COURT OF APPEALS
STATE OF COLORADO
2 E. 14th Avenue
Denver, CO 80203

District Court, Arapahoe County, Colorado, Ctrm 3/402
Honorable Thomas C. Levi
Case No. 98CV3682

Plaintiff-Appellant:

Z.J. GIFTS D-2, L.L.C., an Oklahoma limited partnership, d/b/a CHRISTAL'S.

Defendants-Appellees:

CITY OF AURORA, an incorporated home rule municipal corporation, PAUL TAUER, Mayor of the City of Aurora, in his official capacity, and the CITY COUNCIL of the CITY OF AURORA, COLORADO, and the members thereof, NADINE CALDWELL, KATHY GREEN, INGRID LINDEMANN, JOHN PAROSKE, DAVE WILLIAMS, ED TAUER, EDNA MOSLEY, BOB LEGARE and JOHN MCCRACKEN, in their official capacities only.

COURT USE ONLY

Case Number: 03 CA 425

REVISED REPLY BRIEF OF APPELLANT

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COURT OF APPEALS STATE OF COLORADO 2 E. 14th Avenue Denver, CO 80203 District Court, Arapahoe County, Colorado, Ctrm 3/402 Honorable Thomas C. Levi Case No. 98CV3682 **Plaintiff-Appellant:** Z.J. GIFTS D-2, L.L.C., an Oklahoma limited partnership, d/b/a CHRISTAL'S. **Defendants-Appellees:** CITY OF AURORA, an incorporated home rule municipal corporation, PAUL TAUER, Mayor of the City of Aurora, in his official capacity, and the CITY COUNCIL of the CITY OF AURORA, COLORADO, and the members thereof, NADINE CALDWELL, KATHY GREEN, INGRID LINDEMANN, JOHN PAROSKE, DAVE WILLIAMS, ED TAUER, EDNA MOSLEY, BOB LEGARE and JOHN MCCRACKEN, in their official capacities only. Attorneys for Plaintiff/Appellant: Arthur M. Schwartz, No. 557 Michael W. Gross, No. 14113 SCHWARTZ & GOLDBERG, P.C. 1225 17th Street, Suite 1600, Denver, CO 80202 303-893-2500 Telephone 303-893-3349 Facsimile aschwartz@sgattorneys.com	COURT USE ONLY Case Number: 03 CA425

REVISED REPLY BRIEF OF APPELLANT

COMES NOW the Plaintiff/Appellant, above-named, by and through undersigned counsel, and respectfully submits the Reply Brief of Appellant pursuant to C.A. R. 28, 31 and 32.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the District Court erred in failing to make any findings regarding

Plaintiff's arguments concerning ***City of Los Angeles v. Alameda Books, Inc***, 535 U.S. 425 (2002), where the City did not advance any evidence to support the constitutionality of the challenged ordinance specifically relating to the assertion that the ordinance did not advance the government's goal of minimizing the adverse secondary effects of sexually oriented businesses.

2. Whether the District Court's Order permanently enjoining Plaintiff "from operating a sexually oriented business" is overbroad in violation of C.R.C.P. 65(d) by failing to describe in reasonable detail the acts enjoined and by referring to a definition in an outside document, the Aurora Municipal Code, to describe the acts enjoined.

3. Whether the District Court erred in enjoining Plaintiff from operating a sexually oriented business without a license where the Tenth Circuit subsequently held in ***Z.J. Gifts, D-4, L.L.C. v. City of Littleton***, 311 F.3d 1220 (10th Cir. 2002), that C.R.C.P. 106(a)(4) failed to provide prompt judicial review as required by the First Amendment to the United States Constitution in ***FW/PBS, Inc. v. City of Dallas***, 493 U.S. 215 (1990).

4. Whether the District Court's permanent injunction order is superseded by newly enacted Senate Bill 251, amending C.R.S. §38-1-101, that prohibits the use of amortization provisions to terminate uses that were lawful at the time of their inception.

