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78331-4

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

CECILE B. WOODS,

Petitioner,

v.

KITTITAS COUNTY, a political subdivision of the State of Washington;
EVERGREEN MEADOWS, LLC; STUART RIDGE, LLC; STEELE
VISTA, LLC; and CLE ELUM'S SAPPHIRE SKIES, LLC,

Respondents.

ANSWER TO PETITION FOR REVIEW

March 17, 2006

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Respondents Evergreen Meadows, LLC, Stuart Ridge, LLC, Steele Vista, LLC and Cle Elum's Sapphire Skies, LLC (collectively "CESS"), submit the following answer to the *Petition for Review* (hereafter "*Petition*") filed by petitioner Cecil B. Woods.

This case arises out of a challenge to Kittitas County's "Rural-3" zone classification under the Growth Management Act, RCW Chapter 36.70A ("GMA"). Woods raised this issue of GMA-compliance by challenging a site-specific rezone decision under the Land Use Petition Act, RCW Chapter 36.70C ("LUPA"). The Yakima County Superior Court incorrectly ruled that the rezone violated GMA by allowing "urban" growth in a "rural" area of Kittitas County.

The Court of Appeals reversed, holding that the superior court lacked subject matter jurisdiction under LUPA to determine whether the Rural-3 zone complies with GMA. *Woods v. Kittitas County*, 130 Wn. App. 573, 583, 123 P.3d 883 (2005). The Court of Appeals decision was clearly correct under settled Washington law. The question of whether the Kittitas County Rural-3 zoning classification violates GMA is an issue over which the Eastern Washington Growth Management Hearing Board ("EWGMHB") has exclusive jurisdiction.

I. STATEMENT OF THE CASE

CESS owns approximately 250 acre of land in Kittitas County near, but outside of, the City of Cle Elum. The property is designated as “Rural” land under the Kittitas County Comprehensive Plan. The property previously was zoned “Forest and Range-20” under the Kittitas County Zoning Code, KCC Chap. 17.56. Ex 22 at 1.¹

The Kittitas County Board of County Commissioners approved an application by CESS to rezone the property to the “Rural-3” zone. Both the Forest and Range-20 and Rural-3 zones are consistent with the “Rural” land use designation in the comprehensive plan. Rural-3 zoning would reduce the minimum lot size from 20 acres to 3 acres. Ex 22 at 2. This results in residential density of one development unit (“du”) per three acres of property.

Woods challenged the rezone by filing a land use petition in the Yakima County Superior Court. CP 166-76. Woods’ argued, *inter alia*, that the rezone to Rural-3 violated GMA by allowing “urban” growth in a “rural” area of Kittitas County. CP 98. CESS explained that the superior court had no jurisdiction to consider Woods’ GMA arguments, that only the EWGMHB had jurisdiction to determine whether Kittitas County had

¹ “Ex” refers to the exhibits in the Certified Appeal Board Record transmitted by the Yakima County Superior Court. RAP 10.4(f).

complied with GMA, and that Wood's argument would effectively invalidate the Rural-3 zone throughout Kittitas County. CP 25, 72.

The superior court erroneously concluded that it had jurisdiction over the GMA issue, and held that the rezone violated GMA. The superior court agreed with Woods that the Rural-3 zone was an appropriate "urban density" under GMA. CP 28. CESS appealed.

The Court of Appeals reversed, holding that the superior court lacked subject matter jurisdiction to consider Wood's GMA arguments. The appellate court's decision was based on, and is consistent with, the opinion of Division One in *Somers v. Snohomish County*, 105 Wn. App. 937, 21 P.3d 1165 (2001). *Woods*, 130 Wn. App. at 582-83.

Woods seeks review in this Court.

II. ARGUMENT

The decision to rezone a particular piece of property is a quasi-judicial "land use decision" subject to judicial review under LUPA. RCW 36.70C.020; see *Wenatchee Sportsmen Association v. Chelan County*, 141 Wn.2d 169, 4 P.3d 123 (2000). Based on the record created by the local agency, a court determines whether such a land use decision is supported by the record and complies with the applicable land use regulations. RCW 36.70C.130; *HJS Development, Inc., v. Pierce County*, 148 Wn.2d 451, 468, 61 P.3d 1141 (2003). In this case, the superior court had jurisdiction

under LUPA to consider whether the rezone complied with the applicable provisions of the Kittitas County code. *Woods*, 130 Wn. App. at 581. However, issues relating to GMA-compliance cannot be raised in a challenge to a specific land use decision under LUPA.

