

**BEFORE THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT**

Appeal of Unit Owners' Association
of The Erie Condominium, et al

Appeal No. 19174

OWNER'S MOTION TO DISMISS APPEAL

**I.
INTRODUCTION**

2337 Champlain, LLC ("Owner"), the owner of the property at 2337 Champlain Street, N.W., respectfully requests that the Board of Zoning Adjustment ("Board" or "BZA") dismiss this appeal as untimely filed under 11 DCMR §3112.2(a). The instant appeal was filed by the Unit Owners' Association of The Erie Condominium, et al. ("Appellants) on October 27, 2015 - 132 days after the building permit was issued and more than 19 months after Owner affirmatively presented to Appellants the change to the penthouse height which is the subject of this appeal. Pursuant to 11 DCMR § 3112.2(a), an appeal challenging a decision by the Zoning Administrator must be brought within 60 days after petitioner knew or should have known of the Zoning Administrator's decision. In this case, the Appellants waited more than twice that amount of time from the date the building permit was issued and had actual notice for a significantly longer period of time. Accordingly, this appeal is untimely and must be dismissed for the reasons set forth in detail below.

The Board is bound to consider this threshold question of timeliness first, prior to consideration of the appeal itself. *BZA Appeal No. 17411 of Basken and Meyer*, at p. 4. Accordingly, the Owner respectfully requests that the Board consider this Motion to Dismiss as a preliminary matter at the public hearing on February 9, 2015, prior to the hearing on the Appeal.

II.

STATEMENT OF FACTS

The development of the residential building at 2337 Champlain Street, NW (Lot 112, Square 2563) (the “Property”) has resulted from a development process that began more than four years ago. Appellants have been actively involved during that entire period and have challenged the development at almost every juncture. The final design of the project – especially for the penthouse structure – reflects an evolved design which was driven principally by Appellants’ specific requests. As a result, Appellants knew about the specific changes to the penthouse as part of the development process for this Property for more than 19 months prior to bringing this appeal, yet Appellants did not file the appeal until 132 days after the building permit was issued.

The Prior Owner’s Plans: In late 2011, FCP Champlain, LLC, the prior owner of the Property (the “Prior Owner”), filed an application with the Board for special exception relief for additional height under Section 1403 of the Reed-Cooke Overlay District and a variance from the floor area ratio (“FAR”) requirements under Section 402 of the Zoning Regulations to permit the development of a residential building on the Property which is located in the RC/R-5-B District. The Board held a public hearing on April 3, 2012, and the Erie Condominium Association, an Appellant in this matter and referred to herein as the “Association”, was a party in opposition to the case. The Board considered the case for decision on May 22, 2012, and voted unanimously to approve the application. BZA Order No. 18330 was issued on July 26, 2012 (the “BZA Order”).

The Association appealed the BZA Order to the District of Columbia Court of Appeals. To settle that appeal, the Prior Owner agreed to make certain revisions to the residential building and committed to certain conditions that were not made part of the BZA Order in an effort to further address concerns of the Association. These agreements were set forth in an Adjacent Property Owner Agreement (the “Agreement”). Specifically, the Agreement required the Prior

Owner to (1) reduce the height of the residential building by at least 12 inches from the height approved in the BZA Order to 197 feet, 10 inches¹ and (2) lower the elevation of the parapet of the building to be equal in height to or lower than the existing parapet of Appellants' property, which was at 199 feet, 6 inches.

As required by the Agreement, the Prior Owner submitted its revised plans to the Zoning Administrator for approval in January, 2013. By letter dated April 9, 2013, the Zoning Administrator issued a determination letter approving the Prior Owner's revised plans reflecting the height of the building at 197 feet, 10 inches and the height of the parapet at 199 feet, 6 inches. No changes were proposed to the height of the penthouse, which was shown at 207 feet, 10 inches on the approved BZA plans. See Exhibit A.

