

IN THE  
**SUPREME COURT OF VIRGINIA**

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RECORD NO. 200195

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HISTORIC ALEXANDRIA FOUNDATION,

Appellant,

v.

CITY OF ALEXANDRIA, *et al.*,

Appellees.

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**Brief of Amicus Curiae in Support of Appellant**

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## STATEMENT OF THE CASE

This matter arises on appeal by the Historic Alexandria Foundation ("HAF") of a ruling by the Circuit Court of the City of Alexandria granting demurrers filed by Appellees, Vowell LLC, (the current owner of 619 South Lee St in Alexandria, Virginia, formerly owned by U.S. Supreme Court Justice Hugo Black from 1939 until his death in 1971) ("Justice Black Property") and the City of Alexandria<sup>1</sup> ("City").

In 1969, to protect what the Virginia Historic Landmarks Commission had designated as a Historic Landmark, Justice Black voluntarily donated a perpetual open-space easement on both his home and garden under the Open-Space Land Act, Va. Code Ann. §§ 10.1 – 1700-1705, which is now held by the Virginia Board of Historic Resources. This open-space easement has been in place now for over a half century. Appellant HAF seeks to preserve and protect both the "Old and Historic Alexandria District"<sup>2</sup> and the Justice Black Property by challenging the City's failure to acknowledge and apply the provisions of the Open-Space Land Act, and failure to enforce the terms of the easement. The Circuit Court, by sustaining the demurrers, is allowing major and significant demolition and construction to take place —changes that directly contradict the express

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<sup>1</sup> The City of Alexandria Appellees include: the Alexandria Board of Architectural Review; Alexandria City Council; and the City of Alexandria.

<sup>2</sup> This District was the first special zoning district for purposes of historic preservation in the Commonwealth.

requirements of the Open-Space Land Act (“OSLA”), and the express terms of Justice Black's duly recorded perpetual deed of easement.

### QUESTIONS PRESENTED

1. Does HAF have standing to challenge the City's decision approving the proposed demolition and construction project at the Justice Black Property?
2. Must the provisions of the Open-Space Land Act be satisfied before modifications to the Justice Black Property can be approved?

### STATEMENT OF FACTS

The facts are not substantially in dispute and Amici concur with the Statement of Facts set out by HAF.

### STANDARD OF REVIEW

The issues set forth in this case are issues of law and thus the standard of review is *de novo*.

### ASSIGNMENTS OF ERROR

Amici concur with the Assignments of Error set forth by HAF.

## AMICI

This amicus brief is filed on behalf of: Preservation Virginia; Capital Region Land Conservancy, former Virginia Secretaries of Natural Resources, John W. Daniel II, W. Tayloe Murphy, Jr., L. Preston Bryant, Jr. and Molly J. Ward; and Addison B. Thompson, former Chairman of the Virginia Historic Resources Board.

## INTERESTS OF THE AMICI

Preservation Virginia<sup>3</sup> is a non-profit membership organization that has been dedicated to perpetuating and revitalizing the Commonwealth's cultural, architectural and historic heritage for over 130 years. Preservation Virginia is the state-wide historic preservation organization in the Commonwealth of Virginia. Preservation Virginia's mission is to make Virginia's communities and historic places stronger, more vital and economically sustainable through preservation, education and advocacy for the benefit of present and future generations.

Preservation Virginia also holds title to historic properties, buildings, landscapes and archeological sites, including: Historic Jamestowne at Jamestown, the John Marshall House in Richmond, Patrick Henry's Scotchtown in Hanover County, Bacon's Castle in Surry County and the Cape Henry Lighthouse in

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<sup>3</sup> Preservation Virginia was founded as the Association for the Preservation of Virginia Antiquities in 1889 and retains that corporate name; it was renamed Preservation Virginia in 2004 after combining with the Preservation Alliance of Virginia.

