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Sun and the Law Resources from ELC



So, you want to LEASE YOUR PROPERTY TO A SOLAR COMPANY?

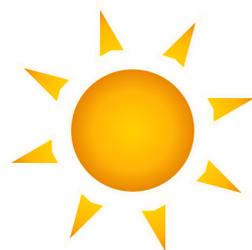
As more solar projects are approved, particularly large-scale projects, more land will be required. To meet demand, both private and public land will be up for lease, requiring smart land use and development.

This guide focuses on private land and more specifically on scenarios in which a property owner is approached by a renewable energy company for the purpose of leasing land or space for a solar installation.

This guide is intended for those who are interested in using their

land for the purpose of solar power generation.

Note that these guides are not a substitute for independent legal advice and are intended to provide summary information helpful to those interested in learning more about solar leases.



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While leasing your land for a solar energy project may involve a novel technology type, the lease itself will likely resemble a standard commercial lease. This includes some of the same risks such as non-payment, liability issues, and lease defaults.

Negotiating Your Lease

While leasing your land for a solar energy project may involve a novel technology type, the lease itself will likely resemble a standard commercial lease. This includes some of the same risks such as non-payment, liability issues, and lease defaults. In addition, there are certain risks inherent to solar including any legislative requirements, such as any required Alberta Utilities Commission approvals, any zoning limitations, and any reclamation requirements.

The following section will identify some issues that should be flagged during the lease negotiation process including any potential constraints on leasing. First, we begin with some provisions that should be included in your lease.

Length

One of the first issues to consider is length. Generally, solar leases are registered on title and are long-term agreements ranging in length from 20-60 years, often with a 20 year minimum.¹ Initial negotiations should; therefore, include discussion about the length of the lease.

Termination and renewal of the lease should also be considered. Termination procedures can be set out in the lease and should include:

- any required notice period;
- how termination can be accepted by either party;
- what to do in the event of a default; and
- which party will be responsible for the costs associated with terminating the lease.

Renewal provisions will be similar. They should specify how one party can propose a lease renewal including notice period, whether it needs to be in writing, how acceptance can be issued, and how any costs will be divided.

Lease Transfers

The potential for such a long lease raises the possibility of another legal issue, that of lease transfers. Once a lease is in place, solar energy companies may be able to transfer the lease to another company or developer. This is often available under standard lease terms, unless specifically forbidden. In contemplation of this, property owners should consider whether they would prefer to negotiate for a non-transferable lease or otherwise ensure that all provisions in the lease will properly transfer to a new owner.² Considering the ability to transfer leases, it is also important that property owners are aware that there is no legislative oversight requiring renewable energy companies to meet certain financial criteria.³

If the solar project requires Alberta Utilities Commission ("AUC") approval, the power plant approval process may also provide some protection in the event of a lease transfer. The new AUC Rule 007, effective September 2021, requires an overview of how the project operator will ensure that the project holds sufficient funds to cover the cost of decommissioning and reclamation at the end of the project's life cycle, prior to approval.⁴ However, micro generation and small scale generating units do not fall under this regime.



Payment Plans

Payment details are another important part of lease negotiations. For example, when negotiating payment, the property owner should consider whether they prefer a lump sum payment up front, periodic payments independent of energy generation, periodic payments based on generated revenue, or a more creative payment program.⁵ These details are important because the compensation structure for oil and gas leases under the *Surface Rights Act* does not apply to renewable energy projects.⁶ This also means that there is no regulatory recourse in the event of a breach and, instead, property owners would need to pursue litigation.

The lease should also set out the procedure to be followed in the event of a default on payment. For example, the lease can state that payment is required on the same date every month and that in the event that payment is not received within 7 days of the due date, the default provisions will kick in. In the event of a default, the lease can specify a notice period prior to termination. The lease can set out a 30 day notice period during which the property owner is to notify the leaseholder that they are in arrears. If payment is not completed within this notice period, the lease can provide an option for termination.

Indemnification

When negotiating a lease, it will be important to consider the liability assigned to each party. In particular,

property owners should ensure that there is an indemnification provision that assigns proper liability to the solar energy company. This provision should ensure that any damage to the property or personal injury will be the responsibility of the solar energy company rather than the property owner. Notably, in the event of gross negligence or intentional action on the part of the property owner or their agents, this provision could be rendered void.

