IN THE SUPREME COURT OF FLORIDA

CASE NO. SC07-1556

THE CROSSINGS AT FLEMING ISLAND
COMMUNITY DEVELOPMENT DISTRICT
Petitioner,

vs.

LISA REINHARDT ECHEVERRI, et al.,
Respondents.

ON PETITION FOR DISCRETIONARY REVIEW

AMICUS BRIEF OF CHRIS JONES AND GREG BROWN IN SUPPORT OF RESPONDENTS

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STATEMENT OF THE IDENTITY AND INTEREST OF AMICUS CURIAE

Greg Brown is the Property Appraiser of Santa Rosa County. Chris Jones is the Property Appraiser of Escambia County. For the past several years, Mr. Brown and Mr. Jones have defended lawsuits in the First Judicial Circuit and the First District Court of Appeal, in which certain ad valorem tax exemptions were at issue. In these cases, Mr. Brown and Mr. Jones denied tax exemptions to private parties who held long-term leaseholds on government property. They denied the exemptions on the grounds that these private parties had all of the benefits and burdens of ownership and were, therefore, the equitable owners of such property. These private parties have sued Mr. Brown and Mr. Jones. In defense, both Mr. Brown and Mr. Jones have raised the equitable ownership argument. In addition, they have pled affirmative defenses based on the Florida Constitution's prohibition of exemptions for private users of government property.

On the merits, the First District Court of Appeal agreed that the private parties with improvements on long-term leases of government land held the benefits and burdens of ownership of the improvements. Therefore, the Court held that such private parties were the equitable owners of the improvements. *Ward v. Brown*, 919 So. 2d 462 (Fla. 1st DCA 2005); *Alvin's Stores v. Jones*, No. 07-0149 (Fla. 1st DCA

Oct. 22, 2007)(per curiam affirmance of the Property Appraiser's position). In these two cases, Mr. Brown and Mr. Jones have briefed the issue of their standing to assert constitutional defenses in litigation. Both contend herein that the defensive posture exception and the public funds exception provide them with standing to raise constitutional issues when they are defendants in tax assessment challenges in court.

SUMMARY OF THE ARGUMENT

The Petitioner's argument relies on a general rule that county officers do not have standing to challenge statutes defining their ministerial duties. This general rule is inapplicable to discretionary decisions by Property Appraisers in performing statutory duties relating to granting or denying requests for ad valorem tax exemptions. The Legislature has decreed that Property Appraisers are to perform the initial review of such exemption applications. In performing this statutory role, Property Appraisers must construe complex Florida Statutes relating to ad valorem tax exemptions, including those defining public purposes and governmental functions. Because the role to be performed in reviewing the law to grant or deny these tax exemption applications is not "ministerial," the case law allowing the remedy of mandamus to mandate the performance of ministerial duties is inapplicable.

In contrast to those mandamus cases seeking to enforce the performance of ministerial duties, this case comes in the context of a deliberate process mandated by

the Legislature for (a) committing the initial discretionary function of reviewing tax exemptions to the Property Appraiser; and (b) allowing for full judicial review of those discretionary decisions under Section 194.171, Florida Statutes. Because this statutory process provides for full judicial review, no Separation of Powers issues arise. This Court has recognized that Property Appraisers may raise constitutional defenses in this type of property tax litigation. Both the "defensive posture" exception and the "public funds" exception provide standing to Property Appraisers and Tax Collectors to raise constitutional issues in defense of lawsuits initiated by taxpayers.

ARGUMENT

I. PROPERTY APPRAISERS AND TAX COLLECTORS HAVE STANDING TO RAISE CONSTITUTIONAL DEFENSES IN ACTIONS INITIATED BY TAXPAYERS CHALLENGING PROPERTY TAX ASSESSMENTS.

A. Standing.

The Petitioner contends that a Property Appraiser has no standing to raise affirmative defenses on constitutional grounds, even when a private taxpayer has sued a Property Appraiser regarding an exemption issue. The Petitioner's argument ignores fundamental policy considerations and the Legislature's scheme for review of contested ad valorem tax exemptions. The issue on appeal is purely a legal question that is to be reviewed *de novo*.

