

25 July 2019

Submission - Clause 4.6 Exception to a Development Standard

State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 - Clause 40(2) site area 49 Forest Way, Frenchs Forest

1 Request for exception to Clause 40(2) site area

1.1 Overview

Clause 4.6 of Warringah LEP 2011 provides a mechanism to allow an exception to a development standard.

As identified, the proposal contravenes Clause 40(2) of State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004. Clause 40(2) relates to '*Development standards—minimum sizes and building height, (2) Site size - The size of the site must be at least 1,000 square metres*'. This is a development standard and an exception is sought.

As required by clause 4.6 (3) the following is a *written request* to justify this contravention for the consent authority's consideration.

1.2 Site details

The site is located at 49 Forest Way, Frenchs Forest. The site is legally described as, Lot 1A in Deposited Plan 382200. The site has an area of 923 m². The land is a corner allotment, irregular in shape having the following dimensions:

- Frontage to Adams Street of 48.205m
- Frontage to Forest Way of 23.775m
- A corner splay to Adams Street and Forest Way of 6.335m
- A southern boundary of 46.95m
- An eastern boundary of 10.74m

1.3 Proposed development and the nature and extent of exception sought

The application seeks development consent, for demolition of existing structures, a Seniors and Disabled Housing development, under the provisions of State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004, and strata subdivision at 49 Forest Way, Frenchs Forest. The proposal is for *Infill self-care housing* (4 dwellings) for independent living.

The exception relates to Clause 40(2) of the SEPP in relation to the site area being 1,000m². The clause states (our emphasis added):

*‘Development standards—minimum sizes and building height, (2) Site size -
The size of the site must be at least 1,000 square metres’*

Being 923m² the site area demonstrates a 7.7% / 67m² exception to the lot size standard.

Clause 4.6 of Warringah LEP 2011 (LEP) provides a mechanism to allow an exception to a development standard.

Clause 40(2) of the SEPP is a development standard and is applicable to the assessment of the proposal. This clause 4.6 submission is made to address the statutory provisions of the Act and the LEP and there is no statutory impediment to the consideration of this submission under clause 4.6.

As required by clause 4.6 (3) the following is a written request for the proposed development to exceed the development standard for the consent authority’s consideration.



Figure 1 – excerpt of the site plan showing the location of the site, the proposed development footprint, the subdivision pattern and the location of surrounding development. The exception relates to the area of the allotment which is 923m²

2 Clause 4.6

Relevant to the subject matter, Clause 4.6 states:

- (1) *The objectives of this clause are as follows:*
 - (a) *to provide an appropriate degree of flexibility in applying certain development standards to particular development,*
 - (b) *to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*
- (2) *Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.*
- (3) *Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:*
 - (a) *that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
 - (b) *that there are sufficient environmental planning grounds to justify contravening the development standard.*
- (4) *Development consent must not be granted for development that contravenes a development standard unless:*
 - (a) *the consent authority is satisfied that:*
 - (i) *the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and*
 - (ii) *the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and*
 - (b) *the concurrence of the Secretary has been obtained.*

In response to the provisions of Clause 4.6, and with the guidance provided by the above judgements, the matters in support of the proposal are documented with this *written request* to justify this contravention of the development standard.

3 Context and Format

This “*written request*” has been prepared having regard to “*Varying development standards: A Guide*” (August 2011), issued by the former Department of Planning, and relevant principles identified in the following judgements:

- *Winten Property Group Limited v North Sydney Council [2001] NSWLEC 46;*

- *Wehbe v Pittwater Council [2007] NSWLEC 827;*
- *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 1009;*
- *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90;*
- *Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248;*
- *Randwick City Council v Micaul Holdings Pty Ltd [2016] NSWLEC 7;*
- *Moskovich v Waverley Council [2016] NSWLEC 1015; and*
- *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118.*

In applying clause 4.6, the findings from these judgements have been taken into account in preparing this submission.

4 Assessment

What is the underlying object or purpose of the standard?

