

AUSTRALIA / JUDGMENT

Costello v Bathurst Regional Council

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Land and Environment Court

New South Wales

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Costello v Bathurst Regional Council [2017] NSWLEC 1195

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10 April 2017

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20 April 2017

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20 April 2017

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Class 1

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Decision:

Appeal dismissed

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DEVELOPMENT APPLICATION: dual occupancy development; minimum lot size

Legislation Cited:

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Bathurst Regional Local Environmental Plan 2014;

Cases Cited:

Wehbe v Pittwater Council [2007] NSWLEC 827; Parris v Randwick City Council [2016] NSWLEC 1507

Texts Cited:

Bathurst Regional Development Control Plan 2014

Category:

Principal judgment

Parties:

Luke Costello (Applicant)

Bathurst Regional Council (Respondent)

Representation:

Counsel:

Mr C McEwan SC (Applicant)

Solicitors:

Mr P Crennan

Crennan Legal (Respondent)

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Judgment

Mr Costello lodged Development Application 2016/240 with Bathurst Regional Council on 17 July 2018 seeking consent for residential dual occupancy development and 2 lot subdivision.

The council resolved to refuse consent on 21 September 2016 and Mr Costello is appealing that decision pursuant to the provisions of s97(1) of the Environmental Planning and Assessment Act 1979 (EP&AAct).

The site and its context

The application relates to land known as 40 Governors Parade Windradyne and is located on the north eastern corner with Colville Street. It is legally described as Lot 1124 in DP 1215618 and has a frontage of 17m and 40m to each street respectively with a 5m splay at the intersection and site area of 789.4m². The land falls from the east to west towards Governors Parade with a level difference of approximately 3.5m.

The site is located at the south western extremity of a new subdivision with recent housing constructed to the north and east of the site. Land opposite is zoned for recreation purposes and performs a drainage function including Sawpit Creek. Development in the vicinity of the site is primarily single storey detached dwelling houses with some dual occupancy development.

Background and the proposal

The application as filed with the Court proposed the construction of two detached 4 bedroom single storey dwelling houses each with double garages and facing to Colville Street. Private open space allocated to each dwelling was to be provided to the west of proposed dwelling 1 and the east of dwelling 2. Vehicle access to both dwellings was from Colville Street.

The matter is heard subject to the provisions of s34AA of the Land and Environment Court Act 1979 (LECAct). It commenced with a site view and the mandatory conciliation conference held at Bathurst Courthouse. Whilst the conciliation conference did not lead to agreement being reached between the parties, it was agreed that the amended plans put forward during those discussions were an improvement to those filed with the Court.

The conference was terminated and the matter proceeded to hearing in accordance with the requirements of S34AA(2)(b)(i) of the LECAct. The parties agreed that evidence in the conciliation conference could be taken into account in determination of the application.

As a result of discussions held during the conference, the applicant sought and was granted leave to rely on amended plans subject to the payment of the council's costs thrown away as it was agreed the changes were not "minor" for the purposes of s97B(2) of the EP&AAct.

The applicant concedes that the plans for which leave was granted (Exhibit B) are not capable of approval by the Court due to the lack of dimensions and in particular proposed finished site levels and the proposed location of the driveway servicing proposed Lot 1 that intersects the splay corner and therefore does not comply with the provisions of s3.2.3 of Australian Standard AS/NZS 2890.1:2004.

The plans reduce the size of the dwellings in both footprint and number of bedrooms, each now contain 3 bedrooms and retain the double garage. Private open space areas are located to the north of the dwellings with an area of 74m² available to Lot 1 and 56m² to Lot 2.

The plans do not show any dimensions for the boundary setback and appear to vary between 3.8m and 5m (Lot 2 and 1 respectively) when scaled.

The dwellings would be setback 2m from Colville Street and the setback of the proposed dwelling on Lot 1 to Governors Parade varies due to the angled frontage however is, at the southern corner only 4m from the splay corner.