The Florida Legislature has devised a statutory process whereby taxpayers submit applications for tax exemptions directly to the Property Appraisers, who have the initial authority to grant or deny such exemptions. §196.011, Fla. Stat. (2007). In deciding whether to grant an application for exemption, the Property Appraiser must interpret many statutes, including those defining "exempt use" and "public purpose." §196.012, Fla. Stat. (2007). For example, Section 196.012(6) defines a public purpose to be performed when the lessee under a governmental leasehold performs a function or purpose "which would otherwise be a valid subject for the allocation of public funds."

These statutes provide for full judicial review of disputes over tax exemption questions, which serves as a constitutional check on the Property Appraiser's ability to unlawfully deny exemption requests. In directing these controversies to the Courts, this statutory system also serves as a corresponding check on the Legislature's ability to nullify the Florida Constitution through the enactment of exemptions that exceed their legislative powers. These checks and balances are twofold. First, the taxpayer may appeal the decision of the Property Appraiser on an exemption question to the Value Adjustment Board. Second, if either the taxpayer or the Property Appraiser disagrees with the determination of the Value Adjustment Board, the dissatisfied party can sue in circuit court under Section 194.171, or Section 194.036, Florida Statutes.

The Legislature also requires the stay of all collection efforts until the Courts have had a full opportunity to hear the tax dispute. §194.171, Fla. Stat. (2007).

In the manner set forth above, the Legislature has ensured that, even though Property Appraisers initially determine whether an exemption application should be granted, the executive's power is not unbridled. Moreover, because an exemption issue can be challenged in circuit court, the system also ensures that the Legislature's power is not unbridled. The Legislature cannot overstep its constitutional bounds, nor can the Executive overstep its own bounds. In this system, there is no ability for a Property Appraiser to nullify any statute.

Historically, this scheme for review of exemptions has allowed Florida Courts to pass on many important tax issues. An example of how this system of checks and balances has worked to serve Floridians well is found in the *Sebring* tax cases. *Sebring Airport Authority v. McIntyre*, 642 So. 2d 1072 (Fla. 1994)(*Sebring I); Sebring Airport Authority v. McIntyre*, 783 So. 2d 238, 240 (Fla. 2001)(*Sebring II*). In the *Sebring I* case, a racetrack operation had attempted unsuccessfully to convince a Property Appraiser that the track served a public purpose. The case proceeded through the lower court system to this Court, which rejected the racetrack's argument. This Court held that the racetrack property, which was leased from a governmental entity, was not exempt because the property was not used for "governmental"

purposes. *Sebring I*, 642 So. 2d at 1073 (citing *Williams v. Jones*, 326 So. 2d 425 (Fla. 1975). This Court quoted *Williams v. Jones* for the proposition that "the Constitution" mandates taxation of governmental property used for proprietary functions. *Sebring I*, 642 So. 2d at 1073.

In the aftermath of *Sebring I*, the Florida Legislature changed the law in an attempt to broaden the definition of public purpose. The new legislation would have exempted many more private entities using government property for profit. The legislation "would have created an ad valorem tax exemption for situations where private enterprise leases government property to be utilized for profit-making endeavors such as convention and visitor centers, sports facilities, concert halls, arenas and stadiums, parks or beaches. The exemption for these ventures was to be accomplished by statutorily defining these types of activities as serving 'a governmental, municipal or public purpose of function.'" *Sebring II*, 783 So. 2d at 240. Again, the Property Appraiser was the line of defense to this attempt to obtain an unfair tax advantage by private parties.

In a landmark decision, this Court held the legislative attempt to create an ad valorem tax exemption for racetracks operating on government property was unconstitutional. Again, this Court ruled in favor of the Property Appraiser, finding that the legislative amendments violated Article VII, sections 3 and 4, of the Florida

Constitution. Given the stake that the people of Florida have in ensuring a fair system of taxation, this Court expressed no reservation in allowing the Property Appraiser to present these important arguments.

In *Williams v. Jones*, this Court described the importance of reviewing legislation that would grant tax exemptions not authorized under our constitutions: "[W]e approach it on the premise that this is a democracy in which every parcel of property is expected to bear its due portion of the burden of government, unless exempted by the legislature in the manner provided by . . . the Constitution. Courts have **no more important function** than to direct the current of the law in harmony with sound democratic theory." *Williams v. Jones*, 326 So. 2d at 429 (quoting Justice Terrell's opinion in *Bancroft v. City of Jacksonville*, 27 So. 2d 162 (1946). In these instances, "the necessity of protecting the public funds, is of paramount importance, and the rule denying to ministerial officers the right to question the validity of the Act must give way to a matter of more urgent and vital public interest." *Barr v. Watts*, 70 So. 2d 347, 351 (Fla. 1953).

