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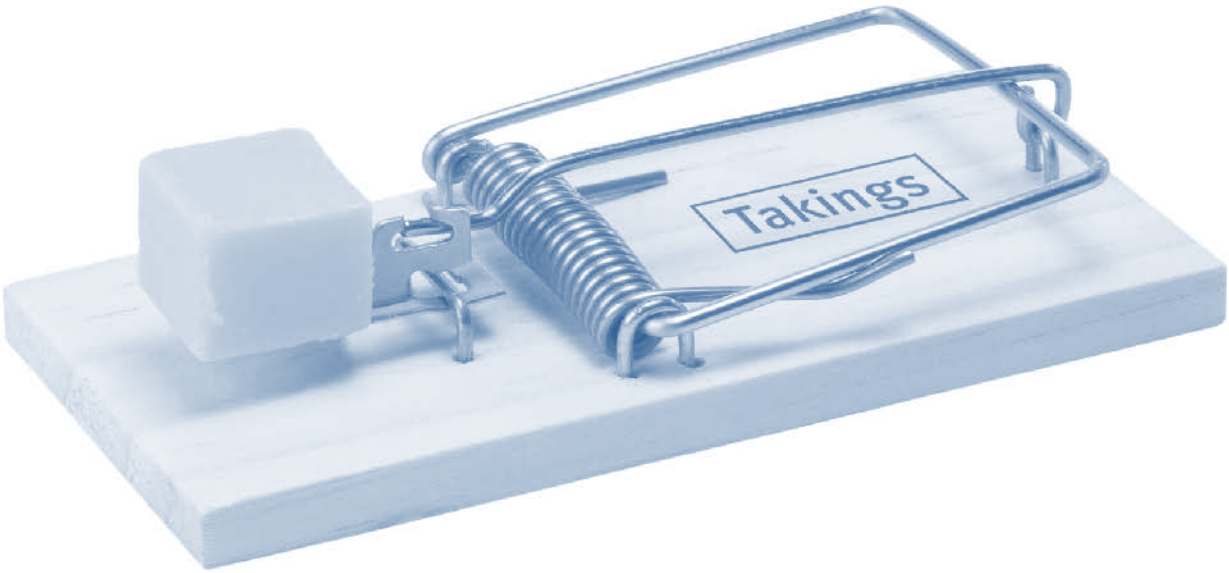

5

Coding to Avoid the Takings Trap

By S. Mark White, AICP

The impact of development regulations (such as zoning, subdivision, resource protection, and urban design requirements) on property rights is one of the oldest and most persistent legal issues for planners. This is because land development regulations can have an economic impact on property owners. Economic impacts range from a reduction in property values or the highest and best use of a property through use, density, or coverage restrictions to direct financial outlays for regulatory compliance with environmental, urban design, or infrastructure requirements. After nearly a century of regulatory takings jurisprudence, the courts have unanimously determined that mere adverse economic consequences do not create a regulatory taking. In 2017, the U.S. Supreme Court in *Murr v. Wisconsin*, 582 U.S. ___, 198 L. Ed. 2d 497, 137 S.Ct. 1933, reaffirmed this line of cases, holding that a "lot merger" requirement of a shoreland protection regulation did not constitute a taking.

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Figure 1. New York City's landmarking of Grand Central Terminal in 1967 kicked off a legal battle that eventually resulted in a three-part test for regulatory takings.

By reaffirming the ability to craft regulations that inadvertently impact property values without invoking compensation, *Murr* was undoubtedly a huge victory for planners. However, its analysis infers a series of guidelines for planners to consider when crafting zoning and other land development regulations that impact the value or development potential of property. This article takes this opportunity to summarize the law of regulatory takings as they relate to development regulations and provides guidelines on how to minimize exposure to financial liability under federal and state takings principles.

WHAT ARE REGULATORY TAKINGS?

