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February 7, 2006

VIA FEDERAL EXPRESS

The Honorable John M. Ullsvik
Jefferson County Circuit Court
320 South Main Street
Jefferson, WI 53549

Re: Coalition for a Better Jefferson v. County of Jefferson
Case No. 05-CV-582

Dear Judge Ullsvik:

Enclosed please find a Motion for Leave to File an Amicus Brief and the proposed Amicus Brief on behalf of Wisconsin Builders Association. We respectfully request and appreciate the Court's consideration of this matter.

By copy of this letter, the parties of this action have been served with the Motion for Leave to File an Amicus Brief and the proposed Amicus Brief.

Sincerely,

MICHAEL BEST & FRIEDRICH LLP

Michael A. Hughes
Eric M. McLeod

MAH:pmc

Enclosures

cc: David Roland Halbrooks
Bennett J. Brantmeier
Brent Denzin

BRUCE / TANYA

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STATE OF WISCONSIN CIRCUIT COURT JEFFERSON COUNTY

COALITION FOR A BETTER JEFFERSON
and PATTI LORBECKI, a qualified elector
of the City of Jefferson,

Plaintiffs,

Case No. 05-CV-582

v.

CITY OF JEFFERSON and COMMON COUNCIL
OF THE CITY OF JEFFERSON,

Defendants.

MOTION OF WISCONSIN BUILDERS ASSOCIATION FOR LEAVE TO SUBMIT AN *AMICUS CURIAE* BRIEF

Wisconsin Builders Association ("WBA") by its counsel, Michael Best & Friedrich LLP, hereby gives notice to the Parties and moves the Court to accept an *amicus curiae* brief in the above captioned matter on the issue of direct legislation. A copy of WBA's proposed *amicus curiae* brief is attached to this motion. In support of its motion, WBA states the following:

1. WBA is a private, not-for-profit association organized under the laws of the State of Wisconsin pursuant to Wis. Stat. ch. 181.

2. WBA was formed to represent and advance the interests of its members, who are professionals and local builders associations dedicated to strengthening their industry and providing quality services and products to residents of Wisconsin.

3. Among the interests of its members is a growing concerning over the improper use of direct legislation petitions to delay or

otherwise forestall property annexations in an effort to prevent desired or necessary real estate developments.

4. The ability of a Circuit Court to accept an *amicus curiae* brief on issues pending before it has long been recognized by the Wisconsin Supreme Court. *White House Milk Co. v. Thomson*, 275 Wis. 243, 248, 81 N.W.2d 725 (1957) ("The provisions of the trial court's order granting to the cooperative the right to file a brief amicus curiae, and to make an oral argument at the conclusion of the trial, further negative any charge of abuse of discretion on the part of the trial court."). *See also Dairyland Greyhound Park, Inc. v. McCallum*, 2002 WI App 259, ¶ 6 n.4, 258 Wis. 2d 210, 655 N.W.2d 474 (noting that "[t]en of the eleven tribes filed an *amicus* brief in the trial court supporting the Governor's motion."); *Juneau County v. Courthouse Employees*, 221 Wis. 2d 630, 641, 585 N.W.2d 587 (1998) (stating that "the circuit court carefully considered the text of the provision, the context of the provisions, and an affidavit submitted with the *amicus* brief of the Wisconsin Courthouse Association by a 'highly skilled' University of Wisconsin English professor setting forth a 'highly technical examination' of the clauses of the statutory provisions"); *State ex rel. B'Nai B'rith v. Walworth County*, 59 Wis. 2d 296, 299, 208 N.W.2d 296 (1973) (stating that the Lauderdale Lakes Improvement Association filed an *amicus* brief

with the circuit court); *Reusch v. Roob*, 2000 WI App 76, ¶ 20 n.2, 234 Wis. 2d 270, 610 N.W.2d 168 (noting that a Pennsylvania assistant attorney general had filed an *amicus* brief with the trial court in *Burke v. Yingling*, 666 A.2d 288 (Pa. Super. Ct. 1995)). In each instance, the Circuit Court permitted entities that were not parties to the action, but would be impacted by the case, to submit *amicus* briefs.