Virginia Beach. In addition, it also promotes preservation by encouraging owners of historic properties to donate easements to the Commonwealth of Virginia which are property interests held by the Virginia Board of Historic Resources, and administered and enforced by the Virginia Department of Historic Resources (“VDHR”). VDHR administers over 663 preservation easements that have been voluntarily donated and encompass over 38,000 acres of land<sup>4</sup>. Many of those easement donations were facilitated by Preservation Virginia. Over its history, Preservation Virginia has helped save over 400 Virginia sites.

As part of its public interest advocacy work, Preservation Virginia often participates in local, state and federal project review processes such as Section 106 consultations under the National Historic Preservation Act to help ensure the best outcome for historic resources threatened by federal projects. Preservation Virginia works with local, regional, statewide and national preservation advocates to find solutions to ensure the integrity of historic preservation tools such as open-space and historic easements, and easement and historic tax credit programs.

Capital Region Land Conservancy (“CRLC”) is a private, non-profit land trust dedicated to serving the Richmond area and surrounding counties. CRLC holds or co-holds a total of 17 easements on a total of 1,957 acres and has

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<sup>4</sup> Originally, the Open-Space Land Act was primarily used in municipal settings. It was later amended to also encompass agricultural, forestal, recreational and wetlands. Compare 1966 Va. Acts Ch. 461, § 4 with Va. Code Ann. § 10.1-1704.

facilitated easements held by other agencies or land trusts on an additional 6,347 acres. The protected lands include nearly 40 miles of riparian areas along our region's streams and rivers. The protected public lands also include about half of the 600 acre James River Park System, Atkins Acres Community Park, and Brown and Williamson Conservation Area.

Former Secretaries of Natural Resources, John W. Daniel II, W. Tayloe Murphy, Jr., L. Preston Bryant, Jr. and Molly J. Ward have a strong interest in the important legal questions this case raises, which they believe should be decided in favor of the Appellant HAF.<sup>5</sup> Addison B. Thompson is the former Chairman of the Virginia Board of Historic Resources, which is the holder of the open-space easement on the Justice Black Property.

These former secretaries had the responsibilities of ensuring the proper administration, growth and expansion of various open-space easement programs. These programs include not only the Open-Space Land Act but also easements held by the Virginia Outdoors Foundation, the Virginia Board of Historic Resources (formerly chaired by amici Addison B. Thompson), the Department of Conservation and Recreation's Division of Natural Heritage and the expansion of

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<sup>5</sup> Secretary Daniel was the first Secretary of Natural Resources when the Cabinet position was created under the Baliles administration. Secretary Murphy served as Secretary under the Warner administration, Secretary Bryant served as Secretary under the Kaine administration and Secretary Ward served in the McAuliffe administration.

open-space easements under the Virginia Conservation Easement Act of 1999—all of which are easements *in gross* designed to preserve various conservation, historic and open-spaces resources in Virginia for the benefit of the public and are designed to exist in perpetuity. Each are recorded deeds in the land records of each county or city and “run with the land.” Consistent with the policy of the Commonwealth set out in Art. XI of the Virginia Constitution, State agencies and non-profit organizations that hold these perpetual open-space easements have a clear duty to safe-guard the public’s interest in preserving the conservation values protected by the easements. This is true, whether they are open-space, wildlife habitat, farmland or forests, battlefields, endangered species, or historic buildings and sites, in order to ensure that the easements’ proper enforcement and administration is uniformly respected.

## ARGUMENT

### **1. Background**

The City of Alexandria's Old and Historic District was created in 1946 and is one of the oldest and largest historic districts in the United States. The Justice Black house is one of the core elements of this District, and is individually recognized by historians and scholars as one of the finest examples of 18th Century

Federal architecture in the Old and Historic District.<sup>6</sup> The property is a certified Historic Landmark pursuant to the Virginia Historic Landmarks Commission Act. 1966 Va. Acts Ch. 632, § 4(a); see 3 Former Va. Code Ann. § 10-138 (1973 Repl. Vol); accord Va. Code § 10.1-2204(A)(1).

