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In Chemical Bank v. Washington Public Power Supply System (WPPSS),¹ the Washington Supreme Court invalidated a participants’ agreement among municipal corporations² for joint development of nuclear power plants. The supreme court held that the agreement was void and unenforceable against Washington cities, towns, and public utility districts³ because these municipal corporations had no authority to enter into the participants’ agreement.⁴

This Note examines Chemical Bank and its application of Washington municipal corporation law. The Note briefly identifies Washington municipal corporation law prior to Chemical Bank and considers how Chemical Bank relates to this prior law. The Note then discusses some of the negative impacts the decision will have on municipal corporations, the courts, and the legislature. Finally, the Note concludes with recommendations for legislative and judicial action to limit the scope of Chemical Bank and provide a more reasonable approach to municipal corporation law.

² For the purposes of this Note, the term “municipal corporation” is used in its broadest sense. Broadly defined, the term “municipal corporation” is applied to any public local corporation exercising some function of government. I E. McQuillin, THE LAW OF MUNICIPAL CORPORATIONS § 2.07a (3d ed. 1971); see Lauterbach v. City of Centralia, 49 Wn. 2d 550, 554, 304 P.2d 656, 659 (1956). However, in the strict and technically proper sense of the word, “municipal corporation” does not include agencies that are created by the legislature for specific and limited purposes and therefore are labelled “quasi-municipal corporations.” See Columbia Irrigation Dist. v. Benton County, 149 Wash. 234, 239, 270 P. 813, 816 (1928). This Note includes “quasi-municipal corporations” in the general term “municipal corporation.”
³ The supreme court’s ruling applied only to the approximately 70% share of project capability owned by Washington city, town, and public utility district participants. C. Luce, E. Carlson & H. Schwab, Recommendations for Solutions to the Major Problems Involving, or Arising from the Washington Public Power Supply System—A Report to Governor John Spellman of Washington and Governor Victor Atiyeh of Oregon app. 2 (Nov. 1983) [hereinafter cited as Luce Report]. After the Chemical Bank ruling, however, a Washington superior court held that the participants’ agreement was invalid for the remaining 60 utilities. The superior court based its decision on (1) indivisibility of obligation, (2) mutual mistake, (3) frustration, and (4) impracticability. Chemical Bank v. WPPSS, No. 82-2-06840-3, slip op. (King County Superior Court Aug. 11, 1983), appeal argued, No. 49868-7 (Washington Supreme Court Mar. 26, 1984); see also Luce Report, supra, app. 7, at 4.9.
⁴ Seeinfra notes 37-46 and accompanying text.
I. OUTLINE OF RELEVANT WASHINGTON MUNICIPAL CORPORATION LAW

The Washington Supreme Court has held that municipal corporations have no inherent right to self-government. Therefore, municipal corporation powers arise from two sources in Washington: the state constitution and state statutes. The following analysis briefly identifies discernible trends in Washington municipal corporation law and describes the rules of construction that the Washington courts traditionally have applied to sources of municipal authority.

A. Rules for Construing Constitutional Municipal Corporation Home Rule Authority

The Washington Supreme Court narrowly construed municipal home rule powers in its early decisions. The state constitution is the primary source of home rule powers in Washington: it grants cities of over 10,000 inhabitants the power to frame their own charters, and it allows counties, cities, and towns to take police power actions not in conflict with general laws. Despite these provisions, the court narrowly interpreted municipal home rule powers and held that home rule did not authorize municipal corporations to act in conflict with state statutes, and that home rule could be preempted by legislative enactments.

In instances where the legislature had not clearly foreclosed or preempted municipal action, the court developed a test that allowed some

7. Home rule can be defined generally as the power of municipal corporations to provide for their own affairs. The extent of home rule powers varies from state to state and is constantly changing. See generally 1 C. ANTIEAU. supra note 6, ch. 3; O. REYNOLDS. LOCAL GOVERNMENT LAW § 35 (1982); C. RHYNE. MUNICIPAL LAW § 4-3 (1957); Vanlandingham, Municipal Home Rule in The United States, 10 WM & MARY L. REV 269 (1968).
8. WASH. CONST art. XI, § 10.
9. Id. § 11.

In some states home rule has been construed as a limit on the powers of the state legislature as well as a grant of municipal power. Sandelow, The Limits of Municipal Power Under Home Rule: A Role for the Courts, 48 MINN L. REV. 643, 648 (1964). The Washington Supreme Court has held that home rule does not immunize municipal corporations from legislative interference in their local affairs. E.g., Lauterbach v. City of Centralia, 49 Wn. 2d 550, 554, 304 P. 2d 665, 659 (1956); Anderson, Resolving StateLocal Governmental Conflict—A Tale of Three Cities, 18 URB L. ANN 129, 130 (1980); see Brachtenbach, Home Rule in Washington—At the Whim of the Legislature, 29 WASH L. REV 295, 298 (1954).
home rule power. Cities, counties, and towns were held to have authority to exercise home rule powers affecting purely local affairs, but were held to have no authority to act where the state had a joint or paramount interest in the activities. The practical effect of this approach was that municipal corporations were subordinate to the legislature in any matter upon which the legislature had acted. However, prior to Chemical Bank, the court had begun to replace this rigid local-joint-paramount interest approach with a test that allowed the court to balance the interests of the state and the municipal corporation.

B. Rules for Construing Sources of Express and Implied Municipal Corporation Authority

In general, the Washington Supreme Court has narrowly construed the statutory powers of municipal corporations. In some of its earliest decisions, the court adopted the narrow, nineteenth-century approach to municipal corporation powers summarized by “Dillon’s Rule.” Under Dillon’s Rule, municipal corporations are limited to: (1) powers that are provided in express terms, (2) powers that are necessarily or fairly implied from the express terms, and (3) powers that are essential to the purposes of the municipal corporation; any doubt regarding the existence of local authority should be decided against the municipal corporation. Within this narrow approach, the supreme court developed further tests and rules of construction for interpreting the various sources of municipal