The Takings Clause of the Fifth Amendment to the U.S. Constitution provides that no "private property shall be taken for public use, without just compensation." States have similar protections in their constitutions, and some have adopted statutory requirements that government compensate property owners for regulations that adversely impact property values (American Planning Association 1995). While this was originally intended to guard against the use of traditional eminent domain (i.e., the forced transfer of property by a government entity) without paying the property owner, courts in the early 20th century began to apply takings principles to regulations. Hence, in 1922 the U.S. Supreme Court declared that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking" (*Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922)). Courts have also recognized that government could not exist if every exercise of regulatory authority that impacts private property would result in a regulatory taking. Therefore, the courts have developed a series of tests to determine whether various types of regulations result in regulatory takings or not.

A regulatory taking is a court determination that a regulation triggers the "just compensation" requirement of the Takings Clause. It is not a determination that the regulation is invalid. It is only a determination that, as a result of the regulation, the community must compensate the property owner for what the owner lost as a consequence of the regulation. For this reason, court determinations that regulations as a written (i.e., a facial challenge) are rare because they require significant evidence that the impacts of the regulation are so severe that they rise to the level of a taking. It is rare that a regulation would rise to this level in every conceivable context. However, the implementation of a regulation could trigger the Takings Clause. This would require the local government to compensate that property owner, but would not require the local government to compensate all property owners subject to the regulation or to repeal the regulation. However, individual takings claims can be significant, and the prospect of multiple, successful takings claims can have a significant deterrent effect on the adoption and implementation of regulations.

In the context of development regulations, there are several categories of takings cases. The first are regulations that simply impact the use or development of property. These trigger a three-part analysis to determine whether the regulation is a taking or not (described below). Examples are zoning

TABLE 1. TAKINGS CATEGORIES

Category	Description	Analysis
Regulation	The regulation affects how property is used or developed but does not require the property owner to surrender property for public use.	Three-part inquiry to determine: 1. The regulation's economic impact 2. The property owner's investment-backed expectations 3. The character of the regulation
Exaction	The regulation or permit condition requires the property owner to surrender property for public use.	Two-part inquiry to determine: 1. Whether there is a nexus between the type of development and what is exacted 2. Whether the exaction is roughly proportionate to the development's impacts

regulations that limit the use or development of property or that establish development standards (such as landscaping, parking, or building design regulations). The second are exactions. These involve the use of regulatory authority, such as a permitting system, to require a property owner to surrender a property interest, or to allow the government to physically possess property for a public purpose. An example is a subdivision plat condition that requires the developer to dedicate and improve property for a collector or arterial road, or to provide a public park. Exactions are not takings if there is a nexus between the type of development and the thing exacted and the exaction is proportionate to the development's impacts. This article focuses on the first category. For a detailed and useful summary of exactions, see Smith (2013).

HOW DO I KNOW IF A REGULATION IS A TAKING?

In 1978, the Supreme Court established a three-part test to determine whether a regulation is a taking (*Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978)):

1. Economic Impact

The court examines the economic impact of the regulation. This typically compares the affected property's value with and without the regulation. Courts have sustained enormous (for example, up to 95 percent) reductions in value without finding that a regulation is a taking.

2. Investment-Backed Expectations

Next, the court considers the degree to which investments made before the regulations were put into place are affected. The investments must be made in good faith and do not count if they are usable under the new regulations.

3. Character of the Regulation

Finally, the courts consider the purposes the regulations are advancing. For example, regulations that protect public health or prevent a public harm are given wide latitude by the courts. Under nuisance case law, property owners do not have a right to inflict harm on their neighbors to begin with. Therefore, a regulation that prohibits these types of nuisances is not a taking because the property owner never had the right to engage in that behavior to begin with. Regulations that promote aesthetics fall further down the spectrum but are still given considerable latitude by the courts in most states.

Significantly, the courts—including the U.S. Supreme Court in the *Murr* decision—provide significant deference for the practice of urban planning and evolutions in the art and science of urban planning.

The Limits of the *Penn Central* Test

The *Penn Central* analysis applies only if some value is left by the regulations, and involves a case-by-case analysis by the court. The breadth of these criteria means that judges in different states and different federal circuits could come to different decisions regarding similar regulatory outcomes. However, because each hurdle is very high for plaintiffs in takings cases and extremely deferential to government action, takings are rarely found when the *Penn Central* analysis applies. In addition, the traditional variance

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Figure 2. The banks of the St. Croix River, looking south toward the Murr property.

