SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
TAX DIVISION

ESTATE OF F. WARREN BROKAW J. BARRY BROKAW, Trustee Petitioner	:	
v.	:	Tax Docket Nos. 5290-92 5779-93
DISTRICT OF COLUMBIA Respondent	:	

MEMORANDUM OPINION AND ORDER

These cases are both appeals from real property assessments. They were consolidated for trial de novo before this Court. The factual issues that are presented by this trial dissolve into the classic question of whether the original assessments are flawed. If so, the Court must determine a de novo fair market value of the property for purposes of taxation in each tax year. Petitioner, a decedent's estate, is the fee simple owner of real property located at 1607-1611 Connecticut Avenue, N.W., Lots 800 and 801 in Square 111 (hereinafter the "subject property"). Petitioner challenged the real property tax assessed against the subject property for tax years 1992 and 1993 pursuant to 47 D.C. § 820 (1981 ed.). The parties filed factual stipulations pursuant to Rule 11(b) of the Superior Court Tax Rules.

Upon consideration of the stipulations, the evidence adduced at trial and having resolved all questions of credibility, the Court is convinced that both of the assessments were flawed in several respects, and that they cannot stand. The manner in which these valuations were executed was flawed in several respects. This is exacerbated by the fact that the assessor left no evidentiary trail by which his work product can be validated in hindsight. The District called no expert witnesses to confirm the accuracy of what the assessor did or to offer any alternative appraisal that would otherwise compete with the expert appraisal offered at trial by the petitioner.

To explicate this decision, the Court sets forth below the applicable statute and case law creating the parameters within which the assessments must be viewed. The Court also renders the following findings of fact and conclusions of law.

I. APPLICABLE LAW

It is appropriate to recapitulate exactly what a commercial tax assessment must involve and the legal standard by which it must be judged in a trial de novo.

The District of Columbia Court of Appeals has emphasized, "[i]n determining the estimated market value, the assessment shall take into consideration:

> all available information which may have a bearing on the market value of the real property including but not limited to government imposed restrictions, sale information for similar types of real property, mortgage or other financial considerations, replacement costs less accrued depreciation because of age and condition, income earning potential (if any), zoning, the highest and best use to

> which the property can be put, and the present use and condition of the property and its location.

District of Columbia v. Washington Sheraton Corp., 499 A.2d 109, 112 (D.C. 1985).

A person who appraises a property for the purpose of determining its value for taxation

> may apply one or more of the three generally recognized approaches of valuation when considering the above factors. Those approaches are the replacement cost, comparable sales, and income methods of valuation. Usually the appraiser considers the use of all three approaches, but one method may be most appropriate depending on the individual circumstances of the subject property.

Id. at 113 [citations omitted].

The "replacement cost approach," also called simply the "cost approach," involves deriving the "'cost of replacing property with new property of similar utility at present price levels, less the extent to which the value has been reduced by depreciation because of age, condition, obsolescence, or other factors.'" Id. at 113, quoting 16 DCRR § 108(b)(2); 9 DCMR § 307.4.

The "income capitalization" approach (also called the "income approach") has been described by the District of Columbia Court of Appeals as follows:

> This method entails deriving a 'stabilized annual net income' by reference to the income and expenses of the property over a period of several years. That annual net income is then divided by a capitalization rate -- a number representing the percentage rate that taxpayers must recover annually to pay the mortgage, to obtain a fair return on taxpayers' equity in the property, and to pay

real estate taxes.

Rock Creek Plaza-Woodner, Ltd. v. District of Columbia, 466 A.2d 857, 858 (D.C. 1983).

The "comparable sales approach" requires the comparison of "[r]ecent sales of similar property" and "the price must be adjusted to reflect dissimilarities with the subject property." District of Columbia v. Washington Sheraton Corp., supra, 499 A.2d at 113.

The objective of the assessment process is to determine the "estimated market value" of the property. This is defined as

> 100 per centum of the most probable price at which a particular piece of real property, if exposed for sale in the open market with a reasonable time for the seller to find a purchaser, would be expected to transfer under prevailing market conditions between parties who have knowledge of the uses to which the property may be put, both seeking to maximize their gains and neither being in a position to take advantage of the exigencies of the other.

