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ARTICLE

SIFTING THROUGH THE ASHES: WHO OWNS THE ASSETS OF A FORMER REDEVELOPMENT AGENCY AND RELATED TITLE CONCERNS

By Brian D. Shaffer*

I. INTRODUCTION[1]

In *California Redevelopment Assn. v. Matosantos*, 53 Cal. 4th 231, 135 Cal. Rptr. 3d 683, 267 P.3d 580 (2011) ("*Matosantos*"), the California Supreme Court confirmed the death of redevelopment agencies ("RDAs") in California. The decision sent a shockwave throughout the California real estate community, as cities, counties, and agencies scrambled to understand the mechanism by which RDAs were to be dissolved and wound down. RDAs were significantly involved in the development of California real estate. Consequently, dissolving and unwinding the activities of RDAs is an extremely complicated task. Unfortunately, the *Matosantos* decision and the legislation it upheld leave a host of critical questions unanswered. As RDAs are dismantled and their assets redistributed, developers, investors, cities, and counties are struggling to interpret the legislation in order to preserve development agreements and maintain their assets, while the state is demanding those same assets to plug a multi-billion dollar deficit.

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Assembly Bill X1 26 ("AB X1 26"), the law upheld by the Supreme Court that orders dissolution of RDAs, provides a basic mechanism for the dissolution process. However, certain ambiguities in the statute have spawned differing opinions as to how certain RDA assets are treated and the procedures required to effectuate a transfer of those assets to successor agencies and third parties. These ambiguities and differing opinions can create significant roadblocks in transactions dealing with former RDA assets. Given the uncertainty with portions of the statute, parties who are unsure that all required procedures and approvals have been obtained may be reluctant to close deals relating to former RDA assets. Further, title insurers who are asked to issue title insurance policies relating to transactions involving former RDA assets may be reluctant to do so until all potentially required approvals have been obtained, even if the statute arguably does not require them. Finality and certainty are desired traits in complex real estate transactions and, unfortunately, *Matosantos* and AB X1 26 have created a significant amount of uncertainty and doubt.

This article by no means discusses every potential issue arising under AB X1 26, but rather focuses on a few key issues that may impact transactions involving former RDA assets (particularly housing assets). Given the extent of RDAs' involvement in California real estate, and the complexity of the transactions involving RDA assets, additional issues may exist and will certainly arise in the future. Until further clarification is received from the legislature or the courts, the dissolution of RDAs will continue to provide a steady stream of headaches.

II. THE RISE AND FALL OF REDEVELOPMENT AGENCIES

The California Redevelopment Act was enacted shortly after World War II and allowed cities and counties to establish RDAs to redevelop blighted areas.[2] California voters subsequently approved a constitutional amendment to allow what is called "tax increment" financing to fund redevelopment projects.[3] In general, tax increment financing allows the growth in property tax revenues created by redevelopment projects to be set aside for other redevelopment projects. With tax increment financing, the assessed value of the project area is determined at the time a redevelopment project is formed.[4] As the redevelopment of the project takes place, property transfers occur that increase the project's assessed property values.[5] The project then generates a higher level of property taxes as a result of the increase in assessed values from the development.[6] A portion of the

growth in property tax revenues resulting from the growth in assessed values is allocated to the RDA to fund further redevelopment activities.[7] In addition, the law required that 20% of the tax increment funds received by an RDA be set aside to fund low and moderate income housing development (the "Low and Moderate Income Housing Fund").[8]

Tax increment financing became a major part of California real estate and spawned the creation of over 400 RDAs throughout California. In particular, RDAs were a major source of funding for affordable housing projects in California.

Faced with a multi-billion dollar budget deficit, Governor Jerry Brown targeted the dissolution of RDAs as a means to lower the deficit and redirect RDA assets to other areas of state and local government. In July 2011, the legislature passed AB X1 26 and Assembly Bill X1 27 ("AB X1 27").[9] While AB X1 26 completely dissolved RDAs, AB X1 27 allowed RDAs to remain in existence if the local jurisdiction agreed to make substantial payments to schools and special districts.[10] The California Redevelopment Association and the League of California Cities filed suit challenging both laws, alleging in large part that AB X1 26 and AB X1 27 violated the California Constitution and Proposition 22, which put limits on the state's ability to require payments from RDAs.[11]

