

A more in depth look
at
Variances
and
Special Use Permits

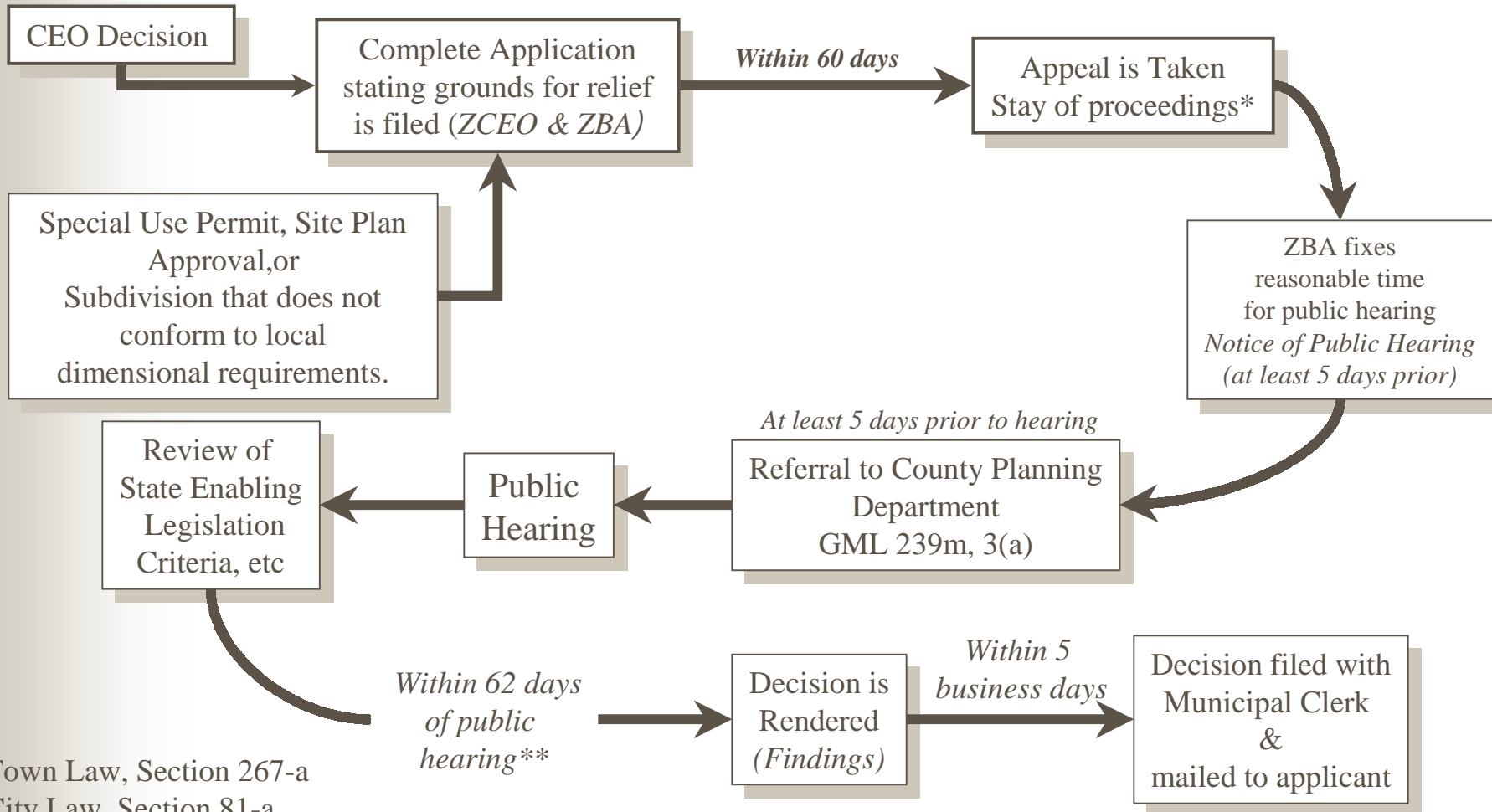


Definitions –Variances

"Use variance" shall mean the authorization by the zoning board of appeals for the use of land for a purpose which is otherwise not allowed or is prohibited by the applicable zoning regulations.

"Area variance" shall mean the authorization by the zoning board of appeals for the use of land in a manner which is not allowed by the dimensional or physical requirements of the applicable zoning regulations.