I. THE DISTRICT COURT ERRED IN UPHOLDING THE AURORA ORDINANCE UNDER ARTICLE II, SECTION 10 OF THE COLORADO CONSTITUTION.

The City insists that the 1998 Tenth Circuit decision in ***Z.J. Gifts, D-2, L.L.C. v. City of Aurora***, 136 F.3d 683 (10th Cir. 1998) involving these parties completely resolves all constitutional claims in this case. While the federal case did resolve the federal constitutional claims, the City admits that the claims under the Article II, Section 10 of the Colorado Constitution remain valid. However, the City seems to take the position that the 1998 Tenth Circuit decision relieves District Court and it from any responsibility for actually dealing with these claims in anything more than a cursory manner.

Certainly the appellate courts in Colorado have not treated Article II, Section 10 of the Colorado Constitution so cavalierly. The City cannot dispute that "[f]or more than a century, [the Colorado Supreme] Court has held that Article II, Section 10 [of the Colorado Constitution] provides greater protection of free speech than does the First Amendment." ***Bock v. Westminster Mall Co.***, 819 P.2d 55, 59 (Colo. 1991). Thus, the state constitutional claims cannot be considered to be identical to the federal constitutional claims.

The City asserts that this greater protection has never been applied to the zoning or licensing of sexually oriented businesses in Colorado. However, the broader state constitutional protection has been twice applied to obscenity statutes involving sexually explicit material. ***People v. Ford***, 773 P.2d 1059, 1065 (Colo. 1989); ***People v. Seven Thirty Five East Colfax, Inc.***, 697 P.2d 348, 356 (Colo. 1985).

Moreover, even at the very minimum, the federal constitutional standards are applicable under the Colorado Constitution. As such, the intervening United States Supreme Court decision in ***City of Los Angeles v. Alameda Books, Inc.*****,** 535 U.S. 425, 122 S.Ct. 1728 (2002) should be considered in making any independent evaluation of the validity of the challenged ordinance under the Colorado Constitution.

In this case, no independent evaluation under the Colorado Constitution was made by the District Court. Indeed the City did not advance any evidence to justify the ordinance nor did the District Court give any serious consideration to the ***Alameda Books*** decision. The United States Supreme Court in ***City of Los Angeles v. Alameda Books, Inc.*****,** 535 U.S. 425, 122 S.Ct. 1728(2002) imposed a evidentiary burden on municipalities to justify time, place, manner regulations of adult businesses. Here, the City failed to advance any evidence to justify the challenged ordinance which regulates Plaintiff's business that does not offer any on premises viewing of entertainment. See ***Encore Videos, Inc. v. City of San Antonio***, 310 F.3d 812 (5th Cir. 10/28/03), *withdrawn and modified*, 330 F.3d 288 (5th Cir. 4/28/03), *cert. denied*, __.U.S.__, Case No. 03-163 (11/3/03).

In the instant case, Plaintiff raised the ***Alameda Books*** decision in written and oral arguments to the District Court. However, the District Court dismissed these arguments in its oral ruling and did not address them in any form in the written order. The City wholly failed to meet its burden of justifying the challenged ordinances. As such, the District Court's order upholding the constitutionality of the challenged Aurora ordinances should be reversed and ordinance declared unconstitutional. In the alternative, the matter should be remanded to give the District Court an opportunity to rule on these constitutional issues.

II. THE DISTRICT COURT'S ORDER ENJOINING PLAINTIFF FROM "OPERATING A SEXUALLY ORIENTED BUSINESS" WAS VIOLATIVE OF COLORADO RULES OF CIVIL PROCEDURE 65(d)

The District Court ordered that "the Plaintiff is hereby permanently enjoined from operating a sexually oriented business at 15141 East Mississippi Avenue." (R., Vol. IV, p. 916) Colorado Rules of Civil Procedure 65(d) provides, in part:

> Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in its terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained... .

The injunction in this case was not specific in its terms, did not describe in detail the acts enjoined, and referred to terms in Aurora ordinances for guidance as to the acts enjoined. *See,* ***Colorado Springs Board of Realtors, Inc. v. State of Colorado***, 780 P.2d 494 (Colo. 1989).

The failure of the order for injunctive relief to set forth in detail the acts to be enjoined is aggravated by the reference to the term "sexually oriented business" which is specifically defined in the Aurora ordinances. The City alleges Plaintiff operates an adult video store as defined in the Aurora Municipal Code as devoting a "substantial or significant" amount of its inventory or floor space as specifically defined adult material. The vague standard is not adequate to support an order for injunctive relief, particularly where the order restricts the sale of protected speech materials.