5. The interests of WBA members will be directly and significantly impacted by the outcome of this case. As an interested party, WBA has been actively engaged on annexation and direct legislation issues and its members themselves are frequently active participants in annexation matters. Therefore, WBA believes its proposed *amicus curiae* brief will be of assistance to the Court in this case.

6. WBA believes that Plaintiffs submitted a defective direct legislative petition that the City of Jefferson was under no obligation to adopt or submit for referendum. Presently, Wis. Stat. §§ 66.0217 and 66.0219 set forth clear standards for annexations that communities and the development industry rely on. The petition, however, impermissibly adds a series of administrative steps for all annexation requests, thereby attempting to re-write Wisconsin law. In particular, the petition attempts to create duplicative studies and reviews before a city can vote on an

annexation proposal. The petition further permits appeals after each review has been completed. If approved, the petition would simply frustrate the democratic process by superseding state annexation statutes, overburden the courts with piecemeal litigation and hampers the public's right to use and develop property.

For the foregoing reasons, WBA respectfully moves this Court to accept the attached *amicus curiae* brief and asks to be heard at a time and place to be set by the Court should any objection to this motion be raised.

Dated this 7th day of February, 2006.

MICHAEL BEST & FRIEDRICH LLP
Attorneys for Proposed *Amicus Curiae*
Wisconsin Builders Association

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STATE OF WISCONSIN CIRCUIT COURT JEFFERSON COUNTY

COALITION FOR A BETTER JEFFERSON
and PATTI LORBECKI, a qualified elector
of the City of Jefferson,

Plaintiffs,

Case No. 05-CV-582

v.

CITY OF JEFFERSON and COMMON COUNCIL
OF THE CITY OF JEFFERSON,

Defendants.

BRIEF OF PROPOSED *AMICUS CURIAE*
WISCONSIN BUILDERS ASSOCIATION

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Wisconsin Builders Association

The Wisconsin Builders Association ("WBA") by its counsel, Michael Best & Friedrich LLP, and as *amicus curiae* respectfully submits the following arguments and authorities in support of Defendants in this action.

INTEREST OF AMICUS

WBA was founded in 1947 as a not-for-profit organization to serve as an advocate for real estate development throughout the State of Wisconsin. WBA has over 8,000 members statewide who are involved in every aspect of development, including builders, developers, subcontractors, lenders, and title companies. Twenty-five local home builders associations located geographically across the State belong to the WBA. In fact, the Jefferson County local association consists of over 1,200 members. Members of WBA work to better their communities through their local home builders associations and participate in matters of statewide concern through the WBA.

WBA members are professionals interested in strengthening their industry and providing quality services and products to the residents of Wisconsin. Among the interests of its members is a growing concerning over the improper use of direct legislation petitions to delay or otherwise forestall property annexations in an effort to prevent desired or necessary real estate developments. In this instance, WBA believes that Plaintiffs submitted a defective Petition for Direct Legislation ("Petition") that the City of Jefferson was under no obligation to adopt or submit for referendum. The Petition impermissibly adds a series of administrative steps for all annexation requests, thereby attempting to re-write Wisconsin law. In particular, the Petition attempts to create duplicative studies and reviews before a city can vote on an annexation proposal. The Petition further permits appeals after each review has been completed. If approved, the Petition would simply frustrate the democratic process by superseding state

annexation statutes, overburden the courts with piecemeal litigation and curtail the public's right to use and develop property.

STATEMENT OF FACTS

On October 10, 2005, Coalition for a Better Jefferson ("Plaintiffs") submitted a Petition to the City of Jefferson Common Council ("Common Council"). (Complaint ¶ 6). Four days later on October 14, 2005, the Plaintiffs offered enough signatures to satisfy the requirements of Wis. Stat. § 9.20. The City Clerk certified the Petition as sufficient as to form on October 21, 2005. The first reading of the proposed direct legislation was held on November 1, 2005. The second reading was set for November 15, 2005.

On November 14, 2005, Plaintiffs filed an Application for Temporary Restraining Order ("TRO") and a Summons and Complaint in the above-captioned matter. A hearing was held by the Court at 1:00 p.m. on November 15, 2005. However, based on a finding of no "irreparable harm" the Court did not grant the Plaintiffs' requested restraining order/injunction. Later that evening, the Common Council unanimously voted to reject the Petition without sending it to a referendum vote.