On December 29, 2011, the California Supreme Court issued its decision, which was the worst-case scenario for RDAs.[12] In *Matosantos,* the California Supreme Court upheld the dissolution of RDAs under AB X1 26, but struck down the "lifeboat" for RDAs provided by AB X1 27.[13] With respect to AB X1 26, the Court essentially held that if the legislature can *create* RDAs, they can also dissolve them.[14] In so reasoning, the Court generally deferred to the California Constitution's grant of legislative power, holding that "if a political entity has been created by the legislature, it can be dissolved by the legislature, barring some specific constitutional obstacle…."[15] With respect to AB X1 27, the Court found that the "continuation" payments under AB X1 27 constituted a payment to the state of tax increment that is allocated to RDAs, which is expressly forbidden by Proposition 22.[16]

Given the dire financial situation of the state, the passage of AB X1 26 was not entirely unexpected. However, this legislation and the *Matosantos* decision have major implications for the California real estate community, as cities, counties, agencies, developers, and title insurers attempt to navigate in a world devoid of RDAs.

III. THE MECHANICS OF AB X1 26: SUCCESSOR AGENCIES AND OVERSIGHT BOARDS

All assets and property of the RDAs were transferred to "successor agencies" on February 1, 2012.[17] All authority, rights, duties, and obligations previously held by the RDAs (except those repealed, restricted or revised pursuant to AB X1 26) are now vested in the successor agency.[18] The successor agency must continue to perform all "enforceable obligations" of the former RDA, repay the outstanding debts of the former RDA, and dispose of the former RDA's property and assets.[19] In general, the property and assets, except for housing assets (see below), are to be sold for the benefit of the taxing entities, or used to satisfy the outstanding enforceable obligations of the former RDA.[20]

The local agency that created the RDA (usually a city or county) is the successor agency, unless it passed a resolution not to serve as the successor agency by January 13, 2012.[21] If the local agency that created the RDA opted out, then any other city, county, or special district within the same county had the option to adopt a resolution to become the successor agency.[22] If no local agency elected to serve as successor agency, then a "designated local authority" was formed by operation of law, with the Governor appointing three residents of the county to serve as the governing board of the designated local authority.[23]

Each successor agency is monitored by an oversight board composed of seven members.[24] In general, the purpose of the oversight board is to direct and oversee the successor agency in winding down the operations of the former RDA.[25] Oversight board members are appointed by local government entities, including the county board of supervisors, the mayor, the county superintendent of education, the chancellor of community colleges, and the largest special district within the county where the former RDA operated.[26] The oversight board also includes one member of the public appointed by the county board of supervisors and one member representing employees of the former RDA.[27] The oversight board has a fiduciary duty to the taxing entities that benefit from distributions of property tax (which necessarily includes cities and counties).[28]

The Department of Finance must review oversight board actions.[29] Any action by an oversight board is not effective for three days from submission to the Department of Finance for approval.[30] If the Department of Finance makes a request to review an action, the Department of Finance has ten days from the date of the request to either approve the action or return it to the oversight board for reconsideration.[31]

IV. SOME KEY ISSUES GOING FORWARD

A. The Conveyancing Conundrum: What to do with the Title?

The fundamental question underlying much of the controversy surrounding AB X1 26 is what happens to the former RDA's assets. As noted above, all assets and property of the RDAs were transferred to the successor agencies on February 1, 2012. A threshold issue that has caused headaches for parties involved with transactions dealing with former RDA properties is how to address the chain of title for properties that were transferred from former RDAs to successor agencies.

As an initial matter, a strong argument can be made that the transfer of assets from the former RDA to successor agencies occurred by operation of law.[32] However, the statute does not provide any guidance as to what, if anything, needs be recorded in the county recorder's office to document this transfer. Unfortunately, there is no clear answer and it appears that no uniform practice has developed. If parties or title insurers raise concerns about the chain of title in a transaction dealing with a former RDA property, parties can provide notice by recording a resolution by the successor agency confirming its status as successor agency under the statute, or by simply inserting a reference to the former RDA and the statute into any grant deed that conveys a former RDA property to a third party.

