

HARDY MYERS
Attorney General



PETER D. SHEPHERD
Deputy Attorney General

DEPARTMENT OF JUSTICE
TRIAL DIVISION

June 22, 2006

Ernest J. Mazorol, III
Deschutes County Courthouse
1100 N.W. Bond
Bend, Oregon 97701

Re: *Ward, Kim et al v. City of Bend Oregon et al*
Deschutes County Circuit Court No. 05CV0448ST

Dear Mr. Mazorol:

Enclosed for filing please find a Reply to Plaintiffs' Response to State of Oregon's Rule 21 Motions and Affidavit of Paul J. Sundermier in the referenced matter.

A postcard is enclosed for your use in notifying me of the action taken.

Sincerely,

Paul J. Sundermier
Senior Assistant Attorney General

TRIO9153.DOC/PJS/tr1
Enclosures

cc: Donald Joe Willis
James H B Forbes
Client

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4 IN THE CIRCUIT COURT OF THE STATE OF OREGON
5 FOR THE COUNTY OF DESCHUTES

6 KIM D. WARD; KIM D. WARD L.L.C., a
7 limited liability company; SALLY WARD;
8 DANA WARD; JESSICA WARD; JUSTIN
WARD; and DONNA MOORE,

9 Plaintiffs,

10 v.

11 CITY OF BEND OREGON; STATE OF
12 OREGON; DEPARTMENT OF LAND
13 CONSERVATION AND DEVELOPMENT
14 OF STATE OF OREGON; LAND
CONSERVATION AND DEVELOPMENT
COMMISSION OF STATE OF OREGON;
and DEPARTMENT OF ADMINISTRATIVE
SERVICES OF STATE OF OREGON,

15 Defendants.

Case No. 05CV0448ST

REPLY TO PLAINTIFFS' RESPONSE TO
STATE OF OREGON'S RULE 21 MOTIONS

16 **Kim D. Ward LLC is the Only Owner of the Subject Real Property**

17 Notwithstanding the grammarians' sophisms about what Measure 37's drafters should
18 have said or how it could have been written more clearly, there is one linguistically supportable
19 interpretation of the phrase "or any interest therein" that is consistent with the sense and purpose
20 of the statute and its surrounding language.¹ The court is fully capable, on its own, of reading
21 and interpreting statutes under the guidelines of ORS 174.010.²

22 _____
23 ¹ *DLCD v. Yamhill County*, 151 Or App 367, 372-373 (1997). (Interpreting "present owner" and
24 concluding that, "as a linguistic matter, it is at least equally plausible to read 'present' as a purely
25 chronological term relating to when the owners must have and have had the necessary
association with the property, as distinct from who the owners are.") That court had no trouble
deciding that "present owner" meant an owner of the "property" at issue – not the owner of an
owner as plaintiffs suggest in this case.

26 ² ORS 174.010 states, "In the construction of a statute, the office of the judge is simply to
ascertain and declare what is, in terms or in substance, contained therein, not to insert what has
been omitted, or to omit what has been inserted . . ."

1 The phrase “or any interest therein” refers to “the property” under the most reasonable
2 and common use of English. Linguistic gymnastics are not necessary to interpret this initiative-
3 created statute.

4 The Statute of Frauds is helpful in two ways in this case. Firstly, the deed to Kim D.
5 Ward LLC establishes a fee transfer of title and not the newly created (in this case) “bare legal
6 title.”³ Secondly, the part of the Statute of Frauds that requires a writing to enforce an agreement
7 to sell real property states, “or for the sale of real property, or of any interest therein.”⁴ The
8 comma is in the statute. No one would seriously read that last clause as referring to an interest in
9 the agreement as opposed to the property because of the placement of the comma.

10 It matters not that Kim D. Ward may have been motivated to transfer fee title to an LLC
11 because of estate planning advice. What matters is the legal effect of that transfer by warranty
12 deed that conveys all of the prior owner’s interest to a new owner. Again, an Oregon statute is
13 helpful: ORS 42.300 states:

14 Except for the recital of a consideration, the truth of the facts
15 recited from the recital in a written instrument shall not be denied
16 by the parties thereto, their representatives or successors in interest
 by a subsequent title.

