

# Purchase and Sale Agreements for Conservation Projects

## Guidance and Sample Provisions

*Acquisitions of land and easements for conservation purposes can involve issues different from other real estate transactions. This guide looks at purchase and sale agreements in general and then reviews potential customizations that may be made to these agreements to specifically address conservation matters.*

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### Introduction

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#### Affirming Commitment, Avoiding Misunderstanding

A landowner may be willing to sell or bargain sell their land or an easement to an organization. But before the organization acts on this willingness, such as raising funds for the purchase, performing due diligence, or otherwise preparing for the acquisition, it likely will want to document the owner's commitment to sell in writing. Otherwise the organization may spend substantial time, energy, and money on a transaction only to find that the owner has changed their mind or has irreconcilable differences with the organization regarding the details of the pending transaction. Documentation of the owner's commitment can both serve to legally bind the owner to the commitment and reduce the opportunity for misunderstanding.

A legally binding contract for the sale and purchase of real estate interests—whether fee simple ownership or easement—must be put into a signed, written document to be enforceable in Pennsylvania (see the Statute of Frauds).

#### Purchase Agreement Contrasted with Purchase Option

##### Purchase and Sale Agreement

*An agreement of purchase and sale*—often called a sales agreement or purchase agreement—spells out the rights and obligations of both the seller and buyer of an interest in real property, whether land or easement. The contract is formed by mutual promises—the seller promises to transfer ownership of certain property and the buyer promises to pay the purchase price

within a certain time after the contract date (at what is called the [closing](#) or settlement). The buyer will want the contract to include representations and disclosures by the seller about the physical condition of the property and title to the property. The contract may (and usually does) include conditions (sometimes called contingencies) that must be met before the seller or, as is more likely, the buyer is legally obligated to close the transaction.

### Purchase Option

In contrast, a *purchase option* does not contain mutual promises. Much like a contract for purchase and sale, the seller promises to deliver the transfer documents to a closing but, unlike a contract, there is no mutual-ity—the buyer may elect whether to proceed to closing or not. The buyer has the *option* to act by notifying seller of its election to purchase (which must be done strictly in accordance with the terms set forth in the purchase option.)

The guide [Purchase Options: Gaining the Right Without the Obligation to Acquire Property Interests](#) describes at length the various features and applications of purchase options. The [Model Grant of Purchase Option with Commentary](#) provides a document that can be tailored to the situation.

Sometimes a purchase and sale agreement is attached to the purchase option to document the understanding of both parties of how the transaction will proceed in the event that the buyer chooses to exercise their option to purchase.

### Blurred Lines

In practice, a purchase and sale agreement may be written to include one or more periods of time in which the buyer may elect to terminate the agreement without penalty because a condition (for example, satisfactory title or property inspection) failed to occur, or sometimes for no reason at all. In such cases, the buyer's election to terminate the contract within a certain time period results in the same outcome as the buyer's election not to exercise its right to purchase under a purchase option.

## Functions of Purchase Agreement

A well-constructed purchase and sale agreement serves several functions:

- It sets out necessary terms: the property interest to be conveyed, a purchase price (or a method to determine the purchase price), and a time for closing. It may also include representations of the seller that the buyer may rely on and conditions that must be satisfied before the buyer is obligated to close. It may also allocate responsibility for liability risks associated with property ownership.
- It allocates the tasks that must be accomplished to complete the transaction and sets the path to get to a smooth, crisis-free closing.
- It covers what remedies the parties will have if expectations are not met and closing does not occur as anticipated.

## Forms of Purchase Agreement

### Attorney-Prepared Forms

Some conservation organizations engage counsel to prepare a purchase agreement tailored to each transaction. Others use an attorney-prepared form, modify it, and then have an attorney review it prior to finalizing the document.

### Pennsylvania Association of Realtors (PAR) Forms

Members of the Pennsylvania Association of Realtors will, unless directed otherwise, prepare a purchase agreement for the acquisition of fee simple ownership using PAR forms. PAR forms can be used by non-realtors as well. Attorneys and others can access the suite of forms online from commercial providers such as [zipLogix](#).