Owner's Plans: Upon purchasing the Property, the Owner evaluated multiple options to create better efficiencies in the approved plans. As a result, the overall design of the project was refined. The refinements did not impact any of the relief approved by the BZA Order and were consistent with the Agreement. Specifically, the height of the building was maintained at 197 feet, 10 inches, and the height of the parapet was maintained at 199 feet, 6 inches. The FAR of the project did not change. The refinements included moving the penthouse farther from the north property line abutting Appellants' property and slightly increasing the height of the penthouse (from 207 feet, 10 inches to 208 feet, 9.36 inches (i.e., 208.78 feet)). The height of the revised penthouse complied with Section 400.7 of the Zoning Regulations. The Owner initially reviewed the proposed refinements with the Zoning Administrator in November, 2013, and the Zoning Administrator issued a determination letter dated December 27, 2013, finding that the refinements were consistent with the BZA Order and did not expand or create any new areas of zoning relief. See Exhibit B.

¹ All heights are referenced at the actual elevation (i.e., in feet and inches above sea level), not above the building height measuring point.

At the same time, the Owner reached out to Appellants, as is discussed in greater detail in the following section. Based on that outreach, the Owner again contacted the Zoning Administrator to provide additional information on the refinements and updates regarding the Owner's work with Appellants. In response, the Zoning Administrator issued a second determination letter to the Owner dated February 10, 2014, finding that the proposed revisions were consistent with the BZA Order and the applicable Zoning Regulations. See Exhibit C (determination letter and presented plans).

Appellants' Involvement in Development: Given the Appellants' history with the project, the Owner reached out to Appellants immediately upon evaluating the refinements with the Zoning Administrator in late 2013 and determining that the refinements would be consistent with the BZA Order. The following list identifies each of the steps that the Owner took to inform and educate the Appellants on the proposed refinements, the details of the project, and the status of approvals for the project:

- December, 2013: Owner reached out to Appellants through Appellant Richard Wiedis ("Wiedis"), president of the Association, to discuss the refinements for the project. Owner and Wiedis met on December 10th to discuss the proposed refinements to the project.
- January 2, 2014: Wiedis emailed Owner expressing general support for the refinements and agreed that the refinements could be submitted to the Zoning Administrator for the requested determination letter. Wiedis indicated that proceeding with the plans from the Prior Owner would result in additional objections from Appellants. See Exhibit D. The plans submitted to the Zoning Administrator showed a penthouse height at 208.78 feet. See Exhibit C.
- January-March, 2014: Owner and Appellants exchanged multiple emails specifically regarding the penthouse and Appellants' concerns regarding the location of the roof top air handling units as well as regarding scheduling a meeting for Owner to present the refinements to Appellants. See Exhibit E.

- March 18, 2014: Owner met with Appellants to present updates on the development of the project and specifically reviewed modifications to the penthouse that had been discussed. Owner presented a modified penthouse structure that included a parapet so that the air handling units could be located on top of the penthouse and screened, instead of on the main roof as previously proposed. This change specifically addressed Appellants' concerns raised in earlier email correspondence regarding the location of the air handling units. The height of the penthouse was shown at 212.28 feet (i.e., the 208.78-foot penthouse structure plus 3.5 additional feet for the parapet to screen the air handling units). The height of the revised penthouse complied with Section 400.7 of the Zoning Regulations. At this meeting, Appellants represented to Owner that this solution was best.
- March 19, 2014: Owner emailed Wiedis the plans that were presented at the March 18th meeting (the "March Plans"). The March Plans showed the height of the penthouse at 212.28 feet (i.e., 212 feet, 3.36 inches) and included comparative plans to educate Appellants. See Exhibit F (email and relevant plans pages included).
- April 29, 2014: Owner re-sent Wiedis the March Plans via email and affirmatively stated that Owner was nearing completion of the building permit plans which were being developed in accordance with the March Plans. See Exhibit G.
- September 27, 2014: Wiedis emailed Owner, noting that there was activity on the Property and requested a status update. Owner responded on September 30, 2014, and Owner indicated that it planned to build the project in accordance with the March Plans. See Exhibit H.
- February 17, 2015: Wiedis emailed Owner to ask questions relating to site work and requested clarification as to the plans for the proposed project. The following day, Owner responded that the plans presented to the Appellants in the spring (i.e., the March Plans) were the final plans. Owner agreed to meet with Appellants to review those plans. See Exhibit I.
- March, 2015: Owner and Wiedis had multiple email correspondence regarding the status of permits and construction, which evidences that Appellants were actively monitoring the construction site. Owner provided a copy of the Foundation to Grade permit to Wiedis. See Exhibit J.
- May 12, 2015: Owner met with Appellants to further discuss the project. At the meeting, Appellants were shown the plans that were submitted with the building permit application. The building permit plans were dated for permit as of July 18, 2014, and revised as of February 6, 2015, for construction drawings (the "Building Permit Plans"). The Building Permit Plans showed a slightly increased height of the penthouse of 213.10 feet. The penthouse was identical to the March Plans but with the additional inches added to the penthouse parapet to ensure that the air handling units were fully screened. The total height of the penthouse including the parapet continued to comply with Section 400.7 of the Zoning Regulations. The