17 That is what the plaintiffs try to do in this case.

18 The State is entitled to rely upon the deed entered into the county records that establishes
19 the LLC as the owner of the property.⁵ In *Collins*, the Oregon Supreme Court stated that:

20 [t]he presumption is that all conveyances are duly recorded, and
21 the fact that the record fails to show a conveyance [sic] of real
22 property would give rise to the presumption that no such a
 conveyance is in existence.⁶

23 _____
24 ³ The Deed is attached as Exhibit A to the Affidavit of Sundermier.

25 ⁴ ORS 41.580(1)(e).

26 ⁵ See *Collins v. Delashmutt*, 6 Or 51, 53-54 (1876) (“The laws of this state provide for the
recording of all conveyances of real estate, so that the validity of titles may appear from the
inspection of the records . . .”).

⁶ *Id.* at 54.

1 Oregon's current recording laws still contain the same requirement:

2 *All instruments* contracting to convey fee title to any real property
3 . . . *shall be recorded* by the conveyor not later than 15 days after
4 the instrument is executed and the parties are bound thereby.⁷

5 This recording mandate is so important that the legislature singled it out as one of three
6 statutes in this Chapter for which penalties for violations attach.⁸

7 Consequently, Kim D. Ward LLC is the only owner of the property at issue in this case.
8 Many provisions of Oregon's Limited Liability Company Act (the Act)⁹ are instructive in this
9 case:

- 10 • "A[n LLC] membership interest is personal property. A member is not a coowner of
11 and has *no interest in specific limited liability company property*."¹⁰ Since any LLC
12 operating agreement must be consistent with the law,¹¹ the operating agreement of
13 Kim D. Ward LLC may not alter the substantive statutory rights of its members or
14 manager so as to create a personal interest in LLC real property.
- 15 • The LLCs may purchase and hold interests in real or personal property,¹² and the Act
16 provides that any manager of a manager-operated LLC "may sign and deliver any
17 instrument transferring or affecting the limited liability company's interest in real
18 property."¹³ Pursuant to its operating agreement, Kim D. Ward LLC is a manager-
19 operated LLC.¹⁴ Mr. Ward owns a majority of the LLC's Class A membership and is

20 _____
21 ⁷ ORS 93.635(1) (emphasis added).

22 ⁸ ORS 93.990 ("Violation of ORS 93.635 is a Class D violation.").

23 ⁹ ORS 63.001-.990.

24 ¹⁰ ORS 63.239 (emphasis added). This provision is not subject to any exceptions. *See* ORS
25 63.239.

26 ¹¹ ORS 63.057 (emphasis added).

¹² ORS 63.077(2)(b).

¹³ ORS 63.140(3) (emphasis added).

¹⁴ *Affidavit of Kim D. Ward in Opposition to Defendants' Rule 21 Motions* (hereinafter *Affidavit of Kim D. Ward*), ¶ 5.

1 designated as a manager of the LLC.¹⁵ Thus, the fact that Mr. Ward has “previously
2 transferred legal title to property in and out of the LLC”¹⁶ has no legal significance,
3 since Mr. Ward is a manager of the LLC and entitled to take such action on behalf of
4 the LLC.

- 5 • “[A]ny matter relating to the business of the [LLC] may be exclusively decided by
6 the manager . . .”¹⁷ The fact that Mr. Ward retained his prior “possession and control
7 of the property”¹⁸ is irrelevant to determining whether he holds a personal interest in
8 the LLC’s real property, since Mr. Ward is manager of the LLC and vested with
9 authority to allow anyone to use the property of the LLC.
- 10 • Mr. Ward and the Ward family members enjoy many benefits of having organized as
11 an LLC, including limited personal liability: “A member or manager is not
12 personally liable for a debt, obligation or liability of the limited liability company
13 solely by reason of being or acting as a member or manager.”¹⁹ Furthermore, the
14 Oregon Tax Court has determined that, for the purposes of paying taxes, an LLC is an
15 entirely separate entity from its members.²⁰ The members and managers of Kim D.
16 Ward LLC may not embrace the LLC entity when it benefits them and disregard it
17 when it does not.²¹

18 ¹⁵ *Id.*

19 ¹⁶ *Id.* at ¶ 8.

