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## **Byron Property Developments Pty Ltd v Byron Shire Council [2010] NSWLEC 1026 (5 February 2010)**

Last Updated: 9 February 2010

NEW SOUTH WALES LAND AND ENVIRONMENT COURT

CITATION: [Byron Property Developments Pty Ltd v Byron Shire Council \[2010\] NSWLEC 1026](#)

PARTIES: APPLICANT [Byron Property Developments Pty Ltd](#)

RESPONDENT [Byron Shire Council](#)

FILE NUMBER(S): 10399 of 2009

CATCHWORDS: THREATENED SPECIES :- Removal of threatened species, s5A(1) and (2) of the EPA Act.

LEGISLATION CITED: [Environmental Planning and Assessment Act 1979](#)  
[Threatened Species Conservation Act 1995](#)

CASES CITED: [Corowa v Geographe Point Pty Ltd & Anor \[2007\] NSWLEC 121](#)  
[Gales Holdings Pty Limited v Tweed Shire Council \[2008\] NSWLEC 209](#)

CORAM: Dixon C

DATES OF HEARING: 8-9 September 2009 and 16 September 2009

JUDGMENT DATE: 5 February 2010

LEGAL REPRESENTATIVES

APPLICANT Mr K Webber (solicitor) SOLICITOR Wilshire Webb  
Staunton Beattie

RESPONDENT Mr A Seton (solicitor) SOLICITOR Marsdens Lawyers

JUDGMENT:

**THE LAND AND**

**ENVIRONMENT COURT**

**OF NEW SOUTH WALES**

**Dixon C.**

**5 February 2010**

**10399 of 2009 Byron Property Developments Pty Ltd v Byron Shire  
Council**

**JUDGMENT**

**Introduction**

1. The applicant, Byron Property Developments Pty Ltd seeks consent to construct four detached dwellings, two swimming pools and parking at 51 Shirley Street Byron Bay in accordance with its development application (DA10.2008.387.1) lodged on 20 June 2008.
2. The Council has issued consent to that application on 24 October 2008 but has attached conditions that delete dwelling 4.
3. This is an appeal, pursuant to section 97(1) of the Environmental Planning and Assessment Act 1979, (EPA Act) against the consent specifically the conditions which delete dwelling 4.
4. The council contends it deleted dwelling 4 because it was to be built in an area which contains vegetation of high conservation value

including vegetation which meets the floristic characteristics of one Endangered Ecological Community pursuant to the [Threatened Species Conservation Act 1995](#) Littoral Rainforest in the NSW North Coast, Sydney Basin and South East Corner Bioregions (EEC) and two threatened species pursuant to the Threatened Species Conservation Act 1995 (TSC Act) being:

1. Three *Macadamia tetraphylla* (Rough-shelled Bush Nut) trees;
2. Two *Syzygium moorei* (Durobby) trees
5. The council's contentions are:

“1. Approval of this proposed development including dwelling 4 (as originally lodged) will have unacceptable environmental impacts in terms of vegetation removal.

2. Alternatively, insufficient information has been provided to adequately assess the impacts from the proposed vegetation removal necessary to accommodate proposed dwelling 4 and therefore that component of the proposed development should not be approved.”

1. The applicant contends on its evidence, including an assessment under section 5A of the EPA Act 1979 (a seven part test) in respect of the threatened species and EEC there is no unacceptable environmental impacts in terms of vegetation removal caused by dwelling 4 and it should be approved.
2. To determine the contentions I must assess the impacts of the removal of vegetation to accommodate dwelling 4 and make a determination under section 5A of the EPA Act 1979 as to whether there is likely to be a significant effect on threatened species, populations or ecological communities, or their habitats before dealing with the section 79C considerations
3. For the reasons detailed below, I find that the applicant has not provided sufficient information to enable me to make the determination as required by section 5A(1) of the EPA Act 1979 therefore I cannot approve dwelling 4.
4. However, dwelling 4 is the only issue that council has raised in respect of this development appeal and council submits that its evidence supports an approval of 3 dwellings subject to conditions. Having had the opportunity of a view of the site and having

considered the merits of the application I am satisfied on the evidence that the development application should be approved for the 3 dwellings consistent with the consent issued by council on 24 October 2009 subject to any amendment of the conditions to reflect my findings.

