MONTGOMERY COUNTY, MARYLAND
COMMISSION ON COMMON OWNERSHIP COMMUNITIES

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CCOC COMMUNICATOR

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HOW MUCH NOTICE IS REQUIRED FOR SPECIAL MEETINGS?

By Dinah Stevens, Esq.

The Maryland Condominium, Homeowners' Association, and Cooperative Housing Acts all require that board meetings be "open." But the specifications for notice of an "open" meeting are confusing or missing. (See Note 1.)

The provisions of the Condominium Act that are relevant to this issue are:

(c) (1) A meeting of the council of unit owners or board of directors may not be held on less notice than required by this section.

(2) The council of unit owners shall maintain a current roster of names and addresses of each unit owner to which notice of meetings of the board of directors shall be sent at least annually.

(4) A regular or special meeting of the council of unit owners may not be held on less than 10 days nor more than 90 days':

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CIRCUIT COURT UPHOLDS CCOC RULING THAT INVALIDATES BOARD DECISION FOR LACK OF PROPER NOTICE AND LEGAL AUTHORITY

On September 20, 2018, Circuit Judge Sharon Burrell issued an order affirming the decisions of a CCOC hearing panel that declared that a condominium's board of directors had failed to give adequate advance notice of a meeting, and that the board's decision at that meeting was invalid because the board did not have the legal authority to approve the expenditure in question.

In the consolidated cases of *Dillin, et al., v. The Willoughby Condominium of Chevy Chase,* CCOC ##2018-040 and 2018-061, the board called a special meeting on less than 3 days advance notice of a meeting at which it voted to approve the replacement of its fire alarm system. The new system would cost well over $10,000. The board gave no reason for the short notice.

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THE "GREEN BANK": HOW TO SAVE ON COMMUNITY ENERGY IMPROVEMENTS

By Josh Patton

If your common ownership community is considering undertaking energy savings improvements, such as replacing older heating and cooling systems or installing solar PV to both save on energy costs and reduce your community's impact on the environment, the Montgomery County Green Bank's Commercial Loan for Energy Efficiency and Renewables (CLEER) will enable you to finance these projects! CLEER enables common ownership communities as well as businesses and individual homeowners to make improvements to the portions of your community that are master metered, which could include common areas and residential areas. With CLEER your community does not have to come out-of-pocket to make the improvements, and you can use the energy saving to cover the costs of the financing. So, you can save your cash reserves that you would have used for these improvements and put them toward other community needs.

CLEER is designed to work with Pepco's Energy Saving for Business Program, enabling your common ownership community to tap Pepco's monetary incentives. These are funds that your community has been paying into the EmPower Maryland fund when it pays its electrical bill.

CLEER offers:

Up to a $250,000 loan amount
Covers: energy efficiency, solar PV, energy storage, HVAC gas
PLUS: 30% of your loan can cover non-energy efficiency improvements (such as roofing repairs, drainage solutions, water conservation measures)
100% financing with no out-of-pocket costs
Loan terms up to 12 years to match energy savings to loan payments
No additional debt on property (dependent on credit review)

For more information on the Green Bank, visit https://mygreenmontgomery.org/tag/green-bank/ and https://mcgreenbank.org/

Josh Patton is the Vice President of Sales at Ascentium Capital, the nation's largest private-independent finance company, which specializes in financing for clean energy and energy efficiency projects. Ascentium is a partner with Revere Bank in Montgomery County's Green Bank program. For more information, contact him at joshpatton@ascentiumcapital.com or call 281-902-1969.

WHEN THE BOARD ACTS, THE BOARD MEETS: THE MEANING AND SCOPE OF THE "OPEN MEETINGS" LAWS

The "open meetings" sections of the three Maryland community association laws (the Condominium Act, the Homeowners' Association Act, and the Cooperative Housing Corporation Act) are some of the most important parts of those laws, and do much to protect the rights of association members. In spite of their importance, however, they are not well thought-out and raise as many questions as they answer. Dinah Stevens' article in this issue on meeting notices (see page 1) is a case in point. (See also Note 1 at the end of this article.)