The objectives of Clause 40(2) are not specifically expressed in the SEPP, however the aims of the SEPP are to increase the supply and diversity of residences that meet the needs of seniors or people with a disability, make efficient use of existing infrastructure and services, and be of good design.

Further, it is reasonable to conclude that the objectives of the site size control include to ensure that sites are of sufficient size to provide for buildings, vehicular access, landscaping and retention of natural topographical features. In addition, that the properties are able to be developed without incurring any reasonable physical impacts on neighbouring properties in terms of shadowing, privacy, visual impact, or view loss.

The following submissions are made in response to the above objectives.

Compensatory design measures

Being 923m² the site area demonstrates a 7.7% / 67m² exception to the lot size standard. In response to this characteristic of the site, the following key compensatory design measures have been incorporated to address this issue and provide an appropriate building form on the site:

- **Lower building height** – The proposed building is excavated into the western section of the site. The proposed building height ranges from 4.6m (western end) to 7.060m (eastern end), as measured to the ceiling level. The height of the building is up to 940mm lower than the height permitted under the Seniors SEPP. The proposed development is responsive to the topography which displays a 4m level change from west to east. This is achieved by excavating the building into the western portion of the site with vehicle access to the basement provided ‘at grade’ from the north east portion of the site.
- **Increased southern and eastern setbacks** - The southern side setback has been increased to a significant 4.2m, whilst the eastern boundary setbacks are 9.5 to 10.8m (approximate), the outcome being generous separation distances to adjoining dwellings. It is noted that each of these setbacks are significantly greater than a development permitted in the R2 zone under the local planning controls, especially given that the DCP’s rear setback control does not apply to corner sites.

- The proposed setbacks assist in achieving a compatible relationship with the neighbouring properties ensuring existing dwellings retain a high level of solar access, privacy and amenity levels. The proposed southern side setback has also been increased to exceed both the Seniors SEPP and the DCP's side setback requirements. Furthermore, the proposed southern side setback has been increased to meet and exceed the DCP's side boundary envelope requirement.

By lowering the height of the building and increasing its setbacks to adjoining residential allotments the potential amenity impacts (privacy, shading and visual) of the proposed development on the southern and eastern adjoining neighbours are reduced in accordance with the SEPP's aims and objectives.

Generous spatial separation is provided and high internal amenity levels to the proposed dwellings are achieved, despite the site being 923m² and less than 1,000m²

- Despite the site being 923m² and less than 1,000m², the proposal achieves a generous amount of spatial separation around the proposed building. The land is a corner allotment that faces Forest Way and Adams Street. As such, the site is adjoined by roadways to its northern and western sides. These increase the property's building separation to adjoining dwellings to the north and west reducing the need for the separation that the standard seeks to create. Furthermore, the proposed development results in a rear setback of 9.5 to 10.8m (approximate) that is significantly greater than a development permitted in the R2 zone under the local planning controls because the DCP's rear setback control does not apply to corner sites. The southern side setback has also been increased to a significant 4.2m noting that the minimum side setback is 900mm.
- The proposed setbacks assist in achieving a compatible relationship with the neighbouring properties ensuring existing dwellings retain a high level of solar access, privacy and amenity levels. The proposed southern side setback has also been increased to exceed both the Seniors SEPP and the DCP's side setback requirements. Furthermore, the proposed southern side setback has been increased to meet and exceed the DCP's side boundary envelope requirement.
- High internal amenity levels to the proposed dwellings are achieved despite the site being 923m² and less than 1,000m². The site being adjoined by roadways to its northern and western sides increase the property's building separation to adjoining buildings to the north and west and facilitate appropriate levels of solar access to the site and high levels of privacy in relation to neighbouring properties.

Generous landscaping and deep soil areas are provided that exceed the minimum controls, despite the site being 923m² and less than 1,000m²

- Despite the site being 923m² and less than 1,000m², the proposal achieves and landscaping and deep soil outcome that meets and exceeds the planning controls under the Seniors SEPP and DCP.
- The design provides a landscape setting complemented by a landscaping plan that will enhance the amenity of the site to the benefit of future occupants and the surrounding amenity. 435m² or 47.2% of the site is proposed to be landscaped area, within which the

proposed building will be sited. 36.2% of the site is proposed to be deep soil landscaped area having a minimum dimension of 3m (exceeding the Seniors SEPP requirement for 15%).

