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November 26, 2013

NOTICE FOR PUBLIC COMMENT

A Petition for Adoption of Rules (Petition) was filed on October 3, 2013 with the Coastal Resources Management Council (CRMC) pursuant to R.I.G.L. § 42-35-6 and Section 14.8 of the CRMC Management Procedures. The Petition seeks to amend Sections 920.1.B.2(f) and (g) of the CRMC Salt Pond Region Special Area Management Plan (SAMP) as they pertain to parcels of land located within CRMC-designated Lands of Critical Concern of the Salt Pond Region SAMP. Sections 920.1.B.2(f) and (g) require a 225-foot setback and a 200-foot buffer, respectively, for all development activities within Lands of Critical Concern. Relief from the setback and buffer regulations requires a Special Exception as defined in Section 130 of the Coastal Resources Management Program unless the land was subdivided before the SAMP regulations adoption. For Section 920.1.B.2(f) the adoption date is April 12, 1999 and for Section 920.1.B.2(g) the adoption date is November 27, 1984. A similar rule is in effect for the CRMC Narrow River SAMP.

The Petitioners seek to amend the SAMP regulations by exempting parcels from the Special Exemption requirement provided that they were originally platted prior to the respective SAMP rule adoption dates and then were subsequently the subject of an administrative subdivision. The proposed rule change could affect parcels in CRMC-designated Lands of Critical Concern located within the Towns of Westerly, Charlestown, South Kingstown and Narragansett.

The Petition has been assigned file number **2013-10-026** and is available for review, including the applicable plat maps and site plans, in the CRMC office during its business hours. Additionally, the Petition itself is available on the CRMC web pages here:
http://www.crmc.ri.gov/applicationnotices.html.

The CRMC Planning & Procedures Subcommittee has the Petition under consideration and is seeking public comment in preparation for developing a recommendation to the full Council as to whether to proceed with rule-making under the Administrative Procedures Act. The Subcommittee invites any interested parties to file written comments regarding the Petition **on or before December 31, 2013**. Written comments should be mailed to the CRMC address above, attention James Boyd, or emailed directly to jboyd@crmc.ri.gov.

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Before the RHODE ISLAND COASTAL RESOURCES MANAGEMENT COUNCIL

In the Matter of Kevin and Suzanne Delane Petition No.:

PETITION FOR REGULATION CHANGE

INTRODUCTION

So that its purpose of protecting the salt ponds through a reduction in development density may be achieved in a manner consistent with both Rhode Island law and the United States Constitution, Petitioners Kevin and Suzanne Delane request, pursuant to R.I. Gen. Laws § 42-35-6, that the Coastal Resources Management Commission amend sections 920.1.B.2(f) and (g) of the Salt Pond Special Area Management Plan. The proposed amendment would clarify that relief from the setback and buffer zone requirements imposed by those provisions

> requires a Special Exception as defined in Section 130 of the RICRMP, unless the lands were subdivided prior to [the adoption date] **or were originally platted prior to [the adoption date of the regulation] and were subsequently the subject of an administrative subdivision, as defined by R.I. Gen. Laws § 45-23-32(2),** and cannot accommodate the requirement.

FACTS

1. Petitioners Kevin and Suzanne Delane (the "Delanes" or "Petitioners") are the owners of real property located on the easterly side of West Beach Road in Charlestown, Rhode Island, which is identified by the Town of Charlestown as Map 2, Lot 339 (the "Delane Lot").

2. The Delane Lot, as it currently exists, was created through the consolidation of several smaller lots created when two larger parcels were subdivided prior to 1974.

3. The easterly section of the Delane Lot was platted in February 1926 as lots 203, 204, 205, 206, 207, 208, 209, 210 and 211 of Section D of the Quonocontaug Highlands Section D plat, which is recorded in the Charlestown Land Evidence records at Plat Book 1, Map 76. Lots 203,

204, 205, 206, 207 and 208 "fronted" on a 40' right of way or "paper street" extension of North Avenue. Lots 209, 210 and 211 "fronted" on the opposite side of the paper street. *See* **Exhibit 1**.

