

September 11, 2020

By Electronic Mail

county.council@montgomerycountymd.gov

The Honorable Sidney Katz, Council President
and Members of the Montgomery County Council
Montgomery County Council
Stella B. Werner Office Building
100 Maryland Avenue
Rockville, MD 20850

RE: Comments on Planning Board Draft of 2020-2024 County Growth Policy (formerly,
Subdivision Staging Policy)

Dear President Katz and Members of the County Council:

This letter is submitted on behalf of Lerch, Early & Brewer's land use practice group regarding the recommendations contained in the Planning Board Draft of the 2020-2024 County Growth Policy. Our firm represents a significant number of property owners, home builders, hospitals, biotech companies, private schools, senior housing providers, and many other businesses and clients in the County who stand to be impacted by the current recommendations and the ultimate final version of the document. Because of the significance of the Growth Policy, we provide comments below on each one of the schools, transportation, and tax recommendations from the Planning Board Draft. We want to thank the Planning Board and the County Planning Department Functional Planning Staff for its availability over the last several months to provide updates on the proposed ideas and recommendations and to answer various questions.

Preliminarily, we want to recognize the time, hard work, and careful thought that went into the Planning Board Draft. It contains some very good themes – notably, curtailing the imposition of automatic moratoria, recognizing the impact from turnover of existing housing and that “new development is generally not the greatest burden on school infrastructure adequacy today” (page 36), emphasizing the importance of the County's economic growth and the need to provide more housing, and updating the impact tax structure in a more equitable manner. At the same time, similar to other broad-scale policy documents, it leaves some important details to be determined later, particularly with respect to Vision Zero principles. It also contains some ideas that we do not support, as explained below. As reflected in our comments, we believe that many ideas from the Planning Board Draft should be adopted while others should be modified or eliminated to advance the County's economic growth, housing objectives, and overall competitiveness more effectively. But overall, the proposed 2020-2024 County Growth Policy is a significant improvement over the current Subdivision Staging Policy.

Some of our individual attorneys will participate further in the public hearing process on behalf of specific clients or projects or with respect to specific items contained in the Planning Board Draft. But on behalf of our entire practice group, we offer these comments which are organized numerically according to the recommendations from the Planning Board Draft.

Schools Recommendations: School Impact Areas

- 4.1 *Classify county neighborhoods into School Impact Areas based on their recent and anticipated growth contexts. Update the classifications with each quadrennial update to the County Growth Policy.*

Comments: We support this recommendation, but have concerns with some of the recommendations within the Greenfield Impact Area (*see* further comments under Recommendation 4.9).

- 4.2 *Classify all Red Policy Areas (Metro Station Policy Areas and Purple Line Station Policy Areas) as Infill Impact Areas.*

Comments: We support this recommendation.

Schools Recommendations: Annual School Test and Utilization Report

- 4.3 *By January 1, 2021, the Planning Board must adopt a set of Annual School Test Guidelines which outline the methodologies used to conduct the Annual School Test and to evaluate the enrollment impacts of development applications and master plans.*

Comments: We support this recommendation.

- 4.4 *The Annual School Test will be conducted at the individual school level only, for each and every elementary, middle and high school, for the purposes of determining school utilization adequacy.*

Comments: We support this recommendation (i.e., we support eliminating the cluster test).

- 4.5 *The Annual School Test will evaluate projected school utilization three years in the future using the following school utilization adequacy standards [see chart on page 44 of the Planning Board Draft].*

Comments: We support the adequacy standards identified on the chart on page 44 of the Planning Board Draft because they are superior to the current Subdivision Staging Policy standards. But we also support elimination of potential moratoria in the Greenfield Impact Area (*see* Recommendation 4.9). We also oppose the recommended change from the five-year timeframe to the three-year timeframe for school adequacy testing. The five-year timeframe is

more consistent with the County CIP process (six years) and more reliably reflects when students from new development will actually enroll.

4.6 *The Annual School Test will establish each school service area's adequacy status for the entirety of the applicable fiscal year.*

Comments: We support this recommendation.

4.7 *The Annual School Test will include a Utilization Report that will provide a countywide analysis of utilization at each school level.*

Comments: We support this recommendation.

