

- 2) Defines “tribal cultural resource” (TCR) as any of the following:
 - a) Sites, features, places, cultural landscapes, sacred places, and objects with cultural value to a California Native American tribe that are either (i) included or determined to be eligible for inclusion in the California Register of Historical Resources, or (ii) included in a local register of historical resources.
 - b) A resource determined by the lead agency, in its discretion and supported by substantial evidence, to be a significant resource to a California Native American Tribe.
 - c) A cultural landscape, to the extent that the landscape is geographically defined in terms of the size and scope of the landscape.
- 3) Requires, under AB 52 (Gatto, 2014), the lead agency responsible for reviewing a project under the California Environmental Quality Act (CEQA), prior to the release of certain CEQA reports for a project, to consult with a California Native American tribe that is traditionally and culturally affiliated with the geographic area of the proposed project, as requested by the tribe. As a part of this consultation, the parties may propose mitigation measures capable of avoiding or substantially lessening potential significant impacts to a TCR or alternatives that would avoid significant impacts to a TCR. Declares that a project with an effect that may cause a substantial adverse change in the significance of a TCR is a project that may have a significant effect on the environment, and that public agencies must, when feasible, avoid damaging effects to any TCR.
- 4) Requires a local planning agency, annually by April 1, to submit a report to the legislative body, the Office of Planning and Research (OPR), and the Department of Housing and Community (HCD) development that includes data points and updates on housing plans and approvals.

This urgency bill:

- 1) Adds to the annual report to OPR and HCD the progress of a local planning agency in adopting or amending its general plan or local open-space element in compliance with its obligations to consult with California Native American tribes, and to identify and protect, preserve, and mitigate impacts to places, features, and objects in sacred sites, as specified.
- 2) Defines “consultation” as the meaningful and timely process of seeking, discussing, and considering carefully the views of others, in a manner that is cognizant of all parties’ cultural values and, where feasible, seeking agreement.

Consultation between local governments and Native American tribes shall be conducted in a way that is mutually respectful of each party's sovereignty. Consultation shall also recognize the tribes' potential needs for confidentiality with respect to places that have traditional tribal cultural importance. A lead agency shall consult the tribal consultation best practices described in the "State of California Tribal Consultation Guidelines: Supplement to the General Plan Guidelines" prepared by OPR.

- 3) Defines "scoping" as the act of participating in early discussions or investigations between the local government and California Native American tribe, and the development proponent if authorized by the California Native American tribe, regarding the potential effects a proposed development could have on a potential TCR or California Native American tribe, as defined.
- 4) States that it is the Legislature's intent that the objective zoning standards, objective subdivision standards, and objective design review be adopted with the requirements in SB 18 (Burton, Chapter 905, Statutes of 2004), which requires a city or county, prior to the adoption or amendment of a general plan, to conduct consultations with California Native American tribes for the purpose of preserving places, features, and objects protected, as specified, that are within the city's or county's jurisdiction.
- 5) Requires, prior to submitting an SB 35 permit application, the developer shall submit a notice of intent to submit an application to the local government. The notice of intent shall be in the form of a preliminary application that includes specified information.
- 6) Requires the local government, upon receipt of the notice of intent to submit an SB 35 application, to engage in a scoping consultation regarding the proposed development with any California Native American tribe that is traditionally and culturally affiliated with the geographic area of the proposed development. Requires the local government to contact the Native American Heritage Commission for assistance in identifying any California Native American tribe that is traditionally and culturally affiliated with the geographic area.
- 7) Requires the timeline for noticing and commencing the scoping consultation to be carried out as follows:
 - a) The local government shall provide formal notice of the developers' intent to submit an SB 35 application to each specified California Native American tribe within 30 business days of receiving the notice of intent. The formal notice shall include the following information:

- i) A description of the proposed development.
 - ii) The location of the proposed development.
 - iii) An invitation to engage in scoping consultation.
 - b) Each California Native American tribe that receives a formal notice shall have 30 business days from the receipt of the notice to accept the invitation to engage in scoping consultation.
 - c) If the local government receives a response to engage in the scoping consultation, the local government shall begin the scoping consultation within 30 business days of receiving the response.
- 8) Requires the scoping consultation to recognize that California Native American tribes traditionally and culturally affiliated with a geographic area have knowledge and expertise concerning the resources at issue and shall take into account the cultural significance of the TCR to the culturally affiliated California Native American tribe.
- 9) Requires the parties to the scoping consultation to be the local government and any specified California Native American tribe. More than one specified California Native American tribe may participate in the scoping consultation, and each California Native American tribe may request to engage in separate scoping consultations with the local government.
- 10) Authorizes a developer and its consultants to participate in the scoping consultation if all of the following are met:
- a) The developer and its consultants agree to respect the principles set forth in this bill.
 - b) The California Native American tribe participating in the scoping consultation approves the participation. The California Native American tribe may rescind its approval at any time.
 - c) The parties shall comply with specified confidentiality requirements.
- 11) Prohibits the California Environmental Quality Act (CEQA) from applying to scoping consultation.
- 12) Authorizes a developer to submit an SB 35 application following the conclusion of scoping consultation if the parties find that no potential TCR would be affected by the proposed development.
- 13) Authorizes a developer to submit an SB 35 application following the conclusion of scoping consultation if the parties find that a potential TCR could

be affected by the proposed development and an enforceable agreement is documented between the California Native American tribe and the local government on methods, measures, and conditions for TCR treatment. The local government shall ensure that the enforceable agreement is included in the requirements and conditions for the proposed development.

- 14) Prohibits a developer from being eligible for SB 35 streamlining if, after concluding the scoping consultation, the parties find that a potential TCR could be affected by the proposed development and an enforceable agreement is not documented between the California Native American tribe and the local government regarding measures, methods, and conditions for TCR treatment.
- 15) Provides that the scoping consultation is concluded if either of the following occur:
 - a) The parties document an enforceable agreement concerning methods, measures, and conditions to avoid or address potential impacts to TCR that are or may be present.
 - b) One or more parties to the scoping consultation, acting in good faith and after reasonable effort, conclude that a mutual agreement on methods, measures, and conditions to avoid or address impacts to TCR that are or may be present cannot be reached.
- 16) Requires that, if the development or environmental setting substantially changes after the completion of the scoping consultation, the local government shall notify the California Native American tribe of the changes and engage in a subsequent scoping consultation if requested by the California Native American tribe.
- 17) Authorizes a local government to accept an SB 35 application only if one of the following applies:
 - a) A California Native American tribe that received formal notice of the development proponent's notice of intent did not accept the invitation to engage in a scoping consultation.
 - b) The California Native American tribe accepted an invitation to engage in a scoping consultation but substantially failed to engage in the scoping consultation after repeated documented attempts by the local government to engage with the California Native American tribe.
 - c) The parties to a scoping consultation find that no TCR will be affected by the proposed development.

- d) A scoping consultation between a California Native American tribe and the local government has occurred and resulted in an agreement.
- 18) Prohibits a project from eligibility for SB 35 streamlining if any of the following apply:
- a) There is a TCR on a national, state, tribal, or local historic register list located on the site of the project.
 - b) There is a potential TCR that could be affected by the proposed development and the parties do not document an enforceable agreement on methods, measures, and conditions for TCR treatment.
 - c) The parties to the scoping consultation do not agree as to whether a potential TCR will be affected by the proposed development.
- 19) Requires, if a project is ineligible for SB 35 streamlining, the local government to provide written documentation to a developer that shall include information on how the developer may seek a conditional use permit or other discretionary approval of the development from the local government.
- 20) Provides that this bill is not intended to limit consultation and discussion between a local government and a California Native American tribe pursuant to any other applicable law, confidentiality provisions under other applicable law, the protection of religious exercise to the fullest extent permitted under existing law, or the ability of a California Native American tribe to submit information to the local government or participate in the process of the local government.
- 21) Provides that this bill shall not apply to any project that has been approved for SB 35 streamlining before the effective date of this bill.

