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No. 91534-2

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THE SUPREME COURT OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON DEPT. OF REVENUE,

Appellant,

v.

CITY OF SNOQUALMIE, a municipal corporation,

Respondent,

And

KING COUNTY EXECUTIVE DOW CONSTANTINE, an individual, in his official capacity; KING COUNTY ASSESSOR LLOYD HARA, an individual in his official capacity; KING COUNTY; Other Parties,

Defendants

Filed
Washington State Supreme Court
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Clerk

MEMORANDUM OF AMICUS CURIAE WASHINGTON STATE ASSOCIATION OF MUNICIPAL ATTORNEYS

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TABLE OF CONTENTS

Table of Authorities ii

I. Identity and Interest of Amicus 1

II. Statement of the Case 1

III. Introduction 1

IV. Argument 3

A. Municipalities have standing to challenge unconstitutional laws on their own behalf and on behalf of their resident taxpayers when well-established standards for individual standing and representational standards are met 3

1. Snoqualmie has standing to challenge the tax scheme adopted in ESHB 1287 Laws of 2014, Chapter 207, on its own behalf 3

2. The City of Snoqualmie has standing to challenge the tax scheme adopted in ESHB 1287, Laws of 2014, Chapter 207, on behalf of its resident taxpayers in a representative capacity 6

B. The PILT is an alternative form of real property tax and not a fee for services, a regulatory fee, or excise tax 7

1. The PILT is a substitute for real property tax 7

2. The PILT is not a regulatory fee or excise tax 10

C. Even if the PILT were a regulatory fee or an excise tax, it must still fail because it does not meet Equal Protection requirements 12

1. ESHB 1287, Laws 2014, ch. 207 violates equal protection because the disparate treatment is not necessary to accomplish the interest 13

2. ESHB 1287, Laws 2014, ch. 207 violates equal protection because there is no rational relationship between the disparate treatment and the State's objective 15

V. Conclusion 17

TABLE OF AUTHORITIES

Cases

Convention Ctr. Coalition v. City of Seattle, 107 Wn. 2d 370, 730 P.2d 636 (1986) 15

Covell v City of Seattle, 127 Wn.2d 874, 905 P.2d 324 (1995) 10

In re Griffiths, 413 U.S. 717, 93 S. Ct. 2851, 2855 (1973) 14

Morton v. Mancari, 417 U.S. 535, 94 S.Ct. 2474 (1974) 13

Mukilteo Citizens for Simple Government v. City of Mukilteo, 174 Wn.2d 41, 272 P.3d 227 (2012) 6

Myrick v. Board of Pierce Cy. Comm'rs, 102 Wn. 2d 698, 677 P.2d 140, 142 (1984) 12

Nielson v. Washington State Bar Ass'n, 90 Wn. 2d 818, 585 P.2d 1191, 1192 (1978) 13, 14

Paulson v. County of Pierce, 99 Wn. 2d 645, 664 P.2d 1202, 1207 (1983) 12

Samis Land Company v. City of Soap Lake, 143 Wn.2d 798, 23 P.3d 477 (2001) 10

Spokane Entrepreneurial Center v. Spokane Moves to Amend the Constitution, Supreme Court No. 91551-2, WL 455957 (February 4, 2016) 6

