

Case No. A120391

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**State of Minnesota**

**In Court of Appeals**

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CITY OF CLOQUET,  
Petitioner-Respondent,

v.

Julie Crandall, et. al.,  
Respondents-Appellants.

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An appeal from the Findings of Fact and Conclusions of Law and  
Order on October 12, 2011 and  
Order Denying motions to amend and for new trial and Judgment  
on February 21, 2012 in Case No. 09-CV-10-913  
In Carlton County District Court,  
Judge David M. Johnson

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**COMBINED RESPONSE AND REPLY BRIEF OF  
RESPONDENTS-APPELLANTS**

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Dated: June 18, 2012

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## INTRODUCTION

The Minimum Compensation Statute was recently enacted in 2006 and contains relatively short, concise language:

When an owner must relocate, the amount of damages payable, at a minimum, must be sufficient for an owner to purchase a comparable property in the community and not less than the condemning authority's payment or deposit under section 117.042, to the extent that the damages will not be duplicated in the compensation otherwise awarded to the owner of the property. For the purposes of this section, "owner" is defined as the person or entity that holds fee title to the property.

Minn. Stat. § 117.187 (2010). At the time Appellants ("Crandall") filed their brief in this matter, only one appellate decision had been enunciated which interpreted this statute. County of Dakota v. Cameron, A11-1273, 2012 WL 987299 (Minn. Ct. App. Mar. 26, 2012). Crandall presented the arguments in its brief based upon that decision. Since the filing of that brief, the Minnesota Supreme Court has accepted a petition to review Cameron.

The undersigned attorneys representing Crandall, who was the condemnee in this case, also represent the appellant in Cameron, who was the condemnee in that case. If the Supreme Court modifies the Cameron decision, Crandall will also modify its reasoning to the Court of Appeals in this case consistent with the Supreme Court decision. Both parties in the present appeal extensively reference the Cameron decision. If the current appeal is not certified to the Supreme Court to be considered with the Cameron appeal, Crandall respectfully requests that this appeal be put on hold until the Supreme Court issues its opinion in Cameron.

**I. THE DEFINITION OF “OWNER” FOUND IN MINN. STAT. § 117.187 ENCOMPASSES CONTRACT FOR DEED VENDEES.**

The City’s argument attempts to exclude the Crandalls and all similarly situated parties from Minimum Compensation claims merely because the purchaser elected to use one type of real estate financing, a contract for deed, over another, a purchase money mortgage. The City is wrong for several reasons. First, the legislative history reflects that the Legislature only sought to exclude “renters” or “lessees” from MCS claims. Second, the legislature could not have intended this “absurd”<sup>1</sup> result because there is no valid reason to compensate a condemnee or not based on the particular financing in place. Put simply, there is no logical reason why the legislature would allow minimum compensation claims from mortgagors but not from contract for deed vendees. Finally, if after considering the foregoing the Court is still in doubt, the rules of liberal construction applicable to remedial statutes and eminent domain proceedings compel a definition of “owner” that includes contract for deed vendees.

Statutory interpretation is a question of law. Auto Owners Ins. Co. v. Perry, 749 N.W.2d 324, 326 (Minn. 2008). The goal of statutory interpretation is to ascertain the legislature's intent. Krueger v. Zeman Const. Co., 781 N.W.2d 858, 867 (Minn. 2010) (citing Minn. Stat. § 645.16).

Courts construe technical words according to their technical meaning and other words according to their common and approved usage and the rules of grammar. Minn. Stat. § 645.08 (2009). When the language of a statute, so construed, is unambiguous, a

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<sup>1</sup> R. ADD -2.

court must apply its plain meaning. McCaleb v. Jackson, 307 Minn. 15, 17 n.2, 239 N.W.2d 187, 188 n.2 (1976). When the language of a statute is ambiguous, courts apply the rules of statutory construction which allow them to examine the legislative history surrounding the statute's enactment to assist in interpreting the statute. Minn. Stat. § 645.16 (1994). A statute is ambiguous if it is reasonably susceptible to more than one interpretation. Tuma v. Comm'r of Econ. Sec., 386 N.W.2d 702, 706 (Minn. 1986).

A. A “fee owner” for purposes of the MCS includes those owners who hold an equitable title in fee.

The City is correct in that at various times throughout Chapter 117 the Legislature formulated various definitions of “owner.” The City then contends that because the MCS includes its own “owner” definition and restricts MCS claims to the “fee owner,” the Legislature must have purposely excluded a contract for deed vendee. The City errs on this issue because it fails to analyze the type of title held by a contract for deed vendee. For purposes of statutory interpretation, it must be assumed that the Legislature was aware of the technical definition of “fee owner.”

“A contract for the sale of land, part of the purchase price being paid and possession taken, vests in the vendee an *equitable title in fee*.” Mark v. Liverpool & London & Globe Ins. Co., 159 Minn. 315, 198 N.W. 1003 (1924) [emphasis added]. Accord Minnesota Bldg. & Loan Ass'n v. Closs, 182 Minn. 452, 453, 234 N.W. 872, 873 (1931) (“a contract [for deed], as we have held many times, makes the vendees *equitable owners in fee*...”). The trial court, consistent with the foregoing definition, held that the definition of “fee owner” encompassed a holder of equitable title, i.e. an

equitable owner in fee.<sup>2</sup> A contract for deed vendee is thus as much of a fee owner as the vendor. While one holds the legal title in fee, the other holds the equitable title in fee. They are both “fee owners.”