4.8 *The Utilization Report will also provide additional utilization and facility condition information for each school, as available.*

Comments: We do not oppose providing additional information for each school. We also do not oppose, in principle, the observation that “The information would also facilitate discussions between developers and MCPS about potential ways the developers can make improvements to school facility conditions (roof replacements, HVAC system upgrades, etc.)” provided that the costs of any such improvements can be credited against applicable school impact taxes (consistent with Recommendation 6.3).

Schools Recommendations: Residential Development Moratorium

4.9 *Moratoria will only apply in Greenfield Impact Areas. The Planning Board cannot approve any preliminary plan of subdivision for residential uses in an area under a moratorium, unless it meets certain exceptions.*

Comments: We support the recommendation to eliminate the automatic moratoria within the Turnover and Infill Impact Areas for the reasons outlined in the Planning Board Draft (pages 50-51). But for those same reasons, we support elimination of the automatic moratoria in the Greenfield Impact Area as well (*i.e.*, moratoria should be eliminated across the entire County consistent with many other jurisdictions as set forth in Appendix I). The Clarksburg area is important for meeting the County's housing goals, and the single-family housing market is important particularly in the face of the existing pandemic. New development should be allowed to move forward within the Greenfield Impact Area without an automatic moratorium, but with payment of the applicable Utilization Premium Payment, as described in Recommendations 4.5 and 4.16, if any of the elementary, middle, or high school levels are over 120% capacity. We support making the entire County consistent in that regard.

Critically, if moratoria is not eliminated within the Greenfield Impact Area altogether, then we ask the County Council at least to support the Planning Board Recommendations 4.5 and 4.11, which provide relief from the current Subdivision Staging Policy to enable two residential projects to move forward. The vast majority of planned development in Clarksburg has already been approved. There are, however, two pending residential projects, filed under the current

Subdivision Staging Policy rules and the school capacity calculations confirmed last November. Both projects would have satisfied the school capacity test when they were filed. Without the relief identified in Recommendations 4.5 (125% capacity prior to triggering moratoria) and 4.11 (potential borrowing), however, the revised school calculations for 2022, combined with the new proposed Growth Policy standards for a three-year test rather than a five-year test, would prevent these two projects from obtaining approval for an undetermined period of time. This result is particularly troubling because the boundary adjustment approved last year for Clarksburg High School was intended to address the capacity issues. (There is ample elementary and middle school capacity for both projects). We ask the County Council to support Recommendations 4.5 and 4.11 to enable these two pending projects to be approved. Their impact on high school capacity will be minimal and spread over a period of years, by which time other projects such as the Damascus expansion will address any concerns.

4.10 Exceptions to residential development moratoria will include projects estimated to net fewer than one full student at any school in moratorium, and projects where the residential component consists entirely of senior living units.

Comments: We support the recommended exceptions. The *de minimus* exception should be clear in being interpreted as net additional units. For example, a project that proposes to remove one unit and build three new units should be considered two units (net additional units) for purposes of calculating the school impact and meeting the *de minimus* exception.

4.11 Establish a new exception that allows the Planning Board to approve residential development in an area under a moratorium if a school (at the same level as any school causing the moratorium) is located within 3, 5, or 10 network miles (ES, MS, or HS, respectively) of the proposed subdivision and has a projected utilization less than or equal to 105 percent.

Comments: We support this recommended exception if a moratorium exists, but we support elimination of potential moratoria altogether (*see* discussion under Recommendation 4.9).

4.12 Eliminate the moratorium exception adopted in 2019 pertaining to projects providing high quantities of deeply affordable housing or projects removing condemned buildings.

Comments: We oppose this recommendation. If any portions of the County are subject to potential moratoria, then this exception should remain.

Schools Recommendations: Student Generation Rate Calculation

4.13 Calculate countywide and School Impact Area student generation rates by analyzing all single-family units and multifamily units built since 1990, without distinguishing multifamily buildings by height.

Comments: We support this recommendation.

Schools Recommendations: Development Application Review

4.14 *Amend Chapter 50, Article II, Section 4.3.J.7. of the County Code to require a development application to be retested for school infrastructure adequacy when an applicant requests an extension of their Adequate Public Facilities validity period.*

Comments: We oppose this recommendation. Extension requests are intended to preserve the original approval for the time period necessary to implement the project, and are not intended to subject the approval to a new Adequate Public Facilities test that could jeopardize the very project that is to be extended. Projected student generation from an approved project already is factored into background school capacity calculations and should not be difficult to monitor. If the Council feels differently, this additional testing requirement should be discretionary, as is the Planning Board's current ability to request additional traffic information for an extension. Under no circumstances should a moratorium be imposed on the project.

