No. 409PA15 THIRD DISTRICT

THE SUPREME COURT OF NORTH CAROLINA

****

GREGORY P. NIES and DIANE S. NIES, Plaintiffs, v. TOWN OF EMERALD ISLE, a North Carolina Municipality, Defendant.	)))))))))	From Carteret County COA 15-169

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BRIEF AMICUS CURIAE OF CIVITAS INSTITUTE CENTER FOR LAW AND FREEDOM IN SUPPORT OF PLAINTIFFS-APPELLANTS

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INTRODUCTION

North Carolina has long protected private property rights. These rights include the ability to exclude non-owners from one's land. In coastal areas, this right of exclusion is subject to the public trust — meaning that the public may access certain portions of private beaches. However, this public trust doctrine has never been extended to include private, dry sand beaches in North Carolina.

The Defendant has argued, and the Court of Appeals agreed, that the public trust doctrine in North Carolina now applies to private, dry sand beaches. This is

incorrect. North Carolina's public trust doctrine is a creature of the Anglo-American common law, and as such it only applies to coastal lands below the mean high water mark. This doctrine may only be modified by an act of the General Assembly, and no such modification has occurred. The Court of Appeals opinion is therefore in error, and must be reversed.

I. THE STATE OF NORTH CAROLINA PROTECTS THE RIGHT TO OWN, MAINTAIN, AND EXCLUDE OTHERS FROM PRIVATE PROPERTY.

a. North Carolina's protections for private property are rooted in the Anglo-American common law.

The State of North Carolina has long protected the right to own, maintain, and exclude others from private property. The State's first Constitution, completed in 1776, provided in its "Declaration of Rights" that "no freeman[1] ought to be...disseized of his freehold liberties or privileges...or deprived of his life, liberty, or property, but by the law of the land." N.C. Const. art. I § 12 (1776). This provision was paralleled by similar provisions in the constitutions of other states, and in the federal Constitution that was ratified eleven years later. *See, e.g.*, S.C. Const. art. XLI (1778); Pa. Const. art. VIII (1776); U.S. Const. amend. V.

[1] This reference to freemen contemplated slavery. The existence of slavery was obviously a gaping hole in the idea of universal rights to private property (or anything else). It is unfortunately beyond the scope of this brief to analyze the extension of private property rights to all North Carolinians.

This common recognition of the importance and rights surrounding private property was not the result of some mental osmosis amongst the thirteen original states, nor was it the product of a sudden decision on the part of colonists to elevate private property to esteemed status. Rather, this common recognition was, like tea, imported into the American colonies from England. British lawyers had for years seen property rights as a fundamental tenant of English law, and the common law had long provided that in order to take a person's property, a state actor had to provide that person with compensation. For example, the Magna Carta provided in clause 28 that "[n]o constable or other bailiff of ours shall take corn or other provisions from anyone without immediately tendering money therefor, unless he can have postponement thereof by permission of the seller." Magna Carta of 1215 cl. 28.

This requirement that immediate payments be made for government expropriations became more robust as the power of the King waned over the centuries. By the time of the French-Indian War, the English Crown was bound by statute to pay for any property taken from private citizens. Reflecting on this period of history, the English House of Lords noted in 1920 that:

> In...1757, we found during the [Seven Years' War] land had actually been taken, that extravagant claims were feared, and that is followed by a statutory provision for vesting the lands taken in trustees till the

> price may be paid as fixed by assessment by jury, and then on payment the trustees are to hold for His Majesty.

Attorney-General Appellant; and De Keyser's Royal Hotel, Limited Respondents, [English House of Lords 1920] UKHL 1, [1920] AC 508. The concept that private property was protected from uncompensated seizure by the State thus predated the existence of the State of North Carolina.

b. North Carolina continues to embrace the Anglo-American tradition of protecting private property.

