

# ZONING **PRACTICE** JULY 2017

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## **PRACTICE** **DEVELOPMENT IMPACT FEES**



# Managing Strategic Growth Using Lawful Impact Fees

By Paige H. Gosney and Martin P. Stratte

When assessing a development plan for a proposed residential, commercial, or industrial project, planners are faced with a multitude of questions related to how the proposed project may impact existing infrastructure and facilities, including roads, utilities, and sewer and water treatment systems.

If the proposed development is residential, there are additional questions, such as whether there are adequate schools, parks, and police and fire resources available to service the proposed project and the residents who would reside there.

When existing facilities and municipal service capabilities are inadequate, and new or additional infrastructure is necessary to support a proposed project, agencies can use development impact fees to secure the funding to construct the facilities and provide the services.

A development impact fee is a monetary exaction *other than a tax or special assessment* that a local governmental agency charges a project applicant in connection with approval of a project. The purpose of a development impact fee is to defray all or a portion of the cost of public facilities related to the proposed project or to accumulate the funds necessary for new capital improvements that will serve the proposed project.

A development impact fee is voluntary and must be reasonably related to the cost of the service that will be provided by the local agency. If a development impact fee does not relate to the impact created by the project, or exceeds the reasonable cost of providing the public service, then the fee may be declared a special tax and be subject to voter approval requirements.

The power to exact development impact fees arises from a local agency's police power to protect public health, safety, and welfare. This police power allows a city or other local agency to act in the interest of its citizenry and to enact and enforce ordinances and

regulations that are not in conflict with state or federal law.

When calculated in accordance with clear, well-reasoned methodologies and developed in conjunction with local land-use regulations and comprehensive zoning plans, impact fees can provide the financing necessary to construct and expand public facilities and infrastructure.

However, as the use of impact fees has increased—often becoming a necessary tool used by local agencies to fund the infrastructure to support and sustain new development—so has the level of scrutiny on the part of developers suspicious of planning agency overreach. This has inevitably led to an increase in lawsuits that seek to challenge the amount of impact fees assessed.

This article discusses the legal standards applicable to impact fee programs, including constitutional requirements; identifies distinctions between development impact fees and other land-use-related exactions; examines commonalities between impact fee programs used in jurisdictions across the country; and provides recommendations for local agencies seeking to establish a valid impact fee program.

## CONSTITUTIONAL REQUIREMENTS

The U.S. Supreme Court has issued three significant decisions that are fundamental to understanding the lawful imposition of development impact fees: *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994); and *Koontz v. St. Johns River Water*

*Mgmt. Dist.*, 133 S. Ct. 2586, 570 U.S. 2588, 186 L. Ed. 2d 697 (2013).

## Nollan

In *Nollan*, landowners proposed the construction of a two-story home within the same footprint as their existing one-story beachfront house. As a condition of issuing a coastal development permit, the California Coastal Commission required that the property owners grant a public access easement across the beach in front of their house.

The property owners successfully argued, and the U.S. Supreme Court affirmed, that the exaction (i.e., the grant of a public easement) was not related to the impact created by the development (i.e., the increased building height).

In so doing, the U.S. Supreme Court held that proof of such an “essential nexus” was required if an exaction was to be lawful. However, the court, did not specify or discuss exactly how close or precise the nexus must be.

## Dolan

In *Dolan*, the owner of a hardware store applied for an expansion of her downtown store, which was located in a floodplain. The city wanted her to dedicate a bike path and a greenway along a stream that bordered her property to the city as a condition of approval.

The U.S. Supreme Court crafted a more refined test for the exaction of real property, ruling that in order for the government to require project-specific exactions, the government must demonstrate that (1) an essential nexus exists between the legitimate state

interest and the exaction imposed by the city (i.e., reconfirming the decision in *Nollan*) and (2) the nature of the exaction must be “roughly proportional” to the impact created by the project.

Thus, in order to meet the “rough proportionality” component of *Dolan* for ad hoc project-specific fees, a city or local agency does not need to make a precise mathematical calculation. However, it must make some sort of individualized determination that the required exaction is related, both in nature and scope, to the actual impact of the proposed development.