The Petitioner's and Florida Chamber's argument against allowing legitimate challenges to rogue legislative acts would prevent the judiciary from passing on these constitutional questions. Such rogue legislative acts have included not only the attempts referred to in the *Sebring* cases, but also other attempts by the Legislature to

grant unconstitutional tax advantages. *See AMFI Investment Corp. v. Kinney*, 360 So. 2d 415 (Fla. 1978)(in striking Special Act granting unconstitutional tax treatment to private users of government property, this Court held: "[The] Florida Constitution requires that all property used for private purposes bear its just share of the tax burden . . . with certain exceptions specifically enumerated in the constitution"); *Archer v. Marshall*, 355 So. 2d 781 (Fla. 1978)("We . . . hold this special act to be unconstitutional on the ground that it provides for an indirect exemption from ad valorem taxes not authorized by our state constitution"). In *Archer v. Marshall*, the Court admonished: "It is fundamentally unfair for the Legislature to statutorily manipulate assessment standards and criteria to favor certain taxpayers over others." *Id.*, at 784.

Ironically, the Petitioner argues that the Courts must decide such questions, not the executive branch, even though its position in this case would rob the Courts of the ability to consider constitutional issues. In truth, the Petitioner seeks to cut off any effective challenge to tax exemptions not authorized in the Florida Constitution, creating an unacceptable risk that the Legislature will not be properly restrained in fashioning special interest exemptions. The Petitioner's argument, if accepted, would not enhance the powers of the Court, but would dilute them.

The point is not whether the judiciary or the executive will decide these constitutional questions. The statutes already direct the final resolution of these tax disputes to the Courts. The Property Appraiser in this case requests only that he have standing to petition the Courts to hear all legitimate defenses in such a lawsuit.

The question is also not whether one branch of government is supreme over another, but whether the Florida Constitution is supreme over all branches. As noted by this Court in *Sebring* in reference to conflicts between branches of government: "Neither department . . . can control the other in the exercise of its legitimate functions. To the judges belongs the power of expounding the laws; and although in the discharge of that duty they may render a law inoperative by declaring it unconstitutional, it does not arise from any supremacy which the judiciary possesses over the Legislature, BUT FROM THE SUPREMACY OF THE CONSTITUTION OVER BOTH." *Sebring*, 783 So. 2d at 244, n. 5 (emphasis supplied by the Court)(quoting *State ex rel. Bisbee v. Drew*, 17 Fla. 67, 84 (1879)(in turn quoting *Greir v. Taylor*, 15 S.C.L. (4 McCord) 206, 210 (S.C. 1827). If the Florida Constitution is to be supreme over all branches, it must be given due consideration when raised as an issue in a lawsuit.

Taxpayers elect Property Appraisers as constitutional officers to secure a fair and equitable tax roll, which includes the power to make the initial determination on

tax exemption requests. The Florida Chamber agrees, in its *amicus* brief, that if an officer's duties are set forth in the Florida Constitution, they have standing to raise the constitutionality of statutes affecting these duties. See Chamber Brief, p. 14 ("Infringement on the powers of the judiciary is not an issue in cases such as *Cone* and *Croom*, where a public officer is exercising powers granted by the Constitution . . .").[1]

No party to this appeal could disagree that Property Appraisers are instrumental in performing duties defined in Article VII of the Florida Constitution, which mandates that valuations must secure a "just valuation" for all property (Article VII, Section 4) and that "all property" used for private purposes is subject to taxation unless expressly exempt under one of the enumerated descriptions in the Florida Constitution (Article VII, Section 3). Thus, the Property Appraisers' duties are indisputably tied to the Florida Constitution and, even under the Chamber's analysis, standing exists for the Property Appraisers to defend on constitutional grounds.