11. E.g., Winkenwerder v. City of Yakima, 52 Wn. 2d 617, 622, 328 P.2d 873, 878 (1958) (except as restricted by the legislature, the powers of first class cities are as broad as the legislature’s powers); Detamore v. Hindley, 83 Wash. 322, 326–27, 145 P. 462, 463 (1915) (within its limits, WASH. CONST. art. XI, § 11 delegates as much police power to cities as that possessed by the legislature); see also 1 C. Antieau, supra note 6, § 3.03.
12. Massie v. Brown, 84 Wn. 2d 490, 492, 527 P.2d 476, 477 (1974) (when the state’s interest is paramount to, or joint with, that of the municipal corporation, the corporation has no power to act without delegation from the legislature).
13. E.g., City of Yakima v. Gorham, 200 Wash. 564, 566, 94 P.2d 180, 181 (1939) (when the state has asserted its jurisdiction over a subject, local ordinances must give way).
14. Trautman, supra note 6, at 772.
15. See infra notes 80–87 and accompanying text.
16. See, e.g., State ex rel. Huggins v. Bridges, 97 Wash. 553, 555, 166 P. 780, 781 (1917) (at least as to municipal corporations other than first class cities, municipal powers must be examined critically and without straining to grant an alleged power).
17. E.g., id. at 557, 166 P. at 781; Tacoma Gas & Elec. Light Co. v. City of Tacoma, 14 Wash. 288, 291, 44 P. 655, 656 (1896).

Judge Dillon, however, qualified his rule by providing that strict construction does not apply to the mode used by a municipal corporation to carry out its grant of power. Id. § 239; see 2 E. McQuillen, supra note 2, § 10.29; see also infra note 76 and accompanying text (discussing how the court in Chemical Bank ignored the exception to Dillon’s Rule).
corporation power. For instance, the Washington court has stated that it looks to legislative intent in deciphering express municipal powers rather than reading its own words into statutes.\textsuperscript{19}

The appropriate rule of construction may also hinge on one of two other factors: (1) the type of municipal corporation involved, and (2) the type of power exercised by the municipal corporation. In deference to the constitutional and statutory grant of some measure of home rule authority to first class cities,\textsuperscript{20} Dillon’s requirement that doubts regarding the existence of municipal powers be resolved against the municipal corporation has not been applied to first class cities.\textsuperscript{21} Also, since code cities have all of the powers of any other class of municipality,\textsuperscript{22} presumably including the powers of first class cities, the courts have liberally interpreted the powers of code cities. This more liberal approach has translated into greater freedom and flexibility for municipal actions. Other types of municipal corporations usually have not enjoyed this liberal approach to their municipal powers.\textsuperscript{23}

The rule of construction also may differ depending upon the type of power exercised by a given municipal corporation. In determining whether a municipal corporation has implied authority to carry on an activity, the supreme court has examined the “necessity” of an alleged

\textsuperscript{19} E.g., Reiter v. Chapman, 177 Wash. 392, 397, 31 P.2d 1005, 1007 (1934) (courts may not amend a statute by adding words but may refer to legislative policy in construing statutes); Shorts v. City of Seattle, 95 Wash. 531, 535, 164 P. 239, 240 (1917) (clear legislative intent is controlling). See generally C. Rhyne, supra note 7, § 4-12.

\textsuperscript{20} A first class city is a city having at least 20,000 inhabitants at the time of its organization or reorganization, and which has adopted a charter for its own government in accordance with WASH CONST. art. XI, § 10. WASH. REV. CODE §§ 35.01.010-.22.010 (1983).

\textsuperscript{21} E.g., Winkenwerder v. City of Yakima, 52 Wn. 2d 617, 622, 328 P.2d 873, 878 (1958); State ex rel Ennis v. Superior Ct., 153 Wash. 139, 149–50, 279 P. 601, 604–05 (1929); see also WASH REV CODE § 35.20.900 (1983).

\textsuperscript{22} WASH REV CODE § 35A.11.020 (1983). A code city is any city or town that elects to be classified as an optional code city under WASH. REV. CODE ch. 35A. Id. §§ 35A.01.020–030 (1983).


\textsuperscript{24} In addition to the general purpose municipal corporations of counties, cities, and towns, Washington presently has approximately 63 different types of special purpose municipal corporations. Wash. House of Representatives Local Gov’t Comm., Memorandum (Apr. 3, 1978) (copy on file with the Washington Law Review).

For strict statutory interpretation of the powers of other municipal corporations, see, e.g., Pacific First Fed. Sav. & Loan Ass’n v. Pierce County, 27 Wn. 2d 347, 352, 178 P.2d 351, 354 (1947) (resolve doubts concerning the grant of municipal power against the grant); State ex rel. Hill v. Port of Seattle, 104 Wash. 634, 638, 177 P. 671, 673, modified, 180 P. 137 (1919) (strict interpretation of statutes regarding port districts); State ex rel. Huggins v. Bridges, 97 Wash. 553, 555–56, 166 P. 780, 781 (1917) (same). This narrow interpretation follows from Judge Dillon’s treatise, which suggested that those “‘best fitted by their intelligence, business experience, capacity, and moral character’ do not hold municipal positions and that municipal affairs are conducted in an ‘unwise and extravagant’ manner. J. Dillon, THE LAW OF MUNICIPAL CORPORATIONS § 9 at 85–86 (2d ed. 1873).
However, the court has applied different versions of the necessity test depending upon the type of municipal power being interpreted. The court normally has applied a liberal "reasonable necessity" test in interpreting police power actions. On the other hand, the court has usually applied a "strict necessity" test in eminent domain cases, and required express authority in taxation cases.

In sum, prior to *Chemical Bank*, the Washington Supreme Court had softened its narrow approach to construing the express and implied powers of municipal corporations in cases involving first class cities, code cities, or a questioned police power action. Additionally, the court had indicated it would look to legislative intent in determining how to construe the powers of municipal corporations.

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25. When a statute provides authority to municipal corporations, all powers necessary to make that legislation effective are generally considered included by implication. 1 C. ANTIEAU, supra note 6, § 5.03; 2 E. McQUILLIN, supra note 2, § 10.12; 2A C. SANDS, STATUTES AND STATUTORY CONSTRUCTION § 55.04 (4th ed. 1973) (revision of SUTHERLAND, STATUTORY CONSTRUCTION). However, these implied powers can be strictly or liberally interpreted. 1 C. ANTIEAU, supra note 6, §§ 5.03–04.

