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Floyd Harmer, Stanley D. Roberts, G. Marion Hinckley, As The Board Of County Commissioners For Utah County, And As The County Board Of Equalization, And As Individual Taxpayers In Ut.A.H County; Harrison Conover, As Utah County Assessor; Elwood L. Sundberg, As Utah County Auditor; Maurice C. Bird, As Utah County Treasurer; C. Steven Hiatch, As A Resident Of And Taxpayer In Utah County v. State Tax Commission : Petition For Rehearing

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# In The Supreme Court of the State of Utah

**FLOYD HARMER, STANLEY D. ROBERTS,  
G. MARION HINCKLEY, as the Board of  
County Commissioners for Utah County,  
and as the County Board of Equalization,  
and as individual taxpayers in Utah County;  
HARRISON CONOVER, as Utah County  
Assessor; ELWOOD L. SUNDBERG, as  
Utah County Auditor; MAURICE C. BIRD,  
as Utah County Treasurer; C. STEVEN  
HATCH, as a resident and taxpayer of Utah  
County,**

**Plaintiffs, Appellants and  
Cross-Respondents,**

**vs.**

**UTAH STATE TAX COMMISSION,**

**Defendant, Respondent and  
Cross-Appellant.**

## **PETITION FOR RE-HEARINGS**

**On Appeal From the Fourth District for Utah County,  
Honorable Allen B. Sorenson, Judge.**

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Clerk, Supreme Court, Utah

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# In The Supreme Court of the State of Utah

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FLOYD HARMER, STANLEY D. ROBERTS,  
G. MARION HINCKLEY, as the Board of  
County Commissioners for Utah County,  
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HATCH, as a resident and taxpayer of Utah  
County,

Plaintiffs, Appellants and  
Cross-Respondents,

vs.

UTAH STATE TAX COMMISSION,

Defendant, Respondent and  
Cross-Appellant.

Case No.  
11369

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## PETITION FOR RE-HEARING

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Appellant respectfully petitions the Court for a rehearing and reconsideration of the decision in this case filed April 2, 1969.

This petition is based upon the following grounds:

1. The Court erred as a matter of law because there was no showing that the State Tax Commission acted with an in-

tentional, systematic, deliberate or fraudulent design to discriminate and thereby violate fundamental constitutional and legislative principles. And absent such showing the majority opinion should, as a matter of law, adopt and reflect Justice Crockett's dissent requiring such a finding before the acts of the Commission can be overturned.

2. This Court held that there was no plan or program or revaluation in existence. The provisions of *Utah Code Annotated* 59-5-46.1, require no written plan, and this Court should grant administrative agencies latitude in determining how they are to fulfill their respective duties, in the absence of a showing of bad faith, or fraudulent purpose.

3. The action of the State Tax Commission in revaluing Provo-Orem properties was an honest, good faith effort by said Commission to effectuate the substantial equality in land valuations and taxation required by Article XIII, Section 3, of the *Utah Constitution*, as well as the Equal Protection Clause of the Fourteenth Amendment.

4. This Court erred in voiding the attempts of the State Tax Commission to achieve substantial equality by beginning in those areas most undervalued and most in need of equalization. The Court, by its decision, has effectively assured the continued inequality in land valuation which is contrary to the Constitution and laws of the State of Utah.

5. If allowed to stand, the decision of this Court will work a great burden and hardship upon those taxpayers who presently shoulder a greater load due to unequal valuations, and will greatly hamper the efforts of the State Tax Commission to fulfill its duties. The recently-adjourned legislature enacted an

amended version of *Utah Code Annotated*, 50-5-46.1, (Senate Bill No. 20), which will require a written plan of revaluation, and implementation of that law will be greatly hampered, if not effectively stopped, in light of the Court's opinion herein.

6. A property owner has no right to have his property undervalued, and in view of the admitted disparity in land valuations of many areas of the State, the effect of this Court's opinion is to perpetuate, rather than eliminate these disparities. If the State Tax Commission's program of revaluation is voided in Provo-Orem, that body is powerless to act even in a flagrant case of misvaluation until granted sufficient funds and personnel by the legislature to enable it to revalue all land in the State in the short span of five years. Even if administratively possible, such an accomplishment would be dubious at the end of the period, when conceivably the initial assessments may be greatly inequitable when compared with the final assessments completed in the fifth year.