[1] The Chamber's quote addressed the cases of *State ex rel. Harrell v. Cone*, 177 So. 854 (Fla. 1937) and *Board of Public Instruction for Santa Rosa County v. Croom*, 48 So. 641 (Fla. 1909). The Chamber cites subsequent cases as being erroneous and "overly expansive" in their interpretation of *Cone*. Chamber Brief, p. 14-15. Thus, the Chamber would have this Court overlook *stare decisis* not just in overturning *Fuchs* and *Lewis*, but also several other cases that the Chamber deems to be "overly expansive" or erroneous.

If the Property Appraiser is denied the ability to submit important questions to the courts, then such challenges are unlikely to proceed. Individual taxpayers simply do not have the ability to fight the special interests who, as evidenced in *Sebring*, often take any route necessary through the judiciary or the legislature in an attempt to carve special tax treatment for themselves. Moreover, private individuals would not typically know when others are attempting to gain tax advantages in using public property for private purposes. Thus, this Court recognizes that "[t]he appraiser may . . . raise such a constitutional defense in an action initiated by the taxpayer challenging a property assessment." *Fuchs v. Robbins*, 818 So.2d 460, 464 (Fla. 2002). This Court's description of when an appraiser may raise a constitutional defense reflected good policy when it was included in the *Fuchs v. Robbins* opinion. No sound policy rationale exists to change this rule.

B. *Atlantic Coast Line*.

The Petitioner relies heavily on *State ex rel. Atlantic Coast Line Railway Co. v. State Bd. of Equalizers*, 94 So. 681 (1922). The case stands for the following proposition: "[E]very act of the Legislature is presumptively constitutional until judicially declared otherwise." *Id.* at 683. Moreover, "[t]he right to declare an act unconstitutional is purely a judicial power, and cannot be exercised by the officers of the executive department under the guise of the observance of their oath of office to

support the Constitution." *Id.* at 683. In this case, the Property Appraiser is not exceeding his powers or ignoring the judicial process. To the contrary, he is seeking a judicial declaration by submitting his defense on the constitutional question to the Courts for resolution.

In *Atlantic Coast Line*, a railroad company sought to appeal a tax assessment to the Board of Equalizers of the State of Florida. The statute at issue provided such a remedy. Nevertheless, the board declined to hear the appeal on the grounds that the statute providing jurisdiction for such an appeal was unconstitutional in the board's judgment. The railroad company filed a petition for a writ of mandamus in order to force the board to take jurisdiction of their appeal.

The question before the Supreme Court in *Atlantic Coast Line* was not whether a constitutional officer had standing to submit a constitutional question to the Court for resolution, but instead "the right of a branch of the government, **other than the judiciary**, to declare an act of the Legislature to be unconstitutional." *Id.* at 682 (emphasis added). In essence, the point of *Atlantic Coast Line* was to preclude an executive branch agency from exercising a de facto doctrine of "nullification" to void a statute that it does not like with no judicial involvement whatsoever.

In contrast with *Atlantic Coast Line*, the Property Appraiser in this case is asking the judiciary to consider a constitutional question. This does not raise the

danger presented by *Atlantic Coast Line*. In *Atlantic Coast Line*, the Supreme Court discussed the issue in the context of the historical conflict between early United States Presidents and the Supreme Court of the United States on the fundamental question of whether the courts or the executive branch could determine the constitutionality of statutes. Again, this is not an issue in this case, because the questions at hand have all been submitted to the Courts as affirmative defenses.

In both *Atlantic Coast Line* case and *Barr v. Watts*, 70 So. 2d 347 (Fla. 1953), the plaintiffs filed petitions for writs of mandamus. Mandamus is a remedy directed at non-discretionary acts. The remedy of mandamus is used to enforce the general rule that county officers may not refuse to perform duties that are "ministerial" in nature. *See Barr v. Watts,* 70 So. 2d at 353 (applying general rule barring such challenges to "duties that are ministerial only").

In this case, the Property Appraiser has performed his ministerial duty of accepting applications for tax exemptions. However, the Legislature has not only assigned a ministerial duty to the Property Appraiser, but also the duty of applying the myriad of Florida Statutes regarding the qualification of a taxpayer for an exemption. Under this statutory process, a Property Appraiser exercises discretion in applying the statutory definitions pertaining to exemptions. Thus, the general rule barring county

officers from challenging statutes defining their ministerial duties does not even apply in this case.