Anglo-American private property rights survive in North Carolina law. A person in our State cannot be "deprived of his...property" unless such deprivation is carried out in accordance with the "law of the land." N.C. Const. art. I § 19. This "law of the land" clause is "synonymous with" the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Tri Cty. Paving, Inc. v. Ashe Cty.*, 281 F.3d 430, 436 (4th Cir. 2002). However, decisions of federal courts interpreting the federal due process clause, "while persuasive, are not binding upon the North Carolina Supreme Court in interpreting the North Carolina Constitution's law of the land clause." *State ex rel. Util. Comm'n v. Edmisten*, 294 N.C. 598, 610 (1978), *citing Horton v. Gulledge*, 277 N.C. 353 (1970). North Carolina therefore provides a form of due process to property owners similar to, but distinct from, federal due process. This state constitutional due process right includes a guarantee against uncompensated takings by the State that is "materially

indistinguishable" from a takings claim under the Fifth and Fourteenth Amendments of the United States Constitution. *Sansotta v. Town of Nags Head*, 97 F. Supp. 3d 713, 728 (E.D.N.C. 2014).

Private property rights are by no means convenient for governments. In fact, they are by their very nature *inconvenient* for governments. As noted, the English common law historically required the King to pay a fee if he wanted to seize private property. *See Attorney-General Appellant; and De Keyser's Royal Hotel, Limited Respondents.*, [English House of Lords 1920] UKHL 1, [1920] AC 508 In American law, a government actor may seize private property only if (1) the seized property will be used for a public purpose and (2) the property owner is given "just compensation." *Brown v. Legal Found. of Washington*, 538 U.S. 216 (2003). These and other requirements of due process "[give] a degree of predictability to the legal system." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

Sometimes, governments attempt to circumvent the inconvenience presented by private property by simply refusing to acknowledge that they have taken property, even when they clearly have. Here in North Carolina, the Department of Transportation faced the inconvenience of actually purchasing property from landowners in order to predictably plan for future interstate construction. *Kirby v. N. Carolina Dep't of Transp.*, 769 S.E.2d 218, 235 (N.C. Ct. App. 2015) *appeal dismissed, review allowed*, 775 S.E.2d 829 (N.C. 2015). The Department of

Transportation thought it would be easier to simply designate future interstate corridors, mandate numerous restrictions on development within these corridors, and then act as though no taking had occurred. Id. The North Carolina Court of Appeals found that, contrary to DOT's claims, the corridor designations and restrictions therein on the use of property constituted a taking. Id.

The case at hand, like *Kirby*, involves a state actor attempting to rewrite both history and longstanding legal doctrine in order to avoid its obligation to respect private property rights. The Town of Emerald Isle (hereinafter the "Town") has essentially claimed that the common law public trust doctrine, as adopted by North Carolina, gives municipalities rights in private dry sand beaches. By doing so, it can pretend that it is not taking the Plaintiffs' dry sand beach property. The Town's legal theory is flawed, as is made clear by an examination of that doctrine's history. The Court of Appeals decision is therefore in error and must be reversed.

II. NORTH CAROLINA'S PUBLIC TRUST DOCTRINE LIMITS COASTAL PROPERTY RIGHTS ONLY TO THE EXTENT PROVIDED BY THE ANGLO-AMERICAN COMMON LAW.

a. The common law public trust doctrine is distinct from its civil law counterpart.

The public trust doctrine is a "matter of state law, subject...to the federal power." *PPL Montana, LLC v. Montana*, 132 S. Ct. 1215, 1235 (2012). There are two frameworks within which states have adopted and applied the public trust

doctrine. The first is the Anglo-American common law, while the second is the Justinian (Roman) civil law.

The Anglo-American common law traces its roots to England. There, the title to tidal lands was "deemed to be vested in the king as a public trust, to subserve and protect the public right to use them." *People v. New York & S.I. Ferry Co.*, 68 N.Y. 71, 76 (1877). The King himself was subservient to this doctrine, and if he were to grant a private title in a tidal region, that title would nonetheless be "subject to the paramount right of public use of navigable waters, which he could neither destroy or abridge." Id. At common law, public trust rights ended at the mean high water mark, which lies "between [the] ordinary high and low-water mark" and is established "the daily tides['] ebb and flow." *United States v. Pacheco*, 69 U.S. 587, 590 (1864). This left private, dry sand beaches outside the reach of public trust rights.

