

April 16, 2019

MEMORANDUM

To: Planning, Land Use and Zoning Committee
From: Ketil Freeman, Council Central Staff
Subject: Clerk File (CF) 314425 – Remand of the Contract Rezone Approval Granted Through CF 314356 for a site located at 7009 Greenwood Avenue

On April 17, the Planning, Land Use and Zoning Committee (Committee) will take up the remand from King County Superior Court of a contract rezoning approved through [Clerk File \(CF\) 314356](#) and [Ordinance 125640](#) and hear oral argument from the parties on the remanded issue.

This memorandum: (1) provides background on the legislative history of the rezoning, (2) sets out some procedural standards applicable to Council decision-making on the remand, (3) identifies the issue on remand, and (4) sets out potential options for Committee consideration.

Background

In December 2016, 70th & Greenwood Ave, LLC (Applicant) applied for a Master Use Permit, including a contract rezoning, for an approximately 21,000 square foot site located at 7009 Greenwood Avenue North. The property has two zone designations: the eastern half of the property is zoned Neighborhood Commercial 2 with a 40-foot height limit (NC2 40) and the western half of the property is zoned Single Family 5000 (SF 5000). The Applicant is seeking to rezone the NC2 40 portion of the property to Neighborhood Commercial 2 with a 55-foot height limit and M Mandatory Housing Affordability suffix (NC2 55 (M)).

The NC2 40-zoned portion of the property is cleared; part of the SF-5000 zoned portion is currently developed with a single-family house and detached garage. The Applicant plans to redevelop the property with a 35-unit apartment building with approximately 6,000 square feet of retail space surrounding an interior courtyard.

On April 9, 2018, the Seattle Department of Construction and Inspections (SDCI) issued an affirmative rezoning recommendation, State Environmental Policy Act decision, and design review decision. On April 30, 2018, the Hearing Examiner held an open record hearing on the rezoning recommendation. On June 5, 2018, the Hearing Examiner issued a recommendation to Council to approve the rezoning subject to conditions in a Property Use and Development Agreement (PUDA). On June 19, 2018, Irene Wall and Bob Morgan (Appellants) filed an appeal with the City Clerk. On August 6, 2018, the Council affirmed the Hearing Examiner's decision, conditionally granted the rezoning application, and passed Ordinance 125640, which amended the Official Land Use Map and accepted a PUDA.

On August 27, 2018, the Appellants filed a land use petition in King County Superior Court alleging six errors in the Council's decision and requesting, among other things, that the Court reverse the Council's decision. On March 5, 2019, the Court issued an order (1) remanding the rezoning approval to Council to address compliance with one rezoning criterion, (2) denying other claims by the Appellants, and (3) retaining jurisdiction. On March 27, 2019, the Court issued an amended order after reconsideration.

Type of Action and Materials in the Record

A Council decision on the remand from Superior Court is a quasi-judicial action. A quasi-judicial action is, “an action of the City Council that determines the legal rights, duties, or privileges of specific parties in a hearing or other contested case proceeding.”¹ Quasi-judicial actions are subject to the state Appearance of Fairness Doctrine prohibiting *ex-parte* communication. Council decisions must be made on the substantive record. That record was initially created by the Hearing Examiner and was later supplemented at Superior Court.

The entire Hearing Examiner’s record is available for review in my office at Councilmembers’ convenience. Excerpts from the record are contained in CF 314356 and CF 314425.

Issue on Remand

In their land use petition the Appellants allege six errors in the Council’s decision.