To reflect matters particular to many, if not most, conservation acquisitions, users of PAR forms need to incorporate an addendum covering the non-standard terms (samples of which are provided later in this guide). The following PAR form addenda might also be applicable:

- Oil and Gas Mineral Rights Disclosure and Addendum to Agreement of Sale
- Appraisal Contingency
- Private Transfer Fee Disclosure

### *Acquisition of Land*

If the land to be acquired is unimproved, the PAR standard form for vacant land may be used with an addendum covering issues particular to the conservation project.

### *Acquisition of Land with Dwelling*

If the land to be acquired is improved with a dwelling, the PAR standard form for sale of a residence is recommended because it contains all of the disclosures required by law and is kept up to date with changes in the law. An addendum covering issues particular to the conservation project may be used with this form as well.

### *Acquisition of Conservation Easement*

None of the PAR forms are suitable for acquiring conservation or trail easements. An attorney-prepared purchase agreement or purchase option such as the [Model Grant of Purchase Option](#) is recommended.

## Legal Review

Legal review and counsel regarding proposed transactions are crucial, ensuring that the organization achieves what it intends with the transaction and document. Moreover, Practice 9.A.1. of [Land Trust Standards and Practices](#) calls for organizations to:

Obtain a legal review of every land and conservation easement transaction, appropriate to its complexity, by an attorney experienced in real estate law.

## Addressing Issues Peculiar to Conservation Transactions

The remainder of this guide reviews purchase agreement drafting issues that often arise in conservation acquisitions but rarely surface in other real estate transactions and provides sample provisions to address these issues.

The provisions may be:

- Placed within the body of the purchase agreement; for example, a PAR form contains a space at the last numbered paragraph for additional provisions; or

- Attached as an addendum with a provision added to the body of the agreement that incorporates the addendum into the agreement.

To guard against ambiguity in the case that an additional provision conflicts with a provision elsewhere in the purchase agreement, a provision such as the following could be added:

These additional terms [OR The terms contained in this addendum] supplement and, to the extent of any inconsistency, supersede any other terms of this agreement.

## Ensure No Harm to Natural Values

The buyer will want to ensure that the values of the property that make the land worth conserving are protected between the time that the purchase agreement is made and the closing. To accomplish this, add a provision to the purchase agreement such as the following:

### **1. No Change to Natural Resources**

Seller's obligation to maintain the Property through the settlement includes the duty to prevent tree cutting, soil removal, or other material change to natural resource values.

## Credit Buyer for Avoided Transfer Tax

Transfers of real property are subject to state and local transfer tax in Pennsylvania unless the transaction is excluded from taxation by statute. The transfer tax statute excludes certain conservation-related transactions including transfers to a conservancy and transfers of conservation and trail easements. (See the guide [Realty Transfer Tax: Exclusions for Conservation-Related Transactions in Pennsylvania](#).)

If the buyer is a *conservancy*, it is not unreasonable to add a provision to the purchase agreement such as the following:

### **2. Credit for Transfer Tax Exemption for Conservancies**

If and to the extent the transfer of the Property is exempt from realty transfer tax, Seller agrees to credit Buyer in an amount equal to one-half of the tax that otherwise would have been assessed upon the transfer but for the transaction being excluded from taxation due to the Buyer's status as a conservancy.

In the case of a *conservation or trail easement purchase by a government entity*, the entity could seek to add a provision to the purchase agreement such as the following:

### 3. Credit for Transfer Tax Exemption

If and to the extent the transfer of the easement is exempt from realty transfer tax, Seller agrees to credit Buyer in an amount equal to one-half of the tax that otherwise would have been assessed upon the transfer but for the transaction being excluded from taxation due to the easement serving a conservation or public recreational use purpose.

## Require Board Approval

For many organizations, the governing board reserves the right to approve the terms of the fully negotiated transaction in its entirety. This presents a risk of the seller requesting further changes or the deal collapsing in the time between the supposed completion of negotiations and the board's approval of the terms. To avoid this risk, draft the purchase agreement so that the organization's authorized signatory may join the seller in signing the agreement but that the organization's resulting obligations are conditioned upon the governing board's approval. Include in the agreement a right of termination if board approval is not obtained within a certain time after signing.

Use a provision such as the following if the amount of time needed by the buyer to satisfy the contingency is not a pressing issue for the seller:

### 4. Board Approval Contingency

Buyer's obligations under this agreement are conditioned upon the approval of the governing board of Buyer of the terms of this transaction including those set forth in this agreement.