When negotiating this provision, it may be helpful to ensure that the limits of the solar energy company's insurance policy are included in the lease. Large projects can require large insurance policies, in the millions of dollars.

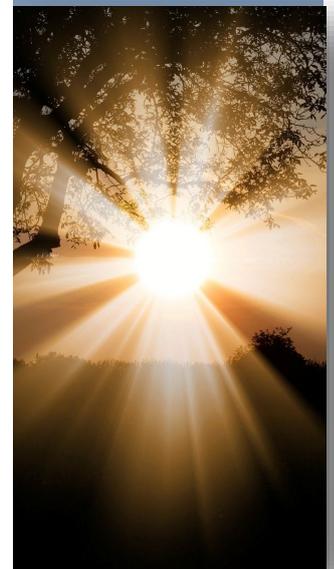
Mediation and Arbitration

In the event of a default, disagreement, or other issue the lease should also include a process to manage these issues. One way to do this is through a mandatory mediation/arbitration clause. This provision would require parties to attempt mediation and/or arbitration prior to bringing a court action. If the lease specifies arbitration, it can also specify whether this arbitration is binding. If nothing is mentioned, non-binding will be assumed. From there, the lease can make reference to the *Arbitration Act*⁷ and require parties to abide by provisions in the Act.

Even if the lease has an arbitration clause, it may still be beneficial to file a Statement of Claim before the relevant limitation date to protect your claim; however, this will be something to discuss with a lawyer.

So, you want to lease your property to a solar company?

The compensation structure for oil and gas leases under the *Surface Rights Act* does not apply to renewable energy projects.



When negotiating a lease, it will be important to consider the liability assigned to each party.



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If you are leasing your land or rooftop to a solar energy company, an easement or a right of way may need to be negotiated. These legal tools allow the company to enter onto your property for installation, maintenance, and other required work.

Access to Land

If you are leasing your land or rooftop to a solar energy company, an easement or a right of way may need to be negotiated. These legal tools allow the company to enter onto your property for installation, maintenance, and other required work that may range from innocuous site visits to check connectivity to more substantial interferences such as vehicles or equipment. These are standard parts of a lease and often, properties already have multiple easements or rights of way on title for drainage, utilities, or roads.⁹

A utility right of way can be granted over or under land by the registered owner for a number of activities including the carrying, laying, constructing, maintaining or using conduits, cables, wires, poles, or transmission lines and may be registered on the land title. An easement is a legal tool that gives the holder certain rights to use the property in question. More specifically, it allows the property owner to retain ownership while giving up certain defined rights on the portion of the land used for the easement.¹⁰

In both cases, the right of way or easement grants rights of use in accordance with the specific terms. Easements; however, are available for a wider array of activities and are not as rigidly defined in statute. In order for an easement to be considered legally binding, it should include a concise definition and a clear description of the boundaries.¹¹ A proper easement would include a description of:¹²

- the real property;
- the three dimensional space;

- when the easement applies;
- any provisions for compensation; and
- a map of the property, among other details.

It should also specify how to create and terminate the easement including that both actions should be in writing (if an express easement) and that it should be registered with the appropriate land titles office.¹³ Any easement should also specifically set out the terms and conditions for a termination or breach.¹⁴ This part of the lease can specify how day to day operations on the property will proceed. For example, it can set out how the solar energy company can enter onto the property including required notice. It may also include a section specifying that all equipment is the property of the solar energy company and outlining how the company can enter onto the property for maintenance or installation.

Reclamation and Decommissioning

While there are certain legislative requirements for reclamation, discussed below, the clean-up and decommissioning of a project can also be negotiated along with the lease. For example, the lease can require the removal of all material within a specified time after termination. Leaseholders may even be able to negotiate security to ensure that proper clean up and reclamation occurs. This security represents an amount of money to be held by the property owner in trust and to be used only in the event that reclamation is not properly completed. Note that a requirement for security may be possible but may also make negotiations difficult and will require discussion with a lawyer.

