

1 **Final agency action regarding decision below:**

2
3 **ALJFIN ALJ Decision final by statute**

4
5 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

6
7 WALTER A. STROMME,

8 Petitioner.

9
10 vs.

11 APACHE WELLS
12 HOMEOWNERS ASSOCIATION, INC.,

13 Respondent.
14

No. 07F-H067009-BFS

**ADMINISTRATIVE
LAW JUDGE DECISION**

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17 **HEARING:** January 22, 2007. Record closed on January 26, 2007.

18 **APPEARANCES:** Michael K. Hair, Esq. for Walter A. Stromme; Eric M. Jackson,
19 Esq. for Apache Wells Homeowners Association.

20 **ADMINISTRATIVE LAW JUDGE:** Lewis D. Kowal

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22 **FINDINGS OF FACT**

23 1. Walter A. Stromme ("Mr. Stromme") is a homeowner of real property located at
24 5809 East Lockwood, Mesa, Arizona and is currently a member of Apache Wells
25 Homeowner's Association ("Apache Wells"). He became a homeowner and a member
26 of Apache Wells in 1996.

27 2. On November 17, 2006, Mr. Stromme filed a Petition with the Arizona
28 Department of Fire, Building and Life Safety ("Department") alleging violations of
29 specified provisions of the Apache Wells' By-Laws and Declaration of Covenants,
30

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1400 West Washington, Suite 101
Phoenix, Arizona 85007
(602) 542-9826

1 Conditions and Restrictions (Collectively referred to herein as the "Governing
2 Documents") regarding three issues.¹

3 3. On December 11, 2006, Apache Wells filed an Answer with the Department
4 denying violations of the Governing Documents, requesting that the Petition be
5 dismissed and that Apache Wells be awarded its fees and costs pursuant to A.R.S. §§
6 12-341.01, 12-341, and 41-2198.01.

7 4. Prior to convening the hearing, Mr. Stromme withdrew one of the issues
8 complained of in the Petition. The remaining issues in dispute that were addressed at
9 the hearing are:

10 a. The Board of Directors of Apache Wells (Board") purchased a
11 building ("Building) for \$723,000.00 without a vote by the homeowners in
12 violation of CC&R §§ 3m and 4a and b. (Issue 1)

13 b. The Board raised the transfer fee from \$300.00 to \$950.00 without a vote
14 by the homeowners, in violation of Article X, Section 2d(1) of the Bylaws. (Issue
15 2).

16 Purchase of the Building-Issue 1

17 5. Paragraph 3 M of the Apache Wells' Revised Declaration of Covenants,
18 Conditions, and Restrictions ("Declaration") recorded in the Maricopa County
19 Recorder's Office at 87-141009 states, in pertinent part:

20 The owner of each residential unit not owned by the
21 Company [Apache Wells] shall pay to the Company as
22 compensation for the privileges herein granted and for the
23 services furnished or secured by Company hereunder, such
24 amount as may be assessed ratably against said owner by the
25 Company each month, such amount so assessed shall be
26 reasonable and shall be based on the cost of maintenance of
27 said facilities and the furnishing of any and all services
28 hereunder.

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¹ Mr. Stromme paid to the Department a filing fee of \$550.00.

1 Any assessments which are not paid when due shall be
2 delinquent. Each residential unit owner further agrees that
3 these charges, if not paid within twenty (20) days after the due
4 date, the assessment shall bear interest and/or penalty charges
5 as determined from time to time by the Board of Directors of
6 [the Company], and shall become a lien until fully paid. This
7 lien shall be subordinate to the lien of any first mortgage or first
8 deed of trust. . . . This paragraph shall continue a request by
9 each lot owner for the Company to perform the obligations
10 imposed on it hereunder.

11 Exhibit R-1 at 7.

12 6. Paragraph 4 of the Declaration provides:

13 Special Assessments. In addition to any other assessments
14 authorized herein, and in order to provide for the health, safety
15 and welfare of the members, the Company shall have the right
16 and power to acquire additional real and personal property,
17 including commercial property and to provide for the
18 construction of additional recreational and common facilities, or
19 the alteration, demolition or removal of existing recreational and
20 other common facilities, including commercial facilities and to
21 use any special assessments to defray in whole or in part the
22 costs thereof.