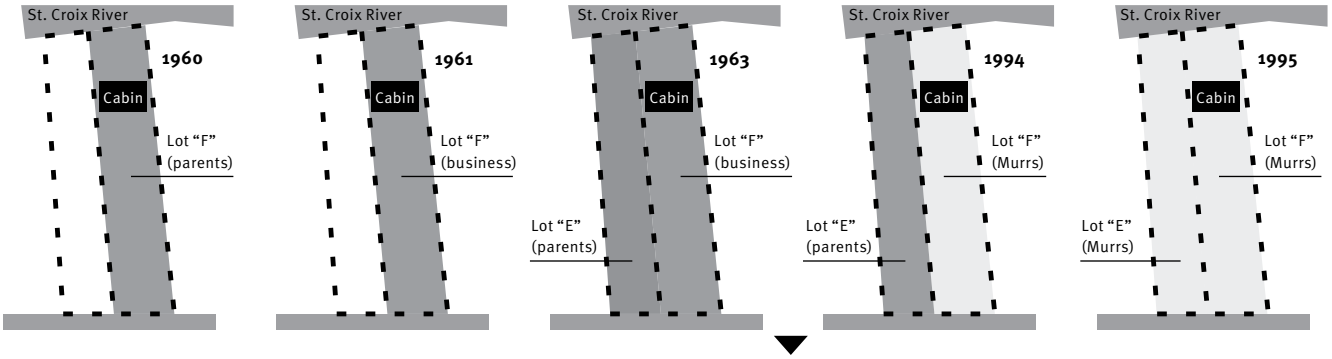

Figure 3. Sequence of property transfers for the adjacent Murr properties.

was invented to allow local governments to assess the impacts of regulations on specific properties before they are actually applied. Therefore, if a regulation has severe economic impact and a local board of adjustment grants a variance from the regulation, the property owner need not pursue a compensation remedy in court.

A second and less frequent type of takings case involves a total taking. If a regulation effectually denies all economic use of the property, a court does not need to apply the *Penn Central* factors. This is considered a "categorical" taking that entitles the property owner to compensation, except (in the rare instance) where the local government demonstrates that any use of the property would violate background principles of nuisance or property law. This principle was announced in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). In that case, a coastal setback line covered a property owner's entire lot. This precluded any economically viable development of the property (the coastal legislation only allowed construction of non-inhabitable improvements such as wooden walkways and small decks). The Supreme Court held that this was a taking, and that the property owner was allowed compensation regardless of any investment-backed expectations or the importance of protecting fragile coastal shorelines.

WHAT HAPPENED IN *MURR V. WISCONSIN*?

The St. Croix River is a picturesque water body that flows 170 miles from northwestern Wisconsin to the Mississippi River, forming the boundary between the states of Minnesota and Wisconsin. Its aesthetic and ecological importance to the region and nation gained it a designation under the federal Wild and Scenic Rivers Act (16 U.S.C. §§ 1274(a)(6), 1274(a)(9)). This required a state management plan, which was put in place by Wisconsin in 1976 and further implemented by zoning regulations adopted by St. Croix County, Wisconsin.

In 1960, the Murr family acquired a lot adjoining the St. Croix River (lot "F"), and built a cabin on that lot. They later transferred lot "F" to their plumbing business. Several years later, they acquired an adjacent lot (lot "E"). After the Wisconsin and county shoreline regulations were adopted, the Murrs transferred lot "F" to their children (the plaintiffs in the case). Their children later purchased lot "E", bringing both lots into common ownership (see Figure 3 above).

The state and local shoreland protection regulations required one net acre to build a residence. The Murrs proposed to move the cabin to a different portion of lot "F" and to sell lot "E" to fund the project. While each lot had more than one acre, the shoreline setbacks and steep slopes on the property left each with less than one net acre. This triggered a "lot merger" provision of the shoreline regulations, which required lots not meeting the acreage thresholds (substandard lots) in common ownership to be combined in order to achieve a full net acre. Under these regulations, substandard lots with no lots in common ownership were allowed one residence, and a single residence could be built on the combined lots. However, substandard lots in common ownership could not be sold or built on separately (see Figure 4 on page 5).

