IN THE

Supreme Court of Virginia

RECORD NO. 171030

PRINCE WILLIAM
BOARD OF COUNTY SUPERVISORS, *et al*.,

Appellants,

V.

HENRY ARCHIE, JR.,

Appellee.

OPENING BRIEF OF APPELLANTS

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STATEMENT OF THE NATURE OF THE CASE AND MATERIAL PROCEEDINGS

On or about August 13, 2015, Mr. Henry Archie, Jr. ("Archie") submitted an application for a nonconforming use verification for three parcels of property (13059, 13065, and 13069 Minnieville Road, Woodbridge, VA) to the Prince William County Zoning Administrator. (JA at 32-33). The application requested non-conforming use verification for an automobile graveyard on all three parcels of property. (JA at 32-33) All three parcels are zoned A-1 Agricultural. (JA at 32-33). Generally, a nonconforming use is lawful under the zoning ordinance at the time it is established but due to subsequent changes in the zoning ordinance it is no longer a permitted use. In this instance, the nonconforming use (automobile junkyard) began prior to the adoption and implementation of the Prince William County Zoning Ordinance. (JA at 214).

On October 1, 2015, the Zoning Administrator's determination on the application was issued and then reissued for clarification purposes on November 5, 2015. (JA at 32-33). The determination stated that only two of three parcels (13059 and 13069 Minnieville Road) included in the application qualified as a lawful nonconforming use for an automobile graveyard. (JA 32-33). One parcel, 13065 Minnieville Road, did not qualify as a lawful non-conforming use. (JA 32-33). On November 19, 2015, Archie

appealed that determination to the Prince William County Board of Zoning Appeals ("BZA"). (JA at 1).

On March 28, 2016, the BZA heard the matter and upheld the Zoning Administrator's determination that the automobile junkyard on 13065 Minnieville Road was not lawfully non-conforming. (JA 177-86).). At the BZA hearing, Archie testified that 13065 Minnieville Road (also referred to as Parcel 20A) was never free of junk vehicles and car parts and that he continued to store car parts on 13065 Minnieville Road even though Land Management Groupe, Inc. ("LMG") owned 13065 Minnieville Road. (JA at 88, 95). He further testified that the County issued a zoning approval for a nonconforming use on the property back in 1982. (JA at 39, 92). He also testified that he continued to store junk cars and car parts on 13065 Minnieville Road when LMG owned 13065 Minnieville Road because he "knew eventually [he] would get it back and if [he] abandoned the use, then [he] would have lost the use." (JA at 94). The BZA adopted a resolution which upheld the Zoning Administrator's determination to deny the request for a non-conforming use verification for an automobile graveyard. (JA at 186). Subsequent to that hearing, Archie sought review of the BZA decision in the Prince William County Circuit Court. (JA at 34-35).

On March 15, 2017, the Prince William County Circuit Court, as heard by the Honorable Lon E. Farris, reversed the decision of the BZA and held the automobile salvage operation or business on 13065 Minnieville Road was a lawful nonconforming use. (JA at 213-17). On April 11, 2017, the Prince William County Board of County Supervisors authorized an appeal of the decision of the Prince William County Circuit Court.

The Prince William County Circuit Court signed the final order in this matter dated May 2, 2017. (JA at 216). On June 8, 2017, the Prince William County Attorney's Office received a copy of the Final Order which included the May 2, 2017 date on which Judge Farris signed the Final Order. Counsel for the appellant noted objections to the Court's decision on Joint Appendix page 217 of the Final Order entered on May 2, 2017.

On May 18, 2017, Counsel for the Prince William Board of County Supervisors and the Zoning Administrator filed a notice of appeal to the Virginia Supreme Court. Pursuant to Virginia Supreme Court Rule 5:9(a), an oral decision was announced on March 15, 2017, but the Notice of Appeal was filed prior to entry of the Final Order since notice of the entry of the Final Order was not provided to the Prince William County Attorney's Office until June 8, 2017.

Because no court reporter was present for the hearing at the Prince William County Circuit Court, Counsel for the Prince William Board of County Supervisors and the Zoning Administrator submitted a written statement of facts pursuant to Virginia Supreme Court Rule 5:11(e) on June 21, 2017.