### **Threshold Question – seven part test**

1. I will deal with the threshold question under section 5A(1) in respect of one of the threatened species the Durobby (*Syzygium moorei*) because there is no dispute between the parties about the necessity to carry out a seven part test in respect of this threatened species listed as Vulnerable in Schedule 2 of the [Threatened Species Conservation Act 1995](#).
2. Section 5A(1) of the EPA Act provides a link between the [Threatened Species Conservation Act 1995](#) and the assessment of a development application under section 79C of the EPA Act
3. The section is a mandatory provision that requires the determination of a fact. In determining that fact I must take into account the factors prescribed in 5A(2) of the EPA Act to determine “...whether there is likely to be a significant effect on the threatened species, populations or ecological communities or their habitats.” The section creates a jurisdictional threshold to any consideration of the merits of the approval of dwelling 4 in this development application appeal.
4. To enable me to make that determination I am reliant on the information that the applicant submits in respect of each factor in section 5A(2). To assist me with the ecological evidence the parties rely on the evidence of Ms Silver of GeoLINK and Mr Parker for the applicant and Ms Matthes for the council.
5. The council contends that the applicant has not provided sufficient information to address the factors in section 5A(2) and as a consequence I am unable to answer the question in section 5A(1).
6. This raises a question as to whether the seven-part test relied upon in respect of the Durobby is adequate? And if not, that is the end of the merit assessment for dwelling 4.
7. Ms Silver of GeoLINK prepared the ecological assessment report lodged with the development application that is exhibit 3 in the proceeding and the seven part test for the Durobby (and the EEC Littoral Rainforest and the *Syzygium moorei* ) at annexure D of

exhibit 3.

8. The methodology she adopts for her ecological assessment is recorded at 2.1 and 2.2 of exhibit 3. She relies on database searches from DECC and the Department of Environment Protection and Biodiversity and conducted field surveys of the site totalling eight hours. She attended the site on four separate occasions (11 July, 3 August, 5 October and 10 January 2008.)
9. She records that her field survey approach focuses on flora surveys and habitat assessments within the site.
10. Ms Silver did not attend the hearing so there was no opportunity to test the rigour of her investigations and the basis of her conclusions.
11. The applicant retained Mr Parker to give evidence at the hearing in respect of the ecological issues. Mr Parker, however, did not conduct an independent seven-part test or prepare an ecological assessment report for the site. But he did participate in the joint report prepared with Ms Matters and filed in the appeal exhibit G.
12. Mr Parker's late entry into the matter was of concern to the council. On hearing that he was retained and briefed about 2 weeks prior to the hearing and had spent only 1 and half hours onsite they submitted that his evidence should be given little weight.
13. Mr Parker only relied on parts of Ms Silver ecological assessment but adopted her seven-part test for the Durobby. Much of the hearing was spent identifying which parts of exhibit 3 he adopted and which parts he disavowed.
14. There is no doubt that the late entry of Mr Parker and his rejection of large slabs of Ms Silver's ecological assessment not only undermines the integrity of Ms Silver's report and assessment but makes it difficult to assess the reliability and rigour of his own evidence.
15. Mr Parker could not explain the detail of Ms Silver's investigation or her understanding of the requirements of the seven part test. He had no idea what she considered to be a "viable local population" or "habitat", At best he expressed his opinion of what was an appropriate definition for a seven part test but he did not do the seven part test which he adopted.
16. What is clear on the evidence is that the applicant's ecologists limited their physical investigation of the ecological issues to the boundaries of the site, data base searches and local knowledge. Ms Matthes is very critical of the ecological assessment being restricted

to the cadastral boundary of the site, which is what the applicant's experts did, because in her view such a restriction precludes a proper seven part test.