Under a contract for deed, the vendee “takes the equitable title,” and “is clothed with the indicia of ownership *to the same extent as if he had taken a deed and given a purchase money mortgage.*” Summers v. Midland Co., 167 Minn. 453, 456, 209 N.W. 323, 324 (1926). Indeed, the rights adhering to the holder of an equitable fee (or “indicia of ownership”) include almost every possible right of property. As detailed by the Court in Shraiberg v. Hanson, 138 Minn. 80, 82, 163 N.W. 1032, 1033 (1917):

[An equitable fee] pass[es] by descent. Stearns v. Kennedy, 94 Minn. 439, 103 N. W. 212. It was subject to dower. Wellington v. St. Paul, etc., Ry. Co., 123 Minn. 483, 144 N. W. 222; Kasal v. Hlinka, 118 Minn. 37, 136 N. W. 569. It was subject to a homestead right. Wilder v. Haughey, 21 Minn. 101; Hook v. Northwest T. Co., 91 Minn. 482, 98 N. W. 463. It was subject to the lien of a judgment and could be sold on execution. Reynolds v. Fleming, 43 Minn. 513, 45 N. W. 1099; Hook v. Northwest T. Co., 91 Minn. 482, 98 N. W. 463. It could be mortgaged. Randall v. Constans, 33 Minn. 329, 23 N. W. 530; Niggeler v. Maurin, 34 Minn. 118, 24 N. W. 369. It would pass by deed. Wilson v. Fairchild, 45 Minn. 203, 47 N. W. 642; Krelwitz v. McDonald, 135 Minn. 408, 161 N. W. 156. It was such title that the owner of it could maintain an action for permanent damages for trespass. Hueston v. Mississippi, etc., R. Co., 76 Minn. 251, 79 N. W. 92.

It is thus disingenuous to argue that an equitable fee title is exempted from the definition of “fee owner.” If one compared the various rights under a contract for deed, the rights of the equitable fee owner would be the greater than those of the contract for deed vendor.

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<sup>2</sup> R. ADD-2.

If the Legislature was going to split hairs and adhere to a more specific definition of “fee owner” it could have done so explicitly, but did not. Because the Crandalls hold equitable title in fee, they are fee owners for purpose of the MCS.

B. The legislative history shows that the Legislature sought to extend minimum compensation claims to non-tenants and did not seek to arbitrarily exclude contract for deed vendees.

If, after considering the ruling of the trial judge, and the “fee owner” discussion in Section I (A), the Court still feels that there is ambiguity in the MCS, an examination of the legislative history still compels the same conclusion. “It is a cardinal rule of statutory construction that a particular provision of a statute cannot be read out of context but must be taken together with other related provisions to determine its meaning.” Kollodge v. F. & L. Appliances, Inc., 248 Minn. 357, 360, 80 N.W.2d 62, 64 (1956). A court may not read statutory language out of context. State v. Loge, 608 N.W.2d 152, 160 (Minn. 2000) (citing Kollodge, 248 Minn. at 360).

The MCS as well as the other eminent domain reform legislation passed during the 2006 Minnesota legislative session, grew out of the almost nationwide backlash from the decision by the United States Supreme Court in the 2005 case, Kelo v. City of New London, 545 U.S. 469 (2005). Following Kelo, thirty-nine states reacted to that decision by making sweeping changes to limit the government’s power of eminent

domain and to provide additional benefits to property owners.<sup>3</sup> Minnesota was one of the states in which legislators responded to the public's concern over the abuse of the power of eminent domain.

In addition to limiting the government's power of eminent domain to certain public uses, the Minnesota legislature passed other legislation to provide new benefits to property owners that had not previously existed under Minnesota law. These additional benefits in Chapter 117 included:

1. Increased appraisal cost reimbursement allowances. Minn. Stat. § 117.036, Subd. 2(b).
2. Mandatory good faith negotiation requirements. Minn. Stat. § 117.036, Subd. 3.
3. Mandatory payment of attorney's fees in certain cases. Minn. Stat. § 117.031(a).
4. Statutory recognition of loss of going concerns claims. Minn. Stat. § 117.186.

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<sup>3</sup> "This issue of eminent domain reform was never more relevant than it is today. Over the three years since *Kelo*, almost every state has either reformed or considered reforming its eminent domain code." Noreen E. Johnson, Blight and Its Discontents: Awarding Attorney's Fees to Property Owners in Redevelopment Actions, 93 Minn. L. Rev. 741, 743 (2008); "Surveys suggest that eighty-one percent of the American population opposes the *Kelo* decision, and the overwhelming opposition to the decision crosses both race and political party lines. Thus, state legislatures are now actively considering ways to reform their eminent domain code to protect the rights of property owners, both substantively and procedurally." Noreen E. Johnson, Blight and Its Discontents: Awarding Attorney's Fees to Property Owners in Redevelopment Actions, 93 Minn. L. Rev. 741, 744 (2008) [internal citations omitted]. "Forty-three states [including Minnesota] have enacted post- *Kelo* reform legislation to curb eminent domain." Ilya Somin, The Limits of Backlash: Assessing the Political Response to Kelo, 93 Minn. L. Rev. 2100, 2102 (2009); "The *Kelo* backlash probably resulted in more new state legislation than any other Supreme Court decision in history." Ilya Somin, The Limits of Backlash: Assessing the Political Response to Kelo, 93 Minn. L. Rev. 2100, 2102 (2009); Ninety-one percent of Minnesotans are opposed to the *Kelo* decision. Ilya Somin, The Limits of Backlash: Assessing the Political Response to Kelo, 93 Minn. L. Rev. 2100, 2112 (2009); "As of early 2009, thirty-six state legislatures have enacted post-*Kelo* reforms." Ilya Somin, The Limits of Backlash: Assessing the Political Response to Kelo, 93 Minn. L. Rev. 2100, 2120 (2009); Ilya Somin, Assistant Professor of Law at George Mason University School of Law, characterized Minnesota's 2006 eminent domain reforms as "the state's 2006 post-*Kelo* reform law." Ilya Somin, The Limits of Backlash: Assessing the Political Response to Kelo, 93 Minn. L. Rev. 2100, 2142 (2009); The Johnson-Bakk bill was introduced in the wake of *Kelo*. Bill Clements, Dispute underscores eminent domain debate, Finance & Commerce, Feb. 9, 2006, <http://finance-commerce.com/2006/02/dispute-underscores-eminent-domain-debate/>

5. The right of first refusal to allow the property owner to buy back their property if it is no longer needed. Minn. Stat. § 117.226.
6. Increased relocation compensation. Minn. Stat. § 117.52, Subd. 1(a).
7. Fair hearings for disputed relocation claims. Minn. Stat. § 117.036, Subd. 4.
8. Payment of minimum compensation to property owners. Minn. Stat. § 117.187.

