THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison R. Lee, Circuit Court Judge

Case Nos. 2007-CP-40-8107 through -8110

Place on the Greene Homeowners
Association, Inc., ... Respondent,

v.

W.G.R.Q., LLC, Easy Coin Laundry, Inc.,
Eva Nell Berry, and Jeffrey O. Kenney, ... Appellants.

BRIEF OF APPELLANTS

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STATEMENT OF ISSUE ON APPEAL

Whether the Trial Court Erred When it Issued an Injunction Enforcing a Restrictive Covenant Instead of Holding That the Covenant Was Unenforceable Due to Waiver, Laches, or Estoppel, or Holding That Issuing an Injunction Would Be Unfair.

STATEMENT OF THE CASE

This appeal is about a restrictive covenant in the master deed for a high-rise building in Columbia. In October of 2007, the building's homeowners association filed lawsuits against four owners of commercial units in the building. Each suit claimed that the owner was allowing his or her respective unit (or unit(s)) to be used in violation a covenant that prohibits the operation of a bar, restaurant, or retail store.

Each of the defendants admitted how their units were being used. Each defendant also claimed, through various defenses, that the units had a long history of being used in violation of the covenant. The defendants further claimed that the homeowners association never registered any objection to such violations and that the claim for injunctive relief was barred by the doctrines of waiver, estoppel, and laches.

The cases were consolidated for trial and tried in front of a judge in April of 2009. See (R.p.55, pp.58-59).

The trial court issued its decision in an order signed July 1, 2011 and filed July 6, 2011. (R.p.1). This order rejected all of the equitable defenses, granted an injunction prohibiting further violation of the covenant, and awarded the homeowners association roughly $8,500 in costs and attorney's fees under a fees and costs provision in the deed. Each defendant served and filed a notice of appeal from this order.

STATEMENT OF FACTS

The building in question is commonly referred to as the "Place on the Greene." It is a five-story residential and commercial complex on Greene Street near the University of South Carolina and the Five Points neighborhood. See (R.p.60, line 22-p.61, line 1). The first floor of the building consists of eight commercial units that face Greene Street and six residential units that face the opposite side of the building. See (R.p.61, lines 7-9) (describing the first floor); and (R.p.266) (map of first floor). The second through the fifth floors contain residential units. This appeal is a dispute between the building's homeowners association and the owners of seven of the eight commercial units.

Place on the Greene is a Horizontal Property Regime with a master deed containing restrictive covenants.[1] The covenant at issue in this case restricts the commercial units to "general office space and limited service establishments[.]" (R.p.264). It further provides:

> no restaurant or establishment engaged in the preparation or delivery of food, no pool hall, game room, bar, lounge, or retail shop that relies on a volume of walk-in patrons shall be permitted.

Id. The master deed was recorded in September of 1984.

All of the commercial units in the building are violating this covenant, and they have been consistently violating it for several years.

Unit A is currently owned by a company – Easy Coin Laundry. (R.p.203, lines 5-18). This unit is leased to a restaurant named the "Pita Pit," that has leased the unit since the year

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[1]Sections 27-31-10 to -440 of the South Carolina Code (2007 & Supp. 2011) contain the "Horizontal Property Act," and *Queen's Grant II Horizontal Property Regime v. Greenwood Development Corp.*, 368 S.C. 342, 360-61, 628 S.E.2d 902, 912-13 (Ct. App. 2006) contains a description of a Horizontal Property Regime — in common terms, a "condominium" development.

2000. (R.p.206, lines 6-7). Before the Pita Pit, this was a coin laundry. (R.p.203, line 21-p.204, line 7; p.205, lines 4-7). The laundry operated 24 hours a day, 7 days a week, from 1988 to 1999. (R.p.204, lines 5-7). The present owner of unit A purchased the unit in 1990. (R.p.204, lines 3-4; p.268-69). This was two years into the unit's operation as a laundry.