ZBA Procedures – Variances



Town Law, Section 267-a
 City Law, Section 81-a
 Village Law Section 7-712-a

* Unless there is “imminent peril to life or property”

** Can be extended by mutual consent of applicant and ZBA

Use Variances - Proving Unnecessary Hardship

The standards for reviewing Use Variances have been in place since the decision in the Case of Otto vs. Steinhilber (282 NY 71, 24 N.E. 2d 851 (1939)).

It is a most stringent test and in fact, several states do not allow for use variances

Permission for certain uses can be granted in spite of clear directives from the Legislative Body through the Comprehensive Plan and related local land use regulations. The following is a list of criteria the applicant must address in order to prove “unnecessary hardship”

- 1) the applicant cannot realize a reasonable return, provided that lack of return is substantial as demonstrated by competent financial evidence;
- 2) that the alleged hardship relating to the property in question is unique, and does not apply to a substantial portion of the district or neighborhood;
- 3) that the requested use variance, if granted, will not alter the essential character of the neighborhood; and
- 4) that the alleged hardship has not been self-created.

Use Variances - Proving Unnecessary Hardship

1) *Reasonable Return* – “ *The ramifications and components of one of the most exacting elements of a use variance application, the lack of reasonable return, is not often full examined except under unusual and contentious circumstances*”*

- Lack of Reasonable Return - Dollars and Cents
- Analysis should be thoroughly documented.
- Suggested Information:
 - Amount Paid for Parcel
 - Present Value
 - Maintenance Costs
 - Taxes
 - Mortgages, etc
 - Income from Land at Issue
 - Other Relevant Facts

Use Variances - Proving Unnecessary Hardship

1) *Reasonable Return – continued (potential to sell)*

- Unsellability may be proof of hardship – Supportive information is still needed.
- Even the opinion of a real estate professional should be supported with factual data that the ZBA can understand and incorporate into its decision (findings)
- Where was it advertised? How Long? What offers were received? Were they reasonable? Why or Why not?
- Failure to Sell Does Not Mean It Can't Be Sold.
- As always, using conclusory testimony without the facts to support may weaken a decision to approve or deny.

Use Variances - Proving Unnecessary Hardship

1) *Reasonable Return – continued (best use)*

- Who finally determines what is a reasonable rate of return? The ZBA*. In each case support the decision whenever possible.
- The applicant is not automatically entitled to the most profitable use.
- The financial analysis must take into account the entire property. This can mean the existing lot or if the applicant recently subdivided, the combination of more than one.
- The use variance procedure is not in place to compensate landowners for bad business decisions.

* [Petruzzelli v. Zoning Board of Appeals of the Village of Dobbs Ferry, 181 A.D.2d 825, 581 N.Y.S.2d 105 \(2d Dept. 1992\); Collins v. Carusone, 126 A.D.2d 847, 510 N.Y.S.2d 917 \(3d Dept. 1987\).](#)



Use Variances - Proving Unnecessary Hardship

2) *Uniqueness*

- Usually a physical characteristic. Environmental constraints, pre-existing development, etc.
- Describing the undesirable characteristics is not enough to satisfy this requirement.
- Is the Hardship on this property greater than on nearby lands?
- How much of the district shares a similar problem?
- A hardship for most of the district may point to the need for a zoning change.

Use Variances - Proving Unnecessary Hardship

3) *Essential Character of the Neighborhood*

- Usually up to the ZBA
- Refer back to Statement of Intent for the Zone and Comprehensive Plan
- “As is the case with respect to the review of any aspect of a decision of a Zoning Board of Appeals, in considering the effect of the granting of relief on an area, the courts defer to the discretion of a zoning board of appeals, because its members are familiar with local conditions and are best suited to evaluate the potential consequences of a proposed use on a neighborhood”*
- That being said, factual support is still needed.

* MCKINNEY'S CONSOLIDATED LAWS OF NEW YORK ANNOTATED TOWN LAW, CHAPTER 62 OF THE CONSOLIDATED LAWS, ARTICLE 16--ZONING AND PLANNING § 267-b. Permitted action by board of appeals*

Use Variances - Proving Unnecessary Hardship

4) *Self Created Hardship – Whose Fault is it?*

- Purchase with knowledge of land use restrictions is self creation
- Purchase with access to knowledge may be self creation.
- The applicant has an obligation to exercise “due diligence”
 - “the courts should not be placed in a position of having to guarantee the investments of a careless land buyer”*
- Improvements with knowledge? – self created
- Imprudent financial decisions? – self created
- Purchase before zoning? – not self created

* *Barby Land Corp v. Zeigner*, 65 A.D. 2d 793, 794, 410 N.Y.S. 2d 312, 313 (2d Dept. 1978).