### Koontz

In *Koontz*, the U.S. Supreme Court held that land-use agencies imposing conditions on the issuance of development permits must comply with the “nexus” and “rough proportionality” standards set forth in *Nollan* and *Dolan*, even if the condition consists of a requirement to pay money and the permit is denied for failure to agree to the condition. The *Koontz* decision was the first case in which a monetary exaction was found to be an unconstitutional condition.

### STATE STATUTORY REGULATIONS

In addition to the U.S. Supreme Court decisions in *Nollan*, *Dolan*, and *Koontz*, which establish the essential nexus and rough proportionality standards that are applicable to all government-imposed conditions on the development of real property, most individual states have established their own statutory regimes that are specific to development impact fees (as opposed to other types of exactions) and impose requirements and obligations above and beyond the constitutional standards outlined above.

Below are some examples of state statutory regulations that govern development impact fees. While these statutory regimes contain many similarities, they represent just a handful of examples, and brief summaries do not account for the differences and unique features of each statute. Accordingly, it is crucial that planners familiarize themselves with the regulations and landmark case holdings that govern development impact fees in their own state.

### California

The Mitigation Fee Act (Government Code §§66000 *et seq.*) codifies the *Nollan/Dolan*

tests and further requires that a city or other local agency identify (1) the fee’s purpose and use; (2) the reasonableness of the relationship between the fee and a given project; and (3) the reasonableness of the relationship between the amount of the fee and the cost of the public facility attributable to the project (Government Code §66001).

In addition, California’s Mitigation Fee Act includes certain noticing and protest procedures for development impact fees, dedications, reservations, or other exactions that a developer can use to waive its right to challenge an exaction if not paid under protest within the specified time frame; however, the waiver provision does not apply if the city or local agency fails to give the requisite formal written notice at the time it imposes the fee (Government Code §66020).

### Georgia

The regulations governing development impact fees in Georgia include, among other things, provisions outlining minimum standards for local ordinances that impose impact fees, the refund of development impact fees, and administrative appeal and arbitration provisions for developers wishing to challenge the imposition of such fees (§§36-71-1 *et seq.*).

### Idaho

Idaho’s development impact fee regulations are similar to Georgia’s and, like California’s,

also give a developer the right to pay the fees under protest without waiving its right to appeal the fees at a future date (§§67-8201 *et seq.*).

### Rhode Island

The Rhode Island Development Impact Fee Act (§§45-22.4-1 *et seq.*) is also similar to the California and Georgia development impact fee regulations as it codifies the *Nollan/Dolan* tests and provides minimum standards for local fee ordinances, protest procedures, and standards for calculating development impact fees.

### South Carolina

The South Carolina Development Impact Fee Act (§§6-1-910 *et seq.*) is also similar to those states discussed above. It identifies certain projects that are exempt from the Act’s provisions and sets forth detailed requirements for calculating the amount of fees.

### COMMON TYPES OF IMPACT FEES AND OTHER TYPES OF DEVELOPMENT-RELATED EXACTIONS

Generally speaking, development impact fees usually encompass the following categories or types: infrastructure fees; sewer fees; water fees; police and fire protection fees; school fees; park fees; traffic impact fees; and so-called “fair share” programs. However, not every jurisdiction chooses to assess development impact fees in these categories, nor



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Development impact fees are a common tool to help finance the development of new infrastructure. It is vital your local impact fee policy is on sound legal footing.



Paul Brennan/Pharaday (CO)



In-lieu fees are commonly used to avoid compliance with local inclusionary housing ordinances, with fees dedicated to a common fund for the development of affordable housing.

do they use development impact fees as the mechanism for funding necessary local infrastructure and services.

Although this article examines development impact fees, there are several other types of exactions that local governments can impose on landowners and developers that agencies and planners should be aware of and understand.

### In-Lieu Fees

Local governments use “in-lieu” fees to allow for the payment of a fee in exchange for an exemption from compliance with a particular zoning ordinance or land-use regulation. Thus, such fees are said to be paid in lieu of compliance with a particular ordinance or regulation. The use of impact fees by local governments arose from the use of in-lieu fees.

For example, suppose the developer of a residential use in an urban area desires to construct a high-density project but cannot (or doesn’t want to) provide the minimum number of parking spaces that would be required by the zoning code. In exchange for the payment of an in-lieu fee, the local government could approve the project with a reduced number of parking spaces.

