

BEFORE THE BOARD OF MULTNOMAH COUNTY COMMISSIONERS

In the Matter of the Appeal of the)	
Application of Interstate)	CASE NOS. CS3-92
Mobilephone Company dba Cellular)	and HV2-92
One for Approval of Conditional)	
Use to Install a Cellular Telephone))	AMENDED FINDINGS OF #92-50A
Transmitter and for Approval of)	FACT, CONCLUSIONS AND
Variances to Permit reduced Front)	ORDER
and Side Yard Setbacks)	

I. Applicant and Nature of Request. The applicant in this matter is Interstate Mobilephone Company dba Cellular One (Applicant). The applicant requested the following approvals:

A. Conditional use to permit a radio and television transmission tower in the R-10/Community Service (CS) Zoning District.

B. Variance to permit a twenty-five (25) foot (south) front yard setback and an eight (8) foot (west) side yard setback where a thirty (30) foot front yard setback is required and a twenty (20) foot side yard setback is required, respectively.

II. Relevant Criteria. The relevant criteria in this case are Multnomah County Code (MCC) Sections 11.15.7035(B), (D), (E), and (F) and Comprehensive Plan Policies 13, 14, 16, 19 and 31 for the conditional use and MCC Section 11.15.8505 for the variances.

III. Conclusions

A. Conditional Use. The Board concludes the applicant presented substantial evidence demonstrating compliance with relevant approval criteria. Findings of Fact and Conclusions discussing the conditional use are contained in Section V.

B. VariANCES. The Board concludes the applicant presented substantial evidence demonstrating compliance with relevant approval criteria. Findings of Fact and Conclusions discussing the variances are contained in Section VI.

C. In addition to these findings, the Board adopts, and incorporates herein by reference, the staff report dated January 6, 1992, as well as the Planning Commission order.

IV. Issues Considered on Appeal. On February 3, 1992, the Planning Commission approved the applicant's requests by a 6 to 2 vote with 1 abstention. The opponents appealed the approval to the Board. MCC § 11.15.8270 provides for an "on the record" hearing before the Board of County Commissioners (Board) of an appeal from a Planning Commission decision. The MCC also allows the Board to hear new evidence. Opponents of this application petitioned the Board to hear new evidence. The Board rejected the request and heard the appeal on the record.

Review on the record resulted in rejection of certain additional exhibits submitted by the appellant. These documents were not shown to have been a part of the file of this case nor were they present during the hearing at the Planning Commission. A map, based upon information from the excluded documents, was also not permitted to be used during the appeal argument.

V. Findings for the Conditional Use. The proposal is consistent with the applicable MCC and Comprehensive Plan criteria and policies based on the following findings.

MCC.7035(B) contains approval criteria for new towers located in urban residential areas which require the following:

A. New towers are not permitted in urban residential districts unless the applicant makes a good faith effort to substantially demonstrate that an existing or planned tower approved after August 19, 1992 cannot accommodate the applicant's proposed antenna transmitter. MCC.7035(B)(1).

The applicant submitted evidence discussing the basic elements of cellular telephone technology. A "cell site" is the basic building block of a cellular telephone system. When a particular cell site reaches its design capacity for handling telephone communications in an efficient manner, a new cell site must be established in order to relieve the overloading. The solution to overloading is not simply a taller tower or increased power output on an existing tower but rather to reduce the power or height at that existing cell site and create a new cell site.

The mature cellular system operates most effectively when utilizing low power outputs and antenna heights of between 75 and 100 feet. Some of the applicant's facilities located at higher elevations have been or will be shortly taken off the air because they interfere with the operation of other cell sites in the system. An example of such a facility is the cell site on the KOIN tower.

Terrain also creates reception problems for cellular telephone users. Additional cell sites are often needed in hard-to-service areas due to terrain, such as this area.

The applicant's engineers have evaluated the problem area which is the area extending from the tunnel for S.W. Canyon Road to the Sylvan area near U.S. Highway 26 and established what is termed a "search circle." The search circle is approximately a one-mile radius to deal with the problem area. In order to effectively serve the cellular telephone system, the new cell site must be within this search circle to eliminate the current technical problems.