20 ¹⁷ ORS 63.130(2)(b).

21 ¹⁸ *Affidavit of Kim D. Ward*, ¶ 7.

22 ¹⁹ ORS 63.165(1).

23 ²⁰ *The Benson Apts. LLC v. Douglas County Assessor*, 2005 Ore Tax LEXIS 156, 6 (Magistrate
24 Division, July 27, 2005). In that case, the Tax Court noted that, although one of the LLCs had
25 only one member, and “therefore could be presumed to have practical control of the property, the
court notes that ORS 63.044 specifically provides for single member LLCs, and that the statutes
make no distinction between single and multiple member LLCs for the purposes of liability and
ownership.” *Id.* at n2.

26 ²¹ See, for a similar analysis of corporate ownership, *City of Salem v. H.S.B., et al.*, 302 Or 648,
655 (1987) (“We hold that, in determining the identity of the owner of condemned parcels, the
courts of Oregon will not disregard the corporate form and look to the identity of individual
shareholders in order to determine unity of ownership, whether such unity be determined by

1 **This is not a Constitutional Case**

2 In an effort to avoid the consequences of failing to seek judicial review of the Final Order
3 under the APA, the plaintiffs try to persuade the court that Unconstitutional Takings Claims are
4 analogous to Measure 37 statutory claims. There is no merit to that position, and, in all events,
5 the plaintiffs mis-cite the law.

6 Both cases cited by the plaintiffs, *Boise Cascade Corp v. Board of Forestry*²² (a spotted-
7 owl temporary regulatory takings case) and *Dunn v. Redmond*²³ (a land use law regulatory
8 takings case), do not support the plaintiffs' position.

9 The Supreme Court in *Boise Cascade* was reviewing the case following dismissal on
10 Rule 21 motions. It merely held that, on the facts alleged, the circuit court has primary
11 jurisdiction to determine if an unconstitutional taking occurred and to pay just compensation.
12 The agency, the Board of Forestry, could analyze the unconstitutional takings claim also, but its
13 jurisdiction was neither all-encompassing nor primary. Later appeals, following the first trial,²⁴
14 established that *Boise Cascade* had not adequately satisfied the "ripeness" or "futility exception"
15 requirements prior to bringing a claim. Nothing in *Boise Cascade* suggests that a Final Order of
16 the agency (supposedly responsible for an unconstitutional taking) need not be reviewed under
17 the APA. In fact, Boise Cascade Corp. sought and obtained judicial review of the Final Order of
18 the Board of Forestry.²⁵ The order was upheld but the court also held that the record was
19 insufficient to determine, at that time, if a taking had occurred. Trials and appeals followed.

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substantial or by complete identity of record title holders of the separate parcels at the date of the
22 taking. To do so would merely provide a benefit to the shareholders by relieving them – for
23 some limited purpose – of the consequences of the corporate form they have voluntarily
assumed.”).

24 ²² 325 Or 185 (1997).

25 ²³ 303 Or 201 (1987).

26 ²⁴ Senior Assistant Attorney General Paul Sundermier defended the State at a new trial following
remand by the last Court of Appeal's decision. 186 Or App 291 (2003). The case is once again
at the Court of Appeals.

²⁵ 131 Or App 552 (1994).

1 Similarly, in the *Dunn* case, the Supreme Court explained that a regulatory taking might
2 occur from enforcement or enactment of a land use regulation, but a circuit court might have to
3 withhold judgment on a takings claim “until the legality of the land use decision is placed before
4 and decided by LUBA and the government has had an opportunity to reconsider and modify its
5 decision.”²⁶ Measure 37 claims are not reviewable by LUBA because the Measure says so.