This article is an attempt to resolve some of the confusion. The main points of this article are these:

1. The open and closed meeting provisions apply to the actions of the board of directors. If the board takes action/makes a decision, then it has held a "meeting" under the law. There is no such thing as an "action without a meeting."

2. If a meeting must be "open" then it must have three elements:

a) There must be advance notice of the meeting;

b) Members must be allowed to attend the meeting; and

c) Members must be allowed to comment on items on the meeting agenda at a designated time during the meeting.

A. What is a meeting?

The first and most important issue is this: what is a "meeting" under the open and closed meeting provisions? It is a serious flaw in the existing laws that although they regulate meetings, they don't define the word "meeting" at all. Is a quorum required? If three members of a five-director board happen to meet at a Starbucks and discuss some issue that is before the board, is that a "meeting?" If the board sits down with its accountant to discuss financial issues, is that a "meeting?" If the board attends an educational or training class, is that a "meeting?" In short, is every gathering of the whole or a part of the board a "meeting?"

It's not a simple question because under all of the three community association laws, members have the right not only to attend and observe "meetings", but to be sent advance notice of them and to comment on any item on the agenda. So, if the board has a conference with its accountant, can all members attend it and speak or ask questions about the issues the accountant is trying to address? That could make work sessions impractical and unnecessarily lengthy. If every gathering of board members, however few, constitutes a "meeting" then the participants have violated the law if they haven't given advance notice and allowed other members to be part of the discussion.

Although the law does not define the term, the CCOC has attempted to do so.

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CCOC ADOPTS GUIDELINES ON "HOW TO HOLD A CLOSED MEETING"

When considering a closed meeting, a board of directors must consult the provisions in their governing documents, as well as open meeting policies and relevant state law. These provisions, however, do not tell a board of directors how to put them into practice. Therefore the CCOC has developed, and suggests, the following guidelines to assist board members in complying with the law *and* best practices when holding a closed meeting.

In Maryland, as a matter of law and general public policy, all common ownership community meetings must be open to the owners and residents in the community. The CCOC has ruled* that a "meeting" is any gathering of a board or committee for the purpose of making decisions and taking actions concerning the business of the association. Any meeting that members cannot attend because a board conducts it in private, by email, telephone, or some other way, is a "closed meeting". Association business may be conducted in a closed session only in specific circumstances. The CCOC will not uphold decisions made by a board in an improperly closed meeting.

Before a closed meeting:

1. Board members must first consider whether their purpose is authorized by the Maryland Condominium, Co-operative Housing, or Homeowners Association Act ("the Acts"), which state: "A meeting of a board of directors or other governing body of the [association] may be held in closed session only for the following purposes:
   a. Discussion of matters pertaining to employees and personnel [Condos, Co-ops, & HOAs];
   b. Protection of the privacy or reputation of individuals *in matters not related to association business* (emphasis added) [Condos, Co-ops, & HOAs];
   c. Consultation with legal counsel on legal matter [Condos, Co-ops, & HOAs];
   d. Consultation with staff personnel, consultants, attorneys, board members, or other persons in connection with pending or potential litigation or other legal matters [Condos, Co-ops, & HOAs];
   e. Investigative proceedings concerning possible or actual criminal misconduct [Condos, Co-ops, & HOAs];
   f. Complying with a specific constitutional, statutory, or judicially imposed requirement protecting particular proceedings or matters from public disclosure [Condos, Co-ops, & HOAs];
   g. Discussion of an individual owner's assessment account [Condos, Co-ops, & HOAs]; or
   h. Consideration of the terms or conditions of a business transaction in the negotiation stage *if the disclosure could adversely affect the economic interests of the association"* (emphasis added) [Condos, Co-ops, & HOAs]
2. Board members may vote to hold a closed meeting (either immediately or at a later date) during any properly called open meeting.
3. If an open meeting is called *only* for the purpose of immediately going into a closed meeting, the notice to members should say so, and a dated copy of the notice should be included with the "closing statement".
4. The Chair of the meeting should prepare a written "closing statement" to be read in open session that states the time, place, and purpose of the closed meeting, and that cites the provision in "the Acts" [at #1] relied upon as authority for closing the meeting.
5. The public vote of each board member to hold a closed meeting must be recorded (i.e., not "unanimous"). This closing statement and record of the vote will satisfy the requirement of "the Acts" [at #9].