4.15 *Require MCPS to designate a representative to the Development Review Committee to better tie the development review process with school facility planning. Ensure this representative has appropriate authority to represent MCPS's official positions.*

Comments: We support this recommendation.

4.16 *Require applicants to pay Utilization Premium Payments when a school's projected utilization three years in the future exceeds 120%.*

Comments: We support this recommendation insofar as Utilization Premium Payments are a better alternative to moratoria. Utilization Premium Payments should be applied in lieu of potential moratoria in the Greenfield Impact Area as well (*see* Recommendation 4.9). The Planning Board recommendation is that the amount of Utilization Premium Payments, if any, will be determined at time of building permit. Whether Utilization Premium Payments are owed at the time of building permit will depend on whether school capacity exceeds 120% three years in the future at the elementary, middle, or high school levels, and based on the applicable rates of Utilization Premium Payments at that time. We believe this creates financial uncertainty for a project. If a project receives subdivision approval and little or no Utilization Premium Payments are owed at the time of the approval, then the project could be subject to substantial Utilization Premium Payments later at time of building permit. These changed circumstances in school capacity that create the Utilization Premium Payments could be due to school boundary changes, enrollment increases due to turnover of existing housing, or other factors outside of the project's control. Thus, the maximum amount of Utilization Premium Payments the project owes should be established at time of subdivision approval based on applicable Utilization Premium Payments at that time of subdivision approval. At time of building permit, Utilization Premium Payments should be recalculated and that amount, if any, should be paid, up to the maximum amount established at the time of subdivision approval.

Transportation Recommendations: Vision Zero Resources

- 5.1 *Design roads immediately adjacent to new development to account for all identified recommendations from applicable planning documents including Functional Plans, Master Plans and Area Plans.*

Comments: When there are conflicts between multiple plans, the most recently adopted plan should supersede any prior plans. However, when a project has relied on a prior plan in the entitlement process before the adoption of a new plan, reasonable grandfathering provisions should apply.

Transportation Recommendations: Mitigation Priorities

- 5.2 *Prioritize motor vehicle mitigation strategies designed to improve travel safety.*

Comments: No one opposes safety. But the cost of trying to achieve maximum safety must be balanced with the County's underlying economic development objectives. The County Department of Transportation should actively participate in the safety evaluation and mitigation strategies. To the extent that safety measures slow or otherwise impair vehicle movements, then vehicular adequacy and delay standards must be adjusted accordingly.

Transportation Recommendations: Development Review Committee

- 5.3 *Given the additional focus on Vision Zero principles in the development review process, designate a Vision Zero representative to the Development Review Committee to review the development application and Vision Zero elements of LATR transportation impact studies and to make recommendations regarding how to incorporate the conclusions and safety recommendations of LATR transportation impact studies.*

Comments: The Vision Zero representative should be a County Department of Transportation official who is familiar with the overall development review process and the inherent need to balance multiple objectives.

Transportation Recommendations: Transportation Impact Study Approach and Scope

- 5.4 *Introduce a Vision Zero Impact Statement for all LATR studies pertaining to subdivisions that will generate 50 or more peak-hour person trips.*

Comments: It is difficult to comment on this recommendation without new LATR Guidelines and further information as to the required scope of these statements and how these statements must be prepared. All information necessary to prepare Vision Zero Impact Statements, such as accident investigation data, must be available and easily obtainable. Any proposed safety improvements resulting from a Vision Zero Impact Statement must meet a basic nexus and proportionality test. Any financial contributions collected based on the Vision Zero

Impact Statement should be spent on Vision Zero improvements (as opposed to going into a general fund), and total funds collected across multiple nearby projects should not exceed the total cost of Vision Zero improvements that would serve those projects.