47 D.C. § 802(4) (1990 Repl.).

II. FINDINGS OF FACT

1. The subject property is located at 1607-1611 Connecticut Avenue, N.W., Lots 800 and 801, Square 111 in the District of Columbia ("subject property").

2. Petitioner J. Barry Brokaw, Trustee of the Estate of F. Warren Brokaw, is an individual whose address is 200 Vesey Street, 23rd Floor, New York, New York, 10285. Petitioner is the owner of the subject property and is obligated to pay all real estate taxes for the subject property.

3. The improvements on lot 800 are a row office building of four stories with no basement. The improvements on lot 801 are also a row office building of four and a half stories with basement. Both structures were originally built circa 1910. Both lots have surface parking accessed from the rear of the structures via 19th Street, N.W. The gross building area of lot 800 is approximately 8,171 square feet of which some 6,129 square feet are above grade. Lot 801 has approximately 14,671 square feet of gross building area of which 11,119 square feet are above grade. The subject sites are currently zoned C-3-B.

For further descriptive purposes, it is useful to note that the first floor tenants were: Daily Grind Coffee Shop, Dupont Image and a shop known as Toast and Strawberries. The second floor tenants were DMS Vista International and Capitol Neurology. The third floor contained tenant space for Image Associates, as well as rest room, kitchen, and storage area. The fourth floor was rented by Malchow & Co., which included space for a kitchen, bathroom and storage. The fifth floor was rented to the November Group, also providing a bathroom and storage area. The basement was not rented. In the rear of the building, there are 12 parking spaces available to the tenants.

The subject property contains one stairwell and an elevator with a capacity of only 500 pounds. All of the offices are heated by water radiator systems and are cooled by window air conditioning units.

4. For tax year 1992, the District's proposed assessment for

both lots was $5,360,000. Petitioner timely filed a complaint with the Board of Equalization and Review (hereinafter "BER"). After a hearing, the BER reduced the assessment to $4,860,900. Lot 800 was reduced to a value of $2,005,900 and lot 801 was reduced to a value of $2,855,000.

5. Petitioner timely paid the real estate taxes and timely filed the petition for a reduction of the assessment and refund of excess taxes paid for tax year 1992. Petitioner asserted that the fair market value of the property for tax year 1992 was no more than $3,350,000.

6. For tax year 1993, the District's proposed assessment was $5,100,000 including the value of lot 800 at $2,100,000 and the value of lot 801 at $3,000,000. Petitioner timely filed a complaint with the BER. After a hearing, the BER sustained the assessment.

7. Petitioner paid the real estate taxes and timely filed the petition for a reduction of the assessment and refund of excess taxes paid for tax year 1993. Petitioner asserted that the fair market value of the property for tax year 1993 was no more than $3,350,000.

8. The tax assessor for both tax year 1992 and tax year 1993 was George Toll. Mr. Toll is a commercial assessor with the Department of Finance and Revenue of the District of Columbia.

9. Mr. Toll was called as a witness by the Petitioner. For tax years 1992 and 1993, Mr. Toll claimed that he used the mass appraisal technique which encompasses all three approaches to

value: the income approach, the comparable sales approach and the cost approach.

10. The assessor testified that, after consideration of all three approaches, he rejected both the cost and income approaches. Mr. Toll testified that the cost approach was not applicable as these are older, established buildings. Based on his allegation that the property is not developed to its highest and best use, Mr. Toll testified that the income approach was not applicable either. He claimed that he ultimately applied the comparable sales (or market data) approach to value in assessing the property.

11. In his trial testimony, Mr. Toll admitted that the applicable regulation, 9 DCMR § 307.1, states that assessors are required to take into account the income earning potential of an income producing property. Mr. Toll testified that he reviewed the income and expense figures as reported by Petitioner to the District and determined the reported net operating income. Nevertheless, he gave this information no weight and he made no calculations to test the income approach.

12. For both tax years, Mr. Toll testified that he was primarily concerned with equalization, i.e. fixing a tax valuation that was close to the value of other buildings in the same area. Thus, he testified that he determined the assessed value in the context of other assessments in his area, allegedly to insure that the land and building components were equitably assessed. He appeared not to have attempted to calculate the "fair market value" of the subject property prior to his attempts at equalization. The

steps taken by the assessor in formulating his valuations are somewhat confusing but are summarized herein as follows.

