

IN THE SUPREME COURT OF THE STATE OF OREGON

JOSEPH SCHAEFER, CITY OF
AURORA, CITY OF
WILSONVILLE, 1000 FRIENDS OF
OREGON, and FRIENDS OF
FRENCH PRAIRIE,

Petitioners,
Respondents on Review,

and

CLACKAMAS COUNTY,

Intervenor-Petitioner below,

v.

OREGON AVIATION BOARD and
OREGON DEPARTMENT OF
AVIATION,

Respondents,
Petitioners on Review,

and

AURORA AIRPORT
IMPROVEMENT ASSOCIATION;
BRUCE BENNETT; WILSON
CONSTRUCTION COMPANY,
INC.; TED MILLAR; TLM
HOLDINGS, LLC; ANTHONY
ALAN HELBLING; and
WILSONVILLE CHAMBER OF
COMMERCE,

Respondents.

Land Use Board of Appeals
No. 2019123, 2019127, 2019129,
2019130

CA A175219

SC N010223

PETITION FOR REVIEW OF OREGON AVIATION BOARD AND
OREGON DEPARTMENT OF AVIATION

Continued...

10/21

Petition for Judicial Review from the Final Opinion and Order of
Land Use Board of Appeals

Opinion Filed: August 4, 2021

PER CURIAM

Before Judges: Armstrong, P. J., and Tookey, J., and Aoyagi, J.

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10/21

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PETITIONER ON REVIEW INTENDS TO FILE A BRIEF ON THE MERITS

TABLE OF CONTENTS

INTRODUCTION	1
BACKGROUND	3
A. Under ODA’s state agency coordination rules, a master plan is deemed compatible with the local government’s acknowledged comprehensive plan if the local government does not identify any incompatibility.....	3
B. The Aviation Board and ODA adopted the 2012 Aurora Airport Master Plan in 2011, and in 2019 made state agency coordination findings related to that plan.	5
1. The Aviation Board found it had complied with its state agency coordination program and so deemed the Master Plan compatible with Marion County’s acknowledged comprehensive plan.	6
2. The Aviation Board also found that the Master Plan did not permit a “larger class of airplane” to use the Aurora Airport.	7
C. Petitioners challenged the findings at LUBA, but LUBA dismissed the matter because the Aviation Board did not have to make separate findings about compliance with statewide planning goals.	8
D. The Court of Appeals reversed LUBA’s decision, concluding that the Aviation Board needed to make separate findings that the Master Plan complied with statewide planning goals.	9
QUESTIONS PRESENTED AND PROPOSED RULES OF LAW	10
First Question Presented.....	10
First Proposed Rule of Law	10
Second Question Presented	11
Second Proposed Rule of Law	11
REASONS REVIEW IS WARRANTED	11
A. The Court of Appeals’ decision involves an important question about how a state agency coordination program works when the Aviation Board issues findings based on work done by ODA staff.....	11

B. The interpretation of “larger class of airplanes” also warrants review because it will affect public airport development across the state.....	16
CONCLUSION.....	18
APPENDIX	

TABLE OF AUTHORITIES

Cases

<i>Schaefer v. Oregon Aviation Board</i> , 312 Or App 316, ___ P3d ___, <i>adhered to on recons</i> , 313 Or App 725 (2021)	1, 2, 5, 6, 8, 9, 10, 12, 13
---	---------------------------------

Statutes & Constitutional Provisions

ORS 197.015(1)	3
ORS 197.015(10)(a)(B)	9, 11
ORS 197.180.....	3
ORS 197.180(1)	3
ORS 197.180(4)	3
ORS 197.180(7)	4
ORS 197.180(11)	3
ORS 197.825(1)	9, 11
ORS 215.213(10)(b)	8
ORS 215.296.....	8
ORS 835.015	5, 13
ORS 835.106(2)	14
ORS 836.025	5
ORS 836.600.....	16

Rules

OAR 603-080-0005	15
OAR 660-012-0065	16
OAR 660-012-0065(3)(n)	2, 7, 10, 11, 16, 17
OAR 660-030-0065(2).....	4
OAR 660-030-0065(3)(d).....	5
OAR 731-015-0065	15
OAR 736-070-0040	15
OAR 738-130-000 to OAR 738-130-0125	4
OAR 738-130-0055	4, 6, 15
OAR 738-130-0055(1).....	4
OAR 738-130-0055(2).....	2, 4, 7, 12
OAR 738-130-0055(4).....	5, 14
OAR 738-130-0055(6).....	5, 14