parties visited the roof of Appellants' property and discussed the planned height of the penthouse and setbacks from Appellants' property. Owner informed Appellants that the building permit drawings had been finalized and were submitted for approval to DCRA in July, 2014.

Construction: DCRA issued Building Permit B-1410680 on June 17, 2015 (the "Building Permit"). See Exhibit K. The Building Permit Plans showed the height of the roof of the building at 196.64 feet and the parapet of the building at 198.31, both lower than that approved by the BZA Order and that agreed to in the Agreement. The Building Permit Plans showed the height of the roof of the penthouse at 209.08 feet and showed the height of the penthouse parapet required to screen the air handling units at 213.10 feet. The overall height of the penthouse was less than permitted by Section 400.7 of the Zoning Regulations and was consistent with the plans shown to Appellants in May, 2015.

Construction on the Property pursuant to the Building Permit started immediately following issuance of the Building Permit. Foundation to grade construction had commenced in April, 2015. The Building Permit – along with all other permits and Traffic Control Plans for the construction activity on the Property - were laminated and displayed on a plywood board at the front of the Property. The Property is immediately adjacent to Appellants' property.

Appeal: The instant appeal was filed on October 27, 2015, which is 132 days after DCRA issued the Building Permit. When the appeal was filed, construction on the project was nearly complete. Specifically, construction of the roof of the main building was complete, and all of the parapet walls were complete. The overbuild of the roof was 80% complete. The elevator shaft and stair towers were constructed at full height and the roof was framed. The penthouse walls were erected and most of the roof trusses were in place.

III.
TIMEFRAME FOR FILING AN APPEAL UNDER
SECTION 3112.2 OF THE ZONING REGULATIONS

Section 3112.2 of the Zoning Regulations provides that an appeal of a zoning decision must be filed “within 60 days from the date the person appealing the administrative decision had notice or knowledge of the decision complained of, or reasonably should have had notice or knowledge of the decision complained of, whichever is earlier.” 11 DCMR § 3112.2 (a). *Waste Mgmt. of Md., Inc. v. DC Bd. of Zoning Adjustment*, 775 A.2d 1117, 1121-22 (D.C. 2001). The Zoning Commission adopted this provision in Z.C. Order No. 02-01, dated February 7, 2003, “in order to reduce uncertainty and litigation over the timeliness of Board of Zoning Adjustment appeals.” The adoption of Section 3112.2 in Z.C. Order No. 02-01 “codifies the principles established in *Waste Management (supra)*, and prior court decisions by requiring all appeals to the Board pursuant to the Zoning Act to be filed within sixty (60) days of the date the appellant had actual or constructive knowledge of the administrative decision complained of.” *Id.* at p. 2 (emphasis added).

The 60-day appeal period begins when an appellant has actual or constructive notice or knowledge of a zoning decision. Once an individual has actual or constructive notice or knowledge that a zoning decision has been made, he is obligated to undertake due diligence to determine the nature of the decision in order to timely appeal. *See Diamond v. Davis*, 680 A.2d 364, 372 (D.C. 1996) (the period for filing a claim is triggered by inquiry notice, which is the knowledge which “a plaintiff would have possessed after due investigation”).

“Ordinarily, the building permit is the document that reflects a zoning decision about whether a proposed structure, and its intended use as described in the permit application, conform to the zoning regulations.” *Basken v. D.C. Bd. of Zoning Adjustment*, 946 A.2d 356, 364 (D.C. 2008); *see also Schonberger v. D.C. Bd. of Zoning Adjustment*, 940 A.2d 159, 161 n. 2 (D.C. 2008)

(describing the BZA's determination that a building permit "contained the relevant zoning decision").