23 A. Any such special assessment shall require the
24 affirmative vote of at least two-thirds (2/3) of the Company's
25 Board of Directors at a duly called meeting at which a quorum
26 is present; and

27 B. Ratified by a majority of the owners in the
28 manner and pursuant to the procedures as set forth in the by-
29 laws of the Company.

30 Exhibit R-1 at 10.

1 7. Apache Wells' By-laws. Article V, Section 5(A)(2) provides that the
2 Board has the authority to:

3 Exercise, for the Association, all powers duties and authority
4 vested in or delegated to the Association not reserved to the
5 membership by other provisions of these By-laws, Articles of
6 Incorporation or the Declaration.

7 Exhibit R-2 at 6.

8 8. Article X, Section 2, (C)(1) of the By-laws provides that "[t]he general
9 assessment rate shall be established each year by the Board of Directors
10 consistent with the Declaration, and based on the budget projections.

11 Thirty (30) days advance notice shall be given to the residential unit owners
12 of any change in the general assessment rate. Exhibit R-2 at 13.

13 9. In 2006, Apache Wells purchased the Building for \$723,000.000 upon a vote by
14 the Board. That purchase involved making a down payment of \$123,000.00 and
15 incurring a bank loan in the amount of \$600,000.00.

16 10. It is undisputed that the funds used to purchase the Building came from Apache
17 Wells' general funds.

18 11. Mr. Stromme contends that the funds used to purchase the Building are to be
19 used for maintenance and that it is improper to use maintenance fees to purchase a
20 building. In contrast, Apache Wells contends that the Board has the power to purchase
21 real property without a vote of the homeowners. The legal arguments and analyses are
22 addressed below in the Conclusions of Law.

23 12. Brian Johnson ("Mr. Johnson"), who served on the Board from January 2004
24 through January 9, 2007 and was Apache Wells' president from January 2006 through
25 January 9, 2007, testified:

26 a. Apache Wells had a long range planning committee
27 ("Committee") organized to analyze where the community was
28 headed in the future to help plan for what would be best for the
29 community.
30

1 b. To assist them, the Committee hired a consultant from
2 Arizona State University. During that process, the Building became
3 available for sale.

4 c. Apache Wells needed more office space and meeting
5 rooms.

6 d. Apache Wells was made aware that 2 other associations
7 had tried to purchase the Building without success.

8 e. The architect who had been consulted by the Committee to
9 prepare plans for a new exercise room, meeting rooms and office
10 space advised Apache Wells to purchase the Building and forego
11 the plans he was hired to draft. The architect informed Apache
12 Wells that the cost to build according to plans would be about 1.5
13 million dollars and the value of the Building to Apache Wells
14 exceeded its purchase price.

15 f. On April 6, 2006, the Board unanimously authorized a
16 committee comprised of Mr. Johnson and Marvin Stoll ("Mr. Stoll"),
17 Apache Wells' current president, to negotiate the purchase of the
18 Building. See *Exhibit R-5*.

19 g. The Board considered whether to have a special
20 assessment but decided that although it could raise funds through a
21 special assessment, it did not have to do so.

22 h. The Board decided Apache Wells could handle payments of
23 the loan from the general assessment fund and could pay off the
24 loan in 7 years. However, the Board established a fifteen-year loan
25 that does not impose a penalty for pre-payment to provide for some
26 flexibility.

27 13. Mr. Stromme testified that there has been increase in the general assessment,
28 which he attributes to the purchase of the Building. However, Mr. Johnson testified that
29 the increase in general assessment was not due to the purchase of the Building.

30 **Transfer Fee Increase (Issue 2)**

1 14. On April 20, 2005, the Board raised the transfer fee from \$300.00 to \$950.00.
2 See Exhibit R-3.

3 15. Mr. Stoll testified

4 a. The transfer fee was first implemented in 1996 and was in
5 place when Mr. Stromme became a member of the community.