4. The western section of the Delane Lot originally was part of a large parcel of land that was subdivided by Mildred E. Richardson prior to February 1974. *See* **Exhibit 2**. One of the resulting lots was a 3.30 acre parcel, originally designated as Lot B but later re-designated as lot 301 by the Charlestown Tax Assessor. *See* **Exhibit 3**.

5. In 1999, Robert Frost, who owned all of the aforementioned lots, undertook an administrative subdivision which took land from lot 301 and added it to the merged lots 203-208 to create a single 2.10 acre lot. *See* **Exhibit 4**. This administratively combined lot was designated by the Charlestown Tax Assessor as Map 1, lot 339. *See* **Exhibit 5**.

6. The 1999 administrative subdivision also resulted in lots 209, 210 and 211 being combined with the remaining part of lot 301 and the 40' right of way to create lot 339. *See Id.*

7. The administrative subdivision resulted in a decrease, rather than an increase, in the number of building lots, as three potential building lots in the form of lots 209-211, lots 203-208 and lot 301 were consolidated into the two lots now known as lots 301 and 339.

8. In addition, the administrative subdivision resulted in the creation of a far better lot upon which to build than lots 203-208 standing alone, because it permits the house and septic system to be placed on the western side of the enlarged lot 339.

9. Kevin and Suzanne Delane purchased lot 339 in 2001 with an expectation that they could build a single family dwelling on the property.

10. The Rhode Island Department of Environmental Management subsequently issued a permit for the installation of a denitrifying individual sewage disposal system ("ISDS") on the Delane Lot.

11. In 2006, the Delanes sought from the Coastal Resources Management Commission ("CRMC") a Preliminary Determination regarding their plans to construct a single family dwelling serviced by a denitrifying ISDS and a private well on the Delane Lot.

12. The Preliminary Determination issued in April 2007 raised issues about the suitability of the Delanes' plan based upon an interpretation of the Special Area Management Plan for the Salt Pond Region (the "Salt Pond SAMP") that requires enhanced minimum setbacks and buffer zones on land subdivided after November 27, 1984 unless a special exception is obtained.

ARGUMENT

I. One purpose of the Salt Pond SAMP is to protect the salt pond watersheds by reducing the density of development within the watersheds.

The Rhode Island legislature has required the CRMC to develop special area management plans "to provide for the integration and coordination of the protection of natural resources, the promotion of reasonable coastal-dependent economic growth, and the improved protection of life and property in the specific areas designated [by the CRMC] as requiring such integrated planning and coordination." R. I. Gen. Laws § 46-23-6(1)(v)(B). As a result, the CRMC promulgated and adopted the Salt Pond SAMP, which covers properties within the salt ponds watershed in the Towns of Westerly, Charlestown, South Kingstown and Narragansett, Rhode Island. The original Salt Pond SAMP, adopted on November 27, 1984, focused on alleviating water pollution through regulations intended to reduce the density of development within the salt ponds watershed. *See generally,* The Salt Pond Region Special Area Management Plan (Coastal Resources Management Commission August 1984)("1984 Salt Pond SAMP") at §§ 140 and 310.1. *See also,* Rhode Island's Salt Pond Region: A Special Area Management Plan (Coastal Resources Management Commission April 12, 1999) ("Salt Pond SAMP") at § 130.B.3.

The 1984 Salt Pond SAMP established three specific land-use classifications based upon the then-existing density of development. These classifications were (1) Self-Sustaining Lands, which

were defined as "lands which were undeveloped or developed at a density of not more than 1 residential unit per 2 acres"; (2) Lands of Critical Concern, which were defined as lands with the same development characteristics as Self-Sustaining Lands but which abut sensitive salt pond areas or overlie acquifer recharge areas for existing or potential water supply wells; and (3) Lands Already Developed Beyond Carrying Capacity, which were defined as "lands . . . developed at densities beyond carrying capacity, frequently at one residential or commercial unit per 1/8 to ½ acre." 1984 Salt Pond SAMP at § 320.1.A-C. After the Salt Pond SAMP was adopted, the Town of Charlestown and other communities within the watershed revised their zoning ordinances to adopt the 2 acre minimum housing lot size recommended by the SAMP, thereby dramatically reducing potential building development in the watershed. Salt Pond SAMP at § 130.D.1.