However, "the zoning statute and regulations do not tie the time for appealing to the BZA to the issuance of a specified type of notice." *Basken*, 946 A.2d at 364. Instead, courts look to when the appellants knew or should have known of the zoning decision complained of. *Id.*; 11 DCMR § 3112.2 (providing for an appeal by any person aggrieved by "any order, requirement, decision, determination, or refusal" within sixty days from the date the person knew or reasonably should have known of "the decision complained of"); *BZA Appeal No. 17468 of ANC 6A* at p. 4 (February 16, 2007) ("the regulations require that the Board determine if there is an earlier date when the Appellant reasonably should have known of the authorization provided by the building permit").

IV.

THIS APPEAL WAS UNTIMELY FILED AND MUST BE DISMISSED

Based on the facts of this case, there is no question that Appellants had actual knowledge of the proposed roof structure prior to the issuance of the Building Permit. The Appellants were actively involved in the development of the plans for the Property, knew of Owner's multiple discussions with the Zoning Administrator and actively monitored the status of construction on the Property:

- Owner presented the March Plans to the Appellants at a meeting on March 18, 2014.
- Owner sent the March Plans to Appellants on March 19, 2014, and again in April, 2014.
- Owner re-affirmed via email in September, 2014, and in February, 2015, that the March Plans would be the plans submitted for Building Permit.

- Owner met with Appellants in May, 2015, and reviewed the Building Permit Plans with Appellants. At this meeting, Owner informed Appellants that the Building Permit Plans had been submitted to DCRA in July, 2014.

Based on these facts, it is clear that Appellants knew or should have known about the issuance of the Building Permit in June, 2015. In fact, because above-grade construction began on the Property in mid-June, 2015, and because the Owner posted the Building Permits and other issued permits in a conspicuous location at the front of the Property, Appellants have no plausible claim that they were unaware that the Building Permit had issued. Yet, Appellants did not file their appeal until October 27, 2015 -- 132 days after the Building Permit issued.

Appellants attempt to make this appeal timely by stating that they were unaware of Owner's plans for the penthouse until Owner began construction of the penthouse in October, 2015. *See* Letter in Support of Appeal, p. 3. This is simply untrue. The Owner presented the revised penthouse height to the Appellants at a meeting held to review the refinements to the plans, and the Owner emailed the March Plans -- which clearly showed the increased penthouse height - to Appellants in both March and April, 2014. The Building Permit Plans show the final approved penthouse height of 213.10 feet, and the Owner met with Appellants in May, 2015, to review the Building Permit Plans and discuss the penthouse.

Indulging every inference favorable to Appellants, Appellants were required to file this appeal by August 16, 2015 — 60 days after the issuance of the Building Permit on June 17, 2015. *See Georgetown Residents Alliance v. D.C. Bd. of Zoning Adjustment*, 816 A.2d 41, 49-50 (D.C. 2003) (upholding Board's decision that appeal was untimely where record was clear that ANC had knowledge of the issuance of the permit, the community generally was aware of it, and the developer of the project had engaged with the ANC and community concerning the permit).

Indeed, in *Appeal No. 17468 of Advisory Neighborhood Commission 6A*, this Board held that neighbors were on notice of the issuance of the building permit when it was posted on the property and construction began. The construction activity, even if it did not show the exact nature of the construction, put neighbors on notice of that a building permit had issued. The Board said: “[t]he regulations contemplate an obligation within a reasonable period of time to undertake due diligence to determine [the] nature [of the construction].”

Similarly, in BZA Appeal No. 17966, this Board held that the appellant “should have known of the permit issuance at some point between... when the permit was posted on the property... and when actual demolition work began.” The Board asserted that since the appellant “lives immediately next door to the subject property [and] sees it daily, [it] should have been aware of [the construction] activities during this period.” BZA Appeal No. 17966, p.4.