26. See, e.g., Scott Paper Co. v. City of Anacortes, 90 Wn. 2d 19, 29, 578 P.2d 1292, 1298 (1978) (power to contract is an implied incident to the power to distribute municipal water); Hunter v. North Mason High School, 85 Wn. 2d 810, 817, 539 P.2d 845, 849 (1975) (power of a municipal corporation to purchase liability insurance is implicit in its power to conduct activities requiring insurance); Municipality of Metropolitan Seattle v. City of Seattle, 57 Wn. 2d 446, 460, 357 P.2d 863, 872 (1960) (authority to pay for a sewer system is implied in authority to provide the system); Christie v. Port of Olympia, 27 Wn. 2d 534, 546–47, 179 P.2d 294, 300–01 (1947) (power to hire employees contains implied authority to enter into collective bargaining); Ayers v. City of Tacoma, 6 Wn. 2d 545, 554, 108 P.2d 348, 352 (1940) (city has implied power to offer pension program); Hart v. King County, 104 Wash. 485, 492, 177 P. 344, 346 (1918) (county has authority to maintain approaches to a ferry it operates); LaMon v. City of Westport, 22 Wn. App. 215, 216–17, 588 P.2d 1205, 1208 (1978) (power to purchase insurance includes the power to self-insure).

However, the court occasionally applied a more strict approach to police powers. See, e.g., Port of Seattle v. Washington Utils. and Transp. Comm' n, 92 Wn. 2d 789, 795, 597 P.2d 383, 386 (1979) (any doubt as to implied powers is resolved against the municipal corporation); see also City of Spokane v. J-R Distrib., 90 Wn. 2d 722, 727, 585 P.2d 784, 786 (1978) (city has no authority to regulate superior courts); Griggs v. Port of Tacoma, 150 Wash. 402, 409–10, 273 P. 521, 524 (1928) (port authority has no implied powers to improve waterways beyond the limits of its district); State ex rel. Hill v. Port of Seattle, 104 Wash. 634, 641–42, 177 P. 671, 674 (1919) (port cannot build an ice plant designed to produce an amount of ice far in excess of its future needs).

27. See, e.g., In re Seattle, 96 Wn. 2d 616, 629, 638 P.2d 549, 557 (1981); see also City of Tacoma v. State, 4 Wash. 64, 66, 29 P. 847, 847–48 (1892) (only an act of the legislature can support municipal eminent domain powers).

II. CHEMICAL BANK

In 1972, the WPPSS began a nuclear power plant construction program to meet forecasted increases in demand for electricity. In 1976, eighty-eight municipal corporations entered into a participants’ agreement to purchase shares of the output from two of the plants WPPSS planned to build—WPPSS nuclear plants 4 and 5. The agreement required the participants to pay their proportionate share of the plants’ cost whether or not the plants ever produced any electricity.

Construction on WPPSS plants 4 and 5 continued until 1981, when WPPSS first suspended and then terminated the plants due to escalating construction costs, reduced electricity demand, and an inability to sell bonds. Prior to termination, however, over $2.25 billion in revenue bond proceeds were spent on the plants. Facing responsibility for this enormous debt, many participants questioned the enforceability of their agreement. Chemical Bank, the trustee for the bondholders, brought a declaratory judgment action against WPPSS and the participants seeking a determination that the participants owed WPPSS sufficient funds to service the bonds and bond interest.

29. WPPSS is a joint operating agency established in 1957 under Wash. Rev Code ch. 43.52 (1983). WPPSS was created to allow municipal corporations to pool their resources in order to build electric power facilities too large for the individual members to build. WPPSS members include four Washington cities and 19 Washington public utility districts. See generally Luce Report, supra note 3.


31. Each municipal corporation purchased a “Share of Project Capability.” WPPSS, Nuclear Projects Nos. 4 and 5 Participants’ Agreement § 5 (April 15, 1976) (copy on file with the Washington Law Review). “Project capability” was defined as:

[T]he amounts of electric power and energy, if any, which the Projects are capable of generating at any particular time (including times when either or both of the Plants are not operable or operating or the operation thereof is suspended, interrupted, interfered with, reduced or curtailed, in each case in whole or in part for any reason whatsoever), less Project station use and losses.

Id. § I(v).

32. Id. § 6(d). Such contract provisions are normally referred to as “dry hole,” “take-or-pay,” or “hell-or-high water” provisions.


34. Luce Report, supra note 3, at 15. With interest charges included, WPPSS plants 4 and 5 “dry hole” costs exceed $7 billion. Chemical Bank, 99 Wn. 2d at 778–79, 666 P.2d at 332.

35. Luce Report, supra note 3, app. 7.

36. The Chemical Bank lawsuit is not the only action arising out of the WPPSS termination of plants 4 and 5. At least 28 other major actions have been filed dealing with WPPSS issues. Id.
In *Chemical Bank v. WPPSS*, the Washington Supreme Court held that Washington public utility districts, cities, and towns had no authority to enter into the participants’ agreement for WPPSS nuclear plants 4 and 5.37 The court found that the agreement did not provide necessary protections for ratepayers because it required the participants to pay for the plants whether or not the plants ever produced any electricity.38 In effect, the *Chemical Bank* court placed the $2.25 billion loss associated with WPPSS’ inability to complete nuclear plants 4 and 5 on bondholders, rather than on the participants and their Pacific Northwest ratepayers.39

The court analyzed four sources of express municipal authority in reaching its conclusion: (1) the general powers provisions of the statutes governing each of the participants,40 (2) statutes allowing municipal corporations to acquire and operate electric generating facilities,41 (3) the joint operating agency statutes,42 and (4) the joint electric facility development statutes.43 The court also discussed whether express authority to acquire and construct electric generating facilities and provide electricity carried an implied power to pay for that service.44 Finally, the court examined whether the home rule powers of first class cities required a liberal interpretation of their participation in projects such as WPPSS plants 4 and 5.45 The court concluded that the Washington public utility district, city, and town participants lacked authority to enter into the agreement.46

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38. 99 Wn. 2d at 798, 666 P.2d at 343.
39. The court recognized the effect a finding for the trustee, Chemical Bank, would have on ratepayers. For example, the court noted that “[u]ltimately the ratepaying consumers of the participants would pay [the approximately $7 billion] for the nonexistent electricity.” Id. at 779, 666 P.2d at 332.
40. Id. at 782–84, 666 P.2d at 334–35. The court examined statutes governing first class cities, WASH. REV. CODE § 35.22.280(15) (1983), second class cities, id. § 35.23.440(44), third class cities, id. § 35.24.290(3), towns, id. § 35.27.370(4), code cities, id. § 35A.80.010, and public utility districts, id. § 54.16.040.
42. *Chemical Bank*, 99 Wn. 2d at 794, 666 P.2d at 340–41. The joint operating agency statutes are found in WASH. REV. CODE ch. 43.52 (1983).
45. Id. at 792–94, 666 P.2d at 340.
46. The decision also prompted concurring and dissenting opinions. The concurring opinion agreed with the result reached by the majority but disagreed with the “significant control” test established by the majority. Instead, the concurring justice would have required the participants to have actual ownership of the plants. *Chemical Bank*, 99 Wn. 2d at 799, 666 P.2d at 343 (Dore, J., concurring); see infra note 55 and accompanying text.

