Municipal Corporations—Business Regulations—Denver Ordinances Prohibiting Erection of New Billboards and Requiring Removal of Existing Billboards Within Five-Year Period Unconstitutionally Exceed City's Regulatory Power. *Combined Communications Corp. v. City & County of Denver*, 542 P.2d 79 (Colo. 1975).

The City and County of Denver enacted two ordinances, numbered 94 and 95, in 1971.[1] The ordinances were a part of the Denver Sign Code. Ordinance 94 prohibited the erection of new off-premises outdoor signs; ordinance 95 required that existing signs of this character be removed over a 5-year period of time. In 1974 Combined Communications Corporation and other persons engaged in outdoor advertising brought suit against Denver in the state district court.[2] The district court held that the two ordinances were unconstitutional and issued a permanent injunction against Denver to prevent their enforcement. Denver appealed the district court's decision to the Colorado Supreme Court which affirmed the judgment of the district court.[3]

The issue considered in *Combined Communications Corp. v. City & County of Denver*[4] was whether Denver had the power to prohibit the erection of off-premises billboards and to force the removal of existing off-premises signs when the effect of such actions "would be to eliminate the billboard business in Denver."[5] The Colorado Supreme Court held that Denver had no such power and that ordinances 94 and 95, which purported to give the city the power, were unconstitutional. The Supreme Court elected to base its ruling in the case on the conclusion of the district court[6] that the

1. Combined Communications Corp. v. City & County of Denver, 542 P.2d 79 (Colo. 1975).

2. Pending the trial date, the district court granted a preliminary injunction against Denver's enforcement of the ordinances. On appeal, the Colorado Supreme Court overturned the injunction, but declined to comment on the issues in view of the impending trial. Combined Communications Corp. v. City & County of Denver, 528 P.2d 249 (Colo. 1974).

3. Combined Communications Corp. v. City & County of Denver, 542 P.2d 79 (Colo. 1975).

4. *Id.*

5. *Id.* at 81.

6. The trial court's findings were that the ordinances constituted a taking of property without just compensation in violation of the fifth amendment of the United States Constitution, and also violated freedom of speech under the first amendment; that the definitions in the ordinance constituted an unconstitutional delegation of legislative authority to the Zoning Administrator, and that ordinance 95 violated state law on a matter of state-wide concern; and that ordinance 94 was an ultra vires act when enacted by the Denver City Council as it exceeded the scope of authority granted the council by the Denver charter. *Id.*

ordinances were ultra vires, *i.e.*, that the city council lacked the authority under the city charter to adopt ordinance 94, and on "the inescapable conclusion that, if 94 fails, 95 must also."[7] The court refused to be persuaded that ordinances 94 and 95 were valid exercises of the regulatory power granted Denver by its charter. The Denver charter provides:

> For the purpose of promoting health, safety, morals or the general welfare of the community, the council of the City and County of Denver is hereby empowered to *regulate and restrict* the height, number of stories and size of buildings and other structures . . . and the location and use of buildings, structures and land for trade, industry, residence or other purposes.[8]

The court determined that the words "regulate" and "restrict" in the charter did not, singly or in combination, grant to the city council the power to prohibit.

In reaching its decision, the court also rejected Denver's contention that the ordinances in question were justified under Denver's police power. The court did not challenge Denver's argument that a government may, under its police power, deprive an owner of a specific use of property in certain situations and not violate the fifth amendment's prohibition against taking private property without just compensation.[9] The majority did, however, qualify its acceptance of that argument by emphasizing that the exercise of Denver's police power had to meet a test of reasonableness.[10] In fact, the court stated that the standard of reasonableness had to be met whether Denver premised the exercise of its power to regulate on its police power in general or on its city charter.

In testing the Denver ordinances against the standard of reasonableness, the court examined the nature of the matter prohibited and the geographic extent of the prohibition. It approved the trial court's finding that the outdoor advertising industry is a separate and distinct industry, differing in fact and in function from that denominated the "on-premises" sign industry.[11] Based on this finding, the court concluded that the cases cited by Denver in support

7. *Id.*
8. *Id.* (court's emphasis).
9. *Id.*, *citing* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).
10. *Id.* at 81-82, *citing* Goldblatt v. Hempstead, 369 U.S. 590 (1962).
11. *Id.* at 82.

of the ordinances were not in point.[12] The court distinguished the cited cases on the ground that none of them supported the proposition that a regulatory power could lawfully be extended to support an absolute prohibition of a separate industry throughout an entire city.

