WEST VIRGINIA CODE CHAPTER 36b ARTICLE 1

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PART I. DEFINITIONS AND OTHER GENERAL PROVISIONS.

§36B-1-101. Short Title.

This chapter may be cited as the Uniform Common Interest Ownership Act.

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§36B-1-102. Applicability.

Applicability of this chapter is governed by Part II of this article.

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§36B-1-103. Definitions.

In the declaration and bylaws (section one hundred six, article three of this chapter), unless specifically provided otherwise or the context otherwise requires, and in this chapter:

(1) "Affiliate of a declarant" means any person who controls, is controlled by, or is under common control with a declarant. A person "controls" a declarant if the person: (i) Is a general partner, officer, director or employer of the declarant; (ii) directly or indirectly or acting in concert with one or more other persons, or through one or more subsidiaries, owns, controls, holds with power to vote, or holds proxies representing, more than twenty percent of the voting interest in the declarant; (iii) controls in any manner the election of a majority of the directors of the declarant; or (iv) has contributed more than twenty percent of the capital of the declarant. A person "is controlled by" a declarant if the declarant: (i) Is a general partner, officer, director or employer of the person; (ii) directly or indirectly or acting in concert with one or more other persons, or through one or more subsidiaries, owns, controls, holds with power to vote, or holds proxies representing, more than twenty percent of the voting interest in the person; (iii) controls in any manner the election of a majority of the directors of the person; or (iv) has contributed more than twenty percent of the capital of the person. Control does not exist if the powers described in this paragraph are held solely as security for an obligation and are not exercised.

(2) "Allocated interests" means the following interests allocated to each unit: (i) In a condominium, the undivided interest in the common elements, the common expense liability, and votes in the association; (ii) in a cooperative, the common expense liability and the ownership interest and votes in the association; and (iii) in a planned community, the common expense liability and votes in the association.

(3) "Association" or "unit owners' association" means the unit owners' association organized under section one hundred one, article three of this chapter.

(4) "Common elements" means: (i) In a condominium or cooperative, all portions of the common interest community other than the units; and (ii) in a planned community, any real estate within a planned community owned or leased by the association, other than a unit.

(5) "Common expenses" means expenditures made by, or financial liabilities of, the association, together with any allocations to reserves.

(6) "Common expense liability" means the liability for common expenses allocated to each unit pursuant to section one hundred seven, article two of this chapter.

(7) "Common interest community" means real estate with respect to which a person, by virtue of his ownership of a unit, is obligated to pay for real estate taxes, insurance premiums, maintenance or improvement of other real estate described in a declaration: Provided, That any resort owner which, prior to the effective date of this article, began the development of a resort and imposed fees or assessments upon owners of real estate in the

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resort for maintenance and care of the roads, streets, alleys, sidewalks, parks, common areas and common facilities in and around the resort, for fire and police protection and for such other services as may be made available to owners of real estate, may also impose the same fees and assessments to be used for the same or similar purposes upon persons purchasing real estate in the resort after the effective date of this article without creating a common interest community.

"Ownership of a unit" does not include holding a leasehold interest of less than twenty years in a unit, including renewal options.

(8) "Condominium" means a common interest community in which portions of the real estate are designated for separate ownership and the remainder of the real estate is designated for common ownership solely by the owners of those portions. A common interest community is not a condominium unless the undivided interest in the common elements are vested in the unit owners.

(9) "Conversion building" means a building that at any time before creation of the common interest community was occupied wholly or partially by persons other than purchasers and persons who occupy with the consent of purchasers.

(10) "Cooperative" means a common interest community in which the real estate is owned by an association, each of whose members is entitled by virtue of his ownership interest in the association to exclusive possession of a unit.

(11) "Dealer" means a person in the business of selling units for his own account.

(12) "Declarant" means any person or group of persons acting in concert who: (i) As part of a common promotional plan, offers to dispose of his or its interest in a unit not previously disposed of; or (ii) reserves or succeeds to any special declarant right.

