(X08) DOCKET NO: FST-CV18-6038249-S	:	SUPERIOR COURT
	:	
REDEVELOPMENT AGENCY	:	JUDICIAL DISTRICT OF
OF THE CITY OF NORWALK, ET AL.	:	STAMFORD/NORWALK
	:	
V.	:	AT STAMFORD
	:	
ILSR OWNERS LLC, ET. AL.	:	MARCH 13, 2019

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT FOR LACK OF SUBJECT MATTER JURISDICTION

Defendants JASON MILLIGAN, MILLIGAN REAL ESTATE LLC, KOMI VENTURES, LLC, and WALL ST OPPORTUNITY FUND, LLC (the "Milligan Defendants"), by and through their undersigned counsel, hereby submit their Memorandum of Law in support of their Motion to Dismiss Plaintiffs' Amended Complaint (the "Complaint") on the basis that Plaintiffs lack standing to prosecute their claims against the Milligan Defendants. Specifically, the Redevelopment Plan upon which the underlying Land Disposition and Development Agreement is conditioned has expired. For the reasons set forth herein, the instant Motion should be granted.

I. FACTUAL AND PROCEDURAL HISTORY

Plaintiffs REDEVELOPMENT AGENCY OF THE CITY OF NORWALK (the "Agency") and CITY OF NORWALK (collectively the "Plaintiffs") commenced the instant action by means of Writ, Summons, and Verified Complaint dated September 14, 2018. On or about December 18, 2018 the Plaintiffs filed their Request for Leave to Amend Complaint with their proposed Six Count Amended Complaint. On or about January 15, 2019, this Court granted Plaintiffs' Request for Leave to Amend over the objection of all Defendants. Accordingly, Plaintiffs' Amended Complaint is the operative pleading in this matter.

A. Plaintiffs' Complaint

For purposes of this Motion to Dismiss, the relevant factual allegations demonstrate that the underlying LDA is conditioned upon, intertwined with, or otherwise dependent upon an extant lawful Redevelopment Plan, including, by way of explanation and not limitation, an approved Redevelopment Area, Project Site, Master Site Plan, and the Plan itself.

Plaintiffs allege that, in accordance with powers delegated to it under Chapter 130 of the Connecticut General Statutes, Plaintiff REDEVELOPMENT AGENCY OF THE CITY OF NORWALK (the "Agency") prepared a redevelopment plan entitled "Wall Street Redevelopment Plan" for the purposes of redeveloping approximately 67 acres in Norwalk to address and materially improve substandard, deteriorated, and/or blighted conditions (the "Redevelopment Plan"). Pls.' Amend. Compl. at ¶ 9. The Redevelopment Area of the Redevelopment Plan encompasses approximately 67 acres of land in the City of Norwalk (the "Redevelopment Area"). Id. In the Redevelopment Plan, the Agency determined, in accord with the public purposes and provisions found in Chapter 130, that it would be in the best interests of the public to redevelop the Redevelopment Area to address and materially improve substandard, deteriorated, and/or blighted conditions. Id. at ¶ 10.

On May 19, 2004, the Housing Authority of the City of Norwalk reviewed the Redevelopment Plan and approved it in accordance with Connecticut General Statutes § 8-127. Id. at ¶12. The Redevelopment Plan thereafter was approved by the Agency and the Common Council for the City of Norwalk, among other various municipal agencies. Id. at ¶¶12-16.

On or around November 30, 2004, the Plaintiffs issued a Request for Proposals for the redevelopment of Parcel 2a including properties at the following addresses: 2, 18, 20, 21, 23,

and 31 Isaacs Street, 61, 65, 71, 77, 83 and 97 Wall Street, and 717 and 731 West Avenue (the "Project Site"). Id. at ¶ 18.

On or about November 14, 2007, the Plaintiffs and Non-party Poko-IWSR Developers, LLC ("Poko") entered into a Land Disposition and Development Agreement (the "LDA") wherein Poko was designated as the approved Redeveloper for the Project Site, and both Poko and the Plaintiffs agreed to certain rights and responsibilities concerning the development of the Project Site. Id. at ¶¶ 22-23. The LDA sets forth certain rights and responsibilities of the Plaintiffs and Poko concerning the development of the Project Site in three phases, including, among other things, a phased construction process consistent with the Agency/City approved Conceptual Master Site Plan whereby the Redeveloper would construct the Improvements in three consecutively occurring phases commonly referred to as Phase I, Phase II, and Phase III (LDA, Article III) (the "Master Site Plan"). Id. at ¶ 23.