The difficulty of the use of terms like "substantial or significant" in creating substantive standards of conduct was forcefully driven home just yesterday in the unanimous decision of the United States Supreme Court in ***United States v. Banks***, 540 U.S. __, case no. 02-473 (Dec. 2, 2003). In ***Banks***, the Court reversed a Ninth Circuit decision that a 15 to 20 second delay before a forcible entry and search of a residence violated the Fourth Amendment. The Court criticized the lower court's analysis that used the terms "significant" and "substantial" in determining the reasonableness of a suspicion of exigent circumstances. "Instructions couched in terms like "significant amount of time" and "an even more substantial amount of time," 282 F.3d, at 704, *tell very little*.' ***Banks***, sl. op. p. 11. (emphasis added)

Likewise, the injunction in this case based upon the ordinance definition employing the terms "substantial or significant amount" of floor space or stock in trade *tells very little* to the Plaintiff that must comply with the order or for that matter the court that must enforce it. Certainly it does not meet the requirements of C.R.C.P. 65(d) that an injunction "shall be specific in its terms; shall describe in reasonable detail, … the act or acts sought to be restrained...".

While the ***Banks*** case admittedly arose in a different context than this case, that does not mean that the identical terms criticized in that case by a unanimous Supreme Court are considered to be Latin or some other foreign language in this case. If laws are to have any meaning, the English language must maintain some integrity.

Plaintiff has already argued that "the proper test for evaluating content-neutral injunctions under the First Amendment [is] 'whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest.'" ***Schenk v. Pro Choice Network***, 519 U.S. 357, 372, 136 L.Ed.2d 18 (1997), *quoting* ***Madsen v. Women's***

Health Center, Inc., 512 U.S. 753, 765, 129 L.Ed. 2d. 593, 114 S. Ct. 2516 (1994). It should be noted the ***Banks*** case involved the seizure of controlled substances, and not the seizure of protected First Amendment materials that require warrants that describe the items to be seized with the "the most scrupulous exactitude." ***Stanford v. Texas***, 379 U.S. 476, 485, 13 L.Ed.2d 431, 437, 85 S.Ct. 506 (1965).

As noted in the Opening Brief, the District Court denied the City's request to hold Plaintiff in contempt of the Court's previous order, noting that the ordinance was vague in its terms. (R. Vol. V. p. 235, l. 1-9). The City seems to believe the mere usage of verbiage that is not unconstitutionally vague provides guidance for Courts or litigants to apply the language the City has chosen for its ordinance.

The ordinance applied in this case restricts the right to exercise free speech, limits the use to which private property may be put, and imposes criminal penalties. The sum of the foregoing factors weigh heavily in favor of the strictest construction of the ambiguous terms of the Aurora ordinance. Against this backdrop of tenets of statutory construction, the City has steadfastly refused to provide any guidance to Plaintiff's businesses as to what is meant by the term "significant or substantial." The District Court's injunction does not provide any other guidance and tells very little to Plaintiff. As such, the injunction entered by the District Court in this case fails to comply with C.R.C.P. 65(d) and should be reversed.

III. PLAINTIFF'S CLAIMS REGARDING AN INJUNCTION BASED UPON A REPEALED ORDINANCE ARE NOT MOOT.

The City incorrectly asserts that the recent amendments to Aurora Municipal Code render Plaintiff's challenge to the judicial review provisions of the licensing ordinance moot.

The United States Supreme Court has clearly stated, " A defendant's voluntary cessation of allegedly unlawful conduct ordinarily does not suffice to moot a case. ***Friends of the Earth v. Laidlaw Environmental Services***, 528 U.S. 167, 174, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000). The burden to establish mootness is upon the party raising the argument. ***Id***., at 189. "The burden is a heavy one." ***United States v. W.T. Grant Co***., 345 U.S. 629, 633, 73 S.CT. 894, 97 L.Ed. 1303 (1952). "A defendant claiming that its voluntary compliance moots a case bears a formidable burden, of showing that it is absolutely clear the alleged wrongful behavior could not reasonably be expected to recur. ***Friends of Earth***, 528 U.S., at 190 *citing* ***United States v. Concentrated Phosphate Export Assn., inc.***, 393 U.S. 199, 89 S.Ct. 361, 21 L.Ed. 2d 344 (1968).