Use Variances - Proving Unnecessary Hardship

Unlike an area variance this is not a balancing test.

If the applicant fails to adequately address any of the four criteria listed in Section 267-b, the ZBA would be acting outside of its very specifically defined authority if it were to approve the proposed use variance.



Area Variances – Benefit vs. Detriment

Unlike a use variance test which contains a strict set of criteria for review, the area variance test is a balancing between the benefit to the applicant and the detriment to the community. It is fundamentally different in that a failure to address certain criteria is not always fatal to the application.

The test evolved out of court cases and was made into law in 1992. Article 16, Section 267b, Part 3 of NYS Town Law requires ZBA consideration of the following:

- 1) whether an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will be created by the granting of the area variance;
- 2) whether the benefit sought by the applicant can be achieved by some method, feasible for the applicant to pursue, other than an area variance;
- 3) whether the requested area variance is substantial;
- 4) whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district; and
- 5) whether the alleged difficulty was self-created, which consideration shall be relevant to the decision of the board of appeals, but shall not necessarily preclude the granting of the area variance.

Area Variances – Benefit vs. Detriment

1) Character of the Neighborhood or Detriment

- Usually up to the ZBA
- Refer back to Statement of Intent for the Zone and Comprehensive Plan
- “As is the case with respect to the review of any aspect of a decision of a Zoning Board of Appeals, in considering the effect of the granting of relief on an area, the courts defer to the discretion of a zoning board of appeals, because its members are familiar with local conditions and are best suited to evaluate the potential consequences of a proposed use on a neighborhood”*
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Area Variances – Benefit vs. Detriment

2) Alternatives

- An alternative that does not allow the applicant to achieve the desired benefit is not truly a feasible alternative.
- Clearly define the desired benefit to determine what qualifies as an alternative.
 - Is a porch being constructed to view the water?
 - Handicapped access – what is actually needed?
- Even though economics is not a separate factor to be addressed, it may help in determining what qualifies as a reasonable alternative.
- If the goal is to make a profit from development with no intent by the owner to occupy the lot then selling a substandard property may be a viable alternative.

Area Variances – Benefit vs. Detriment

3) Is the Area Variance Substantial?

- Up to the ZBA
- This determination should be made on the effect the variance may have, not simply the numerical size or percentage of the variance. If a 5% variance no longer allows safe passage for emergency service vehicles, then the variance may be substantial. Conversely if a 70% variance on a large lot stills leaves plenty of room and doesn't really compromise any zoning objectives (safety, etc) it may not be substantial.
- Watch for cumulative effects of multiple small variances.



Area Variances – Benefit vs. Detriment

4) Environmental Conditions

- Consider evidence presented, not speculation of residents opposed to the project.
- Refer back to statement of intent for the zone and comprehensive plan.
- Environmental overlay on zoning map may point to environmental priorities of the Legislative Body

Area Variances – Benefit vs. Detriment

5) Self Created ?

- Section 267-b, part 3b states that this factor shall be relevant to the application it may not “necessarily preclude” granting of the request.
- Refer to the section on use variances for examples.



Area Variances – Misc.

- State Law directs the ZBA to grant the minimum variance necessary “ and at the same time protect the character of the neighborhood and the health safety and welfare of the community” In other words, grant only what is needed to achieve the applicants stated objective.
- Alternate placement of buildings can be a modification even though this authority partially overlaps with Planning Board site plan review authority.
- Any condition should be directly related to ameliorating demonstrated potential negative affects.

Variations – Conditions and Modifications

- Time Limits – Unless otherwise stated, variations are unlimited in duration.
- Use Variations will be in effect as long as the use, as defined by the ZBA, remains materially unchanged.
- A variation may be limited as a condition or by local law. A time limit is usually related to establishment of the proposed use.
- “If use is not established under the following definition any local approvals will be voided”
- However, if there has been no real change in the relevant conditions surrounding the original application, re-approval is likely.
- Time limits when a significant initial investment is required for establishment may be unreasonable.
- Construction trailers or seasonal uses may be appropriate cases for time limits.

