

Council Inspection Policies - Draft Practice Direction

Submission

December 2019

Summary of recommendations

The Local Government Association of South Australia makes the following recommendations on the draft Practice Direction for Council Inspection Policies (draft practice direction):

1. The State Planning Commission consults with the LGA on the proposed fees and charges schedule to ensure that the requirements of the Planning Development and Infrastructure (PDI) Act are met. Given the tight timeframes, it would be appreciated that this consultation occurs as soon as reasonably possible, so that we can continue our analysis and have adequate time to ensure councils are appropriately resourced by 1 July 2020.
2. That fees for mandated and additional inspections be provided for based on a full cost recovery basis accounting for inspection time, travel time and follow up/repeat inspections.
3. The State Planning Commission considers a transitional provision within the Practice Direction to allow councils adequate time to implement the changes. This time sensitive matter is particularly important given the potential liabilities councils could face for failing to undertake an inspection.
4. That the terms 'occupant' and life safety' is defined.
5. That Part 2(2)(2) be further amended to amended to read "...as may be present *and visible (without the use of any tools or equipment, or any destructive or intrusive methods), as at the time of the inspection.*" (new words in italics).
6. That Part 2(3) be amended to make clear that "additional inspections" are entirely within the discretion of councils and are not "required" or "mandatory" but, rather, "encouraged".
7. That the State Planning Commission work with councils, the State Government, universities and industry bodies to expand the capacity of the building surveying profession and bring on additional staff and upskill graduates into these roles.
8. That the mandatory inspection practice direction¹ be amended so the requirement on councils to assess "the adequacy" of building elements be replaced with a less onerous requirement say, to inspect "...for the purposes of identifying any obvious defects or deficiencies..." or words similar effect. Here the degree of "obviousness" may be measured subjectively in terms of the expertise of the person undertaking the inspection, rather than by some objective standard.
9. That the City of Whyalla only be listed once and that Light Regional Council, as a phase three council,² be included in Part 2.³
10. That the timeframe for inspection for when an inspection is carried out should be extended to at least three business days from receipt of notification of completion within metropolitan Adelaide and at least five business days for regional councils to enable a council to coordinate and engage appropriate resources and authorised officers.
11. Given that the timing of the inspection is discretionary, the LGA recommends the word "must" be replaced with "may".

¹ Above n 28, Part 2(2)(2).

² State Planning Commission, *Planning & Design Code: Local Government Area Phase Allocation* (Approved by State Planning Commission 16 August 2019).

³ *Background Paper on Inspection Policies Practice Direction* page 13.

12. That the requirement for inspections of small commercial or public buildings “on completion” be brought in line with all other classes of buildings where council has discretion when to inspect and is not required to inspect upon completion.
13. Mandatory inspections should be undertaken by the relevant design professionals at all critical stages and evidence of the inspection (such as a certificate from an engineer) be recorded on the SA Planning Portal, with notification given to the relevant council. An Authorised Officer should attend in accordance with the proposed inspection policy to provide necessary regulatory oversight. The draft practice direction be amended to encompass this recommendation.
14. That the separate practice directions for swimming pools and buildings be combined into one document with two parts for ease of reference.

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Introduction

About the Local Government Association of South Australia

The LGA is the voice of local government in South Australia representing all 68 councils across the state and the and the Anangu Pitjantjatjara Yankunytjatjara.

The LGA is recognised in the *Local Government Act 1999* (SA) and is a constituent member of the Australian Local Government Association.

The mission of the LGA is to provide leadership, support, representation and advocacy on behalf of South Australian councils, for the benefit of the community.

Local government's role in the planning reform process

The LGA welcomes the opportunity to provide a response to the State Planning Commission on the Council inspection policies - draft practice direction (the draft practice direction).⁴ The LGA has consistently advocated for a planning system that is “*accessible, integrated, accountable and supports local participation.*”⁵

The LGA is disappointed with the timing and approach taken with the consultation process occurring during the consultation on Phase 2 of the Planning and Design Code. Given the significance of this draft practice direction the LGA considers that the Commission should have worked more closely with the LGA and its members on the preparation of the background paper and draft practice direction.

To develop this submission the LGA has reviewed and considered the draft practice direction, the background paper,⁶ the Botten Levinson Report⁷ and has consulted with councils.