The dissent chided the majority for failing to address properly the real issue presented in *Combined Communication's Corp.* The dissent considered the issue to be whether or not the city, by the reasonable exercise of its police power, could prohibit the erection of new off-premises billboards.[13] The dissent stated that the majority ignored the underlying basis for the attempted prohibition, *i.e.*, "that off-premise billboards create 'visual pollution', and hazards to driving safety."[14] In this connection, the dissent noted that many courts, including the United States Supreme Court, have recognized aesthetic considerations as a valid ground for the exercise of the police power.[15] The dissent did not deny that a prohibition of billboards would adversely effect some businesses, but noted that the very concept of the term "reasonable" implies a balancing of affected interests. In the dissent's view, the majority had erred by making no attempt to strike that balance. The dissent made brief mention of ordinance 95 and stated only that the 5-year amortization process embodied in that statute had been approved by a number of respectable courts.[16] The dissent concluded that the case should be remanded to the trial court for a determination under the blancing tests suggested.

Although zoning ordinances may be promulgated pursuant to local legislative authority, they have traditionally been enacted pursuant to a local government's police power.[17] As a concept arising under the police power, zoning is premised on the notion that governments have the right and, in fact, the duty to protect their citi-

12. The court cited Oregon City v. Hartke, 240 Ore. 35, 400 P.2d 255 (1965), in support of the proposition that all businesses may be prohibited in residential zones. The court also cited United Adv. Corp. v. Metuchen, 42 N.J. 1, 198 A.2d 447 (1964), a case that upheld complete exclusion of the billboard industry from a predominantly residential community.

13. Combined Communications Corp. v. City & County of Denver, 542 P.2d 79, 83 (Colo. 1975) (Kelley, J., dissenting).

14. *Id.*

15. *Id., citing* Berman v. Parker, 348 U.S. 26 (1954).

16. 542 P.2d at 84, *citing, inter alia*, National Adv. Co. v. Monterey, 1 Cal. 3d 875, 464 P.2d 33, 83 Cal. Rptr. 577, *appeal dismissed*, 398 U.S. 946 (1970).

17. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

zens.[18] Zoning laws were virtually unknown before 1900,[19] but as the early zoning cases noted, they were both necessary and subject to change to meet the needs of a developing urban society.[20] Billboard regulation is a concept older than zoning. As early as 1900, a Los Angeles ordinance regulating the height of billboards was sustained on the ground that billboards of great height posed a danger to persons passing by and obstructed the natural view.[21] These early billboard regulations were, as are those of the present, also based on a local government's police power.

Traditionally, the term "police power" has been used to uphold the exercise of government regulatory functions intended for the protection of the public health, safety, morals, or general welfare.[22] The early cases concerned with billboard regulation, therefore, grounded their decisions on one or more of those specific purposes.[23] The more recent cases, however, have dealt with zoning and billboard regulation premised on aesthetic considerations.[24]

Courts considering the weight to be given aesthetics when a regulation is based on the police power have reached divergent conclusions.[25] One apparent reason for this divergence is the inability of the courts to agree on the meaning of the term "general welfare" in the traditional police power formula.[26] Those courts that have held aesthetics invalid as a basis for regulation have generally expressed the view that aesthetics is simply too subjective a concept on which to base an ordinance.[27] The trend, however, appears to be toward increasing recognition of aesthetics as a valid ground for regulation.[28]

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18. Deems v. Mayor & City Council, 30 A.648, 650 (Md. Ct. App. 1894).

19. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 386 (1926).

20. *Id.* at 386-87.

21. *In re* Wilshire, 103 F. 620 (C.C.S.D. Cal. 1900).

22. Manigault v. Springs, 199 U.S. 473, 480 (1905).

23. St. Louis Gunning Adv. Co. v. City of St. Louis, 235 Mo. 99, 137 S.W. 929 (1911), *appeal dismissed*, 231 U.S. 761 (1913).

