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Protecting Private Property Rights In Texas After *Kelo*

By Bill Peacock
Economic Freedom Policy Analyst

Introduction

In its recent *Kelo* decision, the Supreme Court essentially rewrote the Public Use Clause of the U.S. Constitution. This was decried in dissent by Justice Sandra Day O'Connor as hanging "the specter of condemnation … over all property." The decision produced similar reaction and surprise across the country.

Yet the decision should not be so much a surprise as a wakeup call. From one perspective, *Kelo* may be seen as simply a further extension of the court's jurisprudence over the last one hundred years on the Constitution's Public Use Clause.

Texans are now subject to having their property taken by the government for virtually any reason, because the post-*Kelo* standard of economic development can be applied in almost any situation. Unfortunately, Texas law does not provide adequate protections against such takings now that the Public Use Clause has been rewritten.

The Texas Legislature responded to *Kelo* by passing SB 7 during its second special session on school finance. The legislation banned the use of eminent domain for the purpose of economic development. However, the bill contained numerous exceptions to that ban, and only amended statutes, doing nothing to improve constitutional protections for private property rights.

Recommendations

- A determination should be made as to which types of takings constitute a legitimate public use in Texas.
- A revised definition of public use should be considered for adoption as an amendment to the Texas Constitution.
- Texas policymakers should consider adopting a general ban on using eminent domain for commercial purposes, and determine what exceptions to the ban are needed to allow legitimate public uses.
- The possibility of using standards such as replacement value or "after-improved value," instead of fair market value in certain eminent domain cases should be studied and considered.
- Options for ensuring that property taken for a public use is employed for that specific use in a timely fashion should be examined.
- Texans should attempt to determine the scope and appropriateness of eminent domain powers by cataloging the statutes that authorize or impact eminent domain and those entities which are allowed to use eminent domain.

SB 7 was a step in the right direction. But Texas legislators, recognizing that it would be impossible to address the entire issue in a special session, created an interim committee to study the issue and report back to the 80th Texas Legislature in 2007.

There are many issues for the interim committee to study, but the fundamental question for policymakers and all Texans to consider while studying this issue is what constitutes a legitimate public use of private property? The answer to this question will determine what standard will be used in Texas to protect private property.

The current post-*Kelo* standard of allowing economic development takings in certain instances and by certain entities offers little protection. A better option would be returning to an enhanced pre-*Kelo* standard, perhaps accomplished by providing a general ban (with exceptions) on takings for commercial purposes.

However, a third option should be strongly considered—returning to the historical, constitutional standard whereby public use means public use, not public purpose or benefit. This would adhere to what Justice Clarence Thomas calls the natural reading of the Public Use Clause, that a taking is "for public use only if the government or the public actually uses the property." This option would require placing a clear definition of public use in the Texas Constitution, one that would not be as easy to selectively ignore by future courts and legislatures.

The *Kelo* Decision

The Fifth Amendment to the United State Constitution is particularly concerned with the intimate link between personal liberty and economic liberty, and clearly demonstrates the Founding Fathers' belief that the foundation for economic liberty is private property rights.

Despite that belief, nowhere does the Constitution grant government the right to take private property—the right of eminent domain is simply assumed to exist. But it is also assumed that the right to take private property is subject to abuse and must therefore be limited.

To this end, the Fifth Amendment establishes three key points when it comes to the taking of private property by the government: Private property may only be taken according to due process of law, and then only provided that 1) it is taken for public use, and 2) the owner receives just compensation.

For the record, the Fifth Amendment puts it this way, "No person shall be … deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

On June 23, 2005, the U.S. Supreme Court issued an opinion in *Kelo v. City of New London* with far reaching implications for the second of these protections, otherwise known as the Public Use Clause.

The City of New London sought to undertake "a costly urban-renewal project whose stated purpose is a vague promise of new jobs and increased tax revenue, but which is also suspiciously agreeable to the Pfizer Corporation."[1]

Specifically, New London sought to take the homes and property of Suzette Kelo and her neighbors, demolish their homes and turn their property over to private developers for office space and other commercial purposes—all in the name of economic development, i.e., increasing tax revenue for the city's coffers and increasing employment opportunities for the remaining residents of New London.

