Order No. DCA10-GM-284

STATE OF FLORIDA
DEPARTMENT OF COMMUNITY AFFAIRS

RICHARD A. BURGESS,

Petitioner,

v.

DEPARTMENT OF COMMUNITY AFFAIRS and CITY OF EDGEWATER,

DOAH Case No. 09-2080GM

Respondents,

and

HAMMOCK CREEK GREEN, LLC,

Intervenor.
_____/

DETERMINATION OF NON-COMPLIANCE

This matter was considered by the Secretary of the Department of Community Affairs following receipt of a Recommended Order issued by an Administrative Law Judge of the Division of Administrative Hearings. A copy of the Recommended Order is appended to this Final Order as Exhibit A.

Background and Summary of Proceedings

On February 2, 2009, the City of Edgewater adopted an amendment to its comprehensive plan by Ordinance 2008-O-10 (Plan Amendment). The Plan Amendment created the "Restoration Sustainable Community Development District" through text and map amendments to the local comprehensive plan. The Department reviewed the Plan Amendment and issued a notice and statement of

intent to find it not "in compliance."

Thereafter, the Department, City and Intervenor Hammock Green, LLC entered into a stipulated settlement agreement. The City adopted a remedial amendment pursuant to the agreement and, on March 18, 2010, the Department issued a cumulative notice to find the Plan Amendment as remediated "in compliance." The parties were realigned pursuant to Section 163.3184(16)(f), Florida Statutes, with Mr. Burgess as the sole remaining Petitioner, and the matter then proceeding to a final hearing.

The final hearing was held on May 17 & 18, 2010. Upon consideration of the evidence and post-hearing filings, the Administrative Law Judge entered a Recommended Order rejecting all of the allegations raised by Petitioner Burgess. The Order recommends that the Department find the Plan Amendment "in compliance." Petitioner timely filed Exceptions to the Recommended Order and a Motion for Remand. The Department also timely filed Exceptions.

Exceptions

Because this Determination reverses the Administrative Law Judge's recommendation, the Recommended Order and Exceptions will be submitted to the Administration Commission for final agency action pursuant to Section 163.3184(9)(b), Florida Statutes.

Although the Administration Commission must make its own rulings on the Exceptions,[1] the following recommended rulings are submitted in support of the Department's determination that the Plan Amendment is not in compliance.

Standard of Review of Recommended Order

The Administrative Procedure Act contemplates that the Department will adopt an Administrative Law Judge's Recommended Order as the agency's Final Order in most proceedings. To this end, the Department has been granted only limited authority to reject or modify findings of fact in a Recommended Order.

> Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.

Fla. Stat. § 120.57(1)(l).

Absent a demonstration that the underlying administrative proceeding departed from essential requirements of law, "[a]n ALJ's findings cannot be rejected unless there is no competent,

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[1] Rulings on exceptions must be made in a final order, which is to be entered by the Administration Commission in this proceeding. See **Fla. Stat.** §§ 120.57(1)(k) & 163.3184(9)(b).

substantial evidence from which the findings could reasonably be inferred." Prysi v. Department of Health, 823 So. 2d 823, 825 (Fla. 1st DCA 2002)(citations omitted). In determining whether challenged findings are supported by the record in accord with this standard, the Department may not reweigh the evidence or judge the credibility of witnesses, both tasks being within the sole province of the Administrative Law Judge as the finder of fact. See Heifetz v. Department of Bus. Reg., 475 So. 2d 1277, 1281-83 (Fla. 1st DCA 1985).

The Administrative Procedure Act also specifies the manner in which the Department is to address conclusions of law in a Recommended Order.

> The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified.

Fla. Stat. § 120.57(1)(l); DeWitt v. School Board of Sarasota County, 799 So. 2d 322 (Fla. 2nd DCA 2001).

The label assigned a statement is not dispositive as to

whether it is a finding of fact or conclusion of law. See Kinney v. Department of State, 501 So. 2d 1277 (Fla. 5th DCA 1987). Conclusions of law labeled as findings of fact, and findings labeled as conclusions, will be considered as a conclusion or finding based upon the statement itself and not the label assigned.