The above listed reforms firmly establish that the Legislature was concerned that property owners were not getting a fair shake on being compensated for their losses due to condemnation takings. The context, then, is not only the singular line concerning the definition of owner, but the entire Legislative history aimed at protecting property owners, especially small business owners like the Crandalls.

The 2006 Legislature received testimony that businesses had been destroyed without compensation for the business. See March 16, 2006 Hearings of Senate Transportation, Hearing on SF 2750. At hearings held by the Senate Transportation Committee, owners complained that businesses they had built up over decades had been destroyed without compensation. Id.

A consideration of this greater context would support a broad definition of “fee owner,” and not the restrictive reading offered by the City. To overcome this context, the City relies heavily on the transcript of a legislative committee to support its own restrictive definition. An examination of that transcript, however, undermines the City’s position and supports the Crandalls.

An appellate court “may consider transcripts of taped legislative committee discussions and floor proceedings.” McKee-Johnson v. Johnson, 444 N.W.2d 259, 263

(Minn. 1989) overruled on other grounds by In re Estate of Kinney, 733 N.W.2d 118 (Minn. 2007) (citing Handle With Care, Inc. v. Dep't of Human Services, 406 N.W.2d 518, 522 (Minn. 1987)). “While [courts] generally treat with caution statements made in committee discussions or during floor debates we do afford some weight to those made by the sponsor of a bill or an amendment relative to the purpose or effect of the proposed legislation.” McKee-Johnson v. Johnson, 444 N.W.2d at 263. Such comments are entitled to “some weight,” to be balanced by the greater context, and are not dispositive. The appropriate portions of the transcript to apply to the “scale” are the words of the sponsor or legislator and not, for example, the words of a non-legislator.

The “fee owner” clause was inserted during the conference committee review of the Statute. *Eminent Domain Procedures Modifications: House/Senate Conference Committee on SF 2750, 84th Leg., 2005-06 Sess.* (Minn. 2006). Rep. Jeff Johnson, one of the eminent domain bill’s sponsors and the chair of the conference committee, stated during the hearing that the purpose of this provision was to exclude “renters” and “lessees” from a MCS award.<sup>4</sup> This amendment, proposed by Rep. Johnson, goes directly to the purpose of the proposed legislation: to provide minimum compensation claims to “owners,” but not to “renters.”<sup>5</sup> This is the portion of the transcript to which the Court must afford weight. The Crandalls are clearly not renters. They are equitable owners under a contract for deed. Because the Crandalls are not a “renters” or “lessees” the Legislature did not intend to exclude them from a MCS claim.

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<sup>4</sup> R. ADD 15.

<sup>5</sup> Id.

The City, meanwhile, impermissibly relies on an offhand, unanswered question of a non-legislator, namely, Legislative Counsel Bonnie Berezovsky, while ignoring the substantive testimony of the bill's sponsor and the chair of the committee, Rep. Johnson, cited above. While the fact that Ms. Berezovsky is not a legislator should settle this issue, it should also be noted that Ms. Berezovsky's question was unsolicited and never received an affirmation or even a response from any legislator.<sup>6</sup> After Ms. Berezovsky stated her question, she received no response from Rep. Johnson or anyone else in the committee.<sup>7</sup> Her unanswered inquiries are thus no more binding on this Court than the similarly incorrect legal opinion of the City.

C. As stated by the trial judge in this matter, the legislative interpretation suggested by the City would produce an absurd result.

As stated by the trial judge, the City's interpretation of the MCS on this issue would produce a "fundamentally unfair and absurd result" by excluding the equitable title holder and "prevent[ing] the meaningful address of...loss" under a remedial statute.<sup>8</sup> A court is "not to assume that the legislature will engage in a futile act..." Knopp v. Gutterman, 258 Minn. 33, 39, 102 N.W.2d 689, 695 (1960). When construing a statute, the proper interpretation should produce a result that fulfills the intentions of the statute rather than one that is absurd or meaningless. Milbank Mut. Ins. Co. v. Kluver, 302 Minn. 310, 225 N.W.2d 230 (1974). Because the City's interpretation reads into the remedial MCS an unsupported limitation on claimants and

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<sup>6</sup> R. ADD 17.

<sup>7</sup> Id.

<sup>8</sup> R. ADD -2.

absurdly excludes contract for deed vendees but not mortgagors, the City's interpretation was properly rejected at trial.

“A contract for deed is a financing arrangement which allows a buyer—the vendee—to purchase property by borrowing the money for the purchase from the seller—the vendor. It is essentially a financing arrangement for a real estate sale in which the vendee has all the incidents of ownership except legal title.” In re Butler, 552 N.W.2d 226, 229 (Minn. 1996). *See also* 6A Steven J. Kirsch, *Minnesota Practice: Methods of Practice* § 42.22 (3d ed.1990) (A contract for deed is a “seller financed sale[ ] of real property. The buyer pays part of the purchase price on closing and makes periodic payments for the balance due. The seller delivers a deed after the buyer pays the entire contract price.”). “Contracts for deed provide a useful alternative financing mechanism which promotes the availability of credit and the transferability of property, and the legislature has approved contracts for deed as being in Minnesota's best interest by enacting legislation which supports their continued use.” In re Butler, 552 N.W.2d at 230 (citing Minn.Stat. §§ 559.205–.216 (1994)). Under a contract for deed, the vendee “takes the equitable title,” and “is clothed with the indicia of ownership to the same extent as if he had taken a deed and given a purchase money mortgage.” Summers v. Midland Co., 167 Minn. at 456, 209 N.W. at 324.

The City's interpretation would punish an owner that has chosen one legislatively approved financing method over another. There is simply no logical reason why the Legislature would provide this remedy to mortgagors while denying it to vendees that are, for all intents and purposes, identically situated. If the “indicia of

ownership” include anything, they certainly include the right to compensation when the owner/possessor/equitable-fee-owner is forcibly removed by the state.