The Supreme Court held that the "city's proposed disposition of petitioners' property qualifies as a "public use" with the meaning of the Takings Clause."[2]

The meaning of this holding has been vigorously debated. Some, like the Texas Municipal League, have said that *Kelo* offers no change to existing law and "simply confirms what cities have known all along: under the Fifth Amendment to the U.S. Constitution, economic development can be as much a 'public use' as a road, bridge, or water tower."[3]

But even the majority of the Supreme Court doesn't go that far, saying that "our jurisprudence has recognized that the needs of society have … evolved over time in response to changed circumstances."[4] In other

words, the Court has allowed the application of the Public Use Clause to evolve over time. *Kelo*, then, is a change in current law and practice, the next logical step in the Court's progressive jurisprudence.

The Institute for Justice explains the change as follows:

> Before *Kelo*, we knew that government could take property in deeply troubled, almost uninhabitable areas and transfer it to private developers. Now we know that government can take any property and transfer it to private developers. Only a lawyer would be unable to tell the difference.[5]

Looking further back in time, Justice Clarence Thomas states in his dissent to *Kelo* that throughout most of the 19th century, American eminent domain practice largely followed the most natural reading of the Public Use Clause, that it authorized "takings for public use only if the government or the public actually uses the property."[6] He contrasts this with the more modern "public purpose" interpretation used by the Court.

Kelo, then, can be seen as both a sea change from the original meaning of the Public Use Clause and an incremental change of the Clause's application in more modern times.

The Impact Of *Kelo* On Texas

The debate over the meaning of *Kelo* is not just academic. Since the U.S. Supreme Court has indicated that meaningful protection against eminent domain abuse will have to come from the states instead of the federal courts, states must now determine, based on their own constitutions and statutes, whether to follow the Supreme Court's evolutionary standard or provide the more robust protection for property rights originally envisioned by the framers of the U.S. Constitution. The standard adopted by the Texas Legislature and Texas courts will have a significant impact on the practice of eminent domain in Texas.

The Texas Constitution has its own Public Use Clause which reads, "No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made." Additionally, Chapter 21 of the Property Code, which regulates eminent domain, also makes reference to public use as a prerequisite for the use of eminent domain.

However, other parts of Texas law appear to favor public purpose or benefit as the standard in place of public use, much like the U.S. Supreme Court did in *Kelo*.

The Development Corporation Act of 1979 allows cities to create economic development corporations that can exercise eminent domain powers for public purposes. Such purposes can include "the promotion and development of new and expanded business enterprises."

Likewise, the Texas Urban Renewal Law allows cities to seize land for "urban renewal activities" such as "slum clearance, redevelopment, rehabilitation, and conservation activities" that can then be sold to private investors. Additionally, Chapter 335 of the Local Government Code, which provides for sports and community venue districts, allows eminent domain to be used for "a facility site or related infrastructure."

Additionally, Sec. 203.052 of the Transportation Code authorizes the acquisition of land through eminent domain to provide a location for "an ancillary facility that is anticipated to generate revenue for use in the design, development, financing, construction, maintenance, or operation of a toll project, including a gas station, garage, store, hotel, restaurant, or other commercial facility." However, the Texas Legislature did take steps to limit this authority this year by requiring local approval of any such projects.[7]

The application of Texas law on eminent domain is generally guided by *Borden v. Trespalacios Rice and Irrigation Co.*, decided by the Texas Supreme Court in 1905.[8] In *Borden*, the Court said that property can only be taken when "there results to the public some definite right or use in the business or undertaking to which the property is devoted." Accordingly, subsequent courts have adopted this public use test when reviewing eminent domain cases.

This doesn't necessarily mean, though, that the determination of what constitutes a public use under Texas

law has been stricter than the pre-*Kelo* federal standard. The Texas Supreme Court has said "this Court has adopted a rather liberal view as to what is or is not a public use."[9] Indeed, the Court has allowed a port to condemn private property for commercial warehouse space on the theory that the warehouses were necessary for the success of the related port project.[10] In another case, the Court granted the power of eminent domain to a pipeline company that was not a common carrier.[11]

> Following Kelo, Texans will most likely be subject to the latest evolutionary standard applied by the U.S. Supreme Court—that everyone's property is up for grabs.