The common law public trust doctrine is distinct from its counterpart under the civil code, which historically considered "[t]he shore of the sea" to extend to "the point attained by the highest tide in winter." The Enactments of Justinian, Book II, Title I. Concerning the Division of Things § 3. American courts have recognized that the common law public trust doctrine and its civil law counterpart are two distinct frameworks. *See Luttes v. State*, 324 S.W.2d 167, 191-92 (Tex. 1958) (explaining that the boundary between the State-owned submerged tidal

lands (held in trust for the public) and coastal property that could be privately owned was the "mean higher high tide" line under Spanish or Mexican grants and the "mean high tide" line under Anglo-American law).

Some American states do operate within the civil law framework, which applies when land traces to a sovereign that followed that law — such as where the land comes from a Spanish land grant, as Spain followed Justinian (Roman) civil law instead of common law. *See, e.g.*, *Doerr v. Mobil Oil Corp.*, 774 So. 2d 119, 128 (La. 2000), *opinion corrected on reh'g*, 782 So. 2d 573 (La. 2001) (Distinguishing a Civil Code jurisdiction from one that operates under the Anglo-American common law). However, North Carolina is not one of these civil law states. N.C.G.S. § 4-1.

b. North Carolina, a common law state, has adopted the common law public trust doctrine, and therefore provides greater protections for coastal property rights than civil law states.

North Carolina is not a civil law state. It is a former English colony, and has further explicitly adopted "so much of the common law as is not destructive, or repugnant to, or inconsistent with, the freedom and independence of this State," except for those portions of the common law that have been "abrogated, repealed, or become obsolete." N.C.G.S. § 4-1. The United States Supreme Court has confirmed that the high water mark boundary for purposes of the common law Public Trust Doctrine is the mean high water mark—*not* the extreme high water

line or winter high water mark. *See Shively v. Bowlby*, 152 U.S. 1, 13 (1894) (citations omitted), *see also Borax Consol., Ltd. v. Los Angeles*, 296 U.S. 10, 22-23 (1935) (citations omitted). That Court has found that under the English common law "it has been treated as settled that the title in the soil of the sea, or of the arms of the sea, below **ordinary** high-water mark, is in the king...and that this title, jus privatum, whether in the king or in a subject, is held subject to the public right, jus publicum, of navigation and fishing." *Shively*, 152 U.S. at 13 (1894) (citations omitted)(emphasis added). The United States Supreme Court has in fact explicitly found that the "high water mark" contemplated by the Anglo-American Common Law is *not* a physical mark of any kind, but rather a line determined over the passing of time:

> The tideland extends to the high water mark. This does not mean...a physical mark made upon the ground by the waters; it means the line of high water as determined by the course of the tides. By the civil law, the shore extends as far as the highest waves reach in winter. But by the common law, the shore is 'confined to the flux and reflux of the sea at ordinary tides.' It is the land 'between the ordinary high and low-water mark, the land over which the daily tides ebb and flow. When therefore, the sea, or a bay, is named as a boundary, the line of ordinary high-water mark is always indented where the common law prevails.'

Borax Consol., Ltd., 296 U.S. at 22-23 (1935) (citations omitted). The Anglo-American common law therefore uses the average of the high tides over time to

establish the "high water mark," and this is distinct from the civil law system of using the *highest* tide to determine this mark.

The common law to be applied in North Carolina is the "common law of England to the extent it was in force and use within this State at the time of the Declaration of Independence; is not otherwise contrary to the independence of this State or the form of government established therefor; and is not abrogated, repealed or obsolete." *Forsyth Mem'l Hosp., Inc., v. Chisholm*, 342 N.C. 616, 621 (1996), *citing Gwathmey v. State*, 342 N.C. 287, 296 (1995). Modifications to the common law must be made "by statute." *In re Johnston*, 16 N.C. App. 38, 41 (1972). The North Carolina appellate courts are "foreclosed" from making their own modifications to the common law, as "[i]t is the province of our legislature to change the accepted common law in this state." *State v. Lane*, 115 N.C. App. 25, 30 (1994). This is the case regardless of the merits for making such a change. Id.