6 b. The transfer fee was instituted to raise additional funds for
7 the Apache Wells because: 1) The budget did not account for
8 repairs needed to the buildings located in the strip mall that are
9 owned by Apache Wells; 2) The recent construction of a library
10 building which the Board felt required a reserve of at least
11 \$100,000.00 for further work; and 3) Security during the
12 summertime and from 11:00 p.m. to 5:00 a.m. The Board is looking
13 at three bidders but does not have any specific costs associated
14 with the security situation.

15 c. The transfer fee is a fee assessed to the buyer of a home in
16 the community.

17 d. The rationale for the transfer fee is that residents over the
18 years have paid for the amenities in the community. New
19 purchasers of homes in the community get to enjoy and use the
20 amenities but, without the transfer fee, will not have made
21 contributions towards the amenities. By placing a transfer fee on a
22 buyer of a home in the community, funds can be raised to avoid
23 shortfall and there is a contribution made for the amenities in a
24 manner similar to contributions previously made by homeowners
25 who have resided in the community for many years.

26 e. A portion of the transfer fee, \$100.00, is allocated to the golf
27 course to help with the cost of maintenance.

28 f. Members of the golf club are members of the community.
29 The Board decided that it is in the community's best interest to
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1 maintain the upkeep and appearance of the golf course because it
2 impacts the community.

3 g. The transfer fee is not designed to recoup costs associated
4 with the transfer of ownership of property in the community and
5 Apache Wells does not keep track of the costs involved in the
6 transfer of homes in the community.

7 16. Mr. Stoll performed research in 2005 and had a committee and/or the office
8 manager also research the issue of the use of transfer fees by homeowner associations
9 in Arizona. The results of the research indicate transfer fees are being assessed by
10 homeowner associations, and of the nine homeowner associations identified through
11 such research, who impose transfer fees (See Exhibit R-8), four had transfer fees that
12 were higher than \$950.00 and one had a transfer fee of \$940.00.

13 17. The Administrative Law Judge notes that although evidence was presented as to
14 the amount of transfer fees of other homeowner associations, there was no evidence
15 presented that showed whether any of the governing documents provided those
16 associations with the authority to impose transfer fees.

17 18. Mr. Stoll acknowledged on cross-examination, that even though it is the buyer
18 and not the seller who is assessed the transfer fee, if the transfer fee is not paid at
19 closing, the sale of the home would not be consummated because it would be
20 determined that the seller does not have a qualified buyer.

21 **CONCLUSIONS OF LAW**

22 1. Pursuant to A.R.S. § 41-1098.01, the Office of Administrative Hearings has
23 jurisdiction to hear disputes between an owner and planned community association
24 regulated by A.R.S. Title 33 Chapters 9 or 16 to determine if there are violations of the
25 planned community documents or the statutes that regulate the planned communities.

26 2. Mr. Stromme bears the burden of proof and must establish by a preponderance of
27 the evidence that Apache Wells violated provisions of the Governing Documents and
28 regulating statutes in purchasing the Building and raising the transfer fee from \$300.00 to
29 \$950.00 without a vote of the homeowners.
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1 3. A “preponderance of the evidence is such proof as convinces the trier of fact that
2 the contention is more probably true than not.” Morris K. Udall, ARIZONA LAW OF
3 EVIDENCE § 5 (1960).

4 4. It is “evidence which is of greater weight or more convincing than the evidence
5 which is offered in opposition to it; that is, evidence which as a whole shows that the
6 fact sought to be proved is more probable than not.” BLACK’S LAW DICTIONARY 1182 (6th
7 ed. 1990).

8 Purchase of the Building (Issue 1)

9 5. Mr. Stromme argues that pursuant to Paragraph 3M of the Declaration, the
10 general assessment funds must be used for maintenance and cannot be used for the
11 purchase of a building, which is specifically authorized to be accomplished through a
12 special assessment under Paragraph 4 of the Declaration.

13 6. Mr. Stromme also asserts that the Building is not necessary for Apache Wells’
14 use. However, other than the opinion of Mr. Stromme as to the appropriateness as to
15 the use of the Building, Mr. Stromme offered no evidence to support that contention.