The lot merger provision prohibited the Murrs from selling lot "E" separately. After unsuccessfully seeking a variance to do so, the Murrs went to court, claiming that the regulations had taken lot "E." Evidence showed that the lots were worth $771,000 together and without the lot merger restrictions, but only $698,300 together under the lot merger provision. According to the Murrs, lot "E" was left with only $40,000 in value and lot "F" with $373,000, or a combined 54 percent of its value without the regulations (Figure 4). In a 5–3 decision (with Judge Gorsuch not participating), the Supreme Court found that the shoreline lot merger provisions did not effectuate a taking. In so doing, the opinion (written by now retired Justice Kennedy) determined that both parcels were to be considered as a whole in determining the regulatory impacts. Because the regulations left the resulting unified parcel with substantial remaining value, the court rejected the Murr's takings claim by applying the three-part *Penn Central* analysis.

What Is the Relevant Parcel?

First, the court decided that the entire property was to be considered as a unified whole—rejecting an argument that lot "E" was taken. Takings analysis does not typically divide a property to assess the impact

on the portion targeted by a regulation. For example, if a 10,000-square-foot lot has a 20-foot front setback, a court does not consider the regulatory impact of the strip within the setback. Instead, the courts apply a multiplicity of factors to determine whether a reasonable person would consider both properties to be treated as a single unit. In *Murr*, the court noted that the adjoining properties were treated as one under state law before they were acquired and that reasonable persons would expect both to be sold and regulated as a combined entity. Shared topographic features rendered them subject to combined regulation and added value to the remaining site (lot "E") by increasing privacy, expanding recreational space, or preserving surrounding natural beauty. In addition, the court noted that lot merger provisions are a common practice throughout the country. The provision balanced the rights of grandfathered lots and gradually reduced nonconformities, with the added safeguard of a variance procedure.

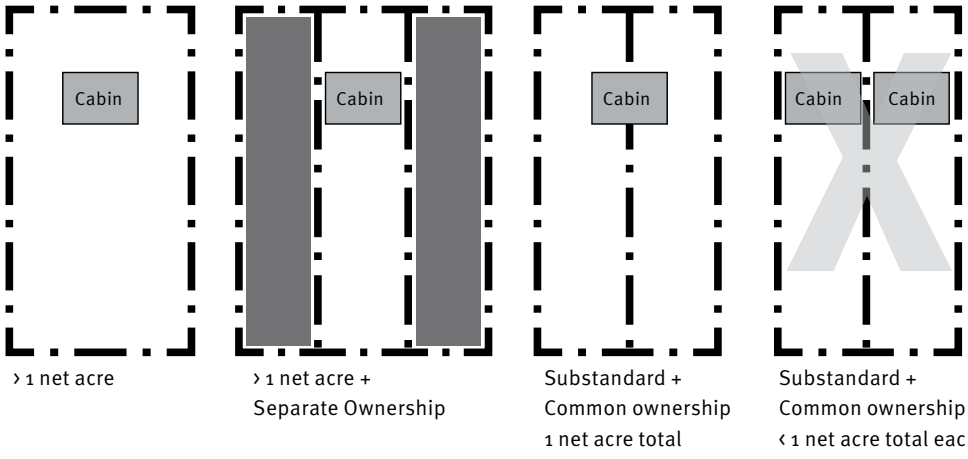

Figure 4. Substandard lot restrictions imposed by Wisconsin and county rules.

Did the Value Reduction Take the Property?

Applying the *Penn Central* test, the court summarily rejected the takings claim. The appraisals indicated that the regulation's economic impact was not severe and predated the acquisition of both lots. Finally, the court stated that the regulation "was a reasonable land-use regulation, enacted as part of a coordinated federal, state, and local effort to preserve the river and surrounding land."

WHAT KINDS OF REGULATIONS COULD BE CHALLENGED AS A REGULATORY TAKING AFTER *MURR*?