The home also is unique within the Old and Historic District for the amount of open-space that has been preserved around it, once comprising 12 separate buildable lots. This open-space is the result of an historic act of leadership by United States Supreme Court Justice Hugo Black when, in 1969, he placed the property under the protection of an easement pursuant to the OSLA,<sup>7</sup> the second such easement ever recorded in Virginia and the first in Alexandria. At the time it was donated to the Commonwealth of Virginia as permanent open-space, the easement property rights were calculated to represent 60% of the total value of the

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<sup>6</sup> See, e.g. D. DAVIS ET AL., Alexandria Houses 1750-1830 112–14 (1946); GAY MONTAGUE MOORE, Seaport In Virginia: George Washington's Alexandria 222–225 (1949); *Collection of Early American Architectural Details*, 25 THE BRICKBUILDER 44-45 (No. 2, Feb. 1916), <https://archive.org/details/brickbuild25unse/page/n257/mode/2up>; *Collection of Early American Architectural Details*, 25 THE BRICKBUILDER 67–68 (No. 3, Mar. 1916), <https://archive.org/details/brickbuild25unse/page/n257/mode/2up>; NATIONAL PARK SERVICE, *View from southwest - Vowell-Snowden-Black House, 619 South Lee Street, Alexandria, Alexandria (Independent City), VA*, HISTORIC AMERICAN BUILDINGS SURVEY (1936), <https://www.loc.gov/pictures/collection/hh//va0223.photos.164344p>; NATIONAL PARK SERVICE, *Vowell-Snowden-Black Stable, Franklin Street, Alexandria, Alexandria (Independent City), VA*, HISTORIC AMERICAN BUILDINGS SURVEY (1933), <https://www.loc.gov/pictures/collection/hh/item/>.

<sup>7</sup> Va. Code Ann, §§ 10.1-1700—10.1-1705.

property, and that value has only increased as the number of open buildable lots in Alexandria has decreased over time.<sup>8</sup>

When the easement was granted, the City tax assessor reduced the tax assessment description from a property with 12 buildable lots to a single lot subject to an OSLA easement that restricted future rights to build on the open-space, and thus lowered its assessed value for the purpose of calculating annual real estate tax payment liability. This reduction in value for property tax purposes has reduced the tax burden on a succession of property owners for over fifty years. While the Justice Black Property owners received the benefit of decreased tax assessments, the public received the benefit of the historic and scenic open-space in return for subsidizing the owners' tax reduction. Commentators recognize that such conservation easements “are held and **enforced by government entities** and charitable organizations **on behalf of the public.**” See McLaughlin, 74 Duke J. L. & Contemp. Probs. 279, 2800 (2011) (emphasis added).<sup>9</sup>

The City has approved a proposal for construction on the Justice Black Property that includes both demolition of some of the most historic architectural features of the house, and construction of three new structures or "Pavilions" in the

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<sup>8</sup> City of Alexandria, Virginia, Deed Book 704: 494–95; see also *Letter from Morgan Delaney, Chair, Historic Alexandria Foundation, to Justin Wilson, Mayor of the City of Alexandria, and Alexandria City Council*, App. at 49 (Apr. 2, 2019).

<sup>9</sup> This view was cited with approval by the Attorney General of the Commonwealth. See Op. No. 11-140, 2012 Report of the Attorney General 31.

landmark-designated open-space that will more than double the square footage of buildings currently constructed on the property. The existing historic property has approximately 5,800 square feet of above-ground living space, which the proposed project seeks to more than double to 14,371 square feet.

As explained below in Section 3, the City's approvals ignored both the express terms of the OSLA and the express terms of the deed of easement from Justice Black. The express terms of the OSLA requires several specific factual determinations to be made, and for substitute easement property to be set aside **before** approving any construction on easement-protected lands. It is undisputed that no such required factual determinations were made, and no required easement substitution was made prior to approval of the construction on the protected easement property.

## **2. HAF Has Standing**

As clearly set forth in HAF's Petition for Appeal, the City's Zoning Ordinance provides detailed and express requirements for a party to establish standing to seek appeal of a City Council zoning decision to a Circuit Court.<sup>10</sup> It is not disputed that HAF has met those requirements by: a) owning property within the Old and Historic District; and b) following the procedural requirements for properly appealing a decision from the Board of Architectural Review and City

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<sup>10</sup> Alex. Zon. Ord. § 10-107(B).