Plaintiffs allege further that, as a modification to the LDA to facilitate acquisition and construction financing for the redevelopment, Plaintiffs and Poko entered into a Loan Recognition Agreement ("LRA"), which was thereafter amended on or about July 31, 2015 as the Amendment of the Loan Recognition Agreement (the "Amended LRA"). Id. ¶¶ 50-57. The Amended LRA, inter alia, assigns Poko's rights and obligations under the LDA relating to Phase II properties to Defendant ILSR OWNERS LLC ("ILSR"). Id. ¶ 57. Notably, Plaintiffs allege that, "[t]he LDA and Amended LRA, as written, were designed to carry out the Redevelopment Plan, as envisioned by the Agency and approved by the City and City agencies for the benefit of the citizens of Norwalk, as to the rights and obligations of each party to these agreements." Pls.' Amend. Compl. at ¶ 131. (Emphasis added).

Plaintiffs have brought a claim against Defendants ILSR for, *inter alia*, breach of the LDA. Specifically, Plaintiffs allege that that "ILSR's unpermitted transfer of the Properties to Wall St has caused, and will continue to cause, the Agency, the City and the citizens of Norwalk irreparable harm in that the redevelopment of the Wall Street area, as contemplated by the Redevelopment Plan, and as further described and negotiated in the LDA is threatened." Id. at ¶98. (Emphasis added).

Plaintiffs further allege that the Milligan Defendants have undertaken certain acts in violation of the LDA, including improperly attempting to circumvent the prohibited transfer clause of the LDA, demolishing one of the Properties, and taking steps to encumber and/or improve the Properties by, among other things, executing a leasehold agreement between Wall Street, as landlord, and Komi, as Tenant, of the former municipal parking lot at 23 Isaacs Street. Id. ¶¶ 112-121.

Notably, Plaintiffs allege that Wall Street's actions have caused, and will continue to cause, the Agency, the City and the citizens of Norwalk irreparable harm in that the redevelopment of the Wall Street area, as contemplated by the Redevelopment Plan, and as further described and negotiated in the LDA with respect to Parcel 2a is threatened. Pls.' Amend. Compl. at ¶ 121. (Emphasis added). Moreover, Plaintiffs claim that the improper conveyances of the Properties to Wall Street are an attempt to bypass and vitiate the terms of the LDA and LRA for the financial gain of ILSR, Jason Milligan and his various entities at the expense of the Redevelopment Plan and the revitalization of the Wall Street Area, as envisioned in the Redevelopment Plan. Id. ¶ 132. (Emphasis added).

Finally, Plaintiffs claim that they are entitled to preliminary and permanent injunctive relief against the Milligan Defendants on the basis that they have no adequate remedy at law because only the injunctive relief requested will protect the redevelopment of the Wall Street area, as contemplated by the Redevelopment Plan, and as further described and negotiated in the LDA. Id. ¶ 150. (Emphasis added).

B. The LDA Itself Requires a Valid Redevelopment Plan

In addition to Plaintiffs' allegations, the LDA itself expressly provides, on its face, that it cannot exist without the underlying Redevelopment Plan. Specifically, certain "whereas clauses" of the LDA provide in relevant part as follows:

> **WHEREAS**, the Agency caused to be prepared a certain redevelopment plan entitled, "Wall Street Redevelopment Plan" in accordance with the provisions of Chapter 130 of the Statutes, which Redevelopment Plan as approved as hereinafter described, and as same hereafter may be modified in accordance with the Statutes, is herein sometimes referred to as the "Redevelopment Plan" or "Plan", and
>
> **WHEREAS**, the Redevelopment Plan affects a land area of approximately 67 acres located in Norwalk and denominated in the Redevelopment Plan as the Wall Street Redevelopment Plan Project Area (the "Project Area" or the "Wall Street Project Area"), which is divided into five Redevelopment Parcels, (referred to sometimes, collectively, as the "Development Parcels" or "Parcels"), including two "Tier I Redevelopment Parcels" (Parcel 2a and Parcel 3) and three "Tier II Redevelopment Parcels" (Parcel 1, Parcel 2b and Parcel 4), and…
>
> **WHEREAS**, the Redeveloper has proposed to the Agency and the City a plan for redevelopment of a portion of the Wall Street Project Area consisting of property in Development Parcel 2a ("Project Site") together with related infrastructure and off-site improvements, which plan includes residential, mixed use, retail uses and parking, including replacement of the existing public parking spaces on the Issacs Street Municipal Parking Lot and the Leonard Street Municipal Parking Lot and other improvements, within the Project Site in accordance with the Redevelopment Plan, and
>
> **WHEREAS**, the Agency and the Common Council of the City have determined that the redevelopment of the Project Site pursuant to the Redevelopment Plan and this Agreement is in keeping with the purposes for which the Redevelopment Plan was adopted; will materially improve substandard, deteriorated and/or blighted conditions

within the Project Site; and thus is in the vital and best interests of the public and in accord with the public purposes and provisions of applicable laws; and

WHEREAS, this Agreement sets forth the obligations and responsibilities of each of the parties hereto with respect to the implementation of the Redevelopment Plan and the construction and development contemplated within the Project Site." (Emphasis added).

Moreover, certain defined terms of the LDA specifically relate to subject Project Site parcels, which terms themselves are predicated upon the lawfulness of the Redevelopment Plan. Specifically the LDA sets forth the following relevant definitions:

i) Section 1.16, "Conceptual Master Site Plan shall mean the site plan described as such in this Agreement, a copy of which is annexed hereto as Exhibit B and made a part hereof.";

ii) Section 1.30, "Infrastructure Improvements shall mean those public roadway and pedestrian improvements to be designed and to be newly constructed and/or to be rehabilitated, renovated, relocated and/or upgraded within and adjacent to the Project Site in order to facilitate the development of the Project.";

iii) Section 1.44, "Plan Requirements shall mean the provisions, guidelines and requirements set forth in the Redevelopment Plan with respect to development of properties subject to the Redevelopment Plan, including without limitation the requirements relating to Goals, Objectives and Strategies, Project Boundaries, Land Use, Design Standards, Streets and Utilities, Displacement and Relocation and Zoning.";

iv) Section 1.45, "Project shall mean all the activities described in this Agreement and the Redevelopment Plan to be undertaken by the Redeveloper and/or the City and the Agency within the Project Site."; and

v) Section 1.48, "Project Site or Project Property or Property shall mean the entire land area more particularly described in Exhibit D attached hereto and made a part hereof (as the same may be expanded in accordance with this Agreement)."

The parties' obligations under the LDA expressly incorporate and reflect the aforestated definitions in connection with the rights and responsibilities of the owner of the Parcel Sites. These obligations are conditioned upon, and cannot be performed in connection with, an

expired Redevelopment Plan. Specifically, the obligations of the Phase II and Phase III Redeveloper are conditioned upon the existence of the Project Site and Redevelopment Area contemplated by the Redevelopment Plan as follows:

i) Section 2.2, "The Redeveloper shall construct on the Project Site within the time limits set forth in this Agreement, the Improvements ("Phase II Improvements") more particularly described in Section 2.2(B) below; together with surface and/or structured parking and circulation space, and appropriate landscaping and pedestrian and vehicular circulation areas, which shall be developed and constructed in accordance with the Conceptual Master Site Plan, the Redevelopment Plan and the Plan Requirements."; and

ii) Section 2.3, "The Redeveloper shall construct on the Project Site within the time limits sets forth in this Agreement, the Improvements ("Phase III Improvements") more particularly described in Section 2.3(B) below; together with surface and/or structured parking and circulation space, and appropriate landscaping and pedestrian and vehicular circulation areas, which shall be developed and constructed in accordance with the Conceptual Master Site Plan, the Redevelopment Plan and the Plan Requirements."

As such, upon the expiration of the Redevelopment Plan, which includes the Redevelopment Area, the Plan Requirements, the Conceptual Master Site Plan, all of which must "start from scratch" as reflected , *infra*, the LDA is unenforceable and moot as a matter of law.