6 Measure 37 claims, however, are reviewable under the APA. The Court of Appeals, in
7 an unpublished order of dismissal of a Measure 37 case this past January, stated:

8 The court determines that the order [a DLCD Final Order on the
9 Measure 37 claim] is an order in other than a contested case, that
10 the circuit court has jurisdiction of judicial review of the order, and
that this court does not. On that ground, the court dismisses the
judicial review in this court

11 (brought as an APA judicial review of an order in a contested case; bracketed portion added).²⁷

12 The court added that there was no reason for it to transfer the judicial review to a circuit court
13 under ORS 14.165 because the petitioner had already filed in two circuit courts (apparently
14 having read the Notice appended to all DLCD Measure 37 Final Orders). The plaintiffs in this
15 case read the same Notice and concluded that Measure 37 somehow provides an alternative route
16 for them to have a court decide the correctness of an agency order. They are mistaken, as the
17 Court of Appeals pointed out in the *Hoff* case.

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26 ²⁶ 303 Or 201, 209 (1987).

²⁷ Exhibit B to Affidavit of Sundermier, Order of Dismissal, *Hoff v. DLCD*, CA A129414.


1 **Conclusion**

2 This case should be dismissed for lack of jurisdiction. Plaintiffs failed to file a petition
3 for judicial review within 60 days of issuance of the Final Order under the APA and that is fatal
4 to their statutory (not constitutional) claims in this case.

5 DATED this 22nd day of June, 2006.

6 Respectfully submitted,

7 HARDY MYERS
8 Attorney General

9 
10 PAUL J. SUNDERMIER #82407
11 Senior Assistant Attorney General
12 Trial Attorney
13 Tel (503) 947-4700
14 Fax (503) 378-3465
15 paul.sundermier@doj.state.or.us

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IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF DESCHUTES

KIM D. WARD; KIM D. WARD L.L.C., a
limited liability company; SALLY WARD;
DANA WARD; JESSICA WARD; JUSTIN
WARD; and DONNA MOORE,

Plaintiffs,

v.

CITY OF BEND OREGON; STATE OF
OREGON; DEPARTMENT OF LAND
CONSERVATION AND DEVELOPMENT
OF STATE OF OREGON; LAND
CONSERVATION AND DEVELOPMENT
COMMISSION OF STATE OF OREGON;
and DEPARTMENT OF ADMINISTRATIVE
SERVICES OF STATE OF OREGON,

Defendants.

Case No. 05CV0448ST
AFFIDAVIT OF PAUL J. SUNDERMIER

STATE OF OREGON)
) ss.
County of Marion)

I, Paul J. Sundermier, being first duly sworn, depose and say:

1. I am a Senior Assistant Attorney General at the Oregon Department of Justice. I am the assigned attorney for the captioned case.
2. I obtained a true copy of a deed, attached hereto as Exhibit A, from First American Title Company which reflects the transfer of fee from Kim D. Ward as an individual to Kim D. Ward, LLC on December 27, 1994.

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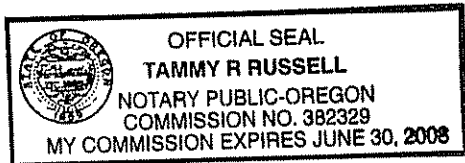
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3. I obtained a true copy of the Order of Dismissal in *Charles Hoff v. DLCD* at the Court of Appeals dated January 17, 2006, attached hereto as Exhibit B.

DATED this 22nd day of June, 2006.

Paul J. Sundermier
PAUL J. SUNDERMIER
Senior Assistant Attorney General

SUBSCRIBED AND SWORN to before me this 22nd day of June, 2006.



Tammy R. Russell
Notary Public for Oregon
My Commission Expires: 6/30/08

135567-34

94-50144

362 - 0027

WARRANTY DEED

Unless a change is requested, all tax statements shall be sent to Grantee at the following address:
Kim D Ward L L C
60801 Brosterhaus Road
Bend, Oregon 97702

After recording, this Deed shall be delivered to:
Kevin J Keillor
PO Box 1151
Bend, Oregon 97709-1151

The true consideration for this transfer is \$0. The consideration consists of other property given, which is the whole consideration

Kim D Ward, Grantor, conveys and warrants to Kim D Ward L L C, Grantee, the following described real property located in Deschutes County, Oregon:

RECORDED BY FIRST AMERICAN TITLE CO. OF DESCHUTES COUNTY AS AN ACCOMMODATION ONLY. NO LIABILITY IS ACCEPTED FOR THE CONDITION OF TITLE OR FOR THE VALIDITY, SUFFICIENCY, OR EFFECT OF THIS DOCUMENT.