General comments

The LGA and local government supports the need for well-defined and robust building inspection policies for councils and their communities. Feedback from members supports the proposed purpose of the inspection policy as laid out in the background paper⁸ namely a focus on public and occupant safety and to maintain the integrity of and confidence in the development control system.

However, the LGA considers that more time should have been taken in engaging with local government to understand the needs and resource requirements prior to the release of the draft practice direction and supporting documents. Feedback from members also highlights that the practice direction does not adequately consider the challenges experienced in rural South Australia, particularly the limited availability of experienced resources and the large geographic areas of many regional councils.

The LGA is also disappointed that the report prepared by Botten Levinson Lawyers was released as a public document without local government first having the opportunity to review and comment on the findings of the report. The LGA considers that the report recommendations used by the State Planning Commission in developing the draft practice direction contains flawed assumptions.

For example, on page 20 the report states that “*in all cases the Councils were well funded, substantial operations capable of funding at least one employee directed to the inspection task*”. However, it is not

⁴ SA Planning Portal, Inspection Policies Practice Direction < https://www.saplanningportal.sa.gov.au/have_your_say >.

⁵ LGA of SA, *LGA Advocacy Plan 2019 – 2023* (ECM 687104) page 20.

⁶ State Planning Commission, Council Inspection Policies, Draft Practice Direction.

⁷ Ibid.

⁸ State Planning Commission, *Background Paper on Inspection Policies Practice Direction* (October 2019), page 12.

clear that the report has included a comprehensive analysis by a financial management expert to justify this assumption. Detailed investigations and analysis undertaken by the LGA demonstrates that on average development application fees recoup only 29% of the cost of administering the current system.

The report has also not adequately considered the availability of suitably qualified people to undertake inspections, particularly in regional areas.

Assumptions of the number of inspections that could be undertaken during a single day by a building inspector are also flawed. The rate of 6 inspections a day assumes there is little or no travel time between inspections and makes no allowance for administrative matters, report preparation and engaging with members of the public; which are key components of local government's building inspection function.

The LGA acknowledges the need for good inspection policy based on accurate information and developed through a collaborative working partnership. While recognising that the purpose of the report is to consider a building inspection regime for local government, the LGA also believes that the development of good policy must also include the obligations and responsibilities not only of local government but also of:

1. Private certifiers,
2. Builders,
3. Owners, and
4. Owner builders.

Fees and financial implication of proposed practice direction

Advice provided to the LGA by councils has highlighted the significant concern amongst councils regarding the cost implications of resourcing the anticipated inspection regime.

The setting of fees under the Act is governed by regulation.⁹ There are currently no prescribed fees associated with building inspections.¹⁰ In addition Section 144 of the PDI Act requires the State Planning Commission to consider 'the financial and other resources of councils' when drafting the Practice Direction. The LGA does not consider that the investigations undertaken by or on behalf the Commission have satisfied the requirement of the PDI Act to expertly analyse the financial and resourcing implications of the proposed building inspection regime.

Building inspections are a resource intensive activity for councils, particularly regional councils facing additional financial, personnel and distance barriers. The draft practice direction places additional inspection responsibilities on councils and as such require more council resources to undertake the recommended number of inspections.

Consulting on this practice direction without any detail of the proposed fee structure has made it difficult for the LGA and its members to provide well rounded and accurate feedback and commentary around the practical reality and resource implications of this proposed draft practice direction.

Further, it is necessary to note that the current structure of the regulations does not enable councils to impose fees for additional inspections,¹¹ which (as explored later in this paper) appear to be in certain

⁹ *Planning, Development and Infrastructure Act 2016 (SA)* Sch 5 (31).

¹⁰ *Planning, Development and Infrastructure (Fees, Charges and Contributions) Regulations 2019.*

¹¹ *Ibid.*

circumstances, mandatory. Further, the Botten Levinson Report recommends inspections be “*flexible, dynamic and unpredictable*” in order to provide for occupant and public safety and maintain confidence and integrity in the development control system.¹² As such, “additional inspections” seem to be required to achieve the objects of the practice direction and as such, fees should be set accordingly.

The LGA notes that both mandatory and additional inspections will have resource implications, both in terms of the inspections themselves, as well as any follow up action where issues are identified.