- Further, the proposed development comfortably complies with the deep soil landscaped area control incorporated in the SEPP.

No significant physical impacts, despite the site being 923m² and less than 1,000m²

Despite the site being 923m² and less than 1,000m², the proposal will not result in any inappropriate physical or amenity impacts on the streetscape or adjoining land noting that:

- The southern side boundary setback is increased from 900 mm to 4.2 metres; furthermore generous 9.46m to 10.86m rear/eastern setbacks are proposed.
- The physical impacts of the proposal, including, overlooking, overshadowing, its side setbacks, building height, massing and scale have been considered. It is assessed that the proposal will not unreasonably impact upon the existing amenity or physically constrain the future development potential of the surrounding land.

In relation to proposed shadowing impacts - Shade will be cast over the adjoining land at 47 Forest Way with no impact on 25 Adams Street during the specified times. During the morning period this will mainly affect the properties frontage to Forest Way and during the afternoon periods this will affect the rear private open space area of the property. The following characteristics of the property and proposed shading outcome are noted below:

- It is noted that no side boundary facing windows are present within the northern façade of the dwelling.
- The proposed 9am shadow is marginally increased but only impacting upon the front yard (Forest Way) frontage to the property.
- The proposed 12pm shadow and area of additional shadow falls upon the rear of the dwelling and property but the large majority of the rear facade and rear private open space area (approximately 70% is not affected by the proposal).
- Between 1pm and 3pm the rear private open space area will experience shading from the proposal, however during this timeframe the front yard area and dwelling façade is not overshadowed by the proposal and receives sunlight.
- The extent of sunlight available to the rear facade and rear private open space area satisfies the provision of the control between 9am and 12pm.

It is concluded that the proposal will not significantly or unreasonably reduce the available sunlight to the adjoining properties and the consideration of solar access to adjoining land is satisfied by the proposal.

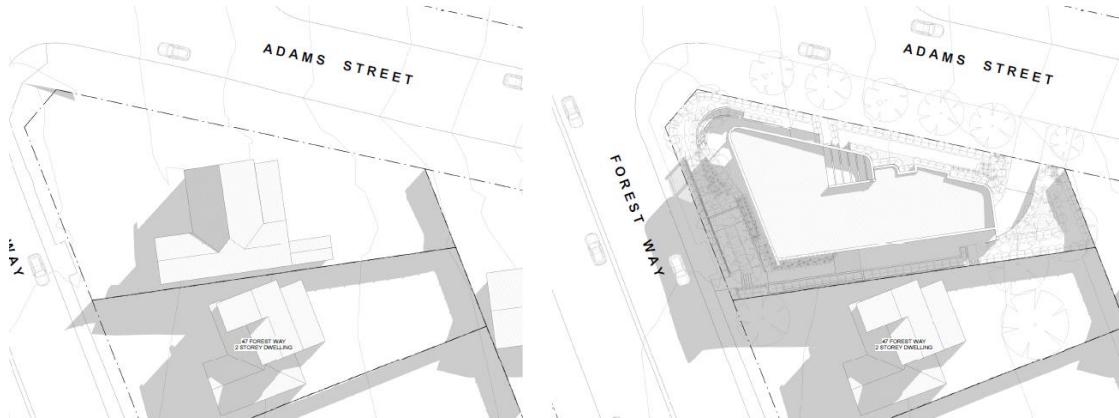


Figure 2 – the existing and proposed shading impact to the southern adjoining development at 9am