The planning controls

The site is zoned R1 General Residential pursuant to the provisions of Bathurst Regional Local Environmental Plan 2014 (LEP).

Clause 2.3(2) of the LEP requires that the consent authority must have regard to the objectives for development in a zone when determining a development application in respect of land within the zone. The objectives of the R1 zone are:

- To provide for the housing needs of the community.
- To provide for a variety of housing types and densities.
- To enable other land uses that provide facilities or services to meet the day to day needs of residents.
- To provide housing choice and affordability by enabling opportunities for medium density forms of housing in locations and at densities that complement the surrounding residential environment.
- To protect and conserve the historic significance and scenic quality of the urban villages of Eglinton, Raglan and Perthville.
- To enable commercial development that is compatible with the amenity of the area and does not prejudice the status and viability of the Bathurst central business district as the retail, commercial and administrative centre of Bathurst.

In accordance with the provisions of clause 2.6(1) land may be subdivided with consent. Dual occupancy development is also permitted with consent in the R1 zone however is subject to the provisions of clause 4.1B which is in the following form:

4.1B Minimum lot sizes for dual occupancies, multi dwelling housing and residential flat buildings

- (1) The objectives of this clause are as follows:
 - (a) to achieve planned residential density,
 - (b) to ensure that the area and dimensions of a lot are able to accommodate development that is consistent with the objectives and development controls for dual occupancies, multi dwelling houses or residential flat buildings,
 - (c) to minimise any likely adverse impact of such development on the amenity of adjoining neighbourhoods.

- (2) Development consent must not be granted to development for the purposes of a dual occupancy on a lot unless the lot is at least the minimum lot size shown on the Minimum Lot Size—Dual Occupancy Map for that lot.
- (3) Development consent must not be granted to development for the purposes of multi dwelling houses or residential flat buildings on a lot unless the lot is at least the minimum lot size shown on the Minimum Lot Size—Multi Dwelling Housing and Residential Flat Buildings Map for that lot.
- (4) Despite any other provision of this Plan, development consent may be granted for the subdivision of a dual occupancy, multi dwelling housing or a residential flat building development into lots of any size to enable the resulting individual dwellings on those lots to have separate titles.

The Minimum Lot Size—Dual Occupancy Map indicates a minimum site area of 850m² is required for the development of a dual occupancy development on this site. The site, at 789.4m², fails to meet this development standard and the applicant relies on the provisions of clause 4.6 of the LEP that provide for Exceptions to development standards.

Bathurst Regional Development Control Plan 2014 (DCP) applies to the site. Part 4 of the DCP applies to residential development with dual occupancy development included in those provisions to which “Medium Density Housing” apply. The site is located within Precinct 2 - Low to Medium Density pursuant to Schedule 6. That objectives for the precinct are:

- a) To provide appropriate forms of low and medium density housing that encourages housing choice and caters for an ageing population.
- b) To permit forms of medium density housing which are compatible with the single dwelling character of the suburbs and whose impact on the existing amenity of neighbourhoods is minimised.

Part 4.2 of the DCP applies to Residential Density and establishes population densities and occupancy rates as follows:

One (1) bedroom dwelling = 1.5 persons

Two (2) bedroom dwelling = 2.2 persons

Three (3) bedroom dwelling = 3.3 persons

Four (4) or more bedroom dwelling = 3.6 persons

The DCP does not include any density controls for dual occupancy development in terms of population. There are controls for “Residential units” however it is common ground that dual occupancy development is not a form of “residential units”.

There is a control for site coverage included in Part 4.2.2 Development Standards that applies to dual occupancy development in the R1 zone and states that the total site coverage of both dwellings is not to exceed 50% of the site area. The note to the clause states that “site coverage means the total area of the footprint of each dwelling and includes the garages and/or carports of each dwelling, whether attached or detached.