RECOMMENDED RULINGS ON EXCEPTIONS

Petitioner's Exceptions to Findings of Fact

Exception One: Paragraph 17

Petitioner first alleges that Finding of Fact 17 "is an inaccurate characterization of Mr. Burgess' allegations on the mixed-use issues and lacks any evidentiary foundation." While this Finding does not contain the detail set forth in the Amended Petition for Administrative Hearing, it is a fair summation of those allegations and is, therefore, support by competent, substantial evidence.

Petitioner's Exception One should be DENIED.

Exception Two: Paragraph 19 (first sentence)

The first sentence of Finding of Fact 19 provides as follows: "Various policies of the Restoration SCD Sub-Element establish minimum and maximum percentages for the subcategories of use." Petitioner alleges that this Finding is a mislabeled and incorrect Conclusion of Law.

This finding is one of fact regarding the contents of the Plan Amendment with respect to the "subcategories of use" and is not a conclusion of law. The question, then, is whether it is supported by competent, substantial evidence.

Policy 3.1.1 of the Plan Amendment establishes and describes the seven subcategories of use within the overall Restoration Sustainable Community Development: Residential, Mixed-Use Town Center, Work Place, Transit-Ready Corridor, Utility Infrastructure Site, Schools, and Open Space. Policy 3.1.1 refers to allowable uses in terms of acreage, square footage, or dwelling units, and does not include minimum or maximum percentages of use for each subcategory.

Policy 8.1.2 of the Plan Amendment establishes minimum percentages for each of the following land uses: Residential, Commercial, Office, Civic/Institutional, Recreation and Open Space, Work Place, and Mixed-Use. These percentages apply to the specific land uses that are allowed within the various subcategories but do not establish percentages by subcategory. There are no other policies that establish percentages specific to each subcategory.

Thus, there is no competent, substantial evidence that the Plan Amendment establishes minimum and maximum percentages for the subcategories of use as set forth in Finding of Fact 19.

Petitioner's Exception Two should be GRANTED.

Exception Three: Paragraph 19 (second sentence)

The second sentence of Finding of Fact 19 provides as follows: "Table I-4 in the Plan Amendments shows the various land uses, their densities and intensities, and their acreages." Petitioner takes issue with this Finding on the basis that it "implies that Table I-4 relates to the 'sub-categories of use' in the RSE [as opposed to 'land uses']."

The Administrative Law Judge consistently refers to "subcategories of use" and "land use" by those different terms when referring to one or the other in the Recommended Order. See, e.g., Paragraphs 7, 9 & 18. Table I-4 is a "Vacant Land Analysis" which lists different land uses by category, density or intensity, and acreage. Finding of Fact 19 accurately describes this table. There is no basis to support a contrary implication.

Petitioner's Exception Three should be DENIED.

Exception Four: Paragraph 42

Finding of Fact 42 notes that the City's Comprehensive Plan has different planning timeframes for the overall Plan, the Recreation and Open Space Element, the water supply work plan, and the Public Schools Facilities Element. Petitioner takes exception to this Finding alleging "[i]t is inaccurate to the extent that it omits to find/conclude that the Coastal Management

Element only has one long-term timeframe to 2010."

Petitioner does not allege that this Finding is not supported by competent, substantial evidence, and a review of the entire record demonstrates that it is.

Petitioner's Exception Four should be DENIED.

Exception Five: Paragraph 43

Finding of Fact 43 provides in full as follows: "Petitioner did not identify an adverse effect created by the different planning horizons." Petitioner asserts that this Finding is "wholly irrelevant" and not supported by competent, substantial evidence.

An agency may reject a finding of fact only if it is not supported by competent, substantial evidence. Thus, while in agreement with Petitioner that this Finding is wholly irrelevant, the Department may not reject Finding of Fact 43 on this basis.

A review of the entire record demonstrates that Finding of Fact 43 is supported by competent, substantial evidence, or, more accurately, the lack of such evidence to support a finding that there is an adverse effect created by the different planning horizons.

Petitioner's Exception Five should be DENIED.