Tavern on the Greene — a bar/restaurant — operates in units B, C, and D. (R.p.223, lines 15-16; p.230, lines 3-5). It opened in 1999 in units C and D, and it quickly expanded into unit B. (R.p.214, lines 15-18; p.229, lines 14-16; p.230, lines 3-5). Unit B was a shoe store before it was a restaurant. (R.p.205, lines 21-23; p.229, lines 5-13). As for units C and D, the Tavern on the Greene is the latest in a series of restaurants to occupy this space. Before the Tavern on the Greene, these units housed a bar named "Dubbs." (R.p.231, lines 10-14). Before Dubbs, they were the "Duck-In." (R.p.92, lines 4-6; p.231, lines 15-16). These units originally contained a hair salon. (R.p.142, lines 24-25; p.168, lines 13-14).

The present owner of unit B purchased it in 2005. (R.p.228, lines 16-18; p.275-77). The present owner of units C and D purchased those units in 2006. (R.p.239, lines 18-20; p.286-87). Again, a bar has operated units C and D since before 1999.

Unit E is not involved in this lawsuit, but it houses an AT&T retail store. (R.p.63, line 25-p.64, line 5) (this suit does not concern unit E); (R.p.110, lines 15-22; p.61, lines 19-20); (R.p.322) (photo). It has been there since at least 1999. (R.p.230, line 21-p.231, line 3).

Units F, G, and H are owned by a limited liability company. (R.p.246, lines 4-7). A tobacco shop currently operates in unit F. (R.p.246, lines 10-13). Before the tobacco shop, this unit contained a restaurant named the "Sub Pub." (R.p.247, lines 15-18). Units G and

H are currently leased to a restaurant named "The Blue Cactus." (R.p.246, lines 8-9). The Blue Cactus opened in May of 1994, (R.p.193, lines 16-17), and there was no evidence of what was in these units before The Blue Cactus became a tenant. The present owner of these units purchased them in 2002. (R.p.246, lines 18-20).

The trial court's order was consistent with this history. The trial court found that the businesses in these commercial units had been violating the restrictive covenant "for an extended period of time." (R.pp.3-4, ¶10). The order recited testimony showing that the board of the homeowners association knew of the violations no later than 1995, see (R.p.4, ¶13), and the evidence generally established that the board took no steps toward enforcing the covenant until it sent the owners a "cease and desist letter" in 2007. See (R.pp.328-335).

In rejecting the defendant's arguments on laches, waiver, and estoppel, the court observed that the defendants were on constructive notice of the covenant because it was in their chain of title. (R.p.8, ¶11). The court also found that the defendants "did not change their position in reliance on the inaction of [the HOA board]," (R.p.10, ¶17); they "presented no other evidence that they would be prejudiced by the issuance of [an] [] injunction other than that they would be financially affected," (R.p.11, ¶22); and that because the defendants knew they were operating in violation of the covenants, they "were not lulled into a false sense of security." (R.p.12, ¶22). As for the HOA board's delay in taking any action toward enforcing the covenant, the court recited "budget restraints, the naivete of the [board], involvement in other litigation," (R.p.11, ¶21), and a "no waiver" clause in the master deed. (R.p.12 ¶25).

ARGUMENT

This case is about whether equity allows a homeowners association to enforce a restrictive covenant after the association has both actively and passively encouraged violations of the covenant for over a decade. The Court should hold that it does not.

For nearly as long as this building has been in existence, the board of directors has acquiesced in violations of the covenant. In some cases, the board openly encouraged them. Whatever the master deed says about non-enforcement not being a waiver, equity should not permit someone to enforce a rule after they encouraged its infraction for years. Equity should not allow this bait-and-switch.

In similar fashion, a request for an injunction centers on the fairness of an injunction to both sides, and though the trial court was right to take stock of an injunctions's likely consequences, the court's conclusion (that the defendants' harm would just be "financial") does not support the result the court reached. Almost immediately after this building opened, the restrictive covenant crippled the marketability of the commercial units. That is why these violating uses began. The present owners (residential or commercial) purchased their units with the understanding that these uses would continue. Put differently, the residential owners bought with at least the implied understanding that they would be living over restaurants, a retail store, and a bar, and the commercial owners bought based on the express understanding that their units could house those types of businesses. An injunction gives the residential owners a windfall — it gives them *more* than they bargained for. As for the commercial owners, the opposite is true. In these circumstances, enforcing this covenant and issuing an injunction is quite *un*fair. For these reasons, the Court should reverse.