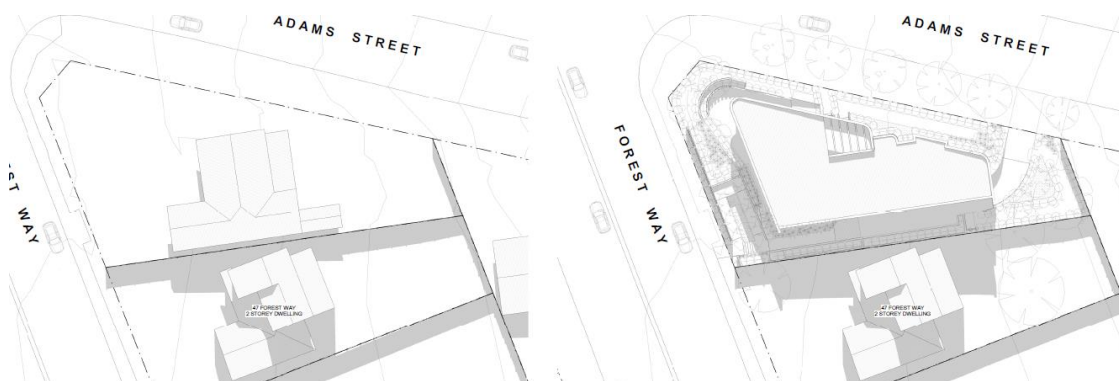


Figure 3 – the existing and proposed shading impact to the southern adjoining development at 12pm

Enhanced and appropriate streetscape outcomes, despite the site being 923m² and less than 1,000m²

Despite the site being 923m² and less than 1,000m², the proposal will provide an enhanced streetscape outcome, noting:

- Quality architecture and building materials are proposed to support a building of high merit and aesthetic value. A new and enhanced landscape regime is proposed for the property. The car parking on the site is provided via an excavated basement and will be concealed from view from adjoining land.
- The proposal will be compatible with the desired local character of the area in relation to building bulk, form and scale. Overall, the proposed development meets the provisions of the key built form controls (under the Seniors SEPP, LEP and DCP) that limit the size and extent of residential dwellings including building height, landscaped area, setbacks from boundaries side boundary envelope and streetscape and solar access provision to neighbouring properties.

In summary, having regard to the objectives of the standard:

- The extent of the proposed development-to-land ratio is not excessive as evidenced by the proposals compliance with the suite of built form controls, is compatible to that accommodated on adjoining nearby properties and the extent of development that can be reasonably expected upon land within the and the R2 zone generally.
- The lot dimensions and lot area are able to the accommodate the proposed residential development in a manner that addresses the relevant provisions of the development controls.
- In the circumstances, the proposed development is consistent with, or not antipathetic to, the assumed objectives of the lot size control, notwithstanding the minor numerical variation.
- It is clear that, based on the merits of the proposal and circumstances of the case, that the site width can physically accommodate the design, intensity and scale of the proposed development without having any unreasonable or excessive physical impacts on the neighbouring properties or the streetscape quality.

How does the proposed development / exception relate to the objectives of the Act?

Further to the objectives of the development standard, the proposed exceedance is appropriate when considering the objectives of the Environmental Planning and Assessment Act 1979. In response to these objectives:

- In response to objective 1.3(c), the exception results in a proposed residential development that will promote the orderly and economic use and development of the land in an efficient manner by a design that is responsive to its development context with a site specific design that achieves high amenity for future occupants and maintains high amenity to adjoining land.
- In response to objective 1.3(g), the proposed development results in a residential development that will promote good design and amenity of the built environment. The built form outcome has been developed through detailed site, context, privacy, and shadow analysis to ensure an appropriate contextual and streetscape fit. The building footprint has been designed to reflect the angular and irregular shape of the site creating an interesting, site-specific building design that presents well to each of its boundaries. The proposed development maintains high levels of residential amenity to adjoining properties by minimising its height, by generous boundary setbacks and through the quality of its surrounding landscape spaces.

Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?

The Department of Planning published “*Varying development standards: A Guide*” (August 2011), to outline the matters that need to be considered in Development Applications involving a variation to a development standard. The Guide essentially adopts the views expressed by Preston CJ in *Wehbe v Pittwater Council* [2007] NSWLEC 827 to the extent that there are five (5) different ways in which compliance with a development standard can be considered unreasonable or unnecessary.