Different and more complicated issues arise from transfers of the former RDA's housing assets. AB X1 26 provides that the city or county that authorized the creation of the RDA may elect to retain the housing assets and functions previously performed by the former RDA.[33] If the city or county that created the RDA elects not to retain the former RDAs' housing assets and housing-related responsibilities, they are transferred to the Department of Housing and Community Development or the local housing agency in the territorial jurisdiction of the former RDA (collectively referred to herein as the "successor housing agency").[34]

AB X1 26 requires the successor agency to "effectuate" the transfer of the housing assets and functions to the successor housing agency.[35] While there is considerable controversy over whether oversight board approval is required for the transfer of housing assets from the successor agency to the successor housing agency (see below), a separate issue is whether anything needs to be recorded with the County Recorder's office to document the transfer of title from the successor agency to the successor housing agency. Again, the statute provides no

guidance on this issue and no uniform practice has developed. If documentation of the transfer is determined to be necessary, a couple of possible approaches are to: (1) record a deed transferring title to the property from the successor agency to the successor housing agency; or (2) adopt a resolution by the successor agency approving the transfer of a specific housing asset to the successor housing agency.

The approaches described above are by no means an exhaustive list of how this issue is being treated by title insurers and parties to transactions involving former RDA assets. Given the ambiguities in the statute, it appears that several different solutions are utilized, many of which may depend on the specific facts of each transaction. Until further guidance is received from the legislature or the courts, concerns such as how to address the title issues for former RDA assets will continue to plague those involved with these transactions.

B. Housing Assets: Oversight Board Approval Required?

As noted above, AB X1 26 allows the city or county that created the RDA to retain the former RDA's housing assets.[36] If such an election is made, those housing assets are transferred by the successor agency to the successor housing agency.[37] In addition to the issues regarding the *title* to these housing assets (see above), another controversy has arisen as to whether the transfer of housing assets to the successor housing agency is subject to review and approval by the oversight board. The Department of Finance has apparently taken the position that housing assets transferred to the successor housing agency must be approved by the oversight board and, therefore, are also subject to review and approval by the Department of Finance.[38] Others, however, have pointed to the fact that housing assets are treated differently under the statute and, therefore, no oversight board or Department of Finance approval is necessary.[39] This difference of opinion has injected uncertainty into transactions dealing with former RDA housing assets.

Several portions of the statute arguably support the position that no oversight board or Department of Finance approval is required for the transfer. For instance:

- Section 34180[40] contains a list of successor agency actions that "shall first be approved by the oversight board."[41] None of the listed successor agency actions relate to housing assets of former RDAs.
- Section 34177 contains a list of actions that the successor agencies "are required" to carry out. Section 34177(e) directs

the successor agency to "[d]ispose of assets and properties of the former redevelopment agency, *as directed by the oversight board*." Several other subsections of 34177 also explicitly mention oversight board approval.[42] On the other hand, Section 34177(g) directs the successor agency to "[e]ffectuate the transfer of housing functions and assets" to the successor housing agency, but does not make any mention of direction from the oversight board. Arguably, if the legislature had intended the transfer of housing functions and assets to require oversight board approval, it would have so stated, as it did with other subsections of 34177.

There are also provisions of AB X1 26 that arguably support the position that oversight board approval is required for the transfer of housing assets to the successor housing agency. Section 34181 provides that "the oversight board *shall direct* the successor agency to do all of the following," including "[t]ransfer[ring] housing responsibilities and all rights, powers, duties and obligations" to the successor housing agency. The phrase "shall direct" implies that the oversight board was intended to take some action to approve the transfer of the former RDAs' housing assets. Consequently, if oversight board approval is required, then Department of Finance review and approval must also occur. Additionally, Section 34177(g) requires the successor agency to "effectuate" the transfer of the housing assets and functions. One could argue that the word "effectuate" implies that some affirmative action, such as oversight board approval, is required.

The uncertainty with respect to what actions, if any, need to be taken in order to "effectuate" the transfer the former RDAs housing assets can potentially lead to significant issues in subsequent transactions. For instance, if a housing asset of the former RDA is being sold to a third party without any oversight board approval, the third party purchaser may want confirmation or assurance that no additional action or approval is necessary. Additionally, title insurers may not be willing to issue a title insurance policy in a transaction involving a housing asset without oversight board approval.