The 1984 Salt Pond SAMP created various management policies and regulations applicable to the various classifications of property located within the salt ponds watershed. Included among the regulations applicable to property classified as Lands of Critical Concern was a requirement that a "200 foot wide natural buffer zone shall be provided in those areas that abut the salt ponds, their tributaries and contiguous wetlands" in which the construction of buildings and sewage disposal systems or leachbeds was to be prohibited. 1984 Salt Pond SAMP at § 320.1.B.2(f).

The CRMC adopted a substantially revised Salt Pond SAMP on April 12, 1999. The revision included additional regulations intended to reduce the cumulative impact of on-going development in the salt ponds watershed. Among these regulations was a requirement for a "minimum 225' setback from the salt ponds, their tributaries, and coastal wetlands, including tributary wetlands . . . for ISDS in Lands of Critical Concern for activities within 200' of a coastal feature and all watershed activities as defined in Section 900.B.3 and 900.B.4 ." Salt Pond SAMP at § 920.1.B.2(f).

Of particular relevance to this Petition are the exceptions from the regulations imposing setbacks and buffer zones on Lands of Critical Concern. As originally adopted, there was no

exception to the buffer zone regulation. *See* 1984 Salt Pond SAMP at § 320.1.B.2(f). The SAMP was revised in 1987, however, to specifically provide that the regulation would not apply to properties platted before the adoption of the 1984 Salt Pond SAMP. Section 320.1.B.3 stated,

> The definition and regulations pertaining to areas of critical concern apply to those properties platted after the adoption date of this plan. Alterations to coastal features or within 200 feet of a coastal feature on properties platted prior to the adoption of this plan will, where possible, conform to the regulations of this section.
>
> In cases where, due to the size or configuration of a lot that was platted prior to the adoption of this plan it is not possible to provide a 200 foot buffer, then the determination of the boundaries of a buffer zone must balance the property owner's rights to enjoy their property with the Council's responsibility to preserve, and where possible, restore ecological systems. Recommended Buffer Zones shall be established according to the environmental values and sensitivities of the site as assessed by the Council's staff engineer and biologist.

The Salt Pond Region Special Area Management Plan (Coastal Resources Management Commission June 1, 1987) at § 320.1.B.3.

When the Salt Pond SAMP was revised in 1999, this provision was replaced by provisions providing that relief from the buffer zone regulation, as well as the newly added setback requirement, may be obtained only through a Special Exception, unless the lands were "subdivided" prior to April 12, 1999, in the case of the setback requirement,[1] or November 27, 1984, in the case of the buffer zone requirement.[2] Salt

[1] Section 920.1.B.2(f) of the Salt Pond SAMP provides as follows: "A minimum 225' setback from the salt ponds, their tributaries, and coastal wetlands, including tributary wetlands, is required for OTWS in Lands of Critical Concern for activities within 200' of a coastal feature and all watershed activities as defined in Section 900.B.3 and 900.B.4 . Relief from this regulation requires a Special Exception as defined in Section 130 of the RICRMP, unless the lands were subdivided prior to April 12, 1999 and cannot accommodate the requirement."

[2] Section 920.1.B.2(g) of the Salt Pond SAMP provides as follows: "A 200' buffer zone from the salt ponds, their tributaries, and coastal wetlands, including tributary wetlands, is required for all development activities within 200' of a coastal feature and all watershed activities as defined in Section 900.B.3 and 900.B.4 in Lands of Critical Concern. Relief from this requirement requires a Special Exception as defined in Section 130 of the RICRMP, unless the lands were subdivided prior to November 27, 1984 and cannot accommodate the requirement."

Pond SAMP at § 920.1.B.2(f) and (g). Thus, property that was subdivided before the regulations were adopted is specifically excluded from having to comply with them.

II. Exclusion of administrative subdivisions from the application of Salt Pond SAMP §§ 920.1.B.2(f) and (g) is consistent with the definitions provided by the Development Review Act.

The exclusions from the setback and the buffer zone requirements do not apply to land that is "subdivided" after the regulations were adopted unless a Special Exception is granted. Salt Pond SAMP at §§ 920.1.B.2(f) and (g).