1. The objectives of the standard are achieved notwithstanding non-compliance with the standard;

The proposed development is generally consistent with, or not antipathetic to, the objectives of the minimum site area development standard, as detailed above, notwithstanding the numerical variation.

2. The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;

The objectives of the minimum lot area remain relevant, and the proposed development is generally consistent with, or not antipathetic to, the objectives of the minimum site area development standard, notwithstanding the numerical variation.

3. The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;

The proposed development is generally consistent with, or not antipathetic to, the objectives of the minimum site area development standard, notwithstanding the numerical variation.

Further, the proposed development will provide additional, residential accommodation within an established residential environment, offering high levels of internal amenity without imposing any significant or adverse impacts on the amenity of the surrounding land.

In the circumstances, strict compliance with the minimum lot area development standard (Clause 40(2) of the SEPP) would be unreasonable and unnecessary to the extent that the site would be unable to accommodate a form of development that is consistent with the overarching objectives of the LEP and the aims of the Seniors SEPP, in circumstances where the building form does not impose any significant or adverse impacts on the amenity or aesthetic value of the surrounding land.

4. The development standard has been virtually abandoned or destroyed by the council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable;

The minimum lot area development standard (Clause 40(2) of the SEPP) has not specifically been abandoned or destroyed by the Council's actions. Irrespective, Council has historically adopted a relatively flexible approach to the implementation of development standards in circumstances where the objectives of the control are achieved, notwithstanding a numerical non-compliance.

In this regard it is noted that DA2018/129 for seniors housing at 34 Adams Street Frenchs Forest (125m to the west of the subject site) was determined by Northern Beaches Council on 14 February 2019. The proposal sought consent for 3 attached seniors' dwellings with 4 above ground car spaces on a site with a area of 917.2m² and frontage of 19.81m. The DA approved a variation from the 1,000m² lot size control of 82.8m² or 8.28%. The DA also approved a variation from the site frontage control of 190mm or 0.95%.

5. Compliance with the development standard is unreasonable or inappropriate due to existing use of land and current environmental character of the particular parcel of land. That is, the particular parcel of land should not have been included in the zone.

Strict compliance with the minimum lot area development standard (Clause 40(2) of the SEPP) would be unreasonable and unnecessary to the extent that the site would be unable to accommodate a form of development that is consistent with the overarching objectives of the SEPP, in circumstances where the building form does not impose any significant or adverse impacts on the amenity of the surrounding land.

Are there sufficient environmental planning grounds to justify contravening the development standard?

The proposed variation to the with the minimum lot area development standard is reasonable and appropriate in the particular circumstances on the basis of the following considerations:

- Despite the proposed exceedance to the lot size standard, appropriate compensatory design measures have been incorporated to address this issue and provide an appropriate building form on the site.
- Despite the proposed exceedance to the lot size standard, the corner location, configuration of the allotment and the proposed design have addressed this issue and provided an appropriate building form on the site.
- The proposed exceedance does not result in an excessive visual building bulk or scale, maintaining an appropriate building presentation to the street frontage and neighbouring properties.
- The proposed exceedance in the minimum lot area development standard is minor in its extent, and in light of the compensatory measures incorporated within the proposed design, is not assessed a determinative issue in the assessment of the application.
- The extent of the proposed development-to-land ratio is not excessive as evidenced by the proposals compliance with the suite of built form controls, is compatible to that accommodated on adjoining nearby properties and the extent of development that can be reasonably expected upon land within the and the R2 zone generally.
- The proposed exceedance does not result in a significant reduction in the quality of the proposed built form will not significantly alter the spatial characteristics of the property.
- The proposed exceedance will not result in unreasonable or excessive physical impacts on the neighbouring properties or the streetscape quality of the property.
- The proposed exceedance is capable of being accommodated on the site without imposing any significant or adverse impacts on the amenity of the surrounding land, or the scenic quality of the wider locality.
- Strict compliance with the minimum site area development standard would be unreasonable and unnecessary to the extent that the site would be unable to accommodate a form of development that is consistent with the overarching objectives

of the SEPP, in circumstances where the building form does not impose any significant or adverse impacts on the amenity of surrounding land.