Council. The Circuit Court erred in apparently finding that Petitioner needed to establish some additional "particularized harm" not experienced by the general public, in addition to meeting the judicial appeal requirements set forth in the Alexandria Zoning Ordinance.

The rights and procedural obligations established by the Alexandria Zoning Ordinance create a subset of parties who are deemed to be aggrieved parties by alleged errors in zoning decisions, and thus specifically given the right to sue in Circuit Court. These rights to sue were created by the same City legislative body which is an Appellee in this case. Alexandria property owners outside of the Old and Historic District are not provided an express right to appeal under the Alexandria Zoning Ordinance. Thus the right to appeal that HAF seeks to exercise as a property owner in the Old and Historic District is clearly not a right shared with the "public generally." The standing expressly granted by the City should end the standing inquiry in this case.

Even if the court determines that the City ordinance is not sufficient on its own to convey standing, HAF is clearly an aggrieved party suffering a

particularized harm as required under applicable common law precedent.<sup>11</sup> In addition to being a property owner, HAF is also a non-profit preservation advocacy organization that owns a substantial portfolio of eight preservation easements on historic properties within the Old and Historic District of Alexandria, six of which were issued under the OSLA. *Historic Preservation Easements*, HISTORIC ALEXANDRIA FOUNDATION, <http://historicalalexandriafoundation.org/easements.html> (last visited Nov. 10, 2020).

The value of HAF's property interests in its own Old and Historic District easements is entirely dependent on whether the terms of such easements are enforced by its easement holder such as the City of Alexandria. If the terms of the OSLA easements are not enforced by such public bodies, then the easements which HAF holds would have little to no value as a preservation tool, or as an interest in real property. Clearly a decision by the City to minimize or eviscerate the value of a property easement that is nearly identical to the portfolio of easements held by HAF, and collected through over 50 years of diligent and sustained preservation advocacy, establishes a particularized harm to the property rights of HAF.

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<sup>11</sup> See *Friends of the Rappahannock v. Caroline Cty. Bd. of Sup'rs*, 286 Va. 38, 45, 743 S.E.2d 132, 135 (2013) (the court determined that to be aggrieved “requires having a sufficient proximity to the property subject to the land use decision and an allegation of particularized harm not shared by the general public”); *Tran v. Fairfax Cty. Bd. of Supervisors*, 87 Va. Cir. 344 (2013). In *Rappahannock*, the court found that the plaintiffs did not have a particularized harm because, they could not prove the loss of personal or property rights.

Similarly, one of the most important tools that HAF has for fulfilling its mission to "preserve, protect and restore structures and sites of historic or architectural interest" is the ability to convince other historic property owners to donate preservation easements, a task that becomes extremely difficult if such easements are not enforced. Easements similar to the one at issue in this case are used, not just in Alexandria, but throughout the Commonwealth by local and regional preservation and conservation entities.<sup>12</sup> HAF, and countless other preservation organizations across the state, rely on easements to protect Virginia's historic sites and natural beauty. For point of reference, the Virginia Outdoors Foundation, which holds about 80% of the Commonwealth of Virginia's open-space easements, recorded its 1000<sup>th</sup> conservation easement in 2001, and in 2016 announced that it had reached nearly 800,000 easement protected acres. *About the Virginia Outdoors Foundation*, VIRGINIA OUTDOORS FOUNDATION, <https://www.vof.org/about/> (last visited Nov. 10, 2020).

Open-space easements allow for the protection of a wide variety of land, including, for example, property donated by Colonial Williamsburg to preserve Virginia's history, and 11,000 acres donated by the City of Roanoke to protect the

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<sup>12</sup> This emphasizes the very reason why the Former Secretaries of Natural Resources have a keen interest in this issue, as a failure to recognize and enforce conservation easements would be a deterrent to the Commonwealth's ability to expand preservation throughout the state and would undermine what has thus far been accomplished.

city's main drinking water source. Id. Further, a decision limiting the enforceability of easements on standing grounds could even harm the interests of the Commonwealth itself. Between 1999 and 2014 Virginia has invested \$119 million in the conservation of 89,400 acres, including many properties protected by conservation easements. THE TRUST FOR PUBLIC LAND, VIRGINIA'S RETURN ON INVESTMENT IN LAND CONSERVATION (Aug. 2016), [tpl.org/va-roi-report](http://tpl.org/va-roi-report).