The dissent suggested that implied authority for the participants’ agreement could be found in
III. CHEMICAL BANK AND PRIOR LAW: INCONSISTENT APPROACH TO AN EXTRAORDINARY PROBLEM

In Chemical Bank, the Washington Supreme Court examined applicable statutory and case law for express, implied, and home rule authority for municipal corporations to enter into the participants’ agreement. Throughout its analysis, the court appeared to sacrifice consistency with its earlier decisions in order to reach the politically popular result of protecting the participants, and consequently Pacific Northwest ratepayers, from financial responsibility for WPPSS nuclear plants 4 and 5. The following analysis contrasts the rules of construction and tests employed prior to Chemical Bank with those the court applied in Chemical Bank.

A. Express Statutory Authority

The Chemical Bank court ignored several accepted rules of statutory construction in interpreting sources of express municipal corporation authority. First, the court did not differentiate between the construction given to statutes that apply to first class and code cities and statutes that apply to other municipal entities. However, failing to differentiate first class and code cities from all other municipal corporations clearly departs from the previously accepted approach, and frustrates the expressed legislative intent to broadly construe the statutes. Under the previously accepted approach, the general provisions pertaining to first class and code cities would have been construed to grant broad authority—includ-

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Washington’s joint operating agency statutes. Chemical Bank, 99 Wn. 2d at 810–14, 666 P.2d at 348–51 (Utter, J., dissenting).

47. See supra notes 5–28 and accompanying text.

48. Chemical Bank, 99 Wn. 2d at 782–84, 666 P.2d at 334–35; see supra notes 21–24 and accompanying text. For instance, in interpreting the participants’ general powers provisions, the court examined the authority of public utility districts in a manner similar to that used to look at the powers of first class and code cities. 99 Wn. 2d at 782, 666 P.2d at 334–35. Public utility districts have explicit authority to “purchase ... electric current for sale and distribution” under WASH REV CODE § 54.16.040 (1983). On the other hand, first class cities have the power to “[furnish] the inhabitants [of the city] with gas or other lights.” Id. § 35.22.280(15). Although the language for first class cities appears to be broader than that granted to public utility districts, the court interpreted both statutory provisions as a grant of authority to “buy electricity.” 99 Wn. 2d at 782, 666 P.2d at 334–35. The court did not use the liberal approach to interpreting the powers of first class cities set forth in its earlier decisions. See supra note 21 and accompanying text.

49. See, e.g., State ex rel. Ennis v. Superior Court, 153 Wash. 139, 149, 279 P. 601, 604–05 (1929) (requiring liberal construction of the powers of first class cities); Winkenwerder v. City of Yakima, 52 Wn. 2d 617, 622, 328 P.2d 873, 878 (1958); Ayers v. City of Tacoma, 6 Wn. 2d 545, 553, 108 P.2d 348, 351–52 (1940); State ex rel. Griffiths v. Superior Court, 177 Wash. 619, 623, 33 P.2d 94, 96 (1934).

50. WASH REV CODE § 35.22.900 (1983) states: “The rule that statutes in derogation of the common law are to be strictly construed shall have no application to this chapter, but the same shall be liberally construed for the purpose of carrying out the objects for which this chapter is intended.”
ing authority to furnish power to the cities’ inhabitants through the participants’ agreement.

Second, the court in Chemical Bank did not liberally interpret the statutes it examined, all of which involved public works. Earlier, the court had indicated that actions involving public works usually fall within the liberally interpreted police powers of cities, counties, and towns. The Chemical Bank court’s narrow reading of municipal authority regarding such capital-intensive activities denies municipal corporations the flexibility necessary to pursue those activities.

Third, the Chemical Bank court misconstrued legislative intent when considering possible sources of municipal authority. One example is the court’s treatment of legislative intent in interpreting statutes that authorize certain municipal corporations to construct, acquire, and operate electric generating facilities. These statutory provisions appear to grant cities and public utility districts full and exclusive control over the electricity produced by an electrical facility. However, the court suggested that these statutes were evidence of legislative intent that the cities and public utility districts must have significant control over the facilities themselves. Thus, the court’s analysis improperly discussed control in terms

51. See, e.g., Housing Auth. v. City of Seattle, 56 Wn. 2d 10, 15, 351 P.2d 117, 120 (1960) (police power extends to providing sewer service); Kaul v. City of Chehalis, 45 Wn. 2d 616, 625, 277 P.2d 352, 357 (1954) (police power extends to fluoridating a municipal water supply); Morse v. Wise, 37 Wn. 2d 806, 810–11, 226 P.2d 214, 216 (1951) (police power includes authority to provide sewer service); Elliott v. City of Leavenworth, 197 Wash. 427, 435, 85 P.2d 1053, 1054–55 (1938) (constitutional provision delimiting police powers applies to a city’s sewage disposal project); Smith v. City of Spokane, 55 Wash. 219, 221, 104 P. 249, 250 (1909) (garbage control is within the police powers of a city). However, eminent domain and taxation actions fall outside of the scope of police power.

For discussion of the court’s usual liberal interpretation of police powers, see supra note 26 and accompanying text.

52. Public works, such as electric generating facilities, water works, and sewer systems, require long-range planning, years of construction, and great sums of money. Police powers involving public works are normally interpreted liberally because flexible statutory schemes and rules of interpretation are most conducive to efficient building of such facilities. See Chemical Bank, 99 Wn. 2d at 810, 666 P.2d at 348 (Utter, J., dissenting); see also infra notes 92–94 discussing problems with raising capital under strict statutory interpretation.