GMA was enacted in 1990 to coordinate the State's growth through comprehensive land use planning. *Viking Properties, Inc. v. Holm*, 155 Wn.2d 112, 125, 118 P.3d 322 (2005).

The GMA contains 13 expressly nonprioritized goals that guide local governments in the development of comprehensive plans and development regulations. These goals include, inter alia, encouraging development within urban areas, reducing the conversion of undeveloped land into low-density development, retaining open space, protecting the environment, and protecting private property rights.

These goals and their accompanying regulatory provisions create a "framework" that guides local jurisdictions in the development of comprehensive plans and development regulations....

Neither the GMA nor the comprehensive plans adopted pursuant thereto directly regulate site-specific land use activities. Instead, it is local development regulations, including zoning regulations enacted pursuant to a comprehensive plan, which act as a constraint on individual landowners. (Emphasis added; citations omitted).

Viking Properties, 155 Wn.2d at 125-26.

A. The Growth Management Hearings Boards have *exclusive* subject matter jurisdiction over issues of GMA compliance.

All questions of whether comprehensive plans, zoning ordinances, and development regulations comply with GMA are within the exclusive jurisdiction of the Growth Management Hearings Boards. RCW 36.70A.280(1); *Somers*, 105 Wn. App. at 949, 21 P.3d 1165 (2001); *see Citizens for Mount Vernon v. Mount Vernon*, 133 Wn.2d 861, 868, 947 P.2d 1208 (1997). Issues within the exclusive jurisdiction of the GMA boards cannot be raised in appeals of land use decisions under LUPA. *Somers*, 105 Wn. App. at 939; *Timberlake Christian Fellowship v. King County*, 114 Wn. App. 174, 188 n.5, 61 P.3d 332 (2002). In other words, issues relating to whether a land use decision complies with local development regulations may be reviewed under LUPA, while issues relating to whether those regulations comply with GMA must be presented to the GMA Boards.

This case is not the first time a project opponent has attempted to raise GMA-compliance issues in a challenge to a specific land use decision under LUPA. In *Somers, supra*, neighboring landowners brought an action under LUPA to review Snohomish County's approval of a residential subdivision. The neighbors argued that the subdivision constituted urban growth outside the Monroe urban growth area (UGA) in

violation of GMA. The trial court agreed, and reversed the approval of the subdivision. *Somers*, 105 Wn. App. at 940-41. The Court of Appeals reversed:

Although the appeal of a decision approving a project permit application is generally the type of land use decision that would be subject to review by a superior court under LUPA, the present appeal is not. Rather, it is one in which the underlying issue is whether a pre-existing local zoning ordinance complies with the provisions of the Growth Management Act (GMA). Accordingly, the proper Growth Management Hearings Board (GMHB or "the Board"), rather than the superior court, has exclusive jurisdiction to review the matter.

Somers, 105 Wn. App. at 939.

Like the trial court in *Somers*, the superior court in this case incorrectly attempted to decide the GMA issue of whether the Rural-3 zone constitutes urban growth. Although a site-specific rezone is generally the type of land use decision that is subject to this Court's review under LUPA, the underlying legal issue is not. *Somers*, 105 Wn. App. at 939.

During questioning at oral argument, counsel for the Somers had to concede that the substance of their position is that, to the extent the County's R-20,000 zoning permits urban growth outside the IUGA, Cromwell Plateau (or any other development) is not permitted under the GMA. No matter how they attempt to otherwise characterize their challenge, the Somers' real argument is that the County failed to comply with the GMA when it applied a pre-existing ordinance that permitted urban densities outside of the IUGA. The question of whether a county is in

compliance with the GMA is an issue over which the GMHB has exclusive subject matter jurisdiction.

Somers, 105 Wn. App. at 945 (emphasis added).

Similarly, the substance of Woods' challenge to the rezone is whether the Rural-3 zone violates GMA by permitting urban growth in a rural area. Under *Somers*, the EWGMHB has exclusive jurisdiction over the question of whether the Rural-3 zone constitutes urban growth. The superior court exceeded its jurisdiction by holding that the "Rural-3" Zone violates GMA.