24. Note, *The Legal History of Zoning for Aesthetic Purposes*, 8 IND. L. REV. 1028 (1975) [hereinafter cited as *Aesthetic Zoning*].

25. *Id.* at 1029.

26. *Id.* It is worthy of note that the term "police power" itself is considered undefinable by many. The United States Supreme Court has said, "[I]t is much easier to perceive and realize the existence and sources of [the police power] than to mark its boundaries, or prescribe limits to its exercise. This power is and must be from its very nature, incapable of any exact definition or limitation." Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 62 (1872).

27. *Aesthetic Zoning, supra* note 24, at 1029.

28. Comment, *Billboard Laws Today—Reaction or Solution?*, 24 BAYLOR L. REV. 86, 97 (1972) [hereinafter cited as *Billboard Laws*].

The case most often cited as the impetus behind the reliance on aesthetics as a basis for promulgating zoning ordinances is *Berman v. Parker*. In this case Mr. Justice Douglas said:

> The concept of the public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean. . . .[29]

In 1967 the Court of Appeals of New York extended its recognition of aesthetics to billboard regulation and upheld a zoning ordinance excluding billboards from certain areas of a city on aesthetic objectives alone.[30] New York has recently reiterated its position on aesthetics,[31] and several other jurisdictions have adopted the view that regulation premised on aesthetics alone is a valid exercise of the police power.[32]

In addition to the controversy over whether aesthetics are a sufficient basis for zoning regulation, courts construing zoning ordinances and billboard regulations are constantly faced with the assertion that the regulations so encroach on private property rights that a taking of property occurs which must be compensated under the fifth amendment of the United States Constitution. The distinctions between government acts that are within the police power and those that are within the just compensation requirements of the fifth amendment are often difficult to ascertain. As the Supreme Court said in *Pennsylvania Coal Co. v. Mahon*,[33] the question is always one of degree. One legitimate generalization in this area of "degrees" appears to be that if the land itself is not taken, the fact that the most beneficial use of that land has been prohibited will not constitute a taking which must be compensated.[34] The Supreme

29. 348 U.S. 26, 33 (1954). It should be noted that *Berman* was a case involving taking by eminent domain rather than regulation under the police power. The distinction between the two is considered in detail at notes 50-53 *infra* and accompanying text. Texas is among the many states adopting the *Berman* rationale. Davis v. City of Lubbock, 160 Tex. 38, 326 S.W.2d 699 (1959).

30. Cromwell v. Ferrier, 19 N.Y.2d 263, 225 N.E.2d 749, 279 N.Y.S.2d 22 (1967).

31. People v. Goodman, 31 N.Y.2d 262, 290 N.E.2d 139, 338 N.Y.S.2d 97 (1972).

32. E.B. Elliott Adv. Co. v. Metropolitan Dade County, 425 F.2d 1141 (5th Cir. 1970); Rotenberg v. City of Fort Pierce, 202 So. 2d 782 (Fla. Dist. Ct. App. 1967); State v. Diamond Motors, Inc., 50 Hawaii 33, 429 P.2d 825 (1967); Oregon City v. Hartke, 240 Ore. 35, 400 P.2d 255 (1965).

33. 260 U.S. 393 (1922).

34. Goldblatt v. Hempstead, 369 U.S. 590 (1962) (prohibiting excavation of gravel);

Court has extended this reasoning to zoning law and held that zoning ordinances are valid regulations under the police power rather than takings which must be compensated.[35]

Even though no compensation is required when a valid exercise of the police power is upheld, many zoning ordinances follow an intermediate approach to the taking problem by providing for amortization periods. These are periods of time during which a nonconforming use, such as a billboard, must be terminated.[36] Theoretically, the amortization period is long enough to enable the owner of the nonconforming use to recover his investment. In actual practice, however, courts do not require that the nonconforming property have no value at the termination date.[37] The use of amortization to terminate nonconforming billboards has been criticized by some writers as a devious attempt to escape the just compensation requirements of the fifth amendment.[38] On the other hand, the courts of most jurisdictions have held amortization to be a valid method of terminating a nonconforming use if the amortization period is reasonable.[39] Whether any given period of time is reasonable necessarily depends on the type of nonconformity being terminated, but in cases concerning only billboards, a 5-year amortization period seems to be evolving into an acceptable standard.[40]

United States v. Central Eureka Mining Co., 357 U.S. 155 (1958) (closing gold mine during war); Miller v. Schoene, 276 U.S. 272 (1928) (removal of trees).

35. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). This ruling has been accepted by most courts. *See* Art Neon Co. v. City & County of Denver, 488 F.2d 118, 123 (10th Cir. 1973), *cert. denied*, 417 U.S. 932 (1974). The United States Congress has taken a different view in the Highway Beautification Act by requiring compensation for some categories of signs subject to removal. 23 U.S.C. § 131(g) (1970).

36. *Billboard Laws, supra* note 28, at 97. The questions of whether nonconforming uses should be terminated, and if so, how they may be terminated constitutionally, have long plagued both judges and legislators. *See* 2 A. RATHKOPF, THE LAW OF ZONING AND PLANNING ch. 58, at 58-1,-8 (3d ed. 1972). An excellent discussion of amortization is Katarincic, *Elimination of Non-Conforming Uses, Buildings and Structures by Amortization—Concept Versus Law*, 2 DUQUESNE U.L. REV. 1 (1963).

37. Art Neon Co. v. City & County of Denver, 488 F.2d 118, 121 (10th Cir. 1973), *cert. denied*, 417 U.S. 932 (1974).

38. *Billboard Laws, supra* note 28, at 98, 107; Note, *State and Local Billboard Control in California*, 11 CAL. WEST. L. REV. 193, 205 (1974).

39. Art Neon Co v. City & County of Denver, 488 F.2d 118 (10th Cir. 1973), *cert. denied*, 417 U.S. 932 (1974); Swain v. Board of Adjustments, 433 S.W.2d 727 (Tex. Civ. App.—Dallas 1969, writ ref'd n.r.e.), *cert. denied*, 396 U.S. 277 (1970). The most persuasive statement of the opposite point of view is contained in Hoffman v. Kinealy, 389 S.W.2d 745 (Mo. 1965).

40. Art Neon Co. v. City & County of Denver, 488 F.2d 118 (10th Cir. 1973), *cert. denied*, 417 U.S. 932 (1974); National Adv. Co. v. County of Monterey, 1 Cal. 3d 875, 464 P.2d 33, 83 Cal. Rptr. 577, *appeal dismissed*, 398 U.S. 946 (1970); Markham Adv. Co. v. State, 73 Wash. 2d 405, 439 P.2d 248 (1968).

Although the amortization issue has not been decided in Colorado, and a regulation based solely on aesthetics was last confronted in that state in 1910,[41] the Colorado holdings on questions of zoning and billboard regulation have generally followed the national trends. The basic concept that zoning ordinances are a valid exercise of the police power, if reasonably related to the public health, safety, or general welfare, has been accepted in Colorado for a number of years.[42] The Colorado Supreme Court has also followed the majority trend in giving presumptive validity to zoning ordinances[43] and in expanding the concept of "general welfare" to meet the changing needs of an increasingly urban society.[44] In the last decade, the Colorado court appeared to have also adopted the modern standard for judicial review of zoning ordinances. The court stated its position to be that it would not substitute its zoning philosophy for that of an elected zoning body.[45]

In *Combined Communications Corp. v. City & County of Denver*,[46] however, it appears that the standard of review just noted has been discarded in favor of a test which does allow the court to substitute its own philosophy. In retreating from its previous standard, the court was forced to engage in judicial gymnastics that in turn leave the decision justifiably open to criticism. The first ground for comment lies in the court's statement that its decision was predicated on the fact that ordinance 94 and 95 were ultra vires acts.[47] Despite this statement, it is clear that the actual basis of the court's decision was that the ordinances were unreasonable exercises of the police power and were thus unconstitutional. Perhaps the reason for the court's emphasis on the police power argument was its recognition that holding the ordinances to be beyond the scope of a home rule city's charter might be only temporarily effective. Because a home rule city can change its charter by a simple vote of the electorate,[48] the court had to hold the ordinances constitutionally invalid

41. Curran Bill Posting & Distrib. Co. v. City of Denver, 47 Colo. 221, 107 P. 261 (1910). At the time *Curran* was decided, zoning laws were not yet in existence in Colorado. *See* City of Englewood v. Apostolic Christian Church, 362 P.2d 172, 175 (1961).