The word "subdivide" necessarily contemplates a division of land into smaller parcels. The Merriam Webster dictionary defines "subdivide" as a verb meaning "(1) to divide the parts of into more parts; (2) to divide into several smaller parts; *especially*: to divide (a tract of land) into building lots." "Subdivide." Merriam-Webster.com. Accessed September 17, 2013. http://www.merriam-webster.com/dictionary/subdivide. *See also*, Black's Law Dictionary Free Online Legal Dictionary, 2nd Ed. Accessed September 24, 2013. http://thelawdictionary.org/subdivide. (Defining "subdivide" as "To divide a part into smaller parts; to separate into smaller divisions."). Thus, the plain and ordinary meaning of the word "subdivided" would imply that buffer zones and setbacks are required only on land that was divided into smaller lots after the Salt Pond SAMP regulations were adopted. However, the CRMC disregards both the common and the effective meaning of this word in its regulations as well as in its application of the regulations.

There is no definition of the word "subdivided" in the Salt Pond SAMP. Instead, the sections of the Salt Pond SAMP relating to Lands of Critical Concern rely upon the definition of the word "subdivision" contained in the Rhode Island Coastal Resources Management Program ("RICRMP"), a set of substantive regulations that serve as the CRMC's management plan for the State's coastal resources. *See, e.g.*, Salt Pond SAMP § 920.1.B.2(a). The RICRMP defines "subdivision" as

> the *division of a lot, tract, or parcel of land into two (2) or more lots, tracts, parcels or other divisions of land* for sale lease or other conveyance or for development simultaneously or at separate times. It also includes re-subdivision and when appropriate to the context, shall relate to the process of subdividing or to land subdivided.

RICRMP at § 325.A.2 (emphasis added). This definition very clearly acknowledges that a subdivision involves creating additional lots by dividing property into two or more lots. It fails, however, to recognize other types of subdivisions that do not yield an increased number of lots and, in fact, may even result in a decreased number of lots for development. As a result, the Salt Pond SAMP also fails to account for such actions.

Some provisions of the Salt Pond SAMP specifically refer to definitions provided in the Rhode Island Development and Subdivision Review Enabling Act of 1992 ("Development Review Act"), R.I. Gen. Laws § 45-23-25, *et seq.*. *See, e.g.*, Salt Pond SAMP at § 920.1.B.2(c)(applying the Development Review Act definition to the terms "major land development project or . . . major subdivision of land"). Although neither the Salt Pond SAMP nor the RICRMP specifically refer to the definitions provided by the Development Review Act in relation to the term "subdivision", the CRMC has indicated that it has adopted the provisions of the Development Review Act in order to maintain "consistency with state land development legislation." *See* RICRMP § 320.A.3.

The Development Review Act was enacted, *inter alia*, "to require that the regulations and standards for all land development projects and subdivisions be sufficiently definite to provide clear direction for development design and construction and to satisfy the requirements for due process for all applicants for development approval." R.I. Gen. Laws § 45-23-29(b)(8). The statute includes a set of definitions that the legislature directed "shall be controlling in all local ordinances, regulations, and rules created under this chapter." *Id.* at § 45-23-32.

The Development Review Act contains a number of definitions relevant to the interpretation of the word "subdivided". First, it defines "subdivision" as

> *The division or re-division, of a lot, tract or parcel of land into two or more lots, tracts, or parcels.* Any adjustment to existing lot lines of a recorded lot by any means is considered a subdivision. All re-subdivision activity is considered a subdivision. The division of property for purposes of financing constitutes a subdivision.

R.I. Gen. Laws § 45-23-32(51)(emphasis added). It also defines "division of land" as "a subdivision." *Id.* at § 45-23-32(11). "Resubdivision" is defined as

> Any change of an approved or recorded subdivision plat or in a lot recorded in the municipal land evidence records, or that affects the lot lines of any areas reserved for public use, or that affects any map or plan legally recorded prior to the adoption of the local land development and subdivision regulations. For the purposes of this act any action constitutes a subdivision.

Id. at § 45-23-32(38).