That part of the West Half of the Southeast Quarter (W 1/2 SE 1/4) of Section Sixteen (16), Township Eighteen (18) South, Range Twelve (12) E.W.M., lying Northwest of the Great Northern Railroad and Southwest of the Sipchen Road, together with water rights appurtenant thereto

The East Half of the East Half of the Northeast Quarter of the Southwest Quarter (E 1/2 E 1/2 NE 1/4 SW 1/4) and the East Half of the East Half of the Southeast Quarter of the Southwest Quarter (E 1/2 E 1/2 SW 1/4 SW 1/4) of Section Sixteen (16), Township Eighteen (18) South, Range Twelve (12) E.W.M., lying Southwest of the Sipchen Road and lying North of the Great Northern Railroad, together with water rights appurtenant thereto Excluding that parcel deeded to Deschutes County by deed recorded at Book 253, Page 478, on July 6, 1977.
ALSO KNOWN AS TAX LOTS 18-12-16-00-620 and 601

That portion of land lying in the Southeast Quarter of the Southwest Quarter (SE 1/4 SW 1/4) South of the Great Northern Railroad and North and East of Murphy Road in Section Sixteen (16) Township Eighteen (18) South Range Twelve (12) East of the Willamette Meridian Deschutes County, Oregon, except that portion conveyed to Deschutes County by Deed recorded at Book 358, Page 703, on June 24, 1982.

ALSO KNOWN AS TAX LOT 18-12-16-00-606

1 - WARRANTY DEED

kjkiward14 010842

RECORDED BY FIRST AMERICAN TITLE CO. OF DESCHUTES COUNTY AS AN ACCOMMODATION ONLY. NO LIABILITY IS ACCEPTED FOR THE CONDITION OF TITLE OR FOR THE VALIDITY, SUFFICIENCY, OR EFFECT OF THIS DOCUMENT.

Kevin J Keillor

40 N.W. Greenwood, P.O. Box 1151, Bend, Oregon 97709-1151 (503) 382-4331 Fax (503) 389-3386

EXHIBIT

A

362 - 0028

Subject to existence of roads, railroads, irrigation ditches and canals, telephone, telegraph and power transmission facilities and water pipe lines

Subject to the rules, regulations and assessments of the Arnold Irrigation District

ALSO KNOWN AS 18-12-16-00-606

Northwest Quarter of the Northwest Quarter (NW 1/4 NW 1/4) and that portion of the Southwest Quarter of the Northwest Quarter (SW 1/4 NW 1/4) lying North of the North Unit Canal, all in Section Twelve (12) Township Seventeen (17) South, Range Twelve (12), Deschutes County, Oregon

ALSO KNOWN AS TAX LOT 17-12-12-00-200

SUBJECT TO all exceptions to coverage contained in Grantor's policy or policies of title insurance insuring Grantor's title to the subject properties respectively, if Grantor has any such policy or policies of title insurance in effect, and if not, subject to all encumbrances, easements and restrictions of record and which an accurate survey or inquiry of parties in possession of the property would disclose

THIS INSTRUMENT WILL NOT ALLOW USE OF THE PROPERTY DESCRIBED IN THIS INSTRUMENT IN VIOLATION OF APPLICABLE LAND USE LAWS AND REGULATIONS. BEFORE SIGNING OR ACCEPTING THIS INSTRUMENT, THE PERSON ACQUIRING FEE TITLE TO THE PROPERTY SHOULD CHECK WITH THE APPROPRIATE CITY OR COUNTY PLANNING DEPARTMENT TO VERIFY APPROVED USES AND TO DETERMINE ANY LIMITS ON LAWSUITS AGAINST FARMING OR FOREST PRACTICES AS DEFINED IN ORS 30.930.

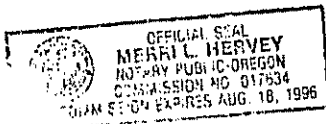
DATED December 27, 1994.