The City’s discussion of possible contract cancellation as a reason to exclude contract for deed vendees is senseless. The possibility that a contract vendee would default is no different than the possibility that a mortgagor would similarly default. A contract vendor may reclaim a property in the same way that a lender can foreclose on a property on which it holds a mortgage. Yet the City does not suggest that the Legislature meant to exclude all owners who happen to have a mortgage on their property. In any event, this speculative possibility is no reason to exclude a class of claimants because under either a rescission or a foreclosure scenario, one claimant is simply substituted for another, i.e. mortgagee for mortgagor or contract vendee for vendor. In either case, the state must pay a MCS claimant.

D. Inclusion of the term “contract purchaser” in Minn. Stat. § 117.036 is not an indication that the Legislature sought to exclude contract for deed vendees from MCS claims, but rather in an indication that the Legislature sought to include purchase agreement buyers under Section 117.036.

The City argues that because the City included “contract purchaser” in Section 117.036 but did not include “contract purchaser” in Section 117.187, the Legislature sought to exclude contract for deed vendees. The City is mistaken because this reading is inconsistent with the legislative history<sup>9</sup> and produces an

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<sup>9</sup> See supra Section I(b).

absurd result.<sup>10</sup> The City is also mistaken because this position is a misconception of what a “contract purchaser” is.

“[P]urchase agreements and contracts for deed are both contracts for the conveyance of real estate.” Loppe v. Steiner, 699 N.W.2d 342, 350 (Minn. Ct. App. 2005). They are not, however, the same. Compare Minn. Stat. § 559.217 (cancellation procedure for purchase agreement) with Minn. Stat. § 559.21 (cancellation of other real estate conveyances). See also McKush v. Hecker, 559 N.W.2d 725, 726 (Minn. Ct. App. 1997) (purchase agreement called for subsequent contract for deed). Nevertheless, “[p]ersons with executory purchase agreement interests have protectable, equitable interests in property.” Automated Bldg. Components, Inc. v. New Horizon Homes, Inc., 514 N.W.2d 826, 830 (Minn. Ct. App. 1994).

The Legislature, in its formulation of Section 117.036, had already encompassed contract for deed vendees in its inclusion of “fee owner.” As established above, a “fee owner” includes both those with legal title in fee and equitable title in fee, thus encompassing contract for deed vendees. What the Legislature had not included was a buyer under a purchase agreement (“Buyers”).

Such Buyers have equitable interests – although are not fee owners – that the Legislature sought to protect. The inclusion of Buyers is consistent with the other class of persons included in Section 117.036, business lessees. Like

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<sup>10</sup> See supra Section I(c).

Buyers, business lessees own less than fee. Also like Buyers, business lessees have a significant stake in the real estate. By including Buyers and business lessees in Section 117.036 the Legislature was expanding those remedies to a select group beyond fee owners. It was not absurdly excluding contract for deed vendees from MCS claims.

E. If there is any debate as to how to weigh the legislative history of the MCS, the absurd result proposed by the City, or the language of Minn. Stat. § 117.036, the liberal rules of construction applicable to remedial statutes specifically and eminent domain statutes generally compel a conclusion that favors the Crandalls, as the beneficiaries and property owners.

“Statutes which...improve or facilitate remedies already existing for [the] enforcement of rights and redress of injuries” are remedial statutes. Black’s Law Dictionary 1293 (6th Deluxe Ed. 1991). Because the MCS is designed to improve remedies for displaced condemnees, it is a remedial statute. When engaging in statutory construction, courts must interpret remedial legislation broadly to better effectuate its purpose. Current Technology Concepts, Inc. v. Irie Enterprises, Inc., 530 N.W.2d 539 (Minn. 1995). “It is elementary that remedial statutes must be liberally construed for the purpose of accomplishing their objects.” State v. Indus. Tool & Die Works, 220 Minn. 591, 604, 21 N.W.2d 31, 38 (1945). Accord In re Welfare of Children of N.F., 749 N.W.2d 802, 808 (Minn. 2008); Miklas v. Parrott, 684 N.W.2d 458, 461 (Minn. 2004). Courts interpret exceptions contained within remedial legislation narrowly. Current Technology Concepts, 530 N.W.2d 539.

Moreover, our Supreme Court has also recently stated that statutory eminent domain provisions should be liberally construed in favor of property owners. Moorhead

Economic Development Authority v. Anda, 789 N.W.2d 860, 876 (Minn.2010).<sup>11</sup>

Consequently, when interpreting the MCS, the rules of liberal construction in favor of the property owner should be applied. If there is any doubt whether to broaden or reduce a restriction in a remedial statute, the Court must find in favor of the condemnee. If there is any doubt as to the “fee owner” definition applied by the Legislature, as to the weight of legislative various committee testimony, or as to the absurdity of the conclusion offered by the City, the Court must side with the Crandalls as condemnees and beneficiaries.

F. The City’s entire discussion of the terms and payments under the Contract for Deed is a red herring.

The City’s discussion on this “issue” is flawed in this regard: the Legislature did not set limits on possible classes of MCS claimants based on the level of equity held in the property, or based on the relative risk of the financing instrument operating on the property. The bare issue for this Court is whether an MCS claim is available to contract

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<sup>11</sup> The Anda Court stated:

Both the United States and Minnesota Constitutions limit this sovereign power, requiring a public purpose and a payment of just compensation to the property owner for each taking. *See* U.S. Const. amend. V; Minn. Const. art. I, § 13; *see also Flach*, 213 Minn. at 356, 6 N.W.2d at 807. The Fifth Amendment to the United States Constitution provides that “nor shall private property be taken for public use, without just compensation,” and article I, section 13 of the Minnesota Constitution states: “Private property shall not be taken, destroyed or damaged for public use without just compensation therefore, first paid or secured.” When construing this language we have said that “[t]he right of compensation thus granted is absolute, precedent to the constitution itself, inherent without recognition therein; and no attempt to deprive the citizen of this incontestable right could be tolerated in any system of free government.” State ex rel. Ryan v. Dist. Court of Ramsey Cnty., 87 Minn. 146, 151, 91 N.W. 300, 302 (1902). Without identifying to which constitution we referred, we have observed that because a constitutional provision for just compensation was “inserted for the protection of the citizen, it ought to have a liberal interpretation, so as to effect its general purpose.” Adams v. Chicago, Burlington & N. R.R., 39 Minn. 286, 290, 39 N.W. 629, 631 (1888).

for deed vendees.<sup>12</sup> How risky the Crandalls' contract was, or their performance under that contract is irrelevant to the issue at bar (especially given the fact that the vendors released all their rights to the Crandalls<sup>13</sup>).