During a closed meeting:

1. "The Acts" require that board members confine their discussions to the topic(s) that closed the meeting, and that they take no action not related to the topic. (They also should maintain the discussion's confidentiality outside the board room).

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HOW MUCH NOTICE IS REQUIRED FOR SPECIAL MEETINGS?

(i) Written notice delivered or mailed to each unit owner at the address shown on the roster on the date of the notice; or

(ii) Notice sent to each unit owner by electronic transmission, if the requirements of § 11-139.1 of this title are met. (See Note 2.)

(5) Notice of special meetings of the board of directors shall be given:

(i) As provided in the bylaws; or

(ii) if the requirements of § 11-139.1 or this title are met, by electronic transmission.

(6) Except as provided in § 11-109.1 of this title, a meeting of the governing body shall be open and held at a time and location provided in the notice or bylaws. Maryland Code Annotated, Real Property Article Section 11-109. (See Note 3.)

A quick reading might leave one thinking that notice to unit owners of board meetings must be done annually, presumably a schedule of regular meetings, or must be given 10 to 90 days before a meeting for which notice has not otherwise been provided.

At least one community did not read the statute this way. In *Dillin, Casale, and Nadri v. The Willoughby Condominium of Chevy Chase*, CCOC Nos. 2018-040 and 2018-061, May 11, 2018, the board read the provision of §11-109 (5) (i) (above) as permitting the board to hold a previously unscheduled special meeting by notice in accordance with the bylaws. As in most communities the notice requirement in the bylaws for board meetings only provides for notice to board members, not for notice to unit owners.

In the *Willoughby* case the notice the board provided was by posting in the lobby about two days ahead of the meeting. The Commission panel found that even allowing for the ambiguity in the statute this notice could not be considered to meet the intent of the statutory requirement for an open meeting.

It is not perfectly clear that notice of a special board meeting must be provided at least ten days in advance though that is the only time period designated in the statutory language. Further, there may be instances when a board needs to hold an emergency meeting and that is not an exception enumerated in Section 11-109.1 of the Real Property Article (RP) of the Maryland Code Annotated.

The open meetings provisions of the HOA and Cooperative Housing Acts do not include requirements regarding notice to unit owners of board meetings beyond stipulating that meetings of the board of directors shall be open to all members of the association. They do state that all members of the association shall be given reasonable notice of all regularly scheduled open meetings of their association. This might be interpreted to apply only to meetings of the unit owners and lacks specificity. There is no clear direction on what notice is required to meet the statutory "open" meeting requirement.

The Maryland Condominium Act was originally adopted in 1957. In 1977 the National Conference of Commissioners on Uniform State laws promulgated a Uniform Condominium Act and in 1982 a consolidated successor Uniform Common Interest Ownership Act (UCIOA) was promulgated, which has been updated a couple of times, most recently in 2008. The provision relevant to this discussion, in its current version, requires that if a meeting of the board (or committee authorized to act for the association) is not listed on a

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HOW MUCH NOTICE IS REQUIRED FOR SPECIAL MEETINGS?

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schedule given to unit owners or is called to deal with an emergency, at least ten days' notice must be given to each board member and to the unit owners, and the notice must state the time, date, place and agenda of the meeting. (See Note 4.)

It would be very helpful if the Maryland legislature would amend the three community association laws to include a provision similar to that in the Uniform Common Interest Ownership Act.

Until there is greater clarity in the statutory requirement, a board meeting held on less than ten days' notice and delivery of that notice to all unit owners, if challenged, may be found not to comply with the requirement that the meetings be "open".