COMMENTS

- 1) *Author's Statement.* According to the author, "AB 168 is consistent with existing California law, which protects tribal sacred sites. Without this bill, tribal cultural resources may be subject to avoidable destruction and desecration. We have lost much of our State's Native history, and once a religious or cultural artifact, site, or burial ground is lost, it cannot be replaced. To honor California's history and diversity, it is important that we continue to honor the consultation process with Native American tribes and protect tribal cultural resources. Early identification and consultation with California tribes will ensure that generations of Californians will play a role in honoring the culture and sovereignty of Native American tribes and communities, and facilitate necessary housing development by avoiding litigation. On June 18,

2019, Governor Newsom issued an Executive Order about California's history saying, 'California must reckon with our dark history. We can never undo the wrongs inflicted on the peoples who have lived on this land that we now call California since time immemorial, but we can work together to build bridges, tell the truth about our past and begin to heal deep wounds.' It is time our Legislature put the Governor's words into action by restoring the right of tribal governments to engage the development process under SB 35."

- 2) *Housing streamlining and SB 35*. In general, constructing a housing development project requires local government approval at multiple stages. This approval process is often referred to as the entitlement process. According to a study conducted by Berkeley Law School and others, *Getting It Right: Examining the Local Land Use Entitlement Process in California to Inform Policy and Process*, in which local government land use and review processes across selected cities in the Bay Area and Southern California were examined, "the processes by which local governments review residential development projects under their zoning ordinances and under CEQA varies from city to city. As a result, developers seeking to construct residential projects often must learn to navigate very different and complicated land use systems, even if they work in the same region." In addition, developers of affordable housing projects must navigate a web of overlapping eligibility criteria and application deadlines for various state and local housing programs, which often results in project delays as developers work to line up various funding sources.

Before building new housing, housing developers must obtain one or more permits from local planning departments and must also obtain approval from local planning commissions, city councils, or county board of supervisors. Some housing projects can be permitted by city or county planning staff ministerially or without further approval from elected officials. Projects reviewed ministerially require only an administrative review designed to ensure they are consistent with existing general plan and zoning rules, as well as meet standards for building quality, health, and safety. Most large housing projects are not allowed ministerial review. Instead, these projects are vetted through both public hearings and administrative review. Most housing projects that require discretionary review and approval are subject to review under the CEQA, while projects permitted ministerially generally are not.

SB 35 (Wiener, Chapter 366, Statutes of 2017) requires local jurisdictions that have not met their above moderate-income or lower-income regional housing needs assessment (RHNA) to streamline certain developments through a ministerial approval process. In other words, projects eligible for SB 35 do not go through CEQA. Eligible projects must meet specified objective criteria to

qualify for SB 35 streamlining; this provides clarity to the local government and development proponents as to which projects qualify for streamlining. In order to protect environmentally sensitive sites, however, SB 35 exempts specified sites from eligibility for streamlining, including but not limited to sites within a very high fire severity zone, wetlands, hazardous waste sites, or containing habitats for protected species.

- 3) *Tribal cultural resources.* The phrase “Tribal Cultural Resources” was first legally recognized in California and defined under AB 52 (Gatto, Chapter 532, Statutes of 2014) under CEQA. The primary intent of AB 52 was to include California Native American Tribes early in the environmental review process and to establish a new category of resources related to Native Americans that require consideration under CEQA, known as tribal cultural resources (TCRs). The process established by AB 52 is crucial for a tribal community to participate in a consultation process to identify TCRs and mitigate any impact to those sites. TCRs are sites, features, places, cultural landscapes, sacred places, and objects with cultural value to a California Native American tribe. TCRs are sometimes referred to as “sacred sites” more generally. In some instances, TCRs have been publicly identified, such as those included or determined to be eligible for inclusion in the California Register of Historical Resources or a local registry of historical resources. However, this is not always the case; a tribe may choose to not publicly disclose locations due to concerns that the sites may be at risk for desecration.

Unlike other protected resources under CEQA, SB 35 did not include a process for the treatment of TCRs, which therefore puts TCRs at risk of destruction. This bill is intended to create a process to ensure TCRs are protected within the SB 35 streamlining process, while also facilitating the construction of desperately needed housing in California.

- 4) *Scoping consultation process in SB 35.* Under the provisions in this bill, before submitting an SB 35 application, a developer applicant sends a pre-application to the city stating their intent to submit an SB 35 application. The city is then required to engage with a California Native American tribe traditionally and culturally affiliated with the proposed project site in a scoping consultation using AB 52 timelines. The scoping consultation shall operate under specified confidentiality provisions. The scoping consultation is specifically exempt from CEQA (maintains ministerial process in SB 35) so as to maintain the ministerial nature of the SB 35 process.