Applicant asserts no existing towers within the search circle can be used by the applicant nor do any existing buildings, water towers or other structures of sufficient height meet the cellular system's needs. The applicant contacted property owners in the area to see if a lease can be negotiated. The applicant then "field checked" each proposed site. The applicant selected the site at the Racquet Club which is within the search circle area, is of sufficient height and at a proper location to serve the problem area within that search circle and meets the need of the cellular system.

Only three towers have been approved in Multnomah County since August 19, 1982. These are located at 160 N.W. Miller Road, 17290 N.W. St. Helens Road and 1468 N.E. Brower Road. None of these are within the applicant's one-mile radius search circle and, therefore, would not alleviate the problem this cell site is intended to remedy.

The applicant testified that this small segment is a critical part of the system in order to serve cellular telephone

users between the tunnel and the Sylvan area.

The Board concludes that the applicant has made a good faith effort to substantially demonstrate that no existing or planned tower approved after August 19, 1982, can accommodate the applicant's proposed cellular telephone transmitter.

Opponents argued that commercial sites were available within one mile to serve as a cell site. Evidence in the record shows the applicant has been looking for a site to serve this problem area for approximately three years. The applicant examined sites at Sylvan, deeper in the valley and a site at the Zoo. The applicant determined none of those sites were sufficient to meet applicant's service needs which this cell site will meet.

The applicant's engineer testified the Sylvan Commercial area at U.S. Highway 26 is not a viable site for the tower because it could not serve users to the east. That is the purpose of the proposed cell site. Moreover, a location at Sylvan is not desirable because signals would "propagate" out into the Beaverton/Aloha area. See Transcript of Planning Commission hearing at 25-26. The Board concludes that the commercial sites referenced by the opponents are not suitable alternatives to this site.

B. MCC.7035(B)(2) prohibits new transmission towers on lots in urban residential districts where no similar tower exists unless the applicant makes a good faith effort to substantially demonstrate that the proposed tower cannot be located on the site of an existing or planned tower approved after August 19, 1982.

For the reasons described under A., above, the Board concludes that the applicant has made a good faith effort to substantially demonstrate and has substantially demonstrated that the proposed tower cannot be located on the site of an existing or planned tower.

C. MCC.7035(B)(3) applies to non-urban sites. This site is included in an urban residential zone, the R-10 District. The Board concludes that this section is not applicable to the application.

D. MCC.7035(B)(4)(a)(i) requires that a proposed tower be of a size and shape sufficient to provide an adequate setback from the base of the tower to a property line abutting an urban residential district to public property or public street. Setbacks shall be sufficient to provide an adequate vegetative, topographic or other buffer as provided in MCC.7035(B)(7) and (11).

MCC.7035(B)(7) concerns visual impact. The applicant is required to demonstrate that the tower will have the least visual impact on the environment, taking into consideration technical, engineering, economic and other pertinent factors.

The applicant submitted evidence showing that towers of the height proposed are usually a galvanized or silver paint unless within a substantial stand of trees. In that event, the tower shall be painted green from the base to the tree line. Either will satisfy the criteria because the monopole is not especially visible given its location and the surrounding trees. The color will be specified at Design Review.

Evidence shows the tree canopy from the surrounding trees will hide much of the tower, especially during the summer months. Moreover, the applicant can and is required to go through Design Review to select the most appropriate paint for the tower. Both the monopole and antenna can be painted any color without affecting operation of the facility. Moreover, the cell site location and tower height are dictated by the technical and engineering needs of the cellular telephone system. We find that visual impact is minimized to the extent these factors will allow.

MCC.7035(B)(11) requires landscaping at the perimeter of property which abuts streets, residences, public parks or areas with access to the general public, other than the owner of such adjoining property. Although the area to be leased by the applicant abuts S.W. Canyon Court, a public street, the proposed cell site is 150 feet from the improved roadway. This distance is explained by the large slope within the right-of-way. The applicant has indicated it will work with the county Design Review to install appropriate landscaping as required. Design Review will be adequate to insure this criteria is satisfied.

The Board concludes that the proposed condition of approval requiring Design Review approval of detailed construction and landscaping plans for compliance with all applicable standards will satisfy the above criteria because while tower height and location are controlled by engineering and technical requirements, the tower will have the least visual impact through the use of appropriate paint and use of existing and additional vegetation.

Design Review will ensure that these standards are met prior to the tower's installation and the Board concludes that this meets the code's requirements.