53. Although the court discusses statutes involving the powers of first class cities, the court does not address expressions of legislative intent as to these statutes. See Chemical Bank, 99 Wn. 2d at 782–84, 666 P.2d at 334–35.

See supra note 19 and accompanying text for a discussion of the court’s earlier emphasis on using legislative intent in construing statutes regarding municipal corporations.


55. Chemical Bank, 99 Wn. 2d at 788, 666 P.2d at 337. The court noted that it might have upheld the participants’ agreement if the participants had maintained control over a project equal to an ownership interest. Id. at 787, 666 P.2d at 337.

The court determined that a contract providing for “project capability” does not equal ownership.
of electrical projects, rather than in terms of the electricity produced.\textsuperscript{56} Further, the analysis does not address other expressions of legislative intent\textsuperscript{57} or the legislative mandate that cities and towns should be allowed to provide for the general welfare of their citizens.\textsuperscript{58}

The court also gave insufficient weight to legislative intent in its analysis of Washington’s joint operating agency statutes.\textsuperscript{59} Ignoring the legislative declaration requiring broad construction,\textsuperscript{60} the court used strict
construction to draw a tenuous distinction between the powers of a joint operating agency and the powers of its participants. The court found that joint operating agencies have broad authority to contract with any municipal corporation or public utility relating to electric power, presumably including authority to sell project capability. But the court held that an agency’s participants’ authority is limited to purchasing electric energy. Such analysis suggests that the legislature authorized joint operating agencies to sell more than electric power to cities and public utility districts, while authorizing the cities and public utility districts to buy only electric power. A more reasonable interpretation is that the legislature authorized joint operating agencies, cities, and public utility districts to buy and sell the same thing. Therefore, the court probably misconstrued the legislature’s intent.

In departing from liberal rules of construction regarding express statutory authority, the court has reduced the flexibilty of municipal corporations in dealing with their needs and problems. In addition, the Chemical Bank decision makes uncertain which rules of construction should be applied to municipal law problems in the future.

B. Implied Statutory Authority

Instead of applying liberal rules of construction to the question of implied statutory authority, the Chemical Bank court narrowly interpreted the police power statutes it examined. The court relied on a taxation decision to hold that the test for implied powers is “legal necessity,” rather than the more liberal “fairly implied” or “reasonableness” test, which

purposes." The lower court took special note of this legislative mandate to liberally construe the joint operating agency statutes. Chemical Bank v. WPPSS, No. 82-2-006840-3, slip op. at 23 (King County Super. Ct. Oct. 15 1982), rev’d, 99 Wn. 2d 772, 666 P.2d 329 (1983).

61. Chemical Bank, 99 Wn. 2d at 794, 666 P.2d at 340–41. The court based this finding on a provision of Wash. Rev. Code that allows joint operating agencies “to contract with any municipal corporation or public utility ‘for any term relating to the purchase, sale, interchange or wheeling of power.’” Id. at 794, 666 P.2d at 340–41 (quoting Wash. Rev. Code § 43.52.391 (1983)).

62. Id. at 794, 666 P.2d at 340–41. For this holding the court interpreted Wash. Rev. Code § 43.52.410 (1983), which allows cities and public utility districts to contract for “the purchase and sale of electric energy or falling waters.”

63. The court also made no attempt, as required in its earlier decisions, to harmonize this apparent conflict in the statute. See, e.g., McGill v. Hedges, 62 Wash. 274, 277, 113 P. 635, 636 (1911). Using the liberal rule of interpretation required by the legislature, see supra note 60, the court should have found that the participants had broad powers to contract in this area.

64. See infra notes 92–100 and accompanying text.

65. See supra note 26 and accompanying text.

66. Chemical Bank, 99 Wn. 2d at 792, 666 P.2d at 339–40 (citing Hillis Homes, 97 Wn. 2d 804, 650 P.2d 193 (1982)).
the court had stressed in its earlier police power decisions. Cases involving the power to tax are distinguishable, however, from police power cases because of the different constitutional provisions controlling the two areas. While the Washington Constitution strictly limits taxation powers, it grants cities and towns great latitude over police power actions. Although a strict necessity test may be proper for taxation cases, a more liberal approach should continue to be used in reviewing police power actions.

Further, the court did not rely on any decisions in cases in which, as in Chemical Bank, the municipal corporation clearly had authority to provide a service and the question before the court was the proper method for financing the service. In analyzing the Chemical Bank situation, the court distinguished case law on point, such as Municipality of Metropolitan Seattle v. City of Seattle (Metro). In Metro, the court held that if a municipal corporation is authorized to provide a service, there is an implied power to pay for the facilities needed to provide the service. The Chemical Bank court distinguished Metro because, unlike Chemical Bank, it involved a conditional revenue pledge, and because the municipal corporation in Metro maintained ownership of the facilities needed to provide the service. However, the differences between Chemical Bank and Metro are much less evident than the differences between Chemical Bank and the case law that the court applied.

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67. E.g., Pacific County v. Sherwood Pac., 17 Wn. App. 790, 794, 567 P.2d 642, 647 (1977) ("a statute expressly granting general authority to achieve a lawful objective includes by implication the right to do such acts as may be reasonably necessary to achieve that objective"); see the examples discussed supra in note 26. See generally discussion of Dillon’s Rule supra note 18 and accompanying text.

68. WASH CONST. art. VII, § 5 (no tax shall be levied except in pursuance of law); id. art. VII, § 9 (legislature may vest the power of taxation in municipal corporations); id. art. XI, § 12 (legislature may vest municipal corporations with taxation powers). The court has interpreted this provision to require express statutory authority. E.g., Hillis Homes, 97 Wn. 2d 804, 809, 650 P.2d 193, 195 (1982).

69. WASH CONST. art. XI, § 11, provides that "[a]ny county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws." This is a more direct grant of authority than that found in the taxation area. The supreme court has held that § 11 is effective without legislative enactment. Patton v. City of Bellingham, 179 Wash. 566, 570, 38 P.2d 364, 365 (1934).