At the conclusion of the scoping consultation, if the parties -- *ie* the local government, California Native American tribe, and developer if authorized by the California Native American tribe -- find no potential TCR will be affected,

an SB 35 application may be submitted. If the parties find that a potential TCR could be affected, and the parties can agree to methods, measures, and conditions to treat the TCR, the applicant may submit an SB 35 application. If the parties find that a potential TCR could be affected, and there is no agreement to methods, measures, and conditions to treat the TCR, the applicant may not submit an SB 35 application. They may however apply for a permit using the ordinary discretionary process, which is subject to CEQA. The local government is required to provide the developer with information about how the developer may seek a conditional use permit or other discretionary approval of the development from the local government. Consultation concludes when the parties reach an agreement or one or more parties agree that after reasonable effort, agreement could not be reached.

- 5) *Deviations from AB 52.* By adding tribes to the “failure to agree” provisions in statute, this bill effectively grants California Native American tribes land use decision-making power over whether a project can proceed with an SB 35 application or not. Under the existing AB 52 process, the city makes the ultimate decision as to whether a TCR exists or whether it can be mitigated, not the city *and* the tribe. This delegation of decision-making power would be unprecedented and would grant California Native American tribes municipal decision-making power over housing projects under a city or county’s jurisdiction.

Additionally, the process contemplated under AB 168 does not grant a developer a legal remedy if their project is prohibited from using the SB 35 process. Under the current SB 35 law, a developer has two kinds of remedies if a city finds that the project is ineligible for streamlining (both legal writs of mandates compelling a local government to take action). For example, if a city finds that there is a protected habitat located on a site proposed for SB 35 streamlining, the developer can sue the city for a Writ of Mandate showing that there is not a protected habitat and request the court compel the city to provide the SB 35 permit.

According to several groups writing in opposition to this bill, “[c]urrent law does not empower the State of California or any local government to make decisions—whether regarding land use or anything else—that may not be challenged in court.” The same groups request amendments be taken to ensure that the decision as to whether a housing project is eligible for SB 35 be afforded the same treatment and be able to be challenged in court.

According to Legislative Counsel, “Under the amendments to [SB 35] proposed by AB 168, both the city and the tribe would be vested with equal authority in connection with the consultation process. Neither party may overrule the other;

rather, the parties must agree regarding the existence and treatment of tribal cultural resources in order for the development to be eligible for streamlining.

“Accordingly, if a developer wanted to challenge the rejection of a development’s eligibility for the ministerial approval process, the developer would need to challenge a decision that was made jointly by two separate decision makers. This would mean that if a city wanted to authorize the ministerial process but the tribe disagreed, an action against the city could not be maintained because the city would have no authority to independently authorize the use of that process. Thus, the developer would need to challenge the tribe’s decision, which would be possible only if the tribe is subject to the jurisdiction of a California court.”

Legislative Counsel finds that based on the California Native American tribes’ sovereign immunity, the California Native American tribes cannot be sued, which means that if the California Native American tribe or the local government rejects the streamlining, there is no remedy available.

The remedies available under SB 35 would only be available if the city was the sole decision-making entity. Since AB 168 would vest a California Native American tribe with equal decision-making in the streamlining process, it wouldn’t be possible to sue the city.

The committee may wish to consider asking the author amend this bill on the Senate Floor to align this bill with the process in AB 52, which leaves the sole decision-making authority with the local government. The committee may also wish to consider asking the author to clarify that the developer and the California Native American tribe may challenge a decision made by a local government and that both are entitled to the same remedies as available under SB 35.

- 6) *To which projects does this process apply?* This bill provides that the scoping consultation process shall not apply to any project that has been approved for SB 35 streamlining before the effective date of this bill. However, it is not clear as to whether this process would apply to pending SB 35 applications. ***The committee may wish to consider asking the author to amend the bill on the Senate Floor to clarify that AB 168 shall apply to any pre-applications submitted to a local government as of the effective date of this bill.*** This clarification would address one of the major concerns raised by those writing in opposition or with concerns with the bill.
- 7) *Freezing local standards.* In order to avoid approving or even stalling housing developments, some local jurisdictions change the review standards applied to

an SB 35 application after submitted by a developer. The author, Chair and stakeholders worked on language to attempt to freeze local approval processes in this bill at the time the “pre-application” or notice of intent to submit an SB 35 application is submitted to a local government. **The author has agreed to amend the bill on the Senate Floor to clarify within SB 35, and outside of the AB 168 language, that the objective standards in place at the time of the notice of intent is submitted pursuant to AB 168 will apply to the development.** This ensures that the review standards are not changed between the date the notice of intent is submitted and the date the SB 35 application is submitted. Here are the agreed upon amendments:

(a)(5) The development, excluding any additional density or any other concessions, incentives, or waivers of development standards granted pursuant to the Density Bonus Law in Section 65915, is consistent with objective zoning standards, objective subdivision standards, and objective design review standards in effect at the time that the development is submitted to the local government pursuant to this section, **or at the time a notice of intent is submitted pursuant to subdivision (b), whichever occurs earlier.** For purposes of this paragraph, “objective zoning standards,” “objective subdivision standards,” and “objective design review standards” mean standards that involve no personal or subjective judgment by a public official and are uniformly verifiable by reference to an external and uniform benchmark or criterion available and knowable by both the development applicant or proponent and the public official before submittal. These standards may be embodied in alternative objective land use specifications adopted by a city or county, and may include, but are not limited to, housing overlay zones, specific plans, inclusionary zoning ordinances, and density bonus ordinances, subject to the following...

- 8) *Clarifying timelines during consultation.* AB 52 and this bill provide a similar timeline for the local government to provide notice to a California Native American tribe, the California Native American tribe to accept the invitation to consult, and the local government to begin consultation. AB 52 uses “days” as the measurement, while this bill uses “business days,” which could potentially add 1-2 weeks per phase to the overall timeline. **The author has agreed to amend the bill on the Senate Floor to align this bill with AB 52 and refer to “days” instead of “business days.”** Here are the agreed upon amendments:

(iii) The timeline for noticing and commencing a scoping consultation in accordance with this subdivision shall be as follows:

(I) The local government shall provide a formal notice of a development proponent’s notice of intent to submit an application described in clause (i) to each California Native American tribe that is traditionally and culturally

affiliated with the geographic area of the proposed development within 30 **business** days of receiving that notice of intent. The formal notice provided pursuant to this subclause shall include all of the following:

- (ia) A description of the proposed development.
- (ib) The location of the proposed development.
- (ic) An invitation to engage in a scoping consultation in accordance with this subdivision.

(II) Each California Native American tribe that receives a formal notice pursuant to this clause shall have 30 **business** days from the receipt of that notice to accept the invitation to engage in a scoping consultation.

(III) If the local government receives a response accepting an invitation to engage in a scoping consultation pursuant to this subdivision, the local government shall commence the scoping consultation within 30 **business** days of receiving that response.

- 9) *Subsequent opportunities to consult.* This bill contains a provision that provides that if a development or environmental setting substantially changes after the completion of a scoping consultation, the local government shall notify the California Native American tribe of the changes and engage in a subsequent scoping consultation, if requested by the California Native American tribe. The intent is that if there are substantial changes that could impact a potential TCR following the completion of a project, the California Native American tribe has an opportunity to engage in a subsequent scoping consultation. The committee is not clear as to what kinds of environmental settings might change and are likely outside of the control of a housing developer, but agrees that if the development changes in such a way that would have an impact beyond the project site subject to the initial scoping consultation, a subsequent scoping consultation may make sense if the California Native American tribe requests it. *To make this clear, the committee may wish to consider asking the author to amend the bill on the Senate Floor to make the following change:*

(b)(2)(E) If the development ~~or environmental setting substantially~~ changes after the completion of the scoping consultation in a way that would have an impact beyond the project site subject to the scoping consultation, the local government shall notify the California Native American tribe of the changes and engage in a subsequent scoping consultation if requested by the California Native American tribe.

- 10) *A template for other streamlining measures.* Since the passage of SB 35, the legislature has passed multiple housing streamlining proposals to facilitate the construction of specified housing development projects. The author's intent is

for the process contained within this bill to serve as a template for other streamlining measures to protect TCRs.