Evaluating the risk involved in the claimant's financing mechanism or examining the "principal:interest" ratio are factually inquiries found nowhere in Minn. Stat. § 117.187. Indeed, the trial court conducted no such inquiries. No threshold of risk or equity determines the right to bring an MCS claim. The City is attempting to stretch the legislative intent on this issue to an extent unfound in the words of the MCS or its legislative history.

G. As holders of both the vendee and vendor's rights under the contract for deed, the Crandalls are entitled to make a minimum compensation claim.

Assuming arguendo the City is correct and there is a bright line barring MCS claims from contract for deed vendees (while ridiculously still allowing claims from other fee owners who used different financing, like mortgagors), this still would not bar the Crandalls claims. In this case, the Crandalls own all rights attributable to both the vendor and the vendee. The respondents in this action, other than the Crandalls, stipulated and agreed that all their rights and interest in any proceeds from the condemnation are released to the Crandalls.<sup>14</sup> This release includes Respondents Lyn E. Johnson and Rae L. Johnson who released Kerry Crandall and Julie Crandall from any

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<sup>12</sup> As established above, they are.

<sup>13</sup> See Appendix at APP-14.

<sup>14</sup> See Appendix at APP-14.

and all obligations related to the Contract for Deed and also filed a satisfaction of the contract for deed.<sup>15</sup>

The Crandalls have stepped into the shoes of the Johnsons by virtue of the release and all rights to receive condemnation compensation in this action, by the MCS or otherwise, belongs to the Crandalls. Consequently, the Crandalls have both the equitable and legal fee interest in the property. If, then, the Court rules that vendees are barred from MCS claims, the Crandalls are nevertheless entitled to an MCS claim because they also own all fee rights.

## **II. AN AD HOC DEFINITION OF “COMPARABLE PROPERTY” FOR MINN. STAT. § 117.187 ONLY LEADS TO AD HOC DECISIONS.**

A major flaw in the reasoning by the City and the trial court is that no standard has been enunciated for determining a comparable property. This flaw is exposed when we contrast the analysis used by the City at the trial court level to the analysis commonly used to determine market value for a particular property.

In a traditional valuation analysis, the standard for establishing comparison is the identification of the material adjustment characteristics associated with the subject property (location, size, condition, access, etc.). Sales are then identified which possess the same highest and best use as the subject property. Each material characteristic is adjusted in the comparable sale to make the characteristic of the comparable sale equivalent to that characteristic in the subject property. The net of all these adjustments is then applied to the sales price for the comparable sale to indicate a value for the

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<sup>15</sup> Id.

subject property. In Cameron, the court affirmed a minimum compensation statute analysis that made adjustments to a comparable sale to achieve a level of equivalency that produced a market value for that comparable sale.

In this case, neither the City nor the trial court attempted an equivalency adjustment process that was undertaken in Cameron. Both hid under the cloak of the term "fluidity" but no application of this test was made as to the Carlton Avenue property that was identified as a comparable. Even Vigen, the expert for the City, acknowledged that the Carlton Avenue property was too small without incorporating additions and/or modifications. This is the same situation which existed in Cameron, however, unlike Cameron, neither Vigen nor the trial court undertook an adjustment analysis and a resultant market value conclusion in order to satisfy the adjustment process that was utilized in Cameron.<sup>16</sup>

In addition, the City's and Trial Court's "fluid" approach to defining comparable properties requires that all cases must be analyzed on a case by case basis. This is a little disingenuous since every case is handled on a case by case basis whether there is a standard or not. Utilizing a standard only means that you are measuring each set of facts to a similar benchmark or threshold. In this case, that is, to determine what is a comparable property. If there is no standard, courts are free to interpret any set of facts as they deem fit leaving plaintiffs and defendants alike without any consistency in the application of the law. Defining a standard under MCS is what this case is about.

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<sup>16</sup> While Crandall believes that the analysis used by the Cameron Court is still inadequate for Minimum Compensation Statute purposes, the analysis done by the trial court and the City in this case falls far short of the analysis that was required in Cameron.

On page 19 of its brief, the City criticizes Crandall by arguing that Crandall's standard is not acceptable because it seeks the "ideal" or "perfect" replacement property. The City misstates Crandall's proffered standard. As stated on page 21 of the Crandalls' initial brief, based upon legislative history, the selection of a comparable property requires 1) identification of the important features associated with the use of the acquired property, and 2) assurance that those features are equivalent in the comparable property. In this case, those features include:

1. The building had 10,524 square feet of floor area that was being entirely used by the Crandall auction business;
2. All of the floor area in the acquired building had at grade access which was needed to accommodate the movement of inventory by the Crandall auction business; and
3. The acquired property was built of masonry construction and had no structural concerns.

At trial, the Crandalls offered a comparable with features equivalent to the above (Kolar); the City did not (Carlton).

Backing off their ad hoc/fluid approach, the City concedes on page 20 of its brief that comparable property must be one "in which the displaced business could feasibly continue to operate after displacement...". Feasible means possible or plausible. This falls short of language to be utilized in a remedial statute. Reasonableness is a standard more in line with remedial statutes. For example, a displaced restaurant averaged seating 100 people for lunch. It is possible the owner could stay in business by fitting in a building that would only allow seating 60 people for lunch, however his profits would be cut in half and he would have to lay off staff. It is possible, but not reasonable.