70. See Chemical Bank, 99 Wn. 2d at 792, 666 P.2d at 339–40 (listing decisions on which the court relied).

71. 57 Wn. 2d 446, 460, 357 P.2d 863, 872 (1960) (included within the power to provide a sewer system is the implied power to pay for it).

72. Id. at 460, 357 P.2d at 872. The lower court in Chemical Bank relied on Metro in its decision to uphold the participants’ agreements. Chemical Bank v. WPPSS, No. 82-2-006840-3, slip op. at 25–26 (King County Super. Ct. Oct. 15 1982), rev’d, 99 Wn. 2d 772, 666 P.2d 329 (1983).

73. Chemical Bank, 99 Wn. 2d at 791–92, 666 P.2d at 339.

74. Contrast the holding in Metro, involving a police power action in many respects similar to Chemical Bank, with the taxation, condemnation, and police power decisions on which the court
In *Chemical Bank*, the court reasoned that practical necessities and “reasonableness” tests play no part in analysis of implied statutory powers—including situations involving the means of accomplishing an authorized activity. In this respect, the court was being even more restrictive than the already narrow nineteenth-century approach espoused by Judge Dillon.75 Under the narrow approach, if a given activity were authorized, municipal corporations could decide how to carry out the activity.76 The *Chemical Bank* decision denies municipal corporations the power to determine the means they will use to provide an authorized service to their citizens. This extreme limitation on implied statutory authority creates uncertainties that will burden municipal corporations, the courts, and the legislature.77

C. Local Self-Government

In *Chemical Bank*, the Washington Supreme Court re-embraced a narrow approach to local government home rule.78 The court’s approach provided that a municipal corporation has no authority to act using home rule powers when the state interest in an activity is paramount to—or joint with—that of the municipal corporation.79 However, this approach ig-

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75. See supra note 18 and accompanying text (Dillon’s Rule).

76. Although Judge Dillon argued for strict construction of statutes relating to municipal corporations, he also suggested that exceptions should be made in some instances. Dillon suggested that the mode chosen by a municipal corporation to carry out its authorized powers should be liberally construed. 1 DILLON, supra note 18, § 237; see 2 E. McQUILLIN, supra note 2, § 10.29. The mode of carrying out an activity should be interpreted to include the type of contract and financial arrangements used by municipal corporations.

77. See infra notes 92–100 and accompanying text.

78. *Chemical Bank*, 99 Wn. 2d at 793, 666 P.2d at 340.

79. Id. The court adopted the analysis of Washington case law as set forth in Trautman, supra note 6, at 772. However, the court did not address the significant problems Professor Trautman identified with the court’s historical approach. Id. at 768–71. Nor did the court discuss Professor Trautman’s suggestion that first class cities are an exception to the narrow construction rule: “The rule of resolving doubts against municipalities does not apply to those [cities] of the first class. This is of particular consequence when a statute grants power to a charter city on a matter of primary state concern or of joint state-local concern . . . .” Id. at 774. Instead of using Professor Trautman’s article as authority for broadly construing the powers of first class cities, the court improperly cited other portions of Professor Trautman’s article as authority for narrow construction of the powers of first class cities. *Chemical Bank*, 99 Wn. 2d at 793, 666 P.2d at 340.
nored recent case law, which had softened this narrow construction of home rule powers.

Prior to *Chemical Bank*, the Washington Supreme Court had begun to liberalize its strict interpretation of home rule powers. For instance, in *City of Issaquah v. Teleprompter Corp.*, the court noted that the effects of a code city’s actions would extend beyond the city’s limits and that the state had passed statutes dealing with the subject matter of the city’s actions. Rather than dismissing the actions due to joint state and local interest, the court weighed the magnitude of the state’s interest against the city’s home rule authority and concluded that the city could act.

In *United States v. Town of North Bonneville*, the court did not address the joint state and local interest issue, even though the case involved a complete relocation of the town. Instead, the court found that North Bonneville, as a code city, had broad powers of self-government, and thus had the authority to contract without restriction with the federal government for a new town location.

The *Chemical Bank* court did not discuss the *Issaquah* and *North Bonneville* decisions. The court instead applied earlier case law requiring a stricter approach. The court should have followed *Issaquah*, because a balancing approach would be more in line with constitutional provisions and legislative enactments which encourage broad local self-government powers.

**D. Summary**

In *Chemical Bank*, the Washington Supreme Court rejected its earlier, liberal approach toward the sources of municipal corporations’ police powers. Rather than applying generally accepted rules for construing express, implied, and home rule sources of municipal corporation authority,

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80. *See supra* notes 7–15 and accompanying text.
81. 93 Wn. 2d 567, 611 P.2d 741 (1980) (suit by a television cable company to prohibit a noncharter code city from owning and operating a cable television system).
82. *See supra* notes 7–15 and accompanying text.
83. *Issaquah*, 93 Wn. 2d at 572–73, 611 P.2d at 744–45.
84. 94 Wn. 2d 827, 621 P.2d 127 (1980).
85. *See supra* notes 7–15 and accompanying text.
86. *North Bonneville*, 94 Wn. 2d at 831, 621 P.2d at 129.
87. *Id.*
88. *See, e.g.*, WASH CONST art. XI, § 11, discussed *supra* in note 69.
89. *See, e.g.*, *supra* note 50 and accompanying text.
90. One strong policy argument against using a strict local-joint-paramount test of state concern is that state legislatures seldom get around to legislating on all “state” or “general” concerns. A social vacuum can be prevented only if a home rule city is allowed to impose controls on these matters within its borders. 1 C. ANTIEAU, *supra* note 6, § 3.08; see also *id.*, § 3.21, at 3–59 (labelling leads to mechanistic decisionmaking; the better approach is a balancing of state and local interests).
the court struggled to reach a result that would invalidate the participants’ agreement. Although the unique political and economic considerations surrounding Chemical Bank may have compelled such a result, the court’s rationales for its decision will subject the actions of municipal corporations to significant uncertainties.

IV. IMPACT OF THE DECISION: UNCERTAINTY IN WASHINGTON MUNICIPAL CORPORATION LAW

The decision and reasoning of the Chemical Bank court created uncertainty over the extent of municipal corporation authority. This uncertainty will have important impacts on all Washington municipal corporations, the state courts, and the state legislature.