United States v. Antelope, 430 U.S. 641, 97 S. Ct. 1395, 1400 (1977) 13

Constitutional Provisions

U. S. Constitution amend. XIV, § 1 12

Article VII, § 1, of the Washington State Constitution 2, 7, 10

Statutes

RCW 35 2

RCW 35A 2

RCW 36.70A 2

RCW 36.70B.170-.210 4

RCW 39.34.180 2

RCW 82.04 11

RCW 82.29A.010 9

RCW 82.29A.030 9

RCW 82.29A.055 ..... 8, 9, 14, 15, 16

RCW 82.29A.110 9

RCW 84.36.010 ..... 8, 13

RCW 90.58 2

Regulations and Rules

WAC 458-29A-200(6) 9

Other Authorities

Chapter 5.04 Snoqualmie Municipal Code 11

ESHB 1287, Laws of 2014, Chapter 207 ..... 3, 6, 8, 9, 13, 14, 15

I. IDENTITY AND INTEREST OF AMICUS

Washington State Association of Municipal Attorneys (WSAMA) is a nonprofit Washington corporation organized primarily for educational purposes and the advancement of knowledge in the area of municipal law. WSAMA has no direct interest in this matter. It has an interest in the impact that this case may have upon the standing of municipalities to challenge unconstitutional laws on their own behalf and on behalf of their resident taxpayers, on the revenues municipalities with Indian owned off-reservation commercial property within their corporate limits will lose, and on the additional tax burden resident tax payers will have to bear, as a result of the unconstitutional Payment in Lieu of Tax (PILT) law.

II. STATEMENT OF THE CASE

Amicus Washington State Association of Municipal Attorneys adopts Respondent City of Snoqualmie's Statement of the Case. *Brief of Respondent,* 3-6.

III. INTRODUCTION.

This case is of far-reaching importance to the fiscal integrity of every municipality in the State of Washington that has Indian owned off-reservation commercial property within its corporate boundaries, and to the tax burden on the resident taxpayers of each such municipality.

Municipalities have many responsibilities imposed on them by law that range from planning to accommodate forecast growth, chapter 36.70A RCW, to managing their shorelines, chapter 90.58 RCW, to prosecuting violations of municipal ordinances, chapter RCW 39.34.180, to providing roads, parks and general government services to promote the public health, safety and welfare, title 35 RCW; title 35A RCW. Municipalities depend principally on tax revenues, including real property taxes, to meet these mandated responsibilities. All municipalities have a substantial interest in protecting their revenues.

Real property taxes are a substantial cost of the ownership of real property. Taxpayers have a substantial interest in legislation that affects the real property taxes they pay. Taxpayers expect the elected officials of their municipal government to look out for their interests.

The legislature's good intentions are not in question in exempting Indian owned off-reservation commercial property from real property taxes. In question is whether the way the legislature chose to implement those intentions, by adopting an alternative form of real property tax through the payment of PILT, really accomplished an "exemption," or actually accomplished an unconstitutional non-uniform alternative real property tax, where favored tax payers pay a lower tax rate, in violation of the state constitution, art. VII, § 1.

Amicus Washington State Association of Municipal Attorneys urges the Court to conclude, as the Superior Court did, that the legislature actually accomplished the latter rather than the former, and the PILT law is unconstitutional as a non-uniform alternative real property tax.

IV. ARGUMENT.

A. Municipalities have standing to challenge unconstitutional laws on their own behalf and on behalf of their resident taxpayers when well-established standards for individual standing and representational standards are met.

1. Snoqualmie has standing to challenge the tax scheme adopted in ESHB 1287, passed as Chapter 207, Laws of 2014, on its own behalf.

The City has provided adequate argument as to its standing to challenge the taxing scheme on its own behalf, Reply Brief of Respondent, pages 6 – 17, and amicus adopts that argument. Amicus will address only the assertion of DOR that the City's direct injury from this taxing scheme, which is the real property tax on new construction that it will lose from the Salish Expansion Project if this taxing scheme is held constitutional, is "speculative" or hypothetical.

The amount of the loss to the City if it does not receive the tax on new construction of the Salish Expansion Project is estimated at $602,000 at 2014 property tax rates. Declaration of Robert Orton, CP 521 - 522. This is direct revenue that will be lost to the City.

DOR's assertion that this loss is "speculative" fails to reflect the on-going contractual relationship between the parties and the substantial amounts of money already paid and committed to be paid by the Muckleshoot Indian Tribe under the Development Agreement. Amicus invites the Court to review the financial commitments in the Development Agreement from 2004 and its five amendments, most recently in 2012, all explained below.

The Salish Expansion was first proposed by Gateway Cascades, Inc., who was the proponent of the annexation and development. The City of Snoqualmie and Gateway Cascades were the parties to the original Development Agreement dated March 8, 2004. CP 222-242. This Development Agreement was entered under authority of RCW 36.70B.170-.210, and contained permitted uses including a 250 room hotel, §3.4. It also established a fire apparatus mitigation payment of $350,000, §4.3, and an alternative $1,000,000 mitigation for the Tokul Roundabout, §§4.4, 4.5 and 4.6.