A. An Action to Enforce a Restrictive Covenant Sounds in Equity, and A Party Can Forfeit the Right to Enforce a Covenant When He Has Passively or Actively Encouraged its Violation.

This is an action in equity. See, e.g., *Buffington v. T.O.E. Enterprises*, 383 S.C. 388, 391, 680 S.E.2d 289, 290 (2009) (request for injunction to enforce restrictive covenants is in equity). In an appeal of an action in equity, this Court may find facts based on its own view of the preponderance of the evidence. *Id.* at 391, 680 S.E.2d at 290 (citing *Townes Assoc. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976)).

Restrictive covenants are disfavored and strictly construed. The source of this disfavor is "the widely held view that society's best interests are advanced by encouraging the free and unrestricted use of land." *Sea Pines Plantation Co. v. Wells*, 294 S.C. 266, 270, 363 S.E.2d 891, 893 (1987). In construing restrictive covenants, the Supreme Court has instructed that all doubts should be "resolved in favor of [the] free use of the property." *Taylor v. Lindsey*, 332 S.C. 1, 4, 498 S.E.2d 862, 864 (1998). That said, the court has given clear guidance that the rule of strict construction will not be applied to defeat the plain and obvious intent of covenants. *Id.* at 4, 498 S.E.2d at 864. This body of law is presented only as background. No one disputes that this covenant prevents an owner or tenant of a commercial unit at Place on the Greene from operating a retail shop, a restaurant, or a bar.

A party may use a number of tools to defend an action to enforce a restrictive covenant. Those tools include the defenses of estoppel, waiver, and laches. The Supreme Court has explained:

> Although there are technical differences in the doctrine of laches, waiver and estoppel, as applied in equitable actions for enforcement of restrictive covenants, . . . [t]he essential difference arises in whether the affirmative

defense is based on passivity (laches) or an affirmative act (waiver or estoppel).

Circle Square Co. v. Atlantis Dev. Co., 267 S.C. 618, 628, 230 S.E.2d 704, 708 (1976). These doctrines are all affirmative defenses, and the burden of proof to establish them is on the party who presents them. *Id.* at 628, 230 S.E.2d at 708.[2]

B. The Place on the Greene Engaged in a Prolonged Course of Conduct That Passively and Actively Encouraged the Operation of Retail Establishments, Restaurants, and Bars.

This is what the Place on the Greene and its homeowners association did to encourage the violation of this covenant:

They never took any action to enforce the covenant until the June of 2007 "cease and desist" letters, despite the fact that there has been a walk-in business in the building since the very first sale of units C & D to the hair salon. (R.p.142, line 18-p.143, line 15). The developer even modified units C & D to accommodate the salon. *Id.* Walk-in stores have thus been in the building — without hint of enforcement — since sometime around 1985. These include a 24/7 laundry that operated from 1988 to 1999, see (R.p.204, lines 5-7), and a cell phone store that has been there since at least 1999. (R.p.230, line 21-p.231, line 3).

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[2]Another tool a party can use to avoid a restrictive covenant is a "change of conditions" claim. A covenant will not be enforced when there has been "such a change in the character of [a] neighborhood [so] as to render the enforcement of the covenant valueless to the covenantee and oppressive and unreasonable as to the covenentor." *Menne v. Keowee Key Prop. Owners' Ass'n*, 368 S.C. 557, 564, 629 S.E.2d 690, 694 (2006); see also *Pitts v. Brown*, 215 S.C. 122, 54 S.E.2d 538 (1949). A trivial change in character will not suffice. There must be "so radical a change that the original purpose of the restrictive covenant can no longer be realized." *Menne*, 368 S.C. at 564, 629 S.E.2d at 694. This theory can be used offensively (in a declaratory judgment) or defensively. See *Dunlap v. Beaty*, 239 S.C. 196, 122 S.E.2d 9 (1961) (declaratory judgment); *Holling v. Margiotta*, 231 S.C. 676, 100 S.E.2d 397 (1957) (affirmative defense). Here again, this is presented as background.