On July 6, 2017, Counsel for Archie filed objections to the written statement of facts filed by the Prince William Board of County Supervisors. In addition, Counsel for Archie also filed an alternative statement of facts, but failed to cite to any Virginia Supreme Court Rule which authorized Appellee to file such an alternative statement of facts. On July 11, 2017, the Prince William County Board of County Supervisors filed its notice of objections due to Archie filing an alternative statement of facts not permitted per the Virginia Supreme Court rules.). The Prince William County Circuit Court signed the alternative statement of facts filed by Archie and Counsel for the Board received notice on July 14, 2017 that the record was transmitted to this Court.

ASSIGNMENTS OF ERROR

1) The Trial Court erred when it ruled that Archie has a lawful nonconforming use to operate an automobile junkyard at 13065 Minnieville Road because Archie did not own the property between 1987-1992, did not have permission to operate an automobile junkyard on the property during that time period and did not have any legal right to use the 13065 Minnieville Road as an automobile junkyard during that time period. (JA at 217).

2) The Trial Court erred when it held that the nonconforming use was not discontinued because Land Management Groupe, Inc. purchased the property in 1987, and never continued the use of placing junk vehicles or parts or placed any junk vehicles or parts on 13065 Minnieville Road throughout its ownership period. (JA at 217).

STATEMENT OF FACTS

13065 Minnieville Road was owned by Henry and Dorothy Williams (the aunt and uncle of Archie) until 1987 when ownership of the property changed to LMG. (JA 40-42, 60). In 1992, the property was sold back to Archie's aunt, Dorothy Williams. (JA at 53-57, 214). Archie ultimately purchased the property in 1995. (JA at 36-38, 214). During 1987-1995, Archie did not own the property. (JA at 60, 214).

In 1985, the County filed a lawsuit against Archie in the Prince William County Circuit Court for operating an automobile junkyard in violation of the County's zoning ordinance on the 13065 Minnieville Road property. (JA at 187-89). Within a few months, the County discovered that the Williams owned the 13065 Minnieville Road property and the Williams

were added to the County's lawsuit. (JA at 211-12). In December 1989, after discovering that LMG had become owner of 13065 Minnieville Road, the County added LMG as a party to the case. (JA at 190-92).

In March 1986, the then owners of the 13065 Minnieville Road property, Henry Freemont Williams and Dorothy Williams, filed a separate lawsuit against Archie because Archie was storing junk cars and junk parts on the 13065 Minnieville Road without their permission. (JA at 201-03). In June 1987, the Prince William County Circuit Court entered an order perpetually enjoining Archie from placing junk vehicles or parts on 13065 Minnieville Road. (JA at 196-97). In August 1987, the Williams filed a motion to find Archie in contempt of the Court's 1987 order for failing to remove the junk vehicles and junk parts from such property. (JA at 204-05).

In November 1989, LMG filed a lawsuit against Archie and soon thereafter on April 1990, LMG obtained a permanent injunction against Archie because Archie was placing "certain junk vehicles and parts therefrom without right or permission of the complainant since at least September 1989." (JA at 193-95, 198-200). The Prince William County Circuit Court ordered that Archie be "perpetually enjoined from placing or storing any vehicles or any auto parts of whatever description upon [13065 Minnieville Road] . . . [whether] owned by complainant [LMG], its

successors or assigns." (JA at 198-99). The Court also ordered Archie to "remove any and all vehicles and any and all auto parts currently present on [13065 Minnieville Road]. . . within thirty (30) days from the entry of this Order." (JA at 199). The Order entered on April 1990 also provided that the matter was continued to a later date on the issue of damages. (JA at 199).

The case between LMG and Archie also reflected a show cause against Archie on June 29, 1990. The Court held that Archie had failed to remove the junk vehicles and auto parts from 13065 Minnieville Road. (JA at 43-44, 206). The court issued a fifty ($50) dollar fine and ten (10) days in jail. (JA at 206). The jail sentence was suspended upon the condition that Archie pay the fine and comply with the Circuit Court's order within ten (10) days. (JA at 206). In August 1991, in the LMG litigation with Archie, the Circuit Court entered an order requiring Archie to pay twelve thousand dollars ($12,000) in damages. (JA at 58-59, 214).