(13) "Declaration" means any instruments, however denominated, that create a common interest community, including any amendments to those instruments.

(14) "Development rights" means any right or combination of rights reserved by a declarant in the declaration to: (i) Add real estate to a common interest community; (ii) create units, common elements or limited common elements within a common interest community; (iii) subdivide units or convert units into common elements; or (iv) withdraw real estate from a common interest community.

(15) "Dispose" or "disposition" means a voluntary transfer to a purchaser of any legal or equitable interest in a unit, but the term does not include the transfer or release of a security interest.

(16)"Executive board" means the body, regardless of name, designated in the declaration to act on behalf of the association.

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(17) "Identifying number" means a symbol or address that identifies only one unit in a common interest community.

(18) "Leasehold common interest community" means a common interest community in which all or a portion of the real estate is subject to a lease, the expiration or termination of which will terminate the common interest community or reduce its size.

(19)"Limited common element" means a portion of the common elements allocated by the declaration or by operation of subdivision (2) or (4), section one hundred two, article two of this chapter for the exclusive use of one or more but fewer than all of the units.

(20)"Master association" means an organization described in section one hundred twenty, article two of this chapter, whether or not it is also an association described in section one hundred one, article three of this chapter.

(21)"Offering" means any advertisement, inducement, solicitation or attempt to encourage any person to acquire any interest in a unit, other than as security for an obligation. An advertisement in a newspaper or other periodical of general circulation, or in any broadcast medium to the general public, of a common interest community not located in this state, is not an offering if the advertisement states that an offering may be made only in compliance with the law of the jurisdiction in which the common interest community is located.

(22) "Person" means an individual, corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision or agency, or other legal or commercial entity. In the case of a trust, the corpus of which is real estate, however, "person" means the beneficiary of the trust rather than the trust or the trustee.

(23)"Planned community" means a common interest community that is not a condominium or a cooperative. A condominium or cooperative may be part of a planned community.

(24)"Proprietary lease" means an agreement with the association pursuant to which a member is entitled to exclusive possession of a unit in a cooperative.

(25) "Purchaser" means a person, other than a declarant or a dealer, who by means of a voluntary transfer acquires a legal or equitable interest in a unit other than: (i) A leasehold interest (including renewal options) of less than twenty years; or (ii) as security for an obligation.

(26) "Real estate" means any leasehold or other estate or interest in, over, or under land, including structures, fixtures and other improvements and interest that by custom, usage or law pass with a conveyance of land though not described in the contract of sale or instrument of conveyance. "Real estate" includes parcels with or without upper or lower boundaries, and spaces that may be filled with air or water.

(27)"Residential purposes" means use for dwelling or recreational purposes, or both.

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(28) "Resort" means a destination location which consists of: (i) One or more persons offering recreational facilities and services such as skiing, golf, tennis or boating to the general public and commercial facilities such as retail stores, restaurants and hotels or other lodging accommodations; and (ii) at least one hundred residential units, a majority of which are used as vacation or second homes rather than primary residences.

(29) "Resort owner" means any person owning or operating substantially all of the recreational facilities located within a resort, or the predecessor in title of any such person.

(30)"Security interest" means an interest in real estate or personal property, created by contract or conveyance, which secures payment or performance of an obligation. The term includes a lien created by a mortgage, deed of trust, trust deed, security deed, contract for deed, land sales contract, lease intended as security, assignment of lease or rents intended as security, pledge of an ownership interest in an association, and any other consensual lien or title retention contract intended as security for an obligation.