#### Option A

If the seller wants some assurance as to when the board will address the transaction, add to the end of the provision:

The board is scheduled to take action at its meeting on \_\_\_\_\_

To provide the seller additional assurance regarding the time needed, add to the end of Option A:

If Buyer fails to deliver notice of termination within ten days following such meeting, this contingency is waived and of no further force or effect.

#### Option B

If the seller wants approval to occur, if at all, within a specific time, add to the provision:

within \_\_\_ days following the Agreement Date

Or, if a generous inspection period is provided in the agreement for title and property inspections, consider adding:

within the inspection period set forth in paragraph \_\_\_ of this agreement

#### Option C

If the buyer needs a longer time to obtain board approval of the terms of funding for the transaction, add the following to either Option A or Option B:

This contingency for board approval may be extended at the election of Buyer an additional \_\_\_ days if needed to obtain final approval of Buyer's funding plan for acquisition of the Property.

## Document a Bargain Sale

If the seller is willing to accept a purchase price less than fair value for the property, with the intention of making a gift to the nonprofit organization or government entity of the foregone value, then the difference between the fair value of the property being sold and the cash purchase price and any other value received in the exchange might qualify as a charitable contribution for federal tax purposes. If the sellers intend to make such a bargain sale, a provision such as the following could be added to the purchase agreement: (Notes regarding each of the paragraphs follow the sample provision.)

### 5. Seller Contribution

Seller voluntarily promises to make a charitable donation the sum (the "contributed value") equal to the excess (if any) of the fair value of the Property less the purchase price and other consideration (if any) received from Buyer on account of the transfer of the Property.

Buyer will issue a substantially contemporaneous acknowledgement of Seller's donation of the contributed value.

Seller is responsible for the costs and expenses of preparation of IRS Form 8283 and the accompanying appraisal required to support Seller's claim of a charitable donation for federal income tax purposes. It is Seller's obligation to deliver this form to Buyer, signed by both Seller and the appraiser, and accompanied by a copy of the complete, signed appraisal report (which Buyer may retain for its records) at least 15 days before Form 8283 is required by Seller for filing with the IRS.

### Donative Intent

The intention to make a gift of the difference in value should be explicitly stated to clearly establish donative intent in support of the Seller's claim of a charitable gift.

### Acknowledgment

At the closing of the transaction, or as soon as possible thereafter, the buyer (gift recipient) should acknowledge receipt of the bargain-sale donation (even if the amount of the donation has not yet been established by appraisal). For further information, see [IRS Publication 1771](#).

### IRS 8283

The sellers/donors must obtain and complete [IRS Form 8283](#) for signature by the gift recipient before claiming the charitable contribution on their federal tax return. This provision is included to ensure no misunderstanding on this matter and remind the owners that there are a number of tasks that the owners are responsible for if they want to pursue a deduction.

## Require Use of New Survey

In Pennsylvania, unlike other states, land is sometimes conveyed without the benefit of a recent or updated surveyed legal description. Boundary lines based upon where certain saplings or rocks were located a hundred years ago may be legally sufficient to convey real estate but they are no substitute for a surveyed legal description accompanied by a certification of the exact acreage included in the parcel.

A provision may be added to the purchase agreement to require the landowners to deliver the deed and other documents at closing using a new, surveyed legal description if the buyer chooses to obtain it. The provision could read, for example:

### 6. Updated Legal Description

If Buyer has obtained a new, updated, or recertified survey of the Property, or the Property has been subdivided from a larger tract, granting documents shall incorporate the legal description of the Property or, if applicable, easement area, conforming to such survey or subdivision plan.

Absent a requirement, the landowners may refuse to warrant title to anything other than the legal description by which they acquired the property.

## Adjust the Purchase Price

A stated purchase price is a critical term in any purchase agreement. In many conservation projects the stated purchase price is a number that may increase or decrease depending upon the results of survey and appraisal work to be completed after the agreement date. (Often, funder rules governing how much they will contribute to a conservation acquisition drive this need.) Several mechanisms are discussed below for adjustment of the agreed upon purchase price set forth in a purchase agreement.