North Carolina law puts the seaward boundary of private property at "the mean high water mark." N.C.G.S. § 77-20. This boundary is "established by the common law as interpreted by the Courts of this state." Id. This mark is therefore "between the ordinary high and low-water mark, the land over which the daily tides ebb and flow." *Borax Consolidated, Ltd. v. Los Angeles*, 296 U.S. 10, 22-23 (1935). This means that the mark is "indented" as compared with its counterpart under a civil law regime. Id. Everything below this mark is "in the public domain,

while property lying above the mean high water mark, the dry sand, may be privately owned." *Cooper v. United States*, 779 F. Supp. 833, 834 (E.D.N.C. 1991).

Generally, if land is artificially raised above the high watermark, the "title thereto shall vest in the owner of that land which, immediately prior to the raising of the land in question, directly adjoined the navigable water." N.C.G.S. § 146-6(a). The General Assembly has carved out one exception to this rule for publicly-financed beach improvement projects. N.C.G.S. § 146-6(f). The Town argues, and the Court of Appeals found, that the public trust doctrine has been expanded by custom and statute to include private dry uplands. Applying the clear statement of the North Carolina common law public trust doctrine to the facts of this case reveals that both the Town of Emerald Isle and the Court of Appeals are mistaken.

III. THE COURT OF APPEALS DECISION IS INCONSISTENT WITH LONGSTANDING COMMON LAW PRECEDENT.

a. The Town has physically invaded the Nies' private, dry sand beach property.

Appellants Greg and Diane Nies bought their beachfront home in Emerald Isle in 2001. When they did so, they acquired fee simple title to the land free of any other easements allowing the government or others to enter the property. Their property extended from inland of the first line of dunes on the landward side to the mean high water mark on the seaward side — meaning that it included the dry sand

area between those two markers. (R p 611). This mean high water mark is where "private property fronting coastal water ends." *West v. Slick*, 313 N.C. 33, 60 (1985). The dry sand area was essentially the Nies' backyard, as pointed out by Appellants. (R pp 285-286).

In 2010, the Town passed an ordinance taking for itself an exclusive driving lane spanning twenty feet in width on the Nies' dry sand property nearest to their home. (R p 98). As shown by Appellants, town vehicles use this lane regularly, and in doing so destroy plants, leave deep ruts in the sand, and make it difficult for the Nies to access the ocean. (R pp 314-316, 463). In 2013, the Town passed a second ordinance permitting beach driving onto the *entirety* of the Nies' dry sand property, subject only to a fee paid to the Town. (R pp 541, 549). Appellants have shown that members of the public drive and park on the Nies' property during the permitted driving period, leaving behind trash and necessitating Town service vehicles to clean up the mess. (R pp 311-312; 668-681) (*See* App. 2-15). The town is therefore not only physically invading the Nies' property, but authorizing and gaining revenue from the physical invasion on the property by others.

The Town has further used the ordinance as an excuse to occupy the Nies' land all the way up to the dunes — even when the dunes are further eroded by natural forces. For example, when Hurricane Irene moved the dunes inland by approximately thirty feet, the Town immediately afterwards began driving vehicles

over the entire new area of dry sand beach. (R p 738 (Nies affidavit)). The Town is essentially claiming rights in all private, dry sand areas of the Nies' property.

Normally, this constant physical use of the Nies' property would constitute a taking, requiring just compensation. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982) ("[A] permanent physical occupation of property is a taking.") But the Town claims that the public trust doctrine allows it to occupy the entirety of the Nies' beach property as it desires, and the Court of Appeals agreed. This statement by the Town, and the Court of Appeals' agreement, are in conflict with longstanding history and precedent. They conflict with fundamental concepts not only of American law, but of the common law as adopted by this State.

b. The Court of Appeals misapplied North Carolina law, the common law, and the concept of judicial notice, and its decision therefore must be reversed.