13. As the first step in performing what he termed the comparable sales approach, Mr. Toll claimed that there are six recognized methods of assessing land. He noted that the best method is the sales comparison approach using land sales. Mr. Toll did not use this method. Instead, he used the extraction method in which he subtracted what he believed to be the value of the buildings from the overall sales prices in order to deduce the land values. He added that he had done this to obtain an "equalized land pattern".

He was asked to identify the precise buildings and sales prices that he used. He was only able to say that he had a list of sales that he prepared **after** he made his assessments, for purposes of making a presentation to the Board of Equalization and Review. However, he admitted that he had kept no contemporaneous records of what he had used while performing the assessments themselves. He produced no comparable sales data and could not remember any.

14. In order to derive the building values that were to be subtracted from the sales prices of improved parcels, Mr. Toll testified that he used cost information from Marshall & Swift. Marshall & Swift is a well known publication of the costs to construct **new** buildings. Toll said that he depreciated the building figures according to the Marshall & Swift tables. Mr. Toll testified that he did not remember how he depreciated the subject for its age, **almost 90 years old**. Toll acknowledged that

the economic life of real property **does not approach that length of time.** He also testified that he did not put any of these complicated calculations on paper. Thus, his work could not be reviewed or checked.

15. Mr. Toll arrived at the same land valuations for tax year 1993 and for tax year 1992.

16. After determining the land assessments, Mr. Toll claimed to have used the comparable sales approach to determine the building values. When asked which sales he used, he testified that he looked at the same sales that he used to derive the land values. He was unable to recall or reconstruct what those properties were. He admitted that he made no notes at the time he made his assessments.

Mr. Toll testified that he subtracted a land value from each sale in order to determine a building value. From the building figures, he derived a rate per square foot of gross building area. For tax year 1993, Mr. Toll applied $31.50 per square foot of gross building area to determine the improvement value of lot 800. He used $32.00 per square foot of gross building area for lot 801.

In this exercise, Mr. Toll did not in fact perform a comparable sales approach, nor did he perform any approach to valuation that is accepted and used in the appraisal industry. After determining land values from the sales, his conclusions for the building values were predetermined.

17. After determining the building values, Mr. Toll added the land values to arrive at his total assessments for the two lots for

each year. Mr. Toll never applied a true comparable sales approach, which involves the comparison of the subject property to the sales of improved comparables, with adjustments to those sales prices. Instead, he concocted his own method to determine land and building values separately and he then added the two components together.

18. Only the Petitioner offered expert testimony. Mr. Joseph L. Donnelly, Jr., M.A.I. testified for the Petitioner. The Court accepted Mr. Donnelly as an expert witness.

19. Mr. Donnelly appraised the properties for the Petitioner as of January 23, 1991 for estate purposes. The two valuation dates for tax year 1992 and 1993 are January 1, 1991 and January 1, 1992. Mr. Donnelly testified that, in his expert opinion, the market value on January 1, 1991 was the same as of January 23, 1991. He also testified that the market value on January 1, 1992 was no more than his value as of January 23, 1991.

20. Mr. Donnelly valued the two properties in two written appraisal reports which were admitted into evidence. His total value for the two parcels together was $3,350,000 including lot 800 at $1,150,000 and lot 801 at $2,200,000. He valued the combined land at $1,550,000, including lot 800 at $550,000 and lot 801 at $1,000,000.

21. Mr. Donnelly testified that he first valued the properties as if vacant (unimproved). He used the comparable sales or market data approach as the best method to estimate the value of the subject sites. This approach entails comparing, weighing, and

relating sales of similar vacant sites to the land being appraised. Mr. Donnelly examined three sales which he adjusted for location, zoning, and use. After these adjustments, he arrived at a land value of $550,000 for lot 800 and $1,000,000 for lot 801.

22. In arriving at market value, as improved, for both lots 800 and 801, Mr. Donnelly considered the three traditional approaches to value: cost, comparable sales and capitalization of income. He rejected the cost approach and considered only the comparable sales and capitalization of income approach.