In his *Petition*, Woods asserts, with no supporting authority, that "judicial review of site-specific rezones for compliance with GMA" is a "fundamental" component of GMA. *Petition* at 15. On the contrary, this Court has consistently held that GMA issues are within the *exclusive* subject matter jurisdiction of the GMA boards. *Citizens for Mount Vernon*, 133 Wn.2d at 868; *Wenatchee Sportsmen*, 141 Wn.2d at 178-79.

Contrary to Woods' argument, there are no "parallel review mechanisms" for GMA compliance. *Petition* at 15. Allowing superior courts to intrude upon the *exclusive* subject matter jurisdiction of the GMA boards results in inconsistent and erroneous application of GMA. The superior courts lack the necessary expertise to decide issues of GMA compliance, and a challenge to a particular land use decision is not the

proper forum for determining whether a local development regulation or zone classification is in compliance with GMA. The superior court's erroneous analysis of urban density in this case proves the point.

B. There are no bright line rules for rural density under GMA.

The EWGMHB has never ruled on the issue of whether the Kittitas County Rural-3 zone violates GMA. Nevertheless, Woods persuaded the superior court that GMA uniformly requires a minimum of 5-acre lots in rural areas, and that any rural zone more dense than that violates GMA. CP 1032. Based on this non-existent rule, the superior court held that the Rural-3 zone violated GMA. CP 28.

Woods continues to argue that the GMA boards "have consistently recognized that the creation of lots less than five (5) acres in rural areas fail[s] to comply with GMA." *Petition* at 8. In fact, while the EWGMHB has rejected rural densities more dense than 5-acre lots in some counties, it has allowed greater rural densities in others. *See Woodmansee v. Ferry County*, EWGMHB No. 95-1-0010 (Final Decision and Order, 5/13/96) (upholding 2.5 acre rural zoning in Ferry County); *1000 Friends of Washington v. Chelan County*, EWGMHB No. 04-1-0002 (Final Decision and Order, 9/2/04) (upholding 2.5 acre rural zoning in Chelan County).

Contrary to Woods' argument, there is no bright-line rule for permissible rural densities. After the briefs were filed in the Court of

Appeals, but before Woods filed his Petition, this Court issued its decision in *Viking Properties, supra*. This Court squarely held that there are no bright-line rules under GMA, and that the GMA boards have no authority to establish statewide policies on density. *Viking*, 155 Wn.2d at 129.

[GMA] does not prescribe a single approach to growth management. Instead, the legislature specified that "the ultimate burden and responsibility for planning, harmonizing the planning goals of [the GMA], and implementing a county's or city's future rests with that community." RCW 36.70A.3201. Thus, the GMA acts exclusively through local governments and is to be *126 construed with the requisite flexibility to allow local governments to accommodate local needs.

Viking, 155 Wn.2d at 125-26.

Viking's claim that the GMA imposes a "bright line" minimum of four dwellings per acre is erroneous. In making this claim, Viking relies upon a 1995 decision of the CPSGMHB. *See Bremerton v. Kitsap County*, CPSGMHB No. 95-3-0039, 1995 WL 903165 (Oct. 6, 1995). However, the growth management hearings boards do not have authority to make "public policy" even within the limited scope of their jurisdictions, let alone to make statewide public policy. The hearings boards are quasi-judicial agencies that serve a limited role under the GMA, with their powers restricted to a review of those matters specifically delegated by statute.

Viking, 155 Wn.2d at 12. After *Viking Properties*, Woods's assertion that the GMA boards have adopted a rule requiring certain rural densities, and that the Kittitas Rural-3 zone violates this rule, is clearly wrong. Under *Viking Properties*, the Kittitas Rural-3 zone is valid unless and until the EWGMHB issues an order that the zone is not valid or that the County is

otherwise out of compliance with GMA with regard to rural densities.

Woods' *Petition* simply ignores *Viking Properties*.