(31)"Special declarant rights" means rights reserved for the benefit of a declarant to: (i) Complete improvements indicated on plans and plans filed with the declaration (section one hundred nine, article two of this chapter) or, in a cooperative, to complete improvements described in the public offering statement pursuant to subdivision (2), subsection (a), section one hundred three, article four of this chapter; (ii) exercise any development right (section one hundred ten, article two of this chapter); (iii) maintain sales offices, management offices, signs advertising the common interest community, and models (section one hundred fifteen, article two of this chapter); (iv) use easements through the common elements for the purpose of making improvements within the common interest community or within real estate which may be added to the common interest community (section one hundred sixteen, article two of this chapter); (v) make the common interest community subject to a master association (section one hundred twenty, article two of this chapter); (vi) merge or consolidate a common interest community with another common interest community of the same form of ownership (section one hundred twenty-one, article two of this chapter); or (vii) appoint or remove any officer of the association or any master association or any executive board member during any period of declarant control (subsection (d), section one hundred three, article three of this chapter).

(32)"Time share" means a right to occupy a unit or any of several units during five or more separated time periods over a period of at least five years, including renewal options, whether or not coupled with an estate or interest in a common interest community or a specified portion thereof.

(33) "Unit" means a physical portion of the common interest community designated for separate ownership or occupancy, the boundaries of which are described pursuant to subdivision (5), subsection (a), section one hundred five, article two of this chapter. If a unit in a cooperative is owned by a unit owner or is sold, conveyed, voluntarily or involuntarily encumbered or otherwise transferred by a unit owner, the interest in that unit which is owned, sold, conveyed, encumbered, or otherwise transferred is the right to possession of

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that unit under a proprietary lease, coupled with the allocated interests of that unit, and the association's interest in that unit is not thereby affected.

(34)"Unit owner" means a declarant or other person who owns a unit, or a lessee of a unit in a leasehold common interest community whose lease expires simultaneously with any lease, the expiration or termination of which will remove the unit from the common interest community, but does not include a person having an interest in a unit solely as security for an obligation. In a condominium or planned community, the declarant is the owner of any unit created by the declaration. In a cooperative, the declarant is treated as the owner of any unit to which allocated interests have been allocated (section one hundred seven, article two of this chapter) until that unit has been conveyed to another person.

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§36B-1-104. Variation by agreement.

Except as expressly provided in this chapter, provisions herein may not be varied by agreement, and rights conferred may not be waived. A declarant may not act under a power of attorney, or use any other device, to evade the limitations or prohibitions of this chapter or the declaration.

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§36B-1-105. Separate titles and taxation.

(a) In a cooperative, unless the declaration provides that a unit owner's interest in a unit and its allocated interests is real estate for all purposes, that interest is personal property. (That interest is subject to the provisions of all homestead exemptions from taxation provided by law, even if it is personal property.)

(b) In a condominium or planned community:

(1) If there is any unit owner other than a declarant, each unit that has been created, together with its interest in the common elements, constitutes for all purposes a separate parcel of real estate.

(2) If there is any unit owner other than a declarant, each unit must be separately taxed and assessed, and no separate tax or assessment may be rendered against any common elements for which a declarant has reserved no development rights.

(c) Any portion of the common elements for which the declarant has reserved any development right must be separately taxed and assessed against the declarant, and the declarant alone is liable for payment of those taxes.

(d) If there is no unit owner other than a declarant, the real estate comprising the common interest community may be taxed and assessed in any manner provided by law.

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§36B-1-106. Applicability of local ordinances, regulations and building codes.

(a) A building code may not impose any requirement upon any structure in a common interest community which it would not impose upon a physically identical development under a different form of ownership.

(b) In condominiums and cooperatives, no zoning, subdivision, or other real estate use law, ordinance, or regulation may prohibit the condominium or cooperative form of ownership or impose any requirement upon a condominium or cooperative which it would not impose upon a physically identical development under a different form of ownership.

(c) Except as provided in subsections (a) and (b) of this section, the provisions of this chapter do not invalidate or modify any provision of any building code, zoning, subdivision, or other real estate use law, ordinance, rule, or regulation governing the use of real estate.