- The extent of the proposed development is not excessive as a result of this exception and the development-to-land ratio proposed, as evidenced by the proposal's compliance with the suite of built form controls. It is compatible to the extent of development that can be reasonably expected upon land within the and the R2 zone generally.
- The proposed allotments and dwellings will not result in a significant reduction in landscaped areas on the property. The principal additions are at the upper building level. There remain appropriately located landscaped areas for vegetation and private recreational use. For these reasons the proposal will achieve a suitable balance between landscaped areas and the built form.

The proposed development

- The proposed development displays a high level of design quality and responds to its corner location by presenting to both street frontage in a manner that will enhance the streetscape quality.
- The proposed allotments and dwellings will improve the existing visual quality of the property to the betterment of the surrounding amenity.
- The proposed development will afford extremely good levels of amenity for future occupants.
- The property supports high quality vegetation and landscaping that positively contributes to its visual presentation to surrounding properties and public spaces.
- The proposed development is consistent with, or not antipathetic to, the objectives of the R2 – Low Density Residential zone.
- The proposed development is generally consistent with, or not antipathetic to, the objectives of the minimum site area development standard, notwithstanding the numerical variation.
- Noting these characteristics, the proposed variation is assessed as satisfactory in meeting the objectives of the control.

Noting these characteristics, the proposed variation is assessed as satisfactory and there are sufficient environmental planning grounds to justify contravening the development standard.

Are there any matters of State or regional significance?

- The proposed variation to the minimum site area development standard does not raise any matters of State or regional significance.

What is the public benefit of maintaining the standard?

The proposed development is generally consistent with, or not antipathetic to, the assumed objectives of the minimum site area development standard, notwithstanding the numerical

variation. In the circumstances, the proposed development does not affect the public benefit of maintaining the site frontage control in other instances.

Any other matters?

There are no further matters of relevance to the proposed variation to the control.

Zone Objectives and the Public Interest

The proposed development will be in the public interest because it is consistent with the objectives for development within the R2 Low Density Residential zone in which the development is proposed to be carried out. These are stated and responded to as follows:

- (a) *To provide for the housing needs of the community within a low density residential environment.*

Response -

The proposal it will contribute to the variety types in the zone and supply of housing within the zone and is consistent with this objective. Further, the proposed development serves the public interest by providing additional residential accommodation within an established residential environment, offering a good level of internal amenity without imposing any significant or adverse impacts on the amenity of surrounding land.

- (b) *To ensure that low density residential environments are characterised by landscaped settings that are in harmony with the natural environment of Warringah*

Response -

The proposed development is not antipathetic to this objective of the zone.

- (c) *To ensure that low density residential environments are characterised by landscaped settings that are in harmony with the natural environment of Warringah*

Response -

The proposed development appropriately complies with the front building line in the street. The character of the streetscape is high solid front fences as a common feature in the location. The proposal will provide an enhanced and more open landscaped setting and streetscape presentation to each of its street frontages.

The design provides a landscape setting complemented by a landscaping plan that will enhance the amenity of the site to the benefit of future occupants and the surrounding

amenity. 435m² or 47.2% of the site is proposed to be landscaped area, within which the proposed building will be sited. 36.2% of the site is proposed to be deep soil landscaped area having a minimum dimension of 3m (exceeding the Seniors SEPP requirement for 15%).

In conclusion it is assessed that the proposal is consistent with or not antipathetic to the objectives of the zone.

5 Conclusion

The purpose of this submission is to formally request a exception to the minimum lot area development standard in Clause 40(2) of State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004.

The proposed exception is modest, and strict compliance with the control is unreasonable on the basis that the objectives are achieved anyway, and unnecessary on the basis that no beneficial planning purpose would be served.

In the circumstances, there are sufficient environmental planning grounds to justify the exception to the minimum lot area development standard.

Yours sincerely,



Michael Haynes
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