PETITION FOR REVIEW OF OREGON AVIATION BOARD AND OREGON DEPARTMENT OF AVIATION

INTRODUCTION

This case involves challenges to findings the Aviation Board made in 2019 regarding how it had complied with its state agency coordination program when it adopted a 2012 master plan for the Aurora airport. Reversing the decision of the Land Use Board of Appeals (LUBA), the Court of Appeals concluded that LUBA had jurisdiction over the Board’s 2019 findings because the Board had not adequately followed its state agency coordination program’s requirements. The Court of Appeals further concluded that the Board had erred in determining that the airport master plan was compatible with Marion County’s comprehensive land-use plan. And the Court of Appeals also concluded that a runway expansion provided for in the 2012 master plan was subject to additional scrutiny because it would permit service to a “larger class of airplanes,” therefore triggering a requirement that the Board seek an exception to Statewide Planning Goal 3 (agricultural uses). *Schaefer v. Oregon Aviation Board*, 312 Or App 316, ___ P3d ___, *adhered to on recons.*, 313 Or App 725 (2021). The Aviation Board and Oregon Department of Aviation (ODA) seek review of that decision.

The Court of Appeals made two critical errors—errors that not only affect the 2012 Aurora Airport Master Plan, but that will also affect other

agencies and other airport projects. First, the Court of Appeals rejected the idea that the Aviation Board could rely on ODA having deemed the Master Plan compatible with Marion County's acknowledged comprehensive plan because the county had an opportunity to review a draft of the plan and did not inform ODA that the plan was incompatible with the county's comprehensive plan. *Id.* at 326. That is contrary to the plain text of OAR 738-130-0055(2), which allows ODA to "deem that the draft plan is compatible with" a local "jurisdiction's acknowledged comprehensive plan" if it receives no response from a jurisdiction after providing a draft plan to the jurisdiction. The Court of Appeals concluded otherwise by drawing an artificial distinction between the Aviation Board and ODA. That was legally incorrect and could affect other state agency activities.

Second, the Court of Appeals misinterpreted "larger class of airplanes" in OAR 660-012-0065(3)(n). The Court of Appeals concluded that the phrase means not just planes with greater tail heights or wider wingspans but instead includes planes that are the same physical size but flying faster or with heavier loads. *Id.* at 338-41. The court's interpretation is contrary to the plain meaning of the rule and will be difficult to implement. This court should grant review to clarify both points of law.

BACKGROUND

- A. Under ODA’s state agency coordination rules, a master plan is deemed compatible with the local government’s acknowledged comprehensive plan if the local government does not identify any incompatibility.**

Oregon’s statewide Land Use Planning Goals are the foundation of Oregon land use. The goals express the state’s policies on land use and related topics, like citizen involvement, housing, and natural resources. Oregon’s statewide goals are achieved through local comprehensive planning. A local comprehensive plan must be consistent with the statewide planning goals and is “acknowledged” when it does so. ORS 197.015(1).

Oregon’s planning laws apply not only to local governments but also to state agencies. ORS 197.180. A state agency must ensure that its land use actions comply with statewide planning goals and are compatible with local acknowledged comprehensive plans. ORS 197.180(1).

To meet those requirements, state agencies that engage in land use actions adopt rules and procedures that are reviewed by the Department of Land Conservation and Development (DLCD) and ultimately certified by the Land Conservation and Development Commission (LCDC). ORS 197.180(4). LCDC has adopted rules governing that process. *See* ORS 197.180(11) (requiring rules); OAR chapter 660, Division 30 (state agency coordination program approval rules). Under one of those rules, LCDC requires that a “state agency shall comply with the statewide planning goals by assuring that its land

use program is compatible with the applicable acknowledged comprehensive plans.” OAR 660-030-0065(2). That rule allows a state agency to rely on the expertise and prior work of the local government, as opposed to making individualized goal findings.