- 11) *Letters of Concern.* A coalition of affordable housing organizations, which includes the California Housing Consortium, California Housing Partnership Corporation, California Council for Affordable Housing, Housing California, Non-Profit Housing Association of Northern California, San Diego Housing Federation, and Southern California Association of NonProfit Housing, wrote a letter of concern over the recent amendments to this bill. These groups are concerned that exclusionary jurisdictions will use the process in this bill to improperly block the streamlined approval of affordable housing by: (1) Allowing a local government or tribe to unilaterally claim a potential TCR and nullify SB 35 eligibility even if there is no agreement from the other party; (2) Providing no remedy to contest the denial of eligibility; and (3) Applying AB 168 to any pending SB 35 applications. They note that they do not object to legislation adhering to the same rules as AB 52, but state that “the current version of AB 168 goes much further and sets a troubling precedent that some land use decisions cannot be reviewed by the courts.”
- 12) *Letters of Opposition.* A coalition which includes the California Building Industry Association, the California Business Properties Association, California Association of Realtors, the International Council of Shopping Centers, and NAIOP California submitted an oppose unless amended letter. This coalition supports the intent to provide California Native American tribes with consultation as part of the SB 35 permitting process, but states that the language in AB 168 goes beyond the AB 52 process by “giving tribes an unchallengeable veto over whether a housing project is eligible for SB 35’s entitlement process.” This group requests the author to mirror existing California state law and ensure that a decision as to whether a housing project is eligible for SB 35 be able to challenge the decision in court. This group also requests that AB 168 be amended to clarify that its provisions only apply to applications submitted after the bills effective date. “Basic principles of fairness and due process dictate that the validity of already submitted applications should be judged by the law that was in effect at the time the application was submitted.”
- 13) *29.10(b) hearing.* The author, policy committees, Chair, and stakeholders have been in ongoing discussions for 14 months about the structure of this bill. This bill passed out of this committee, as well as Senate Governance and Finance Committee, Environmental Quality Committee, and Appropriations Committee last year. This bill was placed on the Inactive File on the Senate Floor in September 2019 to allow the parties to continue negotiations. The author amended this bill on June 23, 2020 with substantial amendments triggering Senate Rule 29.10(b). Under this rule, this Committee may hold the

bill in committee or return it to the Senate Floor for consideration. The Committee cannot amend the bill, but may ask the author to commit to amending it on the Senate Floor.

RELATED LEGISLATION:

AB 831 (Greyson, 2020) — makes several changes to SB 35 (Wiener, Chapter 366, Statutes of 2017). *This bill will be heard in the Senate Housing Committee today.*

SB 35 (Wiener, Chapter 366, Statutes of 2017) — created a streamlined, ministerial approval process for infill developments in localities that have failed to meet their regional housing needs assessment (RHNA) numbers.

AB 52 (Gatto, Chapter 532, Statutes of 2014) — established procedures and requirements under the California Environmental Quality Act (CEQA) for the purpose of avoiding or minimizing impacts to TCRs.

FISCAL EFFECT: Appropriation: No Fiscal Com.: Yes Local: Yes

POSITIONS: (Communicated to the committee before noon on Friday, July 24, 2020.)

SUPPORT:

- Agua Caliente Band of Cahuilla Indians
- Barona Band of Mission Indians
- Big Valley Band Of Pomo Indians
- Cniga - California Nations Indian Gaming Association
- Dry Creek Rancheria Band of Pomo Indians
- Fernandeño Tataviam Band Of Mission Indians
- Habematolel Pomo of Upper Lake
- Jamul Indian Village Of California
- Middletown Rancheria
- Mooretown Rancheria
- Pala Band Of Mission Indians
- Pechanga Band of Luiseno Mission Indians
- Pomo of Upper Lake Habematolel
- Rincon San Luiseno Band of Indians; the
- Santa Ynez Band of Chumash Indians
- Sycuan Band of The Kumeyaay Nation
- Tolowa Dee-Ni' Nation
- Tribal Alliance of Sovereign Indian Nations

Tule River Tribe
Twenty-nine Palms Band of Mission Indians
United Auburn Indian Community
Wilton Rancheria
Yocha Dehe Wintun Nation

OPPOSITION:

Bay Area Housing Action Coalition
California Association of Realtors
California Building Industry Association
California Business Properties Association
International Council of Shopping Centers
NAIOP of California

CONCERNS:

California Council for Affordable Housing
California Housing Consortium
California Housing Partnership
Housing California
Non Profit Housing Association of Northern California
San Diego Housing Federation
Southern California Association of Nonprofit Housing

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