Moreover, the Zoning Regulations do not tie the time for appealing to the BZA to the issuance of a specific type of notice. “[O]ur case law specifically recognizes that a letter from DCRA or the Zoning Administrator conveying a zoning decision may be an appealable decision. *Basken*, 946 A.2d at 366. In BZA Appeal No. 18469, the Board found that the “decision complained of” to be appealed was the Zoning Administrator’s determination that the building permit plans complied with the Zoning Regulations, not the issuance of the building permit itself. The Board determined that the appellant had knowledge of the Zoning Administrator’s approval once (i) the decision was made known to the public through its posting of the word “approved” next to zoning in DCRA’s Property Information Verification System (“PIVS”), and (ii) once the appellant had knowledge of that posting. *See* BZA Appeal No. 18469, p. 8. The Board further found that “[t]here is no requirement that a person know the basis for the decision,” explaining that appellant did not need to “analyze whether the approved plans did, in fact, comport with the

zoning regulations” in order to have knowledge of the Zoning Administrator’s decision that they did. BZA Appeal No. 18469, p. 8.

Here, the date the Building Permit issued is the absolute latest that Appellants should have known of the decision. In reality, Appellants had actual knowledge of the proposed plans much earlier than that.

Under even less compelling circumstances, this Board recognized that the appeal period runs from the date a party has notice (or should have notice) of the decision complained of, not simply from the date a building permit was issued. *See BZA Appeal No. 18300 of Lawrence M. and Kathleen Ausubel* (November 8, 2011).

In *Ausubel*, a property owner had filed a building permit application with DCRA to construct an addition on his home. Neighbors of the property owner, who opposed the construction, had multiple discussions with the property owner and Zoning Administrator about their opposition to the proposed construction. Notwithstanding the neighbors’ objections, the Zoning Administrator ultimately determined that the project complied with applicable zoning regulations. The neighbors received an email from the Zoning Administrator notifying them of his decision on June 14, 2011. The building permit for the proposed project was then issued on July 15, 2011, and the neighbors filed their appeal on September 9, 2011. The Board concluded that because the appeal was filed 86 days after the Zoning Administrator emailed his decision to the neighbors, it was untimely.

Similarly, in *BZA Appeal No. 18469 of Susan Lynch*, Lynch challenged the construction of two new residences on properties that adjoined hers. DCRA issued two building permits, and separate retaining-wall permits for a retaining wall that impacted both new residences. Lynch’s counsel had direct communications with the Zoning Administrator about the proposed permits. The Zoning Administrator informed Lynch’s counsel that he was going to approve the retaining-

wall permits and, in an email with her counsel, Lynch acknowledged that she was aware that the Zoning Administrator had approved the permits. The permits themselves were issued several weeks later but Lynch did not file an appeal with the Board until 60 days after issuance.

The BZA dismissed Lynch's appeal of the retaining-wall permits as untimely. Specifically, the Board concluded that her 60-day appeal period ran from the time her counsel knew of the Zoning Administrator's decision or possibly on the day that the email proved that she had direct knowledge of the Zoning Administrator's decision. *See id.* *See also Basken, 946 A.2d 356* (appeal period ran from date of DCRA letter, and not subsequently issued certificate of occupancy); *BZA Appeal No. 16849 of Robert Lehrman* (May 8, 2003) (appeal period ran from final determination letter, rather than issuance of building permit and other re-affirmations of that determination).

Like the appellants in *Ausubel* and *Lynch*, Appellants in this proceeding were well aware of the Zoning Administrator's decision to permit modifications to the roof structure and Owner's subsequent plans to further modify it in response to issues raised by Appellants. Owner met with and corresponded with Appellants throughout the development process in order to gain their support for this project. Indeed, Owner even modified aspects of the project to address Appellants' concerns.

More recently, in BZA Appeal No. 18888, the Board granted a Motion to Dismiss when an appellant had been constantly monitoring a project but appealed more than 60 days following the date that the Zoning Administrator approved the permit for zoning purposes. Because the appeal was filed more than 60 days after that date, the appeal was not timely even though the appeal was filed within 60 days of the building permit. *See Transcript of BZA Public Meeting on February 10, 2015, p.16.* In the present case, it is clear that Appellants were actively monitoring construction activity on the Property and should have appealed at the latest within 60 days of the issuance of the Building Permit.

Notwithstanding their involvement in the development process, Appellants claim that they only had notice of the plans for the Property when the Owner commenced construction of the penthouse – after the building was constructed to its full height. This position is entirely inconsistent with the factual record, and the appeal should be dismissed as untimely.

V.