Thus *Kelo* changes Texas law not because it rewrites any statutes, but because it eliminates any meaningful review of eminent domain abuse by federal courts under the U.S. Constitution. Pre-*Kelo*, the property rights of Texans were at least potentially shielded from these inherent weaknesses in Texas law by the fact that the U.S. Constitution had not yet been interpreted to permit takings for pure economic development. Thus, whatever the specific provisions of Texas law might have said, there was no general understanding that the U.S. Constitution's Public Use Clause allowed the government to take private property from one owner and give it to another private owner for a supposedly public "purpose" like economic development, as opposed to an actual public "use" like a highway or a school. There were at least potential limits in place. But following *Kelo*, at least without legislative intervention, Texans will most likely be subject to the latest evolutionary standard applied by the U.S. Supreme Court—that everyone's property is up for grabs.

The Texas Response To *Kelo*

Like in much of the rest of the country, many Texans were outraged by *Kelo*. Some local government officials rushed to assure citizens that they had no plans to use eminent domain for private development projects, and state legislators announced plans to file legislation to "to defend the rights of property owners in Texas."[i]

However, the reaction to *Kelo* was not all negative. For instance, Freeport Mayor Jim Phillips said, "This is the last little piece of the puzzle to put the project together."[12]

The project he referred to is a proposed private marina along the Old Brazos River, to be built in part by condemning three waterfront properties belonging to two seafood companies and giving them to a Dallas developer. Freeport officials reacted quickly to *Kelo* by instructing attorneys to prepare the paperwork to move forward with the condemnations.

As a whole, cities seemed to favor the *Kelo* decision. The Texas Municipal League said on its web site that the "*Kelo* decision is a good one for Texas cities."[13]

When *Kelo* was announced, the Texas Legislature was in the midst of a highly contentious special session on school finance. Because Texas Governor Rick Perry added eminent domain to the call of the special session, legislators were able to quickly address the issue. Consequently, the legislature passed Senate Bill 7, by Sen. Kyle Janek, during the Second Called Session, becoming the third state in the U.S.[ii] to pass legislation in response to *Kelo*.

Provisions of Senate Bill 7

The primary approach taken to limiting abuse of eminent domain in SB 7 is to prohibit the use of eminent domain if the taking in question:

- confers a private benefit on a particular private party through the use of the property;

[i] Houston Mayor Bill White and Harris County Judge Robert Eckels offered voters such assurances only hours after the decision was handed down, and Rep. Frank Corte took the lead in filing legislation in Austin, according to Mike Snyder and Matt Stiles in a *Houston Chronicle* article dated June 24, 2005.

[ii] Alabama and Delaware have also passed legislation in response to *Kelo*.

- is for a public use that is merely a pretext to confer a private benefit on a particular private party, or
- is for economic development purposes, unless the economic development is a secondary purpose resulting from municipal community development or municipal urban renewal activities to eliminate an existing affirmative harm on society from slum or blighted areas under:
  - Chapter 373 or 374, Local Government Code, other than an activity described by Section 373.002(b)(5), Local Government Code, or
  - Section 311.005(a)(1)(I), Tax Code.

However, not all uses of eminent domain are affected by the prohibition, for SB 7 goes on to exempt numerous projects and entities from the ban.

Projects exempt from the prohibition include:

- transportation projects, including, but not limited to, railroads, airports, or public roads or highways;
- water supply, wastewater, flood control, and drainage projects;
- public buildings, hospitals, and parks;
- the provision of utility services;
- the new Dallas Cowboys football stadium;
- underground storage operations;
- waste disposal projects; and
- libraries, museums, or related facilities and any infrastructure related to the facilities.

Entities exempt from the prohibition are:

- port authorities, navigation districts, and any other conservation or reclamation districts that act as ports;
- common carriers; and
- energy transporters.

SB 7 also provides a few other modifications of, or restrictions to, the eminent domain process:

- The bill states that a determination by an entity using eminent domain that the taking does not involve a prohibited act or circumstance "does not create a presumption with respect to whether the taking involves that act or circumstance;"
- An institution of higher education is prohibited from using the power of eminent domain to acquire land for a lodging facility or related parking structure; and
- A charitable corporation that seeks to purchase or use eminent domain to acquire property that may be used in a manner that doesn't comply with existing deed restrictions is required to provide written notice to the owner of record of the properties it seeks to acquire and of the properties within 200 feet of the properties it seeks to acquire.