If preservation organizations like HAF are determined to lack standing to seek enforcement of preservation easements in state court, in spite of clear directives to the contrary found in both local ordinances and state law, then not only will HAF suffer massive harm to its own property interests, but preservation organizations throughout the state could lose one of their most effective and valuable instruments. Easements that are not enforced, or are unenforceable, are of little value to preservation and conservation, and will quickly become of little value to tax assessors and property owners. These consequences would cause the entire 50+-year-old easement-based preservation and conservation strategy to dissolve for lack of enforceability. It's hard to imagine an interest more critical and particularized than the interest of HAF in the ability to enforce easements like the one at issue in this case.

### **3. The Requirements of the OSLA Must Be Satisfied Before Construction On OSLA-Protected Property Can Be Approved By A Government Entity**

The OSLA provides that:

**No open-space land [protected by an OSLA Easement] shall be converted or diverted from open-space use unless (i) the conversion or diversion is determined by the public body to be (a) essential to the orderly develop and growth of the locality and (b) in accordance with the official comprehensive plan . . . and (ii) there is substituted other real property which is (a) of at least equal fair market value, (b) of greater value as permanent open-space land than the land converted or diverted and (c) of as nearly as feasible equivalent usefulness and location for use as permanent open-space land as is the land converted or diverted. The public body shall assure that the property substituted will be subject to the provisions of this chapter.**

Va. Code § 10.1-1704 (emphasis added).

The approval of construction at the Justice Black Property by the City has by-passed or ignored all of these requirements of the OSLA. Neither the VDHR nor the City made any of the required factual findings, and did not even attempt to undertake any of the mitigating easement substitution measures mandated by this section of the OSLA. There was no finding that the conversion of the Property from open-space to "Pavilions" is essential to orderly City development, and no finding that the planned construction is in accordance with the City's official comprehensive plan. Likewise, neither VDHR, nor the City, even attempted to ensure that substitute easement property of equal market value and superior

preservation value was acquired to replace the square footage proposed for new construction.<sup>13</sup> None of these facts are in dispute.

Conservation easements under the OSLA and other state laws serve an important public function and interest. They facilitate and further the Commonwealth's policy to protect her natural resources and historic sites. That policy is set forth not only in various statutes but is explicitly set forth in Virginia's Constitution. See Va. Const. Art. XI Sec. 1 ("...it shall be the policy of the Commonwealth to conserve, develop and utilize its natural resources ...and its historical sites and buildings.").

The Virginia legislature has created easement programs like the OSLA because there is a significant public benefit. Stewardship of such easements is supported by public funds including general fund appropriations, tax exemptions, state income tax credits pursuant to Code of Va. §§ 58.1-10 through 513, federal income tax deductions in accordance with IRC § 170(h), and property tax reductions provided to grantors. As lands and properties are placed under easements, the public receives a benefit that exists in perpetuity, but only if the terms of the easements are respected and enforced, and enforceable in state courts unlike cases where they are ignored or overlooked, such as this one.

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<sup>13</sup> This statutory requirement is especially significant, since for over a half-century the citizens of Alexandria have been subsidizing the tax reduction on the Justice Black Property and are entitled to something in return should the easement requirements be abandoned.

OSLA provisions make clear that they must be considered and cannot be ignored by local Virginia governments like the City in this case. There is a statutory mandate that property under the OSLA, subject to narrow exceptions set forth above, will be “preserve[d]” and that the provisions and powers of the Act “...shall be in addition and supplemental to the powers conferred by any other law.” Va. Code §§10.1-1704(B); 10.1-1705. To hold, as the Circuit Court did, and as the City asserts, that the provisions of the OSLA are not applicable and need not be considered flies in the teeth of the specific statutory language that the provisions of the Act are “**in addition and supplemental**” to any other law, whether state or local. *Id.* (emphasis added).