17. In her view it is necessary to investigate beyond the site and in the case at hand have regard to the vegetation in the regenerating EEC on the road reserve and the KIAH site and the Durobby at the rear of 49 Shirley Street. The applicant's experts did not do this and on that basis her evidence is that the seven part test is flawed.
18. Because of the limited assessment undertaken by the applicant's consultants the Council invites me to attribute little weight to their conclusions.
19. Ms Matthes who prepared the joint report with Mr Parker gave evidence that demonstrated she has an in-depth understanding of the site and surrounding area and the relevant planning controls, no doubt assisted by the fact that she has been involved with this matter from the lodgement of the development applicant. The court has the benefit of her ecological assessment reports to council that support the deletion of dwelling 4. She was also involved in the preparation of the conditions of its consent issued by council on the 24th of October 2008 and she addresses those conditions, which are raised by the contentions in her joint report comprehensively in exhibit G.
20. Ms Matthes's evidence is not only critical of the applicant's seven part test because of the limited investigation it is based on but also because of the factual errors recorded by Ms Silver's in her report exhibit 3.
21. The court was taken to page 38 of the joint report where she lists the errors and deficiencies in Ms Silver's ecological assessment. Her evidence is not contradicted by Mr Parker and perhaps that explains why he rejects many parts of Ms Silver's ecological assessment in Exhibit 3
22. It is significant that Ms Silver incorrectly recorded the species on the site and this required Ms Mattes and Mr Parker to prepare a list of species, which was ultimately tendered. The rigour of Ms Silver's assessment process and survey is questionable given the number of errors Ms Matthes and Mr Parker identified in her evidence during the hearing.
23. I set out below section 5A of the EPA Act (the seven part test) and will now deal with Ms silver assessment (adopted by Mr Parker as

amended) in respect of the Durroby  
Significant effect on threatened species, populations or ecological communities, or their habitats

5A(1) For the purposes of this Act and, in particular, in the administration of sections 78A, 79B, 79C, 111 and 112, the following must be taken into account in deciding whether there is likely to be a significant effect on threatened species, populations or ecological communities, or their habitats:

(a) each of the factors listed in subsection (2),

(b) any assessment guidelines.

(2) The following factors must be taken into account in making a determination under this section:

(a) in the case of a threatened species, whether the action proposed is likely to have an adverse effect on the life cycle of the species such that a viable local population of the species is likely to be placed at risk of extinction,

(b) in the case of an endangered population, whether the action proposed is likely to have an adverse effect on the life cycle of the species that constitutes the endangered population such that a viable local population of the species is likely to be placed at risk of extinction,

(c) in the case of an endangered ecological community or critically endangered ecological community, whether the action proposed:

(i) is likely to have an adverse effect on the extent of the ecological community such that its local occurrence is likely to be placed at risk of extinction, or

(ii) is likely to substantially and adversely modify the composition of the ecological community such that its local occurrence is likely to be placed at risk of extinction,

(d) in relation to the habitat of a threatened species, population or ecological community:

- (i) the extent to which habitat is likely to be removed or modified as a result of the action proposed, and
  - (ii) whether an area of habitat is likely to become fragmented or isolated from other areas of habitat as a result of the proposed action, and
  - (iii) the importance of the habitat to be removed, modified, fragmented or isolated to the long-term survival of the species, population or ecological community in the locality,
- (e) whether the action proposed is likely to have an adverse effect on critical habitat (either directly or indirectly),
- (f) whether the action proposed is consistent with the objectives or actions of a recovery plan or threat abatement plan,
- (g) whether the action proposed constitutes or is part of a key threatening process or is likely to result in the operation of, or increase the impact of, a key threatening process.

(3) In this section:

assessment guidelines" means assessment guidelines issued and in force under [section 94A](#) of the [Threatened Species Conservation Act 1995](#) or, subject to section 5C, [section 220ZZA](#) of the [Fisheries Management Act 1994](#) .

key threatening process" has the same meaning as in the [Threatened Species Conservation Act 1995](#) or, subject to section 5C, [Part 7A](#) of the [Fisheries Management Act 1994](#)".

1. It is necessary to appreciate the meaning of the words "habitat" and "threatened species" as used in the section they are defined below:
2. For the purpose of section 5A of the EPA Act the word "habitat" has the same meaning as in section 4 the [Threatened Species Conservation Act 1995](#):

"habitat" means an area or areas occupied, or periodically or occasionally occupied, by a species, population or ecological community and includes

any biotic or abiotic component.

1. For the purpose of section 5A of the EPA Act the word “threatened” has the same meaning as in the threatened species Conservation Act 1995.