E. MCC.7035(B)(4)(a)(ii) requires that privacy of adjoining residential property be preserved. The applicant submitted evidence showing a substantial number of trees and open space will separate the monopole from the nearest adjoining residential properties. The uses are separated by about 250 feet. Moreover, only about two visits to the site will be made each month. The Board concludes the monopole will not interfere with the privacy now enjoyed by adjacent residential properties.

F. MCC.7035(B)(4)(a)(iii) requires adjoining property to be protected from the potential impact of tower failure and ice falling from the tower by being large enough to accommodate such events based on the engineer's analysis submitted with the application.

The proposed monopole is designed to withstand sustained winds over 100 mph. Exhibit 3 contains the manufacturer's specifications for the monopole. The monopole's ability to sustain extreme winds has been certified by a registered engineer.

The monopole's proposed height, 96 feet, is less than the distance to any residential building. The setbacks of the tower meet the 20% of tower height requirement in MCC.7035(B)(4)(b)(ii) because it is 20 feet from the nearest property. (See Section H, below.) The proposed tower is to be

located in the southwest corner of the subject property where it will be farthest from any residential use in the immediate area. The Board finds this criteria is met.

The Board concludes that the tower's size and shape is such that adjoining property will be protected from potential tower failure and ice falling based upon evidence from the applicant's engineer. The engineer certified that ice fall would be limited to within 10 feet of the tower base and the tower base is 20 feet from the nearest property.

G. MCC.7053(B)(15) requires compliance with MCC .7035(F). MCC.7035(F) requires the public to be protected from non-ionizing electromagnetic radiation (NIER) in excess of the standard contained in MCC.7035(F)(1).

The applicant submitted Exhibit 4 showing the calculation prepared by its engineers which establishes the measurement at the nearest lot line. This measurement is calculated to be 1.553 uw/cm² (0.001553 mw/cm²) and is 0.050 uw/cm² (0.00005 mw/cm²) at the closest dwelling which is 250 feet to the northwest. The engineer's certification shows the tower's output to be well below the maximum required by code. As Exhibit 5 shows, the maximum output is 666 times less than the output of a microwave oven. The Board finds this criteria is satisfied.

H. A cellular tower site must be of sufficient size. MCC.7035(B)(4)(b). It is presumed to be of sufficient size when 1) it meets the requirements described in MCC.7035(B)(4)(a)(iii) and (iv), above, 2) provides a setback equal to twenty percent

(20%) of the height of the tower to any property line abutting an urban residential district, public property or public street and 3) provides a setback equal to or exceeding the rear yard setback required for the adjoining property where the adjoining property is not in an urban residential district nor public property nor a public street.

The evidence submitted by the applicant shows the proposed tower meets the requirements of MCC.7035(B)(4)(a)(iii) and (iv), above.

The final requirement [MCC.7035(B)(4)(b)(iii)] applies only when a property is not in an urban residential district nor public property nor a public street. The adjoining property at the rear yard is in an urban residential district. The Board concludes that this section is inapplicable.

I. MCC.7035(B)(4)(d) requires that structures and uses associated with the transmission use, other than the tower itself, must be located to meet the setbacks required in MCC.7025. MCC.7025 requires a 20-foot side yard setback and a 30-foot front yard setback. The applicant has requested variances to these setbacks. This is discussed in Section VI.

J. MCC.7035(B)(5) requires that a guyed structure be of a size and shape sufficient to provide an adequate setback from a guy anchored to any property line abutting an urban residential district, public property or public street in addition to the size required in (4), above. A setback shall be adequate to provide a vegetative, topographic or other buffer sufficient to obscure view

to the anchor from such adjoining properties.

The applicant indicates this proposal is a self-supporting monopole without any guys. The Board finds this section is inapplicable.

K. MCC.7035(B)(6) requires all new towers to be designed to structurally accommodate the maximum number of additional users technically practicable. In particular, a cellular transmission tower such as this must accommodate at least one 2-way radio antenna for every 10 feet of the tower or at least one 2-way radio antenna for every 20 feet of the tower and at least one microwave facility.