A. Impact on Municipal Corporation Development

Under municipal corporation law, one who deals with a municipal corporation is charged with knowing the extent of its authority. A significant effect of the Chemical Bank analysis is that any action not backed by the clearest express authority may be found to be ultra vires. Therefore, bond counsel will be reluctant to give a favorable opinion to—and consequently investors and contractors will be reluctant to support—municipal projects without legislative or judicial proof of municipal authority. The end result is a bond issue that is difficult to market.

Another result of the uncertainty will be the tendency of municipal corporations to balk at innovative solutions to their problems in the absence of a clear expression of legislative or judicial approval. Because a municipal corporation’s actions are more likely to be found ultra vires under the Chemical Bank interpretation than under liberal rules of construction, the Chemical Bank decision provides an incentive for persons hostile to ma-

91. See supra notes 29–36 and accompanying text.
94. See Brief of Amicus Curiae The City of Seattle at 10, Chemical Bank v. WPFSS, 99 Wn. 2d 772, 666 P. 2d 329 (1983), No. 49868-7 (Washington Supreme Court, argued Mar. 26 1984) (“This Court’s ruling that the Washington municipal participants lacked implied statutory authority to enter into the Participants’ Agreements has clouded the opinions of bond counsel . . . ‘’); Seattle-Northwest Securities Corp., Testimony to the Washington State House Committee on Energy and Utilities [regarding] H.B. 1556 [48th Leg., 1984 Reg. Sess.] 5 (January 31, 1984) (copy on file with the Washington Law Review) (after Chemical Bank, test cases would be required to clarify municipal authority in some instances, and “[w]ithout a clean legal opinion, bonds could not be marketed and issued.”).
ior municipal undertakings to bring a court challenge. The resulting reluctance by municipal corporations to use new approaches to problems will discourage cooperation between municipal corporations and limit the ways municipal corporations can solve their common problems.

B. Declaratory Judgments

An increase in the number of declaratory judgments sought to validate municipal actions should be expected due to the supreme court's narrow interpretation in Chemical Bank. Under the general declaratory judgment statutes, Washington courts are authorized to declare the rights, status, and legal relationships affecting all parties to a declaratory judgment action. In addition, a special declaratory judgment procedure is available for municipal bond issues. In order to satisfy hesitant investors and prevent lawsuits by citizens hostile to municipal projects, municipal corporations will increasingly use these provisions to test the validity of municipal projects. The increase in declaratory judgment proceedings will add to the crowding of court dockets, require diversion of scarce judicial resources, and cost taxpayers time and money.

C. Legislative Impacts

The Chemical Bank decision will also increase burdens on the legislature because municipal corporations will increasingly ask for legislative clarification of their authority. However, the legislature's limited meeting

97. For example, in South Columbia Basin Irrigation Dist. v. City of Seattle, No. 83-2-00418-3, oral op. (Grant County Super. Ct. Oct. 25, 1983), the cities of Seattle and Tacoma used the declaratory judgment procedure to validate contracts for a hydroelectric facility. In its oral opinion, the superior court specifically mentioned the need for certainty in concluding municipal agreements. Id. at 4. The court also found that a determination of contract validity was necessary to obtain reasonable financing. Id. at 3-4.

In addition, policymakers have suggested that one response to the Chemical Bank decision should be a liberalization of Washington's declaratory judgment statutes to allow even greater certainty for municipal corporation actions. E.g., Luce Report, supra note 3, at 67.

The Washington legislature has looked at these suggestions and has proposed legislation which allows counties, cities, and towns to test any ordinance or resolution in an expedited proceeding before the superior court and provides direct review to the Washington Supreme Court. The proposed legislation, Wash. H.B. 1542, 48th Leg., Reg. Sess. (1984), passed the House of Representatives but died in a Senate committee. Washington Legislative Information Sys., Report (April 20, 1984) (copy on file with the Washington Law Review) [hereinafter cited as Information Sys. Report]. The issue will be studied by the House Local Government Committee during the interim before the 1985 legislative session. See generally Spec. Comm. on Energy, supra note 96, at 11.
schedule will cause significant time lags between problem identification and final solutions. Also, municipal corporations will be forced to "sell" their approaches to problem solving to legislators who may not understand or sympathize with the problems facing municipal entities. And with the great number of issues before the legislature, proper time and attention may not be given to municipal corporation concerns. Therefore, municipal corporations may be left without express authority to use the best means to address their problems.

Further, legislation will have to be very explicit to survive a strict statutory interpretation by the courts. Rather than developing flexible statutory schemes, the legislature will have to ensure that all contingencies are covered in enactments relating to municipal corporations. This will serve to increase the amount of time and staff required to prepare legislation. The ultimate result will be a legislature which is less able to function efficiently.

V. RECOMMENDED ACTION

The mismanagement and lack of accountability by WPPSS and its participants might be offered as an example of the need for strict statutory interpretation. This rationale is a throwback to Judge Dillon's concerns that municipal corporations are not managed by those "best fitted by their intelligence, business experience, capacity, and moral character." Under this rationale, the costs of strict interpretation detailed in this analysis would be considered a small price to pay for better controls on municipal corporations.

But the better reasoned and majority approach is to allow more extensive municipal corporation powers. In addition to the impacts discussed in the analysis, reasons for liberal construction include: (1) municipal corporation officials are as capable as state legislators, (2) general distrust of local governments is no longer the overriding concern it was at the turn of the century, (3) the strict construction rule hampers the day-to-day opera-

98. Wash. Const. art. II, § 12 limits the Washington State Legislature to a 105 day regular session in odd-numbered years and a 60 day regular session in even-numbered years.
99. One of the justifications for home rule is the lessening of log-rolling or legislative trading common in the enactment of much local legislation. Vanlandingham, supra note 7, at 270; see Sandalow, supra note 10, at 655.
101. 1 J. Dillon, supra note 24, § 9 at 85.
tions of local government, and (4) local governments best understand local problems and therefore are best suited to resolve them.102

The failings of one municipal action should not force all municipal corporations to undergo the strict scrutiny required by the Chemical Bank holding. This would punish the taxpayers and ratepayers of all municipal corporations by making the actions that are subject to strict scrutiny more expensive and time-consuming. Instead, the legislature and the supreme court should act to cure the municipal corporation problems caused by the Chemical Bank decision.