ODA adopted a state agency coordination program that DLCD found sufficient and LCDC certified. ORS 197.180(7); OAR 738-130-000 to OAR 738-130-0125.¹ The coordination procedures that ODA must follow when it adopts a master plan are set out in OAR 738-130-0055. ODA must ensure that local governments receive a draft of the plan and have an opportunity to inform ODA of any conflicts the plan may have with the local governments’ comprehensive plans. OAR 738-130-0055(1), (2). If the local government does not identify any incompatibility, ODA may deem its master plan compatible with the affected government’s acknowledged comprehensive plan. OAR 738-130-0055(2).² When that happens, ODA can determine that

¹ ODA previously had been the Oregon Aviation Division of the Oregon Department of Transportation (ODOT). When the Aviation Board initially adopted the 2012 Aurora State Airport Master Plan, it was subject to ODOT’s state agency coordination program. But ODA’s rules are essentially the same as ODOT’s rules were. (App-42 (fn 3)).

² OAR 738-130-0055(2) provides:

The Department shall provide a draft of the proposed facility plan to planning representatives of all affected cities, counties and metropolitan planning organization and shall request that they identify any specific plan requirements which apply, any general

Footnote continued...

the plan complies with statewide goals because it is compatible with the acknowledged comprehensive plan, rather than separately assessing compliance with the goals. *See* OAR 738-130-0055(4) (setting out when such findings are required either because statewide goals specifically apply under OAR 660-030-0065(3)(d), or because the affected comprehensive contains no provisions that would be triggered or affected by the master plan).

ODA must present findings to the Aviation Board, which then must adopt findings. OAR 738-130-0055(6).

B. The Aviation Board and ODA adopted the 2012 Aurora Airport Master Plan in 2011, and in 2019 made state agency coordination findings related to that plan.

The Aviation Board and ODA are tasked with developing an aviation plan for the state. ORS 835.015. They are also required to plan for airports owned by the state. ORS 836.025. From 2009 to 2011, the ODA worked on a 2012 Master Plan for the Aurora Airport. *Schaefer*, 312 Or App at 320. ODA worked closely with a number of stakeholders, including Marion County.

plan requirements which apply and whether the draft facility plan is compatible with the acknowledged comprehensive plan. If no reply is received from an affected city, county or metropolitan planning organization within 45 days of the Department's request for a compatibility determination, the Department shall deem that the draft plan is compatible with that jurisdiction's acknowledged comprehensive plan. The Department may extend the reply time if requested to do so by an affected city, county or metropolitan planning organization.

(App-74–76). The Master Plan was adopted in 2011. *Schaefer*, 312 Or App at 318. Eight years later, in 2019, the Aviation Board adopted findings as required under its state agency coordination program that it complied with the coordination steps set out in OAR 738-130-0055. *Id.* at 321. ODA presented findings on compliance with the state agency coordination program to the Aviation Board in two separate memoranda. (App-69–80). The Aviation Board adopted ODA’s draft findings. (App-68).

- 1. The Aviation Board found it had complied with its state agency coordination program and so deemed the Master Plan compatible with Marion County’s acknowledged comprehensive plan.**

In the Aviation Board’s 2019 findings, it found that it had adopted the Master Plan in October 2011, and the Master Plan was a “final decision” that is “not subject to challenge now.” (App-74). The findings further noted that the state agency coordination program requirements had been met at the time the Master Plan was adopted but that that Board back in 2012 had “not adopt[ed] specific findings of compatibility with any affected jurisdiction’s comprehensive plan or specific findings of compliance with applicable statewide planning goals.” (App-75). The 2019 state agency coordination findings sought to correct potential perceived deficiencies from a lack of findings. (App-75).

As directed by ODA's state agency coordination requirements, ODA proposed findings, which the Aviation Board adopted, evaluating whether there were any conflicts between the Master Plan and Marion County's comprehensive plan. (App-77). The findings described ODA's involvement with Marion County and confirmed that the county had not identified any conflicts between the Master Plan and Marion County's comprehensive plan. (App-75-77). As permitted by OAR 738-130-0055(2), ODA relied upon Marion County's silence to deem the Master Plan as, in fact, compatible with the acknowledged comprehensive plan. (App-76). The Board further found that because the Master Plan was compatible with the Marion County comprehensive plan, it complied with statewide planning goals. (App-76-78). Accordingly, the Board concluded that it did not need to separately make findings about whether the Master Plan complied with the statewide planning goals. (App-78). In the alternative, the Aviation Board determined that the Master Plan complied with the statewide planning goals. (App-53, 78-80).