Exception Six: Paragraph 44 (first sentence)

The first sentence of Finding of Fact 44 provides as

follows: "The City is currently preparing its Evaluation and Appraisal (EAR)-based amendments." Petitioner alleges that this sentence is not supported by competent, substantial evidence. Intervenor and the City agree with Petitioner that this sentence lacks record support. A review of the entire record finds no support for this sentence.

Petitioner's Exception Six should be GRANTED.

Exception Seven: Paragraph 44 (last sentence)

The last sentence of Finding of Fact 44 provides as follows: "It [the EAR] is the logical process for reviewing and revising plan horizons." Petitioner alleges that this Finding is actually an incorrect Conclusion of Law.

Petitioner is correct that this Finding is mislabeled and is actually a Conclusion of Law regarding the statutory and rule requirements for maintaining planning horizons.

Section 163.3191(2)(h), Florida Statutes, provides that the evaluation and appraisal report is to "contain appropriate statements to update the comprehensive plan" on several issues, specifically including "new revised planning timeframes." The local government is then to amend and update its comprehensive plan "based on the recommendations in the report." **Fla. Stat.** § 163.3191(10). Thus, it is logical that the EAR-based amendment process will include the revision of planning timeframes.

However, it is contrary to the statute to conclude - as was done in Finding of Fact 44 - that the EAR is the (singular) process to review and revise planning horizons. This conclusion is apparently based on the following argument forwarded by the City and Intervenor Hammock Green:

> Until a local government adopts its EAR based amendment, there is no requirement for a local government to extend its planning periods so as to ensure that they continue to include at least five years and at least ten years.

Proposed Recommended Order at 37.

There is nothing in the statute or rule to support the proposition that the two planning timeframes need be maintained only as part of the Evaluation and Appraisal Report (EAR) process. The statute and rule both require that local comprehensive plans maintain two planning timeframes, "one covering at least the first 5-year period occurring after the plan's adoption and one covering at least a 10-year period." **Fla. Stat.** § 163.3177(5)(a); see also **Fla. Admin. Code. r.** 9J-5.005(4). Moreover, at least with respect to the capital improvements element, the statute explicitly requires annual updates to ensure the local government maintains a financially feasible five-year schedule of capital improvements. **Fla. Stat.** § 163.3177(3)(b)1.

To accept the Administrative Law Judge's conclusion would

render planning timeframes largely irrelevant. Local governments must prepare an EAR once every seven years. **Fla. Stat.** § 163.3191(1). Amendments to implement the EAR must be adopted within eighteen months of the report being declared sufficient. **Fla. Stat.** § 163.3191(10). The Department may grant a six-month extension of this deadline for "good and sufficient cause." Id. Thus, the entire EAR and EAR-based amendment process can take nine years.

If a local government adopted five and ten-year planning timeframes as part of its EAR-based amendments and did not have to update them until the next EAR, the shorter of the two planning timeframes would have expired by the time it would be due to be updated. The longer of the two would be reduced to a one-year timeframe. The very purposes of planning timeframes - to anticipate and plan for future growth - would be thwarted by such an interpretation.

The interpretation that planning timeframes must be maintained as part of the planning process and not just as during the EAR update is as or more reasonable than the contrary conclusion reached by the Administrative Law Judge.

Petitioner's Exception Seven should be GRANTED.

Petitioner's Exceptions to Conclusions of Law

Exception One: Paragraph 63 (first sentence)

Petitioner takes exception to the following portion of Paragraph 63: "Petitioner apparently objects to the flexibility that the Plan Amendments provide through the use of minimum and maximum densities and intensities." Petitioner contends that this mischaracterizes his allegations.

While this Finding does not contain the detail set forth in the Amended Petition for Administrative Hearing, it is a fair summation of those allegations and is, therefore, support by competent, substantial evidence.

Petitioner's Exception One should be DENIED.

Exception Two: Paragraph 63 (second sentence)

Petitioner takes exception to the second sentence of Paragraph 63, which reads in full as follows: "The Department does not interpret Section 163.3177(6)(a) or Rule 9J-5.006(4)(c) to prohibit this kind of flexibility, and the Department's interpretation is a reasonable one." The "flexibility" that is the subject of this sentence is set forth in the first sentence of Paragraph 63, which reads in full as follows: "Petitioner apparently objects to the flexibility that the Plan Amendments provide through the use of minimum and maximum densities and intensities."