### Surveyed Acreage Adjustment

If the purchase price is set in a purchase agreement as a fixed amount (not a per-acre amount), then neither party is entitled to an adjustment in the purchase price if the acreage turns out to be more or less than stated in the agreement. If the purchase price is stated as a price per acre, a provision, such as the following, may be added to adjust the purchase price based upon the actual acreage to be conveyed:

#### 7. Acreage Adjustment

The total purchase price is based upon the estimated acreage set forth in this agreement multiplied by the sum of \$\_\_\_\_\_ per acre. If Buyer obtains a new, updated, or recertified survey, the purchase price shall be adjusted on a per-acre basis to reflect the increase or decrease in the acreage of the Property, as certified by the surveyor (net of rights-of-way and overlaps).

This adjustment is net of rights-of-way and overlaps, because, for conservation acquisitions, there is good reason to calculate the purchase price net of rights-of-way held by vested interests that are inconsistent with

the conservation purposes of the acquisition, for example, rights of way for highways and utility lines.

### Appraisal Adjustment

The buyer or, in many cases, a funder of the conservation project might want assurance from a professional appraiser, unconnected with the transaction, that they are making a reasonably prudent expenditure. Practice 9.H.1. of [Land Trust Standards and Practices](#) calls for organizations to (with some exceptions):

...obtain an independent appraisal by a qualified appraiser in advance of closing to support the purchase price.

The issues that are likely to arise with respect to adjustment of the purchase price to reflect appraised value are discussed after the following sample provision for adjusting the purchase price based on appraisal:

#### 8. Appraisal Adjustment

The Purchase Price set forth in the agreement shall be adjusted up or down to reflect the fair value of the property established by an appraisal that is performed in accordance with Uniform Standard of Professional Appraisal Practices or otherwise acceptable to Seller, Buyer, and, if applicable, sources of funding for Buyer's acquisition of the Property. The appraisal is to be ordered by, and addressed to, Buyer and paid for by Buyer.

#### Multiple Appraisals

If more than one appraisal is required by a funder, what happens if the appraisal figures are different? Does the lower of the two always prevail? Are the two averaged? Commercial transactions frequently use a formula that allows the two to be averaged if they are within a certain variance range; for example, the values are within 10% of each other. If the two appraisals are outside that range, then a third appraiser is selected and the third appraisal determines fair value (but only within the high and low range of the first two appraisals). If funders have not issued guidelines to resolve this issue, the conservative approach is to seek an adjustment of the purchase price based upon the lower of the two appraisals.

### Option to Terminate If Outside Acceptable Range

Both the seller and buyer may have limits as to how much less or more than the tentative purchase price they can receive or pay before they must walk away from the transaction. Even if the seller is motivated by a strong desire to conserve the land, they often need a minimum amount of compensation to pay off mortgages or make other arrangements for their residential living requirements. Likewise, the buyer may only be able to afford the purchase if the adjusted purchase price is within a certain range. If this is the case, a provision, such as the following may be included after any other provisions addressing purchase price adjustments:

#### 9. Limits on Price Adjustments

The above-described adjustments to the Purchase Price are limited as follows:

- a. Seller is not obligated to accept a Purchase Price less than \$\_\_\_\_\_ (the "Floor").
- b. Buyer is not obligated to pay a Purchase Price greater than \$\_\_\_\_\_ (the "Ceiling").
- c. If the adjusted Purchase Price is lower than the Floor, Seller may terminate this agreement at any time upon thirty (30) days' notice to Buyer. Buyer may avoid the termination if, within the 30-day notice period, Buyer agrees in writing to pay the Floor as the Purchase Price.
- d. If the adjusted Purchase Price is greater than the Ceiling, Buyer may terminate this agreement at any time upon thirty (30) days' notice to Seller. Seller may avoid the termination if, within the 30-day notice period, Seller agrees in writing to accept the Ceiling as the Purchase Price and contribute the value in excess of the Ceiling as a charitable contribution.

### Exclude Portion of the Tract

Land that is, for the most part, desirable for conservation purposes may include an improved area that the buyer and seller have agreed should remain with the seller (or be sold to another party). If this is the case, the purchase agreement must address several issues such as provided in the following sample provision: (Notes regarding the provision follow.)