LMG's case against Archie also had an impact on the County's case against Archie and LMG. In May 1990, Counsel for LMG sent Counsel for the County a letter requesting that the County dismiss the case against LMG since Archie was required to remove all automobiles and any parts from the 13065 Minnieville Road property as a part of the LMG case against Archie by May 17, 1990. (JA at 61-62). Counsel for LMG also

stated that "[LMG] has been as much a victim in this matter as the County as its property was improperly invaded by Mr. Archie and has potentially sustained serious environmental damage." (JA at 61).

In October 1990, the Circuit Court entered an order dismissing LMG from the County's litigation. (JA at 45-47). In addition, the Order specified that "[i]t appearing, that [LMG] has cleared its property of junked vehicles and parts thereof by virtue of Agreed Order in this Court's Chancery Number 28641, which compels [Archie] to remove all junked automobiles and auto parts of whatever nature from . . . [13065 Minnieville Road] and which perpetually enjoins [Archie] from placing or storing any vehicles or any auto parts of whatever description upon . . . [13065 Minnieville Road], whether [13065 Minnieville Road] be owned by the Groupe or its successors and assigns . . . ." (JA at 45-46).

In May 1991, the Circuit Court entered a final order in the County's case and concluded that, "[13065 Minnieville Road] is not properly before the Court because no evidence was presented that there are any cars stored thereon and because a decree enjoining storage thereon has already been entered by this Court in Chancery No. 28641." (JA at 207).

On February 18, 1992, 13065 Minnieville Road was sold to Archie's aunt, Dorothy Williams. (JA at 53-57, 214). During LMG's ownership period

of 13065 Minnieville Road, LMG never placed any junk vehicles or parts on the property or permitted any junk vehicles or parts to be placed on the property. (JA at 88, 160-161). On August 28, 1995, Archie purchased 13065 Minnieville Road from Dorothy Williams. (JA at 36-38).

STANDARD OF REVIEW

On the issue of whether the trial court made an error of law, this Court reviews that issue *de novo*. As such, the question of whether Archie has a lawful nonconforming use is reviewed by this Court *de novo*. Hale v. Bd. of Zoning Appeals, 277 Va. 250, 268 (2009) (citing Lovelace v. Orange County Bd. of Zoning Appeals, 276 Va. 155, 158 (2008). In addition, whether the lawful nonconforming use was discontinued is also a legal issue which is reviewed *de novo*. Id.

ARGUMENTS

The Trial Court erred when it held that Archie had a lawful nonconforming use. Archie was illegally using 13065 Minnieville Road as an automobile junkyard without right or permission of the property owner. From 1987-1992, Archie did not own the property at 13065 Minnieville Road nor did he have permission to operate an automobile junkyard on the

property. Any use of 13065 Minnieville Road by Archie as an automobile junkyard without permission or right was an illegal use. Therefore, Archie cannot use an illegal use of 13065 Minnieville Road as a basis upon which to establish or continue a lawful nonconforming use.

In addition, the Trial Court erred by concluding that the nonconforming use was not discontinued for a span of two years. LMG discontinued the nonconforming use for more than two years when LMG ceased placing junk vehicles or parts on 13065 Minnieville Road when it purchased the property in September 1987, filed a lawsuit in 1989 that successfully and perpetually enjoined Archie from placing any junk vehicles on 13065 Minnieville Road, and did not place any junk vehicles for the duration of LMG's ownership of the property, ending in 1992.

I. THE TRIAL COURT ERRED WHEN IT HELD THAT ARCHIE HAD A LAWFUL NONCONFORMING USE TO CONTINUE AN AUTOMOBILE JUNKYARD ON 13065 MINNIEVILLE ROAD BECAUSE ARCHIE NEVER HAD THE LEGAL RIGHT OR PERMISSION TO CONTINUE TO USE 13065 MINNIEVILLE ROAD FROM 1987-1992 AS AN AUTOMOBILE JUNKYARD BECAUSE HE DID NOT OWN THE PROPERTY NOR DID HE HAVE PERMISSION TO USE THE PROPERTY TO STORE JUNK VEHICLES OR PARTS DURING THAT TIME PERIOD.