There has been a restaurant in the building since at least 1993. The evidence of this is in the minutes of the homeowners association's 1993 annual meeting which discuss "The Duck-In Restaurant." (R.p.342). The Blue Cactus opened in units G and H in 1994. Restaurants have thus operated in the building — without hint of enforcement — from at least March of 1993 (the date of the "Duck-In" minutes) to the June of 2007 "cease and desist" letters. The minutes from the homeowners association's 1995 annual meeting even recount that the meeting was held *in* one of the restaurants. See (R.p.344).

A pattern of non-enforcement is passive action, but the homeowners association's encouragement was active too. The 1993 meeting minutes record "The Duck-In Restaurant has notified the Board of its intent to build a deck in front of the commercial units currently occupied by [retail establishments]." (R.p.342). The minutes continue "[t]he opinion of those present at the meeting was that the deck, done properly, could be an asset to the building." *Id.*

The homeowners association board also gave permission for the Blue Cactus to cut a hole through the exterior of the building to accommodate the ventilation for the restaurant's grill. (R.p.169, line 20-p.170, line 13). Cutting the hole to allow the grill vent was a specific request that was made to the board and granted, by a vote. See (R.p.171, lines 3-6). Also, some time in the mid-1990's, a party approached the homeowners association with a request that the businesses be able to sell beer and wine. (R.p.168, lines 17-23). The record suggests that this request was also granted by the board via vote. (R.p.179, lines 1-2).

The 1995 annual meeting minutes recount that the building's doors were relocated so patrons of the commercial units could access the restrooms, but not the rest of the

building. (R.p.344). The minutes further recount that the "[c]ommercial owners and tenants have been notified," presumably by the board, "that they will be responsible for maintaining the restrooms." *Id.*

In 2004, the board of the homeowners association published "new rules and regulations." See (R.p.99, lines 18-22) (testimony describing the rules); (R.p.347-350) (the rules themselves). These rules regulated how the businesses in the commercial units could advertise. (R.p.347) (rule titled "Solicitation"). The rules also instructed that after 10 p.m., the businesses could only serve patrons that were inside the commercial units, and that the trash from the commercial establishments was to be disposed of in a certain way. (R.p.348) (see rules titled "Annoyances" and "Trash").

Telling someone how to take out their trash does not equal ratifying the violation of a restrictive covenant, but the homeowners association board did more than that. Here, the board engaged in a *prolonged* course of conduct — in the case of walk-in stores, 20+ years; in the case of restaurants, 12+ years — of passive and active accommodation. The board gave permission for the Duck-In to build a deck, the Blue Cactus to install its grill, and whatever bar was there to serve beer. What is more, the physical circumstances of this case — specifically, the layout of this building — should say something: this suit concerns one building and how the (very visible) street level units in that one building can be used. This is not a sprawling development where violations can go unnoticed for a period of time, and these violations were not violations that occurred in secret. For over a decade, non-conforming businesses openly occupied the commercial units, in full view of the other unit owners and the world. The owners of the residential units were directly confronted with

these violations whenever they walked in to or out of their property, and whenever they turned in or out of the parking lot.

C. The Trial Court's Analysis Was Not Faithful to These Principles, and its Conclusions with Respect to Notice of the Covenant and the Harm of an Injunction Do Not Support the Issuance of an Injunction.

The trial court's primary answer to the board's pattern of non-enforcement and encouragement was to observe that because the defendants knew they were operating in violation of the covenants, they "were not lulled into a false sense of security." (R.p.12, ¶22). With the utmost respect for the trial court, that statement directly conflicts with the law as it pertains to these equitable defenses. The trial court imputed knowledge of the covenant to the defendants because it was in their chain of title. See (R.pp.11-12, ¶22) ("One cannot avoid the contents of the document by failing to read it."). If this were the touchstone, the only defense to an action to enforce a restrictive covenant would be that the covenant is not in the defendant's chain of title. Many cases exhibit that this is not so. See, e.g., *Gibbs v. Kimbrell*, 311 S.C. 261, 428 S.E.2d 725 (Ct. App. 1993) (a covenant can by waived by conduct); *Hunnicutt v. Rickenbacker*, 268 S.C. 511, 234 S.E.2d 887 (1977) (enforcing restrictive covenants because the character of the neighborhood had not changed).