42. Jones v. Board of Adjustment, 119 Colo. 420, 204 P.2d 560 (1949).

43. Baum v. City & County of Denver, 147 Colo. 104, 363 P.2d 688 (1961).

44. City of Englewood v. Apostolic Christian Church, 146 Colo. 374, 362 P.2d 172 (1961).

45. Nopro Co. v. Town of Cherry Hills Village, 180 Colo. 217, 504 P.2d 344 (1972).

46. 542 P.2d 79 (Colo. 1975).

47. *Id.* at 81.

48. As a home rule city, Denver has long had the unquestioned power to adopt, amend, and alter its own charter by a simple vote of the electorate. City & County of Denver v. New

to prevent their resurrection under a broadened charter. Whether the ordinances were attacked as ultra vires acts or as unconstitutional attempts to exercise police power made no difference to the court, however, inasmuch as it stated its standard of review was the same under either concept.[49] The court's failure to draw this distinction is illustrative of the contorted nature of the court's reasoning.

The court's consideration of the validity of the ordinances under the city's police power and its actually basing its decision on this rationale raises a second criticism of the court's opinion. The constitutional test applied by the court was not the constitutional test it asserted as the basis for its decision.[50] The court found that ordinance 94 was unreasonable when the police power was balanced against the restrictions imposed by the fifth amendment on government taking of private property and cited two United States Supreme Court cases that considered the taking question.[51] It was this test, police power balanced against taking, that the court asserted as the basis for its finding that ordinance 94 was unreasonable and thus invalid. That this was not the test actually used by the court can easily be demonstrated. Ordinance 94 was a prospective ordinance, the effect of which was to prohibit the construction of billboards in the future.[52] It would seem to be abundantly clear that a property right not yet in existence cannot be taken away. Although ordinance 95, which provided for termination of existing billboards by amortization,[53] could be construed to involve the taking issue, its provisions were not considered. The invalidity of ordinance 95 was premised entirely on the invalidity of ordinance 94. Because ordinance 94 was held to be constitutionally unreasonable, and the asserted test was clearly inapplicable, the court's utilization of some other constitutional test of reasonableness is apparent. The test actually used by the court appears to have been the reasonableness test of substantive due process, a concept embodied in both the fifth and fourteenth amendments.

York Trust Co., 229 U.S. 123 (1913). Additionally, the state cannot alter or affect the charter of a home rule city as it relates to matters of local concern. People *ex rel.* Elder v. Sours, 31 Colo. 369, 74 P. 167 (1903).

49. 542 P.2d 79, 82 (Colo. 1975).

50. The Colorado Supreme Court cited only the fifth amendment to the United States Constitution and United States Supreme Court cases construing the same. *Id.* at 81-82.

51. *Id.*

52. *Id.* at 80. Ordinance 94 also operated to make existing billboards nonconforming uses, but did not propose their elimination. *Id.*

53. *Id.*

If the Colorado Supreme Court indeed utilized the reasonableness test of substantive due process to strike down ordinance 94, it has resurrected a concept that has been discredited in the law of business regulation for some time.[54] Perhaps the sentiments generally held by courts on substantive due process were best expressed by the United States Supreme Court when it said that it would not "sit as a super legislature."[55] In *Combined Communications Corp.* the Colorado Supreme Court acted as a "super city council" and imposed its concept of what is reasonable over the views of the elected representatives of the City of Denver. Its action in this matter was also contrary to existing state law.[56] Whether the Colorado Supreme Court misconceived the applicable constitutional provisions relating to prospective zoning laws or simply chose to impose its will over the will of the people, the reasoning it used to rule on the validity of ordinance 94 was incorrect.