5.5 *For LATR studies of new development generating 50 or more peak-hour weekday person trips, couple current multi-modal transportation adequacy tests with options that can be implemented over time utilizing Vision Zero-related tools and resources currently available and under development. When the appropriate set of tools (described in the Vision Zero Resources section above) are operational, the current multi-modal transportation adequacy tests should be updated as described below.*

Comments: We have concerns with this Recommendation. As described on pages 66-71 of the Planning Board Draft, the current Subdivision Staging Policy requires a motor vehicle adequacy test if the development generates 50 or more peak-hour weekday person trips. It also requires pedestrian, bicycle, and transit system adequacy tests if the development generates at least 50 peak-hour trips by that particular mode. The number of projected person, pedestrian, bicycle, and transit trips is a function of the type and size of proposed development and the project's location in the County.

The Planning Staff recommended lowering the requirement for pedestrian, bicycle and transit system adequacy tests if the project generates at least 5 peak-hour trips by that given mode. We opposed that Planning Staff recommendation to lower the testing from 50 peak-hour trips to 5 peak-hour trips on the basis that lowering the threshold would be too onerous since the testing is expensive and time consuming, would capture smaller projects that do not justify that level of testing, and would make the County less competitive with other local jurisdictions.

The Planning Board recommendation goes beyond the Planning Staff recommendation. It eliminates any minimum required number of projected trips for each mode, and requires adequacy tests for all four modes – motor vehicle, pedestrian, bicycle, and transit – if the development generates at least 50 peak-hour person trips (i.e., it requires pedestrian, bicycle, and transit testing also if a motor vehicle adequacy test is required). There are many potential projects, particularly those further upcounty, which would generate at least 50 peak-hour person trips, but very few, if any, pedestrian, bicycle, or transit trips.

We ask the Council to restore the Planning Staff recommendation of a 5 peak-hour trip minimum threshold. This change would at least avoid the extreme cases of requiring adequacy tests for pedestrian, bicycle, and transit even though the project would generate very few or no trips within those modes.

The Planning Board Draft inadvertently references the original Planning Staff recommendation -- “The pedestrian, bicycle and transit system adequacy tests are required if the given mode generates at least five peak-hour trips by that mode” (Page 71). We ask the Council to keep this original Planning Staff recommendation in the final Growth Policy.

These comments only concern the amount of testing that is required, which is separate from the amount of mitigation or improvements that could be required in connection with a project. Naturally, any potential improvements that are imposed cannot be disproportionate to the size of the project.

- 5.6 *Eliminate the LATR study requirement for motor vehicle adequacy in Red Policy Areas (Metrorail Station Policy Areas and Purple Line Station Areas).*

Comments: We support this recommendation.

- 5.7 *Expand the application of the Critical Lane Volume (CLV) analysis methodology as a screening tool to determine the necessity for the application of the more robust Highway Capacity Manual (HCM) analysis methodology for the motor vehicle transportation adequacy analysis.*

Comments: We support this recommendation.

Transportation Recommendations: Transit Corridor LATR Intersection Congestion Standard

- 5.8 *Increase the intersection delay standards to 1,700 CLV and 100 seconds/vehicle for transit corridor roadways in Orange and Yellow policy areas to promote multi-modal access to planned Bus Rapid Transit service in transit corridors.*

Comments: We support this recommendation.

- 5.9 *Place all Purple Line Station policy areas (existing and proposed) in the Red policy area category.*

Comments: We support this recommendation.

- 5.10 *Continue producing the Travel Monitoring Report (formerly the Mobility Assessment Report) on a biennial schedule as a key travel monitoring element of the County Growth Policy.*

Comments: We support this recommendation.

Transportation Recommendations: Policy Area Review

- 5.11 *The proposed auto and transit accessibility metric is the average number of jobs that can be reached within a 45-minute travel time by automobile or walk access transit.*

- 5.12 *The proposed metric for auto and transit travel times is average time per trip, considering all trip purposes.*

- 5.13 *The proposed metric for vehicle miles traveled per capita is daily miles traveled per “service population,” where “service population” is the sum of population and total employment for a particular TAZ.*
- 5.14 *The proposed metric for non-auto driver mode share is the percentage of non-auto driver trips (i.e., HOV, transit and nonmotorized trips) for trips of all purposes.*
- 5.15 *The proposed metric for bicycle accessibility is the Countywide Connectivity metric documented in the 2018 Montgomery County Bicycle Master Plan (page 200).*

Comments: We do not have enough information to take a position on Recommendations 5.11 – 5.15.