The defendants *were* "lulled into a sense of false security," but it did not come from ignorance of the covenant. Instead, it came from the board's pattern of non-enforcement and enabling. Though the court generally does not look to the parties to give it the applicable law, almost every statement the plaintiff or its witnesses made about the board's lack of diligence in policing the covenant is contrary to the law. For example, the plaintiff's trial

counsel argued that though a police officer might allow a motorist to speed by him every day, that does not effect the officer's ability to issue a speeding ticket. See (R.p.63, lines 1-7). That might be the law with respect to traffic violations, but it is not the law with respect to restrictive covenants. As another example, the current president of the homeowners association offered that the board should not be "penalized" for never having enforced the covenant because "we're just a group of people, five people, that constantly changes year after year." (R.p.85, lines 10-12). Imputed knowledge works both ways. If the commercial unit owners are to be imputed with knowledge of the restrictive covenants, the same reasoning requires that the board be imputed with knowledge of the master deed, the covenant, and that certain conduct will render restrictive covenants unenforceable.

Rabon v. Mali, 289 S.C. 37, 344 S.E.2d 608 (1986), involved several lots that were subject to a covenant restricting the lots to use for "residential purposes." An individual (Mr. Forbes) purchased four of the lots plus the single building on them and "used the premises for various businesses and for his residence from 1959 until November 1983." *Id.* at 39, 344 S.E.2d at 609. Two of Mr. Forbes's lots were exempt from the covenant, two of the lots were not, and the building was on exempt and non-exempt lots. Mr. Forbes sold the property to people who began to operate a daycare on the premises, and the neighbors filed suit.

In finding that laches applied, the Supreme Court observed "[i]t is obvious from the evidence that the residents of the Lakeside subdivision knew of the businesses operated by Forbes[,] and some of the residents were also customers." *Id.* at 39, 344 S.E.2d at 610. As it pertained to the purchasers of Mr. Forbes's properties, the Court noted they "purchased the property with knowledge of its prior commercial use," and spent money on improvements

to the property. *Id.* at 40, 344 S.E.2d at 610. The Court held that the daycare could continue, but that the new owners could not pave one of the restricted lots to serve as a parking lot for the business. The knowledge of the prior commercial use prevented enforcing the covenant.

Rabon should be useful to the present case in a couple of respects. First, it shows why the lower court's conclusion about financial harm to the defendants should have cut the other way. All of the current owners of the commercial units were witnesses at trial. The owner of unit A purchased it in 1990. See (R.p.268-69). The owner of unit B bought in 2005. See (R.p.277-77). The owner of units C & D bought in 2006. (R.p.286-87). The owner of F, G, and H bought in 2002. (R.p.308-312). All of these purchasers bought with actual or constructive knowledge of the covenant, but to be fair, all also bought with the understanding that the units could be used as they were being used and had been used for some time. Like the purchasers in *Rabon*, they bought based on a *long* history of these activities being permitted *despite* the covenant.

And by the same token, the testimonies offered by the owners of the residential units indicates that although they may not prefer to live (or own rental units) over retail stores, restaurants, and a bar, they bought their units with knowledge that those businesses were there. The current president of the homeowners association purchased her unit in May of 2002. (R.p.67, lines 2-3). Though she thought it irrational for people to purposefully live over a bar, her testimony was that she "assumed those commercial people could be there." (R.p.84, lines 11-17).[3] The other residential owner that testified at trial purchased his unit

[3]The president of the homeowners association board does not reside in the building, and she testified that "the great majority [of the residential units] are leased." (R.p.66, lines 19-20; p.92, lines 17-18).

in 2001. (R.p.127, line 25-p.128, line 2). With the exception of the tobacco shop operating in unit F, this was years after the present tenants of the commercial units had been operating the businesses that are still there today. See (R.p.246, lines 14-15).

"A court does not automatically issue a mandatory injunction once it finds a restrictive covenant has been violated." *Sea Pines Plantation Co.*, 294 S.C. at 274, 363 S.E.2d at 896. Instead, "[t]he court must balance the equities between the parties; and if the harm to the defendant outweighs the plaintiff's benefit, no relief will be granted." *Id.* at 274, 363 S.E.2d at 896.