The combined fire apparatus mitigation of $350,000 and $1,000,000 Tokul Roundabout mitigation payment was required to be paid by July 1, 2005, under §2 of the First Amendment to the Development Agreement, CP 246.

The Muckleshoot Indian Tribe acquired the Salish Expansion

Property by deed dated October 9, 2007, CP 156 – 164, specifically subject to the Development Agreement per Exception 11, CP 163. The City recognized the Muckleshoot Indian Tribe as the successor in interest to Gateway Cascades, Inc., in the Third Amendment to the Development Agreement, CP 262 – 265, in Recital B, CP 267.

Under the Fifth Amendment, the unexpended portion of the original $1,000,000 Tokul Roundabout mitigation payment paid in 2005 in the amount of $430,000 was returned to the Muckleshoot Indian Tribe, and the Muckleshoot Indian Tribe committed to pay an additional $1,177,555 toward the Tokul Roundabout, for a total payment toward the Tokul Roundabout of $1,607,555.

Thus, the Muckleshoot Indian Tribe has paid, or committed to pay, a total of $1,957,555 in combined mitigation payments through 2012, together with unknown amounts it has expended pursuing the development of the Salish Expansion. In Recital I of the 2012 Fifth Amendment, both the City and the Muckleshoot Tribe reaffirmed their mutual commitment to the Salish Expansion Project. CP 274. Both the long contractual history and the amount of funds paid or committed to be paid by the Tribe remove this project from the realm of the merely "speculative" or hypothetical.

The Court should conclude that the City of Snoqualmie has

standing to challenge the tax scheme of ESHB 1287, Chapter 207, Laws of 2014, on its own behalf.

2. The City of Snoqualmie has standing to challenge the tax scheme adopted in ESHB 1287, Laws of 2014, Chapter 207, on behalf of its resident taxpayers in a representative capacity.

The City likewise has appropriately demonstrated that under current case law, municipalities have standing to raise constitutional issues on behalf of their residents. Amicus therefore devotes argument in this section to a case decided after the briefing by the parties was concluded.

In *Spokane Entrepreneurial Center v. Spokane Moves to Amend the Constitution,* Supreme Court No. 91551-2 (February 4, 2016), the Court found that all of the organizational plaintiffs had representational standing because of the effect a proposed local initiative would have on their individual members, citing *Mukilteo Citizens for Simple Government v. City of Mukilteo*, 174 Wn.2d 41, 46, 272 P.3d 227 (2012), noting that an association of city residents had standing to challenge a proposed initiative because the individual members had standing as "Mukilteo residents who are eligible to vote."

If this taxing scheme is held to be constitutional, the City's residents taxpayers will have to pay on average $30 more tax per resident. CP 523. For the same reasons as in *Mukilteo* and *Spokane Entrepreneurial Center*, the City of Snoqualmie has standing to raise the constitutionality

of this taxing scheme on behalf of its resident taxpayers because all of its taxpayers must pay real property tax and will have to pay a higher amount if the taxing scheme is held to be constitutional.

WSAMA urges the Court not to undo decades of progress in the law in recognizing municipal representational standing as DOR urges.

B. The PILT is an alternative form of real property tax and not a fee for services, a regulatory fee, or excise tax.

1. The PILT is a substitute for real property tax.

Article VII, § 1, of the state constitution vests the power to tax property with the Legislature. It also sets limitations on that power. For the purpose of the Legislature's power to tax, the word "property" means "everything, whether tangible or intangible, subject to ownership." Const. art. VII, § 1. It is axiomatic that this definition includes real property. Article VII, however, limits the Legislature's power to tax real property by requiring that that "all real estate shall constitute one class," and that "all taxes shall be uniform upon the same class of property within the territorial limits of the authority levying the tax." Const. art. VII, § 1. Consequently, as an alternative form of real property tax, the disputed PILT system without question violates the uniformity requirement, with respect not only to its non-uniformity with regular property tax based on assessed valuation but also to its non-uniformity between PILTs required

to be paid by different tribes.