The LGA views it as unreasonable to place further financial burden on councils without adequate opportunity to cost recover, and recommends fees should be adopted for all inspections provided for under this practice direction, mandatory, additional or otherwise and the fees should be based on a cost recovery basis.

The fee structure should also consider the limitations of councils required to engage a person holding “*particular knowledge, skills and qualifications*.”¹³

Recommendations

1. The State Planning Commission consults with the LGA on the proposed fees and charges schedule to ensure that the requirements of the PDI Act have been met. Given the tight timeframes, it would be appreciated that this consultation occurs as soon as reasonably possible, so that we can continue our analysis and have adequate time to ensure councils are appropriately resourced by 1 July 2020.
2. That fees for mandated and additional inspections be provided for based on a full cost recovery basis accounting for inspection time, travel time and follow up/repeat inspections.
3. The State Planning Commission considers a transitional provision within the Practice Direction to allow councils adequate time to implement the changes. This time sensitive matter is particularly important given the potential liabilities councils could face for failing to undertake an inspection.

Analysis of the draft practice direction

Overall Purpose

The focus of the draft practice direction is occupant and life safety.

The objects of the Practice Direction are very broad and not defined and as such, the object of the Practice Direction could be applied very broadly, and potentially taken out of context, or interpreted in different ways.

Recommendation

1. That the term ‘occupant and life safety’ is defined.

¹² State Planning Commission, Council Inspection Policies, Draft Practice Direction, Part 1(3).

¹³ Ibid, Part 3 – Authorised officers (2).

Part 2 – Inspection Policy

The application of the mandated 66% and 100% could be clarified in the Practice Direction.

Tables 1, 2, 3 & 4 of the draft practice direction state the inspection requirements for ‘building work’ regarding the specified timing, number of inspections and portion of developments within the Council area. The draft practice direction provides that the term ‘building work’ has the same definition as within section 3(1) of the *Planning, Development and Infrastructure Act 2016* (SA) (PDI Act), which would essentially apply to all Building Consents. This will therefore include small fit outs, minor alterations etc. Clarification is required regarding whether this is intent of the draft practice direction.

Mandatory inspections

A fundamental issue of this reform and draft practice direction is the “assessment of the adequacy”¹⁴. This assessment gives rise to questions about who should be involved in the inspection process and that individual’s required level of qualification, skills and experience to undertake this work.¹⁵

This matter will be discussed in greater detail below in the “authorised officers” section.

The LGA notes that there are timing implications arising from the requirement to assess the adequacy of certain building elements “as may be present”¹⁶. The draft practice direction generally leaves it up to councils when the mandatory inspection will occur. The difficulty with this is that if an inspection is undertaken at, or towards, the end of the construction process¹⁷ some “elements” listed may be “present”¹⁸ but not visible.

Recommendation

1. That Part 2(2)(2) be further amended to amended to read “...as may be present *and visible (without the use of any tools or equipment, or any destructive or intrusive methods), as at the time of the inspection.*” (new words in italics).

It is also noted that regulation 93(1)(d) of the *Planning, Development and Infrastructure Regulations* allows private certifiers to specify mandatory notification stages when giving a building consent. It is unclear, given the statements in the draft practice direction and Background Paper, whether the private certifier specifying additional stages of inspection creates any obligation on councils to undertake inspections at those specific stages. It is noted that this may encourage the practice of private certifiers specifying many stages for council to inspect and raises a question of whether this would have any implications for council's liability if councils chose not to undertake inspections at each of the stages specified by the certifier.

Recommendation

1. That this matter be clarified within the draft practice direction

¹⁴ Above n10 Part 2(2)(2).

¹⁵ Above n5 Page 16.

¹⁶ Draft Practice Direction Part 2(2)(2).

¹⁷ Ibid Appendix 2, Table 2 - This is required for “small commercial or public buildings”

¹⁸ Ibid Part 2(2)(2)(a)-(i).