In ***City of Mesquite v. Aladdin's Castle, Inc.*** 455 U.S. 283, 102 S.CT 283, 71 L.Ed.2d 152 (1982), after the district court declared an ordinance unconstitutional, the municipality repealed the ordinance while an appeal was pending in the court of appeals. The United States Supreme Court held the legal challenges to the ordinance were not mooted. The Court stated, "It is well settled that a defendant's cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice. ***Id.***, at 289. The Court further stated "the city's repeal of the objectionable language would not preclude it from reenacting precisely the same provision if the District Court's judgment were vacated, ***Id***. Subsequently the Court clarified that ***City of Mesquite*** was not limited to a threat to reenact an identical ordinance. "[I]f that were the rule, a defendant could moot a case by repealing the statute and replacing it with one that differs only in some insignificant respect." ***Northeastern Florida Chapter Association General Contractors v. City of Jacksonville***, 508 U.S. 656, 662,

113 S.Ct. 2297, 124 L.Ed.2d 586 (1993).

In the instant case, the City did not repeal the ordinance until January 27, 2003. Certainly the neither the District Court nor this Court were advised of this new development until the City's answer brief. There is no assurance the City will not reenact the old ordinance particularly since the United States Supreme Court has now granted certiorari on this issue of prompt judicial review in ***City of Littleton v. Z.J. Gifts, D-4 L.L.C***., __U.S.__, Case no. 02-1609, (October 14, 2003). As such, the City has not met its heavy burden of establishing Plaintiff's claims are moot.

In addition, Plaintiff may well be able to make the same claims against the newly enacted Aurora ordinance provision relating to judicial review under Chapter 86-55. At this point Plaintiff has had no opportunity to put this issue before the Court since it was enacted after the initiation of this appeal. Certainly the District Court's order enjoining Plaintiff from operating without a license should not be extended to cover a new licensing ordinance that did not exist at the time of the order. The former licensing requirement was likely unconstitutional. As such, this portion of the injunction should be vacated.

IV. SENATE BILL 251 PRECLUDES THE CITY FROM TERMINATING A USE THAT WAS LAWFUL AT THE TIME OF ITS INCEPTION BY AMORTIZATION

A. The Legislative Intent In Enacting Senate Bill 251 Is Clearly set forth in the Language of the Statute.

The fundamental responsibility of the courts in interpreting a statute is to give effect to the Legislature's purpose or intent in enacting a statute. ***Martin v. People***, 27 P.3d 846 (Colo. 2001); ***People v. Cooper***, 27 P.3d 348 (Colo. 2001). The plain language of the statute is the best indication of legislative intent. ***In re 2000-2001 District Grand Jury ex rel. First Judicial***

District concerning Proland Annexation, 22. P.3d 922 (Colo. 2001). 2000)

Senate Bill 251, amending C.R.S. Section 38-1-11, which states as follows:

> **38-1-101(3)(a)** Notwithstanding *any* other provision of law to the contrary, a local government *shall not* enact or enforce an ordinance, resolution or regulation that requires a nonconforming property use that was lawful at the time of its inception to be terminated or eliminated by amortization.
>
> (b) For purposes of this subsection (3), "local government" means a county, city and county, town, or home rule or statutory city. (emphasis added)

The mandatory language of this provision could not be clearer. "Notwithstanding any other provision of law to the contrary" clearly indicates that this legislation will override "any" provision of law in conflict with it. The word "'any ' means without limitation or restriction." ***National Farmers Union Property and Casualty Co. v. Estate of Mosher***, 22 P.3d 531 (Colo. App. 2001) *citing* ***Colorado State Bd of Accountancy v. Raisch***, 931 P.2d 498, 500 (Colo.App. 1996)["the term 'any' is an inclusive term often used synonymously with the terms 'every ' and 'all.'"] The term "law" has been held to include the Colorado Constitution. ***City of Thornton v. Farmer's Reservoir and Irrigation Co.***, 575 P.2d 382 (Colo. 1978), and should include judicial decisions, statutes, constitutional provisions as well as the common law.