Moreover, Virginia’s Constitutional provisions likewise cannot be ignored. Under Art. XI, Sec. 1 the policy of the Commonwealth is “...to conserve ...its historical sites and buildings.” Further it is clear under the provisions of Art. XI, Sec. 2 that the General Assembly, with the enactment of laws like the OSLA, implemented the mandate for “conservation” “acquisition and protection of historical sites and buildings...” *Id.* The Justice Black Property is such a historical site and building and though the City argues that it can ignore the provisions of the OSLA, it should not be permitted to ignore both the OSLA and these provisions of Virginia’s Constitution.

The OSLA and its requirements are also supreme over local government laws and decisions, including the government decision approving the construction at the Justice Black Property in this case. First, the OSLA provides that “insofar as the provisions of [the OSLA] are inconsistent with the provisions of any other law, the provisions of [the OSLA] shall be controlling.” Va. Code § 10.1-1705.

Through this provision the legislature clearly intended the OSLA to supersede all other potentially applicable laws in the Commonwealth, which include official actions of local governments. Second, state law in general preempts local laws and decisions, except where the state legislature has explicitly provided for local control. The supremacy of state laws like the OSLA, and the requirement that formal local government decisions like those made by the City in this case be consistent with state law is set forth in Virginia's supremacy clause—codified at Virginia Code Section 1-248—which provides that:

The Constitution and **laws** of the United States and **of the Commonwealth shall be supreme**. Any ordinance, resolution, by-law, rule, regulation, **or order of any governing body** . . . shall not be inconsistent with the Constitution and the laws of the United States or of the Commonwealth.

Va. Code § 1-248 (emphasis added).

The text of the OSLA and the Virginia supremacy clause demonstrate that the state did not intend to delegate power over land encumbered by an open-space

easement to local governments. OSLA was crafted by the state legislature to require additional steps to be taken in the process of obtaining local government approval of construction on land subject to an open-space easement. In this case, the easement holder and local government body have not even tried to satisfy the statutorily required conditions.

If this failure to satisfy any of the OSLA statutory requirements cannot be enforced in Circuit Court, then these provisions of the OSLA would be rendered null and void. The Virginia supremacy clause would be effectively eviscerated by the actions of the City and the omission and inaction of the Alexandria Circuit Court. The OSLA mandates that its provisions are in addition to, and supplemental to any other state or local law. Judicial bodies like the circuit courts of Virginia are constitutionally charged with responsibility for enforcing the Commonwealth's statutes. They must not be allowed to effectively repeal statutes like the OLSA by refusing to apply its clear and unambiguous provisions, ignoring the express legislative mandates, or dismissing cases brought by aggrieved parties on dubious standing grounds.

## CONCLUSION

It is undisputed that the provisions of the OSLA have not been followed in this case. These governmental omissions reflect a complete disregard for text of the OSLA, and the Constitution of Virginia. Such omissions will lead to

destruction of open-space protected by a perpetual open-space easement recorded in the land records of Alexandria and will deprive the citizens of Virginia, present and future, of the benefits they have paid for over the last 50 years by subsidizing reduced real estate taxes on the Justice Black Property. It is also beyond dispute that HAF has standing to challenge the City's decision in this case. Standing exists by virtue of both the rights granted by the City ordinance on zoning-decision appeals, as well as the particularized material harm the City's decision will have on open-space easements, including those owned by HAF. Thus the decision of the Circuit Court should be reversed and the case remanded back with instructions that the preservation provisions of the OSLA be implemented.

### CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that on the 16<sup>th</sup> of November, 2020, a true and correct copy of this Amicus brief was served electronically via email on all counsel of record.

I further certify that the foregoing brief does not exceed 50 pages or 8,750 words and that I have otherwise complied with Rules 5:26 and 5:30 of the Rules of the Supreme Court of Virginia.

s/ Anthony F. Troy

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