Finally, SB 7 creates an interim committee to "study the use of the power of eminent domain, including the use of the power of eminent domain for economic development purposes and the issue of what constitutes adequate compensation for property taken through the use of eminent domain."

Analysis of Senate Bill 7

The level of protection for private property ownership provided in SB 7 will likely be determined through many years of litigation—such is the nature of the issue. However, several observations are in order.

As noted previously, the property rights protections offered in SB 7 center on prohibiting takings that confer a private benefit or are for the primary purpose of economic development. However, the majority in *Kelo* made it clear that takings that confer a private benefit are not allowed:

> The City would no doubt be forbidden from taking petitioners' land for the purpose of conferring a private benefit on a particular private party. Nor would the City be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit.[14]

The U.S. Supreme Court did not consider the taking contemplated in *Kelo* to have conferred a private benefit. As such, the private benefit language in SB 7 does not seem to add protections beyond what are already found in *Kelo*, and would have little impact on a similar type of taking in Texas.

The prohibition against takings for the purpose of economic development would seem to offer more protection. Justice Sandra Day O'Conner points out that the *Kelo* majority creates a new category of allowable takings where economic development is a public purpose sufficient to meet the public use requirement.[15] The only criteria set forth for this category is that a taking "be executed pursuant to a 'carefully considered' development plan."[16] Thus the economic development ban, applied across the board, might even return Texas to the pre-*Kelo* standard.

But, as seen in the previous section, the prohibition on certain takings in SB 7 provides for numerous exceptions that would allow a large number of public and private entities to take property for the purpose of economic development (and to confer a private benefit) under a wide variety of circumstances.

At their best, the prohibitions on takings in SB 7 offer limited new protections against the abuse of eminent domain that is threatening the rights of private property owners.

Perhaps the most significant property rights protection in SB 7 is the provision that limits the impact of the government's finding on the legality of the taking. Courts have traditionally deferred to the determination of entities that their takings are for a legitimate public purpose.[i] Removing this presumption is a significant boost for private property rights and removes the government's "because we said so" argument when determining whether a taking is for a public use.

Finally, it should be observed that SB 7 was not a joint resolution that would have been sent to the voters to amend the Texas Constitution. This is important because, if the public testimony in the legislature can be used as a proxy, the vast majority of Texans favored putting the protections against *Kelo*-style takings into the Texas Constitution in order to make it harder in future years to overturn the protections.

Opposition to the constitutional protections came from 1) those who supported the *Kelo* decision and wanted no additional constitutional protections on eminent domain, and 2) those who wanted to proceed cautiously in amending the constitution for fear of adversely affecting the government's power of eminent domain.

Preparing For 2007

Looking at the debate over property rights in the context of a contentious special session, opposition from local governments and the large amount of research needed to adequately comprehend the scope of the problem, it is fair to conclude that SB 7 was intended primarily as an interim measure to give members more time to study the issue and develop long-lasting solutions to the problem of eminent domain abuse. The Texas Legislature created an interim committee on eminent domain in SB 7 in order to assist in this process.

There are numerous issues that members of the legislative interim committee and others interested in this issue must focus on over the next year or so if Texas is to truly protect its citizens' private property rights. The following recommendations are designed to help focus the debate on the most important issues.

The Meaning of Public Use

At the center of the debate over the abuse of eminent domain is the meaning of public use. What constitutes a public use is the most fundamental question facing Texas policymakers in this debate.

In her dissent in *Kelo*, Justice Sandra Day O'Connor identified three areas that have traditionally been considered public use: 1) "the sovereign may transfer private property to public ownership—such as for a road, hospital, or a military base," 2) "the sovereign may transfer private property to private parties, often common carriers, who make the property available for the public's use—such as with a railroad, a public utility or a stadium," and 3) takings that transfer private property to private parties to satisfy a public purpose to redress a harm being done to the public—such as removing a public blight.[17] *Kelo*, then, constitutes a fourth category, takings that transfer private property

[i] The majority in *Kelo* cites "our longstanding policy of deference to legislative judgments in this field."

to private parties to advance a public purpose or benefit—such as, economic development.