C. The 3-acre (1du/acre) density permitted in the Rural-3 zone is not an urban density.

To avoid recognition that Woods' argument effectively invalidates the Rural-3 zone throughout Kittitas County, Woods persuaded the superior court that the 1du/3 acre density created by the Rural-3 zone was an appropriate *urban* density under GMA. CP 28. In fact, urban zones are generally more than ten times *more dense* than the "Rural-3" zone. The GMA boards have typically required urban areas to have densities of 4du/acre or higher. *See Hensley v. City of Woodinville*, CPSGMHB No. 96-3-0031 (FDO, 2/25/97).

The following diagrams visually illustrate the dramatic difference between typical "rural" and "urban" densities under GMA. Figure 1 shows the 1 du / 5 acres rural density demanded by the respondent. Figure 2 shows the 1 du / 3 acres density allowed in the Kittitas "Rural-3" zone. Figure 3 shows the typical *minimum* urban density of 4 du / acre.

Figure 1: 1 du / 5 acres (typical “rural” density)

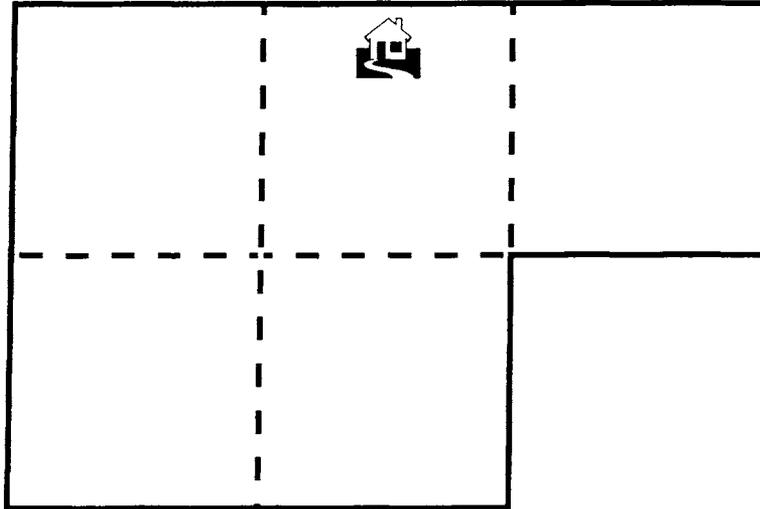


Figure 2: 1 du / 3 acres (Kittitas “Rural 3” zone)

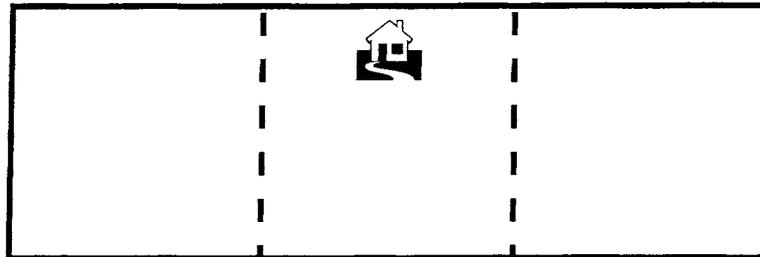
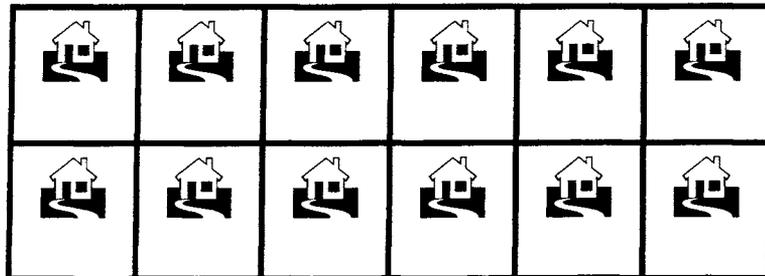


Figure3: 4 du / acre (typical minimum “urban” density)



Given that the 4 du/acre density (Figure 3) is typically the *minimum* density for “urban” zones, Woods suggestion that the “Rural-3” zone (Figure 2) is an appropriate “urban” density is absurd. Yet Woods managed to convince the superior court that the “Rural-3” was appropriate for “urban” areas, but not “rural” areas. CP 28.