During the period of the time when LMG owned 13065 Minnieville Road, Archie had no legal right to continue placing junk vehicles or junk

parts on 13065 Minnieville Road. (JA at 215). LMG sued for and obtained a permanent injunction ordering Archie to discontinue the storing of junk vehicles and junk parts on LMG's property at 13065 Minnieville Road. (JA at 198-200). Since Archie had no legal right during that five-year period to place junk vehicles or parts, Archie cannot establish a lawful nonconforming use on the property because he was not legally permitted to continue the use and LMG discontinued the use. In fact, Archie was trespassing onto property which he did not own or have permission to occupy in order to continue the use of the automobile junkyard. This ruling by the Trial Court allows an individual who has no legal right to a property to trespass, and establish a lawful nonconforming use on a property even though the landowner has not granted permission to the individual to use the property. Therefore, it was legal error for the Trial Court to hold that Archie had a lawful nonconforming use to store junk vehicles and junk parts on 13065 Minnieville Road and the decision of the Trial Court should be reversed.

Prince William County Code Section 32-601.10(1) defines a nonconforming use as "any use that was lawful on the date of enactment of this chapter, or amendment thereto, which has been continued although otherwise rendered unlawful by such enactment or amendment." See also

Virginia Code § 15.2-2307. As a general rule, public policy does not favor the extension of nonconforming uses and in fact favors the elimination of nonconforming uses. City of Chesapeake v. Gardner Enters., 253 Va. 243, 248 (1997) (citing 8A Eugene McQuillin, *Municipal Corporations* § 25.184 (3d ed. 1994)); see also Prince William County Code Section 32-601.01. A nonconforming use is not consistent with the current zoning ordinance and therefore, nonconforming uses detract from the general comprehensive zoning plan. Gardner Enters, 253 Va. at 248. As such, nonconforming uses are disfavored by law. Id. (citing Construction of New Building or Structure on Premises Devoted to Nonconforming Use as Violation of Zoning Ordinance, 10 A.L.R.4th 1122, § 2[a] (1981)).

This Court has clarified the scope of nonconformities. In Board of Supervisors of Washington County v. Booher, 232 Va. 478 (1987), this Court held that a nonconforming use may not be established when the zoning ordinance already prohibits that use. Id. at 481-82. In Booher, the landowner filed a rezoning application to change the zoning of his property from A-2 to B-2 in 1975. Id. at 481. At that time, the landowner informed the Board of County Supervisors of his intent to use the property as an automobile graveyard. Id. at 479. While the Board agreed to rezone his property to B-2, an automobile graveyard was not a permitted use in the B-

2 zoning district. Id. at 479, 482. In October 1981, the zoning ordinance was amended to permit automobile graveyards in M-2 zoning districts. Id. at 480. The landowner attempted to rezone his property to M-2 and the Board denied that request. The Board instructed the landowner to discontinue the automobile junkyard on the property. Booher, 232 Va. at 480.

This Court concluded that it may have been possible that the Board intended to permit the landowner to operate an automobile junkyard when the landowner's request to rezone to the B-2 zoning district was approved; however, an automobile graveyard use was simply not permitted in that zoning district and therefore the use was *never* lawful. Id. at 481-82; see also Dick Kelly v. City of Norfolk, 243 Va. 373, 381-82 (1992) (holding that for a landowner to establish a valid nonconforming use, the use must be a "lawful use existing on the effective date of the ordinance.") Essentially, a landowner cannot use an illegal use to establish a lawful nonconforming use. See Dick Kelly at 381-82; Booher at 481-82.

However, this Court has further opined that the failure to abide by a particular zoning requirement, such as the failure to screen, is normally not a basis in which a nonconforming use terminates. Donovan v. Board of Zoning Appeals of Rockingham County, et al, 251 Va. 271 (1996). In

Donovan, this Court held that the failure to screen an automobile graveyard, which was a zoning ordinance requirement, could not be the basis for termination a nonconforming use. Id. at 275-76. This Court concluded that simply because a provision in the zoning ordinance required the automobile junkyard to be screened, failure to comply with that provision would not invalidate the nonconforming use. Id. at 275.