After conceding “an implied requirement” in which the displaced business could feasibly continue to operate after displacement, the City turns around in the next paragraph (on p. 20) stating that the appraiser “narrows the list of comparable properties down to those from which the displaced business can reasonable operate from.” The Crandalls disagree as to how you get to this point (a MCS property cannot be comparable unless the displaced business can reasonable operate from it to begin with), but at least the two parties agree that the ultimate MCS comparable must be a property that the displaced business can reasonable operate its business from the property.

The City cites to the Cameron case concerning balancing and a rejection of the “perfect comparable” (pp. 21-22), however this discussion is irrelevant given that everyone is in agreement the ultimate MCS comparable must be a property that the displaced business can reasonable operate its business from the property. The only relevance is that it shows the inconsistency in the City’s arguments. On one hand, it maintains that the ultimate MCS comparable must be a property that the displaced business can reasonably operate its business from; yet on the other hand, it is willing to compromise on the very features<sup>17</sup> that allow the displaced business to reasonably operate within that space.

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<sup>17</sup> As stated above at the bottom of p. 20, those features include:

1. The building had 10,524 square feet of floor area that was being entirely used by the Crandall auction business;
2. All of the floor area in the acquired building had at grade access which was needed to accommodate the movement of inventory by the Crandall auction business; and

The City does not dispute that the Crandalls can operate their business out of the Kolar property. The parties do disagree as to whether the Carlton property can house the Crandall auction business in the same manner in which it operated before the taking. On pages 23 and 24, the City makes its arguments as to the comparability of the Carlton property and the Crandall property. Crandalls will not rehash all of its previous arguments and directs the Court to its analysis on pages 24-29 and 36-39 in its initial brief (which is accompanied by extensive citation to the record), but a few highlights must be addressed.

On page 23 of its brief, the City argues that the difference in size between Carlton (4,100 sq. ft) and the subject (10,524 sq. ft., not 5,566 sq. ft. as stated in the City's brief<sup>18</sup>) can be remedied by the larger site. However, this is simply conjecture, and speculation. There are no plans, diagrams, estimates, or even a drawing on the back of a napkin on the record. Vigen did testify that a storage pod could be placed on the Carlton site, but admitted on cross examination that this would simply be a removable fixture not associated with real property valuation.<sup>19</sup> Not only is the record void of evidence of the type and size of structure the City guesses could fix the size difference, there is no evidence of the costs associated with the phantom remodel. Moreover, the only evidence on the record as to whether the Carlton property could be renovated

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3. The acquired property was built of masonry construction and had no structural concerns.

<sup>18</sup> See Crandall's initial brief at pp. 36-39.

<sup>19</sup> Vigen suggested the use of container storage to provide the needed storage. (See Trial Transcript at p. 288, l. 3-12) That storage is personal property. (See Trial Transcript at p. 290, l. 10-17) This case is about real estate, so this option is not available under the minimum Compensation Statute.

questioned the structural integrity of the Carlton building.<sup>20</sup> You cannot add on to a building that will fall down if you try to do so.

The City, on page 23 and consistently throughout the litigation, refers to the Crandall property as “pre-World War II construction”. However, the City conveniently fails to mention that the Subject Property underwent significant renovations in the 1980’s when Sears converted the Crandall property to a retail operation.<sup>21</sup> Consequently, as far as age, the Crandall property is more similar to Kolar than the “pre-World War II” Carlton property.

It is also important to note that that the City does not contest the evidence concerning the structural integrity of the Carlton property<sup>22</sup> or the condition of the Carlton property (which its own expert describes as poor<sup>23</sup>) when comparing them to the Crandall property<sup>24</sup>. This is probably because its expert (Vigen) never set foot in the Carlton property.

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<sup>20</sup> Exterior photos showed extensive upper areas of the building’s sidewalls that were exposed to the elements with no siding. (See Trial Exhibit 33, photos of the Carlton Avenue property; see also Trial Transcript at pp. 342-3). Reach was concerned about this lack of siding because of the negative ramifications caused by water penetration. (See Trial Transcript at p. 349:4-15, p. 350:7-15). The problems resulting from water penetration are rotting of the structure and the formation of mold. (Id). The interior pictures, showing vertical and horizontal twisting of the main structural beam, only intensifies the water penetration concerns for that building which is of wood frame construction. (See Trial Exhibit 33 (Reach’s pictures of the Carlton Avenue property).) By contrast the acquired property is of masonry construction which Vigen even acknowledged is superior to wood. (See Trial Transcript at p. 246:5-8, p. 248:24-25, p. 249:1-7.) Vigen also stated that he had no concerns about the structural integrity of the acquired property. (See Trial Transcript at p. 250:8-10.)

<sup>21</sup> Trial Transcript, p. 20, l. 19-24.

<sup>22</sup> Id.

<sup>23</sup> See Vigen’s reports where he describes the Crandall property in “fair” condition, but Carlton as “poor”; see also Trial Transcript at p. 199, l. 6-7, p. 207, l. 23-24.

<sup>24</sup> See Crandalls’ initial brief at pp. 27-29 and the extensive citation to the record.

**II A. WHETHER THE CRANDALL BUSINESS OPERATED IN A SMALLER SPACE IN ITS PAST OR IN A TEMPORARY LOCATION AFTER THE TAKING IS IRRELEVANT GIVEN THAT AT THE TIME OF TAKING IT IS UNDISPUTED THAT IT USED THE BUILDING'S FULL SQUARE FOOTAGE.**

The City argues on pages 24-25 that since the Crandalls used less than the full square footage in the past and after the taking (at a temporary location to keep their business operating which did not work because it was too small), then they should not be able to claim the full square footage for a replacement property. First, to avoid duplication, the Crandall points the Court to pages 36 to 39 which also addresses this issue as well as Mr. Crandall's alleged admission. Second, damages in condemnation cases are determined on the date of taking. Twin Cities Metropolitan Public Transit Area v. Twin City Lines, 301 Minn. 386, 224 N.W.2d 121, (1974) ("it has been the general rule in Minnesota that damages in condemnation are measured by the value at the date of taking"); see also Oronoco School Dist. v. Town of Oronoco, 170 Minn. 49, 212 N.W. 8 (1927); Ford Motor Co. v. City of Minneapolis, 143 Minn. 392, 173 N.W. 713 (1919); Conter v. St. Paul & S.C.R. Co., 22 Minn. 342 (1876). Even Vigen, the City's expert recognizes that it is undisputed that the full square footage was being used on the date of taking.<sup>25</sup>

**II B. AVAILABILITY OF A COMPARABLE PROPERTY AT THE DATE OF TAKING.**

The City restates the Cameron decision on page 28 of its brief concerning the availability of the property in order to be considered comparable. With all due respect

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<sup>25</sup> See Trial Transcript at pp. 236, 255.

to Cameron, and for the reasons stated in its initial brief at pages 29-30, the Crandalls disagree. Given that the Supreme Court has granted review of the Cameron decision, the issue is still unresolved. In addition, this issue is not dispositive to the other issues on appeal.