Most importantly, and consistent with the common meaning of "subdivision", the Development Review Act recognizes that although a re-subdivision results in a differently configured tract of land, such an adjustment of lot lines may not result in additional lots. This action is considered to be an "administrative subdivision", which is defined as

> Re-subdivision of existing lots *which yields no additional lots for development*, and involves no creation or extension of streets. The re-subdivision only involves divisions, mergers, mergers and division, or adjustments of boundaries of existing lots.

Id. at § 45-23-32(2)(emphasis added). Thus, the Development Review Act recognizes a distinction that the RICRMP and the Salt Pond SAMP do not – that, in some cases, property can be "subdivided" without creating any additional lots for development.

Because it has acknowledged that its regulations should be consistent with the Development Review Act, the CRMC should recognize that administrative subdivisions do not result in any additional building lots and amend the Salt Pond SAMP to treat such actions in a manner consistent with the SAMP's stated purpose of reducing the density of development. Otherwise, property owners undertaking administrative subdivisions are likely to be misled and prejudiced because the undeniably ambiguous language of sections 920.1.B.2(f) and (g) of the

Salt Pond SAMP is not consistent with the definitions provided in the Development Review Act "to provide clear direction for development design and construction and to satisfy the requirements for due process for all applicants for development approval." R.I. Gen. Laws § 45-23-29(b)(8).

III. The relief requested by Petitioners is consistent with the density reduction policies incorporated in the Salt Pond SAMP.

Petitioners' request to amend the Salt Pond SAMP to exclude administrative subdivisions from the application of section §§ 920.1.b.2(f) and (g) of the SAMP is entirely consistent with the SAMP's purpose of alleviating water pollution by reducing the density of development within the salt pond watersheds. *See* Salt Pond SAMP at § 130.B.3. Because administrative subdivisions do not create any additional lots, such subdivisions do not increase the density of development. In some cases, such as the administrative subdivision that created the Delane Lot, the number of building lots actually decreases, effectively reducing the density of potential development. Therefore, administrative subdivisions, such as the one at issue here, should be encouraged rather than penalized.

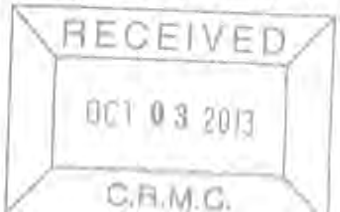
A nutrient loading study conducted by the University of Rhode Island in the 1980's indicated that sustainable development in the salt ponds watershed could be accomplished by requiring building lots to be a minimum of 2 acres in size. Unfortunately, pre-existing development in many areas close to the salt ponds had resulted in densities far greater than those recommended by the study. These areas, deemed Lands Developed Beyond Carrying Capacity by the Salt Pond SAMP, frequently have houses crowded together on 10,000 to 20,000 square foot lots. In an effort to mitigate the effects of these more densely developed areas, the Salt Pond SAMP recognizes that land located up-gradient of Lands Developed Beyond Carrying Capacity should be developed at as low a density as possible. Salt Pond SAMP at § 310.3.A.4. As a result, the SAMP recommends reducing

densities in "undeveloped areas previously platted at extremely high densities" through amendments to zoning ordinances and other actions. Salt Pond SAMP at § 920.1.C.3(a).

The Delane Lot is in an area adjacent to, and up-gradient of, Lands Developed Beyond Carrying Capacity. The administrative subdivision that created it and Lot 301 merged several lots which were platted in 1926 at densities far greater than is now permitted by the Salt Pond SAMP to create just two lots, both of which are larger than 80,000 square feet. Merger is an accepted method of combining two or more contiguous substandard lots in order to create a single buildable lot. R.*J.E.P. Associates v. Hellewell*, 560 A.2d 353, 355 (R.I. 1989). The law permits and encourages merger of contiguous lots of common ownership, especially if it will result in reduced residential densities and traffic congestion. *See Brum v. Conley*, 572 A.2d 1332, 1334 (R.I. 1990); *Baker v. Zoning Board of Review of Jamestown*, Superior Court No. NC 07-0416 (May 4, 2009). Thus, the action that CRMC has indicated should preclude development of the Delane Lot is actually one that furthers CRMC's stated policy of reducing densities in the salt pond watershed generally and in areas adjacent to Lands Developed Beyond Carrying Capacity specifically. As a result, the Salt Pond SAMP should be amended to recognize that administrative subdivisions after the adoption of sections 920.1.B.2(f) and (g) do not disqualify properties from the exceptions to the buffer zone and setback requirements provided in those sections.