Additional Inspections

While the intent of the draft practice direction is “to set minimum mandatory requirements that councils must comply with”¹⁹ it also notes that “should the circumstances call for it, and councils have the capacity, councils may undertake additional inspections to those requirements set out.”²⁰

The LGA notes the findings of the Botten Levinson Report namely that the, “current inspection regime is adequate in so far as it goes, but that the focus of council policies is almost solely on those issues which are mandated for in the current regulations....and largely does not extend much further than this minimum regime.”²¹

The Botten Levinson Report and the background paper outline and note that to achieve the objects of the practice direction, namely, to provide occupant and public safety and maintain confidence and integrity in the development control system, the inspection criteria should be “flexible, dynamic and unpredictable to ensure that industry is kept alert.”²²

On the face of it, the draft practice direction attempts to achieve the flexibility as recommended by dividing the inspection policy into two sections; mandatory inspections²³ and additional inspections.²⁴

Noting the findings of the Botten Levinson Report, its recommendations and the objects and drafting of the draft practice direction “additional inspections”²⁵ as described in the background paper, cannot be interpreted as a task that is only to be undertaken if councils have “capacity”²⁶.

The statutory protections provided to councils under section 233 require that a council act in “good faith.”²⁷ Noting questions around civil liability are not straightforward, it is likely that issues of “capacity”²⁸ are irrelevant where a council fails to undertake an additional inspection where they have “information to indicate circumstances warrant it.”²⁹

The LGA believes the drafting and use of terminology within the draft practice direction (separating mandatory and additional inspections and the title “additional inspections”) creates an impression that these inspections, as they are currently drafted, are not required or mandatory, which is potentially misleading and confusing for councils and the community.

The LGA notes that the “additional inspections” element of the draft practice direction, as it currently stands, fails to accurately reflect and provide for relevant considerations highlighted by the State Planning Commission, such as, a council’s capacity.³⁰

Recommendation

1. That Part 2(3) be amended to make clear that “additional inspections” are entirely within the discretion of councils and are not “required” or “mandatory” but, rather, “encouraged”.

Alternately, if the intent is that “additional inspections” are required, then different terminology should be used, or clause 3 should contain an unequivocal statement to that effect.

¹⁹ Above n 5 Page 11.

²⁰ Ibid.

²¹ Ibid Page 9.

²² Ibid page 9.

²³ Draft Practice Direction, Part 2(2).

²⁴ Ibid Part 2(3).

²⁵ Ibid Part 2(3).

²⁶ State Planning Commission, *Background Paper on Inspection Policies Practice Direction* (October 2019), page 11.

²⁷ *Planning and Development Act 2016 (SA)*.

²⁸ *Background Paper on Inspection Policies Practice Direction* (October 2019) Page 11.

²⁹ Draft Practice Direction, Part 2(3)(2).

³⁰ Above n25 Page 11;

Part 3 – Authorised Officers

The draft practice direction requires a council to ensure that an inspection and any subsequent “assessment of the adequacy”³¹ of building elements is carried out by a person who has the appropriate qualifications, skills, knowledge and experience.³²

There may be broader capacity issues within the building surveying profession in South Australia to enable councils to fulfil this obligation. Advice received from councils is that recruitment of Building Surveyors can be challenging due to the limited pool of experienced candidates and in effect councils often recruit from each other rather than the broader profession.

A distinction is drawn between the inspection, which can be performed by an authorised officer with a minimal level of accreditation, and the assessment of adequacy, which is likely to require input from a more qualified person, either before or after the inspection.

Practically, it is difficult to determine how a “division of labour” would work. When should a council consider engaging a person with greater expertise and how should that assistance be rendered? This introduces a level of opacity that could hinder the intent of the policy being successfully implemented.

This creates uncertainty about when an appropriately qualified person will need to be engaged for this purpose. Engaging qualified persons outside of council is onerous and generally a resource intense endeavour, particularly for regional councils. The practical realities faced by regional councils to try and source and engage appropriate outside individuals to fulfil their obligations will be timely and cost intensive.

The LGA notes that as above, where a council fails to engage a sufficiently accredited person to undertake the “assessment as to adequacy” it is unlikely to be regarded as acting in good faith³³ and therefore councils may be opened to liability.

Recommendations

1. That the State Planning Commission work with councils, the State Government, universities and industry bodies to expand the capacity of the building surveying profession and bring on additional staff and upskill graduates into these roles.
2. That the mandatory inspection practice direction³⁴ be amended so the requirement on councils to assess “the adequacy” of building elements be replaced with a less onerous requirement say, to inspect “...for the purposes of identifying any obvious defects or deficiencies...” or words similar effect. Here the degree of “obviousness” may be measured subjectively in terms of the expertise of the person undertaking the inspection, rather than by some objective standard.