2. The Aviation Board also found that the Master Plan did not permit a "larger class of airplane" to use the Aurora Airport.

The Aviation Board also found that the 2012 Master Plan update, which contemplated an expansion of the airport's runway, would not permit service to a larger class of airplanes. Therefore, under OAR 660-012-0065(3)(n), the Board concluded that it did not need to make findings that the updated Master

Plan complied with statewide planning Goals 3, 11, and 14. (App-71–72). That rule was adopted by LCDC as authorized by ORS 215.213(10)(b) to implement ORS 215.296, which addresses development on exclusive farm use land.

In making its determination about whether the runway expansion would permit service to a larger class of airplanes, the Board relied on classifications established by the Federal Aviation Administration (FAA). The FAA uses Airport Reference Codes (ARCs) for airport design standards. The ARC is made up of a letter, which represents the Airport Approach Category and is determined by aircraft speed, and a roman numeral, which represents the Airplane Design group, which is determined by wingspan or tail height. *See Schaefer*, 312 Or App at 339 (so explaining). The Aviation Board reasoned that the development proposed by the Master Plan would not allow a larger class of airplane because the “airport is currently a C-II airport and after the proposed improvements * * * the airport would continue to be a C-II airport.” (App-71–72).

C. Petitioners challenged the findings at LUBA, but LUBA dismissed the matter because the Aviation Board did not have to make separate findings about compliance with statewide planning goals.

Petitioners challenged the Aviation Board’s 2019 state agency coordination findings at LUBA. The Aviation Board and ODA asserted that LUBA lacked jurisdiction because the Aviation Board did not need to separately apply the statewide planning goals in the 2019 findings and therefore

the findings were not a “land use decision” *See* ORS 197.825(1) (LUBA has jurisdiction “to review any land use decision or limited land use decision of a * * * state agency”); ORS 197.015(10)(a)(B) (an agency decision is a “land use decision,” if an agency “is required to apply the [statewide planning] goals.”). As described above, the Aviation Board determined it did *not* need to make separate findings on the statewide planning goals itself because the 2012 Master Plan was deemed compatible with the acknowledged Marion County comprehensive plan. LUBA agreed and concluded that meant that there was no land use decision. (App-45–46, 48–53, 67).

LUBA also agreed with the Aviation Board that the 2012 Master Plan did not allow service to a larger class of plane, explaining that because the FAA’s Airplane Design Group portion of the ARC—which is based on tail height or wingspan, whichever is more demanding—had not changed. (App-59–60).

D. The Court of Appeals reversed LUBA’s decision, concluding that the Aviation Board needed to make separate findings that the Master Plan complied with statewide planning goals.

On review, the Court of Appeals reversed. The court concluded that LUBA had jurisdiction because the Aviation Board needed to separately apply the statewide planning goals itself and could not rely on ODA deeming the Master Plan consistent with Marion County’s acknowledged comprehensive plan. *Schaefer*, 312 Or App 316.

The Court of Appeals also rejected the Aviation Board and LUBA's construction of OAR 660-012-0065(3)(n). The court concluded that "larger class of plane" referred not to the size of the plane, but rather to the types of planes that could use the runway. *Schaefer*, 312 Or App at 338-41. That is, the Court of Appeals concluded that because expanding the runway would be "more inclusive" and allow more types of planes to use the airport, it would serve a larger class of plane. The Court of Appeals also noted that even if "larger class of plane" referred to the size of the plane, size is not limited to the tail height and wingspan. *Id.* at 341; 313 Or App at 727.

QUESTIONS PRESENTED AND PROPOSED RULES OF LAW

First Question Presented

Can the Aviation Board, as part of its state agency coordination program, rely on its agency staff having deemed the facility plan to be compatible with the local government's acknowledged comprehensive plan to determine such compatibility and ensure compliance with statewide planning goals?

First Proposed Rule of Law

Under the Aviation Board's regulations, it appropriately ensures that a facility plan complies with statewide planning goals when ODA staff, as part of the state agency coordination program, deem the facility plan to be compatible with the local government's comprehensive plan.