7. The Court's decision is ambiguous in that it leaves unanswered the issue of whether the Commission can make emergency or spot revaluations in those counties not undergoing a cyclical revaluation program in order to correct gross misvaluations. If the Commission does undertake such emergency revaluations, must the Commission, having entered the county on an emergency basis, completely revalue the entire county?

8. The Court's opinion seems to require that the State Tax Commission must complete its five-year revaluation program before adding any of the revalued property to the tax rolls. If this is the intention of the Court, its decision will not only greatly hamper the discharge of petitioner's duty to assure equal valuation, but it is contrary to the weight of case law in this area.

## ARGUMENT

## POINT I

THE ACTIONS OF THE STATE TAX COMMISSION IN REVALUING REAL PROPERTY CANNOT BE ATTACKED AS VIOLATING EQUAL PROTECTION OR THE JUST VALUATION REQUIREMENT OF THE UTAH CONSTITUTION, ARTICLE XIII, SECTION 3, IN THE ABSENCE OF A SHOWING OF A SYSTEMATIC, DELIBERATE, INTENTIONAL OR FRAUDULENT DESIGN TO VIOLATE THOSE CONSTITUTIONAL PRINCIPLES.

Mr. Justice Crockett's able dissent has focused on a key element of this case.

\* \* \*

"But from what has been made to appear, I am not persuaded that the Tax Commission has been arbitrary, unreasonable or discriminatory in proceeding toward the desired objective."

Dissenting Opinion, *Harmer, et al v. State Tax Commission*, No. 11369, April 2, 1969, p.4.

In a recent A.L.R. annotation, the problem of constitutional challenges to revaluation programs was summed up as follows:

"... the question of violation of constitutional right is largely one of the presence or absence of actual *intention to discriminate*, despite the fact of substantial, and in some instances great, inequality in taxation necessarily resulting from only partial application of new values." 76 A.L.R. 2d, at 1077, (emphasis supplied); see also; 51 Am. Jur. "Taxation," Section 170, *et seq.*



The basic principles of law applicable to this case are set forth in *Sunday Lake Iron Company v. Township of Wakefield*, 247 U.S. 350, 38 S. Ct. 495, 62 L.Ed. 1154 (1918). The state of Michigan had valued appellant's mining lands at full value for tax purposes, whereas most other property was valued at one-third market value.

While recognizing that an intentional, systematic undervaluation contravenes the constitutional rights of one taxed at full value, (*id.*, at 352-353,) the Court required the following burden of proof of one challenging a valuation on constitutional grounds:

"[One must show] something which in effect amounts to an intentional violation of the essential principal of practical uniformity. *The good faith of such officers and the validity of their actions are presumed*; when assailed, the burden of proof is upon the complaining party."

*Id.*, at 353, (emphasis supplied).

Further delineation of the burden upon one challenging valuations by taxing officials was expressed in *Liggett Company v. Lee*, 288 U.S. 517, 53 S. Ct. 481, 77 L.Ed. 929 (1933), which required an intentional and systematic undervaluation to sustain such a challenge, which requirement can only be met by evidence of a clear and hostile discrimination against particular persons and classes. *Id.*, at 539-540.

When our sister state of Wyoming valued property of the Chicago and Northwestern Railway at 113 1/3 per cent of actual value, as compared with the usual 60 per cent of actual value assigned to other types of property, the railroad challenged the State's action as a violation of the Equal Protection Clause. The Supreme Court held that there must be an intent

or fraudulent purpose to disregard the fundamental principle of uniformity before activities of taxing authorities would be considered violation of Equal Protection. The Court said it was not discriminatory to undervalue other property. *Rowley v. Chicago & N. W. Ry.*, 293 U.S. 102, 111, 55 S. Ct. 55, 79 L.Ed. 222 (1934).

One of the best statements of the law in our area of inquiry is in *Great Northern Ry. v. Weeks*, 297 U.S. 135, 56 S. Ct. 426, 80 L.Ed. 532 (1936), a North Dakota tax-valuation case.