Policy 3.1.1 of the Plan Amendment establishes and describes the seven subcategories of use within the overall Restoration Sustainable Community Development: Residential, Mixed-Use Town Center, Work Place, Transit-Ready Corridor, Utility Infrastructure Site, Schools, and Open Space. Policy 3.1.1 establishes minimum and maximum densities and intensities for each subcategory. These floors and ceilings establish an "objective measurement" of the individual land uses within the overall Restoration SCD mixed-use land use category as required by Rule 9J-5.005(4)(c), Florida Administrative Code.

Allowing a local government "flexibility" to approve developments and combinations thereof within the permissible ranges adopted in the comprehensive plan is a reasonable interpretation of the rule. Petitioner has not demonstrated that a contrary interpretation - presumably one which would fix exact levels of allowable development for each sub-category - would be as or more reasonable.[2]

Petitioner also seems to contend that the sub-categories within the overall Restoration SCD mixed-use category must be

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[2] It is a well-settled principle of law in this State that the comprehensive plan establishes only a range of permissible uses with the decision as to whether to permit the maximum or some lower amount being one to be made by the local government sitting in a quasi-judicial capacity. See Brevard County v. Snyder, 627 So. 2d 469, 475 (Fla. 1993).

individually depicted on the future land use map. This mapping was not the subject of the "flexibility" discussed in Paragraph 63 and this portion of the exception, therefore, need not be addressed. However, it is worth noting that Section 163.3177(6)(a), Florida Statutes, specifically contemplates the mapping of areas for mixed-use development: "The future land use plan may designate areas for future planned development involving combinations of types of uses . . . ."

Petitioner's Exception Two should be DENIED.

Exception Three: Paragraph 64

This Exception relies upon other Exceptions that have been ruled on elsewhere in this Determination.

Petitioner's Exception Three should be DENIED.

Exception Four: Paragraph 72 (second sentence)

Petitioner next takes exception with the second sentence of Paragraph 72, which reads in full as follows: "There is no express requirement in Chapter 163 or Rule Chapter 9J-5 that a comprehensive plan maintain uniform planning timeframes." Petitioner asserts that this sentence is an erroneous conclusion of law.

The requirement for planning timeframes is found in Section 163.3177(5)(a), Florida Statutes.

> Each local government comprehensive plan must include at least two planning periods, one

> covering at least the first 5-year period occurring after the plan's adoption and one covering at least a 10-year period.

This requirement is repeated in Rule 9J-5.005(4), Florida Administrative Code.

Planning timeframes are at the very foundation of comprehensive planning. A local government selects the timeframes over which it wishes to plan, forecasts anticipated population and growth over those periods, allocates sufficient suitable land to accommodate that forecasted population, and then plans for the infrastructure needed to support that growth. **Fla. Stat.** § 163.3177(6)(a); **Fla. Admin. Code rr.** 9J-5.005(2)(e) & 9J-5.006(2)(c). As the testimony at the final hearing stated, these timeframes are the "basis for forecasting growth, identifying land use areas needed to accommodate the growth, and the infrastructure elements to . . . provide for the transportation, the water, the sewer, [and] the other facilities . . ." Tr. at 557.

The several elements of the comprehensive plan must be consistent.

> Coordination of the several elements of the local comprehensive plan shall be a major objective of the planning process. The several elements of the comprehensive plan shall be consistent . . . .

Fla. Stat. § 163.3177(2). As part of this coordination, "[w]here

data are relevant to several elements, the same data shall be used, including population estimates and projections." **Fla. Admin. Code r.** 9J-5.005(5)(emphasis added).

Coordination of and consistency among the several elements of necessity require that uniform planning timframes be used throughout the local comprehensive plan. This conclusion is found in the express rule and statutory provisions cited above. This conclusion is as or more reasonable than the Administrative Law Judge's contrary conclusion.