The answer is that virtually any regulation is susceptible to the flexible three-part takings inquiry announced in *Penn Central* and applied in *Murr*. For example, Table 2 on page 6 summarizes how courts could apply these principles to regulations that protect shorelines and control the environmental impacts of waterfront development:

When considering how to craft shoreline/waterfront regulatory systems after *Murr*, consider the following options:

1. Document

Document the issues that serve the regulations underlying purposes. For example, in *Pulte Home Corp. v. Montgomery County*, 271 F. Supp. 3d 762 (D. Md. 2017), a watershed study led to an area plan amendment that increased open space set aside requirements to 80 percent and limited impervious surfaces to six to 16 percent. This left only 17 percent of a large-scale development for which $62 million had been spent (including $12 million for development rights) developable. The court rejected a takings claim, noting that the property had only lost 83 percent of its value and the investment was speculative. The court also relied on public health concerns regarding development around a sensitive riparian watershed. In *Quinn v. Bd. of County Comm'rs for Queen Anne's County*, 862 F.3d 433 (4th Cir. 2017), a lot merger provision was applied to an area formally characterized by failing septic systems, with the plaintiff's development requiring 12 lots to merge into four. The court rejected a takings claim, noting that there was value to assembling the parcels and that the density controls avoided overburdening public services, limited environmental damage, and avoided other harms.

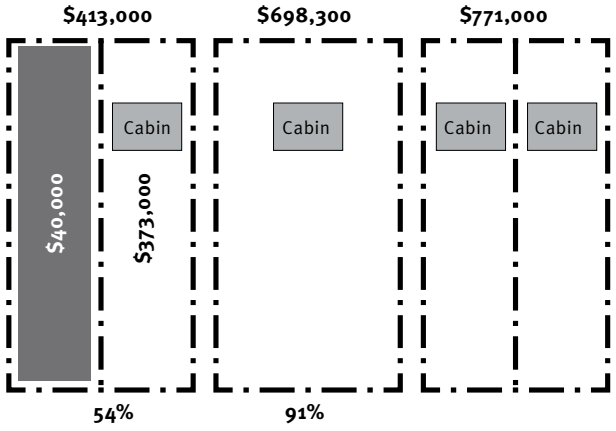

Figure 5. Property values with and without the lot merger requirements.

TABLE 2. SHORELINE/WATERFRONT DEVELOPMENT REGULATIONS

Regulation	Description	Economic impact	Analysis
Use restrictions	Uses in shoreline overlay districts that have minimal impact on water quality or resources	P	Limiting the range of uses could reduce property values, but any economic remainder is likely to defeat a takings claim. This applies unless none of the uses are capable of yielding an economic return (such as the wooden walkways in the *Lucas* case).
Minimum lot area	Requires a minimum area (typically net of restricted resources such as steep slopes, wetlands, or shoreline buffers) to build	P, B	Economic impacts are unlikely to create a viable takings claim unless no use is left of the property. Restricting any development due to inability to meet minimum lot size could result in a categorical taking, which is ameliorated by lot merger and grandfathering provisions, such as those employed by Wisconsin in the *Murr* case.
Maximum density/ intensity	Directly limits the number of dwelling units or floor area that can be constructed within the protected area, sometimes based on a carrying capacity analysis	P	This is a more flexible type of regulation that is typically applied at the subdivision plat stage or where large tracts of land are available. Limitations below market rates of density or intensity are not likely to sustain economic takings claims.
Riparian setbacks	Building or impervious surfaces setbacks a given distance from a regulated shoreline	B	These are treated as typical setbacks. Courts do not segregate the regulations inside and outside of the setback for purposes of takings analysis. However, if the setback is so large that it encompasses an entire property or makes it impossible to build a viable structure, the regulation could be susceptible to a viable takings claim under either the *Penn Central* or *Lucas* analysis.
Impervious surface/coverage limits	Impervious surface limited within a restricted area near a shoreline to protect water quality and to minimize runoff	B	There is abundant scientific evidence that increases in impervious surface above 10 percent can degrade the quality of surrounding surface waters (Schueler and Holland 1994). However, the restriction should ensure that individual properties are left with the reasonable amount of square footage to support an economic use of the property. The regulation should also include variance procedures and provisions for flexible development alternatives to potentially avoid takings claims in the first place.
Transfer of development rights/density allocations	Allows development subject to impervious surface or density limits to convey unused development potential to properties with fewer development restrictions	B	This provision mitigates the economic impact of the development restrictions listed above, allowing restricted properties and economic return for unused development potential. However, the underlying restrictions remain subject to takings claims (*Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997)).