16 7. Apache Wells asserts that the Building was necessary and appropriate because
17 Apache Wells needed more office space and additional space for meeting rooms.
18 Apache Wells also maintains that pursuant to Section 3(M) of the Declaration, the
19 residential lot owners shall pay for the services furnished or secured by the association.
20 According to Apache Wells, secured services include the purchase of real property.
21 Apache Wells relies on that provision as authority for use of general funds to acquire the
22 Building.

23 8. Apache Wells also cites *Candlelight Hills Civic Association, Inc. v. Goodwin*, 763
24 S.W. 2d 474 (Tex. App. 1989) wherein the court held that a homeowner’s association’s
25 general funds could be used to acquire real property because of the governing
26 documents. The Administrative Law Judge does not consider *Candlelight* as controlling
27 authority in reaching a decision in this matter because it is a Texas case.

28 9. Apache Wells also argues that the business of a homeowners’ association is
29 managed by its board of directors. A.R.S. § 10-2011 and Article V, Section 1(A) of the
30 Bylaws.

1 10. In the absence of contrary precedent, Arizona courts look to Restatement (Third)
2 of Property: Servitudes ("Restatement"). *Paxon v. Glovitis*, 203 Ariz. 63, 67, n.3, 50
3 P.3d 420 424, n.3 (App. 2002). "Unless expressly authorized by the governing
4 documents, such projects [acquisition of additional property or the alteration or
5 improvement of existing common property] should be undertaken only if needed to
6 enable the common-interest community to carry out its functions and only with the
7 member approval required for assessment increases." Restatement § 6.6, Comment c.

8 11. Apache Wells maintains that because A.R.S. § 33-1802(4) states that planned
9 communities are "created for the purpose of managing, maintaining or improving the
10 property", that the general assessment can be used for such improvement and
11 acquiring necessary office space and meeting rooms furthers that purpose.

12 12. According to Apache Wells, there is a presumption that the directors of Apache
13 Wells acted in accordance with the statutory requirements. See A.R.S. § 10-830(D) and
14 *United Dairymen of Arizona v. Schugg*, 212 Ariz. 133, 128 P.3d. 756 (App. 2006).

15 13. Mr. Stromme asserts that general assessment funds should not have been used
16 to purchase the Building because such funds must be used for expenses related to
17 maintenance in accordance with paragraph 3 of the Declaration. Apache Wells also
18 contended that although it could have used a special assessment to raise funds to
19 purchase the Building, it did not need to do so and it was appropriate to use general
20 funds.

21 14. Restrictive covenants must be given their ordinary meaning and are not to be
22 read in a manner that defeats the plain and obvious meaning of the restrictions. *Burke*
23 *V. Voicestream Wireless Corp. II*, 207 Ariz. 393, 87 P.3d 81 (Ariz. App. Div. 1 2004).

24 15. Mr. Stromme relies on *Divizio v. Kewin Enterprises Inc.*, 113 Ariz. 476, 666 P.2d
25 1085 (Ariz. App, Div. 2 1983) as the main legal authority in support of his interpretation
26 of Paragraph 3 M. *Divizio* involved a declaratory judgment action brought by mobile
27 home park lot owners against the park owner seeking an accounting for assessment.

28 16. According to Mr. Stromme, the language contained in restrictive covenant that
29 was addressed by the Court in *Divizio* is almost identical to that found in paragraph 3 M
30 of the Declaration. Apache Wells did not dispute that contention.

1 17. The trial court in *Divizio* determined that cost of purchasing common areas and
2 debt service thereon were proper and direct and indirect cost and expense of
3 improvement and repair of the community. However, the Court of Appeals concluded
4 that the trial court's determination was erroneous and found the maintenance expense,
5 which was part of the assessment, could not include costs for the purchase of the
6 common areas and debit service related thereto.

7 18. According to Mr. Stromme, Paragraph 3M, in accordance with *Divizio*, does not
8 provide authority for the Board to have purchased the Building and it should have gone
9 to a vote of the members for a special assessment as required in paragraph 4 of the
10 Declaration.

11 19. Mr. Stromme asserts that because *Divizio* has not been overturned or
12 distinguished that this Tribunal should follow the ruling in *Divizio* because the issues are
13 the same, e.g., interpretation of a property restrictive covenant which has previously
14 been interpreted by an Arizona Court of Appeals.