“Overvaluation is not of itself sufficient to warrant injunction against any part of taxes based on the challenged assessment; mere error of judgment is not enough; there must be something that in legal effect is the equivalent of *intention or fraudulent purpose* to overvalue the property.”

*Id.*, at 139, (emphasis supplied).

Admittedly, these cases were concerned with the application of the Equal Protection Clause, but a comparable line of cases construing State constitutional provisions similar to Utah's Article XIII has reached the same result, and requires a showing of a fraudulent, intentional, systematic design to discriminate before one may successfully challenge the actions of taxing authorities.

*Alfred J. Sweet, Inc. v. City of Auburn*, 180 A. 803, 805 (1935), speaks of a systematic purpose to cast a disproportionate share of the tax burden on one or a group of taxpayers as the only justification for judicial interference in this area, requiring “intentional violation of the essential principle of practical uniformity.”

The mere fact that one person's property is assessed at its full value and that of others at less than full value, even though the statutes allow no such discrimination, raises no constitutional question, said the court in *Lubbock Hotel Co. v. Lubbock Independent School District*, 85 S. W. 2d 776 (1935). Before the court will interfere, it must appear that a rule or system of valuation has been adopted by the assessing authority which was designed to operate unequally and to violate a fundamental constitutional principle. *Id.*, at 778. The fraud requirement in *Lubbock* was defined as a conscious failure to exercise the fair and impartial judgement the law requires of assessing officers. *Id.*

Arizona requires that the improper administration of valuations be deliberate to sustain a challenge of taxing authorities' actions. *Dubame v. State Tax Commission*, 179 P.2d 252, 261 (1947).

*Skinner v. New Mexico State Tax Commission*, 66 New Mexico 221, 345 P.2d 750 (1959), is the main case in an annotation in 76 A.L.R. 2d 1077.

There the county assessor valued 20% of the county real property at the uniform rate of 16% of market value, while 80% of the properties on the tax rolls were valued from 1% to 166% of market value.

In refusing a property owners challenge of the valuations, based on the *New Mexico Constitution*, Article VIII, Section 1; the New Mexico Supreme Court held that the taxpayer must show either a well-defined and established scheme of discrimination or some fraudulent action. 345 P.2d, at 752.

"Taxes levied upon tangible property shall be in proportion to the value thereof, and taxes shall be equal and uniform upon subjects of taxation of the same

class." N.M.S. Annotated, 1953, Vol. I, at 176.

The following is provided for in the Constitution of the State of Missouri: "Taxes . . . shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax." Article X, Section 3, R.S.Mo. 1959, vol. 4 at 4844.

The limits of the courts to intervene in land revaluation by tax authorities was clearly delineated by the Missouri court in *May Department Stores Co. v. State Tax Commission*, 308 S.W. 2d 748 (1958).

"The court may not sit in judgment on the opinion and estimates of duly constituted taxing officials and substitute their own opinions. (Citations omitted.) So far as excessiveness is concerned, the assessment must be so grossly excessive as to be entirely inconsistent with an honest exercise of judgment before the courts may intervene."

*Id.*, at 764.

On the degree of discrimination necessary to invalidate a tax official's actions, *Crothers v. County of Santa Cruz*, (California 1st District Court of Appeals,) 151 Cal. App. 2d 219, 311 P.2d 557 (1957), is instructive.

"The essential question with respect to the assessment of properties of the same or different classes to be determined is as to whether the provisions of the Constitution regarding uniformity in valuation and of the laws declaring how uniformity and equality in the distribution of the burdens of taxation are to be ascertained and applied have been fairly conformed to or systematically, and intentionally disregarded."

*Id.*, at 561 citings *Mahoney v. City of San Diego*, 198 California 388, 398, 245 P.2d 189, 193 (1926), which required such a degree of discrimination as to evince a willfull and systematic disregard of federal and state constitutional requirements. *Id.*, at 192.