Second Question Presented

OAR 660-012-0065(3)(n) makes airport expansions that do not permit service to a “larger class of airplanes” compatible with certain statewide planning goals. What constitutes a “larger class of airplanes” for purposes of that rule?

Second Proposed Rule of Law

A “larger class of airplanes” is a class of planes that are physically larger—in other words, planes with greater tail height or wingspan.

REASONS REVIEW IS WARRANTED

A. The Court of Appeals’ decision involves an important question about how a state agency coordination program works when the Aviation Board issues findings based on work done by ODA staff.

The Court of Appeals announced a rule of law in this case about how the Aviation Board must address land use issues. That rule of law is contrary to how the Aviation Board has understood its rules. It will require a change in agency practice for the Board and, importantly, for other agencies that are run by boards or commissions—a common structure in Oregon.

As described above, LUBA concluded that it lacked jurisdiction over the 2019 findings because the Aviation Board did not need to separately find compliance with statewide planning goals in its assessment of the state agency coordination process. *See* ORS 197.825(1) (LUBA has jurisdiction to review a “land use decision”); ORS 197.015(10)(a)(B) (a “land use decision” is one

where the agency “is required to apply the [statewide planning] goals.”).

LUBA concluded that because the Aviation Board had found, based on OAR 738-130-0055(2), that the Master Plan was deemed compatible with the acknowledged Marion County Comprehensive Plan, the Board was not required to apply the statewide planning goals independently. Again, the state agency coordination rule directs that ODA “shall provide a draft of the proposed facility plan to planning representatives of all affected” local governments “and shall request that they identify any specific plan requirements which apply, any general plan requirements which apply and whether the draft facility plan is compatible with the acknowledged comprehensive plan.” OAR 738-130-0055(2). Then, “[i]f no reply is received from an affected” local government within a specified time, ODA “*shall* deem that the draft plan is compatible with that jurisdiction’s acknowledged comprehensive plan.” OAR 738-130-0055(2) (emphasis added). The Aviation Board treated that deemed compatibility as establishing compatibility, and thus determined it did not have to make separate independent findings that the Master Plan complied with the statewide planning goals.

The Court of Appeals rejected the Aviation Board’s reliance on OAR 738-130-0055(2) to determine that the agency had appropriately ensured, through the state agency coordination program, that the Master Plan complied with statewide goals. *Schaefer*, 312 Or App at 326. The Court of Appeals did

not “perceive how *ODA*’s ability to deem the draft plan compatible with the” acknowledged Marion County Comprehensive Plan “affects *the Board*’s obligation to ‘adopt findings of compatibility with the acknowledged comprehensive plans of affected cities and counties.’”³ *Id.* It appears that the Court of Appeals was concerned that ODA—which interacted with Marion County during the Master Plan process and which is the subject of the rule at issue—is a separate body from the Aviation Board. But the legislature has tasked ODA to act on behalf of the Aviation Board to do the groundwork for aviation facility projects in the state. ORS 835.015.⁴ The director of ODA is

³ The Court of Appeals also alternatively concluded that the Aviation Board had not relied on ODA deeming the plan compatible with the acknowledged Marion County Comprehensive Plan because it had made findings about the statewide planning goals. *Schaefer*, 312 Or App at 326-27. The Aviation Board made those findings in the alternative. In the first instance, it relied on ODA having deemed the plan compatible with the acknowledged Marion County Comprehensive Plan. (App-53, 76–77).

⁴ ORS 835.015 provides:

The State Aviation Board with the advice of the Oregon Department of Aviation shall incorporate as part of its program a definite plan for the development of airports, state airways, airplane industries and aviation generally. It shall through the department cooperate with and assist the federal government, the municipalities of the state, and other persons in the development of aviation activities. Municipalities are authorized to cooperate with the department in the development of aviation and aviation facilities in this state, and shall notify the department of, and allow the department to participate in an advisory capacity in, all municipal airport or aviation system planning.

“the administrative head of the department” and is to “[a]dminister the laws of the state concerning aviation.” ORS 835.106(2). Specifically for a master plan, ODA writes findings, and the Aviation Board ultimately adopts findings. OAR 738-130-0055(4) & (6). Thus, the Aviation Board can rely on steps and actions taken by the staff of ODA.