Subsequently, Plaintiffs filed another TRO motion on December 19, 2005, and another hearing was held on December 28, 2005. At the conclusion of that hearing, the Court issued a TRO prohibiting the City from annexing any property of 15 acres or more while this mandamus action was pending. The Court gave the Plaintiffs two weeks, or until January 11, 2006, to file a response to the Defendants' Motion to Dismiss, and indicated that the Court would set the matter for a full hearing on the Motion to Dismiss within 45 days. As we understand, a hearing has now been set for February 20, 2006.

On January 3, 2006, the Common Council held its regular monthly meeting. There were two annexation items on the agenda. Item #4 was the Sherman/Pinnow 22 acre annexation. Item #5 was the St. Coletta 288 acre annexation notice. As a result of the Court's order, Mayor Collin Stevens removed item #4 from the agenda "per the Order of Judge Ullsvik, which temporarily restrains the City from annexing any property into the City 15 acres or more while the mandamus action is pending." Mayor Stevens also removed item #5 from the agenda, or the first reading of a notice to annex over 288 acres filed by St. Coletta of Wisconsin.

THE PROPOSED DIRECT LEGISLATION

The Petition, as laid out by Plaintiffs, sets forth a number of procedures the City of Jefferson would be required to follow when exercising its annexation authority over property in excess of 15 acres. First, the City would be required to conduct a series of impact statements designed to address the potential effects of the proposed annexation on the environment, traffic, the City's infrastructure and the community in general. *See* Petition §§ 1-4. Each impact statement would then have to be approved by the Common Council, with two of the statements (environment and infrastructure analysis) requiring public hearings. After the City approved each impact statement, the public would have the opportunity to appeal the City's decision within thirty days of the approval. *Id.* § 5. The Petition would further grant the City the right to recoup any costs it expended on the impact statements by authorizing the imposition of special assessment and impact fees on the owner of the proposed annexed property. *Id.* § 7. Only after each and every one of these requirements were satisfied and/or exhausted could the City annex the subject territory.

ARGUMENT

Section 9.20 of the Wisconsin Statutes sets forth the provisions governing direct legislation within cities and villages. Before any direct legislation petition may proceed, the petitioners must obtain the signatures of at least 15 percent of the city or village's electors. Wis. Stat. § 9.20(1). Within 15 days of the petition's filing, the city or village clerk must determine whether the petition is "sufficient" and "in proper form." *Id.* § 9.20(3). If the clerk finds the petition to be insufficient or in improper form, the petitioners will be given 10 days to amend the petition. *Id.* If, on the other hand, the petition is found to be sufficient and in proper form, it will be forwarded to the common council or village board, who will then have 30 days to either adopt the petition without alteration or submit it to a referendum. *Id.*

Importantly, however, direct legislation is not available under all circumstances or allowed with respect to all matters that might otherwise be the subject of local legislation. There are matters that are not properly the subject of direct legislation. In particular, Wisconsin courts have recognized four broad exceptions to the statutory requirement that a common council or village board must either adopt a petition for direct legislation or submit it to the electors for their consideration via referendum. These common-law exceptions to the statutory rule include when the proposed direct legislation:

> 1. Involves executive or administrative matters, rather than legislative ones;
>
> 2. Compels the repeal of an existing ordinance or resolution, or compels the passage of an ordinance which would be in clear conflict with existing ordinances or resolutions;
>
> 3. Seeks to exercise legislative powers not conferred on a municipality; and
>
> 4. Modifies statutorily prescribed directives that would bind a municipality if it were attempting to legislate in the same area.

See Heitman v. City of Mauston Common Council, 226 Wis. 2d 542, 595 N.W.2d 450 (Ct. App. 1999); *Mount Horeb Cmty. Alert v. Village of Mt. Horeb*, 263 Wis. 2d 544, 665 N.W.2d 229 (Ct. App. 2002). If any of the exceptions apply to a petition, the common council or village board is not obligated to accept it or act upon it.

As drafted, the Petition in this case violates all four exceptions referenced above.[1] As a consequence, the Common Council is not required to pass as an ordinance the contents of the Petition. Nor is the Common Council required to submit it to the electors for their consideration at a referendum. Therefore, the Court should deny Plaintiffs' writ of mandamus and grant the City's Motion to Dismiss.