15 20. In contrast to Mr. Stromme's assertion that *Divizio* is "on all fours" and is
16 controlling with respect to this issue, Apache Wells asserts that *Divizio* is inapplicable it
17 involved a mobile home park and not a homeowner" association. The distinction,
18 pointed out by the Apache Wells, is that homeowner associations are governed by the
19 Arizona Non-profit Corporation Act and either the Condominium Act or the Planned
20 Community Act, which were not in existence at the time when *Divizio* was decided.

21 21. Apache Wells also argues that, unlike in *Divizio*, homeowners associations'
22 members manage their own affairs and Article II, Section 1 (D) of the Bylaws provides
23 that the Apache Wells is to "assess members to carry out . . . the acquisition of
24 property."

25 22. The Administrative Law Judge concludes that, while *Divizio* has not been
26 overturned, it is not controlling with respect to this matter for several reasons. First, in
27 this matter, as pointed out by Mr. Stromme, the language in the governing documents
28 control. In order to interpret the governing documents, it is necessary to consider all of
29 their provisions, look at the context of the situation presently before the Administrative
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1 Law Judge, and consider the context of circumstances under which *Divizio* was
2 decided.

3 23. Unlike the situation in *Divizio*, there are governing documents that are germane
4 to deciding the issue as to the appropriateness the Board's action with respect to the
5 purchase of the Building. There was no reference to language in *Divizio* that is similar
6 to the Section 1(D) of the Bylaws, which provides authority for the Association to
7 purchase real property.

8 24. The provision relied on by Mr. Stromme, Paragraph 3M, does address that the
9 amount assessed be based on the cost of maintenance of the facilities. However, the
10 evidence of record established that the general assessment was not increased due to
11 the purchase of the Building. There is no evidence showing that the general
12 assessment was improperly assessed and that issue was not raised in the Petition. The
13 issue is whether the Board had to present to the association members a vote before it
14 purchased the Building. Further, language in Paragraph 3M bases the assessment on
15 the furnishing of any and all services thereunder.

16 25. Paragraph 4 of the Declaration does not mandate that there be a special
17 assessment for the purchase of real estate, it permits but does not require that there be
18 a special assessment for the purchase of real estate. The Board decided that a special
19 assessment was not required and used general funds to purchase the Building.

20 26. The evidence of record established that the Association had sufficient funds to
21 purchase the Building in the manner it did with use of general funds and a promissory
22 note, which can be paid off in seven years, if the Board wishes to expend the general
23 funds to accomplish that.

24 27. The Administrative Law Judge concludes that by virtue of the Board's authority to
25 run the business activities of the Apache Wells, the provision in the Bylaws that Apache
26 Wells can purchase real estate, and the credible evidence of record that Apache Wells
27 needed to obtain additional office space and meeting rooms, it was not unreasonable
28 for Apache Wells to purchase the Building to satisfy its business needs.

29 Transfer Fee Increase- (Issue 2)

1 28. With respect to the transfer fee, although Mr. Stromme maintained that Apache
2 Wells does not have any authority under the governing documents to assess a transfer
3 fee, he is not challenging the imposition of a transfer fee but the increase of the fee from
4 \$300.00 to \$950.00.

5 29. Apache Wells maintained that other homeowner associations assess a transfer
6 fee and that the transfer fee increase was appropriate to provide additional income to
7 Apache Wells so it could have enough funds to cover anticipated expenses for repair to
8 existing buildings and security.

9 30. Although Apache Wells did not provide any citation to any provision within the
10 governing documents that provides it with the authority to assess a transfer fee, much
11 less increase it, it did provide legal authority for the imposition of such fees². The
12 Administrative Law Judge is not addressing whether the imposition of transfer fees is
13 appropriate because that is not the issue before the Administrative Law Judge and even
14 Mr. Stromme acknowledged that he was not seeking to have such fees invalidated.