Other relevant controls are contained in Part 4.4 General Siting Considerations and of particular relevance to the application are the development standards in Part 4.4.2 that require a front building line setback for corner lots to be calculated as “the combined distance of the 1 building line setbacks to the 2 roads is to be not less than 8 metres, provided that neither is less than 2 metres”. The note to that clause provides for variation to reduce the building lines with consideration to existing setbacks in the street.

The controls for External Appearance – Dual Occupancies and Residential Units require:

- a) All dual occupancy or residential unit developments that directly front a public road must be orientated toward that street by way of openings, verandah, awning and/or other similar articulation and detail. If a dwelling is proposed on a corner allotment, articulation, openings and detail in the building facade must also be provided for both street frontages.
- b) Any proposed dual occupancy must display relief in the roof form and articulation of the walls and front façade. for detached dual occupancies or residential units, there is to be variation in the detailing of the front façade between each dwelling for the dual occupancy or residential unit development. The change in detail is to be illustrated on the plans.

Private open space provisions apply and in the circumstances of this case require a minimum area of private open space of 40m² for 3 bedroom dwellings and 50m² for dwellings with 4 or more bedrooms, must be located behind the front building line, have a width of 4 metres and be no steeper than 1:10 gradient with at least 20m² of the space adjoining a habitable living room at ground level and be generally north facing.

Parking required under Part 4.9 in Precinct 2 requires 1 covered car parking space per dwelling and 1 visitor's space per dwellings that contain 3 or more bedrooms. The visitor space can be located or attached to each dwelling rather than being provided as a communal space, where appropriate to the overall design of the development. The spaces are not to form part of the vehicle manoeuvring areas, are to be located at or behind the building line, as close as possible to the dwelling they are to serve with visitor parking adequately screened by landscaping to reduce the effect of the development on the streetscape and to be clearly designated and readily accessible.

The issues

The original contentions in the case were detailed in the Council's Amended Statement of Facts and Contentions filed with the Court on 27 March 2017. The contentions are summarised as follows:

Contravention of the minimum lot size provisions under clause 4.1B of the LEP.

Insufficient justification to vary that minimum lot size.

Overriding public interest in maintaining the development standard for minimum lot size;

Non-compliance with DCP provisions that relate to solar access to living rooms, detailing and design of the façade of the dwellings, offsetting of windows, inadequate private open space due to gradient and width and failure to provide visitor parking spaces.

The non-compliance with the DCP controls results in a failure to achieve the objectives of the lot size design for dual occupancies set out in clause 4.1B of the LEP.

The council continues to press contentions 1, 2, 3 and 5 and submits that the plans that form Exhibit B, whilst an improvement from that originally filed, are not in a form that would provide for consent to be granted and contain other unsatisfactory aspects which are pressed in relation to contention 4.

The evidence

A site view was held prior to the conference and evidence heard from the owner of an adjoining dwelling to the immediate north of the site. The view included observation of a number of dual occupancy developments in the vicinity of the site. There is no evidence provided to the Court that those development are not on lots that satisfy the minimum lot size development standard.

The issues raised in objection to the proposal are summarised as follows:

Development is contrary to provisions of LEP and DCP and in particular the site is too small to accommodate a dual occupancy development;

Moved to Bathurst expecting low density housing to surround me;

Development proposed would double the impacts on amenity, particularly the number of occupants, pets, children and cars than anticipated from a single dwelling with associated increase in noise;

Loss of aural and visual privacy and natural light due to the close proximity of walls to common boundary;

Dwellings would be substantially higher and when combined with proximity would be overbearing;

Extension of fence line to Governors Parade boundary would disrupt views, vistas and enjoyment of front verandah and adversely impact on the streetscape;

When subdivision was released blocks that were suitable for dual occupancy development were identified and the site is not one of these;

There is sufficient supply of dual occupancy developments in the vicinity of the site;

I did my homework and expected that development would accord to the LEP that was developed following public consultation and reflecting the best interests of the local community.