1. “The rezone is unlawful because it violates the one and only mandatory directive for contract rezones in the Land use Code that “[a] gradual transition in height and scale and level of activity between zones shall be provided unless major physical buffers...are provided.” SMC 23.34.009.D.2.” (Land Use Petition, paragraph 7.1)
2. “The Council Action was unlawful because it violated additional mandatory rezone criteria for height increases in SMC 23.34.009.” (Land Use Petition, paragraph 7.2)
3. “The Council Action was issued in violation of Land Use Code because it violates provisions of the General Rezone Criteria in SMC 23.34.008.” (Land Use Petition, paragraph 7.3)
4. “The Council action that allowed construction of a five-story building rising several stories right on the shared boundary line dividing the commercial lots from the adjacent single family lots was unlawful because the Council knowingly authorized a building that violated various Land use Code provisions governing setbacks between commercial and residential zones, and access across zones, and the Council admitted that the rationale SDCI had used to allow this building to evade Land Use Code requirements had no basis in the Land Use code regulations or definitions or in Council policy.” (Land Use Petition, paragraph 7.4)
5. “The Council Action was unlawful because it, in effect, rezoned the vacant single family lot in violation of the proper procedures, and without any findings and conclusions on that matter, even though: (1) such action was not among the findings and conclusions of the Hearing Examiner; (2) it was not part of SDCI’s Recommendation; (3) it was not requested by the Applicant; and (4) it affected a lot that Applicant had specifically excluded from its rezone application.” (Land Use Petition, paragraph 7.5)
6. “The contract rezone was unlawfully enacted as a spot rezone.” (Land Use Petition, paragraph 7.6)

The Court denied claims two through six and remanded the rezone solely to consider the following:

“Pursuant to RCW 36.70C.140, the contract rezone approval and Property Use and Development Agreement are hereby remanded to the City Council to address compliance with SMC 23.34.009.D.2, which requires that ‘[a] gradual transition in height and scale and level of activity between zones shall be provided unless major physical buffers, as described in subsection [23.34.008.E.2], are present,’ in the area where the commercial Lot 287710- 4100 shares a rear

¹ [Council Quasi-judicial Rules II.J.](#)

boundary line with the single family residential Lot 287710- 4120 at 7010 Palatine Avenue North.” (Order of Remand after Reconsideration, March 27, 2019)

For the location of Lot 287710- 4120 at 7010 Palatine Avenue North see page 13 [of Exhibit 50 in CF 314356](#). Lot 287710- 4120 is identified with the number three.

Potential Options for Committee Consideration

Two draft and conceptual Findings, Conclusions, and Decision documents are attached. These options may be informed by oral argument from the Applicant and Appellants and from Committee discussion.

- Option 1 – This option would approve the rezone subject to further conditioning of the project by limiting development in the rear yard of single family residential Lot 287710- 4120 at 7010 Palatine Avenue North and provide a physical buffer. See Attachment A.
- Option 2 – This option would approve the rezone subject the condition that the project be setback at the zone boundary from the single family residential Lot 287710- 4120 at 7010 Palatine Avenue North above a height a 13 feet to achieve a gradual transition between zones. Attachment B
- Option 3 – There are no draft Findings, Conclusions, and decision for this option. However, the Council could deny the rezone if the Applicant declines to accept self-imposed limitations on development in the rear yard of the single family residential Lot 287710- 4120, an upper level setback requirement, or both.

Next Steps

If the Committee makes a recommendation on any options on Wednesday, I will develop a final Findings, Conclusions, and Decision document for Full Council consideration. If the recommendation is to approve the rezone, I will draft a council bill rescinding the prior rezone ordinance, amending the Official Land Use Map, and accepting a new PUDA. Council action on that bill could not occur unless the Applicant executes the new PUDA.

Attachments:

- Draft Findings Conclusions and Decision – Option 1
- Draft Findings Conclusions and Decision – Option 2

cc: Kirstan Arestad, Central Staff Director
Aly Pennucci, Supervising Analyst

**FINDINGS, CONCLUSIONS, AND DECISION
OF THE CITY COUNCIL OF THE CITY OF SEATTLE**

In the matter of the remand)	C.F. 314425
from King County Superior)	SDCI Project 3023260
Court of)	FINDINGS, CONCLUSIONS,
)	AND DECISION ON REMAND
)	
The Approval Granted)	
through CF 314356 for a)	
Contract Rezone: Application)	
of 70th & Greenwood Ave,)	
LLC to rezone an)	
approximately 12,188 square)	
foot site located at 7009)	
Greenwood Avenue North)	
from Neighborhood)	
Commercial 2 with a 40-foot)	
height limit (NC2-40) to)	
Neighborhood Commercial 2)	
with a 55-foot height limit and)	
M Mandatory Housing)	
Affordability suffix (NC2-55)	
(M)) (Project No. 3023260;)	
Type IV).)	