15 31. With respect to the issue of the increase of transfer fees, the Restatement (Third)
16 of Property: Servitudes provides guidance. The Restatement provides that such fees
17 are generally valid “[s]o long as there is some rational justification for the imposition of
18 such fees.” Restatement at § 3.5, Comment c. Consequently, the Administrative Law
19 Judge concludes that an increase in such fees would be appropriate if there is some
20 rational justification for such increase.

21 32. In the instant matter, Apache Wells provides some justification for an increase of
22 the fees, e.g., security costs, repairs needed for existing buildings in the strip mall, and
23 the need for a reserve. In its Supplemental Hearing Memorandum, Apache Wells
24 asserted the position that the Board has discretion to set the transfer fees, and that the
25 fees are reasonable if there is a rational justification.

26 33. Apache Wells provided general information of some of the expenses that would
27 be defrayed by the collection of the increased transfer fee. However, Apache Wells has
28 not provided the exact amounts of identifiable expenses that were considered or how

29 ² See *Powell v. Washburn*, 211 Ariz. 553,125 P.3d 373 (2006) , wherein the Court adopted the approach
30 of Restatement (Third) of Property Servitudes § 3.5, Comment c, which referred to transfer fees being
generally valid to cover administrative costs associated with the transfer of ownership and raising funds
for the general operation and expenses of an association.

1 the Board determined the amount of the increase. Apache Wells' witnesses
2 acknowledged that administrative costs with respect to transfer of property within the
3 community are not maintained by Apache Wells.

4 34. The evidentiary record reflects that the determination as to the amount of the
5 increase of the transfer fee was arbitrarily and capriciously selected and not reasonably
6 related to specific expenses that are anticipated. Under the circumstances, the
7 Administrative Law Judge concludes that the increase of the transfer fee was not
8 authorized and was not reasonable related to expense.

9 Attorney's Fees and Filing Fee

10 35. Mr. Stromme, in his Prehearing Memorandum acknowledged that he is not
11 entitled to attorney's fees in this proceeding and is limited to recovery of his filing fee.
12 Apache Wells has requested an award of attorney's fees and cost incurred in defending
13 this action pursuant to A.R.S. §§ 41-2198.01, 12-341.01, 12-342 and Paragraph 3(N) of
14 the Declaration. There were two issues on appeal and Mr. Stromme prevailed on the
15 second issue and lost on the first issue.

16 36. An administrative proceeding is not an "action" such as to make attorney's fees
17 awardable under A.R.S. § 12-341.01.³ Moreover, there is no provision in Governing
18 documents that provide for an award of attorney's fees or costs in a proceeding such as
19 the instant one. Consequently, Apache Wells has not established that it is entitled to its
20 attorneys' fees.

21 37. In order to determine whether Mr. Stromme is entitled to his filing fee
22 necessitates a determination as to who was the prevailing party. The Administrative
23 Law Judge concludes that, because Mr. Stromme prevailed on one issue (Issue 2-the
24 Transfer Fee Increase), and established that Apache Wells acted without authority, Mr.
25 Stromme has established that he is the prevailing party and is entitled to his filing fee by
26 virtue of A.R.S. §41-2198.02.

27 **ORDER**

28
29 ³ See *Semple v. Tri-City Drywall, Inc.*, 172 Ariz. 608, 611-612, 838 P.2d 1369, 1372-73 (App. 1992)
30 (Prevailing party in administrative claim before Registrar of Contractors was not entitled to attorney's
fees from opponent under A.R.S. § 12-341.01(A) because administrative hearing is not an "action").

1 Based on the above, it is concluded that with respect to Issue 1, Apache Wells
2 acted appropriately with respect to the purchase of the Building and no action is required
3 of Apache Wells with respect to that issue;

4 It is concluded that with respect to Issue 2, Apache Wells acted arbitrarily,
5 capriciously and unreasonably in increasing the transfer fee from \$300.00 to \$950.00.
6 Therefore, the increase of the transfer fee is voided and the transfer fee shall be \$300.00;

7 **IT IS ORDERED** that within forty days from the date of this Order, Apache Wells
8 shall pay to Mr. Stromme his filing fee of \$550.00.

9 Done this day, February 12, 2007.

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12 _____
13 Lewis D. Kowal
14 Administrative Law Judge

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Original transmitted by mail this
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By _____