23. Mr. Donnelly first considered the market data (or comparable sales) approach. Market data is good evidence of value when enough sales of comparable properties are available. This approach implies that a prudent person will not pay more to buy a property than it will cost to buy a comparable substitute property. The price a typical purchaser pays is usually the result of an extensive shopping process in which available substitutes are compared. Mr. Donnelly testified that valuation by the comparable sales approach involves the direct comparisons of the property being appraised to similar (or comparable) properties that have sold in the same or in a similar market. Each sale is carefully verified and analyzed, and then adjusted for important differences with the subject.

24. Petitioner's expert testified that there was enough comparable sales data available to perform a comparable sales analysis. Mr. Donnelly recorded the data, analyzed it and adjusted it. He also examined properties that were listed for sale as of

the date of appraisal to determine trends in the market. His data was discussed in detail in his two reports and was available for analysis by the Respondent. The same was not true of Mr. Toll's data. Mr. Toll retained no data and made none available to check. As a result of his comparable sales method, Mr. Donnelly testified that he concluded that the market value of lot 800 was $1,150,000 and 801 was $2,200,000 for a total of $3,350,000 effective for both valuation dates at issue.

25. Since this is an income producing property, Mr. Donnelly also analyzed market value using the capitalization of income approach. Mr. Donnelly stabilized the net operating income of each property, including real estate taxes as an expense. His net income was developed by reference to the historical income of the properties as well as comparable leases in the area. He testified that he capitalized the net operating income at 9% (without adding the tax rate) to get the following indicated values: $820,000 for lot 800 and $2,060,000 for lot 801. His total, as determined by the income capitalization approach, was $2,880,000.

26. Mr. Donnelly developed his capitalization rate using the mortgage equity band of investment technique. The band of investment method is a traditional manner of determining capitalization. Under this technique, the appraiser develops weighted components of the mortgage and equity to develop the overall rate. Mr. Donnelly used factors based upon a 75% mortgage at 10% interest for 30 years and a 5% equity dividend rate. In Mr. Donnelly's method, the tax rate was not added to the capitalization

rate, but the taxes were deducted as an expense.

27. In reconciling his two values from the comparable sales approach and the income approach, Mr. Donnelly testified that the market data approach was preferred to the capitalization of income approach in this instance. He testified that other similar properties on the market were competing for potential investment dollars. Mr. Donnelly concluded that the market value was a total of $3,350,000 for both lots together.

28. On cross examination by counsel for Respondent, Mr. Donnelly explained that while the subject buildings were not developed to their full allowable floor area ratio (FAR) of 4.0, this did not affect his conclusions as to the fair market value of the property. He cited several reasons.

First, he noted that the majority of the other properties along Connecticut Avenue in the neighboring blocks were also not developed to the legally allowable FAR. This, in the Court's view, indicates the lack of any historical pressure to do so by market forces. In other words, no property owner in the immediate strip area of the subject property has concluded that the particular property would be more valuable, in the long run, by developing every available square foot for rental purposes (as opposed to saving room for parking or other appropriate uses).[1]

Second, Mr. Donnelly stressed that it was probably not financially feasible to develop these sites to their allowable FAR.

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[1]During cross-examination, this witness and respondent's counsel clashed over the manner in which the witness used the term "FAR." This was a semantical issue, in the Court's view.

Such renovation for the subject property necessarily would involve adding more rentable space, though not necessarily by building upward. This would likely result in **eliminating the parking spaces behind the buildings.**[2] Since parking is obviously at a premium in the Dupont Circle area, the limitation or obliteration of the parking spaces would be a detriment to the value of this property.[3] This viewpoint makes good sense. No other expert witness was called to the stand by the District to refute the logic of what Donnelly pointed out with regard to the parking space issue.