Mr L Fletcher prepared an Expert Report addressing town planning issues, Exhibit 4. Mr Fletcher provided comments through the conciliation phase and agreed that the amended plans were an improvement on those originally filed however did not consider that they fully resolved those matters detailed in contention 4. Mr Fletcher was not required for cross examination.

In his expert report, Mr Fletcher highlighted the areas of non-compliance with the relevant DCP requirements and agrees that through further amendments to the plans now before the Court that the issue of solar access may be capable of resolution. The applicant proposed the deletion of the roof above the alfresco area as the solution to this contention however Mr Fletcher says there is inadequate information in relation to site levels, dimensions and setbacks to be satisfied that the changes suggested would satisfactorily address the contention. Similarly, he considers that there remains insufficient information in relation to levels both within the site and on adjoining lands to be satisfied that the proposed private open space areas would receive adequate sunlight and there were no adverse amenity impacts from those areas to the adjacent property, particularly that to the north of the site. Finally, whilst agreeing that the design of the dwellings in terms of articulation and differentiation had been improved he considers there is insufficient details shown on the plans to ensure compliance with the DCP requirements and also be assured of the finishes that are proposed.

The Court notes that the plans before the Court are not capable of approval in their present form and has indicated to the parties that it would determine the threshold issue of minimum lot size. It would then be a matter for the applicant to prepare amended plans and lodge a new development application with the council addressing the issues outlined in this judgment ensuring compliance with the DCP controls.

Conclusion and findings

Clause 4.6 of the LEP imposes a precondition to a consent authority exercising the power to grant consent to development on land to which the clause applies and if I am not satisfied that the provisions of the clause are met, consent cannot be granted.

Clause 4.6 is in the following form:

- (1) The objectives of this clause are as follows:
 - (a) to provide an appropriate degree of flexibility in applying certain development standards to particular development,
 - (b) to achieve better outcomes for and from development by allowing

- (2) Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.
- (3) Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:
 - (a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and
 - (b) that there are sufficient environmental planning grounds to justify contravening the development standard.
- (4) Development consent must not be granted for development that contravenes a development standard unless:
 - (a) the consent authority is satisfied that:
 - (i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and
 - (ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and
 - (b) the concurrence of the Secretary has been obtained.
- (5) In deciding whether to grant concurrence, the Secretary must consider:
 - (a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and
 - (b) the public benefit of maintaining the development standard, and
 - (c) any other matters required to be taken into consideration by the Secretary before granting concurrence.....

This imposes a number of tests, the first that compliance with the development standard must be unreasonable or unnecessary in the circumstances of the case, the second that there are sufficient environmental planning grounds to justify contravening the development standard, the third that the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3) and the fourth, that the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out. In addition, satisfaction of those matters that must be considered by the Secretary in determining whether concurrence should be granted is required.

Preston CJ in *Wehbe v Pittwater Council* [2007] NSWLEC 827 sets out five ways of demonstrating that compliance with a development standard is unreasonable or unnecessary. They are:

the objectives of the development standard are achieved notwithstanding non-compliance with the standard;

the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary;

the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable;

the development standard has been virtually abandoned or destroyed by the Council's own actions in granting consent departing from the standard;

the zoning of particular land was unreasonable or inappropriate so that a development standard appropriate for that zoning was also unreasonable or unnecessary is applied to the land.

The objectives of the R1 zone are detailed at [12] and the objectives of the development standard for Minimum lot sizes for dual occupancies, multi dwelling housing and residential flat buildings are at [13].

The applicant relies on a written request prepared pursuant to the provisions of clause 4.6(3) of the LEP (Exhibit A) seeking to vary the provisions of clause 4.1B of the LEP as it applies to minimum lots size for dual occupancy development. Clause 4.1B requires a minimum lot size of 850m² whereas the site is 789.4m² or 60.6m² less than required. This represents a variation of 7.13%.