1. Farmers' Advocate Office, "Negotiating Renewable Energy Leases" (1 February 2017) Ag Dex 817-15 Government of Alberta at 8 online: <https://open.alberta.ca/dataset/c0df7ced-59c9-4bc7-aa9c-2897edb6a07c/resource/521e1d42-9b76-420d-92cf-e84cd2808192/download/agdex-817-15-february-2017.pdf> [Negotiating Renewable Energy Leases].

2. *Ibid* at 8-9.

3. *Ibid* at 9.

4. Alberta Utilities Commission, *Rule 007: Applications for Power Plants, Substations, Transmission Lines, Industrial System Designations and Hydro Development* (1 March 2021) at s 4.42, TP22 [Rule 007].

5. Daniel B.R. Johnson, "They Ain't Making Any More of It: Land Lease Considerations for Alberta Renewable Energy Projects" (September 2020) *The Negotiator* at 6 [Daniel B.R. Johnson].

6. *Surface Rights Act*, RSA 2000, c S-24, s 23.

7. *Arbitration Act*, RSA 2000, c A-43.

Notification Regime

Property owners should also be aware of any potential effects a solar energy lease may have on neighbours.

In the event that AUC approval is required, the solar energy company will need to comply with the notification rules set out in AUC Rule 007.¹⁵ However, even if the AUC is not involved, it may still be helpful to talk to neighbours to discuss price, past experiences, or other related issues.¹⁶

In addition to the social benefits, these discussions may be important due to potential limitations on future development. Lease agreements may dictate setbacks for future development and neighbouring properties can be affected.¹⁷ Effects within municipalities will likely be more minimal; however, required easements or rights of way may still impact upon neighbouring land.

Legislative Considerations

Legislative requirements will differ depending on location, size, and more and before agreeing to a lease, property owners should make sure that the renewable energy company has properly reviewed any necessary legislative provisions and received the proper approvals. Some examples are set out below but this is in no way an exhaustive list.

If a proposed project qualifies as a utility scale solar project, AUC approval will be required.¹⁸ This is important for a property owner to consider because even if a project lease is agreed to between the renewable energy company and the property owner, the AUC will make

the final decision in approving a power plant.¹⁹ This means that after a lease is negotiated, the AUC can impose additional requirements or even cancel the project.

During the approval process, other provincial statutes may also affect the outcome. For example, under the *Water Act*, the ownership of all bodies of water is vested in the Crown, even on private land.²⁰ If a solar project will impact upon a body of water or a wetland, *Water Act* approvals may be required and property owners should ensure that the solar energy developer is cognizant of all these approvals. Alberta Environment and Parks may also require that a set of standards are met, as set out in the *Wildlife Directive for Solar Energy Projects*.²¹ This Directive is intended to protect wildlife populations and habitat around renewable energy project installations.²² During the AUC power plant approval process, a Renewable Energy Referral Report must be submitted and requirements may include mitigation, monitoring, or other restrictions for the benefit of wildlife and habitat.²³ Notably, the *Wildlife Directive for Solar Energy Projects* does not apply to solar projects located within municipal boundaries nor does it apply to projects that are considered a small scale or micro generating unit.²⁴

To ensure all potential legislative considerations are met, the lease can include warranties and representations wherein the solar energy company commits to abiding by all regulatory requirements and receiving the proper approvals before work begins.

So, you want to lease your property to a solar company?

Property owners should also be aware of any potential effects a solar energy lease may have on neighbours.



8. Alberta Land Surveyors' Association, "Understanding Easements and Rights-of-Way" at 6-7 online: [https://www.alsa.ab.ca/Portals/0/PDF/Surveys in Alberta/Understanding Easements and Rights-of-Way 2010.pdf?ver=o9QqpoWaUjKR9krbGBjZ6A%3d%3d×tamp=1610060853720](https://www.alsa.ab.ca/Portals/0/PDF/Surveys%20in%20Alberta/Understanding%20Easements%20and%20Rights-of-Way%2010.pdf?ver=o9QqpoWaUjKR9krbGBjZ6A%3d%3d×tamp=1610060853720).

9. *Land Titles Act*, RSA 2000, c L-4, s 69(1) (a).