The parties have well described how the ESHB 1287, Laws of 2014, ch. 207, works. At the outset, it exempts otherwise taxable real property owned by a federally recognized Indian tribe, so long as the property is used exclusively for "essential government services," including "commercial activities... that facilitate the creation or retention of businesses or jobs, or that improve the standard of living or economic health of tribal communities." RCW 84.36.010.

Unlike other exempt properties, tribally owned properties are only entitled to exemption from real property tax under certain conditions and subject to certain limitations. *See* RCW 84.36.010(1) stating that tribally owned properties are exempt *if* they meet certain criteria but does not use the word "if" to set criteria for any other exempt property, and RCW 82.29A.055(1)(b) subjecting tribally owned exempt properties to the disputed PILT system unless there is a taxable leasehold interest in the property. By creating this conditional exemption, the Legislature swapped the payment of real property tax for either a payment in lieu of leasehold excise tax, or payment of leasehold excise tax. The bottom line is that a leasehold excise tax or a payment in lieu of leasehold excise tax is substituted for real property tax.

Substitution of a leasehold excise tax for real property tax

conforms to the constitution's uniformity requirement: RCW 82.29A.030(1)(a) sets the amount of leasehold excise tax at "twelve percent of taxable rent." The rate is the same regardless of the identify of either the lessee or the lessor. *See* WAC 458-29A-200(6) establishing criteria for the department of revenue to determine taxable rent that do not include the identify of the lessee or the lessor. The leasehold excise tax, as a substitute for real property tax, is intended to be uniform. *See* RCW 82.29A.010(1)(b) recognizing "that a *uniform* method of taxation" should apply to leasehold interests in publically owned property exempt from real property taxation (emphasis added), and RCW 82.29A.110 requiring uniformity between state and local leasehold excise taxes.

Unlike the leasehold excise tax, the payment in lieu of leasehold excise tax established by ESHB 1287, Laws of 2014, ch. 207 is not uniform. The amount of the PILT is determined "jointly and in good faith negotiation [by]... the tribe that owns the property and the county in which the property is located." RCW 82.29A.055(2).[1]

That is the infirmity of this legislation. Its purpose is to backfill real property taxes at a lower rate than that assessed on all other real

1. If the tribe and the county cannot agree as to the amount of PILT to be paid, "the department [of revenue] may determine the rate. RCW 82.29A.055(2). The PILT amount, whether determined by a negotiation between a tribe and a county or determined by the department of revenue, cannot "exceed the amount of leasehold excise tax that would otherwise be owed by a taxable leasehold interest in the property." RCW 82.29A.055(2).

property, and at rates that may differ from tribe to tribe and from county to county. It is precisely this kind of discrimination or favoritism that the uniformity requirement of Art. VII, § 1, of the state constitution does not allow.

2. The PILT is not a regulatory fee or excise tax.

To escape the uniformity requirement for real property, the DOR has attempted to characterize the PILT as either a regulatory fee or an excise tax instead of a substitute real property tax. There is well-established law addressing the characteristics of regulatory fees as opposed to taxes. *See Samis Land Company v. City of Soap Lake*, 143 Wn.2d 798, 23 P.3d 477 (2001) and *Covell v City of Seattle*, 127 Wn.2d 874, 905 P.2d 324 (1995). The *Samis* Court restated the three part *Covell* test for regulatory fees as follows:

> First, one must consider whether the primary purpose of the legislation in question is to "regulate" the fee payers or to collect revenue to finance broad-based public improvements that cost money. Second, one must determine whether or not the money collected from the fees is segregated and allocated exclusively to "regulat[ing] the entity or activity being assessed." Third, one must ascertain [whether a direct relationship exists between the rate charged and either a service received by the fee payers or a burden to which they contribute.

143 Wn.2d 798, 806.

The PILT regulates nothing. It is purely a measure to backfill lost

property tax revenue. PILT revenues are not required to be segregated or allocated to any specific activity whatsoever; they will be deposited in the general fund of the municipality receiving the payment, and will be used for precisely the same kind of general government expenses as real property tax would be used. Finally, there exists no relationship, direct or otherwise between the rate charged and any service to be received by the tribe, which will be the full panoply of municipal services.