Variances – Conditions and Modifications

Food for Thought Only – Caution

Modification of conditions on an existing variance condition may not require a rehearing of the original variance application. Focus may be more properly placed on whether the condition is still needed to ameliorate a demonstrated substantial negative impact.*

- Miller v. Zoning Board of Appeals of the City of Saratoga Springs, 176 Misc. 2d 383, 671 N.Y.S. 2d 954 (Sup. Ct. Saratoga Co. 1998)
- Jackson v. Zoning Bd. Of Appeals of City of Long Beach (2 Dept. 2000) 270 A.D. 2d 267, 703 N.Y.S. 2d 521.

Limitations on Variances : They Should Not:

- They should not create a de facto change in the Zoning Code or Map
- They should not vary the building code
- They should not undermine any land use restriction that have public safety as a basis.
- Proposals involving placement of public utilities use a different test for use and area variances.
 - is the proposed use a public necessity?
 - are reasonable alternatives available
- Incidental Uses (lighting, fences, etc) - rarely grantable under use variance criteria.

Definition – Special Use Permit

Definition of special use permit. As used in this section the term "special use permit" shall mean an authorization of a particular land use which is permitted in a zoning ordinance or local law, subject to requirements imposed by such zoning ordinance or local law to assure that the proposed use is in harmony with such zoning ordinance or local law and will not adversely affect the neighborhood if such requirements are met.*

The municipality needs to have standards in place that can be consistently and fairly applied during review of special use permit applications

If the applicant addresses all relevant criteria the permit must be granted and vice-versa.



Special Use Permit – Basics

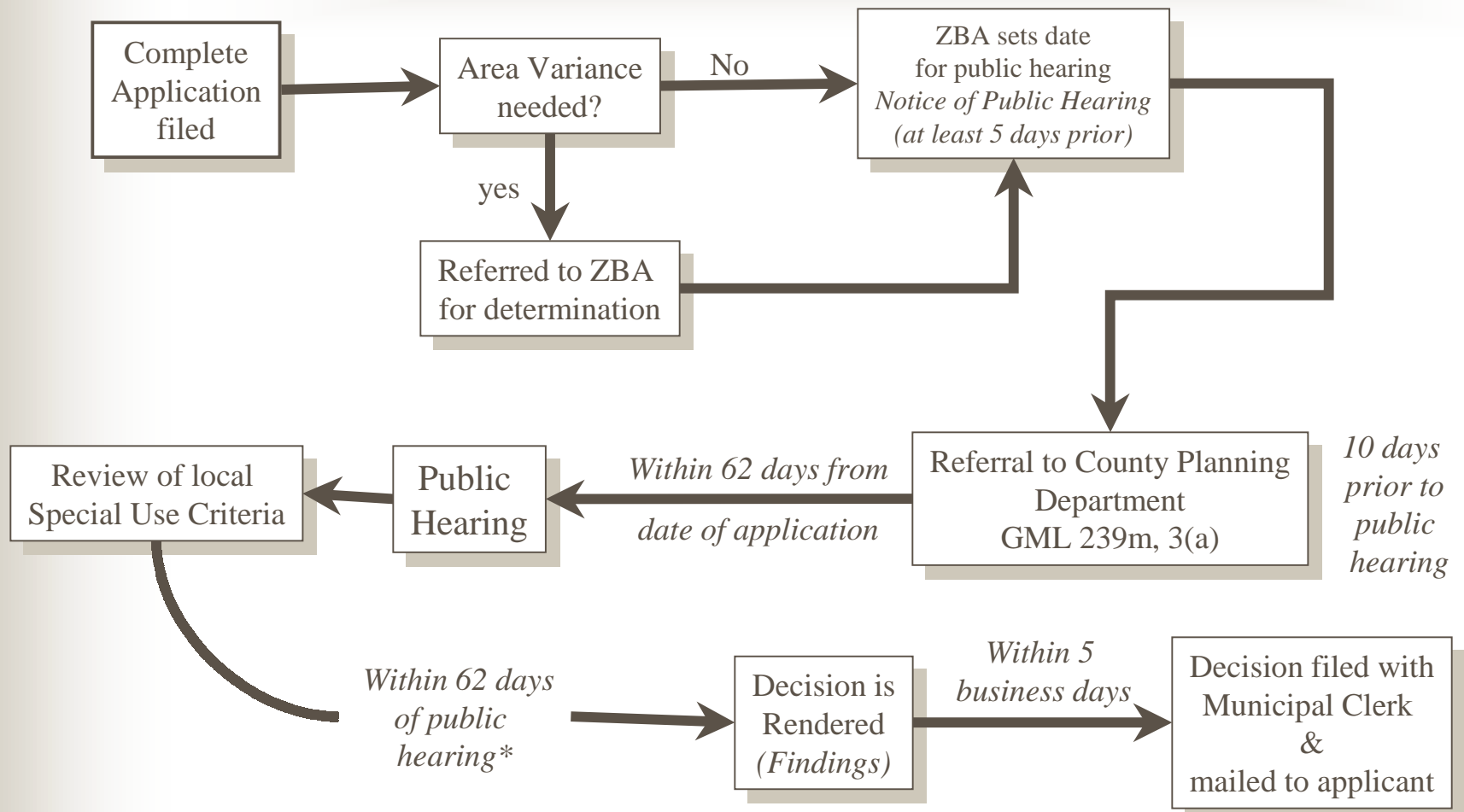
- May be the job of the ZBA or Planning board or the Municipal Board may reserve the authority for themselves.
- Review authority (including waivers) must be specified in local law.
- Standards for review should create an administrative, objective review process.