The City relies upon the presumption that statutes are to operate prospectively and that retroactive application of statutes is generally disfavored by both common law and statute. See ***In the Matter of the Estate of Dewitt***, 54 P.3d 849, 854 (Colo. 2002). However, the City fails to mention that the Supreme Court in ***Estate of DeWitt*** determined that the statute did, in fact, operate. In reaching this conclusion, the Court stated:

> First, we must determine whether the general assembly intended the

> challenged statute to operate retroactively. [***City of Greenwood Village v. Petitioners for the Proposed City of Centennial***, 3 P.3d 427, 444 (Colo. 2000)] In order to overcome the presumption of prospectively, the statute must reveal a clear legislative intent of retroactivity ***Ficarra [v. Department of Regulatory Agencies]***, 849 P.32d, [6], at 14 (Colo. 1993). However, express language of retroactive is not required for courts to find such intent." 54 P.3d, at 854.

In ***Ficarra***, the Supreme Court rejected the rule "that without an express statutory provision stating that an act is to have retroactive effect, it can only be applied prospectively." "However, in numerous cases concerning the presumption that statutes operate prospectively, this court has never held that only an express contrary declaration by the General Assembly is sufficient to overcome the presumption that statutes are prospective in operation [citations to 7 cases omitted]. We have never held that express language of retroactive application is necessary to express such intent." 849 P.2d, at 14.

"[A] local government shall not … enforce an ordinance … that requires a nonconforming property use that was lawful at the time of its inception to be terminated or eliminated by amortization." The plain language of the statute indicates a clear legislative intent to prohibit the actual application of amortization ordinances through enforcement actions against private property owners.

If there is any doubt that the legislature intended Senate Bill 251 to apply in all cases regardless of when the case arose it is dispelled by the preamble to the statue that lays out the purpose of the statute. "When construing legislative intent, [the courts] consider legislative declarations of purpose. ***City & County of Denver v. Bd of Assessment Appeals***, 30 P.3d 177, 183 (Colo. 2001***); Common Sense Alliance v. Davidson***, 995 P.2d 748, 755 (Colo. 2000) (stating that when divining legislative purpose, "[o]ne of the best guides ... is an act's declaration of policy");

State v. Nieto, 993 P.2d 493, at 502 (Colo.2000) (stating that "[l]egislative intent is the polestar of statutory construction") ***State Dept. of Labor and Employment v. Esser***, 30 P.3d 189 (Colo. 2001)

The preamble to Senate Bill 251 states as follows:

> SECTION I. Legislative declaration. (1) The general assembly hereby finds that:
> Section 3 of article II of the state constitution declares that all person shave certain inalienable rights, which include the right to acquire, possess, and protect property.
> Section 15 of article II of the state constitution prohibits property from being taken or damaged without just compensation and further requires that such compensation be paid to the owner of the property prior to the proprietary rights of the owner in the property being divested.
> The general assembly recognizes a duty to protect and defend the fundamental civil rights set forth in paragraphs (a) and (b) of this subsection (1) and to ensure that persons throughout the state are not unjustly deprived of their property rights.
>
> In order to protect such inalienable property rights, it is necessary to enact a statewide law that prohibits local governments from eliminating or terminating most nonconforming uses that were lawful at the time of their inception by amortization.

This strong statement of the legislative intent reveals that Senate Bill 251 was intended to ensure persons throughout the state are not unjustly deprived of their property rights through amortization. The declaration refers to "uses that *were* lawful at the time of their inception." The goal of the statute is "the protection of the inalienable property rights of persons whose initially lawful property uses may be terminated or eliminated through amortization of nonconforming uses." Thus, the intent of the bill was to protect the rights of persons prior lawful uses may be terminated at a future date by enforcement of amortization provisions. There is no exemption for any enforcement actions that are already pending nor is there any exemption for relating to amortization periods that expired prior to the enactment of the statute. Quite simply

the unequivocal mandatory language of Senate Bill 251 overrides all other laws, subject to constitutional limitations, an, actions that the statute contemplates that to protect the inalienable civil rights of the citizens of Colorado.