The answer to this issue is not particularly clear. As noted above, the statute is susceptible to different interpretations, which may lead to litigation as parties attempt to obtain a clearer picture of what the statute requires.

C. What Qualifies as a Housing Asset?

Since AB X1 26 allows cities and counties to retain the former RDA's housing assets, rather than disposing of them as required for other assets, the definition of what qualifies as a "housing asset" becomes a critical determination. As noted above, AB X1 26 generally directs the successor agency to sell the former RDAs non-housing assets for the benefit of the taxing authorities and/or be used to satisfy the outstanding obligations of the former RDA.[43] On the other hand, successor agencies are generally entitled to retain housing assets.[44] Thus, whether an asset qualifies as a housing asset is crucial, because it may lead to retention of a significant asset by a city or county.

Unfortunately, AB X1 26 does not define what qualifies as a housing asset. It appears that the Department of Finance has adopted a restrictive definition of housing assets. On its website, the Department of Finance states that housing assets include "[a]ny real property, interest in, or restriction on the use of real property, whether improved or not … that was acquired for housing purposes (either by purchase or through a loan) *in whole or in part with funds from the Low and Moderate Income Housing Fund."*[45] In other words, it appears that the Department of Finance takes the position that only assets acquired in whole or in part with funds from the Low and Moderate Income Housing Fund are housing assets and, therefore, subject to the retention by the successor housing agency.

Some contend that the Department of Finance's definition of what qualifies as a housing asset is unduly restrictive.[46] In reality, most affordable housing projects are financed by many different sources, including state and federal funding, in addition to financing from the former RDAs. Those arguing against the Department of Finance's interpretation point out that some RDAs funded affordable housing projects with "80% tax increment" (i.e., tax increment proceeds that are not part of the mandatory 20% set aside for affordable housing).[47] Some of these affordable housing projects are still subject to the affordable housing use, income, and occupancy restrictions that apply to projects financed by 20% set aside for affordable housing.[48] As such, those arguing against the Department of Finance's position contend that these affordable housing projects should be considered "housing assets" under AB X1 26, even though the funds used to finance them did not flow from the Low and Moderate Income Housing Fund.

Going one step further, if a housing asset is only *partially* financed with funds from the Low and Moderate Income Housing Fund, an issue

arises as to whether the *entire* asset should be treated as a housing asset under AB X1 26, or only that *portion* financed by funds from the Low and Moderate Income Housing Fund. The Department of Finance seems to take the position that mixed-financed projects should be treated as housing assets only to the extent of the proportional financing by the RDA.[49] The Department of Finance website provides:

> The share of the asset value that should be considered housing assets should be proportionate to the share of ownership of the asset that is held by the successor agency, or if share are not defined by contract, in proportion to funding provided by the redevelopment agency in proportion to the total funding for the project.[50]

In other words, if only *part* of a project is considered a "housing" asset, then how should the *entire* project be treated under AB X1 26? The Department of Finance seems to take the position that if only a portion of a project qualifies as a housing asset, the remainder should be subject to the more restrictive "non-housing" provisions of AB X1 26. However, under the Department of Finance's view, it is unclear whether a physical subdivision of the project must occur or whether the entire project should be sold and the proceeds allocated. Some argue that the Department of Finance's interpretation would lead to significant complications and litigation.[51]

Again, the answer to this issue is not clear. As noted above, many RDA projects are extremely complex multi-use projects with financing from a wide variety of sources. Trying to fit these types of projects into the parameters of AB X1 26 can make one's head spin and it is not surprising that parties have different opinions as how these projects are treated under statute. Until the legislature provides further guidance, or until the courts have an opportunity to analyze the statute, the issue as to what qualifies as a housing asset under AB X1 26 will likely persist.

D. Navigating the "Claw Back"

AB X1 26 allows the state controller to reverse transfers made by a RDA to a city, county, or public agency that occurred after January 1, 2011.[52] These provisions are commonly referred to as the "claw back" provisions. The apparent purpose of the claw back provisions are to negate deals made by the RDAs to insulate their assets by transferring them elsewhere once it became known that RDAs were on the chopping block. The claw

back provisions have created a large degree of uncertainty, as transactions worth millions of dollars are at risk of being negated.