Clearly, in light of the facts of this case, the actions of State Tax Commission officials in the Provo-Orem area were not the result of a deliberate, systematic, intentional, fraudulent design to violate Equal Protection and the uniformity and equality required in land valuations by Article XIII, Section 3, of the *Utah Constitution*. As a matter of law, Mr. Justice Crockett's dissenting opinion should be incorporated into the majority opinion, to reflect the failure of the Utah County plaintiffs to meet the burden of showing an intentional violation of fundamental principles of uniformity or equality in land valuations.

Petitioner respectfully submits that this Court erred in not recognizing that the efforts of the State Tax Commission under challenge were in fact, good faith efforts by that administrative body to fulfill its statutory and constitutional duty. This Court held that no plan or program existed, but Utah Code Annotated 59-5-46.1 requires no written plan, and this Court should grant the Commission latitude in determining how it is to fulfill its duties, absent a showing of bad faith or fraudulent purpose.

Is it not more likely, in the absence of any showing of an "intentional violation of the essential principle of practical uniformity," *Sunday Lake Iron, supra*, that the State Tax Commission's revaluation of properties in the Provo-Orem area was in reality a good faith effort, halted by this suit, to hasten the time when all real property in Utah is valued and taxed,

as the Constitution requires, uniformly and equally? And would not this Court better serve both the constitutional principles, and its concerns for reasonable uniformity and equality announced in *Harmer, et al v. State Tax Commission*, by sustaining this first attempt of the State Tax Commission to equalize land valuations?

We respectfully urge this Court to do so, and sustain petitioner's contentions that the earlier decision was erroneous in its application of the law to the facts of this case.

## POINT II.

THE REVALUATION OF PROVO-OREM PROPERTY WAS AN HONEST, GOOD FAITH ATTEMPT ON THE PART OF THE STATE TAX COMMISSION TO FULFILL THE CONSTITUTIONAL REQUIREMENT OF SUBSTANTIAL EQUALITY IN LAND EVALUATIONS.

That good faith is the most important element in the working of a tax board is a principle all will recognize. The actions of a tax board in a situation so sensitive as land revaluation invade a precious area: individual property rights, long recognized as one of man's basic, inherent rights.

The good faith of taxing officials is presumed. *Sunday Lake Iron Co. v. Township of Wakefield, op.Cit.*, at 353; *Interstate Oil Pipeline Co. v. Guilbeau*, 46 So. 113 (1950).

In the *Sunday Lake Iron Case*, cited *supra* at page 5, the court said the following of the tax commission's efforts in valuing the company's property at full value, other lands at one-third of value.

"Its action is not incompatible with an honest effort in new and difficult circumstances to adopt valuations not relatively unjust or unequal."

*Id.*, at 353.

Petitioner respectfully submits to this court that such an analysis of its activities in the Provo-Orem area are subject to the same observation.

Confronted with express constitutional and statutory requirements, of substantial equality of valuation, petitioner recognized a complete lack of uniformity of valuation in the State. As was pointed out at trial, locally-assessed properties have been for years assessed at substantially lower rates than state-assessed properties.

(P. Exh. 3, Def. Exh. 11).

Utah Code Annotated §9-5-47 requires petitioners to equalize the valuation of taxable property in the various counties of the State.

In a good faith effort to comply, the petitioner began its program in the Provo-Orem area. Rather than perpetuating or accenting variances in valuation, that effort resulted in bringing more property values in line with comparable property in other counties.

As Mr. Justice Crockett has observed, "I am not persuaded that the Tax Commission has been arbitrary, unreasonable or discriminatory, in proceeding toward the desired objective" [equalization of property valuations.].” *Dissent, Opinion, op. cit.*, p.4.

Might not this Court more adequately serve to hasten the day of equality by allowing the efforts of the Tax Commission to stand, "as an honest effort in new and difficult circumstances to adopt valuations not relatively unjust"? *Sunday Lake Iron, op.cit.*

The *Skinner v. New Mexico State Tax Commission* case, *op.cit.*, presents a situation somewhat parallel to the instant case. There a county assessor was faced with unequal valuations ranging from 1% to 166% of market value. The New Mexico Constitution requires the same substantial equality of assessment as Utah's. His plan was to assess all property at 16% of market value, but limitations of funds and personnel allowed him to complete revaluation of only 20% of the property on the tax rolls. Thus, 80% of the taxpayers paid taxes based on the old, grossly disparate valuations, while 20% paid a uniform tax based on the 16% valuation.