As set forth in the District Court's order, Plaintiff was a lawful use at the time of its inception. Pursuant to the clear and mandatory terms of Senate Bill 251, the City may not enforce an ordinance that would terminate a lawful use by amortization. Thus, Plaintiff's business remains a lawful use and may not be terminated by enforcement of the amortization provision contained in the ordinance. Based upon the unambiguous language of Senate Bill 251, the City is foreclosed from enforcing the Aurora zoning restrictions against Plaintiff. As such, Plaintiff's claims concerning the locational restrictions have been rendered moot by the enactment of Senate Bill 251.

B. **Senate Bill 251 is Not Unconstitutional**

The City asserts that Senate Bill 251 is constitutional because the Aurora ordinance preempts the state statute under Aurora's home rule powers. The City asserts that zoning is a local matter of local concern and, as such, the Legislature cannot intrude upon this local matter.

The City relies upon the test set forth in ***City of Northglenn v. Ibarra***, 62 P.3d 151 (Colo. matter of statewide concern and is not preempted by local concerns.

The focus of the City's argument is that Senate Bill 251 deals with local zoning issues. This mischaracterizes Senate Bill 251. Zoning is a legislative act representing a legislative judgment as to how the land within a City should be utilized and where the lines of demarcation between the several use zones should be drawn. ***City of Greeley v. Ellis***, 527 P.2d 538 (Colo. 1974); ***Nopro Co. v. Town of Cherry Hills Village***, 504 P.2d 344 (Colo. 1972).

As set forth without any room for doubt in the preamble, Senate Bill 251 was enacted to protect and defend the fundamental civil rights of persons to property and ensure persons through out the state are not unjustly deprived of their property rights. Thus, Senate Bill 251 deals not with zoning matters that are of local concern but with the property rights of its citizens. Certainly, property rights guaranteed by the Colorado Constitution should not vary from municipality to municipality within the state. The Constitution should apply to all persons equally. A person's fundamental civil right to possess property should not vary from Burlington to Boulder to Cortez. While municipalities remain free to enact whatever zoning laws concerning utilization of land within their boundaries, they should not have the "flexibility" to deprive persons of their inalienable right to acquire, possess and protect property.

The City also asserts that amortization of uses by cities does not have any extraterritorial impact on residents outside he municipality. However, this is simply not true. For example in the area of adult businesses, the termination of a lawful nonconforming uses will have a ripple effect on neighboring jurisdictions by forcing such uses to relocate to neighboring cities. Since all cities are constitutionally required to provide at least some locations for adult businesses, the termination of an existing lawful adult business will exert great pressure on the neighboring cities to provide additional proper locations.

The City asserts that historically cities have been able to terminate nonconforming uses. However the cases cited by the City do not directly deal with the use of amortization to terminate nonconforming uses. ***Service Oil Co. v. Rhodus***, 500 P.2d 807 (Colo. 1972) and ***Hartley v. City of Colorado Springs***, 764 P.2d 1216 (Colo.1988) dealt with the termination of nonconforming uses by abandonment. None of the cases cited by the City deal directly with amortization.

Contrary to the assertions of the City, Senate Bill 251 involves a matter of statewide concern, namely the fundamental inalienable right to own private property. The use of amortization provisions has apparently been abused by cities to the extent the legislature felt compelled to put an end to the deprivation of property owners the lawful use of their property. Senate Bill 251 is not unconstitutional. In the event the Court wants to address the issue, Plaintiff would suggest that the Colorado Attorney General be given an opportunity to present his position on the constitutionality of this statute.

CONCLUSION

Based upon the foregoing arguments and authorities and those previously presented, Plaintiff-Appellant respectfully requests this Honorable Court to reverse the Arapahoe County District Court's order dated November 18, 2002 and remand the case for further proceedings, and for such other and further relief this Court deems appropriate under the circumstances.

Respectfully submitted,

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CERTIFICATE OF MAILING

I do hereby certify that I have mailed a true copy of the above and **REVISED REPLY BRIEF OF APPELLANT**, by depositing same in the United States Mail, postage prepaid, addressed to:

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on this _____ day of December, 2003.