C. <u>The Redevelopment Plan has Expired.</u>

Plaintiffs allege that the Redevelopment Plan was executed in accordance with Chapter 130 of the Connecticut General Statutes and approved by the Norwalk Common Council on July 13, 2004. Pls.' Amend. Compl. at ¶¶ 9,15. Pursuant to § 8–127(c)(1) of Chapter 130, any redevelopment plan is effective for a period of ten years after the date of its approval. § 8–127(c)(1) further provides, "[t]he legislative body shall review the plan at least once every ten years after the initial approval, and shall reapprove such plan or an amended plan at least once

every ten years after the initial approval in accordance with this section in order for the plan or amended plan to remain in effect.

On March 6 and 7, 2019, Plaintiffs called Timothy Sheehan, the Agency's Executive Director, to testify on the Plaintiffs' behalf. Notably, Mr. Sheehan testified that the Redevelopment Plan had expired in or about June of 2018. Specifically, Mr. Sheehan' testified as to the effect of the expiration of the Redevelopment Plan as follows:

Q: What happens if [the Redevelopment Plan] is expired? What is the process if it's expired?
A: If the plan becomes expired --
Q: Yeah.
A: -- ultimately, the issues relative to eminent domain under that plan, all of the -- the statutory powers of the plan ultimately are vacated during that period of the plan being expired.
Q: Okay. So if it's expired, in essence, you have to start from scratch with a brand new Redevelopment plan under Chapter 130, right?
A: And that's what we've done in terms of this particular plan.
Q: Right, but you have to start from scratch in terms of all the things -- You've alleged in your complaint there's -- I'm not going to go through them, but the first few pages of your complaint, starting at Paragraph 9 and going through Paragraph 15, relate to or set forth everything that needed to be done in the first instance in order to have this Redevelopment plan approved, right?
A: That's correct.

. . .

Q: …in Paragraphs 9 through 15 all the steps that needed to take place in order to establish a redevelopment area to then establish a Redevelopment plan, to then get that approved at all the municipal levels, right? Yes?
A: Yes.
Q: Does that need to start from scratch in the event that the current plan is expired?
A: Yes.
Q: Okay. And that would actually start with having to determine a -- have a redevelopment area, right?
A: Yes.
Q And in order to have a redevelopment area there is a requirement under the statute that a certain percentage of that area be blighted, right?
A: Yes.
Q: And it's twenty percent blight that has to be found, right?

A: Yes.

See Trial Tr. at 6-8, March 6, 2019.[1]

Due to the fact that the Redevelopment Plan, Redevelopment Area, and Conceptual Master Site Plan have expired, any and all of Plaintiffs' claims under the LDA, which itself is borne by and/or otherwise conditioned upon the Redevelopment Plan, cannot be enforced as a matter of law and has been rendered moot. Accordingly, the Milligan Defendants respectfully move to dismiss the Plaintiffs' Complaint on the basis that this Court lacks subject matter jurisdiction.

II. LEGAL STANDARD

"A motion to dismiss . . . 'properly attacks the jurisdiction of the Court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the Court.'" Gurliacci v. Mayer, 218 Conn. 531, 544 (1991) (internal citation omitted). "The grounds which may be asserted in this motion are: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, and (5) insufficiency of service of process." Zizka v. Water Pollution Control Authority, 195 Conn. 682, 687 (1985); Connecticut Practice Book § 10-31. "Jurisdiction of the subject matter is the power to hear and determine cases of the

[1] Additionally, the Milligan Defendants ask the Court to take judicial notice of the information recently reported within the week by the Norwalk Hour regarding Mr. Sheehan's testimony. See Justin Papp, https://www.thehour.com/news/article/A-new-undiclosed-proposal-emerges-from-four-days-13673874.php (last visited March 13, 2019). Specifically, Mr. Sheehan was quoted as follows: "When you actually formulate the redevelopment plans, it goes through an approval process . . . [a]nd if the plan expires, the plan expires. So the rights and remedies associated with that plan basically expire with the plan. You undertake the development of a new plan if you determine the area still requires the need of a redevelopment plan." (Emphasis added).

general class to which the proceedings in question belong." Doe v. Roe, 246 Conn. 652, 661 (1998) (internal quotation marks omitted).