III. CONCLUSIONS OF LAW

In a trial de novo of a tax assessment appeal, the Petitioner bears the burden of proving that the assessment in question "is incorrect or illegal, not merely that alternative methods exist giving a different result." Safeway Stores, Inc. v. District of Columbia, 525 A.2d 207, 211 (D.C. 1987). The District of Columbia Court of Appeals has emphasized that this burden can be discharged successfully whenever a petitioner proves that the assessment is "flawed". Brisker v. District of Columbia, 510 A.2d 1037, 1039 (D.C. 1986). The Court's obligation is to weigh the evidence as a whole to determine whether there are any flaws in the assessment

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[2]Logically, this would occur if the build-out swallows the parking spaces themselves or if they are sacrificed for the purpose of creating an entrance to some type of underground parking. It is rather difficult, however, to envision an underground garage being built under such a small property in such a tightly occupied block.

[3]Ironically, Mr. Toll acknowledged that none of the other properties on this commercial strip have as much parking as the subject property.

and whether such flaws impact the fair market value of the property.

This Court concludes as a matter of law that there are at least two major flaws in the assessments for both tax years and that each one (as well as both in tandem) has compromised the correctness of the assessments. The only credible and reliable evidence as to fair market value was presented through the expert testimony of Mr. Donnelly. The District offered no expert testimony whatsoever to rebut the logic of his fundamental opinions as to value. While Government counsel did cross-examine the expert, the testimony on cross-examination did not yield a solid basis for rejecting the expert's opinion.[4] The Court's analysis follows herein.

The first major flaw in the assessments is the mistaken manner in which the assessor executed the sales comparison approach to valuation. In short, the assessor haphazardly blended together certain features of the cost approach and the comparable sales approach - and he did so in a way that produced an arbitrarily high assessment.

As a practical matter, Mr. Toll set out to prove a value that was virtually pre-selected, rather than deriving an appraisal as a fresh calculation from sales data of comparable properties. It is fair to say that his initial goal was to find a way to make the assessment for the subject property fit as closely as possible to

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[4]It was not necessary for the Court to resort to appointment of any other expert for a second opinion.

the tax valuations of other buildings that he considered to be comparable. All of his **subsequent** actions were designed to prove the value that he already had in mind.

The second major flaw in the assessments was Toll's conclusion that the property must be assessed as if it was fully developed to its legally allowable FAR. In other words, he constructed his assessment in such a way as to penalize the taxpayer for not eliminating precious parking space in favor of arbitrarily building out every square foot of space that might be converted to rentable area. The assessor's point of view was arbitrary and did not conform to the reality of whether such a development decision actually makes sense in terms of maximizing the profitability of this property so as to justify a hypothetical sales price at the assessed value.

On this point, the expert testimony of Mr. Donnelly is especially impressive to the Court. Without question, Donnelly has isolated the fact that the elimination of parking space at this particular property would, in the vernacular, create more of a problem than it is worth. Donnelly's observation takes into account the unique circumstances of this property: (1) that it is part of a strip of small commercial buildings that house shops and service-oriented businesses; (2) that it fronts on Connecticut Avenue, with one lane that evidently would not accommodate all day parking for employees of the tenant businesses; and (3) that the parking spaces that do belong to this property are conveniently positioned at the rear of the property itself.

The regulations that cover the assessment of commercial real estate do indeed command the assessor to consider a list of factors, including but not limited to the "highest and best use to which the property can be put." 9 DCMR § 307.1(g). As Mr. Donnelly emphasized in his written appraisal report corresponding to tax year 1992, the highest and best use must be "probable" rather than conjectural or speculative. Moreover, there must be a "profitable demand for such use and it must return to the land the highest net return for the longest period of time."[5]

In the context of a de novo trial, this Court concludes that it is not probable that the elimination of parking spaces for this property would actually produce the **highest** net return to the investor for the longest period of time. Highest net return, in the assessor's mind, must have meant some net return that is greater than the present return on the owner's investment. He gave no thought to weighing the pros and cons of gaining more immediate rental income from newly developed space at the expense of making the property itself less convenient on a permanent basis for both tenants and their future customers or clients.

Having determined that the original assessment was "flawed," the Court also turns to questions of credibility. Mr. Donnelly is a credible witness; the assessor is not.[6]

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[5]See Appraisal Report of January 23, 1991 at page 32, found in the trial record as petitioner's exhibit 1.

[6]A credibility problem is certainly a separate "flaw" in the assessment. The two major flaws that were identified as such by the Court are characterized as flaws under an assumption that the assessor actually did what he claims to have done.