It could be argued that the criticism above is narrow and hypercritical in that it limits the court's action to the literal terms of its own language. A broader view would be to construe the court's language, although it is directed only at ordinance 94, as if it were intended to encompass the effect of both ordinances. By assuming that the court was considering both ordinances, the termination provisions of ordinance 95 could produce a taking issue[57] not present when ordinance 94 is considered alone. If the court had considered both ordinances, it would have been justified in testing the reasonableness of these ordinances against the taking restrictions of the fifth amendment. Even under this broad view of the case, it quickly becomes apparent that the decision cannot be supported. To determine what is reasonable requires a balancing of competing interests, and this the court did not do. The tone of the court's opinion implies that an absolute prohibition of a distinct industry is unreasonable per se.[58]

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54. Olsen v. Nebraska *ex rel.* Western Ref. & Bond Ass'n, 313 U.S. 236 (1941).

55. For cases in which this phrase has been repeated by various justices, see Morey v. Doud, 354 U.S. 457 (1957) (Frankfurter, J., dissenting).

56. Art Neon Co. v. City & County of Denver, 488 F.2d 188, 121 (1973), *cert. denied*, 417 U.S. 932 (1974); Nopro v. Town of Cherry Hills Village, 180 Colo. 217, 504 P.2d 344, 348 (1972).

57. *See* notes 33-39 *supra* and accompanying text.

58. Combined Communications Corp. v. City & County of Denver, 542 P.2d 79, 82 (Colo. 1975). A number of cases, however, have held absolute prohibitions to be reasonable. United Adv. Corp. v. Metuchen, 42 N.J. 1, 198 A.2d 447 (1964) (billboards); Hohl v. Readington, 37 N.J. 271, 181 A.2d 150 (1962) (mobile homes); Oregon City v. Hartke, 240 Ore. 35, 400 P.2d 255 (1965) (auto wrecking yards).

The primary consideration urged by Denver in support of the ordinances was the aesthetic well-being of the people.[59] The trial court refused to hear evidence on this point[60] and the Supreme Court certainly did not weigh it against the conceded economic injury to the sign companies. Without weighing, or even hearing the competing interests involved, it is difficult to determine how the court could reach a conclusion that one is more reasonable in light of the city's police power than the other.[61] Why the Colorado Supreme Court, considering the natural beauty of that state and its attraction to tourists,[62] would refuse to even consider the clearly rising trend toward recognition of aesthetics as an integral facet of the public's general welfare[63] is inexplicable. Another factor that should have been placed in the balance to determine reasonableness was the amortization procedure provided in ordinance 95.[64] The amortization period provided by this ordinance was 5 years regardless of the age or value of the billboard.[65] Because the court never discussed the provisions of ordinance 95, no determination was made as to the reasonableness of the 5-year period. In fact, the acceptability of the amortization technique in general has still not been decided in Colorado. The court's failure to address amortization was a failure to consider an aspect of the zoning schemes that has been determinative of reasonableness in other courts.[66]

It is hoped that the Colorado Supreme Court will reconsider the issues presented by *Combined Communications Corp. v. City & County of Denver*[67] in the near future. If the issues are reconsidered, the court should not rely on substantive due process, but should

59. Combined Communications Corp. v. City & County of Denver, 542 P.2d 79, 83 (Colo. 1975) (Kelley, J., dissenting). Denver also asserted that off-premises signs were a hazard to driving safety. Although off-premises signs in certain locations, *e.g.*, next to freeway ramps, may be especially hazardous, it is difficult to conclude that off-premises signs throughout a city are any more hazardous to driving than on-premises signs. Since the trial court refused Denver's offer of evidence on this point, it is not considered further in this discussion. *Id.*

60. *Id.*

61. This point was also raised by the dissent. *Id.* at 84.

62. These factors have been given considerable weight by the courts of Florida and Hawaii. *See* cases cited note 32 *supra*.

63. *See* authority cited note 28 *supra*.

64. Combined Communications Corp. v. City & County of Denver, 542 P.2d 79, 80 (Colo. 1975).

65. *Id.*

66. *See* cases cited note 40 *supra*.

67. 542 P.2d 79 (Colo. 1975).

base its decision on a careful examination of the competing interests involved. Only by balancing the general welfare of the people against the effect on the sign industry can the court's decision reflect a proper judicial determination of a difficult question of great import.

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