Introduction

This matter involves a remand from King County Superior Court of a decision by the Council to approve the application by 70th & Greenwood, L.L.C. (the Applicant) to rezone a site located at 7009 Greenwood Avenue North (the Property).

The eastern part of the Property is zoned Neighborhood Commercial 2 with a 40-foot height limit (NC2 40) and the western part of the Property is zoned Single Family 5000 (SF 5000). The Applicant proposes to rezone the NC2 40 portion of the Property to Neighborhood Commercial 2 with a 55-foot height limit and M Mandatory Housing Affordability (MHA) suffix (NC2 55 (M)), as shown on Exhibit A.

The Applicant proposes to develop the Property with a 35-unit apartment building with approximately 6,000 square feet of retail space surrounding an interior courtyard. The building would have below-grade parking for 26 vehicles. The proposed building would be approximately five stories tall. An existing single-family house and detached structure, which are located on the SF-5000 zoned portion of the Property are proposed to remain.

On April 9, 2018, the Director of the Seattle Department of Construction and Inspections (SDCI) recommended approval of the proposed rezone subject to conditions. SDCI also issued a State Environmental Policy Act (SEPA) decision and design review decision.

On April 30, 2018, the Hearing Examiner held an open record hearing on the rezone recommendation. On June 5, 2018, the Hearing Examiner recommended that the Council conditionally approve the rezone petition. On June 19, 2018, Irene Wall and Bob Morgan (Appellants) appealed the Hearing Examiner's recommendation to the Council.

On August 6, 2018, the Council affirmed the Hearing Examiner's decision, conditionally granted the rezone application, and passed Ordinance 125640, which amended the Official Land Use Map and accepted a PUDA.

On August 27, 2018, the Appellants filed a land use petition in King County Superior Court alleging six errors in the Council's decision and requesting, among other things, that the Court reverse the Council's decision. On March 5, 2019, the Court issued an order (1) remanding the rezone approval to Council to address compliance with one rezone criterion, (2) denying other claims by the Appellants, and (3) retaining jurisdiction. On March 27, 2019, the Court issued an amended order after reconsideration. The amended order directs:

Pursuant to RCW 36.70C.140, the contract rezone approval and Property Use and Development Agreement are hereby remanded to the City Council to address compliance with SMC 23.34.009.D.2, which requires that '[a] gradual transition in height and scale and level of activity between zones shall be provided unless major physical buffers, as described in subsection [23.34.008.E.2], are present,' in the area where the commercial Lot 287710- 4100 shares a rear boundary line with the single family residential Lot 287710- 4120 at 7010 Palatine Avenue North. (Order of Remand after Reconsideration, March 27, 2019)

On April 17, 2019, the Planning, Land Use and Zoning Committee heard oral argument from the Applicant and Appellants.

Findings of Fact

The Council adopts the Hearing Examiner's Findings of Fact as stated in the Findings and Recommendation of the Hearing Examiner dated June 5, 2018, and the following additional findings of facts:

1. On March 18, 2019, the Council passed Ordinance 125791, which increased the height of the commercial zone adjacent to the Property from 40 feet to 55 feet and established new upper level setback development standards.
2. The rear yard of the single family residential Lot 287710- 4120 at 7010 Palatine Avenue North can be modified to provide a landscaped open space that could be integrated into the landscaped open space on single family residential lot 287710- 4127.

Conclusions

The Council adopts the Hearing Examiner's Conclusions as stated in the Findings and Recommendation of the Hearing Examiner dated June 5, 2018 and the following additional conclusions.

1. A landscaped open space in the rear yard of the single family residential Lot 287710- 4120 at 7010 Palatine Avenue North provides a physical open space buffer between land uses and allows for a gradual transition between the height and scale of the neighborhood commercial zone on the east side of the Property and the single family zone on the west side of the Property.

Decision

The Hearing Examiner's recommendation to conditionally approve the rezone is ***affirmed and the rezone is granted*** contingent on execution by the owner of the Property of a Property Use and Development Agreement (PUDA) containing those rezone conditions set out below.