As noted above, Justice Thomas disagreed with the inclusion of the third category (and certainly the fourth) as a traditional use of public domain. And his predecessor, Supreme Court Justice William Paterson, agreed. In 1795, he said "It is difficult to form a case, in which the necessity of a state can be of such a nature, as to authorize or excuse the seizing of landed property belonging to one citizen, and giving it to another citizen."[18]

Recommendation: A determination should be made as to which types of takings constitute a legitimate public use in Texas.

Constitutional Amendment

The most important factor in protecting private property rights in Texas is how the justices of the Texas Supreme Court will interpret the Texas Constitution's public use clause.

Unfortunately, the protections afforded by the clause have eroded over the years as the courts have taken a liberal view of what constitutes a public use. The legislature has followed suit by passing various laws that allowed takings under the more liberal standard of public purpose or benefit.

Though putting more robust property rights protections in the constitution doesn't guarantee actual success in protecting property rights, it is a better solution than putting them into a general law that can be changed by a fifty percent vote of any future legislature or selectively ignored by future courts. And it is the solution favored by the vast majority of the citizens who have testified before the Texas Legislature on this issue.

While there may be some property rights protections that are more appropriately placed in statute, a constitutionally-revised definition of public use is the best way to guide future courts and legislatures on the protections that should be afforded to the ownership of private property.

Recommendation: A revised definition of public use should be considered for adoption as an amendment to the Texas Constitution.

Using Eminent Domain to Acquire Land for Private Commercial Enterprise

Though much of the focus of the legislative debate on this issue has been on economic development, at the heart of the matter is the practice of taking land from one property owner and transferring it to another. The public was not outraged about the economic development aspects of *Kelo*, but about the confiscation of an individual's land in order to benefit wealthy, connected interests.

The ban on economic development in SB 7 is ineffective because the term is nebulous—no one knows what it bans or doesn't ban, so everyone wanted to be exempted. SB 7's ban on using eminent domain to confer a private benefit is more to the point but offers land owners no protection because it is clear that the majority of the U.S. Supreme Court does not see *Kelo*-style takings as conferring a private benefit.

A more promising approach, and one perhaps most appropriately addressed in statute, is the one taken by legislation filed in Pennsylvania. SB 881 generally prohibits "the exercise by any condemnor of the power of eminent domain to take private property in order to use it for private commercial enterprise."

Unlike the Texas ban on takings for economic development, this approach is very specific and easily understood by the courts, government entities and private parties. Thus it also allows for very specific exceptions to be made to the ban in order to allow for eminent domain to be used for legitimate purposes without rendering the ban useless.

The exceptions to the ban in SB 881 include when the consent of the landowner is obtained, the commercial enterprise is a common carrier, the property is abandoned, blighted or contains a public nuisance, and other similar provisions.

Recommendation: Texas policymakers should consider adopting a general ban on using eminent domain for commercial purposes, and determine what exceptions to the ban are needed to allow legitimate public uses.

Just Compensation

Though just compensation for taken property was not at issue in *Kelo*, it became an issue during the post-*Kelo* debate. Several legislators in Texas began discussing the possibility of requiring "replacement value" for takings involving residential property, rather than the standard of "fair market value." Fair market value is the standard in almost all takings' cases, but it may mean different things in different states. According to the Castle Coalition, "In some states, [fair market value] means just the value of your land and building. In others, it may include some of your business value, business fixtures, goodwill, or other items."[19] In any case, it is generally seen as what a willing buyer would pay a willing seller for the property.[20]

Unfortunately, there is a serious problem with using this standard—there are no willing buyers and willing sellers when eminent domain is used to seize property.