The superior court’s erroneous determination that Rural-3 was an appropriate urban density demonstrates why the Legislature has entrusted issues of GMA compliance to specialized GMA Hearings Boards. Fortunately, the Court of Appeals followed Division One’s analysis in *Somers*, holding that the superior court exceeded its jurisdiction by considering whether the “Rural-3” Zone complied with GMA. *Woods*, 130 Wn. App. at 582-83. The Court of Appeals correctly held that the EWGMHB has exclusive jurisdiction over the question of whether the Rural-3 zone constitutes urban growth in a rural area. *Id.*

D. The Court of Appeals decision does not conflict with *Wenatchee Sportsmen Association v. Chelan County*.

Woods’ argument is entirely based on *dicta* in *Wenatchee Sportsmen, supra*. *Petition* at 10-13.² The issue in that case was whether the petitioner’s challenge to a rezone decision was *timely* where the rezone

² Woods made the same argument in the trial court and the Court of Appeals. CP 54-58; *Brief of Respondent* at 16-21.

could have been appealed under LUPA two years earlier. *Wenatchee Sportsmen*, 141 Wn.2d at 175. The suggestion that the petitioner could have raised issues of GMA compliance in an earlier LUPA action is *dicta*, not relevant or necessary to the Court's holding.

In *Wenatchee Sportsmen*, Chelan County rezoned certain property to "recreational residential" (RR-1) in 1996. Project opponents (WSA) did not seek review of the rezone under LUPA at that time. After the rezone was approved, the developer submitted an application to subdivide the property. The county approved the subdivision in 1998, and the project opponents sought review under LUPA. *Wenatchee Sportsmen*, 141 Wn.2d at 174. The trial court found that project complied with the new zoning, but that the project violated GMA by allowing urban growth outside the county's interim urban growth area (IUGA). *Wenatchee Sportsmen*, 141 Wn.2d at 175.³

On direct review of the trial court's decision, this Court framed the legal issue as follows:

Does a party's failure to timely appeal a county's approval of a site-specific rezone bar it from challenging the validity of the rezone in a later LUPA challenge to county approval of a plat application to develop the property?

³ The exact basis of the trial court's decision is not clear from the *Wenatchee Sportsmen* opinion, and was irrelevant to the issue actually decided by the supreme court.

Wenatchee Sportsmen, 141 Wn.2d at 175. This Court held that the project opponents' argument was barred because opponents did not challenge original 1996 rezone decision under LUPA. *Wenatchee Sportsmen*, 141 Wn.2d at 182. But in reaching its conclusion that the project opponents' action was untimely, this Court simply assumed that the superior court would have had jurisdiction to consider the petitioner's argument if the project opponents had challenged the 1996 rezone under LUPA:

At that time a court reviewing the rezone decision could have considered whether the minimum density allowed by the RR-1 district was compatible with the IUGA. If there is no challenge to the decision, the decision is valid, the statutory bar against untimely petitions must be given effect, and the issue of whether the zoning ordinance is compatible with the IUGA is no longer reviewable.

Wenatchee Sportsmen, 141 Wn.2d at 181-82.

Given the actual issue and holding in *Wenatchee Sportsmen*, the ambiguous suggestion that the project opponents could have challenged the rezone for GMA compliance if they had brought a LUPA action in 1996 is *dicta*.⁴ The Court of Appeals in this case concluded, as in *Somers*, that GMA compliance issues cannot be raised under LUPA. *Woods*, 130

⁴ This Court's recent decision in *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 120 P.3d 56 (2005), confirms that the issue in *Wenatchee Sportsmen* was timeliness under LUPA. "In *Wenatchee Sportsmen*, this court held that a petitioner could not collaterally challenge a rezone decision by way of its LUPA petition that challenged a plat approval when the period for challenging the initial rezone decision had already passed." *Habitat Watch*, 155 Wn.2d at 410.

Wn. App. at 583. “Consistency with the comprehensive plan is properly determined in a LUPA petition; compliance with the GMA is not.” *Id.*

Another portion of this Court’s *Wenatchee Sportsmen* opinion, which is not merely *dicta*, shows that Woods’ argument is incorrect. The developer argued that the project opponents were required to challenge the rezone before the GMHB. This Court disagreed. “[U]nless a petition alleges that a comprehensive plan or a development regulation or amendments to either are not in compliance with the requirements of the GMA, a GMHB does not have jurisdiction to hear the petition.” *Wenatchee Sportsmen*, 141 Wn.2d at 178.