The current case is more analogous to Booher and Dick Kelly as compared to Donovan. In Booher and Dick Kelly, this Court held that in order to establish a lawful nonconforming use, the use must be *lawful* when it begins. Booher, 232 Va. at 481-82; Dick Kelly, 243 Va. at 381-82. In this case, while Archie began the use when it was legal to have an automobile junkyard on the property, it became illegal when Archie no longer had the legal right to use 13065 Minnieville Road as an automobile junkyard. (R. 60). Moreover, LMG's actions demonstrated its intent to abandon the nonconforming junkyard use on the property and not permit the continued use of their property as an automobile junkyard. Therefore, Archie was illegally trespassing in order to continue the automobile junkyard use.

When LMG owned 13065 Minnieville, LMG made it clear that it did not want the junk vehicles or parts on the property. LMG sued Archie and obtained a permanent injunction against him to prohibit Archie from storing

or placing junk vehicles on their property at 13065 Minnieville Road. (R. 322-23). Archie was knowingly placing the junk vehicles on LMG's property even though he knew it was not his property and LMG did not permit it because "[he] knew eventually [he] would get [the property] back and if [he] abandoned the use, then [he] would have lost the use." (JA at 94). As in Booher and Dick Kelly where the landowner was engaged in illegal behavior, Archie's behavior became illegal when the landowner (LMG) and the Prince William County Circuit Court (through a Court Order) made it clear that Archie was not permitted to store junk vehicles or parts on 13065 Minnieville Road and Archie continued to illegally store vehicles on the property.

This Court has held that the use must be legal in order to establish a lawful nonconforming use. See Dick Kelly at 381-82; Booher at 481-82. In this instance, Archie did not own 13065 Minnieville Road nor did he have permission to be on the property and therefore he had *no legal right* to establish, or attempt to continue, a lawful nonconforming use. His continued use of the property to store junk vehicles and parts was a trespass on property he had no legal right to occupy or use. Only LMG, as the landowner, had the ability to continue the lawful nonconforming use. However, LMG made it clear, through a permanent injunction issued by the

Prince William County Circuit Court, that it did not want to continue the storing of junk vehicles or parts on the property it owned. Therefore, since Archie had no legal right to engage in his behavior, he cannot establish or continue a lawful nonconforming use at 13065 Minnieville Road.

In Dick Kelly and Booher there was no legal right to engage in the nonconforming use because it was illegal behavior. In Donovan, the landowner had a legal right to engage in the nonconforming use and continue the use; in fact, the zoning ordinance never took away that legal right to engage in the nonconforming use because the failure to file a screening plan did not equate to the lawful nonconforming use becoming illegal. Donovan, 251 Va. at 276. Unlike Donovan, LMG and the Prince William County Circuit Court (through a Court order) made it clear that Archie had no legal right to engage in storing junk vehicles and parts on 13065 Minnieville Road and therefore, this situation is more analogous to the situation in Booher and Dick Kelly because Archie did not have the legal right to continue the use. (JA at 198-200).

Before the Trial Court, Archie cited Prince William County Code Section 32-601.11 as a basis to permit Archie's illegal activity of storing junk vehicles at 13065 Minnieville Road, even though the landowner, LMG,

did not permit this activity to be done on the property. Prince William County Section 32-601.11 states

> The nonconforming status of any nonconforming use, lot or structure shall adhere solely to the use of the land, and not to the owner, tenant, or other holder of any legal title to the property or the right to make use thereof.

This County Code section does not allow an individual to *trespass onto another landowner's property* to conduct a nonconforming use on the property when the landowner does not want to continue or permit the nonconforming use. This County Code section merely deals with situations when a landowner sells or conveys a particular property with a lawful nonconforming use. If a lawful nonconforming use exists when the landowner sells the property, the nonconforming use remains with the property; it does not move with the landowner when the landowner moves, i.e., the landowner cannot transfer the lawful nonconforming use to another property.

Therefore, the Trial Court adopted an erroneous rule of law when it held that Archie had no legal right to use the property but concluded that Archie still had a lawful nonconforming use. (JA at 215-16). This holding would allow an individual who has no legal right to a property to trespass, and establish or continue a lawful nonconforming use even though the landowner has not granted permission to the individual to use the property

and the landowner has taken steps to stop the use. In addition, this holding by the Trial Court is not consistent with this Court's decisions in Booher and Dick Kelly. As such, the Trial Court erred by concluding that Archie had a lawful nonconforming use and the decision of the Trial Court should be reversed.