The Court of Appeals found that the Appellants' ability to exclude the public from enjoying the dry sand portion of their property was never part of the "bundle of rights" purchased by the Appellants in 2001. *Nies v. Town of Emerald Isle*, 780 S.E.2d 187, 197 (N.C. Ct. App. 2015), *appeal dismissed, review allowed*, 784 S.E.2d 171 (N.C. 2016). It reasoned, therefore, that public trust rights in North Carolina extend all the way to the dunes and include private, dry sand beaches. *Nies* at 197. The Court of Appeals further held that the Town may enforce

ordinances that reserve unimpeded access over portions of the Appellants' dry sand beach without compensating the Appellants under the Fifth Amendment, since the ordinances fall under the umbrella of public trust rather than that of takings. Id. at 192-202.

These holdings essentially equate to a finding by the Court of Appeals that the public trust doctrine in North Carolina applies to private, dry sand beaches. Indeed, the Court of Appeals noted that "[t]he majority of Plaintiffs' argument [that the contested beach driving ordinances constitute physical invasion of property] is predicated on Plaintiffs' contention that the dry sand portion of the Property is not encumbered by public trust rights." Id. at 198. Such a holding would require the Anglo-American concept of public trust rights ending at the mean high water mark to have been altered at some point by the General Assembly. Such an alteration has not occurred, and the Court of Appeals' decision is therefore legally flawed.

The Court of Appeals specifically found that "privately owned dry sand beaches [are] subject to the public trust doctrine." Id. at 193. For privately owned dry sand beaches to be subject to the public trust doctrine, the "high water mark" used in North Carolina would have to be that of the civil law system — *not* that of the common law system. In order to reach this conclusion, the Court of Appeals

read a flawed statutory interpretation in tandem with the legally irrelevant opinions of state agencies, and then took judicial notice of its own creation.

First, the lower appellate court found "the position of the General Assembly" to be "that the public trust portions of North Carolina ocean beaches include the dry sand portions of those beaches." Id. at 195, *citing* N.C.G.S. § 77-20(d). It based its reading of the statute on a 1996 advisory opinion of the attorney general stating that "the public must either be in the water or on the dry sand beach when the tide is high." *Nies* at 195, *citing Opinion of Attorney General re: Advisory Opinion Ocean Beach Renourishment Projects, N.C.G.S. § 146-6(f)*, 1996 WL 925132, *2 (Oct. 15 1996) ("Advisory Opinion"). However, this attorney general opinion has no precedential or authoritative value, and is "advisory only." *Lawrence v. Shaw*, 186 S.E. 504, 509 (1936), *rev'd on other grounds*, 300 U.S. 245 (1937) (Noting that an opinion of the North Carolina Attorney General had no value other than that of advice).

Second, the Court of Appeals pointed to a regulation of the North Carolina Department of Environmental Quality (hereinafter "NCDEQ") expressing what the court considered to be that agency's understanding that public trust rights extend to dry sand beaches in North Carolina. *Nies* at 195, *citing* 15A N.C.A.C. 7M.0301. It is worth nothing that the NCDEQ regulation cited by the Court of Appeals makes no clear statement about the location of the mean high water mark. Regardless,

NCDEQ has no power to abrogate or change the common law as it is enforced in North Carolina. *See generally* N.C.G.S. § 143B-279.1 (Stating the powers of the Department of Environmental Quality, which do not include the ability to amend the common law as adopted by the North Carolina Legislature).

The Court of Appeals in fact *admits* in its analysis that the mean high water mark in North Carolina has not been changed from that which existed at common law, but then went on to adopt a new version of the public trust doctrine:

> A thorough search of the opinions of this Court and our Supreme Court fails to uncover any holding establishing the landward extent of North Carolina's ocean beaches...[I]t is not clear that any North Carolina appellate court has specifically recognized the dry sand portion of our ocean beaches as subject to public trust rights.

Nies at 196. Nonetheless, the Court of Appeals essentially decided to modify the location of the mean high water mark by declaring that private dry sand beaches are subject to public trust rights. This is something that North Carolina courts do not have the power to do, as changes to the common law must be made "by statute." *In re Johnston*, 16 N.C. App. 38, 41 (1972). There is no statute that makes this change. While the Court of Appeals opinion finds that N.C.G.S. § 77-20 "establishes that some portion, at least, of privately-owned dry sand beaches are subject to public trust rights," that statute actually provides only that "[t]he seaward boundary of all property within the State of North Carolina, not owned by

the State, which adjoins the ocean, is the mean high water mark." *Nies* at 196; N.C.G.S. § 77-20(a).