The developer would then pay into a fund comprised of in-lieu fees from other projects, which the government could use to construct a parking garage for multiple nearby residential developments.

Another common example is when the

developer of a proposed residential project wants to avoid having to comply with the provision of low- or moderate-income units in accordance with an inclusionary housing ordinance. In exchange for the payment of an in-lieu fee, the local government could approve the project without the minimum number of required low- or moderate-income units. The local government could then use pooled in-lieu fees to develop a project that provides affordable housing.

### Compensatory Mitigation Fees

Federal, state, and local regulatory agencies use mitigation fees to compensate for impacts to the habitats of animal and plant species that will be affected by development. Federal or state regulatory agencies often use these fees in conjunction with environmental programs, such as multispecies habitat conservation plans.

Consider a development project that will be constructed on previously undisturbed land that is the home to a certain species of lizard. Federal or state regulatory agencies may require a developer to pay a mitigation fee to compensate for the damage to the lizard’s habitat. The agency could then use this fee to improve or protect areas of the lizard’s habitat located elsewhere.

Some states have extensive programs that oversee the payment of compensatory mitigation fees into “banks.” This approach is known as mitigation or conservation banking.

### Affordable Housing or ‘Linkage’ Fees

New development often results new low-wage jobs. However, in many cities, the workers who perform these jobs are not able to afford housing due to high rental costs. In recognition of this link between new development and affordable housing demand, some local governments require developers to pay “linkage” fees into an affordable housing fund.

Although affordable housing fees are a type of impact fee, these fees are distinguishable because the fees do not result in the improvement or expansion of public facilities and infrastructure.

### Special Taxes

A special tax generally refers to a tax levied for a specific purpose, rather than a tax levied and then placed into the general fund. Special taxes must be approved by a two-thirds majority of the qualified voters in the service area, which is usually the jurisdictional area of the local government agency that initiates the special tax.

The amount of the special tax is not typically limited to the relative benefit it provides to property owners or taxpayers.

Often, local governments levy special taxes on a per-parcel basis, either according to the square footage of the parcel or as a flat charge, although the laws in many jurisdictions commonly provide flexibility to levy the special tax on any “reasonable basis.” Moreover, local governments commonly levy special taxes to obtain funds for services such as libraries, hospitals, schools, fire protection, and public safety.

### Special Assessments

A special assessment is a charge levied against real property that is particularly and directly benefited by a local improvement, in order to pay for the cost of that improvement. The rationale of a special assessment is that the assessed property has received a special benefit over and above that received by the general public; the local improvement, such as the paving or lighting of a street, directly benefits and increases the value of adjacent real property. The public should not be required to pay for special benefits for the few, and the few specially benefited should not be subsidized by the general public.

Generally speaking, a special assessment may be a fixed sum. Alternatively, a special assessment may be an amount that

fluctuates with the assessed valuation of the property, with the expenses of the improvement, or in accordance with the manner in which the assessed property is used.

Thus, strictly speaking, a special assessment is not really a tax, but rather a benefit to specific real property financed through use of public credit.

### Property-Related Fees

A property-related “fee” or “charge” is any levy other than an ad valorem tax, a special tax, or a special assessment that is imposed by a local government on a parcel or a person as an incident of property ownership. These usually include user fees or charges for property-related services, but do *not* apply to fees or charges imposed as a condition of property development, such as development impact fees.

The rationale for distinguishing between property-related fees and development impact fees is that the development impact fees are imposed as an incident of the voluntary act of development, whereas property-related fees arise from property ownership.

### OVERVIEW OF DEVELOPMENT IMPACT FEE ELIGIBILITY IN THE UNITED STATES

As previously discussed, most individual states have established their own statutory regimes that are specific to development impact fees. Set forth below is a listing of the different types of development impact fees eligible for use by local governments in various jurisdictions throughout the United States as of 2015.

As Figure 1 shows, all surveyed jurisdictions allow for the imposition of fees for development-related impacts to roads. On the other side of the spectrum are school fees, which are only allowed in 10 of the states analyzed in the survey.