In addition to the SEPA and design review conditions from the Hearing Examiner's recommendation, which are incorporated herein by reference, the rezone is subject to the following conditions:

Rezone Conditions

1. Future development of the Property, including the single-family-zoned portion, is restricted to a project that complies with Master Use Permit (MUP) No. 3023260, once the Seattle Department of Construction and Inspections (SDCI) issues that MUP. This includes maintaining as landscaped open space areas of the residential lots identified as Assessor's Parcel Number 287710-4120 and 287710-4127. Before issuing the MUP, SDCI must confirm that the drawings substantially comply with the conditions established during the design review process and Council review, including the structure design and location on the site, structure height, building materials, landscaping, street improvements, parking design, signage and site lighting.
2. The provisions of Seattle Municipal Code Chapters 23.58B and 23.58C shall apply to the rezoned portion of Property. For purposes of applying those Chapters, future development of the rezoned portion of the Property shall be subject to the following performance or payment requirements:

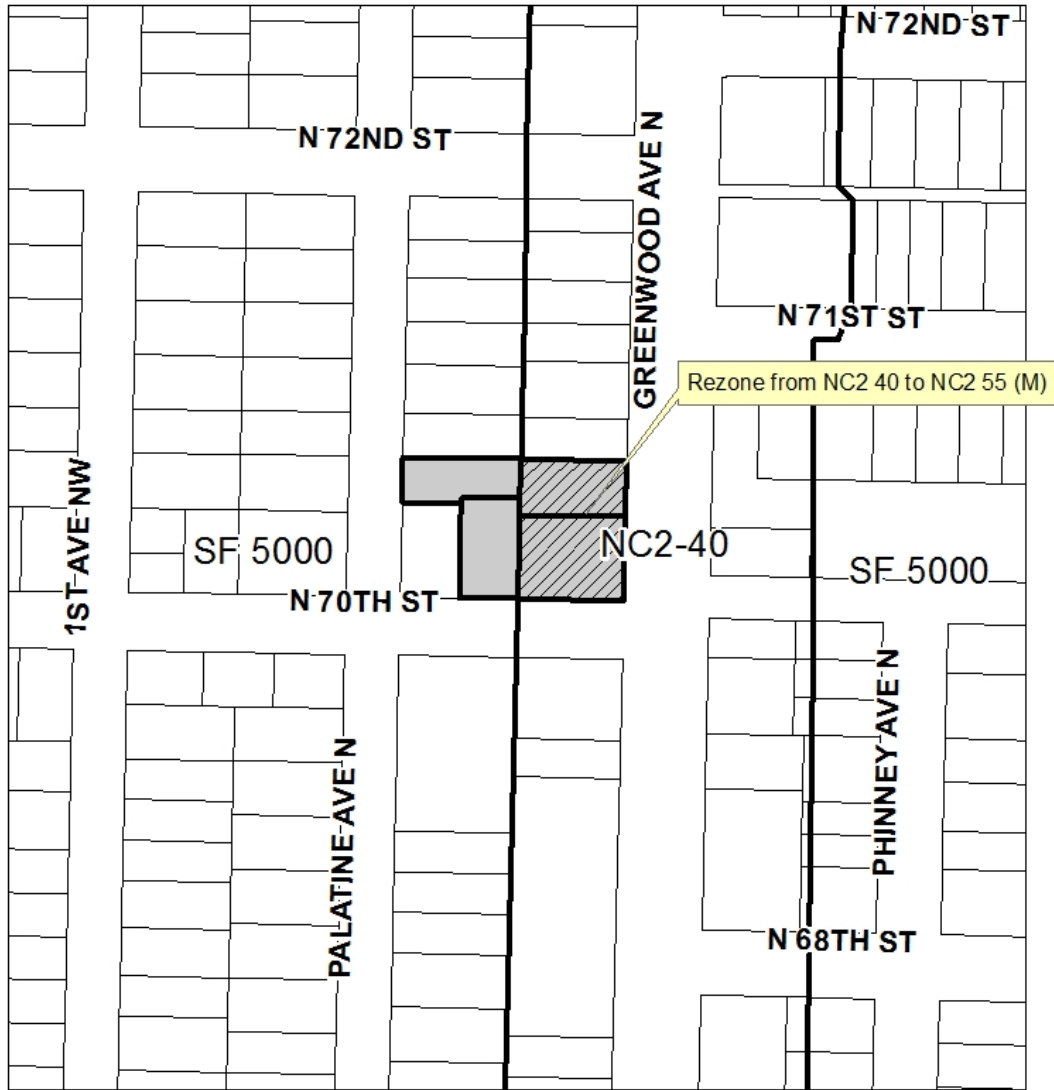
- For Chapter 23.58B, 5% per square foot for the performance option or \$7.00 per square foot for the payment option; and
- For Chapter 23.58C, 6% of units for the performance option or \$13.25 per square foot for the payment option.