### 10. Subdivision Approval Contingency

If the Property sold under this agreement is less than the entirety of the tax parcel of which it is a part (that entirety, the "Entire Tract"), then Buyer's obligation to complete the purchase of the Property is conditioned upon issuance of final, written, unappealed, and unappealable approval of all governmental authorities having jurisdiction of the separation of the Property from the remainder of the Entire Tract (that approval, the "Subdivision Approval"). Buyer shall use commercially reasonable, good faith efforts to obtain the Subdivision Approval and Seller shall cooperate with Buyer to obtain the same. Any rollback taxes arising from the separation of the Property from the Entire Tract shall be borne by Seller.

#### Subdivision

The improved area generally will need to be formally subdivided from the conservation project area in compliance with the local municipal subdivision and land development ordinance, or, in the absence of a local ordinance, the county ordinance, before the purchase can close. To decide whether the subdivision is feasible, a number of potential issues must be explored: What is the minimum acreage required for the improved area to be a legal lot? Does the configuration of the improved area and the open space allow for sufficient road frontage for each to comply with zoning requirements? Are there any shared roads or other facilities that need to be documented of record? What are the arrangements for shared facilities? Who pays for the costs of subdivision and, perhaps, variances required for the separation?

If it is determined that the subdivision is feasible and the other questions are answered satisfactorily, it is still not a given that the subdivision will be approved by the relevant governmental authorities. A subdivision approval contingency provides that the transaction won't move forward unless the necessary government approvals are obtained.

#### Act 319

Whenever land is to be subdivided in Pennsylvania, consideration must be given to whether the subdivision or any change of use will trigger roll-back taxes under [Pennsylvania's preferential assessment law, Act 319](#), commonly known as [Clean and Green](#). (See the guide [Clean and Green: Pennsylvania's Preferential Tax](#)

[Assessment Program](#) for more information.) Even if the subdivision doesn't trigger roll-back taxes, there is a risk to the owner of one subdivided parcel that the owner of the other subdivided parcel will at a later date run afoul of Clean and Green rules, which could trigger roll-back taxes on both parcels even though the one owner is not at fault. (This risk may persist for seven years following the subdivision). Clean and Green administrative practices vary by county, and this risk won't arise if the county agency administering the program enrolls the parcels in the program separately following the subdivision. However, if the county keeps the parcels enrolled together, then it may be prudent to include in the purchase agreement a provision that survives closing requiring the owner that violates Clean and Green to pay the roll-back tax assessed on the non-violating parcel.

## Satisfy Funding Needs

Agreements of sale typically contain a contingency for the buyer to obtain mortgage financing but conservation projects are rarely funded by mortgage loans. Instead, buyers of land for conservation seek one or more grants to fund the purchase from public (e.g., state agency or local government) or private funders. This section addresses the needs and concerns of buyers dependent on grant funding by offering a sample funding contingency provision followed by a discussion.

### 11. Funding Contingency

#### a. Funding Plan

Buyer intends to fund payment of the Purchase Price plus funding of Buyer's reasonably anticipated costs and expenses to be incurred in connection with this acquisition (collectively, the "Needed Funding") by seeking grants and contributions from the below sources (collectively, but excluding Seller, the "Funding Sources").

- \_\_\_% State government
- \_\_\_% County government
- \_\_\_% Local municipal government
- \_\_\_% Other funding sources
- \_\_\_% Donated value furnished by Seller
- 100%

## b. Contingency

Buyer's obligation to complete the purchase of the Property is conditioned upon issuance of commitments for the Needed Funding from the Funding Sources and availability of the Needed Funding at the time set for settlement under this Agreement.

## c. Extension of Contingency Periods

All time periods for satisfaction or waiver of contingencies are extended to the extent needed to obtain review and approval by Funding Sources.

## d. Time Extension for Settlement

If, on the last day for settlement under this agreement (the "Scheduled Settlement Date"), binding commitments to provide the Needed Funding have been issued by the Funding Sources, but the Needed Funding is not yet available to Buyer, then Buyer may notify Seller of its election to extend the Scheduled Settlement Date for an additional ninety (90) days (the "Extended Date").

## e. Failure of Contingency

If settlement does not occur on the Scheduled Settlement Date (or, if Buyer has elected to extend, the Extended Date) either Buyer or Seller may terminate the Agreement on ten (10) days' notice to the other, and any funds deposited or paid on account of the Purchase Price shall be returned to Buyer.