Key:
P = Potentially limits property values below maximum supported by market
B = Constrained ability to construct buildings needed to sustain an economically viable use

2. Findings

With any restriction, document their underlying basis in findings of fact and statements as to the public benefits and benefits to burden properties. Courts will recognize and often defer to these statements if litigation is involved. These can support the underlying character of the regulations.

3. Alternatives Analyses

During the planning stage, carefully consider a wide range of regulatory options as they relate to the resource you are protecting. While the minimum lot size/lot merger provisions work well in Wisconsin, they may not be the best option in your community. For example, depending on the environmental restrictions, lot patterns, state laws, and local political realities, a simple riparian buffer might serve the underlying purposes without inviting successful legal challenges.

4. Flexibility

Offer as much flexibility as you can in the regulations without undermining their

underlying purpose. If a large-scale property is involved, the ability to allocate density to unrestricted parts of a property can mitigate economic impacts and defeat takings claims in some instances. In addition, the community should document the benefits that restricted properties confer on unrestricted ones. For example, in *Matter of City of New York (South Richmond Bluebelt, Phase 3),* 60 Misc. 3d 232, 75 N.Y.S.3d 830, 2018 N.Y. Misc. LEXIS 1453, 2018 NY Slip Op 28126, a lot was condemned as part of the "Staten Island Bluebelt" shoreline protection plan. The lot was part of a common development involving six houses built on an adjacent property. The court found that that lot had been used as mitigation subject to the original development plan, which benefited development of the surrounding properties. This provision did not amount to a regulatory taking, which reduced the outlay required for condemnation.

5. Processes

Make sure there are adequate opportunities to mitigate the regulatory impact at the administrative level. This can include variances, alternative standards, or ways to work with surrounding property owners to transfer development rights. These can often avoid litigation in the first place, and property owners typically cannot proceed to court until all administrative vehicles are exhausted.

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Figure 6. Ten Mile Creek in Montgomery County, Maryland.

CONCLUSION

Murr v. Wisconsin is undoubtedly a resounding victory for planning and development regulations that implement comprehensive plans. However, the doctrine of regulatory takings lives on, and the result in *Murr* was advanced by excellent regulatory findings and research by the state and county in that case, along with the particular circumstances of that property. In addition, the recent appointments of Neil Gorsuch and Brett Kavanaugh (replacing the author of the *Murr* opinion), have cemented a majority on the Supreme Court of those likely to take a more favorable view of property rights interests in future cases. However, it is not clear whether the new majority will redefine how regulatory cases are analyzed or change the deference that courts give to local land development regulations.

Fortunately, communities retain considerable authority and discretion to develop regulatory systems that best fit their needs. Of the 36 reported cases citing the Supreme Court's decision in *Murr*, 23 (or 64 percent) found no taking and seven (or 19 percent) were disposed of on other grounds. Only four cases (or 11 percent) found that there was a taking. With proper planning, stakeholder outreach, and an intelligent approach to the community's regulatory needs, the regulations can serve their intended purposes without creating needless financial liability.

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S. Mark White, AICP, a planner and attorney with White & Smith, LLC, is recognized as an expert in zoning and subdivision law, form-based zoning and new urbanism, land-use and takings litigation, housing, development of comprehensive growth management plans, and implementation systems. He has represented city, state, and local governments, as well as major private developers, many of whom are involved in environmental permitting proceedings and takings litigation.

REFERENCES

American Planning Association. 1995. *Policy Guide on Takings*. Available at http://bit.ly/2FK6aQT.

Schueler, Thomas R., and Heather K. Holland. 1994. "The Importance of Imperviousness." *Watershed Protection Techniques*, 1(3): 100–111. Available at http://bit.ly/2JQcbQl.

Smith, Tyson. 2013. "What *Koontz v. St. Johns River Water Management District* Means for Planners . . . For Now." *Zoning Practice*, October. Available at planning.org/publications/document/9006898.

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5