**THERE IS NO BASIS FOR AN EXTENSION OF THE 60-DAY TIME PERIOD FOR
FILING THIS APPEAL**

Because this appeal is untimely, the D.C. Zoning Regulations allow this Board to hear the appeal only if both (1) there are exceptional circumstances outside the Appellants' control, which could not have been reasonably anticipated, and that substantially impaired the Appellants' ability to file this appeal to the Board; and (2) the extension of time will not prejudice the Owner. 11 DCMR § 3112.2 (d). Even assuming that this inquiry is justified, this appeal could be heard only if Appellants satisfied both tests. They cannot satisfy either one; therefore, this appeal must be dismissed.

1. There Are No Exceptional Circumstances Outside of Appellants' Control That Substantially Impaired Their Ability To File A Timely Appeal.

As set forth above, Appellants knew of the planned height and configuration of the penthouse with more than sufficient time to file a timely appeal. Owner began engagement with Appellants as early as December, 2013, to discuss the refinements. Owner presented the plans showing the changes to the penthouse height in March, 2014. Owner again met with Appellants in May, 2015, to review the Building Permit Plans. At the absolute latest, Appellants had actual notice or knowledge of the decision when the Building Permit was issued in June, 2015.

Yet, they did not file a timely appeal. There are no exceptional circumstances outside of Appellants' control that could have substantially impaired their ability to do so. Appellants argue

that they were not provided with plans prior to October 22, 2015. That statement is not accurate based on the undisputable facts set forth herein.

In BZA Appeal No. 17414, the Board found unanticipated exceptional circumstances outside the appellant's control, which prevented them from filing the appeal within 60 days of the issuance of the permit, and thus concluded that the appeal was timely filed. The relevant and specific facts in BZA Appeal No. 17414 do not apply to the present case: in that case, the property owner received a building permit to construct a 20-foot (i.e., possibly two story) garage, but constructed a one-story garage only. Owner represented to appellant neighbors that he would not build a second story. Two years later, and clearly more than 60 days after the issuance of the permit, property owner commenced construction of the second story. The Board found that "[o]nce the builder had completed construction of the... one story garage... there was no reason for the appellants to believe that a second story would be added," and at that point "the appellants would not have had any reason to file an appeal and could not have anticipated that a second story would ever be added to the garage." BZA Appeal No. 17414, pp. 4-5.

In the present case, Owner informed Appellants at every possible step that it planned to build the project with the penthouse as modified based on the numerous discussions with the Appellants. It is clear that "the Board need not countenance delay in taking an appeal when it is merely convenient for an appellant to defer in making that decision." *BZA Appeal No. 17411 of Basken*, at p. 6.

2. Allowing This Appeal to Proceed Will Prejudice The Owner.

Allowing this appeal to proceed will cause substantial prejudice to the Owner. The Owner has repeatedly sought the Zoning Administrator's approval and Appellants' support for refinements to the project. Before construction began, Owner spent a great deal of time and money working with its neighbors and the Zoning Administrator to ensure that the project complied with

applicable regulations. The changes that were made after the issuance of the February, 2014, Zoning Administrator determination letter were made in direct response to requests from Appellants and were presented to Appellants in multiple ways (e.g., via email, in meetings, in discussions from the roof of Appellants' building).

Appellants waited until construction was nearly complete to put the Owner on notice of their complaints. As a practical matter and as a direct result of Appellants' delay, construction on the project was nearly complete before the Owner was given notice of the challenge.

Between June, 2015, when the Building Permit was issued, and October 27, 2015, when this appeal was filed, Owner had invested a tremendous amount of time, energy, and money in construction at the Property—all without knowledge of Appellants' objection. The project is on schedule to deliver in early Spring, 2016, less than two months following the hearing on this appeal. If this very delayed appeal is allowed to move forward, the Owner will not be able to obtain its certificate of occupancy and sell any of the units in the building – including both market-rate and affordable units. As a result, Owner would be prejudiced if this Board allows this untimely appeal to proceed.

The appeal deadline is designed to avoid this exact situation. Appellants should not be rewarded by their dilatory behavior “lying in wait” to bring this appeal when they had notice of the relevant facts more than 19 months before their appeal was filed.

VI.
CONCLUSION

Based upon the clear language of the Zoning Regulations and upon prior rulings by this Board and by the D.C. Court of Appeals, this appeal is untimely and there is no basis for extending the 60-day appeal period. Accordingly, the appeal should be dismissed.

Respectfully submitted,

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