On the other hand, the tribe will pay fees such as water, sewer, and garbage just like any other property owner. The tribe will pay regulatory fees, including building permits regulating building activity and storm water fees regulating drainage activity for its commercial activities property, just like any other property owner.

The PILT is not an excise tax either. An excise tax is a tax on the privilege of conducting some activity within the corporate boundaries. The tribe will pay excise taxes for its commercial activities property, both to the state and local government, such as a business and occupations tax, chapter 82.04 RCW (state) and business license fee and a business and occupations tax, chapter 5.04 Snoqualmie Municipal Code (city), on the privilege of conducting its commercial activity business, just like any other property owner.

The Court should have little trouble rejecting out of hand the

DOR's contention that the PILT is either a regulatory fee or an excise tax. Amicus submits that all remains that the PILT cannot be anything other than a non-uniform alternate form of property tax.

C. Even if the PILT were a regulatory fee or an excise tax, it must still fail because it does not meet Equal Protection requirements.

The disparate payments that result from the disputed PILT system must fail even if they are not a substitute property tax because an unexplained and unjustified regulatory fee or excise tax that creates disparate treatment violates the equal protection clauses of the Washington and U.S. Constitutions. The equal protection clauses of the Washington and U.S. Constitutions prohibits the State from "deny[ing] to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

The first step in an equal protection determination is to identify the appropriate standard of judicial scrutiny. *Paulson v. County of Pierce*, 99 Wn. 2d 645, 652, 664 P.2d 1202, 1207 (1983). If the matter does not involve a suspect classification or a fundamental right, then rational basis review, the minimum level of judicial scrutiny, is applied. *Myrick v. Board of Pierce Cy. Comm'rs*, 102 Wn. 2d 698, 701, 677 P.2d 140, 142 (1984). A statute that "creates an inherently suspect classification such as one based upon race, nationality, or alienage... will be subjected to strict

judicial scrutiny." *Nielson v. Washington State Bar Ass'n*, 90 Wn. 2d 818, 820, 585 P.2d 1191, 1192 (1978). The disputed PILT system created by ESHB 1287, Laws 2014, ch. 207 fails to meet the requirements of either strict scrutiny or rational basis review.

1. ESHB 1287, Laws 2014, ch. 207 violates equal protection because the disparate treatment is not necessary to accomplish the interest.

Inherently suspect classifications based on race include membership in a federally recognized tribe. *See*, generally, *Morton v. Mancari*, 417 U.S. 535 (1974). The enactment of ESHB 1287, Laws 2014, ch. 207, therefore, triggers strict scrutiny review because it creates a class based on race where tribal status is required.[2] The exemptions provided by RCW 84.36.010(1) are categorical for all properties *other* than tribally owned properties, which must meet certain conditions and limitations to receive the exemption. RCW 84.36.010(1) states that tribally owned properties are exempt *if* they meet certain criteria but does not use the word "if" to set criteria for any other exempt property.[3]

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2 Notably, federal regulation singling out this particular racial classification is only subject to rational basis review because of the Indian Commerce Clause. *United States v. Antelope*, 430 U.S. 641, 648, n.11, 97 S. Ct. 1395, 1400 (1977). The State, however, does not have the same authority. Consequently, classification based on tribal status by the State of Washington is subject to strict scrutiny under both the Washington and U.S. Constitutions.

3 Making the exemption conditional for tribally owned properties and categorical for all other properties is disparate treatment that not only violates equal protection, but also frustrates the stated purpose of the act. ESHB 1287, Laws 2014, ch. 207, states that it is an act to subject "federally recognized Indian tribes to *the same* conditions as state and local governments for property owned exclusively by the tribe."

Classification based on race also occurs in RCW 82.29A.055(2) which singles out tribes to negotiate their own PILT amount instead of either paying nothing, like all other categorically exempt properties, or paying a uniform rate of 12%, like all other leasehold excise taxpayers. Creating a class based on tribal status requires the enactment of ESHB 1287, Laws 2014, ch. 207, to meet strict scrutiny review.