**III. THE KOLAR PROPERTY IS COMPARABLE BECAUSE IT WAS THE ONLY PROPERTY OFFERED AT TRIAL THAT WAS AT LEAST EQUIVILENT TO THE SUBJECT WITH REGARDS TO THE KEY FEATURES.**

On pages 28-31 the City defends the trial court's holding that the Kolar property was not comparable to the subject. As stated above, in order to be considered comparable, the parties agree that the potential comparable must be a property from which the displaced business can reasonable operate. At trial (and detailed in their initial brief at pp. 31-33) it was shown, and undisputed, that the Crandall business could reasonably operate from the Kolar site. It was the only property offered that met equivalency standards for the features key to allowing the Crandall business to reasonably operate from the site.

The Crandalls concede that the Kolar property has superior features than the Crandall property, but that is only relevant if another comparable is offered. If two comparables are offered, both of which are equal as to equivalency features, the Crandalls would agree that the displaced property owner is not entitled to the superior of the two. However, in this case, only one property (Kolar) met the equivalency standard for key features (see pp. 24-29).

The City argues that the Kolar property is not comparable because it is 6,000 square feet larger than the subject (interesting though, considering the City ignores this same 6,000 square foot disparity when it compares Carlton's 4,000 square feet to the subject), however, that fact would only be relevant if there was another comparable equivalent as to key features but had square footage closer to Crandall's 10,000+ square footage, but still equal or greater to that 10,000+ square feet.

The City also highlights irrelevant differences like the different locations: Scanlon, where the Kolar property is located is just adjacent to Cloquet, where Crandall was located. As for age, the City again describes the Crandall property as "pre-World War II" ignoring the 1980's remodeling by Sears which makes it much closer in age to Kolar than Carlton. Surprisingly, the City brings up condition (comparing Kolar's "good" condition to the Crandall's "fair"<sup>26</sup> condition while ignoring its own expert's description of Carlton as "poor") given how the condition of the Carlton Avenue property pales when compared to the Crandall property (see initial brief at pp. 23-24 and pp. 26-29). The City's comments on zoning are irrelevant since both allowed auction use. As for access, there was nothing on the record showing that the Kolar access was superior to Crandall property for the auction business.

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<sup>26</sup> See APP-518; Trial Exhibit 18, on page 27 of his appraisal report Vigen states the acquired property is "fair quality"; and at APP-554, Exhibit 19, Vigen's Minimum Compensation Report describes the property in "fair" condition in his grid on page 5.

#### **IV. VIGEN'S MINIMUM COMPENSATION REPORT AND TESTIMONY WERE INADMISSABLE.**

The City argues on pages 32 that Vigen's<sup>27</sup> testimony and report were admissible given the relaxed evidentiary standards as to market value in condemnation cases. First, (as stated in their initial brief pp. 43-46), the main problem with Vigen concerns what he did not do, as opposed to what he did. If market value must be considered, as per Cameron, it is to determine the market value of the comparable property.<sup>28</sup> As stated in their initial brief, Vigen did not determine the market value of the comparable property (Carlton Avenue). The City does not dispute this point. So even under Cameron, the City concedes that its expert did not do the type of analysis required by the MCS. For this undisputed reason alone, Vigen's testimony and report should have been thrown out and the decision of the Trial Court reversed.

Second, Vigen's number is merely a cap, not a purchase price of a replacement property or the market value of the comparable. He is merely stating that if you bought Carlton Avenue and renovated it, whatever number that would end up would not be

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<sup>27</sup> It is a sad realization how some attorneys sink so low in their briefing in order to sway the court. On page 33, the City criticizes Reach for handling only one other MCS case while stating its own expert's "experience and qualifications are beyond reproach". To reproach a bit, the City fails to mention that Vigen has previously admitted that: he is not an expert on the 2006 eminent domain legislation (Comm. Hrg. p. 60:24); and, he had never done a minimum compensation analysis (Comm. Hrg. p. 62:20-22).

<sup>28</sup> This will be an issue raised before the Supreme Court in Cameron. If you are using the market value of comparable properties to determine damages for minimum compensation, then all you are really doing is a market value analysis but instead of using the highest and best use (which very well could result in a value higher than the existing use) you are stuck with the existing use of the displaced owner. It is hard to imagine a situation where this formula would result in compensation greater than the fair market value.

greater than the \$195,000 fair market value of the Crandall property.<sup>29</sup> The glaring omission in his analysis is that he never opined as to what exact renovations were needed or the costs of those renovations. Absent in the record are any plans, plats, schematics, contractors' estimates, Marshall & Swift costs. There is nothing on the record as to what exact renovations were needed or the costs of those renovations. Given this, he cannot offer an opinion that lacks basic foundation for that opinion.

Third, with all due respect to Cameron, market value of the Subject Property has nothing to do with determining the purchase price for minimum compensation. Fair market value was never disputed in this case. The dispute lies with finding the purchase price of a comparable property in the community. Reach found such a price. Vigen never did. Crandalls never disputed that Vigen can testify all he wants to about the fair market value of the Subject Property, but since he admittedly did not determine a purchase price, his testimony on minimum compensation was inadmissible speculation.