The Board concludes that the purpose of this MCC requirement is to minimize tower proliferation. In this particular instance, evidence submitted by the applicant shows the tower is structurally capable of supporting additional users. The code also requires that towers be built to the lowest height sufficient to serve the applicant's needs, and this may reduce the chances for shared use in some circumstances. Nevertheless, the Board finds the evidence submitted by the applicant shows the proposed monopole will structurally be capable of accommodating other users. The evidence shows the proposed monopole could handle the required additional users. See page 38 of the Planning Commission Transcript for testimony by Ken Seymour, Engineering Manager for applicant. The applicant's testimony before the Planning Commission shows that the applicant is willing to enter into good faith negotiations with any potential user and the applicant has

demonstrated that its ground lease will allow shared use of the tower.

The Board concludes the applicant has sufficiently demonstrated the tower is structurally capable of accommodating additional users. The Board also finds the required conditions of approval in MCC.7035(B)(6)(f) are included in the decision.

L. MCC.7035(B)(7) requires the applicant demonstrate the tower have the least visual impact on the environment taking into consideration technical, engineering, economic and other pertinent factors. Towers 200 feet or less in height must have a galvanized finish or be painted silver. In heavy vegetation areas, towers must be painted green from the base to the tree line with the remainder painted silver or galvanized finish. Further, such towers must be illuminated as required by the Oregon State Aeronautics Division. Finally, towers must be the minimum height necessary to provide parity with existing similar tower-supported antenna and shall be free standing where the negative visual effect is less than would be created by use of a guyed tower.

Evidence shows the heavily wooded site will minimize visual impact. Moreover, the monopole will be painted to further reduce visual impact.

The applicant will comply with the color decided during Design Review.

The Oregon State Aeronautics Division requires illumination of the monopole. The applicant will comply with the requirement.

The applicant's proposed tower is a self-supporting monopole. It is at a height which is the minimum necessary to satisfy the technical aspects of the proposal. The Board concludes the above requirements are met.

The Board also concludes the ordinance's intent is to approve, where appropriate, towers above or below 200 feet in height as long as they are the lowest height useable by the applicant. The Board finds that the MCC's intent is not to limit towers to 35 feet in height as specified in the R-10 Zoning District. The Board finds that such a limitation would be inconsistent with the purpose of MCC.7035 and inconsistent with the purpose of allowing transmitting towers.

M. MCC.7035(B)(8) requires automated equipment at the tower site to the greatest extent possible to reduce traffic and congestion.

According to applicant no one will be at the site on a daily basis. The cell site will be operated by remote control from the applicant's main offices in downtown Portland. Based on system-wide averages, the applicant estimates two maintenance checks per month will be performed on this cell site. A technician using a panel-type van will be at the site for a few hours to perform routine maintenance on the equipment at each maintenance check. The applicant has had no complaints from similar sites regarding congestion or interference with other electronic equipment or noise complaints.

N. MCC.7035(B)(9) requires the applicant to provide a minimum of two parking spaces at the cell site.

The applicant will provide one parking space adjacent to the cell site and another parking space in the Racquet Club overflow parking area. The applicant indicated only one van usually arrives for the scheduled periodic maintenance. The Board concludes that the minimum number of parking spaces required have been provided.

O. MCC.7035(B)(10) requires that native vegetation be preserved to the greatest extent practicable on the site. The applicant must submit a site plan showing existing significant vegetation to be removed and that to be replanted to replace the lost vegetation.

The applicant's proposed monopole and adjacent facilities are located to preserve the large trees existing on the area. The applicant will install landscaping to augment native vegetation as required through the Design Review process. Finally, Design Review, which is a prerequisite to building permit issuance, will assure compliance. The Board concludes the applicant has minimized loss of native vegetation to the greatest practical extent and that Design Review will ensure not only retention of native vegetation but replacement of that lost.

P. MCC.7035(B)(11) requires the applicant to provide a buffer area of twenty-five (25) feet of landscaping beginning at the property line containing at least one row of Evergreen shrubs spaced no more than 5 feet apart. One row of Evergreen trees or

shrubs not less than 4 feet in height at the time of planting and spaced not more than 15 feet apart must also be provided. In lieu of these standards, the applicant may use alternative detail plan and specifications to screen and buffer the tower and its accessory uses.

The amount of native vegetation on the site and the height of the trees near the monopole provide an adequate buffer. The facility should not be visible from existing roadways or residences. The applicant has proposed no additional screen. The staff concluded that the monopole and small building will be well screened from the surrounding properties by existing vegetation. Moreover, Design Review will ensure maintenance of the screening. The Board concludes this criteria is met.