Finally, the Court of Appeals took judicial notice of — and based its opinion on — the fact that the "public right of access to dry sand beaches in North Carolina is so firmly rooted in the custom and history of North Carolina that it has become a part of the public consciousness." *Nies*, 780 S.E.2d 186, 196 (N.C. Ct. App. 2015). It based this notice on an attorney general opinion, its own interpretation of N.C.G.S § 77-20, and a law review article from 2000 stating that the tradition of dry sand beaches being open to the public trust uses has a long history in North Carolina. Id., *citing* Joseph J. Kalo, *The Changing Face of the Shoreline: Public & Private Rights to the National & Nourished Dry Sand Beaches of North Carolina*, 78 N.C. L. Rev. 1869, 1876-77 n. 36 (2000). The law review article to which the Court of Appeals cites makes mention of this "long history" only in a footnote, and there cites only to one case. Id. That case did not deal with the mean high water mark, but with "the correct construction of" federal regulations concerning commercial fishing. *Peele v. Morton*, 396 F. Supp. 584, 587 (E.D.N.C. 1975).

A court has the power to take judicial notice on its own initiative, and such notice may be taken at any state of a proceeding. N.C.G.S. § 8C-1, Rule 201(c), (f). However, "a judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of

the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." N.C.G.S. § 8C-1, Rule 201(b). The Court of Appeals may further take notice of "commonly known fact[s]," like the "fact that innumerable persons bear the surname 'Brown.'" *State v. Brown*, 81 N.C. App. 281, 283 (1986). Other facts that may be established by judicial notice include things like:

- Cream soda and ginger do not combine to make a deadly poison. *State v. Keever*, 177 N.C. 144 (1919);
- When the term "car" is applied to a motor vehicle it is used as a synonym for "automobile." *Jernigan v. Hanover Fire Ins. Co. of N.Y.*, 235 N.C. 334 (1952);
- Sometimes phone booths are on the street. *State v. Craddock*, 272 N.C. 160 (1967);
- Most machines sold in the United States come with instruction manuals. *Millikan v. Guilford Mills, Inc.*, 70 N.C. App. 705 (1984), *review denied*, 312 N.C. 798 (1985);
- An "Afro" is a moderately long to long haircut, which is bushy in appearance and appears to extend outward from the wearer's head in symmetrical fashion. *Williams v. Batton*, 342 F. Supp. 110 (1972).

Judicial notice is *not* a tool that may properly be used to abrogate, amend, or clarify the common law as it is in force in North Carolina, particularly when that notice is based on an attorney general opinion, an administrative regulation, and a

law review footnote. The common law, as adopted by North Carolina, may only be changed "by statute." *In re Johnston*, 16 N.C. App. 38, 41 (1972).

Our state adopted the public trust doctrine as it existed in 1776, and no statute — including N.C.G.S. § 77-20 — has extended that doctrine to include private dry sand beaches. As the doctrine does not extend to private dry sand beaches, the Town's physical invasion of the Nies' dry sand coastal property constitutes a taking. The Court of Appeals' opinion is therefore legally flawed, and must be reversed.

CONCLUSION

For the reasons stated above, this Court should reverse the lower court's decision and remand this case to the trial court for further proceedings consistent with its decision.

DATED: The 23rd day of May, 2016.

ELECTRONICALLY SUBMITTED
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I certify that the certified law student listed below has authorized me to list his name on this document as if he had personally signed.

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CERTIFICATE OF COMPLIANCE

I certify that the font used in this brief is Times New Roman 14-point and in compliance with Rule 28(j) of the North Carolina Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing BRIEF AMICUS CURIAE OF CIVITAS INSTITUTE CENTER FOR LAW IN SUPPORT OF PLAINTIFFS-APPELLANTS was served on all parties by depositing true copies thereof with the United States Postal Service, first-class mail, postage prepaid, the 23rd day of May, 2016, addressed to the following:

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