However, the statute exempts certain assets from the reach of the claw back provisions. RDA assets transferred to a city, county, or other public agency that are "contractually committed to a third party" are not subject to the claw back provisions.[53] In other words, if an RDA transferred an asset to a city after January 1, 2011, and then the city subsequently entered into a contract to transfer that asset to a third party, then the statute may exempt that transaction from the claw back. However, an ambiguity in the statute has created some confusion regarding the breadth of this exemption. The statute does not establish any specific date or deadline by which a city, county, or other public agency must have contractually committed or encumbered property transferred from a RDA in order to exempt the property from the reach of the claw back.

Again, this ambiguity has led to differing interpretations and substantial controversy over whether certain transactions are subject to the claw back. State Controller John Chiang sent a letter on April 20, 2012 to county controllers, auditors, and the successor agencies stating that any contract entered into *after June 28, 2011* is still subject to the terms of the claw back provision.[54] Since Governor Brown signed AB X1 26 as urgency legislation in late June, the apparent rationale behind the June 28, 2011 cutoff date is that anyone contracting with the RDAs should have known of the law and, therefore, any contract entered into after that date is suspect.[55] However, others have vigorously disputed using the June 28, 2011 as the deadline for application of the exemption, pointing out that *no such date appears in the statute*.[56]

The lack of guidance in the statute on this issue has the potential to create problems in transactions dealing with former RDA assets that may fall within the reach of the claw back. For instance, title insurers may be reluctant to issue policies for transactions relating to property originally transferred from an RDA, as they may fear that any third party contract was entered into "too late" and therefore falling outside the purview of the exemption to the claw back. However, as noted above, the lack of statutory guidance will undoubtedly produce differing opinions and disputes as to the reach of the claw back.

V. CONCLUSION

The discussion above provides a sampling of the complex issues created by AB X1 26 and the *Matosantos* decision. Importantly, the statute calls for the California Law Revision Commission to draft a Community Redevelopment Cleanup Bill ("Cleanup Bill") for consideration by the Legislation no later than January 1, 2013.[57] While the Cleanup Bill may help clarify some of the issues discussed herein, this will be of little solace to those who are dealing with former RDA assets in the present. Until further clarification occurs, cities, counties, developers, and title insurers will likely continue to wrestle with the issues described above.

NOTES

1. The author would like to thank JoAnne Dunec, shareholder of Miller Starr Regalia, for her invaluable input in researching this article.
2. *California Redevelopment Assn. v. Matosantos*, 53 Cal. 4th 231, 245, 135 Cal. Rptr. 3d 683, 267 P.3d 580 (2011) ("*Matosantos*"); Health & Saf. Code, §§3300 et seq.
3. Cal. Const., art. XVI, §16; Health & Saf. Code, §33670.
4. *Matosantos*, *supra,* 53 Cal.4th 231, 246.
5. *Id.* at 246-47.
6. *Ibid.*
7. *Ibid.*
8. Health & Saf. Code, §§33334.2, 33334.3, 33334.6; *Matosantos, supra,* 53 Cal.App.4th at 247-48.
9. *Matosantos, supra,* 53 Cal.App.4th at 250.
10. *Id.* at 251. AB X1 27 would have required payments from RDAs of $1.7 billion in the current fiscal year and $400 million each subsequent year.
11. *Matosantos, supra,* 53 Cal.App.4th at 241.
12. *Id.* at 231.
13. *Id.* at 242.
14. *Id.* at 254.
15. *Id.* at 255.
16. *Id.* at 267-270.
17. Health & Saf. Code, §34175, subd. (b). The deadlines originally set forth in AB X1 26 were extended by the Court in the *Matosantos* decision by four months. (*Matosantos, supra,* 53 Cal.App.4th at 241, 275-76.)
18. Health & Saf. Code, §34173, subd. (b).
19. Health & Saf. Code, §34177.
20. Health & Saf. Code, §34177, subd. (e).
21. Health & Saf. Code, §34171, subd. (j); Health & Saf. Code, §34173. As an example, the City of Los Angeles voted against becoming the successor agency to the Community Redevelopment Agency of Los Angeles ("CRA/LA"). Governor Brown subsequently appointed three individuals to serve as the successor agency for the CRA/LA.
22. Health & Saf. Code, §34173, subd. (d)(2).
23. Health & Saf. Code, §34173, subd. (d)(3).
24. Health & Saf. Code, §34179, subd. (a).
25. Health & Saf. Code, §34179, subd. (c).
26. Health & Saf. Code, §34179, subd. (a)(1)-(a)(10).
27. Health & Saf. Code, §34179, subd. (a)(1)-(a)(10).