Q. MCC.7035(B)(12) requires that accessory uses be limited to only such buildings and facilities necessary to the transmission function.

The applicant proposes only the monopole and a small building to house the electronic equipment. The Board concludes that this section is met.

R. MCC.7035(B)(13) requires that the proposed tower must comply with Comprehensive Plan Policies No. 13 (Air and Water Quality and Noise Level), No. 14 (Development Limitations), No. 16 (Natural Resources), No. 19 (Community Design), No. 31 (Community Facilities) and other plan policies identified by the Planning Commission.

1. Policy No. 13.

The proposed tower does not emit noxious materials into the air, does not have any impact on water quality nor does it generate noise. The Board concludes that the proposed use complies with Policy No. 13.

2. Policy No. 14.

The site contains no known development limitations. No party submitted any substantial evidence showing the site contains any development limitations. The applicant will prepare a site analysis prior to placement of the monopole and building to assure that development limitations are neither present nor exacerbated. Such information will be submitted during the building permit process. The staff report found this policy to be met. The Board concludes that Policy No. 14 is met.

3. Policy No. 16.

The proposed cell site contains no natural resource areas. The Board finds and concludes this policy is satisfied.

4. Policy No. 19.

The proposed monopole is designed to have minimal impact. The height of the monopole is the minimum required to be an effective cell site and to serve the problem area identified in the search circle radius. The tower's painting, minimal lighting and landscaping will all serve to minimize potential conflicts between the tower and the surrounding uses. Moreover, the Design Review process will ensure further compliance

with this policy. The Board concludes that Policy No. 19 is met.

5. Policy No. 31.

The proposed facility does not require water or sewer service. All other needed utilities are available at the site. Public funds are not required for services to this site. The evidence is that the delivery of public services such as emergency response and Sheriff's patrols will be benefited by enhanced cellular service which this site will provide. The Board concludes that Policy No. 31 is met.

6. Additional Policies. The Board finds no additional policies have been identified as relevant to this proposal.

S. MCC.7035(B)(14) requires agency coordination. The applicant submitted a letter from the Federal Aviation Administration indicating that the monopole does not require notice to the FAA nor does it require markings and lighting. The applicant also submitted a letter from the Oregon State Aeronautics Division that the proposed monopole is to be lighted. The final color of the lighting can be determined in Design Review. Finally, the applicant submitted a copy of its FCC license authorizing cellular telephone services in the Portland-Vancouver area. The Board finds the agency coordination requirement met.

VI. Findings for the Variances.

The applicant requested a variance to the required front yard (south) from 30 feet to 25 feet and a variance in the required side yard (west) from 20 feet to 12 feet. The variances will allow

placement of the equipment building as shown on the site plan. One of the requested variances does not exceed twenty-five percent (25%) of the dimensional standard of the MCC and could be treated as a minor variance. The applicant, however, elected to include consideration of both variances for reduction of the required yards as part of the conditional use proceedings rather than to be considered separately as allowed by the Zoning Code. The variance criteria are discussed below:

A. The applicant must demonstrate that a circumstance or condition applies to the property or intended use that does not generally apply to other property in the same vicinity or district. Such circumstances may relate to size, shape, topography of the property or location or the size of the physical improvements on the site or nature of the use as compared to surrounding uses.

The first condition relates to the size and shape of the property. These variances would not be necessary but for the irregular shape of the right-of-way for S.W. Canyon Court taken by the government. The map of the area illustrates the irregular shape of the publicly controlled land and the resulting unusual "bite" taken out of the lot. If it were not for this unusual lot shape, there would be sufficient yard area to satisfy the setback requirements. In fact, the structure will actually be in excess of 50 feet from the street improvement. Other properties in the area are not affected by this condition.

Other conditions creating the need for the variances relate to the topography of the property and the location of

physical improvements on the site. Much of the site is sloping. By necessity, the main clubhouse and parking lots are located on the flat portion of the land. The topography limits flexibility in locating the building and parking lot. The location and size of these existing physical improvements prevent placement of the current application at a location satisfying the setback provisions.

Either of these conditions alone, lot shape or physical improvements on the site, would satisfy the variance criteria.