Transportation Recommendations: Policy Area Designations

- 5.16. *Define the boundary of the Forest Glen Metro Station Policy Area.*
- 5.17. *Expand the boundary of the Grosvenor Metro Station Policy Area.*
- 5.18. *Establish the proposed Lyttonsville/Woodside Purple Line Station policy area as a Red policy area.*
- 5.19. *Establish the proposed Dale Drive/Manchester Place Purple Line Station policy area as a Red policy area.*

Comments: We support Recommendations 5.16 – 5.19.

Tax Recommendations: School Impact Taxes

- 6.1 *Change the calculation of school impact taxes to include one tax rate for all multifamily units, in both low-rise and high-rise buildings, based on the student generation rate for multifamily units built since 1990.*

Comments: We support this recommendation.

- 6.2 *Calculate standard school impact taxes at 100% of the cost of a student seat using School Impact Area student generation rates. Apply discount factors to single-family attached and multifamily units to incentivize growth in certain desired growth and investment areas. Maintain the current 120% factor within the Agricultural Reserve Zone.*

Comments: We support lowering school impact taxes in desired growth areas. As a general policy, development impact taxes should be lowered as much as possible to increase the County’s economic competitiveness.

- 6.3 *Allow a school impact tax credit for any school facility improvement constructed or funded by a property owner with MCPS's agreement.*

Comments: We support this recommendation. Credits for land dedication should be allowed to continue and any school facility condition improvements – whether or not they add classroom capacity – should be given credit.

- 6.4 *Eliminate the current impact tax surcharge on units larger than 3,500 square feet.*

Comments: We support this recommendation.

Tax Recommendations: Impact Tax Exemptions on Residential Uses

- 6.5 *Eliminate the current impact tax exemptions for development in former Enterprise Zones.*

- 6.6 *Any development located in a Qualified Opportunity Zone certified by the United States Treasury Department is exempt from development impact taxes.*

Comments: It is important to note that Glenmont is not yet a Former Enterprise Zone, but is within an Enterprise Zone that expires June 2023, unless extended (thus not an immediate issue but still within the life of this Growth Policy). Glenmont is not in an Opportunity Zone. Thus, if Recommendation 6.5 is adopted, and if the Glenmont Enterprise Zone is not extended beyond 2023, then Glenmont would become a Former Enterprise Zone and would lose its exemption status. Glenmont needs to keep its exemption. Making certain that Glenmont retained the exemption status for its overall viability appeared to be extremely important to the Planning Board and its Staff. This should be addressed as part of the Council's review (a likely oversight at the Planning Board level). Otherwise, we can support Recommendation 6.5 (elimination of the exemption for Former Enterprise Zones) but only provided that Recommendation 6.6 (exemption for Opportunity Zones), which we support, is adopted. If Recommendation 6.6 is not adopted, then we oppose the recommended elimination of the exemption for Former Enterprise Zones.

Silver Spring and Wheaton, the Former Enterprise Zones, are not yet self-sustaining and need to be exempt. These areas, with their fragile market and lower rent structure, are not able to absorb either the existing or the proposed new impact taxes. The impact tax exemption is what allows the equalization of the market place between the Former Enterprise Zones and other areas of the County, such as Bethesda or White Flint. The construction cost for buildings is the same in all four areas, but the rental return in Silver Spring and Wheaton is far below that of Bethesda or White Flint. The impact tax exemption is what allows Silver Spring and Wheaton to make their lower rental rates economically viable, by reducing the cost economics of the project in a way that it can be sustained by a lesser income stream from those lower rents.

The Silver Spring Former Enterprise Zone essentially is coterminous with the CBD and the new Opportunity Zone boundaries. The fact that Silver Spring and Wheaton received

Opportunity Zone designations reflects that the Former Enterprise Zones are not ready to lose the benefits of having been Enterprise Zones. To be designated as an Opportunity Zone requires being composed of Low Income Community Census Tracts (“LICCT”). Downtown Silver Spring, essentially a single census tract, is sufficiently below the Washington Metropolitan Statistical Area Average Median Income, and therefore, qualifies as an Opportunity Zone. Silver Spring and Wheaton are not finished with needing the benefits of the exemption.