## **DUROBBY**

1. The experts agreed that the area where dwelling 4 is proposed contains 2 specimens of the Durobby tree and they are threatened species (identified as tree numbers 524 and 525).
2. The experts agree that removal of the Durobby to construct dwelling 4 is the action we are talking about in the seven part test .
3. Ms Silver addresses the seven part test at annexure D of Exhibit 3 and Mr Parker adopts her comments and conclusions with the some amendments.

Section 5A(2)a(i) says

The following factors must be taken into account in making a determination under this section:

(a) in the case of a threatened species, whether the action proposed is likely to have an adverse effect on the life cycle of the species such that a viable local population of the species is likely to be placed at risk of extinction,

1. Council’s evidence is that the experts in addressing this factor have not identified how they defined ‘viable local population’ and therefore the factor has not been addressed
2. Ms Silver refers to the distribution of the species generally from “Richmond ...Tallebudgera Creek Valley in Queensland”( probably based on the data search ) but it is difficult to accept that this is “viable local population”
3. Instead of addressing the effect of action on the life cycle of the species in the viable local population (as Ms Matthes comments is necessary at page 10 of the joint report) the applicant’s evidence is broad-brush. Mr Parker ‘s evidence is based on his familiarity with the area. His evidence is that Durobby are cultivated as ornamentals

in the nursery trade and commonly planted as an ornamental garden tree species in Byron Bay and because of that he believes these planted specimens on the site if removed will have no "... adverse effect on the life cycle of the species such that the viable population of the species is likely to be placed at extinction." He gives no reliable evidence to support such a conclusion

4. Ms Matthe's evidence is that the applicant's assessment is flawed because it does not address the importance and value of the Durobby plants on the site for the viable local population in the EEC to the north for example. In her expert opinion consideration should have been given to the likely age of the plants, the potential likely source of the material, and their genetic importance. Ms Matthes's evidence is that irrespective of whether the specimens on the site are planted or not, genetic material from old specimens, that may no longer exist, is likely to represent unique genetic material and that needs to be assessed.
5. Mr Parker rejects any need to assess the genetic material of the Durobby to be removed because he assumes the trees are planted on the site and for that reason are not of value to the viable local population. He rejects Ms Silver's comment "that it is unclear if the two species on the site are historical planting of unknown genetic origin or remnant species". Mr Parker speculates that on his knowledge of the area "they were likely planted on the site by a previous owner and are typical in urban backyards along Shirley St some 30 years ago".
6. Mr Parker's evidence is at times confusing. On the one hand he says there is no need to carry out genetic testing of the Durobby on the site (or at 49 Shirley Street) it is not viable local population for the trees on the site and at other times he believes it is possible that the trees on this site are related to the Durobby on 49 Shirley. Then somewhat confusingly he does concede that the health of a tree is relevant in assessing section 5a(2)(a). However, he says he has not assessed the health of any tree outside the site but agrees the trees to be removed are generally healthy.
7. Ms Silver's conclusion that "Given the highly disturbed nature of the site and the unknown genetic origin of the species it is considered the proposed works are unlikely to have an adverse effect on the life cycle of the Durobby such that a viable local population of the

species is likely to be placed at risk of extinction” is not supported by any assessment in her report. Based on the evidence her assessment does not adequately address the factor in 5A(2)(a).

8. Mr Parker’s evidence that he did not need to go beyond the site boundary to understand what the “viable local population” of the Durobby is at odds with Ms Matthes expert evidence. When pressed to explain what he thought the viable local population was he said “one tree can be the viable local population and then later agreed that he might have to have regard to a bigger area and more trees within a particular area.” He did not know what Ms Silver defined as “viable local population” for the purposes of her assessment under section 5A(2)(a) which is of concern when he adopts her conclusion.
9. I cannot accept the conclusion that the removal of the two Durobby on this site to accommodate dwelling 4 is unlikely to have an adverse effect on the life cycle of the species such that a viable local population of the species is likely to be placed at risk of extinction when Ms Silver and Mr Parker do not define with any certainty what they mean by “a viable local population” On the basis of the evidence the factor is not addressed as required by the section. Council submits that the failure to address this factor alone would be sufficient to support a finding that the applicant’s experts have not provided sufficient information to enable be to make a determination under section 5A(1) because they have not addressed 5A(2).
10. Ms Silver does not need to address sections 5A(b) or (c).
11. In respect of 5A(2)(d)(i)  
the extent to which habitat is likely to be removed or modified as a result of the action proposed, and

1. Again there is a need to identify in the evidence and answer the factor mindful of the correct definition of “habitat” which for the purposes of this section is the definition in [section 4](#) of the [Threatened Species Conservation Act](#).