Mootness, however, "presents a legal question and implicates [a] court's subject matter jurisdiction, a threshold matter to resolve." Gladstein v. Goldfield, 325 Conn. 418, 424–25 (2017). "Mootness presents a circumstance wherein the issue before the court has been resolved or has lost its significance because of a change in the condition of affairs between the parties." (Internal quotation marks omitted.) Wilcox v. Ferraina, 100 Conn.App. 541, 547, 920 A.2d 316 (2007). "The test for determining mootness is not whether the [plaintiff] would ultimately be granted relief ... The test, instead, is whether there is any practical relief this court can grant the [plaintiff]." (Internal quotation marks omitted.) In re Jeremy M., 100 Conn.App. 436, 441–42, 918 A.2d 944, cert. denied 282 Conn. 927, 926 A.2d 666 (2007). A question is moot when no practical relief can follow from its determination. Furstein v. Hill, 218 Conn. 610, 627, 590 A.2d 939 (1991). "Subject matter jurisdiction must be addressed and decided whenever the issue is raised. The parties cannot confer subject matter jurisdiction on the court, either by waiver or consent." Candlewood Landing Condo. Assn., Inc. v. Town of New Milford, 1995 WL 631012 (Conn.Super.) (Pickett, J.) citing Sadloski v. Manchester, 228 Conn. 79, 84 (1993)). "Once the question of lack of jurisdiction of a court is raised, it must be disposed of no matter in what form it is presented and the court must fully resolve it before proceeding further with the case." Golden Hill Paugussett Tribe of Indians v. Town of Southbury, 231 Conn. 563, 570, 651 A.2d 1246 (1995) (internal brackets, quotation marks & ellipses omitted).

III. LAW AND ARGUMENT

The Plaintiffs' Complaint should be dismissed on the basis that it has been rendered moot by virtue of the fact that the Redevelopment Plan has expired. Specifically, the LDA upon which all causes of action in this case are predicated, is conditioned upon the approved Redevelopment Area, Redevelopment Plan, and Conceptual Master Site Plan, all of which are expired as a matter of law.

As a threshold matter, Connecticut's Redevelopment Act, General Statutes § 8–124 *et seq.* sets forth the procedures that a redevelopment agency must follow in adopting a "new" redevelopment plan. Specifically, § 8–127 provides in relevant part as follows:

> "[b]efore approving any redevelopment plan, the redevelopment agency shall hold a public hearing thereon, notice of which shall be published at least twice in a newspaper of general circulation in the municipality, the first publication of notice to be not less than two weeks before the date set for the hearing. The redevelopment agency may approve any such redevelopment plan if, following such hearing, it finds that: (1) The area in which the proposed redevelopment is to be located is a redevelopment area; (2) the carrying out of the redevelopment plan will result in materially improving conditions in such area; (3) sufficient living accommodations are available within a reasonable distance of such area or are provided for in the redevelopment plan for families displaced by the proposed improvement, at prices or rentals within the financial reach of such families; (4) the redevelopment plan is satisfactory as to site planning, relation to the plan of conservation and development of the municipality adopted under section 8-23 and, except when the redevelopment agency has prepared the redevelopment plan, the construction and financial ability of the redeveloper to carry it out; (5) the planning agency has issued a written opinion in accordance with subsection (a) of this section that the redevelopment plan is consistent with the plan of conservation and development of the municipality adopted under section 8-23; and (6) (A) public benefits resulting from the redevelopment plan will outweigh any private benefits; (B) existing use of the real property cannot be feasibly integrated into the overall redevelopment plan for the project; (C) acquisition by eminent domain is reasonably necessary to successfully achieve the objectives of such redevelopment plan; and (D) the redevelopment plan is not for the primary purpose of increasing local tax revenues."