Projects that have been approved in Silver Spring have relied upon the impact tax exemption as a part of their economic model. Several of these projects have been approved with multiple phases, intending to be implemented over time. Portions are begun and other portions remain for the future. However, that phasing process and long gestation and development process was expected from the outset. These projects should not be adversely affected economically by the retrospective application of a change in the impact tax structure.

While many projects have site plan review, and therefore would, in theory, be protected in the recommended grandfathering, the likelihood is that over the course of the development process, site plan amendments will be required, as is often the case with long term multi-phased projects. Regardless of the final decision on the merits of the exemption, and applying it to post-January 1, 2021 site plans, the eventual action, if implemented, should make clear that amendments to previously approved site plans do not change the grandfather protections of those projects.

Existing applications and approvals should be protected in a manner that allows these existing in-progress projects to proceed to completion using the previous tax exemption rules. This equitable reasoning should apply to any of the tax exemptions if they are to be removed. They should remain available in their previous form to those projects which were approved while the exemption was a part of the law, and upon which law the application relied.

Regarding the other current impact tax exemptions, we support maintaining all current exemptions. Finally, for dwelling units for seniors age 55 and above, we support converting the classification from “rate set at \$0” to “exempt.”

- 6.7 *Modify the current impact tax exemptions applied to all housing units when a project includes 25% affordable units to:*
1. *require the affordable units be placed in the county’s or a municipality’s MPDU program, and*
 2. *limit the exemption amount to the lowest standard impact tax in the county for the applicable dwelling type.*

Comments: We opposed the Planning Staff’s original version of this recommendation because it removed the potential exemption from the Greenfield Impact Area and it required the project to include two times the standard share of MPDUs applicable to the project location. The Planning Board Draft recommendation above removed those two provisions, but added Section 2, which limits the exemption amount. We support the removal of the doubling requirement and allowing the Greenfield Impact Area to claim the exemption, but do not support the limitation of the exemption amount (Section 2). The reduced value of the exemption does not seem to

recognize the cost or benefit to providing the additional amount of affordable units. Thus, we generally oppose this recommendation, though it is preferable to the original Planning Staff version. We support maintaining the current exemption, and could support Section 1, requiring affordable units to be placed in the MPDU program, on its own. The current exemption supports providing more housing generally, and with it more affordable units as MPDUs. As has been argued for many years, the best way to achieve more MPDUs is to provide more housing generally, which then increases the number of MPDUs required.

This proposal could restrict the use of the exemption to HOC and other affordable housing providers only. A number of private developers have begun proposing 25% affordable housing, seeking to utilize the exemption. Now that the existing provision is finally achieving some success with the private sector, the recommendation proposes to change the program in a way that could effectively eliminate it for most developers. This seems to be the worst possible time to make these changes. Use of the exemption has already been factored into the economics of projects. If changes are made, then a grandfather provision should be added to protect those projects that are in progress, relying on the exemption as it is today, so there is no confusion about its continued use. If site plan approval after January 1, 2021 remains the trigger, there should be clarity that subsequent amendments do not change the protection received by the previously-approved site plan.

6.8 *Continue to apply impact taxes on a net impact basis, providing a credit for any residential units demolished.*

Comments: We support this recommendation.

Tax Recommendations: Recordation Tax

6.9 *Incorporate progressive modifications into calculation of the Recordation Tax to provide additional funding for school construction and the county's Housing Initiative Fund.*

Comments: Recordation Taxes should be as low as possible to make the County competitive when it comes to tax policy.

As a final general comment, and as emphasized several times in this letter, comprehensive grandfathering provisions are necessary. Protection should be provided for all projects that have filed, are in process, or have approvals that may require amendments later. Specifically regarding impact taxes and exemptions, we support the recommendation in Appendix N related to the Transition from the existing Subdivision Staging Policy to the updated Growth Policy. This Transition language is important because projects with approval have relied on current exemptions in their planning process. Projects with preliminary or site plan approval under the existing Subdivision Staging Policy provisions should be allowed to propose amendments after the effective date of January 1, 2021 and still claim any exemptions under the existing Subdivision Staging Policy.

We thank the Council for its consideration of this input. We look forward to participating in the hearing on September 15, 2020, and in the following worksessions. After you have had a chance to review our comments, we would welcome the opportunity to continue the discussion if you have any questions. Thank you very much.

Very truly yours,

LERCH, EARLY & BREWER, CHTD.
LAND USE PRACTICE



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