The statutory process for tax exemption review specifically provides for judicial review under section 194.171, Florida Statutes. Because there is a statutory process for reaching the Courts in this case (unlike the *Atlantic Coast Line* case and *Barr v. Watts* cases), the Separation of Powers issues do not arise. In an action under this statutory process, the parties should have the unfettered ability to raise all questions related to an assessment or an exemption.

1. Defensive Posture Exception.

The general rule of *Atlantic Coast Line*, as noted by the Petitioner, is subject to two judicially recognized exceptions. The first exception applies when certain public officers raise such constitutional questions **in defense**. This Court has held a Property Appraiser has standing to raise an affirmative defense regarding the constitutionality of the statute. *Fuchs v. Robbins*, 818 So.2d 460, 464 (Fla. 2002)("The appraiser may also raise such a constitutional defense in an action initiated by the taxpayer challenging a property assessment."); *see also Dept. of Education v. Lewis*, 416 So.2d 455 (Fla. 1982)(if "the operation of a statute is brought into issue in litigation brought by another against a state agency or officer, the agency or officer may defensively raise the question of the law's constitutionality").

The Petitioners complain that the holding in the 2002 *Fuchs v. Robbins* case was dicta, citing the 1922 *Atlantic Coast Line* case. Whether dicta or not, this Court was not ambiguous when it stated: "The appraiser may also raise such a constitutional defense in an action initiated by the taxpayer challenging a property assessment." Petitioners contend that the concurring opinion in *Sunset Harbour Condominium v. Robbins*, 914 So.2d 925 (Fla. 2005) served to change or clarify the prior rulings. Yet, the majority in *Sunset Harbour* neither expressed nor implied any willingness to alter the holding in *Fuchs v. Robbins*. Moreover, Justice Bell, the author of the concurring opinion, recognized that his own comments were dicta. *Sunset Harbour*, 914 So.2d 925, 933, n. 7. The concurrence actually did not advocate overturning of any prior case law. Instead, the concurrence suggested only that the basis for standing to raise constitutional questions in past cases was the "public funds exception," not a "defensive posture exception."

All of these opinions constituted an attempt to delineate for the bench and bar the guidelines for when a Property Appraiser may challenge such a statute on constitutional grounds. Through this Court's two most recent pronouncements on the issue of standing, i.e., *Fuchs v. Robbins* in 2002, and *Lewis* in 1982, this Court has

refined its position on the issue.[2] That position allows a Property Appraiser to raise constitutional issues in defense to taxpayer initiated litigation.

2. Public Funds Exception.

A second exception to the general rule is that officers can challenge the constitutionality of statutes under the public funds exception. This Court has upheld the public funds exception as a clear and well defined exception to the principle that a ministerial officer cannot generally challenge the constitutionality of a statute. In *Barr v. Watts*, 70 So. 2d 347, 351 (Fla. 1953), this Court held:

> [T]here is, of course, an exception to this rule-and that is, **when the public may be affected in a very important particular, its pocket-book.** In such case, the necessity of protecting the public funds, is of paramount importance, and the rule denying to ministerial officers the right to question the validity of the Act must give way to a matter of more urgent and vital public interest.

Id. at 351 (emphasis added).

In this passage in *Barr*, this Court carefully defined the scope and purpose of the public funds exception. *Barr* was cited with approval by Justice Bell in his

[2] In terms of whether judicial pronouncements in this context constitute dicta, the First District in *Green v. City of Pensacola*, 108 So.2d 897, 901 (Fla. 1st DCA 1959) stated: "It might be said with some justification that the expression of our Supreme Court last above quoted is dictum in that the control of expenditure of public funds was not involved in that case. We perceive no reason, however, why the court should have qualified the general rule adhered to in that opinion by reiterating the exception last mentioned unless it was to again bring to the attention of the bench and bar that the exception remained a sound principle of law to be observed in those cases falling within its purview."

concurrence in *Sunset Harbour Condominium v. Robbins*, 914 So.2d 925 (Fla. 2005). In fact, Justice Bell quoted *Barr,* in stating his opinion that the exceptions to *Atlantic Coast Line,* as discussed in *Dept. of Education v. Lewis,* 416 So. 2d 455 (Fla. 1982), were more consistent with the public funds exception than the "defensive posture" exception. *Sunset Harbour*, 914 So. 2d at 935 (concurring opinion).