In sustaining the assessor's actions, the court found that the equalization process is a continual one, and that there was no need to complete it within one year. As pointed out earlier, the Court recognized the need of a challenging taxpayer to find a well-defined and established scheme of discrimination or some fraudulent action. 345 P.2d, at 752.

A county Board of Equalization's attempt to increase the land valuations of designated tracts in only the commercial areas of a city was considered in *May Department Stores Co. v. State Tax Commission*, 308 S.W. 2d 748 (1958), a Missouri case under a constitutional provision, *op.cit.*, substantially similar to Utah's Art. XIII.

The order increasing land valuations was held not to be in violation of State and federal constitutional principles because immediate, complete revaluation was impossible, and such an increase was merely a step toward attaining uniformity of valuation. 308 S.W.2d, at 759.

In voiding the actions of the State Tax Commission in the Provo-Orem revaluation, this court has effectively sanctioned



the continuance of the gross inequality so offensive to it, to the citizens of Utah, and to the Utah Constitution.

As in *Skinner*, the petitioner herein is severely handicapped by lack of funds and personnel. To some extent, the 1969 Legislature has alleviated that problem in its new version of Utah Code Annotated § 59-5-46.1. But petitioner respectfully submits that unless this Court allows it to continue to revalue as much as funds and personnel limits allow, the State Tax Commission will come to an abrupt halt in its good faith efforts to equalize valuations in accordance with its statutory and constitutional obligations.

As the *Skinner* court observed, equalization is a continual process. Even at the end of the Five year period set forth in Utah Code Anontated § 59-5-46.1, those properties revalued at the start of the first year, given the normal rise in property values generally, will be undervalued vis-a-vis those properties revalued in the waning hours of the cycle. Are we then to scrap all the past five years' work because we haven't valued all lands equally? Hardly, for as the Missouri court observed, *supra*, immediate complete revaluation is impossible. Instead, the petitioner must act as it sees fit, in good faith, to equalize the most grossly misvalued properties first, as a first step of many on the road to substantial equality and uniformity on a state-wide basis.

Requiring, as has this court, completion of cyclical revaluations in one county at a time, seriously hampers the petitioner in fulfilling its duties. Petitioner respectfully urges this Court to reconsider the portion of its opinion on this matter, in the light of the case law set forth hereinabove, and Mr. Justice Crockett's dissent, cited previously.

## POINT III.

IF ALLOWED TO STAND, THIS COURT'S OPINION THREATENS TO PRECLUDE ANY EFFECTIVE ACTION BY PETITIONER IN DISCHARGE OF ITS CONSTITUTIONAL AND STATUTORY DUTIES.

As a basis for its opinion, this court held that since land valuations were not substantially uniform or equal in Utah or Utah County, respondent-taxpayers' properties could not be added to the tax rolls, despite the fact that the revaluation tended to conform these properties to a more equal valuation vis-a-vis other like property.

Also, it was expressly stated that the intent of the legislature was to require each revaluation program to be completed a county at a time.

Carried to its logical conclusion, this line of reasoning seems to require a full county to be revalued before any properties can be added to the tax roll. Petitioner respectfully submits that this extension of logic shows the error of the Court's holding on this point.

Petitioner has cited *Skinner v. New Mexico State Tax Commission*, *supra* at page 7, where a county assessor placed revalued properties on his tax rolls along with grossly misvalued properties.

The Court effectively characterized the nature of the taxpayer's challenge in that instance, which is strikingly parallel to the instant case.

"Here, appellants have shown no discrimination or fraud, nor did they ask that all other property be immediately raised in assessed value. On the contrary,

they say, in effect, 'we have been under-assessed in the past and we must continue to be under-assessed until every other piece of property is placed on the tax rolls at comparative, though less than market values.' "

345 P.2d, at 752.

The *Skinner* court then answered this contention, as petitioner submits this court should have answered that of respondent-taxpayers, by citing *Hamilton v. Adkins*, 250 Alabama 757, 35 So.2d 183 (1948), *cert.den.*, 335 U.S. 861. That well-reasoned opinion held that before discrimination violative of constitutional provisions can be found in assessment or valuation by taxing authorities.