Equal protection analysis under strict scrutiny requires that the State "show its purpose or interest in the enactment is both constitutionally permissible and substantial, and that the use of the classification is necessary to the accomplishment of its interest. *Nielson*, 90 Wn. 2d at 820, 585 P.2d at 1192 (citing *In re Griffiths*, 413 U.S. 717, 721-22, 93 S. Ct. 2851, 2855 (1973)). Amicus agrees with the parties that the Legislature's taxing authority is constitutionally permissible and that the interest in "creat[ing] jobs and improve[ing] the economic health of tribal communities" is substantial. ESHB 1287, Laws 2014, ch. 207, § 1; *Brief of Appellant*, p. 4-5; *Brief of Respondent*, p. 17.

Although the Legislature's taxing authority is constitutionally permissible, and the interest of improving the economic health of tribal communities is substantial, the provisions in ESHB 1287, Laws 2014, ch. 207, fail to survive strict scrutiny because there is nothing in the legislative record to demonstrate that the disputed PILT system is

necessary to accomplish this interest. Alternative means of accomplishing the Legislature's interest are myriad; including, but not limited to, vocational training, educational grants, and small business loans. Without any explanation from the Legislature as to why the disputed PILT system is necessary to creating jobs and improving the economic health of tribal communities, the provision fails to meet the requirements of Equal Protection and, as concluded by the Court of Appeals for other reasons, must be struck as unconstitutional.

2. ESHB 1287, Laws 2014, ch. 207 violates equal protection because there is no rational relationship between the disparate treatment and the State's objective.

Assuming *arguendo* that singling out properties on the basis of tribal ownership is not subject to strict scrutiny, the disputed PILT system in RCW 82.29A.055(2) must still meet the requirements of rational basis review. Yet even under this minimal standard, the provision does not pass muster.

A rational basis review requires the court to determine "(1) whether the legislation applies alike to all members within the designated class; (2) whether there are reasonable grounds to distinguish between those within and those without the class; and (3) whether the classification has a rational relationship to the purpose of the legislation." *Convention Ctr. Coalition v. City of Seattle*, 107 Wn. 2d 370, 378-79, 730 P.2d 636

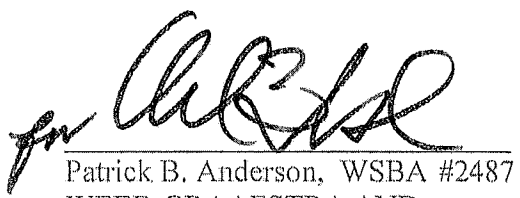
(1986). For the purpose of the present matter, Amicus assumes that the first two criteria are met. Despite this, RCW 82.29A.055(2) does not, and cannot, meet the third criterion.

The Legislature's stated purpose is to create jobs and improve economic health of tribal communities, but then leaves the amount of PILT to be paid by tribal communities to the relative bargaining abilities of those tribal communities. Not only is there no rational relationship between the means and the ends, but it is likely that the means will undermine the ends. Tribal communities most in need of economic development will, inherently, have diminished bargaining power when negotiating with counties. Consequently, the disputed PILT system sets up a taxing scheme where communities with the greatest need receive less benefit than better represented communities who can negotiate better tax rates. Disparate benefit from one tribal community to the next is not rationally related to the overall goal of improving tribal economic wellbeing. In fact, disparate improvements diminish overall economic wellbeing. For these reasons, RCW 82.29A.055 does not meet rational basis review and is unconstitutional under equal protection of the U.S. and Washington Constitutions. Consequently, this Court should affirm the decision of the Court of Appeals.

V. CONCLUSION.

Amicus curiae urges the Court to affirm the trial court ruling in this matter.

Dated this 16 day of March, 2016.



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Subject: WSAMA Amicus – Washington State Dept. of Revenue v. City of Snoqualmie – King County No. 91534-2 - Letter, Motion and Memorandum

Dear Mr. Carpenter:

Attached hereto please find an electronic copy of a Motion for Leave to file Brief of Amicus Curiae and a proposed Memorandum of Amicus Curiae of the Washington State Association of Municipal Attorneys in the above-referenced case. I am also including an electronic copy of a cover letter. Also, in addition to mailing our pleadings to counsel of record, per the certificate of mailing (appended to the Motion), for their convenience, I am also cc'ing them with this e-mail.

Please let me know if you have any questions. Thank you.

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