A contrary conclusion could affect numerous state agencies that have a board, commission, or council that issues orders and rules, but rely on the work of a related departments to carry out their business. At least 10 other state agencies—and some of the largest in the state—are structured in that manner, including the Board of Agriculture, Energy Facility Siting Council, Environmental Quality Commission, Fish and Wildlife Commission, State Board of Forestry, Governing Board of the Department of Geology and Mineral Industries, LCDC, State Parks and Recreation Commission, Oregon Transportation Commission, and Oregon Water Resources Commission. Clarification from this court on this issue would implicate the operation of those boards, commissions, and council.

That is particularly likely because the rule at issue here is similar to the rules adopted by other agencies. Like the Aviation Board, some boards and commissions rely on their related departments’ interaction with local government to determine that the plan is compatible with the local acknowledged comprehensive plan. Thus, the Court of Appeals’ disapproval of

the process could affect numerous agencies and projects across the state. For example, the ODA rule, OAR 738-130-0055, was modeled on ODOT's rule on the same subject, OAR 731-015-0065. ODOT's rule contains the same requirement that it provide a draft of a proposed facility plan to affected local governments and that it "shall deem that the draft plan is compatible with that jurisdiction's acknowledged comprehensive plan" if it receives no response from the local government identifying any incompatibility. OAR 731-015-0065. ODOT has many more facility projects than ODA. And other agencies structured with a board or commission have similar rules. *See e.g.* OAR 736-070-0040 (Parks and Recreation Department can establish compliance with statewide planning goals by providing "written notice to the affected local government(s)" and then "presume[ing] that the proposed action is compatible with the applicable comprehensive plan if no response is received within the period of review established by the Department's administrative rule governing land use action"); OAR 603-080-0005 (for Department of Agriculture projects, department "shall make its goal compliance findings based on the land use compatibility information provided to the department by the affected city or county or project applicant"). Thus, the Court of Appeals' decision could have widespread affect.

B. The interpretation of “larger class of airplanes” also warrants review because it will affect public airport development across the state.

The Oregon legislature recognized the importance of airports to the economy and citizens of the state and declared that “the policy of the State of Oregon is to encourage and support the continued operation and vitality of Oregon’s airports.” ORS 836.600. ODA owns and operates 28 airports, mostly in rural areas of the state.⁵ There are another 69 airports owned by local governments. All of those airports, some of which are planning expansions, are subject to OAR 660-012-0065(3)(n), which provides that certain “transportation improvements are consistent with Goals 3, 4, 11, and 14” including “[e]xpansions or alterations of public use airports that do not permit service to a larger class or airplanes.”⁶ As described above, apart from the state agency

⁵ See <https://www.oregon.gov/aviation/Airports/Pages/Airports.aspx>

⁶ OAR 660-012-0065 provides:

(1) This rule identifies transportation facilities, services and improvements which may be permitted on rural lands consistent with Goals 3, 4, 11, and 14 without a goal exception.

* * * * *

(3) The following transportation improvements are consistent with Goals 3, 4, 11, and 14 subject to the requirements of this rule:

* * * * *

(n) Expansions or alterations of public use airports that do not permit service to a larger class of airplanes;

coordination program, the Aviation Board and LUBA relied on OAR 660-012-0065(3)(n) to conclude that the Board did not need to separately apply statewide planning Goals 3, 11, and 14 to the 2012 Master Plan.

As described above, LUBA construed “larger class of planes” to refer to size and concluded that because the expansion would not permit airplanes with greater tail heights or wingspans it does not permit a larger class of planes. That is a straightforward approach that is easy to apply by considering the roman numeral portion of the ARC which reflects tail height and wingspan.

The Court of Appeals construed the rule in a way that is difficult to implement. As described above, the court rejected the argument that “larger” referred to the size of the plane and instead interpreted “larger” to mean “more inclusive.” That means that a body applying the rule would need to consider *how* planes are flying such as speed and fuel, cargo, or passenger load. That is more difficult to apply and will lead to more involved litigation for all sides. That is contrary to the purpose of the rule and the state policy on encouraging safe airport development.

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CONCLUSION

This court should allow review to interpret the regulations involved in this case.

Respectfully submitted,

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