"habitat" means an area or areas occupied, or periodically or occasionally occupied, by a species, population or ecological community and includes any biotic or abiotic component.

1. Mr Parker adopts Ms Silver seven part test and her conclusion that the site provides some optimal habitat for the recruitment of juvenile specimens and the extent to which habitat is likely to be removed or modified as a result of the proposed action in is minor.
2. Mr Parker did not in his evidence clearly define what he considered to be habitat or what he believed Ms Silver defined to be habitat for the purposes of 5A(2)2(d)(i).
3. Furthermore, Ms silver and Mr Parker do not define the extent of the habitat to be removed as is necessary to answer the question. In terms of identifying the habitat of the tree Mr Parker's evidence is quite confusing initially says the habitat of the tree is the tree and does not turn appear to turn his mind to the definition of habitat in [section 4](#) until asked by council's lawyer. It is unclear on the evidence whether Ms Silver had any regard to the definition in the Act.
4. In contrast Ms Matthes is clear in both the joint report and her oral evidence of the extent of the habitat she thinks needs to be assessed to address the factor in section 5(2) and her evidence is consistent with the definition in section 4 of the TSC Act. In her expert opinion the habitat includes areas of regenerating vegetation because in her opinion plants do not exist in isolation of what is happening in the environment in which they exist that is their habitat. Ms Matthes's view is that the habitat of the Durobby on this site extends beyond the site boundary and in her view the seven part tests should have included an assessment of the extent of the habitat that took in the regenerating EEC Littoral Rainforest to the north, the Kiah site rainforests and the Durobby at 49 Shirley St.
5. Ms Matthes's evidence is that this site has connectivity with the regenerating EEC on the Cavvanbah Street road reserve and the Kiah site and 49 Shirley Street .She does not accept that the site is currently fragmented or isolated from other areas of habitat or localities. Ms Matthes's expert opinion addresses the factor in the section and has regard to the appropriate definition in the legislation, however she did not do a seven part test for the purposes of this application. Ms Silver in contrast offers an unsubstantiated assessment and a bold conclusion in her assessment report. Mr Parker's evidence only adds to the confusion.
6. I am not satisfied on the evidence that a proper seven part test was

carried out in respect of section 5A(2)(d)(i).

7. In respect of 5A(2)(d)(ii)

whether an area of habitat is likely to become fragmented or isolated from other areas of habitat as a result of the proposed action, and

1. Mr Parker adopts Ms Silver's conclusion that the site is currently fragmented and isolated from other areas of habitat due to adjoining residential development. The action therefore is unlikely to further significantly fragment or isolate the local occurrence of this community.
2. There is no discussion by Ms Silver about any other areas of habitat because she assesses that the site is fragmented and isolated because it adjoins residential development. She does not look outside the site boundary. She makes no mention of the area in Council's Biodiversity Strategy map identifies high conservation value regenerating EEC Littoral Rainforest to the north of the site on the Council reserve or at the rear of 49 Shirley Street. Her assessment is restricted to the site boundary and on that basis I do not accept that her research via database sufficiently addresses the factor in section 5A(2)(d)(ii). Given the fact that Mr Parker attended the site briefly and did not assess beyond the boundary of the site and relies on his local knowledge I find is evidence of little assistance.
3. Ms Silver does not address fact is 5A(2)(e) and (f) and I accept that is appropriate
4. In respect of 5A(2)(g) her evidence is that the action (removal of two species of Durobby) is possibly a key threatening process under process under [Threatened Species Conservation Act](#), which only reinforces the need for a satisfactory ecological assessment under [section 5A\(2\)](#)
5. I am not satisfied that the applicant has provided me with sufficient information to address the factors in [section 5A\(2\)](#) and therefore I cannot make a determination section 5A(1) of the EPA Act.
6. I accept Ms Matter's evidence in her joint report which she further elaborated upon at the hearing the ecological assessment by Ms Silver adopted in part by Mr Parker did not address the importance and value of the Durobby plants on the site as required 5a(2)(d)(iii).
7. I accept Ms Matthes opinion that consideration should have been

given to the likely age of the plants, the potential likely source of the material, the genetic importance, not just on the site but as a resource for future recovery and research.