Notes:

1. The Maryland Condominium Act (RP §11-109 (c)(6)), the Maryland Homeowners Association Act (RP §11B-111 (1)) and the Maryland Cooperative Housing Corporation Acts (Section 5-6B-19 of the Corporations Article) require that Board meetings be "open".
2. "Electronic transmission of notice" provision which sets forth protocol for use of electronic transmission for notices.
3. "Closed meetings of board of directors" provision sets forth approved reasons to hold a closed meeting and process for doing so.
4. Section 3-108 (b) of the UCIOA. This provision addresses many useful topics for the handling of board meetings in an electronic age as well as clearly establishing the elements that constitute an open meeting. The Uniform Act can be located by searching "ucioa" in a browser.

Dinah Stevens is an attorney and has served as a CCOC Panel Chair for over 25 years.

COURT AFFIRMS CCOC RULING INVALIDATING BOARD DECISION FOR LACK OF PROPER NOTICE AND LEGAL AUTHORITY

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As described in more detail in the lead article of this newsletter (page 1), the panel members disagreed over which part of Section 11-109 of the Condominium Act applied to the situation but they all agreed the notice was insufficient under that law.

In addition, the association's bylaws provided that any "improvements" over $10,000 must be approved by the membership. In this case, the board argued that the replacement of the fire alarm system amounted to "repairs and replacements substantially similar to the original construction" and therefore did not need membership approval. The panel disagreed, however, and held that the new system was of a different design than the original and included substantial changes and upgrades, and therefore constituted an "improvement" and not a "repair."

The panel ordered the association to comply with the Section 11-109, and not to take any further action on the fire alarm system without a majority vote of the membership. It further ordered the association to provide the necessary background information on the need for the new system to the general membership prior to conducting the vote. (The panel members were Dinah Stevens, Michael Burrows, and David Gardner.)

RENTAL LICENSING IN MONTGOMERY COUNTY

By Clifton Bouma

Did you know that condominium units, townhouses or single family homes in Montgomery County must have a rental license before renting? The process to obtain a rental license involves a couple steps.

The first step for obtaining a rental license is to submit an application. The easiest way to do so is through the website for the Licensing & Registration Unit at http://www.montgomerycountymd.gov/DHCA/housing/licensing/index.html

You must first create an AcccessMCG account if you do not already have one by clicking **Register New User** on the AccessMCG page. When submitting the application, you may need to submit additional documents. You can upload these directly to the property record through your AcccessMCG account.

- If the property was sold and the State Department of Assessment and Taxation record has not been updated, you will need to submit a HUD/ATLA settlement form showing the new owner's name.
- If the property was built before 1978, the Maryland Department of the Environment (MDE) requires that it be registered and inspected for lead. You will need to submit a copy of the lead inspection certificate before the property is licensed. For more information visit the MDE website - http://www.mde.state.md.us/programs/Land/LeadPoisoningPrevention/Pages/index.aspx
- If the owner is out of state (including Washington D.C.) or uses a P.O. Box, a Legal Agent with a Maryland mailing address is required. The form to designate a legal agent can be found here - http://www.montgomerycountymd.gov/DHCA/Resources/Files/housing/licensing/form_legal_agent_update.pdf

The mailing address for the property owner must not be the rental property, contacts must not just be a company (but must be someone's name), trusts must list trustee names and their contact information and corporations must list general partners with contact information.

Rental licenses in Montgomery County are for the fiscal year (July 1 – June 30). If the property is rented or advertised for rent at any time during the period, the license fee must be paid. There is no prorating of fees. For Fiscal Year 2019, the license fees are $59 for a condo unit and $101 for a single family house. If a property is licensed and sells in the same fiscal year, the new owner only needs to pay a $5 transfer fee.

Lastly, there are some incorporated cities within Montgomery County that have their own rental licensing programs. These cities are the City of Gaithersburg, City of Rockville, and City of Takoma Park. Montgomery County does not license rental properties in those incorporated cities as they each have their own licensing programs and requirements.

This article is a brief overview, and the Licensing & Registration Unit welcomes questions.