Kim D. Ward
Kim D. Ward

STATE OF OREGON, County of Deschutes, ss:

The foregoing instrument was acknowledged before me this 27th day of Dec, 1994, by Kim D. Ward

Merrill Hervey
Notary Public for Oregon
My Commission Expires: 8/18/96



2 - WARRANTY DEED

kjklward14.010842

Holmes-Hulky Bevan Lynch ■ Lynch
40 N.W. Greenwood, P.O. Box 1151, Bend, Oregon 97709-1151 (503) 382-4331 Fax (503) 389-3366

362 - 0029

STATE OF OREGON) ss.
COUNTY OF DESCHUTES)

I, MARY SUE PENHOLLOW, COUNTY CLERK AND
RECORDER OF CONVEYANCES, IN AND FOR SAID
COUNTY, DO HEREBY CERTIFY THAT THE WITHIN
INSTRUMENT WAS RECORDED THIS DAY:

94 DEC 28 PM 2:49

MARY SUE PENHOLLOW
COUNTY CLERK

BY *M. Wallace* DEPUTY
NO 94-50144 FEE 4.00
DESCHUTES COUNTY OFFICIAL RECORDS

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IN THE COURT OF APPEALS OF THE STATE OF OREGON

CHARLES HOFF,
Petitioner,

v.

DEPARTMENT OF LAND CONSERVATION
AND DEVELOPMENT,
Respondent.

Agency No. M 119114

CA A129414

ORDER OF DISMISSAL

Colman & Docket

Before Wollheim, P.J., Brewer, C.J., and Schuman, J.

Petitioner has petitioned for judicial review of a joint order of the Department of Administrative Services (DAS) and the Department of Land Conservation and Development (DLCD) determining not to apply certain land use regulations to petitioner's parcel of land in lieu of paying compensation under Ballot Measure 37. Respondent has moved for a determination of whether the court has jurisdiction of the order on the ground that the order is an order in other than a contested case and, therefore, jurisdiction lies in the circuit court, not the Court of Appeals. Respondent further requests that, if the court determines that the court does not have jurisdiction of the order, the judicial review be dismissed. Lastly, respondent requests a determination whether the circuit court of Washington County or of Clackamas County has jurisdiction to review the order.

The motion for a determination of jurisdiction is granted. The court determines that the order is an order in other than a contested case, that the circuit court has jurisdiction of judicial review of the order, and that this court does not. On that ground, the court dismisses the judicial review in this court.

The parties have not briefed the question of which circuit court has jurisdiction of a petition for judicial review of a joint DAS/DLCD order in other than a contested case relating to property apparently located in Clackamas County. Moreover, petitioner already has filed actions in the circuit courts of both Washington County and Clackamas County relating to the order; therefore, there is no need for this court to transfer the judicial review to a circuit court under ORS 14.165. Respondent's request to determine which circuit court has jurisdiction of the judicial review of the joint DAS/DLCD order is denied.

Judicial review dismissed.

JAN 17 2006

Date

Robert Wollheim

Robert Wollheim, Presiding Judge

ORDER - Page 1 of 2

EXHIBIT
B

RECEIVED
2006
APPELLATE DIVISION
SALEM, OREGON

1 **CERTIFICATE OF SERVICE**


2 I certify that on June 22nd, 2006, I served the foregoing Reply to Plaintiffs' Response to
3 State of Oregon's Rule 21 Motions and Affidavit of Paul J. Sundermier upon the parties hereto
4 by the method indicated below, and addressed to the following:

5
6 Donald Joe Willis
7 Schwabe Williamson & Wyatt, PC
8 549 Mill View Way Ste 100
9 Bend, Oregon 97702
10 Attorney for Plaintiffs

- HAND DELIVERY
- U.S. MAIL
- OVERNIGHT MAIL
- TELECOPY (FAX)
- EMAIL ATTACHMENT

9
10 James H B Forbes
11 Attorney at Law
12 835 NW Bond St Ste 200
13 Bend OR 97701
14 Attorney for City of Bend

- HAND DELIVERY
- U.S. MAIL
- OVERNIGHT MAIL
- TELECOPY (FAX)
- EMAIL ATTACHMENT

15 
16 PAUL J. SUNDERMIER #82407
17 Senior Assistant Attorney General
18 Trial Attorney
19 Tel (503) 947-4700
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