II. THE TRIAL COURT ERRED WHEN IT CONCLUDED THAT THE NONCONFORMING USE WAS NOT DISCONTINUED FOR A PERIOD OF TWO YEARS BECAUSE DURING THE PERIOD OF LMG'S OWNERSHIP (1987-1992) LMG NEVER PLACED OR PERMITTED JUNK VEHICLES OR PARTS TO BE PLACED ON ITS PROPERTY.

The Trial Court also erred when it held that the nonconforming use was not discontinued for a period of two years. LMG ceased using the property as an automobile junkyard when LMG purchased the property in 1987 and did not conduct this use at any time during its entire ownership of the property from 1987-1992. Even if this Court holds that Archie's illegal use of 13065 Minnieville Road does not invalidate the nonconforming use, then LMG still discontinued or ceased the use for more than two years.

At issue here is Prince William County Code Section 32-601.21(1) and (2). Subsection (1) provides that, "[i]f any nonconforming use is discontinued for a period of two years, it shall lose its nonconforming status, and any further use shall conform to the provisions of this chapter."

Subsection (2) provides that, "[f]or the purposes of this section, cessation of a nonconforming use for the aforesaid period shall be conclusively presumed to establish discontinuance." This Court has previously held that "'zoning laws should be given a fair and reasonable construction in light of the manifest intent of the legislative body enacting them, the object sought to be attained, the natural import of the words used in common and accepted usage, the settling in which such words are employed, and the general structure of the ordinance as a whole.'" Patton v. City of Galax, 269 Va. 219, 229-30 (2005) (quoting Mooreland v. Young, 197 Va. 771, 775 (1956)). In addition, this Court also affords "'great weight' to the interpretation given [to] a zoning ordinance by the official charged with its administration. Adams Outdoor Adver., L.P. v. Bd. of Zoning Appeals, 274 Va. 189, 196 (2007) (citing Donovan, 251 Va. at 274).

In this instance, the Trial Court held that the discontinuance of the nonconforming use of the automobile junkyard at 13065 Minnieville Road began in November 1989, when LMG filed a lawsuit for a permanent injunction against Archie and the August 1991 agreement on damages was the ending date for the discontinuance. (JA at 215). As such, the Trial Court found that this was less than the two years required by Prince William County Code Sec. 32-601.21(1). (JA at 215-16). However, Archie failed to

present any evidence that LMG placed or stored any junk vehicles or parts on the property during its period of ownership from 1987-1992. (JA 160-61).

Under Prince William County Code Section 32-601.21(2), cessation of a nonconforming use for a two-year period shall be conclusively presumed to establish discontinuance. In this instance, when LMG purchased the property in September 1987, it ceased using the property as an automobile junkyard because LMG never placed any junk vehicles on the property nor permitted Archie to place any junk vehicles on the property. Archie, not the landowner (LMG), was the one continuing to illegally place junk vehicles and parts on LMG's property without LMG's permission. (JA at 94). Therefore, the cessation of the nonconforming use began when LMG purchased the property and did not place any junk vehicles or parts on the property nor permitted Archie to place any junk vehicles or parts on the property. As such, the Trial Court erred when it found that the nonconforming use was not discontinued for a period of two years and the decision of the Trial Court should be reversed.

CONCLUSION

An illegal use should never form the basis of a lawful nonconforming use. The Trial Court erred by holding Archie had a lawful nonconforming

use to 13065 Minnieville Road. In addition, even if this Court concludes that Archie's illegal use of the property still allowed him to establish or continue a lawful nonconforming use, then the use was discontinued or ceased for more than two years because LMG never placed nor permitted to be placed any junk vehicles on its property during its 5 year period of ownership. Due to these legal errors, the decision of the Trial Court that Archie had a lawful nonconforming use should be reversed and Judgment entered in favor of the Prince William County Board of County Supervisors.

Respectfully Submitted,

Prince William Board of County Supervisors

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CERTIFICATE OF SERVICE

I hereby certify that Rule 5:26 of the Supreme Court of Virginia has been complied with and pursuant to Rule 5:26(e), a PDF version of this brief has been filed through VACES and three paper copies delivered to the Clerk's Office. An electronic version has also been delivered to opposing counsel via email at jhickman@comptonduling.com and hsteele@comptonduling.com on this 24th day of January 2018.

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