10. Marie-Ann Bowden, "Protecting Solar Access in Canada: The Common Law Approach" (1985) 9:2 Dal LJ 261 at 276.

11. Ronald M. Khurulak, "A Legal Review of Access to Sunlight in Sunny Alberta" (1981) The Alberta Environmental Research Trust at 11

online: <http://www.hme.ca/sdplans/A%20Legal%20Review%20of%20Access%20to%20Sunlight%20in%20Sunny%20Alberta.pdf>.

12. *Ibid* at 11.

13. *Ibid* at 11.

14. *Ibid* at 11.

15. Rule 007, *supra* note 4.

16. *Ibid* at Appendix A1, s 5.

17. Negotiating Renewable Energy Leases, *supra* note 1 at 12.

18. Rule 007, *supra* note 4.

19. Negotiating Renewable Energy Leases, *supra* note 1 at 13.

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Prior to entering into a lease agreement, property owners should ensure that zoning rules in the area permit a solar energy system and that project plans comply with any and all requirements.

Potential Constraints on Leasing

The following section will identify some potential issues that may arise and impact upon your proposed lease.

Zoning

The ability to install a solar energy system on your property may depend on the zoning requirements in your area. For example, cities set zoning and land use rules for different districts. This may take the form of limits on roof height or connectivity requirements. Outside of cities, land may be zoned as agricultural, residential, or may otherwise prohibit development. Prior to entering into a lease agreement, property owners should ensure that zoning rules in the area permit a solar energy system and that project plans comply with any and all requirements.

Another potential consideration is whether the area is under any form of restrictive covenant. Restrictive covenants can limit the roof style, height, or even shingle type and may impact upon a property owner's ability to install a solar energy system.²⁵ Restrictive covenants are listed on title and it will be important to pull a title search for your properties before proceeding.

Surface Rights Issues

The Alberta surface rights regime manages leasing arrangements between landowners and oil & gas companies in Alberta.²⁶ Currently, this regime is concerned primarily with accessing crown owned oil and gas

resources and therefore any protections and obligations set out in the *Surface Rights Act* do not apply to solar energy leases.²⁷ This includes right of entry orders, lease protection, and repayment protection options.

This lack of an equivalent surface rights regime presents both benefits and challenges for property owners. On one hand, it allows property owners who do not wish to have their land taken over by energy projects the right to refuse, with no repercussions, but it also means that if a property owner enters into an agreement, enforcement will be their responsibility. In this regard, property owners can take a number of precautions before leasing their land, including retaining a lawyer and negotiating a fixed lease.

The *Surface Rights Act* may, however, apply to infrastructure associated with a renewable energy project, such as infrastructure that is required to connect the solar energy system to the electricity grid.²⁸ This is important because although the project itself is voluntary, the right of entry process may apply to transmission lines. This means that the Surface Rights Board may be able to issue an order for the construction, operation, or removal of a power transmission line, even without property owner agreement.²⁹ Infrastructure may also be installed on neighbouring land, regardless of whether neighbours are involved in the initial project.

20. *Water Act*, RSA 2000, c W-3.

21. Alberta Environment and Parks, "Wildlife Directive for Alberta Solar Energy Projects" (4 October 2017) AEP Fish and Wildlife Policy 2017 No. 5 online: <https://open.alberta.ca/dataset/6a71e752-8d72-4126-a347-e9f328279904/resource/527c6a99-4004-440c-8033-07872cb8adb0/download/wildlifedirective-albertasolarenergyprojects-oct4-2017.pdf>.

22. *Ibid.*

23. Rule 007, *supra* note 4 at s 4.3.2, SP22.

24. Alberta Utilities Commission, "E.L. Smith Solar Power Plant EPCOR Water Services Inc." (20 February 2019) at para 27 online: http://www.auc.ab.ca/regulatory_documents/ProceedingDocuments/2019/23418-DO1-2019.pdf.

25. An example of a restrictive covenant affecting the shingle type that could be installed can be found at: CBC News, "Spat over roofing materials ends in court, homeowners ordered to change shingles" (30 August 2019) *CBC News* online: <https://www.cbc.ca/news/canada/edmonton/spat-over-roofing-materials-ends-in-court-homeowners-ordered-to-change-shingles-1.5266092>.