³¹ Draft Practice Direction, Part 2(2)(2) and Note below.

³² Ibid Part 3(1)(2).

³³ *Planning and Development Act 2016 (SA)* s 233.

³⁴ Above n 28, Part 2(2)(2).

Appendix 1 – Application

Part 2: Councils not subject to this Practice Direction

The LGA notes that the City of Whyalla has been listed twice in this appendices and Light Regional Councils has not been listed at all.

Recommendation

1. That the City of Whyalla only be listed once and that Light Regional Council, as a phase three council,³⁵ be included in Part 2.³⁶

Appendix 2 – Mandatory Inspection Requirements

The LGA has concerns with the additional responsibility of undertaking commercial inspections. For many councils this requirement will result in additional inspections, with limited time to prepare adequate resources and unknown funding (as discussed above).

Where all large commercial buildings require certification, it is suggested that the certifier be responsible for inspection of these buildings.

The LGA notes that Tables 1 – 4 contained in the practice direction requires the following timeframe for an inspection on completion;

“...inspection...must be carried out within 1 business day of receipt of the completed Statement of Compliance”³⁷

This one day proposed timeframe fails to consider practical realities experienced by all councils and neglects specific considerations relevant to regional councils, where travel time, coordination of authorised officers or the need to engage an external person to assist can take more than one day to coordinate.

Recommendation

1. That the timeframe for inspection for when an inspection is carried out should be extended to at least three business days from receipt of notification of completion within metropolitan Adelaide and at least five business days for regional councils to enable a council to coordinate and engage appropriate resources and authorised officers.

Table 1. Domestic dwellings

Column 1, paragraph (a) states;

(a) Except where clause (b) applies, inspection must be carried out any time during construction.

Recommendation

1. Given that the timing of the inspection is discretionary, the LGA recommends word “must” was replaced with “may”.

³⁵ State Planning Commission, *Planning & Design Code: Local Government Area Phase Allocation* (Approved by State Planning Commission 16 August 2019).

³⁶ *Background Paper on Inspection Policies Practice Direction* page 13.

³⁷ Draft Practice Direction, Appendix 2 Table 1, Table 2, Table 3 and Table 4.

Table 2. Small commercial or public buildings

The rationale for requiring inspections of small commercial or public buildings to occur “on completion” is unexplained. In respect to all other classes of buildings, the council has discretion when to inspect, and is not required to inspect on completion.

Recommendation

1. That the requirement for inspections of small commercial or public buildings “on completion” be bought in line with all other classes of buildings where council has discretion when to inspect and is not required to inspect upon completion.

Table 4 Large Commercial Buildings

The process for commercial buildings as defined in Appendix 2 (specifically large multi-storey construction) will not meet the objects of the proposed draft practice direction for the following reasons:

- The terminology used in Regulation 57(7), by the use of the word ‘may’, means that it is optional for the relevant authority (council or private certifier) issuing building rules consent to specify notifications at critical stages. Where a council is not the relevant authority, and it remains optional, there is a risk that a relevant authority may not issue additional notifications. This would instead leave it up to council officers who have no knowledge of the design or critical elements of the application to set necessary and essential, mandatory inspection stages to meet the objects of the Practice Direction. Further, this does not align with recommendation 18 of the Shergold Weir report which suggested a requirement for the building surveyor (relevant authority) to set the inspections required at the time of the initial approval and to consult with engineers about appropriate inspection points.
- As currently drafted, there is a concern that the ability for a council to ‘choose’ which stage to inspect on a large-scale development might not deliver the best outcomes. For example, a council may elect to undertake a final inspection only; however, this won’t allow appropriate visibility of the construction methods to ensure compliance and/or public safety. This combined with the likely requirement of a council having to bear the cost of engaging an engineer with the required skillset to undertake a primary element inspection, may lead to a council opting to not undertake inspections at these stages. It is not considered realistic or practicable to engage and adequately brief a suitably qualified engineer and conduct an inspection on a large commercial building within the 24-hour period.
- It is recommended that Regulation 57(7) of the *Planning, Development and Infrastructure (General) Regulations 2017* (SA) is amended from ‘may’ to ‘should’. It is also considered that the practice direction should further clarify what is meant by ‘large commercial buildings’ and refer to the definition provided for Type A buildings as defined in the National Construction Code (NCC). These amendments would require the relevant authority for building rules consents on ‘large commercial buildings’ to specify mandatory notifications at the critical stages, determined by the relevant design professionals (see below discussion on this point). If there are no critical stages, this should be stated on the building rules consent Decision Notification Form. The ability for a council to apply additional notifications should be retained and can be used for targeted inspections, which would be attended by an Authorised Officer and any consultants considered necessary.