A. The Petition is administrative in nature and thus invalid.

Under the process for direct legislation, only *legislative* propositions may be submitted, not administrative or executive ones. The Court of Appeals has defined the difference between a legislative and an administrative proposition as follows:

> The test of what is a legislative proposition and what is an administrative proposition, with respect to the initiative or referendum, has further been said to be whether the proposition is one to make new law or to execute law already in existence... 'The power to be exercised is legislative in its nature if it prescribes a new policy or plan; whereas it is administrative in its nature if it merely pursues a plan already adopted by the legislative body itself, or some power superior to it.'

Mount Horeb, 263 Wis. 2d at 557. Additionally, ordinances relating to subjects of permanent and general character are legislative, as opposed to ordinances relating to subjects of temporary and special character which are regarded as administrative. *Save Our Fire Dep't Paramedics Committee v. City of Appleton*, 131 Wis.2d 366, 376, 389 N.W.2d 43 (Ct. App. 1986).

[1] This Brief will not address the second exception – the Petition repeals or conflicts with existing ordinances – as we believe the City's briefs in support of its Motion to Dismiss adequately address that issue.

According to these standards, it is clear that the Petition submitted to the City of Jefferson is administrative in nature.

When a direct legislation proposal affects or controls governmental decisions, a court may look to the nature of the governmental entity involved in the decision. If the governmental agency is administrative in nature, then the proposal is an administrative one. *Mount Horeb*, 263 Wis. 2d at 558 n.7 ("We also held that the resolution would have modified the statutory authority granted to the city planning commission, an administrative body that was charged with carrying the initial proposal into effect, and for this additional reason was not a proper subject for direct legislation.") (citing *Heider v. Common Council of City of Wauwatosa*, 37 Wis. 2d 466, 477-78, 155 N.W.2d 17 (1967)). Here, although clothed solely in terms of the City, the Petition is actually geared toward the City Planning Commission because it outlines a series of procedural steps that the City must complete prior to annexing land parcels 15 acres or larger. The Planning Commission alone is responsible for reviewing and advising on all proposed changes to the City's geographical area and zoning laws. City of Jefferson Code § 286-26. Therefore, as the Planning Commission is an administrative agency, the Petition itself is administrative, not legislative.

The Petition is also administrative because it does not prescribe any new substantive policy or plan governing annexations by the City. *Mount Horeb*, 263 Wis. 2d at 558. As noted above, the Petition simply outlines a series of procedural steps a City must take before annexing a particular property. Yet, an administrative action is one where the object of a petition is to tell the governing body *how* to do something as opposed to a legislative action, which tells the governing body *what* to do. The Wisconsin Legislature has already created specific statutes which contain the substantive rules governing the annexation of land as well as the procedures

by which proposed annexations are to be considered. Wis. Stats. §§ 66.0217, 66.0219. The Petition here seeks to impose an additional set of procedures on the manner in which the City administers existing annexation law. It does not provide substantive rules. Therefore, the Petition is the very definition of administrative. Because the Petition is administrative in nature, it is not a proper subject of direct legislation.

B. The Petition either modifies or ignores the role of the Department of Administration.

Under Wisconsin law, no initiative may be passed if it would modify statutorily prescribed directives that would be binding on a city if it attempted to legislate in the same area. Yet the Petition seeks to do precisely that.

Wisconsin law governing the annexation of land is very clear about the process and procedure to be followed by local governing bodies. *See* Wis. Stats. §§ 66.0217, 66.0219. In certain circumstances, before an annexation proposal may proceed, the Department of Administration must review the proposal and determine whether it is in the public interest. Wis. Stat. § 66.0217(6)(a) (requiring the Department of Administration to determine whether an annexation is in the public interest for counties with populations of 50,000 or more).[2] In determining whether the proposed annexation is in the public interest, the Department of Administration considers the following factors:

> 1. Whether the governmental services, including zoning, to be supplied to the territory could clearly be better supplied by the town or by some other village or city whose boundaries are contiguous to the territory proposed for annexation which files with the circuit court a certified copy of a resolution adopted by a two-thirds vote of the elected members of the governing body indicating a willingness to annex the territory upon receiving an otherwise valid petition for the annexation of the territory.