This is how the equities balance: the commercial owners bought their units with either the incorrect assumption that these uses were permitted or the correct assumption that the restrictive covenant would not be enforced. The residential owners bought their units with these violations occurring in full view. Equity should not take away the very thing one party bargained for and, in the same stroke, give someone else *more* than their fair bargain.

The history of these commercial units should also be telling. One of the witnesses to testify at trial was the current property manager. (R.p.136, lines 13-17). This individual had also been involved with the initial development of the Place on the Greene, (R.p.137, lines 7-23), and had served on the homeowners association board "pretty consistently" from 1986 to 1995. (R.p.150, lines 4-8).

The property manager testified that the original "target market" for the residential units was professionals living and working downtown. (R.p.140, lines 2-7). Once the residential units went on the market, however, parents of college students "became [] the buyers of a lot of them." (R.p.140, lines 9-15). As for the commercial units, the "concept"

was that the first floor would be general office space for "a CPA or a lawyer[.]" (R.p.141, lines 6-10). These units were not actively marketed and did not sell, (R.p.142, lines 12-17), and as it pertained to leasing the commercial units, parking was a substantial problem. The units were allotted only one parking space a piece. (R.p.162, line 20-p.163, line 9).

Some of the building's developers proposed an amendment to the covenant in 1985. See (R.p.337-38). This was before the first meeting of the homeowners association board. (R.p.157, lines 3-11). The property manager testified that such proposals were made "on a regular basis." (R.p.158, lines 22-25). One such proposal in 1991 — justified by vacancy in the commercial units — failed because less than 75% of the owners were present at the annual meeting. See (R.p.340). The property manager admitted that she was on the homeowners association board in 1993 and that she knew the deed was not being followed. (R.p.178, lines 6-11). She opined that the board was "just trying to make it work" because some of the commercial spaces were vacant. (R.p.190, line 21-p.191, line 8).

That is one thing about this case that should throw the inequity into stark contrast: this is not a case where there have been minor or inconsequential exceptions to a covenant,[4] nor is it a case where the purpose of the covenant may yet be realized by enforcing it.[5] All of the evidence suggests that the only valuable uses for these commercial units — in the

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[4]See, e.g., *Kneale v. Bonds*, 317 S.C. 262, 452 S.E.2d 840 (Ct. App. 1994) ("A party's waiver of the right to object to a minor violation of a covenant does not result in waiver of his right to object to a subsequent and more substantial violation) and *Gibbs*, 311 S.C. at 261, 428 S.E.2d at 725 (party's consent to the operation of a blueberry farm did not equal consent to the operation of an automobile repair business).

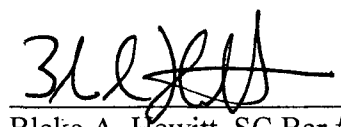
[5]See, e.g, *Flinkingshelt v. Johnson*, 258 S.C. 77, 187 S.E.2d 233 (1972) and *Dunlap*, 239 S.C. at 196, 122 S.E.2d at 9 (analyzing why the purposes of the covenants either could (*Flinkingshelt*) or could not (*Dunlap*) be realized).

future or the past — are as retail or hospitality establishments. The fairest thing is for those uses to continue. In fact, the record in this case reflects that *none* of these units has ever contained a business that did not violate this covenant. Among all of the arguments in this case, that should be one of the most telling.

CONCLUSION

The appellants respectfully ask this Court to reverse because the trial court's conclusion does not faithfully apply the law regarding restrictive covenants and because issuing an injunction in these circumstances would be *un*fair.

Respectfully submitted,



October 3, 2012

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 211(a), SCACR, I certify that the *Brief of Appellant* and the *Reply Brief* comply with the provisions of Rule 211(b), SCACR, and with the August 13, 2007, Supreme Court Order regarding personal data identifiers.

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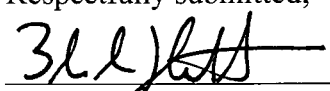
October 3, 2012

Respectfully submitted,



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