A. Legislative Actions

No legislative solution by itself will solve the problems presented by the Chemical Bank ruling. One possibility is legislation that provides a prospective grant of power to enter into capability and "hell-or-high water" contracts.103 Although this would alleviate the particular concerns of municipal corporations desiring to use these contractual instruments, such legislation would not ensure that municipal powers are broadly construed in the future. Action beyond the granting of specific statutory powers should be taken.

Another possible action is a statutory "reminder" to the Washington Supreme Court of the legislature's intent that statutes relating to municipal corporations are to be construed broadly. Similarly, a signal could be sent to the courts regarding the legislature's position on home rule authority.104 However, the court has either ignored105 or misapplied106 similar past expressions of legislative intent in order to reach a desired result.

102. See generally O. Reynolds, supra note 7, at 97; Brachtenbach, supra note 10, at 298; Sandalow, supra note 10, at 652–58.

Another possibility is legislation which validates the agreements that the Washington Supreme Court held to be ultra vires. But, such retroactive legislation would be politically unpopular and subject to constitutional challenges. Wash. H.B. 1575, 48th Leg., Reg. Sess. (1984) would have retroactively validated the participants' agreement. The bill died in the House Energy and Utilities Committee. Information Sys. Report, supra note 97. See supra notes 31–32 for discussion of capability and "hell-or-high water" contracts.

104. Wash. H.B. 1160, 48th Leg., Reg. Sess. (1984) was such a reminder. The bill provided that: "Whenever any doubt arises about the [police power] authority of a county, city, or town to act on a matter, it shall be construed that the county, city, or town possesses the authority to so act within its territorial limits." After passing the House of Representatives on a 97–0 vote, House Bill 1160 died in the Senate Rules Committee. Information Sys. Report, supra note 97.
105. See, e.g., supra notes 59–63 and accompanying text.
106. In Chemical Bank, the court found that a statement of legislative intent that points out the need for energy development should be interpreted to mean that the state has preempted action in this
A third possibility is the development of a constitutional amendment designed to strengthen the powers of municipal corporations. However, constitutional provisions are also subject to judicial interpretation. If the amendment were worded very broadly, the court could continue to use its local-joint-paramount interest test to restrict municipal authority. On the other hand, if the amendment were very specific, the court could restrict municipal powers to those specifically listed and apply the same rules of strict construction it currently employs in looking for implied municipal authority. Finally, if a proposed constitutional amendment failed to receive voter approval, the supreme court could interpret the failure as the will of the people that the powers of municipal corporations be interpreted very narrowly.

The legislature should clearly express its intent that Washington courts are to broadly construe police power statutes. This would impress upon the judiciary the legislature’s position on municipal corporation statutory construction. However, due to the discretion that the court has exercised in applying legislative intent, true power to reform the rules of construction lies with the judicial branch.

B. Judicial Actions

In Chemical Bank, the Washington Supreme Court reverted to a nineteenth-century view of local government. Even though some judicial review of local conduct may be necessary, a strict construction scheme is no longer appropriate for regulating municipal corporations.

The court should take several steps to alleviate the problems it created in Chemical Bank. First, it should adopt a rule of construction that liberally construes police power grants of authority to municipal corporations. Such an action would not necessarily mean that the courts would no longer have a role in reviewing municipal actions. Instead of reviewing municipal actions for literal compliance with enabling statutes, the court would look at the overall impact of the actions. Additionally, liberal rules of construction would provide municipal corporations with essential


107. Brachtenbach, supra note 10, at 299; Comment, Home Rule, Revisited, 10 J. LEGIS. 231, 242 (1983) (suggests a constitutional amendment is the preferred means of strengthening home rule authority).

108. See supra notes 7–15 and accompanying text.

109. See supra notes 25–28 and accompanying text.

110. E.g., to prevent fraud or corruption.

111. See supra notes 92–102 and accompanying text.

112. But see supra notes 26–28, 68 and accompanying text, discussing areas where liberal construction may not be preferred. Taxation situations are one example.
flexibility and allow them to address their problems without the negative impacts already discussed.\(^{113}\)

Second, the Washington Supreme Court should take the earliest opportunity to limit *Chemical Bank* to its facts. The extraordinary economic and political setting surrounding WPPSS' termination of nuclear plants 4 and 5\(^{114}\) makes the *Chemical Bank* situation unique. The approach and result in the *Chemical Bank* case should not determine the approach and result of future cases with less imposing financial and political consequences.

Third, the court should strive for consistency and clarity in applying its rules of statutory construction.\(^ {115}\) Rather than cite lines of cases which lead to a desired result, the court should distinguish between the categories of cases that require strict construction and those in which liberal interpretation is more appropriate. The court should expressly overrule or clearly distinguish precedent that does not conform to a liberal rule of construction for police powers. Though overriding policy reasons for strict construction may exist in some instances—for example in the case of taxation powers—the court should not use this strict construction approach in situations where liberal rules are usually applied, such as police power actions.\(^ {116}\)

Finally, the court should once again adopt the flexible approach for determining whether a municipal action is of local or state concern.\(^ {117}\) This flexibility would allow counties, cities, and towns a better opportunity to solve their problems without being forced to wait for legislative or judicial action. Decisions inconsistent with the flexible approach, such as *Chemical Bank*, should not be followed.

VI. CONCLUSION

In *Chemical Bank*, the Washington Supreme Court significantly narrowed its interpretation of municipal corporation powers. This narrow construction results in uncertainty for both private citizens dealing with municipal corporations and the municipal corporations themselves. This uncertainty will create burdens for the legislature and the judicial system.

\(^{113}\) See *supra* notes 92–94 and accompanying text.

\(^{114}\) See *supra* notes 29–36 and accompanying text.

\(^{115}\) See *supra* notes 5–28 and accompanying text.

\(^{116}\) See *supra* notes 67–69 and accompanying text.

\(^{117}\) See *supra* notes 80–87 and accompanying text.
The legislature and the state courts must act to remedy these uncertainties. The legislature can remind the Washington Supreme Court of its intent that municipal corporations be given broad powers of self-government and liberal statutory interpretation. Additionally, the supreme court should limit the *Chemical Bank* holding to its facts and develop a consistent, liberal approach to construing the police powers of municipal corporations. By taking these steps, the court would reduce *Chemical Bank*'s negative impacts and promote the resolution of municipal problems by those most able to deal with those problems—the municipal corporations themselves.

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