28. Health & Saf. Code, §34179, subd. (i).
29. Health & Saf. Code, §34179, subd. (h).
30. Health & Saf. Code, §34179, subd. (h).
31. Health & Saf. Code, §34179, subd. (h). Some successor agencies and oversight boards have created websites with critical information regarding AB X1 26. (*See, e.g.,* City and County of San Francisco as Successor to the Redevelopment Agency, http://www.sfredevelopment.org/ [last visited May 31, 2012]; Oversight Board, City & County of San Francisco, Successor Agency to the Redevelopment Agency, http://sfgsa.org/index.aspx?page=5205 [last visited May 31, 2012].) Additionally, a portion of the Department of Finance's website provides information on AB X1 26. (Department of Finance, "AB X1 26 Redevelopment Dissolution," http://www.dof.ca.gov/assembly_bills_26-27/ [last visited May 31, 2012].)
32. While not explicitly stated in AB X1 26, it appears that the transfer of assets to the successor agencies occurred by operation of law. For instance, §34175, subd. (b) provides that "[a]ll assets, properties, contracts, leases, books, records, buildings, and equipment of the former redevelopment agencies *are transferred…to the control of the successor agency* …." Further, §34173, subd. (b) provides that "[e]xcept for those provisions of the Community Redevelopment Law that are repealed, restricted, or revised pursuant to the act adding this part, *all authority, rights, powers, duties, and obligations previously vested with the former redevelopment agencies … are hereby vested in the successor agencies*." Thus, these provisions construed together imply that the legislature intended to transfer the assets of the former RDA to the successor agencies by operation of law.
33. Health & Saf. Code, §34176, subd. (a).
34. Health & Saf. Code, §34176, subd. (b).
35. Health & Saf. Code, §34177, subd. (g).
36. Health & Saf. Code, §34176, subd. (a).
37. Health & Saf. Code, §34176, subd. (a)-(b).
38. Department of Finance, "Housing Frequently Asked Questions," http://www.dof.ca.gov/assembly_bills_26-27/ (last visited May 27, 2012) ["Housing assets to be transferred to the housing successor agency must be approved by the oversight board and thus are also subject to review by Department of Finance"].
39. League of California Cities, "Questions and Answers: Transfer of Housing Assets," http://www.cacities.org/redevelopment.aspx [last visited May 27, 2012].
40. All code references are to the Health and Safety Code, unless otherwise noted.
41. Health & Saf. Code, §34180.
42. Health & Saf. Code, §34177, subds. (a)(1), (h), (j), and (l)(1)(F).
43. Health & Saf. Code, §34177, subd. (e).
44. Health & Saf. Code, §34176, subd. (a).
45. Department of Finance, "Housing Frequently Asked Questions," http://www.dof.ca.gov/assembly_bills_26-27/ (last visited May 27, 2012).
46. League of California Cities, "Supplemental Questions and Answers: Transfer of Housing Assets," http://www.cacities.org/redevelopment.aspx [last visited May 27, 2012].
47. *Ibid.*
48. *Ibid.*
49. Department of Finance, "Housing Frequently Asked Questions," http://www.dof.ca.gov/assembly_bills_26-27/ (last visited May 27, 2012)
50. Ibid.
51. League of California Cities, "Supplemental Questions and Answers: Transfer of Housing Assets," http://www.cacities.org/redevelopment.aspx [last visited May 27, 2012].
52. Health & Saf. Code, §34167.5.
53. *Ibid.*
54. Seipel, California Controller Seeks Return of Redevelopment Agency Property, Assets, San Jose Mercury News, May 7, 2012.

55. *Ibid.*
56. League of California Cities, "Questions and Answers: Asset Transfer Assessment/State Controller "Clawback" Provision/Agency-City Asset Transfers/Third Party Agreements/ Property Acquisition and Eminent Domain ," http://www.cacities.org/redevelopment.aspx [last visited May 27, 2012].
57. Health & Saf. Code, §34189, subd. (b).

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