In fact, all of the varying opinions on the standing issue can be harmonized to the extent that all agree with the passage from *Barr*, which confirms that public officers have standing to raise constitutional issues in litigation, when "the public may be affected in a very important particular, its pocket-book." The *Barr* case did not limit the exception to acts involving the disbursement of funds. Instead, this Court described the exception as including any instance in which the public pocketbook "may be affected."

The valuation and exemption decisions committed to the discretion of Florida's Property Appraisers form the backbone for the collection of the great majority of local taxes. These decisions are compiled into the certified tax roll for the local taxing units, to which the taxing units apply the tax rates for purposes of funding local government, including the district school boards and their operation of our public schools. If a party gains an exemption through this process, the burden on all other taxpayers must be increased to meet the local governmental budgetary requirements.

The tax roll prepared by the Property Appraiser not only serves as the basis for local government and the public school system, the level of assessment also plays a major part in the State of Florida's funding of schools. The Florida Legislature has enacted statutes that provide for state funding of local schools based on a formula that is based on the Property Appraisers' calculation of the taxable value for school purposes. §1011.62, Fla. Stat. (2007). If the Property Appraiser submits revised data, based on the outcome of litigation before the value adjustment board or before the courts, the state and local funding is subject to revision.

The role that the Property Appraiser plays in establishing a basis for the funding of local government and schools public is vital to the collection of money for the public pocket-book. The necessity of protecting the public funds from those who would deprive the schools of funds through unconstitutional measures is of paramount importance. Thus, any rule denying to Property Appraisers the right to question the validity of an exemption or assessment must give way to the more urgent and vital public interest in an equitable tax system based on just valuation of all private property.

The public funds exception applies not only to Property Appraisers, but also to Tax Collectors, who frequently appear as defendants in tax cases. *See* §194.181, Fla. Stat. (2007). Tax Collectors are constitutional officers, who are charged with the duty

to collect and disburse funds to the county, city, school boards and other taxing units. *See e.g.*, Art. VIII, §1(d), Fla. Const.; §197.332; §197.383 ("tax collector shall distribute taxes collected to each taxing authority"); §197.3045 (in the context of deferred taxes and interest, "tax collector shall distribute payments received"). Therefore, they certainly have the power to raise affirmative defenses relating to the constitutionality of allowing favorable tax treatment for private taxpayers claiming exemptions not authorized by the Florida Constitution.

The Petitioner and the Chamber have ignored many important cases invoking the public funds exception in their briefing, including *Kaulakis v. Boyd*, 138 So.2d 505 (Fla. 1962). In that case, this Court upheld the public funds exception, holding that the governmental entity had not only the right but "indeed, the duty" to challenge the validity of the pertinent statute. *Id.* at 507. Here, the Property Appraiser also has a duty to the public to protect the public pocketbook. There is no question that state and local government funding stands to be affected in this type of case. Moreover, there is no question that all parties have committed the pertinent questions to the judiciary for resolution. Therefore, there is no Separation of Powers question, and the Property Appraiser has standing to raise the question of whether the exemption at issue complies with Article VII of the Florida Constitution.

CONCLUSION

An elected Property Appraiser in Florida has unique, statutory responsibilities, relating to the handling of applications for ad valorem tax exemptions. The Legislature has devised a statutory process by which taxpayers can challenge a Property Appraiser's denial of an exemption request. This statutory process guarantees a right of judicial review. Because the role to be performed in reviewing tax exemption applications is not "ministerial," the case law allowing the remedy of mandamus to force the performance of ministerial duties is inapplicable. Here, the Property Appraiser is attempting to bring to the attention of the judiciary an affirmative defense relating to an exemption question. Public policy dictates that the Property Appraiser should be allowed to present all relevant defenses to the Courts in actions relating to tax assessments. Allowing standing to present such questions to the Courts does not present a Separation of Powers issue. Instead, such standing serves to preserve the supremacy of the Florida Constitution over all branches of government.

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I HEREBY CERTIFY that the font requirements of Rule 9.210(a), Florida Rules of Appellate Procedure, have been complied with in this Brief and the size and style of type used in this brief is Times New Roman 14 point.

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