- An inspection process for large commercial buildings that is collaborative and involves an Authorised Officer, the relevant design professionals, and the builder, will have the highest likelihood of achieving an increase in occupant and public safety and maintaining confidence and integrity in the development control system. Therefore, to achieve the objects of the draft practice direction, this approach should be adopted.
- The draft practice direction should further define 'large commercial buildings' as Type A buildings as defined in the NCC. The PDI Regs should require mandatory inspections to be set by the relevant authority on the building rules consent Decision Notification Form, to be determined in collaboration with the relevant design professional. 'Relevant Design Professional' should also be defined and should be a broad definition to apply to all appropriately qualified engineers.

Recommendation

1. Mandatory inspections should be undertaken by the relevant design professionals at all critical stages and evidence of the inspection (such as a certificate from an engineer) be recorded on the SA Planning Portal, with notification given to Council. An Authorised Officer should attend in accordance with the proposed inspection policy to provide necessary regulatory oversight. The draft practice direction be amended to encompass this recommendation.

Other Matters

E-Planning

Part 4, section 1 of the draft practice direction states that records must be maintained in a central register and made available for inspection upon 7 days' notice from the Commission. This central register should be the SA Planning Portal. As such, there isn't a need to provide 7 days' notice for inspection by the Commission, as it should all be available via the centralised Portal.

We understand that notifications of completion of a building stage for a mandatory inspection will predominately take place through the Portal (as per Regulation 93(2) of the PDI Regs); however, the inspection process will also need to occur within council systems. This is not an ideal solution from the ePlanning system and should be included within the scope of generation 1 of the ePlanning solution. This will remove possible duplication of work. We also consider it to be necessary as some councils may need to outsource their inspections to private accredited professionals. Centralising the process will simplify it for all parties involved.

Additionally, as outlined in the consultation documentation, follow up inspections will not go towards the required 66% or 100% count; however, this provides important information on the number of inspections councils are undertaking. It will also assist with keeping account of trends in the number of follow up inspections required based on the different criteria. It would be a useful performance indicator to be able to analyse this data across multiple councils and further emphasise why the inspection processed should be included within the centralised ePlanning solution.

Practice Directions

It is noted that there will be two separate Practice Directions providing requirements for building inspections namely one for swimming pools and one for other buildings.

Recommendation

1. That the separate Practice Directions, swimming pools and buildings be combined into one document with two parts for ease of reference.

Conclusion

The LGA supports the principle behind the draft practice direction to provide occupant and life safety outcomes.

However, as there has been no expert financial analysis undertaken, local government does not have confidence that it will have the resources required to successfully implement the proposed building inspections framework. At this time the State Government has not provided advice in relation to a fee structure to support the mandated inspection requirement and other requirements relating to the Planning and Design Code.

The current development assessment and compliance system is heavily subsidised by ratepayers and the fees that councils are able to charge under Regulation recover, on average, only 30% of the total costs of providing planning and building services. This puts upward pressure on council rates and affects the ability of councils to satisfy the requirements of the legislation.

The LGA considers that the intent of the draft practice direction will not be delivered unless there are adequate resources available to councils to fulfil the requirements of their role. The fees for mandated and additional inspections should be provided for based on a full cost recovery basis, taking into account inspection time, travel time, administrative requirements and follow up/repeat inspections.

The success of the proposed framework is also dependant of the availability of qualified and experienced professions to carry out the work required. LGA considers that the State Government should seek to address the potential shortfall in experienced and qualified professionals and work with Universities, industry and local government to address this concern.

Given the potentially significant implications of the new mandated inspection regime it is recommended that the State Government adopts a transitional approach to the inspection regime with inspection levels to be increased over time to reflect council capacity and industry circumstance.



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