Petitioner claims that the case of Moore v. Clackamas County, 350 Or App 39, 580 P2d 583 (1978) precludes approval because the case prevented location of buildings from serving as the basis for a variance. The County code is substantially different from the Clackamas County code which does not specifically authorize consideration of the location of physical improvements. See 580 P2d at 585, n.1. The County code clearly intends to permit greater flexibility than the Clackamas County. In addition, Moore indicated that the applicant had insufficient land. Here, the amount of land is sufficient. Finally, Moore found a self-created hardship. The Multnomah County code does not address self-created hardships.

Moreover, the shape of the lot alone establishes the basis for a variance, particularly since the public created the conditions preventing the applicant from meeting the standard setback requirements.

The Board concludes the applicant has demonstrated a circumstance or condition applies to this property and the intended use that does not generally apply to other property in the same vicinity or district. No other property in the area has the same unusual shape problem or comparable locational issues involving physical improvements.

The Board concludes that this variance criteria is met.

B. The zoning requirement would restrict the use of the property to a greater degree than it restricts other properties in the vicinity or district.

Other properties in the vicinity or district have already been granted variances from the required setbacks. The setbacks requested by the applicant merely bring it into conformance with the pattern already established in the area. Moreover, the building location satisfies the code's side yard setback requirements for surrounding properties which is 10'. It also satisfies the setbacks for the underlying zone on the property. The setback for the underlying zone for the property is 30' which is met.

C. The variance must not be materially detrimental to the public welfare or injurious to property in the same vicinity or district in which the property is located, or adversely affect the appropriate development of adjoining properties.

Existing vegetation and location of the monopole on the Racquet Club site will minimize any impacts on the surrounding

area. Moreover, Design Review will ensure that visual impacts are further minimized.

Opponents argued the cell site would have adverse health effects on the neighborhood. Opponents failed to present any reliable or substantial facts or explanation of these health concerns. The applicant has sufficiently demonstrated that its proposed monopole and transmitter will be well below all county requirements pertaining to health and interference. The transmitter will be a low-power (100 watt maximum) facility.

The Board concludes that this variance criteria is met.

D. The variance will not adversely effect the realization of the comprehensive plan nor will it establish a use which is not listed in the underlying zone. The cellular tower is a permitted use in the CS overlay in the R-10 zone. The Board has previously concluded that the relevant comprehensive plan policies are met.

VII. Order and Conditions of Approval.

It is ordered by the Board of County Commissioners of Multnomah County that the decision of the Planning Commission in Case Nos. CS3-92 and HV2-92 is hereby affirmed and the application is approved.

The application is approved subject to the following conditions:

E. The applicant shall provide detailed development plans to Design Review for review and approval. Those plans shall

include, in addition to those items required by MCC.7035(A)-(G), specifics of:

1. The materials and colors of the electronic building;

a. The provisions for maintenance of vegetative screening including the maintenance of current screening and additional screening for the structure, fence and monopole subject to approval in Design Review.

b. The details of erosion control for any excavation and grading;and

c. Fence materials and colors.

2. The applicant shall:

a. Record the letter of intent required in MCC.7035(D)(5) in Miscellaneous Deeds Records of the Office of the County Recorder.

b. Respond in a timely, comprehensive manner to a request for information from a potential shared use applicant required under MCC.7035(B)(1) and (2).

c. Negotiate in good faith for shared use by third parties.

d. Allow shared use where the third party seeking such use agrees in writing to pay reasonable, pro rata charges for sharing, including all charges necessary to modify the tower and transmitters to accommodate shared use, but not total tower reconstruction, and to observe whatever technical

requirements are necessary to allow shared use without creating interference.

e. Willful, knowing failure of an owner whose tower was approved after the effective date of Ordinance 330, to comply with the requirement of (a) through (d) above shall be grounds for suspension or revocation of the Community Service designation. Following report of such failure, the Planning Director shall schedule a public hearing in the manner provided in MCC.8290 and .8295 to determine whether the CS designation should be suspended or revoked.

3. Such conditions shall run with the land and be binding on subsequent purchasers of the tower site.

This Order was presented to and adopted by the Board of County Commissioners of Multnomah County.

ADOPTED this 14th day of May, 1992.



By Gladys McCoy
Gladys McCoy, Chair
Multnomah County, Oregon

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