The difficulties of determining fair market value can be seen in a couple of cases. In one instance, the U.S. Supreme Court permitted owners of cured pork and black pepper to recover only the government mandated price for these taken commodities, despite the fact that it was below the replacement value and that the commodities were worth more to the owner if they would have simply been allowed to hold on to their property.[21] In another case, the Court held that a tug owner was not eligible to receive present market value for a seized tug because its "value had been greatly enhanced as a consequence of the Government's wartime needs."[22]

In both cases, the property owner was not allowed to recover either the fair market value or the replacement value for the property. This calls into question the current process of determining the compensation due in a taking. It is not unreasonable to assume that a seller would be willing to sell her own property only when she would receive compensation that allowed her to replace what was being sold. This is particularly true if the seller is losing her home and needs to purchase a new one.

While it would be difficult to entirely replace the current standard of fair market value in determining the compensation in a taking, there are clearly circumstances where this standard does not result in just compensation.

Recommendation: The possibility of using standards such as replacement value or "after-improved value,"[i] instead of fair market value in certain eminent domain cases should be studied and considered.

Proper Use and Return of Condemned Property

Under current practices, there are few options for holding governmental entities accountable in the use of the property they have acquired through eminent domain. Once acquired, land may be used for practically any purpose or be allowed to sit unused for years. Only if an entity officially cancels within ten years of acquisition the public use for which the property was condemned can a property owner repurchase the property, and then only at the fair market value of the property at the time the use was cancelled—not at the price that the original owner was paid.

Recommendation: Options for ensuring that property taken for a public use is employed for that specific use in a timely fashion should be examined.

Determining the Scope of Eminent Domain Powers in Texas

During a Senate State Affairs Committee hearing on eminent domain, Sen. Robert Duncan, the committee's chair, said that he had asked the Legislative Council to prepare a list of the entities in Texas that are authorized to exercise eminent domain. He was told that the list of entities was so extensive that there was insufficient time to put together the list in the two days left before the hearing.

In truth, there is no limit to the number of entities that can be created to exercise eminent domain. Texas law give broad latitude to political subdivisions to create new entities for this purpose.

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[i] The after-improved value is the value of the property in question after it has been put to the use for which it was condemned.

To adequately understand the scope of eminent domain power in Texas and better determine what, if any, limits should be placed on it, a comprehensive list is needed that identifies: 1) Texas statutes that authorize or impact eminent domain and 2) the types of public and private entities in Texas that are authorized to use eminent domain. Additionally, though it may be impossible to complete, an attempt should be made to catalog all of the entities that can exercise eminent domain in order to give policymakers an indication of the vast numbers involved. Finally, the lists should be examined to determine whether the power of eminent domain is properly delegated in each situation.

Recommendation: Texans should attempt to determine the scope and appropriateness of eminent domain powers by cataloging the statutes that authorize or impact eminent domain and those entities which are allowed to use eminent domain.

Conclusion

Whatever the standards governing eminent domain may be today, it is clear that they have evolved significantly from those in place in the early years of our country. While *Kelo* is only the latest advance in these evolutionary standards, it nonetheless represents a real erosion of property rights in Texas and the rest of the country.

> *Kelo* represents a real erosion of property rights in Texas and the rest of the country.

Protecting Texans' private property rights from eminent domain abuse requires action in three distinct areas: 1) limiting the number of entities that are authorized to exercise eminent domain, 2) limiting the ever-expanding interpretations of the meaning of public use, and 3) requiring just compensation for taken property that represents more accurately than today's standards what a willing seller would accept for property.

Actually, there is a fourth area that will significantly influence property rights protections in Texas, the arena of public opinion.

For example, the owners of Western Seafood, one of the companies whose property is threatened by the previously mentioned marina project, have succeeded in getting a referendum on the ballot that gives voters the ability to dissolve the Freeport Economic Development Corp., the entity behind the effort to condemn their land. The voters will decide this issue in the November 8 election.

However that issue is decided, it is another indication that perhaps the most significant aspect of *Kelo* has been its impact on public opinion. The public reaction to *Kelo* spurred the Texas Legislature's initial efforts in SB 7, and will likely play a significant role in how the state addresses the problems enumerated in this paper.

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Bill Peacock is the economic freedom policy analyst at the Texas Public Policy Foundation.

The Center for Economic Freedom was established by the Texas Public Policy Foundation to champion economic freedom in Texas by providing policymakers with reliable information and practical market-based alternatives to state regulation of transactions between businesses, employees, and consumers.

Contact Bill Peacock at: bpeacock@texaspolicy.com

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