For consent to be granted, I firstly must be satisfied that the request demonstrates that that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and that there are sufficient environmental planning grounds to justify contravening the development standard.

The request follows the first test in *Wehbe* that is the objectives of the development standard are achieved notwithstanding non-compliance with the standard.

In relation to the first objective, that is to achieve planned residential density, the request has regard to clause 4.2 of the DCP which it says its provisions inform the intent of the clause and that for dual occupancy development the planned residential density is controlled by site coverage rather than persons per site hectare as the latter applies only to 'residential units' (three or more dwellings). Pursuant to clause 4.2 "the total site coverage of both dwellings is not to exceed 50% of the site area". The applicant states that because the proposal does not exceed this control it achieves the planned residential density for dual occupancies.

The second objective is to ensure that the area and dimensions of a lot are able to accommodate development that is consistent with the objectives and development controls for dual occupancies, multi dwelling houses or residential flat buildings.

The applicant correctly states that the objective refers to consistency rather than strict compliance. It argues in the written request that, with changes to the plans as filed, the development would be consistent with those controls detailed in the DCP and in particular those controls that the council identified in its Statement of Facts and Contentions as not being met.

Finally, the third objective of the development standard is to minimise any likely adverse impact of such development on the amenity of adjoining neighbourhoods.

The request states that there are no identified likely adverse impacts on the amenity of the 'neighbourhood' that dual occupancies are a form of residential development encouraged by the R1 zone objectives and exist in a myriad of different forms throughout the subdivision release area. there will be no visual indicator that the site is marginally below a numeric standard the origins of which it says do not appear to be based upon any mathematical prescription or research. With respect to immediate neighbours, the proposed development is single storey (2 storey is permissible), does not overshadow neighbours and complies with DCP setbacks.

On this basis, the request concludes that compliance with the development standard would be unreasonable and unnecessary.

The second test is whether there are sufficient environmental planning grounds to justify contravention of the development standard. In this regard the applicant's written request relies on the following grounds:

It does (or is able to) satisfy or exceed all development controls of the DCP.

It will be constructed in a single storey form which will be compatible with development in the release area and accordingly compatible with the established character of the immediate area.

There are not any increased external amenity impacts above and beyond that of a compliant lot.

The development, on a corner allotment, does not prejudice the establishment of any other dual occupancy.

The 2 detached dwellings provide for a better planning outcome and, in a single storey form achieve greater compatibility with the nature of existing housing in the visual catchment. Two storey development is permissible but not proposed by the applicant.

The proposed lot size enables development which will satisfy or outperform a number of the DCP controls including site coverage, private open space, car parking and boundary setbacks.

The proposal will provide housing choice and affordability (not to be confused with 'affordable housing') superior to that of a single dwelling house on the land.

The location of the site on a corner allotment and the varied lot size and subdivision pattern in proximity to the site and the location and orientation of the dwelling erected immediately to the north of the site will ensure that the shortfall in lot size will not lead to a development outcome which is adverse. Rather, the grant of development consent to the proposed development will achieve a better outcome for and from development in the particular circumstances of this case.

Findings

In relation to the first test, I queried during the hearing as to how site coverage can be a measure of density. Mr McEwan, for the applicant submitted that this was the control in the DCP and that no other control related to density. It is a 'footprint' control and the development satisfies that control.

The first objective requires that the planned residential density is achieved. I accept Mr McEwan's proposition that the DCP does not provide much guidance on what that density is. Therefore, it is appropriate to have regard to what "density" is in terms of the objective. In this regard, I consider the control is aimed at establishing a certain density of dwellings and therefore population within the precinct.

I am not satisfied that the written request adequately demonstrates that the objective is met. Whilst site coverage may limit the size of a building, it has limited effect in delivering a planned density. The request does not explore what is the density planned for the site, the estate in which it is located nor the density anticipated in the R1 zone.