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§36B-1-107. Eminent domain.

(a) If a unit is acquired by eminent domain, or part of a unit is acquired by eminent domain, leaving the unit owner with a remnant that may not practically or lawfully be used for any purpose permitted by the declaration, the award must include compensation to the unit owner for that unit and its allocated interests, whether or not any common elements are acquired. Upon acquisition, unless the decree otherwise provides, that unit's allocated interests are automatically reallocated to the remaining units in proportion to the respective allocated interests of those units before the taking, and the association shall promptly prepare, execute and record an amendment to the declaration reflecting the reallocations. Any remnant of a unit remaining after part of a unit is taken under this subsection is thereafter a common element.

(b) Except as provided in subsection (a), if part of a unit is acquired by eminent domain, the award must compensate the unit owner for the reduction in value of the unit and its interest in the common elements, whether or not any common elements are acquired. Upon acquisition, unless the decree otherwise provides, (i) that unit's allocated interests are reduced in proportion to the reduction in the size of the unit, or on any other basis specified in the declaration and (ii) the portion of the allocated interests divested from the partially acquired unit are automatically reallocated to that unit and to the remaining units in proportion to the respective allocated interests of those units before the taking, with the partially acquired unit participating in the reallocation on the basis of its reduced allocated interests.

(c) If part of the common elements is acquired by eminent domain, the portion of the award attributable to the common elements taken must be paid to the association. Unless the declaration provides otherwise, any portion of the award attributable to the acquisition of a limited common element must be equally divided among the owners of the units to which that limited common element was allocated at the time of acquisition.

(d) The court decree must be recorded in every county in which any portion of the common interest community is located.

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§36B-1-108. Supplemental general principles of law applicable.

The principles of law and equity, including the law of corporations and unincorporated associations, the law of real property, and the law relative to capacity to contract, principal and agent, eminent domain, estoppel, fraud, misrepresentation, duress, coercion, mistake, receivership, substantial performance, or other validating or invalidating cause supplement the provisions of this chapter, except to the extent inconsistent with this chapter.

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§36B-1-109. Construction against implicit repeal.

This chapter being a general act intended as a unified coverage of its subject matter, no part of it shall be construed to be impliedly repealed by subsequent legislation if that construction can be reasonably be avoided.

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§36B-1-110. Uniformity of application and construction.

This chapter shall be applied and construed so as to effectuate its general purpose to make uniform the law with respect to the subject of this chapter among states enacting it.

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§36B-1-111. Unconscionable agreement or term of contract.

(a) The court, upon finding as a matter of law that a contract or contract clause was unconscionable at the time the contract was made, may refuse to enforce the contract, enforce the remainder of the contract without the unconscionable clause, or limit the application of any unconscionable clause in order to avoid an unconscionable result.

(b) Whenever it is claimed, or appears to the court, that a contract or any contract clause is or may be unconscionable, the parties, in order to aid the court in making the determination, must be afforded a reasonable opportunity to present evidence as to:

(1) The commercial setting of the negotiations;

(2) Whether a party has knowingly taken advantage of the inability of the other party reasonably to protect his interests by reason of physical or mental infirmity, illiteracy, inability to understand the language of the agreement, or similar factors;

(3) The effect and purpose of the contract or clause; and

(4) If a sale, any gross disparity, at the time of contracting, between the amount charged for the property and the value of that property measured by the price at which similar property was readily obtainable in similar transactions. A disparity between the contract price and the value of the property measured by the price at which similar property was readily obtainable in similar transactions does not, of itself, render the contract unconscionable.

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§36B-1-112. Obligation of good faith.

Every contract or duty governed by this chapter imposes an obligation of good faith in its performance or enforcement.

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§36B-1-113. Remedies to be liberally administered.

(a) The remedies provided by this chapter shall be liberally administered to the end that the aggrieved party is put in as good a position as if the other party had fully performed. However, consequential, special or punitive damages may not be awarded except as specifically provided in this chapter or by other rule of law.