Clifton Bouma is a Program Specialist II in the Licensing and Registration Unit of the Department of Housing and Community Affairs. Readers can reach him at 240-777-0311 or by email at Clifton.Bouma@montgomerycountymd.gov

WHEN THE BOARD ACTS, THE BOARD MEETS

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A Hearing Panel of the CCOC faced this issue head-on in its decision in the case of *McBeth v. Fountain Hills Community Association* (CCOC #52-12/67-12). In that decision, Panel Chair Dinah Stevens wrote that although many different kinds of gatherings could possibly be defined as "meetings" under the relevant laws, the most important of them all were the gatherings of the board of directors for the purpose of "conducting business", which essentially means making decisions and voting. Hence, mere discussions, training, work sessions, etc., are not "meetings" unless they include decision-making by the board. The corollary of this holding, of course, is that if the board intends to make decisions, it must comply with the open or closed meetings statutes of the relevant community association acts.

Are these two board members having a "meeting?"

The same interpretation reached in *Fountain Hills* applies to what are often called "remote" meetings, such as those conducted by email, video, telephone, *etc.*, and not in person. Remote meetings are allowed by the Corporations statutes under certain conditions. However, community associations wishing to take advantage of the Corporations statutes must still comply with the relevant community associations laws. (See Note 2.) Those laws do not exempt associations from obeying the open meetings laws when holding remote or even "emergency" meetings. Therefore, associations wishing to conduct emergency and remote meetings must still provide notice, the opportunity to attend, and the opportunity to speak, whenever the topic of the meeting requires the meeting to be an open one.

While the relevant open meetings statutes clearly provide that members have the right to attend the board's meetings, and to speak to any item on the meeting agenda, they are less clear about the kind of advance notice the association must give, as Ms. Stevens has described in her article in this issue. The laws explicitly require advance notice of "regularly scheduled open meetings" but don't address the issue of notice for special meetings of the board. That omission, however, does not mean the association is absolved from *all* duty to give notice. On the contrary, the CCOC has ruled (*Kelly v. The Willoughby of Chevy Case,* CCOC #677 and *Prue v. Manor Spring HOA*, CCOC #39-09) that a meeting can't be considered "open" if the members don't know about it (and therefore can't attend it), and therefore the association must give "reasonable" notice if it can't meet the other deadlines required by law or its own documents. What is "reasonable" depends on the situation and the amount of time the board has before it must meet and decide. Even if the board must meet on short notice due to an emergency—for example, two or three days—it can still post notices on community bulletin boards, or send notice by electronic transmission, *etc.* If it has more time, say, a week or more, it may be possible to include the notice in newsletters or by other means. But it must attempt to give as much notice as it can. This principle also applies to "remote" meetings as well as to special meetings at which the board gathers personally.

As emphasized, if a meeting—regular, special, emergency or remote—is open, then the association must also take reasonable steps to comply with its duties of allowing member observation and participation. If the meeting is to be conducted by video means, the association should try to allow members access to the video application being used; if it is going to be conducted by circulating emails, the members should be offered the right to be part of the chain so they can read the emails. Even where member ability to attend is limited,

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WHEN THE BOARD ACTS, THE BOARD MEETS

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the association can still offer them the right to submit emailed or written comments to the board on the topic to be discussed.

In short, whether a meeting is "open" or "closed" depends on the topic of the meeting, and not whether it's a special, remote, or emergency meeting, or called on short notice. If it's an open meeting under the laws, the association must provide or try to provide some means of giving notice, the right to observe, and the right to participate by offering comments on association matters at the time designated for such comments.

Ms. Stevens, in her article in this issue, also pointed out that the confusion in the statutes over the proper timing of meeting notices can result in disputes over the validity of the board's actions. One possible way to minimize these challenges is for the board to take advantage of its right to "ratify" its decisions. Ratification can be used when the board, in a properly-called meeting, votes on whether to approve the decision it made in a previous meeting that may have suffered from a procedural defect of some sort (such as lack of proper advance notice). The ratification meeting, to be proper, should include giving the correct advance notice, placing the issue on the agenda, and letting members address the issue during the meeting before voting on whether to ratify the earlier decision or not. CCOC hearing panels have upheld the board's right to uphold earlier votes when the board properly ratified them (*Killea and McNulty v. Cabin John Gardens*, CCOC ##88-10/24-11; *Susman v. Sussex House Condominium, CCOC* ##779/26-06).