This portion of the *Wenatchee Sportsmen* opinion is entirely consistent with *Somers, supra*, and *Citizens, supra*, and the Court of Appeals decision in this case. Contrary to Woods erroneous interpretation of *Wenatchee Sportsmen*, issues of GMA compliance are within the exclusive jurisdiction of the GMA boards.

E. The Court of Appeals decision does not present an issue of “public importance.”

Woods asserts that the Court of Appeals decision “eliminates any judicial review of site specific rezones for compliance with [GMA]” and that this is a matter of “public importance.” *Petition* at 14-15. Woods has no authority for the proposition that GMA compliance issues were ever

reviewable under LUPA. Woods’s unsupported argument about “parallel review mechanisms,” *Petition* at 15, is frivolous in light of the *exclusive* subject matter jurisdiction of the GMA boards.

F. The other issues addressed by the Court of Appeals do not warrant review by this Court.

Woods’ LUPA action included other challenges to the rezone decision. CP 166-170. These issues were extensively briefed in the trial court. *See* CP 19-27; 30-118. The trial court did not rule on these issues because the court (erroneously) concluded that the rezone violated GMA. CP 29. After reversing the trial court on the central GMA issue, the Court of Appeals reviewed and rejected each of Woods other challenges to the rezone. *Woods*, 130 Wn. App. at 584-89. Woods argues that the Court of Appeals did not have “jurisdiction” to review these issues because the superior court did not address them. *Petition* at 16.

Woods cites no authority for the proposition that this is a “jurisdictional” issue. Contrary to Woods’ unsupported argument, an appellate court may review any issue in the case, even an issue that was never presented to the trial court, as long as the record is sufficient to fairly consider the issue. *See* RAP 2.5(a).

Woods argues that the other issues “were neither decided by the trial court nor raised or briefed on appeal.” *Petition* at 17. That is

immaterial. Even if the trial court had ruled on the other issues, its decision would be irrelevant to the Court of Appeals:

When reviewing a superior court's decision on a land use petition, the appellate court stands in the shoes of the superior court. An appellate court reviews administrative decisions on the record of the administrative tribunal, not of the superior court. (Citations omitted).

HJS Development, Inc., 148 Wn.2d at 468. On appeal of the superior court's ruling, the Court would have reviewed the Board's decision, not the superior court's decision. The Court of Appeals correctly applied this standard of review. *Woods v. Kittitas County*, 130 Wn. App. 573, 584, 123 P.3d 883 (2005). A decision of the superior court is not necessary for an appellate court to review a quasi-judicial decision of an agency or local jurisdiction.⁵

Woods cannot show any prejudice. All of the parties' memoranda as well as the entire certified Board record were transmitted to the Court of Appeals. Because the trial court did not decide the other issues presented, any new briefing submitted to the Court of Appeals would have been a rehash of arguments the parties had already made in their trial court memoranda. The extensive analysis in the Court of Appeals' opinion

⁵ It is worth noting that a party seeking judicial review under the Washington Administrative Procedure Act may appeal directly to the Court of Appeals. RAP 2.1(c).

shows that the Court carefully considered the record and the arguments of the parties.

After the Court of Appeals issued its opinion, Woods filed a motion for reconsideration. That motion argued that the Court of Appeals should not have decided the other issues, but did not present any argument that the Court of Appeals decision on those issues was erroneous. *Motion for Reconsideration* at 11-13. This confirms that Woods had nothing new that was not already part of the record.

Finally, Woods has not offered any argument as to why the procedure followed in this particular appeal would warrant review under RAP 13.4(b). Likewise, the merits of the additional rezoning issues are highly fact-specific, and do not warrant this Court's review.

III. CONCLUSION

For all these reasons the Court should *deny* the petition for review.

In the alternative, if the Court grants review on the GMA issue, the Court should limit its review to that specific issue. RAP 13.6. The other rezoning issues in this case do not warrant this Court's review.

DATED this 17th day of March, 2006.

Respectfully submitted,

GROFF MURPHY TRACHTENBERG
& EVERARD PLLC

A handwritten signature in black ink, appearing to be "MJM", written over a horizontal line.

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