Special Use Permit – Review Criteria

- Can be very general or specific or both.
- Review criteria define the extent of the reviewing boards' authority.
- They should provide adequate guidance for consistent and fair administration of special use permits.
- Submission requirements and review criteria may be waived but only if the reviewing agency is properly empowered to do so by local law.
- Specifically enumerated criteria (5 ac minimum) should probably be waived by the reviewing agency and not varied by the ZBA. However, the law is unclear. Check with your municipal attorney.

Procedures – Special Use Permits



Town Law, Section 274-b
City Law, Section 27-b
Village Law Section 7-725-b

* Can be extended by mutual consent of applicant and ZBA



Special Use Permits – Example

AG – Agricultural Zoning

Statement of Intent: The primary purpose of this zone is to maintain a viable farming community by preserving and protecting the remaining active and idle farmland while still accommodating a small amount of low density residential development.

Allowed Uses:

- Customary Agricultural Practices (See Definitions Section)

Allowed Accessory Uses:

- Agriculture Related Buildings (Barns, Silos, Corn Cribs, Etc)

Specially Permitted Uses:

- Farm Employee Housing
- Individual Single Family Homes and Related Structures
- Agriculture Based Home Occupations
- Manure Storage Facilities



Special Use Permits – Example of Criteria

Individual Single Family Homes in the AG Zoning District must meet the following criteria before a special use permit will be issued.

- 1) The house and related facilities will be specifically placed to minimize infringement upon important active or idle farmland as identified in figure 9A of the 1998 Comprehensive Plan.
- 2) The house, related facilities and landscaping will be placed to minimize potential impacts of farming on the residence (odors, dust, noise etc)
- 3) Resulting density will not exceed one house/25 acres as measured by sampling a square, 100 acre land area of which the proposed house is the center.



Conditions

- Relevant to Proposed Use, not the Applicant
- May only apply to property in question
- Must be aimed at reduction of potential adverse impacts.
- Time Limits ? Seasonal, temporary uses
- Be Careful on limits of Operation of Business
- Special Use Permits: Generally, conditions must be made to enforce the articulated special use permit standards.



Procedures – Findings of Fact

This applies to any decision made by any municipal board!

- ✓ Make a complete & thorough record of your decisions
- ✓ It will serve as the basis for judicial & other types of review.
- ✓ “Conclusory” statements vs. a showing of supportive evidence
- ✓ Disclose All Supporting Evidence

Getting Help

Nobody knows everything about Planning & Zoning. The local code should provide for a review process that allows for consultation with qualified people to aid in decision making.

- ☑ A fee schedule should be set up in local law to address the need for engineers, architects and other professionals generally helpful to review.
- ☑ Different fee schedules may apply to different types and sizes of projects.
- ☑ Findings, Findings, Findings, Findings, Findings
- ☑ The decision to approve or deny must be made by the empowered agency. The decision cannot be based solely on:
 - the opinion of the municipal attorney or other professional without the facts to back it up
 - SEQR findings unrelated to review criteria
 - hearsay
 - public opposition

Information Sources

- www.co.ontario.ny.us/planning
 - Info, Links, Dept of State Publications
- <http://www.nymir.org/>
 - New York Municipal Insurance Reciprocal
 - Simple Registration Required
- <http://leginfo.state.ny.us:82/nysleg/menugetf.cgi>
 - NYS Laws
- http://www.dec.state.ny.us/website/dcs/EP_SEQR/seqr_1.html
 - NYSDEC Introduction to SEQR with links to law text, downloadable forms, etc.



Information Sources

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