8. I accept irrespective of whether the species on the site are planted or not, the genetic material from old isolated species, that may no longer exist, is likely to represent unique genetic material.
9. Section 5A requires that I take account of each factor in section 5A(2) in deciding whether there is likely to be a significant effect on the Durobby or its habitat. If just one of these factors is not addressed then that is sufficient to preclude me from determining the fact under section 5A(1).
10. I accept the council's submission that the genetic relationship of the vulnerable species has not been assessed and should have been particularly given the proximity of the specimen at 49 Shirley Street and the EEC Littoral Rainforest regenerating in the council reserve and the Kiah site.
11. I accept that the genetic diversity and value of these 2 Durobby may be relevant in answering section 5A(2)(d)(iii) . Mr Parker ultimately agreed that he needed to have regard to certain information such as the health of the trees in the local population to address this factor of the seven part test however, there is no evidence that he did that beyond the site and no evidence that Ms Silver did it at all.
12. I reject the applicant's submission that this seven-part test is not seriously challenged by the council's evidence because I accept all of the concerns raised by Ms Matthes and to some extent Mr Parker's evidence about the integrity, adequacy and accuracy of Ms Silver's seven part test
13. Council did not and is not required to conduct a seven-part test. This is the applicant's proposal and obligation to satisfy the requirement under section 5A.
14. The council's evidence and Mr Parker's evidence has been of assistance to me in assessing the inadequacy of the applicant's seven-part test.
15. It is not necessary for me to comment on the seven part tests in respect of the Rough Shelled Bush Nut or the EEC Littoral Rainforest, which have similar deficiencies, because as council submits a finding that one of the factors in section 5A(2) is not satisfied is sufficient to preclude me from making a determination

under section 5A(1).

16. Based on the evidence I am unable to make a determination under section 5A(1) therefore I am unable to proceed to a merit assessment of dwelling 4 under section 79C of the EPA Act.

#### **Deletion of dwelling 4**

1. I accept that council did issue consent on 24 October 2009 after a full assessment under the relevant sections of the EPA Act including section 79C having regard to the relevant planning instruments that apply to this site. The evidence is that the application was notified and no submission was received. Following a comprehensive assessment council determined to approve the application subject to conditions deleting dwelling 4.
2. Council submits such a course is open to me as I have evidence to support an approval of the application for 3 dwellings subject to conditions.
3. At the conclusion of the hearing I clarified with council's solicitor the changes if any to its conditions that would be required if I were to grant consent consistent with the approval issued by the council on 24 October 2008.
4. I was told that there may need to be change to the landscape condition to reflect the amended plan exhibit 16 and a change to the car parking condition to reduce the car parking to reflect 3 dwellings.
5. These matters in my view are able to be dealt by council in a short period.

#### **Development approval subject to the deletion of dwelling 4**

1. I have had an opportunity of taking a view of the site and surrounding area and have considered the development application and the relevant statutory controls together with Council's merit assessment reports pursuant to section 79C of the EPA Act.
2. I understand that the application has been notified and no objection was received in respect of the application.
3. Council raises no issue with any aspect of this application apart from the deletion of dwelling 4.
4. Council submits that the evidence supports an approval of the application subject to the deletion of dwelling 4 on the basis of the conditions imposed by Council on 24 October 2008.

## **Conclusion**

1. Based on the above, I am satisfied following my assessment of the evidence and the relevant considerations under the EPA Act including section 79C that the application should be approved subject conditions that delete dwelling 4. Furthermore, I am satisfied with the conditions attached to council's consent on 24 October 2008 as amended by my findings.
  2. The Court Orders:
    1. The appeal in respect of the property at 51 Shirley Street Byron Bay is upheld subject to deletion of dwelling 4.
    2. I grant consent to the development application no (DA10.2008.387.1) lodged on 20 June 2008 subject to the conditions which delete dwelling 4 and these conditions form Annexure "A".
    3. The council is directed to file amended conditions reflecting my findings by 12 February 2010 and these will be annexure "A".
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**Susan Dixon**

**Commissioner of the Court**

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