(b) Any right or obligation declared by this chapter is enforceable by judicial proceeding.

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§36B-1-114. Adjustment of dollar amounts.

(a) From time to time the dollar amounts specified in sections 1-203 and 4-101(b)(7) must change, as provided in subsections (b) and (c), according to and to the extent of changes in the Consumer Price Index for Urban Wage Earners and Clerical Workers: United States City Average, All Items 1967=100, compiled by the Bureau of Labor Statistics, United States Department of Labor, (the "Index"). The Index for December, 1979, which was 230, is the Reference Base Index.

(b) The dollar amounts specified in sections 1-203 and 4- 101(b)(7), and any amount stated in the declaration pursuant to those sections, must change July 1 of each year if the percentage of change, calculated to the nearest whole percentage point, between the Index at the end of the preceding year and the Reference Base Index is ten percent or more, but

(i) The portion of the percentage change in the Index in excess of a multiple of ten percent must be disregarded and the dollar amounts shall change only in multiples of ten percent of the amounts appearing in this chapter on the date of enactment;

(ii) The dollar amounts must not change if the amounts required by this section are those currently in effect pursuant to this chapter as a result of earlier application of this section; and

(iii) In no event may the dollar amounts be reduced below the amounts appearing in this chapter on the date of enactment.

(c) If the Index is revised after December, 1979, the percentage of change pursuant to this section must be calculated on the basis of the revised Index. If the revision of the Index Changes the Reference Base Index, a revised Reference Base Index must be determined by multiplying the Reference Base Index then applicable by the rebasing factor furnished by the Bureau of Labor Statistics. If the Index is superseded, the Index referred to in this section is the one represented by the Bureau of Labor Statistics as reflecting most accurately changes in the purchasing power of the dollar for consumers.

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PART II. APPLICABILITY.

§36B-1-201. Applicability to new common interest communities.

Except as provided in sections 1-202 and 1-203, this chapter applies to all common interest communities created within this state after the effective date of this chapter. The provisions of chapter fifty-three, acts of the Legislature, one thousand nine hundred sixty-three, chapter one hundred twenty-nine, acts of the Legislature, one thousand nine hundred eighty, and chapter thirty-eight, acts of the Legislature, one thousand nine hundred eighty-four, do not apply to common interest communities created after the effective date of this chapter.

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§36B-1-202. Same -- Exception for small cooperatives.

If a cooperative contains only units restricted to nonresidential use, or contains no more than twelve units and is not subject to any development rights, it is subject only to sections 1-106, (applicability of local ordinances, regulations, and building codes) and 1-107 (eminent domain) of this chapter, unless the declaration provides that the entire chapter is applicable.

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§36B-1-203. Applicability to new common interest communities. -- Exception for small and limited expense liability planned communities.

If a planned community:

(1) Contains no more than twelve units and is not subject to any development rights; or

(2) Provides, in its declaration, that the annual average common expense liability of all units restricted to residential purposes, exclusive of optional user fees and any insurance premiums paid by the association, may not exceed $300 as adjusted pursuant to section 1-114 (adjustment of dollar amounts), it is subject only to sections 1-105 (separate titles and taxation), 1-106 (applicability of local ordinances, regulations and building codes) and 1-107 (eminent domain) unless the declaration provides that this entire chapter is applicable.

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§36B-1-204. Applicability to preexisting common interest communities.