On page 34 of its brief, it appears the City argues since the MCS is in a "very fluid legal situation" that the Court should be lenient with Vigen. The City also argues that the Crandalls have not offered any authority under the MCS to exclude Vigen's testimony and reports. The Crandalls disagree. Just because a law is new, experts should not be given a free pass. Moreover, as stated above and in its initial brief, Vigen cannot even satisfy the only MCS case, Cameron, since he failed to determine the market value of his comparable property (Carlton Avenue). Finally, as to the absence of

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<sup>29</sup> His opinion is based upon the "*probable* total expenditure for this property (inclusive of acquisition and renovation)" from Exhibit 19 Vigen's Alternate Property Study at page 6 at the end of the second to last paragraph (emphasis added).

authority, in footnote 134 of its initial brief, the Crandalls cited authority for the position that an opinion of an expert must be based on facts sufficient to form an adequate foundation for an opinion (which Vigen clearly has failed to do). See 20 Am.Jur., Evidence, § 795; 32 C.J.S., Evidence, § 522. And further that an opinion based on speculation and conjecture (like Vigen's) has no evidentiary value. See Susnik v. Oliver Iron Mining Co., 205 Minn. 325, 331, 286 N.W. 249, 252 (1939) (“\* \* \* an affirmative finding cannot be sustained upon mere conjecture, as distinguished from real deduction. This rule applies to opinion evidence, even that of the best of experts, Honer v. Nicholson, 198 Minn. 55, 268 N.W. 852 (1936). It governs in weighing all evidence and its analysis for purposes of decision.”).

As for the criticism of Reach and that he is inconsistent with Cameron, again, the City is quick to point out different features where the differences between the features are irrelevant to the business (i.e. location – customers will find him in Scanlon as well as Cloquet), but fails to recognize, as Reach did, that some features cannot be compromised (size, ease of access within the space, and condition).

#### **V. THE COMMISSIONERS SHOULD NEVER HAVE BEEN ALLOWED TO TESTIFY.**

Clearly, the City's ardent defense of the commissioners shows that you cannot fit a square peg in a round whole. The City's argument is three-fold: the commissioners' actions were within the statute; this was not a civil trial; and finally, since the Crandalls had appealed and had a trial de novo, they were not harmed (no harm, no foul).

In arguing that the commissioners were within the statute (at pp. 37-38), the City states that the commissioners were simply requesting additional information which is acceptable under Minn. Stat. § 117.085. However, the language they are referring to specifically states, “[i]f deemed necessary, they may require the petitioner or owner to furnish for their use maps, plats, and other information which the petitioner or owner may have showing the nature, character, and extent of the proposed undertaking and the situation of lands desired therefor.” Does the following exchange as described by Commissioner Maki between him and a city employee (that takes place **after** the commissioners’ hearing and during their deliberations) really sound like he was requesting a map:

But he had mentioned to me  
something like that, well, why don't the  
Crandalls buy my property, that would work.  
And so I said, well, I wasn't aware that  
it -- it wasn't on the market.

This was how the theory of the Chief Theater property as a comparable entered this case. The commissioners’ numerous ex parte communications are discussed more fully in the Crandalls’ initial brief at pp. 47-50.

Over and over, the City argues that the commissioners’ hearing was not a trial so, what’s the big deal. First of all, this is a statutory proceeding concerning a property owner’s constitutional right to compensation for the taking of his property. It is a big deal. Moreover, the City’s brief completely ignores the statutory requirement that “*[a]ll testimony taken by them shall be given publicly, under oath...*”. Minn. Stat. § 117.085 (2010). Put aside the fact that Commissioner Maki was running for City Council (and is

now on the City Council), the commissioners had two City employees whispering in the their ears and questioned two others all without the Crandalls having any opportunity to cross examine the witnesses, offer anything in rebuttal, and more important in direct conflict with the statute.<sup>30</sup>

Finally, the City argues that since there was a trial de novo, there was no harm from the commissioners' transgressions. If the trial court granted the Crandalls' motion in limine and the commissioners and their testimony and report were excluded from trial, the City's argument would have some merit. But the commissioners did testify, and the trial court simply adopted their findings.<sup>31</sup> The Crandalls were harmed and their only remedy now is a new trial without the commissioners' testimony and report.

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<sup>30</sup> The City also argues that the commissioners' are entitled to "view the premises"; obviously, this refers to the property taken, not all the other properties the commissioners viewed. Even so, this does not excuse all the ex parte testimony the commissioners obtained during these viewings.

<sup>31</sup> See Trial Court's order filed October 12, 2011 made the following findings and conclusions:

5. The **commissioners conducted** a minimum compensation analysis within the intent and meaning of the minimum compensation statute by comparing the various available properties identified in the report prepared by David Reach for purposes of determining whether they could serve as locations for the displaced auction business.

6. The **commissioners concluded** that the property located at [hereinafter the "Carlton Avenue property"] was a comparable property within the meaning of the minimum compensation statute.

7. The **commissioners concluded** that the award of \$198,000 would have provided just compensation for Respondents Julie and Kerry Crandall to purchase the Carlton Avenue property and make improvements such that the Carlton Avenue property could have served as a location for their auction business....

11. The **commissioners concluded** that the property located at 3206 River Gate Avenue in Scanlon, Minnesota [hereinafter the "Kolar property"] was not a comparable property within the meaning of the minimum compensation statute....

3. The **commissioners identified** the Carlton Avenue property as a comparable property...

## CONCLUSION

For all the forgoing reasons this Court respectfully should reverse the District Court and remand this case for a new trial with instructions consistent with the Cameron case (or consistent with the Supreme Court's yet to be released opinion), without the testimony of the commissioners or their report, and without Vigen's testimony and report on minimum compensation.

Dated: June 18, 2012

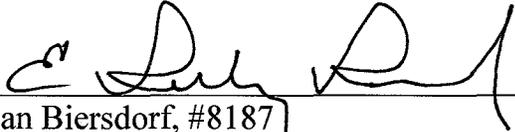


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**FORM AND LENGTH CERTIFICATION**

I certify that this brief conforms to the rules contained in Minnesota Rules of Appellate Procedure for a brief produced using the following font: Times New Roman, 13 point.

The word count for the brief is 7,204 words.

Dated: June 18, 2012 

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