IV. The relief requested by Petitioners is necessary to prevent claims that the CRMC's interpretation of the Salt Pond SAMP constitutes a taking of private property for public use.

The exceptions from the setback and buffer zone requirements provided by sections 920.1.B.2(f) and (g) of the Salt Pond SAMP can also be considered "grandfather clauses." The general purpose of a "grandfather clause" is to preserve rights and prevent hardship to individuals who have existing uses. *Spaght v. State of Oregon Dept. of Transportation*, 564 P.2d 1092, 686 (Or. App. 1977). The specific purpose of the grandfather clauses at issue clearly was to



preserve rights to develop land as it existed immediately before the date the regulations were adopted.

The Fifth Amendment to the United States Constitution provides that private property shall not "be taken for public use, without just compensation." U.S. Const. amend. V. The Supreme Court recognized long ago that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). "[T]he Fifth Amendment is violated when land use regulation 'does not substantially advance legitimate state interests or denies an owner economically viable use of his land.'" *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 (1992) (quoting *Agins v. Tiburon*, 447 U.S. 255, 260 (1980)).

To determine whether a regulation effects a taking, a court must consider, among other factors, "the economic impact of the regulation, and, particularly, the extent to which the regulation interferes with distinct, investment-backed expectations." *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978). A regulation may be found to interfere with a property owner's reasonable investment-backed expectations when a regulation deprives the owner of the ability to develop that property. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 (1992).

The exceptions to the setback and buffer zone requirements imposed by the Salt Pond SAMP do not apply to land that was "subdivided" after the adoption of the regulations imposing those requirements. Salt Pond SAMP §§ 920.1.B.2(f) and (g). The plain and ordinary meaning of the word "subdivided" is an action that results in a parcel of land being divided into two or more smaller parts. *See supra* at 6. Therefore, it is reasonable for an owner of land that had not been divided into smaller parts after the adoption of those regulations to expect that development would be permitted without having to fulfill the setback and buffer zone requirements. A finding that such development could not occur because the property had been the subject of an administrative

subdivision that consolidated smaller lots into fewer, larger lots would undeniably interfere with the property owner's reasonable investment-backed expectations.

Moreover, such a finding is not consistent with the Salt Pond SAMP's established purpose of reducing the density of development within the salt pond watersheds. *See* Salt Pond SAMP at § 130.B.3. Land use regulation for the purpose of protecting legitimate state interests is constitutionally permissible only if the regulation substantially advances the asserted state interest. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 127 (1978). A regulation will be deemed to constitute a taking requiring compensation under the Fifth Amendment if the regulation "utterly fails to further the end advanced as the justification for the [regulatory] prohibition." *Nollan v. California Coastal Commission*, 483 U.S. 825, 837 (1987).

The CRMC's current interpretation of the Salt Pond SAMP, which treats administrative subdivisions resulting in the same or a fewer number of lots the same as subdivisions that increase density by creating additional lots for development, does not substantially advance the CRMC's interest in reducing development density. As a result, application of the setback and buffer zone regulations to administrative subdivisions occurring after the adoption of those regulations may be considered a compensable taking. Thus, the SAMP should be amended, as requested by Petitioners, to recognize that administrative subdivisions resulting in the same or a fewer number of lots are not the same as subdivisions that create additional lots.

CONCLUSION

Property owners who consolidate multiple lots created though subdivisions platted prior to 1999 in order to create fewer, larger lots that are better suited for development are acting in a manner consistent with the density reduction purposes of the Salt Pond SAMP. The Development Review Act recognizes that such actions are different than subdivisions which result in a larger number of buildable lots. The Salt Pond SAMP should be amended, as requested by the Petitioners,

to recognize that difference in order to achieve a consistency with the Development Review Act and prevent constitutional challenges to the SAMP.

Respectfully submitted,

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By their attorney,

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