(a) Except as provided in section 1-205, Same; exception for small preexisting cooperatives and planned communities, sections 1-105 (separate titles and taxation), 1-106 (Applicability of local ordinances, regulations and building codes), 1-107 (Eminent domain), 2-103 (Construction and validity of declaration and bylaws), 2-104 (Description of units), 2-121 (Merger or consolidation of common interest communities), 3-102(a)(1) through (6) and (11) through (16) (Powers of unit owners' association), 3-111 (Tort and contract liability), 3-116 (Lien for assessments), 3-118 (Association records), 4-109 (Resales of units), and 4-117 (Effect of violation on rights of action; attorney's fees), and section 1-103 (Definitions) to the extent necessary in construing any of those sections, apply to all common interest communities created in this state before the effective date of this chapter; but those sections apply only with respect to events and circumstances occurring after the effective date of this chapter and do not invalidate existing provisions of the declaration, bylaws or plats or plans of those common interest communities.

(b) The provisions of chapter one hundred fifty-three, Acts of the Legislature, one thousand nine hundred sixty-three, chapter one hundred twenty-nine, Acts of the Legislature, one thousand nine hundred eighty, or of chapter thirty-eight, Acts of the Legislature, one thousand nine hundred eighty-four, do not apply to condominiums or other common interest communities created after the effective date of this chapter and do not invalidate any amendment to the declaration, rules, bylaws, plats and plans and code of regulations of any condominium or common interest community created before the effective date of this chapter if the amendment would be permitted by this chapter. The amendment must be adopted in conformity with the procedures and requirements specified by those instruments and by chapter one hundred fifty-three, Acts of the Legislature, one thousand nine hundred sixty-three. If the amendment grants to any person any rights, powers or privileges permitted by this chapter, all correlative obligations, liabilities and restrictions in this chapter also apply to that person.

(c) This chapter does not apply to condominiums or units located outside this state, but the public offering statement provisions, (sections 4-102 through 4-109) apply to all contracts for the disposition thereof signed in this state by any party unless exempt under section 4-101(b).

(d) The provisions of this chapter shall apply to all condominiums or common interest communities to the extent such provisions conflict or are inconsistent with the provisions of chapter one hundred fifty-three, Acts of the Legislature, one thousand nine hundred sixty-three: Provided, That the provisions of this chapter shall not modify, limit or nullify any rights, duties or obligations created or existing under any declaration, bylaws or plats or plans of condominiums created in this state before the effective date of this chapter.

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§36B-1-205. Same -- Exception for small preexisting cooperatives and planned communities.

If a cooperative or planned community created within this state before the effective date of this chapter contains no more than twelve units and is not subject to any development rights, it is subject only to sections 1-105 (separate titles and taxation), 1-106 (applicability of local ordinances, regulations and building codes), and 1-107 (eminent domain) unless the declaration is amended in conformity with applicable law and with the procedures and requirements of the declaration to take advantage of the provisions of section 1-206, in which case all the sections enumerated in section 1-204 apply to that cooperative or planned community.

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§36B-1-206. Same -- Amendments to governing instruments.

(a) In the case of amendments to the declaration, bylaws or plats and plans of any common interest community created before the effective date of this chapter:

(1) If the result accomplished by the amendment was permitted by law prior to this chapter, the amendment may be made either in accordance with that law, in which case that law applies to that amendment, or it may be made under this chapter; and

(2) If the result accomplished by the amendment is permitted by this chapter, and was not permitted by law prior to this chapter, the amendment may be made under this chapter.

(b) An amendment to the declaration, bylaws or plats and plans authorized by this section to be made under this chapter must be adopted in conformity with applicable law and with the procedures and requirements specified by those instruments. If an amendment grants to any person any rights, powers or privileges permitted by this chapter, all correlative obligations, liabilities and restrictions in this chapter also apply to that person.

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§36B-1-207. Applicability to nonresidential planned communities.

This chapter does not apply to a planned community in which all units are restricted exclusively to nonresidential use unless the declaration provides that the chapter does apply to that planned community. This chapter applies to a planned community containing both units that are restricted exclusively to nonresidential use and other units that are not so restricted, only if the declaration so provides or the real estate comprising the units that may be used for residential purposes would be a planned community in the absence of the units that may not be used for residential purposes.

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