"THE MOTION HAS BEEN MADE THAT FROM NOW ON WE PLAY BY THE RULES. ANY SECONDS?"

Notes:

1. Do not confuse the open meetings sections of the community association acts with the Maryland Open Meetings Act, which is a far more comprehensive law that applies only to government agencies, not to community associations or corporations. (For more information on the Open Meetings Act, visit http://www.marylandattorneygeneral.gov/Pages/OpenGov/OpenMeetings/default.aspx.)

2. The Corporations and Associations Article also applies to the operations of community associations. However, if any provision in the community association laws conflicts with a provision in the Corporations article, the community association law takes priority. See Md. Code Ann., Corporations and Associations Section 1-102(c) and (d).

3. Members of condominiums and cooperatives who live in associations that are themselves members of larger associations (called "master" or "umbrella" associations) are granted open meetings rights not only by the Condominium or Cooperative Housing acts, but also by the Homeowner Association Act. Master/umbrella associations are defined as homeowner associations by law. Therefore, condominium owners and cooperative members can attend meetings of the master association and its board, and have the right to inspect its records, *etc.,* under the HOA Act since they, as well as their own associations, are members of the HOA. See, RP Section 11B-101(h), (j), (k), and (m).

Editor's Note: The articles in this newsletter reflect the opinions of their authors, and do not necessarily reflect the official positions of the CCOC or of Montgomery County. Unsigned articles are written by the Editor, Peter Drymalski. The exception to the foregoing in this issue is the article on the CCOC's new guidelines on "How to Hold a Closed Meeting," which were formally adopted by the CCOC.

CCOC ADOPTS GUIDELINES ON "HOW TO HOLD A CLOSED MEETING"

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2. Minutes of the closed meeting are to be written, adopted, and sealed. They are not available for public inspection unless a majority of the board votes to unseal them, whether on its own initiative, in response to a request, or by order of a court or the CCOC.

After a closed meeting:

1. "The Acts" require that minutes of the next regular open meeting of the board of directors include a statement [i.e. the "closing statement" at #4] relating:
   a) the time, place, and purpose of the closed meeting,
   b) The provision in "the Acts" relied upon as authority for closing the meeting, and
   c) The public vote of each board member to close the meeting (i.e. not "unanimous").
2. The statement for the minutes also should include:
   a) who attended the closed meeting,
   b) a summary of the proceedings, described as fully as possible without compromising confidentiality, and
   c) what decisions were made and actions taken (if any), described as fully as possible without compromising confidentiality.

A board also should consider that just because "the Acts" say they *can* hold a closed meeting, does not mean they *should*. A board has an obligation to act in good faith and to be as transparent and accountable as possible when discussing issues affecting the association, and should not conceal the decisions it makes during these meetings.

The Commission is providing this general guidance as a service to the public, consistent with its educational mandate under Chapter 10B of the Montgomery County Code. Residents and associations seeking legal advice about specific issues should consult a licensed Maryland attorney.

Source material:

*CCOC #52-12 McBeth v. Fountain Hills CA & #67-12 Muse v. Fountain Hills CA (consolidated)

Common Ownership Community Manual & Resource Guide, Chapter 3, Section VII, page 42-43

Community Association Institute's "*Common Ground*" magazine, March/April 2008

https://montgomerycountymd.gov/DHCA/housing/commonownership/ccoc_index.html

Maryland Attorney General web site: http://www.marylandattorneygeneral.gov/Pages/OpenGov/Openmeetings/default.aspx

*Sample Forms and Checklist

*Maryland Open Meetings Act Manual, Chapters 5 & 6, pages 37-49

[Note: This law applies to government bodies, not to community associations, but it is included here because it can provide useful guidance on many details that the community associations laws do not clearly cover.]

Maryland Condominium Act, RP Section 11-109.1, pages 22, 27-28

Maryland Co-operative Housing Corporation Act, Corp. & Assn's Section 5-6B-19(e) (1) & (2), pages 200-202

Maryland Homeowners Association Act, RP Section 11B-111(4) & (5), pages 18-20

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