As for the average amounts of impact fees charged per type of land use, residential uses are typically charged higher amounts of impact fees per unit in comparison to every 1,000 square feet of nonresidential uses, including retail, office, and industrial. Overall, single-family residential uses are charged the highest amount of total impact fees and industrial uses are charged the lowest. (See Figure 4.)

Furthermore, the types of fees resulting in the highest amounts of charges incurred by residential uses are typically for impacts

Figure 1: Facilities Eligible for Impact Fees by State

| State              | Roads | Water | Sewer | Storm Water | Parks | Fire | Police | Library | Solid Waste | School |
|--------------------|-------|-------|-------|-------------|-------|------|--------|---------|-------------|--------|
| Arizona (cities)   | X     | X     | X     | X           | X     | X    | X      | X       |             |        |
| Arizona (counties) | X     | X     | X     |             | X     | X    | X      |         |             |        |
| Arkansas (cities)  | X     | X     | X     | X           | X     | X    | X      | X       |             |        |
| California         | X     | X     | X     | X           | X     | X    | X      | X       | X           | X      |
| Colorado           | X     | X     | X     | X           | X     | X    | X      | X       | X           |        |
| Florida            | X     | X     | X     | X           | X     | X    | X      | X       | X           | X      |
| Georgia            | X     | X     | X     | X           | X     | X    | X      | X       |             |        |
| Hawaii             | X     | X     | X     | X           | X     | X    | X      | X       | X           | X      |
| Idaho              | X     | X     | X     | X           | X     | X    | X      |         |             |        |
| Illinois           | X     |       |       |             |       |      |        |         |             |        |
| Indiana            | X     | X     | X     | X           | X     |      |        |         |             |        |
| Maine              | X     | X     | X     |             | X     | X    |        |         | X           |        |
| Maryland           | X     | X     | X     | X           | X     | X    | X      | X       | X           | X      |
| Montana            | X     | X     | X     | X           | *     | X    | X      | *       | *           | *      |
| Nevada             | X     | X     | X     | X           | X     | X    | X      |         |             | **     |
| New Hampshire      | X     | X     | X     | X           | X     | X    | X      | X       | X           | X      |
| New Jersey         | X     | X     | X     | X           |       |      |        |         |             |        |
| New Mexico         | X     | X     | X     | X           | X     | X    | X      |         |             |        |
| Oklahoma           | X     | X     | X     | X           | X     | X    | X      |         | X           |        |
| Oregon             | X     | X     | X     | X           | X     |      |        |         |             | ***    |
| Pennsylvania       | X     |       |       |             |       |      |        |         |             |        |
| Rhode Island       | X     | X     | X     | X           | X     | X    | X      | X       | X           | X      |
| South Carolina     | X     | X     | X     | X           | X     | X    | X      |         |             |        |
| Texas (cities)     | X     | X     | X     | X           |       |      |        |         |             |        |
| Utah               | X     | X     | X     | X           | X     | X    | X      |         |             |        |
| Vermont            | X     | X     | X     | X           | X     | X    | X      | X       | X           | X      |
| Virginia****       | X     |       |       |             |       |      |        |         |             |        |
| Washington         | X     |       |       |             | X     | X    |        |         |             | X      |
| West Virginia      | X     | X     | X     | X           | X     | X    | X      |         |             | X      |
| Wisconsin (cities) | X     | X     | X     | X           | X     | X    | X      | X       | X           |        |

\* can be imposed by super-majority vote of city council or unanimous vote of county commission