[2] Jefferson County has a population of approximately 74,000 – Wisconsin Counties Association, 2004.

> 2. The shape of the proposed annexation and the homogeneity of the territory with the annexing village or city and any other contiguous village or city.

Wis. Stat.. § 66.0217(c). Clearly, the Department of Administration is not only authorized, but mandated by the legislature to ensure that an annexation is in the public interest. The statute succinctly labels all of this review as ensuring that the bundle of "governmental services" will be sufficient for any given annexation.

On the other hand, the Petition separately draws out the various sticks of the bundle of government services by requiring an environmental impact statement, a traffic impact statement, infrastructure analysis and a community impact statement. Surely, it is not difficult to see that these things are all components of, or relate to "governmental services." Thus, the Petition seeks to adopt procedures relating to same matters -- the same bundle of sticks -- that the state statute already addresses. Accordingly, the Petition either takes power away from the Department of Administration and gives it to the City or creates an additional, overlapping review process. Either way, the Petition falls within at least one exception to permissible direct legislation.

First, if the former is true, it violates the direct legislation procedure because it gives the electors the power to do something the City could not do (i.e. ignore the requirement of submittal to the Department of Administration and conduct its own "public interest" determination). Alternatively, if we assume that the Petition prescribes an additional set of procedures concerning the sufficiency of governmental services (in addition to the one required by statute) and related matters, it would violate the holding of *Henderson v. Hoesley*, 225 Wis. 596, 275 N.W. 443 (1937). That case determined that since a statute provided a "special and exclusive way" to discontinue municipal plans to acquire a public utility, direct legislation permitting discontinuance in a different manner was contrary to the legislative intent. *Id.* Such direct

legislation was invalid as an abrogation of an existing law. Similarly, here the state statute specifically mandates a review by the Department of Administration. The Petition's additional, overlapping review process concerning the same issues would fly in the face of the legislative intent of the original statute. Such a result is impermissible.

Therefore, the provisions outlined in the Petition are an attempt to amend or disregard the state statutes governing annexation and thus the Petition is invalid.

C. The Petition improperly grants the City authority to impose special assessment and impact fees.

Section 7 of the Petition grants the City the "right of recoupment" by allowing it to impose special assessment or impact fees for the costs of the required environmental impact statement, the traffic impact statement, infrastructure analysis and the community impact statement. The City, however, has no authority to impose such fees.

Wis. Stat. § 66.0703(1)(a) permits a municipality to levy and collect special fees from the property owner for improvements benefiting the property. *Cf.* Wis. Admin. § Trans. 223.015(2) ("'Improvement' means any permanent addition to or betterment of real property that involves the expenditure of labor or money to make the property more useful or valuable."). Thus, to be entitled to such a fee, the property itself must be improved and receive a benefit. Despite whatever arguments Plaintiffs may raise, it is undeniable that the required reports are not improvements to real property. The various reports simply assess the potential impacts to the community in general. As no work is performed on the property itself, the City cannot impose special assessments.

Likewise, the City is also not entitled to impact fees pursuant to Wis. Stat. § 66.0617, which permit the imposition of fees to reimburse the City for "the capital costs to construct, expand or improve public facilities." Wis. Stat. § 66.0617 (1). Although capital costs include

"legal, engineering and design costs," they are limited to such costs that actually go toward the construction, expansion or improvement of public facilities. *(Id.)* As noted above, the various impact statements are not geared toward the design of any particular public service. They merely address potential impacts.

Therefore, by seeking reimbursement of its costs associated with the impact statements, the Petition would have the City exercise powers it does not have. Accordingly, the Petition violates the third exception and is invalid as a matter of law.

D. The Petition's appeals procedure violates Wisconsin law.

Section 5 of the Petition provides that: "Any person who is a resident of the lands to be annexed or the City may, within thirty (30) days after the approval of the EIS, TIA, the IA or the CIS, or any of them, by the City, appeal the approval determination of the City to the Circuit Court upon writ of certiorari or other appropriate writ or remedy." There are, however, two fundamental problems with this procedure.