Petitioner's Exception Four should be GRANTED.

Exception Five: Paragraph 73 (first sentence)

Exception Six: Paragraph 73 (second sentence)

Petitioner's next two Exceptions are best addressed as one. Petitioner's Exception Five takes exception to the first sentence of Paragraph 73, which provides in full as follows: "Petitioner's claim that the use of different planning timeframes in different elements of the Comprehensive Plan causes the plan to be internally inconsistent requires more than merely pointing out that different timeframes are being used." Exception Six is directed to the second sentence of Paragraph 73, which provides in full as follows: "Petitioner failed to prove that an adverse effect is caused by the use of different planning timeframes in the City's Comprehensive Plan."

The plain language of the relevant statute does not support this conclusion and, in fact, can only support a contrary conclusion. As noted immediately above, the several elements of the comprehensive plan must be consistent.

> Coordination of the several elements of the local comprehensive plan shall be a major objective of the planning process. The several elements of the comprehensive plan shall be consistent . . . .

Fla. Stat. § 163.3177(2). There is nothing in this provision or elsewhere that contains a requirement that an inconsistency can only support a finding of non-compliance if it is accompanied by proof of some adverse effect.

Importantly, the definition of "in compliance" provides in pertinent part as follows: "'In compliance' means consistent with the requirements of ss. 163.3177 . . . ." There is nothing in this definition that requires a showing of some adverse impact as a prerequisite for a finding of non-compliance. To accept the Administrative Law Judge's conclusion would insert into the relevant statutory provisions requirements not included by the Legislature.

Moreover, there is no precedent to support this new interpretation. As noted by Petitioner, the clearest statement of the Department's interpretation of these requirements is found in the Statement of Intent for the City's 2009 amendments.

> By utilizing a 2025 planning horizon for this amendment, even though the rest of the plan is based on a 2010 horizon, the City creates an internal inconsistency in violation of Section 163.3177(2) and 163.3187(2), F.S. and Rule 9J-5.005(5), F.A.C.

The Department's interpretation as set forth in this Statement does not include any requirement that an adverse impact be demonstrated.[3]

The conclusion that a demonstration of internal inconsistency does not include the requirement to prove an adverse impact is as or more reasonable than the contrary conclusion reached by the Administrative Law Judge.

Petitioner's Exceptions Five and Six should be GRANTED.

Exception Seven: Paragraph 74

Petitioner next takes exception to Paragraph 74, which contains the Administrative Law Judge's ultimate conclusion that the issue of whether the Plan Amendment creates an internal inconsistency is fairly debatable. For the reasons set forth above, it is beyond fair debate that the Plan Amendments do create an internal inconsistency. This conclusion is as or more reasonable than the one reached by the Administrative Law Judge.

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[3] The Department has been given the responsibility and authority to administer Chapter 163, Part II, Florida Statutes, and, accordingly, its interpretation is to be afforded great deference and affirmed unless "clearly erroneous." State Board of Admin. v. Huberty, 46 So. 3d 1144 (Fla. 1st DCA 2010).

Petitioner's Exception Seven should be GRANTED.

Exception Eight: Paragraph 82

Petitioner next takes exception to Paragraph 82, which contains the Administrative Law Judge's ultimate conclusion that the issue of whether the Plan Amendment is in compliance is fairly debatable. For the reasons set forth above, it is beyond fair debate that the Plan Amendment is not in compliance. This conclusion is as or more reasonable than the one reached by the Administrative Law Judge.

Petitioner's Exception Eight should be GRANTED.

Exception to Recommendation

Petitioner takes exception to the Administrative Law Judge's recommendation that the Department of Community Affairs enter a Final Order finding the Plan Amendment in compliance. As noted above, the Department has determined that the Administration Commission should enter a Final Order determining the Plan Amendment to be not in compliance.

Petitioner's Exception to Recommendation should be GRANTED.

The Department's Exceptions to Finding of Fact

Exception One: Paragraph 32

The Department takes exception to Paragraph 32, which provides in full as follows:

> The Director of the Department's Division of Community Planning stated that it is not the practice of the Department to treat a format error or omission as requiring a determination that a plan amendment is not in compliance.