In order to demonstrate that the planned density is achieved, some regard must be had to what that density is and what density is delivered by the development. Site coverage alone cannot ensure the planned density is delivered. That is because all site coverage controls is the area of land covered by a building. It does not control the occupancy of that building and therefore its population nor does it control the bulk or scale of the building in that it could be a single storey or multi-level building. For these reasons, I cannot be satisfied that the development would achieve that planned density and therefore the objective of the control is met.

I distinguish my decision from one of my earlier decisions referenced by Mr McEwan, *Parris v Randwick City Council* [2016] NSWLEC 1507, as in that case the Court had significant evidence in relation to the council's review of minimum lot sizes, population density and other factors that were addressed in determination of planned density and had been addressed. That is not the case in regard to the written request now before the Court.

In relation to the second objective, the plans before the Court fail to demonstrate compliance with the relevant development controls contained within the DCP however I accept that in a modified form it may be possible to achieve a design that would be consistent with those controls.

The third objective requires minimisation of any likely adverse impacts. Having regard to the evidence in this case and in particular that provided by the neighbour, I am not satisfied that the amended design does minimise adverse impacts. In particular, the siting of the main private open space and alfresco area in close proximity to a bedroom of the adjacent property is likely to result in noise impacts and no evidence of any planned ameliorative treatments has been provided.

Consideration as to whether the request demonstrates that there are sufficient environmental planning grounds to justify contravention of the development standard is also required. Having regard to those issues detailed at [42], I do not consider that these reasons are particular to the circumstances of the proposed development. A single storey dwelling house could be constructed on the site and result in the same outcome. There is nothing particularly identified or that there are particular circumstances that justify contravention of the development standard. Therefore, there are insufficient environmental planning grounds to justify contravention of the development standard.

Clause 4.6 also requires the Court to have regard to whether the proposed development would be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the R1 zone. I have already found that it is not consistent with the objectives of the minimum lot size development standard.

In relation to the objectives of the zone, I am satisfied that a dual occupancy development would provide for the housing needs of the community and a variety of housing types and densities (however I am not satisfied that this density would be the “planned density”) and provide housing choice. I have no evidence other than the assumption made in the written request that building two dwellings on one allotment would be more “affordable” than other housing within the estate. Overall, apart from the lack of evidence on affordability, I could be satisfied that the proposal would be consistent with the relevant objectives of the zone.

Mr McEwan cited a number of decisions of the council which upheld written requests in relation to development standards for minimum lot size (Exhibit C) and submits that the council does exercise discretion in applying the provision. He does not suggest that the development standard has been abandoned but rather submits that in the circumstances of the case, there is no public benefit in maintaining that standard.

Having reviewed the decisions, I agree that the council has, as required by legislation, applied its discretion in determination of the applications however do not consider that this in itself is reason to allow the contravention of the development standards in the circumstances of this case. I make no comment as to whether that determination was appropriate in the circumstances because that was a matter for the council at the time.

Finally, determination of the provisions of clause 4.6 requires consideration of whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and of other matters required to be taken into consideration by the Secretary before granting concurrence. I have no evidence of any such issues.

For these reasons, I am not satisfied that the written request justifies contravention of the development standard.

In relation to the merits of the application, I am not satisfied that the plans before the Court are capable of consent or that they represent an appropriate design solution, particularly in relation to site access and finished levels having regard to the surrounding development.

The Orders of the Court are:

The applicant is granted leave to rely on amended plans, Exhibit B, subject to payment of the respondent's costs thrown away pursuant to s97B of the Environmental Planning and Assessment Act 1979.

The written request to vary the development standard contained in clause 4.1B of Bathurst Local Environmental Plan 2014 is not supported.

Development Application 2016/240 for residential dual occupancy development and 2 lot subdivision at Lot 1124 DP 1215618 No. 40 Governors Parade Windradynne is refused consent.

The exhibits, other than exhibit B, are returned.

Commissioner Morris

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Decision last updated:

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