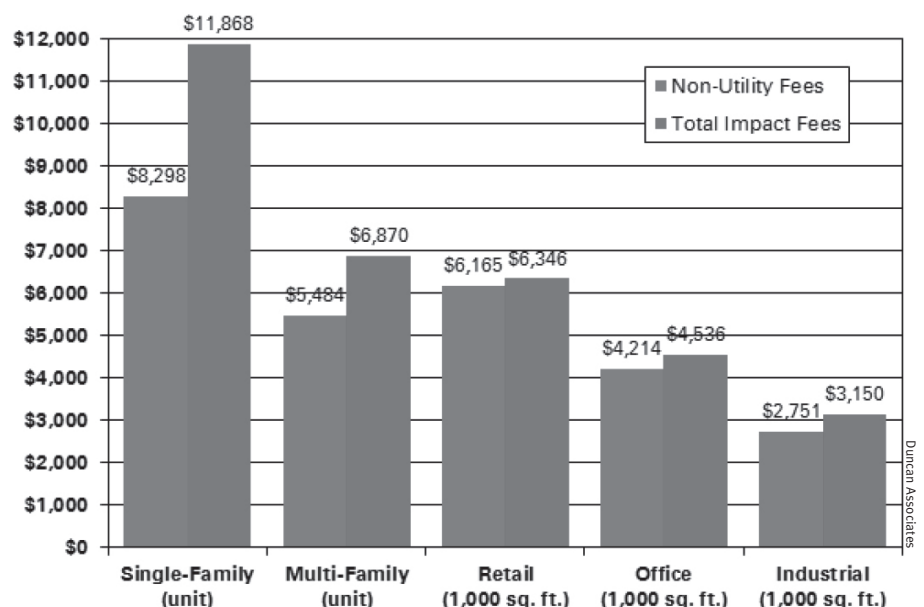
\*\* school construction tax up to \$1,600 per unit authorized in districts with populations up to 50,000 (NRS 387.331)

\*\*\* development tax of up to \$1.00/sq. ft. for residential and \$0.50/sq. ft. for nonresidential may be imposed by school districts

\*\*\*\* impact fees may be imposed on by-right residential subdivision of agriculturally-zoned parcels for a broad array of facilities under certain circumstances

Source: Clancy Mullen, *Summary of State Impact Fee Acts*, August 2015 ([www.impactfees.com](http://www.impactfees.com) - state information)

Figure 4. Average Fees by Land Use, 2015



**Table 1. Average Fees by Land Use and Facility Type, 2015**

| Facility Type      | Single-Family (Unit) | Multi-Family (Unit) | Retail (1,000 sf) | Office (1,000 sf) | Industrial (1,000 sf) |
|--------------------|----------------------|---------------------|-------------------|-------------------|-----------------------|
| Roads              | \$3,256              | \$2,201             | \$5,605           | \$3,403           | \$2,063               |
| Water              | \$4,038              | \$1,387             | \$647             | \$606             | \$627                 |
| Wastewater         | \$3,694              | \$1,777             | \$663             | \$640             | \$642                 |
| Drainage           | \$1,397              | \$784               | \$1,056           | \$891             | \$1,097               |
| Parks              | \$2,812              | \$2,099             | **                | **                | **                    |
| Library            | \$403                | \$314               | **                | **                | **                    |
| Fire               | \$472                | \$347               | \$388             | \$339             | \$211                 |
| Police             | \$365                | \$283               | \$403             | \$259             | \$171                 |
| General Government | \$1,689              | \$1,200             | \$745             | \$751             | \$436                 |
| Schools            | \$4,769              | \$2,562             | **                | **                | **                    |
| Total Non-Utility* | \$8,298              | \$5,484             | \$6,165           | \$4,214           | \$2,751               |
| Total*             | \$11,868             | \$6,870             | \$6,346           | \$4,536           | \$3,150               |

\* Average of total fees charged by jurisdictions, not sum of average fees by facility type (non-utility excludes water and wastewater)

\*\* rarely charged to nonresidential land uses, with the exception of school fees in California

related roads, parks, and utilities (i.e., water, wastewater, and drainage), whereas the highest amounts of charges incurred by nonresidential uses are typically for impacts related to roads. (See Table 1.)

According to *National Impact Fee Survey: 2015* prepared by Duncan Associates, with the exception of California, the average amounts of impact fees have been declining since the beginning of the Great Recession in 2008 ([impactfees.com/publications%20pdf/2015\\_survey.pdf](http://impactfees.com/publications%20pdf/2015_survey.pdf)). However, the survey indicates that the increase of the amounts of impact fees charged in California slowed from 2012 to 2015.

#### ESTABLISHING AND IMPLEMENTING A VALID DEVELOPMENT IMPACT FEE PROGRAM

A well-planned fee program can generate sufficient funds to allow the city to mitigate impacts created by new development.

Conversely, a poorly planned fee program can result in the city either collecting too little money and being forced to pay for new development through its general fund, or collecting too much money based on an unsupported fee program, thus exposing the city to a fee challenge and significant litigation costs. Accordingly, the following principles should guide the creation and implementation of a fee program.