The Department alleges that this Paragraph does not accurately recount the testimony of the Director.

This Paragraph does accurately recount the Director's testimony that formatting errors do not require a finding of non-compliance in every instance. This Paragraph does not provide that such errors could never support a finding of non-compliance, as argued by the Department in this Exception.

The Department's Exception One should be DENIED.

Exception Two: Paragraph 43

This Exception mirrors Petitioner's Exception Five to Findings of Fact, the recommended ruling on which is incorporated by this reference.

The Department's Exception Two should be DENIED.

The Department's Exceptions to Conclusions of Law

Exception Three: Paragraph 72

This Exception mirrors Petitioner's Exception Four to Conclusions of Law, the recommended ruling on which is incorporated by this reference.

The Department's argument that the evidence does not support

a finding of internal inconsistency is rejected as there is abundant competent, substantial evidence that the City's Comprehensive Plan contains numerous, inconsistent planning timeframes. See Recommended Order Paragraph 42 & Petitioner's Exceptions at 30.

The Department's Exception Three should be GRANTED.

Exception Four: Paragraph 73

This Exception mirrors Petitioner's Exception Six to Conclusions of Law, the recommended ruling on which is incorporated by this reference.

The Department's Exception Four should be GRANTED.

Exception Five: Paragraph 79 (second sentence)

The Department takes exception to the second sentence of Paragraph 79, which provide as follows: "The most recent population projections are not the 'best' available data if use of the data would cause an internal inconsistency." Petitioner agrees "that the sentence to which exception is taken has no basis in law." Response to Department's Exceptions at 6.

There is indeed no basis in statute or rule for this conclusion. Striking it completely from the Recommended Order is as or more reasonable as allowing it to remain.

The Department's Exception Five should be GRANTED.

Intervenor's Notice of Errata

Intervenor notes that Paragraph 13 of the Recommended Order refers to the "Resolution SCD" instead of the "Restoration SCD." This is clearly a typographical error which should be corrected in the Final Order.

RECOMMENDED RULING ON MOTION FOR REMAND

Petitioner alleges that the Administrative Law Judge failed to make findings of fact and conclusions of law regarding allegations in the Amended Petition and requests that this proceeding be remanded to the Administrative Law Judge so that he may make such findings and conclusions. Specifically, Petitioner alleges that the Administrative Law Judge failed to make detailed findings and conclusions regarding the data and analysis submitted to support the Housing Element, but instead dismissed them with "a broad-brush rejection." Motion at 3.

Petitioner is correct in asserting that basic tenets of due process require that an agency final order contain specific findings of fact to support the ultimate decision. See Gentry v. Department of Professional and Occupational Regulations, 283 So. 2d 386 (Fla. 1st DCA 1973).

The Recommended Order addresses the Housing Element data and analysis as follows:

> 46. Similarly, Petitioner contends that some of the support documentation that is included as part of the Housing Element is not the best available data. Petitioner did not produce better data or show how better data do not support the Plan Amendments.
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> * * *
>
> 81. Petitioner failed to prove beyond fair debate that the Plan Amendments are not based on relevant and appropriate data, including data and analysis regarding need.

Recommended Order at 14 & 23. The above-cited Finding of Fact and Conclusion of Law directly address and dispose of the compliance issue with the Housing Element raised by Petitioner.

The Motion for Remand should be DENIED.

DETERMINATION

Based on the Recommended Order and the Recommended Rulings on Exceptions, the Department has determined that the Plan Amendment should be found not "in compliance."

DONE AND ORDERED in Tallahassee, Florida.

Thomas G. Pelham

Thomas G. Pelham, Secretary
DEPARTMENT OF COMMUNITY AFFAIRS
2555 Shumard Oak Boulevard
Tallahassee, Florida 32399-2100

CERTIFICATE OF FILING AND SERVICE

I HEREBY CERTIFY that the original of the foregoing has been filed with the undersigned Agency Clerk of the Department of Community Affairs, and that true and correct copies have been furnished to the persons listed below in the manner described, on this 22nd day of December, 2010.

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