It is suspicious that the assessor, who is assertedly a longtime professional in this job, has no contemporaneous notes or other documentation of what he did during the performance of this assessment.[7]

For the following reasons, this Court does not believe his story that he seriously considered each of the three standard approaches to value.

With regard to the comparable sales approach, Toll belatedly claimed that he could reconstruct what he did, by referring to a list of comparable properties that he allegedly analyzed as part of his presentation to the Board of Equalization and Review. However, this is latter-day information that is **not** the same thing as having notes that are contemporaneous with the original assessment itself. Essentially, the assessor has no useful paper trail of what he was doing.

The assessor was entirely too vague about exactly how he performed calculations. The Court is left with the distinct impression that the assessor was capricious in trying to fix a value for this property.

As to the cost approach, Toll testified in his own words that he "ran some numbers" as part of allegedly testing the cost approach. However, he cannot articulate what comprised this process of "running numbers." Further, since the assessor himself admitted that it is difficult to figure out how to depreciate this

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[7]In this Court's experience from other trials, most commercial real property tax assessors do maintain their old notes and worksheets and can readily produce them for trial.

90 year-old building, it is not credible that he "ran" any numbers in any meaningful exercise.

As to the income approach, Toll had nothing useful to say. He testified that (1) he cannot recall the mathematical steps that he took to determine the net operating income; (2) he cannot recall any capitalization rate that he would have used to apply to the NOI; (3) he "stopped bothering" with the income approach as soon as he determined that square footage of the property,[8] as soon as he visited the building in the field, and as soon as he concluded that it was not developed to what he thought was its "highest and best use".[9] This Court does not credit his claim that he actually, seriously considered this approach to value.

There is such a substantial credibility problem with this witness that the Court does not believe that he did most of the things that he claims to have done.

Petitioner provided very believable evidence as to the value of the subject property for tax years 1992 and 1993. Upon review of the testimony and documentation presented at trial, the Court concludes that the analysis was properly performed by Petitioner's expert, thereby producing a solid and reliable estimate of market

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[8]Toll implied that the small size of the building caused him to reject the use of the income approach; but he never actually said this.

[9]This was a reference to the issue of parking spaces versus additional development of the rear portion of the property. The reference to highest and best use does not appear to be a formal component of the income approach itself. Rather, it is an overall factor that the assessor should consider, without regard to which formal approach to value is selected.

value.

In assessing this property for tax years 1992 and 1993, the District's assessor claimed that he valued the properties using the comparable sales approach. However, the method he in fact used was not the comparable sales approach at all. Instead, he mixed the cost approach and the sales approach together to arrive at his land assessments and building assessments.

This Court finds that the assessor, in failing properly to find market values by the comparable sales approach, did not estimate market value as is required by the District of Columbia Code.

In assessing real property, the value of the land and improvements must be identified separately. 47 D.C. Code § 821(a) (1990 Repl.).

The Court adopts $550,000 as the value for lot 800 and $1,000,000 as the value for lot 801 for tax years 1992 and 1993.

This Court also adopts Mr. Donnelly's total improved values of $1,150,000 for lot 800 and $2,200,000 for lot 801 or a total of $3,350,000.

The remaining portion of the total assessment is allocated to the building in each tax year.

Upon the findings of fact and conclusions of law made herein, and upon the evidence adduced at trial, it is by the Court this 26th day of July, 1995,

ORDERED, ADJUDGED and DECREED as follows:

1. That the correct assessment for the subject property for tax year **1992** is as follows:

	Lot 800	Lot 801
Land	550,000	1,000,000
Improvements	650,000	1,200,000
Total	1,150,000	2,200,000

The correct assessment for the subject property for tax year **1993** is as follows:

	Lot 800	Lot 801
Land	550,000	1,000,000
Improvements	600,000	1,200,000
Total	1,150,000	2,200,000

2. That the assessment record card for the property maintained by the District shall be adjusted to reflect the value determined by this Order.

3. That Respondent shall refund to Petitioner any excess taxes collected for tax years 1992 and 1993 resulting from assessments that are in excess of the values determined by this Order.

4. That entry of decision shall be withheld pending submission of a proposed Order under the provisions of Rule 15 of the Superior Court Tax Rules.

Judge

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