Reclamation Options and Issues

Once a lease has been negotiated and installation complete, the next potential issue arises when the project is no longer in service and the company is nowhere to be found. This is another step in the process that is different for renewable and non-renewable energy projects.

For example, if an oil well is orphaned without proper reclamation, it can be taken over by the Orphan Well Association.³⁰ This association helps landowners get wells cleaned up in the event that a company becomes insolvent before reclamation is completed. In contrast, if a solar energy system was installed on a parcel of land but reclamation was not completed before insolvency, there is no equivalent organization for recourse. This could apply to rural and urban properties and to building roofs, although reclamation requirements would be different for each. Requirements could include dismantling panels, collectors, or other infrastructure; restoring the property to its original state; and repairing any damage due to installation or partial removal.

Reclamation should be considered by property owners at the outset of a solar energy lease negotiation because dismantling a large scale solar energy system is costly and may leave impacts on the land or rooftop. In the event that AUC approval is required, the *Conservation and Reclamation*

Regulation will apply. This Regulation requires a reclamation certificate for renewable energy projects and would govern the reclamation process for a solvent and functioning company.³¹ This would not be applicable to community, small scale or microgeneration. Regardless, in all cases, requirements for the clean-up and/or dismantling of a solar energy system should be included in the lease. This is also where a security deposit could be negotiated to ensure sufficient funds are available in the event that the solar energy company abandons the project prior to reclamation.

All of this ties into the consideration of term limits. Unlike non-renewable energy leases, renewable energy sites typically gain value over time and associated infrastructure retains a strong resale value. Essentially, renewable energy will only get cheaper and more efficient to run as technology improves.³² However, this does not mean that property owners or solar energy companies will want to be tied into a lease term that lasts beyond the expected lifespan available for the solar technology.³³ Considerations for a lease may include, expected lifetime, any projected changes to climate in the area, and plans in the event the project is no longer economical.³⁴

So, you want to lease your property to a solar company?

Reclamation should be considered by property owners at the outset of a solar energy lease negotiation because dismantling a large scale solar energy system is costly and may leave impacts on the land or rooftop.



26. *Surface Rights Act*, RSA 2000, c S-24.

27. *Ibid.*

28. *Ibid.*, s 12(1)(d).

29. *Ibid.*, s 12(1)(d).

30. Alberta Energy Regulator, "Orphan Well Association" online: <https://www.aer.ca/regulating-development/project-closure/liability-management-programs-and-processes/orphan-well-association>.

31. *Conservation and Reclamation Regulation*, Alta Reg 115/1993.

32. Max Roser, "Why did renewables become so cheap so fast? And what can we do to use this global opportunity for green growth?" (1 December 2020) *Our World in Data* online: <https://ourworldindata.org/cheap-renewables-growth>.

33. Daniel B.R. Johnson, *supra* note 5 at 4-5.

34. *Ibid* at 5.

35. Daniel B.R. Johnson, *supra* note 5 at 4.

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This offers another opportunity for agrivoltaics or pollinator friendly solar, both of which can be used for weed management whether through grazing animals or simply by ensuring noxious or invasive species are kept at bay.

Land Use Considerations

Due to the potentially significant land use requirements of renewable energy installations, concurrent land use may be attractive. If a lease agreement allows concurrent land use, solar energy companies will want to ensure that their lease agreement includes protection for equipment and provisions regarding improper access.³⁵ If there will be multiple uses of the land, the lease can also specify how and when others can enter onto the property to manage weeds, animals, or crops, particularly if they will be working near the solar energy installation.

Depending on the suite of available land use options, landowners should also consider any fencing requirements. For example, if the land is being used for a dual purpose such as through the incorporation of agrivoltaics³⁶ or if grazing animals are allowed, fencing and other land use details should be included in the lease.³⁷

Leases should also consider weed control, which can be a source of disagreement between landowners and solar companies.³⁸ It is important that weed control is managed in order to ensure that a solar energy system is functioning properly. This offers another opportunity for agrivoltaics or pollinator friendly solar, both of which can be used for weed management whether through grazing animals or simply by ensuring that noxious or invasive species are kept at bay.