In interpreting General Statutes § 8–124 *et seq*., the Connecticut Supreme Court has

held, "[s]trict compliance with each of the enumerated steps in the statute is a condition to the validity of the entire proceeding concerning a redevelopment plan." Sheehan v. Altschuler, 148 Conn. 517, 523, 172 A.2d 897, 900 (1961). The rule applicable to the corporate authorities of municipal bodies is that when the mode in which their power is to be exercised is prescribed, that mode must be followed. Jack v. Torrant, 136 Conn. 414, 419, 71 A.2d 705. Thus, failure to properly follow these statutory guidelines renders any redevelopment plan invalid. See Sheehan v. Altschuler, 148 Conn. 517, 523–24, 172 A.2d 897, 900 (Conn. 1961) ("Essential steps were not taken as required by the statute for the adoption of a redevelopment plan. The purported plan, as well as any attempted approval of it and any action taken under it, was invalid."). See Mar. Ventures, LLC v. City of Norwalk, 277 Conn. 800, 822, 894 A.2d 946, 960 (2006) ("In our decision today, we make explicit what was implicit in our decision in *Aposporos*, namely, that no renewed finding of blight is required for approval of a modification to a redevelopment plan unless the "amended" plan resulting from such modification is in fact not merely an amended plan, but a new plan." (Internal citations omitted, emphasis added).

Connecticut Appellate authority has held that where, as here, a contract refers to other documents and extrinsic materials, the terms and conditions of those documents become part of the underlying contract. Specifically, the Connecticut Appellate Court has held, "[w]hen parties execute a contract that clearly refers to another document, there is an intent to make the terms and conditions of the other document a part of their agreement, as long as both parties are aware of the terms and conditions of the second document." Morales v. PenTec, Inc., 57 Conn. App. 419, 438, 749 A.2d 47, 58 (2000). See also Local

391, Council 4, AFSCME, AFL-CIO v. Dep't of Correction, 76 Conn. App. 15, 22, 817 A.2d 1279, 1284 (2003); (Lussier v. Spinnato, 69 Conn. App. 136, 141, 794 A.2d 1008, 1013 (2002); Espinal v. Child & Family Agency of Se. Connecticut, Inc., No. 568897, 2005 WL 834491, at *2 (Conn. Super. Ct. Mar. 14, 2005) ("It has been recognized that '[s]o long as the contract makes clear reference to the document and describes it in such terms that its identity may be ascertained beyond doubt, the parties to a contract may incorporate contractual terms by reference to a separate, noncontemporaneous document, including a separate document to which they are not parties, and including a separate document which is unsigned.'")[2]; Holmes v. Colorado Coal. for Homeless Long Term Disability Plan, 762 F.3d 1195, fn 13 (10th Cir. 2014) ("A document, even one that is not contemporaneous, may be incorporated by reference into a contract so long as the contract makes clear reference to the document and describes it in such terms that its identity may be ascertained beyond doubt.") (Internal quotations omitted); Infinity Fluids, Corp. v. Gen. Dynamics Land Sys., Inc., No. CIV.A. 12-40004-TSH, 2013 WL 3158094, at *4 (D. Mass. June 19, 2013) ("When a writing refers to another document, that other document, or the portion to which reference is made, becomes constructively a part of the writing, and in that respect the two form a single instrument."); Walker v. Builddirect.Com Techs. Inc., 2015 OK 30, ¶ 11, 349 P.3d 549, 553 ("extrinsic material is properly incorporated when the underlying contract makes clear reference to the separate document, the identity of the separate

[2] See 11 S. Williston, Contracts (4th Ed.1999) § 30:25, p. 233-34 (Generally, all writings which are part of the same transaction are interpreted together…as long as the contract makes clear reference to the document and describes it in such terms that its identity may be ascertained beyond doubt, the parties to a contract may incorporate contractual terms by reference to a separate, noncontemporaneous document, including a separate agreement to which they are not parties, including a separate document which is unsigned.

document may be ascertained beyond doubt, and the parties to the agreement had knowledge of and assented to the incorporation.").

Applying the law to the facts at hand, it is clear that the LDA cannot be lawfully enforced without reference to the Redevelopment Plan, which has expired as a matter of law. Accordingly, Plaintiffs' causes of action have been rendered moot, and the instant Motion to Dismiss should be granted.

IV. CONCLUSION

For the reasons set forth herein, the instant Motion to Dismiss should be granted.

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CERTIFICATION

The undersigned hereby certifies that the foregoing Memorandum was sent via electronic mail this 13th day of March, 2019 to the following counsel of record, to wit:

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