" . . . it is necessary that the action of the administrative officials be more than mere error in judgment or result in more than inequality in valuation. It must be shown that the officials are chargeable with a purpose or design to discriminate by a systematic method."

*Id.*, at 184.

For purposes of this petition, it is important to note that the Alabama court was considering a revaluation program only one-fourth completed at the end of the year, due to limitations in budget and personnel available for the task.

Petitioner contends that is is not necessary, in the light of applicable case law, for a revaluation program to be completed before any revalued properties may be added to the tax rolls. Regrettably, this court's opinion, if allowed to stand, compels a contrary conclusion, and runs counter to the current state of the law in this field.

In accord with the views of the Missouri and Alabama

decisions are two California cases in the First District Court of Appeals.

*Alberts v. Board of Supervisors of County of San Mateo*, 193 Cal. App. 2d 225, 14 Cal.Rptr. 72 (1961), *bearing denied* by State Supreme Court, August 16, 1961, held that a cyclical reappraisal program that is not completed is not discriminatory, and those properties reappraised may be legally added to the tax rolls before all property has been reappraised. *See also: Lord v. County of Marin*, 29 Cal. Rptr. 248 (1963).

Petitioner is confronted with a related problem due to this Court's holding, and respectfully requests the Court to consider and give petitioner the benefit of its opinion on the following:

"May the State Tax Commission, in furtherance of its duty to assure a uniform rate of valuation, re-value property in a county that is not at the time undergoing the statutory cyclical revaluation program?"

The problem arises when land development takes place in a county changing the use of the property, often increasing its value many-fold. For instance, what was once farm land, may in the space of a few months become a sub-division or shopping center. If this occurs just after the State Tax Commission has completed its revaluation program in that county, the property may be grossly undervalued for as many as five years, unless the Commission can make a spot-revaluation.

This Court's opinion seems to answer the query in the negative, but petitioner respectfully urges consideration of the following points.

1. Such a holding in effect impedes implimentation of

the constitutional requirement of substantial equality or uniformity.

2. The case law seems to indicate no violation of constitutional provisions occurs when spot revaluations are undertaken by taxing authorities.

*May Department Stores Co. v. State Tax Commission*, 308 S.W. 2d 748 (1958), cited *supra* at page 8, was a case under the *Missouri Constitution's* Art. X, Section 3, which requires substantial uniformity of assessment.

The application of that provision, and the Equal Protection Clause, to a County Board of Equalization's attempts to increase the land values of designated tracts in only the commercial areas of a city was the concern of the Missouri Court.

The order increasing those specific land valuations was held to be valid because immediate, complete revaluation was impossible and such an increase in specific properties was merely a step toward attaining uniformity of valuation in that area. *Id.*, at 759.

The State Tax Commission contends that spot revaluations, made in an honest attempt to fulfill the constitutional standard of equality of valuation, should be valid, but that if this Court's opinion is allowed to stand, serious doubts are present as to whether such action is possible in Utah.

Petitioner respectfully asks this court to consider this vital question, and to render an opinion thereon.

## CONCLUSION

Petitioner respectfully submits that the majority opinion in this case is contrary to accepted legal authority; that the dissenting opinion of the Honorable Chief Justice Crockett

correctly interprets the law applicable to the case and should be adopted as part of the majority opinion.

The opinion as it now stands perpetuates the very inequities this court found to be so objectionable and opens the door to continued litigation each time a plan of reappraisal is commenced within a county. The effect of such litigation would be to preclude any comprehensive reappraisal program initiated by the Commission or contemplated by the 1969 Utah Legislature when it amended Section 59-5-46.1, Utah Code Annotated.

The decision is ambiguous in that it does not clearly state when re-valued property is to be placed upon the tax rolls nor does it consider the problems attendant to an expanding economy where property values change overnight. It appears to preclude any spot revaluations in counties not being revalued under a cyclical revaluation program, thereby perpetuating existing and newly arising inequities.

Petitioner therefore respectfully urges this honorable court to reconsider its decision in this case.

Respectfully Submitted,

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