The considerations for solar energy

systems on urban lots will be different. For example, landowners will need to consider noise related to both construction and maintenance, particularly if tenants live or work in the building. Rental agreements often provide tenants with the right to quiet enjoyment which should be balanced with solar energy system lease requirements. Another consideration is glare – although minimal, solar energy systems may result in some glare which could be a concern for neighbours.

Telecommunications: A History of Leasing our Rooftops

It may be hard to imagine a neighbourhood where every rooftop is covered in solar panels but we are actually closer to that reality than you may think. Historically, leasing agreements of this type did exist, they just weren't for solar. Instead, property owners leased their roofs to telecommunication companies.

In fact, due to requirements for unobstructed lines of sight, telecom companies have been leasing rooftops for years. This meant that multiple telecom towers ended up on some of the tallest towers to secure adequate coverage in different service areas. These leases will look very similar to solar energy leases because they allow a third party to come onto your roof, install technology, and pay you for the space.

36. Agrivoltaics refers to the installation of solar panels on top of, or amongst, working agricultural land.

37. Negotiating Renewable Energy Leases, *supra* note 1 at 15.

38. *Ibid* at 15-16.

39. Kendra Sugloski, "500 solar panels cover south side of downtown Edmonton office tower" (30 March 2017) *Global News* online: <https://globalnews.ca/news/3347122/500-solar-panels-cover-south-side-of-downtown-edmonton-office-tower/>.

40. *Ibid*.



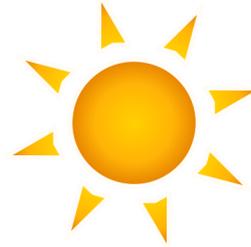
Do I Have A Right to the Sun?

So, you want to lease your property to a solar company?

Finally, when negotiating a solar lease, it may be important to consider whether solar access will become an issue in the future. If your building is surrounded by other high-rise buildings and yours is a floor or two taller than the others, this may not be an issue; however, if new developments are proposed for the area and your solar energy system will be on the ground or on a smaller building, solar access may be impeded by future construction. This occurs when a nearby building blocks the sun that was previously hitting your solar energy system. As of 2021, there is no law in Alberta that prevents this from happening.

Simply put, you may have a solar energy system on your roof but the city could still approve a development permit for an even larger building next door. This concern arose with one of downtown Edmonton's only large scale solar energy systems which is located on a 10 storey office tower.³⁹ Currently, the unobstructed solar access is under threat because three 40 storey buildings were approved on a neighbouring lot.⁴⁰ To read more about solar access issues check out our report [Here Comes the Sun: Solar Law in Alberta.](#)

Your solar access may be impeded by future construction. This occurs when a nearby building blocks the sun that was previously hitting your solar energy system and as of 2021, there is no law in Alberta that prevents this from happening.



About the Environmental Law Centre

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The Environmental Law Centre (ELC) has been seeking strong and effective environmental laws since it was founded in 1982. The ELC is dedicated to providing credible, comprehensive and objective legal information regarding natural resources, energy and environmental law, policy and regulation in Alberta. The ELC's mission is to advocate for laws that will sustain ecosystems and ensure a healthy environment and to engage citizens in the law's creation and enforcement. Our vision is a society where laws secure an environment that sustains current and future generations and supports ecosystem health.

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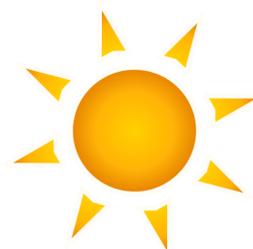
The Environmental Law Centre has created three topical guides for Albertans interested in getting involved in the solar industry.

These guides can be found here:

- [So, you want to start a solar co-op?](#)
- [So, you want to lease your condo's roof to a solar company?](#)
- [So, you want to lease your property to a solar company?](#)

In addition to these topical guides, the Environmental Law Centre has released a report on legal considerations for solar energy generation in Alberta:

Here Comes the Sun: Solar Law in Alberta provides Albertans with access to information about how the law impacts and guides the development of solar energy systems in the province. While solar power may be fast growing, it still only makes up a very small fraction of the Alberta electricity grid. This report identifies barriers to future growth and makes recommendations for improvement. Find out more at the ELC website at elc.ab.ca



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