Dated this _____ day of _____, 2019.



City Council President

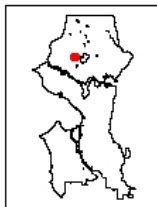
Option 1 - Draft

Exhibit A

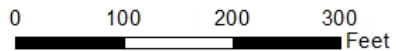


Rezone
Clerk File 314356
SDCI Project No. 3023260
7009 Greenwood Ave N.

-  Rezone Area
-  Area Subject To PUDA



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On April 9, 2018, the Director of the Seattle Department of Construction and Inspections (SDCI) recommended approval of the proposed rezone subject to conditions. SDCI also issued a State Environmental Policy Act (SEPA) decision and design review decision.

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Pursuant to RCW 36.70C.140, the contract rezone approval and Property Use and Development Agreement are hereby remanded to the City Council to address compliance with SMC 23.34.009.D.2, which requires that '[a] gradual transition in height and scale and level of activity between zones shall be provided unless major physical buffers, as described in subsection [23.34.008.E.2], are present,' in the area where the commercial Lot 287710- 4100 shares a rear boundary line with the single family residential Lot 287710- 4120 at 7010 Palatine Avenue North. (Order of Remand after Reconsideration, March 27, 2019)

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Findings of Fact

The Council adopts the Hearing Examiner's Findings of Fact as stated in the Findings and Recommendation of the Hearing Examiner dated June 5, 2018, and the following additional finding of fact:

1. On March 18, 2019, the Council passed Ordinance 125791, which increased the height of the commercial zone adjacent to the Property from 40 feet to 55 feet and established new upper level setback development standards.

Conclusions

The Council adopts the Hearing Examiner's Conclusions as stated in the Findings and Recommendation of the Hearing Examiner dated June 5, 2018 and the following additional conclusion.

1. The zoning and height principles listed in SMC 23.34.008.E and 23.34.009.D are generally aimed at minimizing the impact of more intensive zones on less intensive zones, if possible. They express a preference for a gradual transition between zoning

designations, including height limits, if possible, and potential physical buffers to provide a separation between different uses and intensities of development.

The predominant zoning pattern in this neighborhood is a commercial zone with a 55-foot height limit in the urban village adjacent to a single-family zone. In some instances, zone transitions include buffers such as rights-of-way, but in other instances zone transitions occur along shared property lines.

The rezone of a portion of the site to NC2 55 (M) would allow development up to a height allowable on the properties to the north, south, and east. The proposed full height modulation will help break down building's the mass. The transition to the west of the site at the single family residential Lot 287710- 4120 at 7010 Palatine Avenue North is less gradual. At this location, there is less of a physical buffer provided by landscaped open space. A more gradual transition between zones would be achieved by providing a greater setback above the ground floor.

Decision

The Hearing Examiner's recommendation to conditionally approve the rezone is ***affirmed and the rezone is granted*** contingent on execution by the owner of the Property of a Property Use and Development Agreement (PUDA) containing those rezone conditions set out below.

In addition to the SEPA and design review conditions from the Hearing Examiner's recommendation, which are incorporated herein by reference, the rezone is subject to the following conditions:

Rezone Conditions

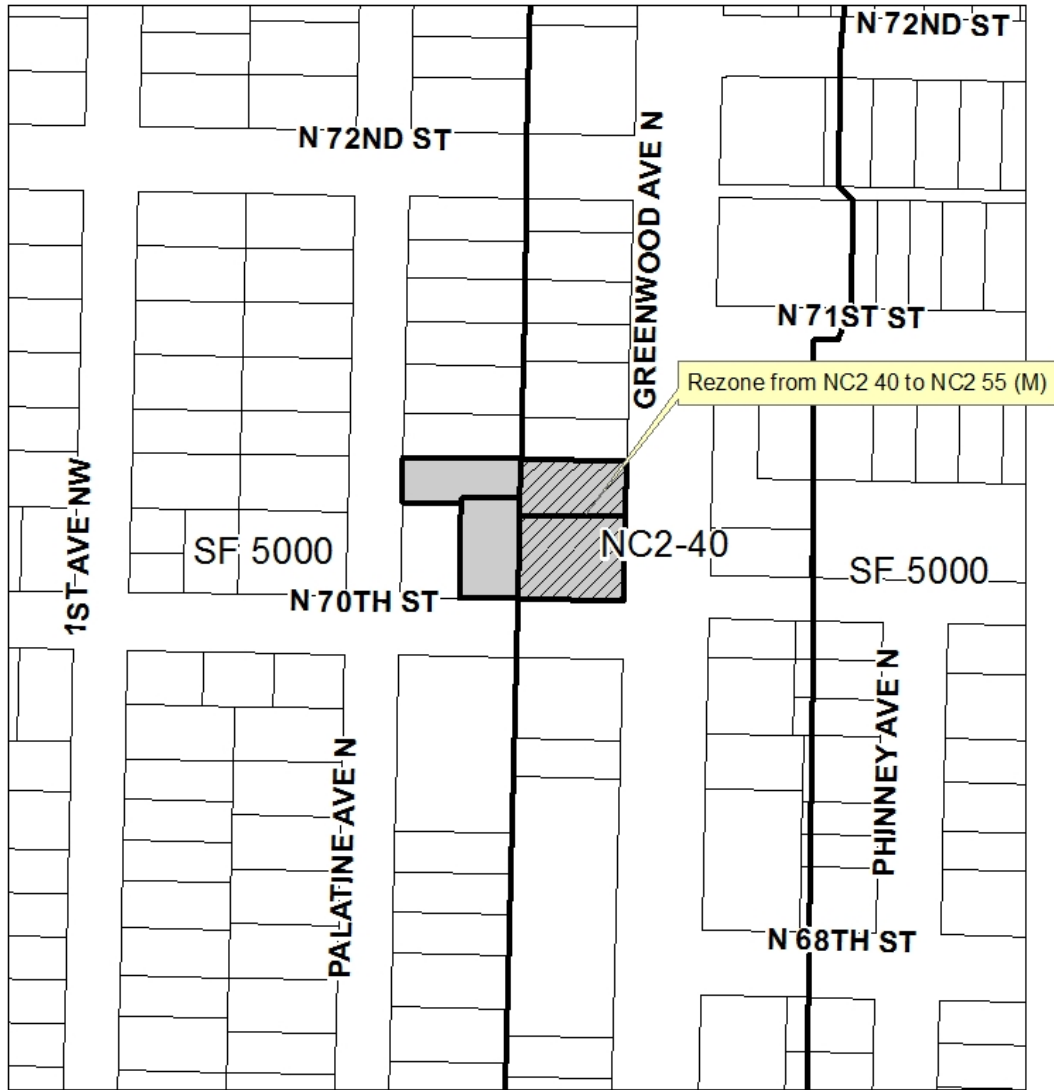
1. Before issuing a Master Use Permit (MUP), the Applicant must revise the plans to provide setbacks that meet the requirements of SMC 23.47A.014.B from the zone boundary at the western edge of the building where it meets single family residential Lot 287710- 4120.
2. The provisions of Seattle Municipal Code Chapters 23.58B and 23.58C shall apply to the rezoned portion of Property. For purposes of application of those Chapters, future development of the rezoned portion of the Property shall be subject to the following performance or payment requirements:
 - For Chapter 23.58B, 5% per square foot for the performance option or \$7.00 per square foot for the payment option; and
 - For Chapter 23.58C, 6% of units for the performance option or \$13.25 per square foot for the payment option.

Dated this _____ day of _____, 2019.



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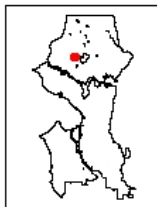
Option 2 - Draft

Exhibit A



Rezone
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7009 Greenwood Ave N.

-  Rezone Area
-  Area Subject To PUDA



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