#### Identify and Plan for Areas of Future Growth

Planners should be aware of where and how growth will occur in their jurisdiction and use this information to plan for specific public facilities and infrastructure that may be needed

for future development. The local agency's comprehensive plan is a valuable tool for sharing this information.

For example, if the agency's comprehensive plan projects new development to occur in a concentrated area geographically separat-

It is essential that local agencies and planners understand and adhere to the *Nollan/Dolan* nexus and rough proportionality standards when calculating the amount of development impact fees to be imposed on a particular project.

ed from existing development, new schools, fire stations, libraries, and other facilities may be required to service the new development. This will necessarily have an impact on the cost of new infrastructure and, of course, on the uses to which the resulting fee revenues may be devoted.

#### Tailor Impact Fees to Address Specific Impacts

It is important for local agencies and planners to tailor each fee to address a particular impact, as broad-brush fees are subject to legal challenge and will likely result in appeals or payment of the fee under protest by the developer. Keep in mind that each fee must bear a reasonable relationship to the impact it is intended to mitigate and the agency must also be able to clearly account for each fee collected.

Conversely, creating too many fee categories may generate administrative difficulties in implementing and accounting for fees once they are collected from developers and project applicants.

#### Don't Make New Development Pay More Than Its Fair Share

It is essential that local agencies and planners understand and adhere to the *Nollan/Dolan* nexus and rough proportionality standards when calculating the amount of development impact fees to be imposed on a particular project.

New development cannot be required to pay for existing deficiencies, and the amount of any impact fee must bear a reasonable relationship to the actual cost of providing the public services demanded by the new development on which the fee is imposed.

If a development impact fee is excessive or fails to meet these constitutional standards, a legal challenge by the developer is almost certain to result.

#### Imposing Too Many Exactions May be Detrimental to the Local Economy

It is axiomatic that a proposed development can only pay so many fees before the project will no longer "pencil out" for the developer.

Thus, at the outset, a local agency should consider what types of developments are most affected by high impact fees and whether the kinds of development the agency wants to encourage within its jurisdiction will be helped or hindered by new fees.

For example, housing advocates often argue that impact fees on residential projects can price many low- and moderate-income wage earners out of the local housing market and encourage developers to construct larger, more expensive homes, because high-end occupants can more easily absorb higher impact fees.

Similarly, business groups often argue

that imposing fees on commercial developments may prevent a city or local agency from attracting businesses that will help generate valuable tax dollars. Accordingly, local agencies and planners should consider providing fee waivers for certain types of projects or outright exempting such projects from impact fees.

### Consider Using Development Agreements Instead of Impact Fees

In certain jurisdictions, such as California, fees imposed pursuant to a development agreement are not subject to the constitutional nexus requirements or otherwise applicable notice and protest provisions.

The rationale for exempting these fees is that, unlike development impact fees imposed via local ordinance in accordance with state law, development agreement impact fees are considered voluntary, negotiated terms of an arms-length agreement between the developer and the city or local agency.

Planners should review their state and local regulations to determine whether such fees are also exempted in their jurisdiction.

### CONCLUSION

The use of development impact fees is a powerful tool for local agencies to strategically manage future growth within their jurisdictions.

Among other things, development impact fees help ensure that future development does not outpace the infrastructure necessary to sustain it by providing a source of funding that local agencies can use to construct the necessary facilities and provide the municipal services required to support new development, such as water, sewer, and police and fire protection.

Importantly, however, these fees are subject to constitutional limitations, as well as other state and local regulatory requirements, which planners should become familiar with in order to ensure that local impact fee programs are consistently and fairly applied and comply with the *Nollan/Dolan* essential nexus and rough proportionality requirements.

Finally, the American Planning Association's *Policy Guide on Impact Fees* is a helpful resource for planners seeking further information on development impact fees and ways to improve local impact fee programs ([planning.org/policy/guides](http://planning.org/policy/guides)).



Jason Goh/Phixabay (CCO)



Tailoring your impact fees to address the specific impacts of a new development (for instance, needed transportation improvements) can help your community avoid legal challenges.

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