First, this section would permit an appeal after the approval of every impact statement. Thus, an interested party could conceivably file five separate appeals during the course of one annexation procedure – an appeal of the approval of each impact statement and an appeal of the approved annexation itself. Such an appellate procedure, however, directly conflicts with State law. Wis. Stat. § 66.0217(11)(a) only permits an appeal to take place "within the time after adoption of the annexation ordinance provided by s. 893.73(2)." Section 893.73(2)(b), in turn, provides that "an action to contest the validity of an annexation" must be "brought within 90 days after the adoption of the order, annexation ordinance or final determination of the action contested." Thus, it is beyond dispute that State law prohibits any interlocutory appeals of annexation proceedings. *Cf. State ex rel. A. E. v. Circuit Ct. of Green Lake County*, 94 Wis. 2d

98, 101, 788 N.W.2d 125, *reconsidered on other grounds*, 94 Wis. 2d 105a, 792 N.W.2d 114 (1980) ("The final judgment-final order rule is designed to prohibit piecemeal disposal of litigation and this plays an important role in the movement of cases through the judicial system."). Instead, an interested party must wait until the annexation has been approved before bringing suit.[3] Such a requirement makes perfect sense when one realizes that the mere approval of an impact statement does not necessarily mean that the annexation itself will be approved. Thus, as the annexation is not yet final, there would be no actual case or controversy before the court. *Lake Country Racquet & Athletic Club, Inc. v. Village of Hartland*, 2002 WI App 301, ¶ 15, 259 Wis. 2d 107, 114, 655 N.W.2d 189 (citing *Putnam v. Time Warner Cable*, 2002 WI 108, ¶ 41, 255 Wis. 2d 457, 649 N.W.2d 626). The permissive appellate procedure outlined in Section 5 of the Petition is solely intended to slow the annexation process to a virtual halt and is contrary to the intent of the State's annexation process. Therefore, the procedures outlined in Section 5 are preempted as a matter of law. *Fox v. Racine*, 225 Wis. 542, 545, 275 N.W.2d 513 (1937) ("A city cannot . . . lawfully forbid what the legislature has expressly licensed, authorized or required, or authorize what the legislature has expressly forbidden.").

Second, section 5 of the Petition impermissibly permits all residents of the City to bring an action regarding the approval of the impact statements. However, the law is well-settled that only residents of the property to be annexed generally have legal standing to challenge the proposed annexation. *Village of Slinger v. City of Hartford*, 2002 WI App 187, ¶ 9, 256 Wis. 2d 859, 650 N.W.2d 81. In *Village of Slinger* the City of Hartford adopted an ordinance annexing 67.7 acres of land from the Town of Hartford. *Village of Slinger*, 2002 WI App 187 at ¶ 3. The

[3] There is no prejudice to any party by requiring it to wait until the annexation has been approved. In return for waiting, a plaintiff challenging an annexation is statutorily assured a speedy trial. Wis. Stat. § 66.0217(11)(b) ("An action contesting an annexation shall be given preference in the circuit court.").

annexation resulted from a petition for direct annexation by a company which proposed residential development of the area. *Id.* The challenged ordinance also provided for the rezoning of the annexed land for residential use. *Id.* Two of the plaintiffs in the case were individuals who resided in the Town of Hartford and owned 75.4 acres of land abutting the entire length of the northern border of the annexed land. *Id.* The court of appeals held that the individual plaintiffs lacked standing because they did not reside in the area being annexed. *Id.* at ¶ 15. By permitting all residents of the City to challenge annexation proceedings, as opposed to just the residents of the annexed territory, the Petition has impermissibly enlarged the doctrine of standing and is thus invalid.

CONCLUSION

While Wisconsin law does provide limited authority for citizens to submit petitions advancing direct legislative initiatives to their city councils and Village boards for adoption or referendum, a city council is under no obligation to adopt such legislation or submit it to electors for their consideration if the legislation fails to satisfy judicially developed standards for such initiatives. For all the foregoing reasons, the Court should vacate Plaintiffs' temporary restraining order, deny Plaintiffs' motion for a writ of mandamus, and grant the City of Jefferson's Motion to Dismiss.

Dated this 7th day of February, 2006.

MICHAEL BEST & FRIEDRICH LLP
Attorneys for Proposed *Amicus Curiae*
Wisconsin Builders Association

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