## Obtaining Financing

Buying real estate can involve substantial sums of money; thus, financing (mortgage) contingencies—purchase agreement provisions that allow buyers to back out of purchases if they cannot obtain financing—are routine in real estate transactions. The expectation is that the financing contingency will be satisfied (if at all) by issuance of a binding commitment from a lender within a relatively short (30–60 days) period of time following the agreement date. The loan commitment will list certain items including satisfactory appraisal needed to close the loan. (Before accepting the lender's commitment, the buyer will evaluate the risk that the conditions will be satisfied before closing.) Once accepted by the buyer, the loan commitment is firm and gives comfort to both seller and buyer that funds to close the sale will be available as and when needed. The standard mortgage contingency in a PAR form or other off-the-shelf purchase

agreement will be crafted to meet these common financing expectations.

## Obtaining Funding

The process of obtaining funding differs greatly from the financing process; therefore, a standard financing contingency in a PAR form or other off-the-shelf purchase agreement will not adequately address the issues.

Due to the lengthy time needed to obtain grants from many funders, it's usually impossible to obtain a commitment binding upon a funder (subject only to fulfillment of specific conditions) during a typical mortgage contingency period. Common factors leading to a lengthy fundraising process include the following:

- The buyer may submit an application for funding to a funder for consideration, but no decision will be made until after the funder's then-current window for applications is closed, that window likely only occurring a few times a year at best.
- The funder might then have to compare applications competing for limited funds and allocate scarce resources accordingly.
- For a state agency, the review and approval process may involve multiple layers of bureaucracy and unpredictable delays.
- When a funder chooses to award a grant for a project, a considerable lag may occur between the decision and the issuance of a contractual commitment. (For some funders, the commitment is never truly made until the payment is issued.)
- Even after a grant contract has been issued, the funder may not be obligated to make payment on the grant until it is fully satisfied that the project meets all of its requirements, which can be many and sometimes challenging.
- Even after all the funder's requirements are met, sometimes funding is deferred due to budgetary constraints. For a number of reasons unrelated to the conservation acquisition itself, grant administrators may not be able to release the funds when the seller and buyer are ready to close on the acquisition.

## Direct Various Property Interests to Different Parties

A land trust may rely on multiple funders to conserve the entirety of a property, each funder funding the acquisition of different interests in the property and in some cases seeking an interest for itself in the property: the state agency may support the purchase of the biodiverse forest habitat; the county may direct its funds in the placement of a conservation easement over the productively farmed portion of the property; a school district may invest its funds in a leasehold on the agricultural lands for student gardens; and the township may invest its funds in the acquisition of a public access easement for an extension of its trail system through the property. This raises a number of issues: How are all of these interests to be documented? For interests being granted to the funders, who's the grantor of the interest—the sellers or the land trust? What is the order of recording? This is a key decision that determines who has priority vis-à-vis the others.

### Delivery of Multiple Documents

The PAR form or other off-the-shelf purchase agreement will not require the sellers to do anything but convey the entirety of the sellers' interest by delivery of a single deed. The sample provision below provides for delivery of multiple documents at closing, not just a deed, and further provides that the land trust, as buyer, may assign to various funders the right to receive separate interests in the property.

### Separate Recorded Agreement to Clarify Rights, Etc.

In complex conservation transactions, the funders are well-advised to enter into a recorded agreement, among themselves, clarifying their rights and, if applicable, responsibilities vis-à-vis each other regardless of the order of recording of documents. For example, the township has the right and responsibility to install and maintain trails for public use; the county has the right and responsibility to enforce its conservation easement against the property; the school district has the right to use a portion of the property for agricultural education; and the Commonwealth has the right to enforce its deed restriction against the property

against all of the other funders, as well as the landowner, and approve any change to the conservation easement or the trail easement.

### 12. Multiple Granting Documents

Buyer may elect to accept title to the Property by delivery of granting documents for one or more easement interests (for example, grant of conservation easement and/or grant of trail or other access easement) as well as a deed granting fee simple ownership.

Buyer has the right to identify one or more grantees for each granting document to be delivered at settlement.

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The most recent version of this guide and related resources can be found at [redacted]

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