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ARTICLE

Enforceable Resale Restrictions: Keeping the Doors Open for Long-Term Affordable Housing

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I. INTRODUCTION

Affordable housing programs, both voluntary and mandatory, have proliferated throughout the state in recent years as affordable housing shortages have intensified and increased pressure has been placed on municipalities to achieve minimal affordable housing goals. Providing affordable housing to low- and moderate-income persons and fostering the stability of owner-occupied communities are recognized as legitimate purposes in line with California's public policy. Policies supporting the development of affordable housing are reflected in various legislative enactments, including, for example, state planning law, which requires that the housing element of a city's general plan contain a program to meet its fair share allocation of regional housing needs for each of four income levels. The general plan must also include a program that sets forth "a five-year schedule of actions the local government is undertaking or intends to undertake to implement the policies and achieve the goals and objectives of the housing element…."[1]

To implement affordable housing programs, local governments may offer various financial and process-based incentives to develop-

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ers. Common incentives include density bonuses, impact fee waivers, transfers of inclusionary credits to other projects, and expedited permit processing or other regulatory concessions. These incentives not only reduce the financial burden of providing affordable units and thereby encourage participation in voluntary programs, but also reduce the likelihood that mandatory affordable housing requirements result in a taking of property without payment of just compensation.

One of the most common incentives granted by a local government is a density bonus which is established by statute. It allows a developer who builds affordable units to include a certain percentage of market-rate units in addition to what would otherwise be permitted under the zoning regulations and use a site more intensively.[2] Other incentives are associated with design flexibility. For example, developers may be allowed a choice of housing type, e.g., single family, duplex, townhouse units, multi-family, second-unit, or senior housing units. Under certain waiver provisions developers may be alleviated of setback, building height and lot size requirements within the development. Finally, "Fast track" permitting incentives allow expedited development review, or give an applicant's project priority over other applications filed on the same date or in the same period.

California also administers both federal and state low-income housing tax credit programs authorized by federal legislation to encourage private investment in affordable rental housing.[3] Under these programs, which provide a significant source of funding for affordable housing projects, qualified rental housing projects made subject to rent and income restrictions are eligible for tax credits that enable low-income housing sponsors and developers to raise project equity through the sale of tax credits to investors. While there are numerous variations in the types of affordable housing programs and inclusionary zoning practices implemented throughout the state, they generally require or encourage new housing developments to include a given percentage of units that are affordable to low-income and moderate-income households.

Common to all affordable housing programs is the essential requirement that affordable units remain affordable. Consequently, project sponsors, developers and local governments face numerous challenges in meeting rigid statutory and regulatory requirements aimed to ensure long-term affordability. To that end, resale and rental restrictions are typically established through deed restrictions that require subject units to be sold to other qualified low- or moderate-income buyers at a restricted price. While relatively simple in concept, maintaining the long-term affordability of units in order to satisfy the requirements of local inclusionary programs and low-income housing tax credit programs, a project proponent must implement legally enforceable restrictions, and a local government must administer, monitor and enforce those restrictions.

II. REQUIREMENTS FOR AFFORDABILITY RESTRICTIONS

As a general matter, there are two types of affordability restrictions—those imposed privately as part of an incentive program, and those imposed by a governmental agency as part of a subsidized program. As discussed below, while both serve the same underlying policies, each is subject to different requirements.

A. Privately Imposed Restrictions As Part Of An Incentive Program

One of the primary incentives created by statute for the development of affordable housing is contained in State Density Bonus Law,[4] and requires cities to grant a density bonus to developers that provide affordable housing. Government Code Section 65915, subd. (b)(1) requires a city to grant one density bonus when an applicant for a housing development seeks and agrees to construct a housing development that will contain at least one of the following: (a) 10 percent of the units affordable to lower income households, as defined in Section 50079.5 of the Health and Safety Code; (b) 5 percent of the units affordable to very low income households, as defined in Section 50105 of the Health and Safety Code; (c) a qualifying seniors development; or (d) 10 percent of the units in a condominium or planned development project affordable to moderate income households, as defined in Section 50093 of the Health and Safety Code.[5]

The calculation of the amount of the density bonus and allowable increase over the otherwise maximum allowable residential density under the applicable zoning ordinance and land use element of the general plan as of the date of application by the applicant to the city, is specified in Section 65915, subd. (g). The amount of density bonus to which the applicant is entitled varies according to the amount by which the percentage of affordable housing units exceeds the percentage established in Section 65915, subd. (b)(1).[6] For housing developments meeting the criteria of having at least 10 percent affordable to lower income households, the density bonus is a minimum of 20 percent and is to be calculated based on specified numbers set forth in the statute.

Simply put, the statute creates reciprocal duties whereby the developer must construct affordable housing and the municipality must grant a density bonus. The intent is for the density bonus or other incentives offered by the city or county to "contribute significantly to the economic feasibility of lower income housing in proposed housing developments."[7] Courts have interpreted Section 65915 as furthering an important state policy to promote the construction of low-income housing and to remove impediments to the same.[8] Significantly, to qualify for a density bonus, a project applicant must agree to, and the city or county must ensure, "continued affordability of all low- and very low-income units that qualified the applicant for the award of the density bonus for 30 years or a longer period of time…"[9] Equity recapture or equity retention provisions allow the local government to enforce an equity sharing agreement unless it is in conflict with the requirements of another public funding source.[10] By statute, an equity sharing agreement must provide that (1) the seller of an affordable unit shall retain the value of any improvements, the downpayment, and his or her proportionate share of appreciation upon resale, and (2) the local government shall recapture any initial subsidy, i.e., the fair market value of the home at the time of initial sale minus the initial sale price to the moderate-income household, plus the amount of any downpayment assistance or mortgage assistance as well as its proportionate share of appreciation, which must be used within five years for specific purposes designed to promote home ownership.[11]

B. Government-Imposed Restrictions in Subsidized Governmental Programs

In California, federal and state affordable housing tax credit programs that finance affordable housing projects are administered by the California Tax Credit Allocation Committee ("CTCAC"), established under Section 50199.8 of the Health & Safety Code.[12] The Low Income Housing Tax Credit Program establishes specific procedures for their reservation and allocation of tax credits, and compliance monitoring.[13] Under federal law, units that are part of a tax credit project must remain affordable for at least 30 years, and under state law, a 55-year extended use period is generally required for a 9 percent tax credit project.[14] To effectuate long-term rental restrictions in satisfaction of the extended low-income housing commitment required by Section 43(h)(6) of the Internal Revenue Code, a developer or housing sponsor requesting an allocation of a the housing tax credit enters into a regulatory agreement with the CTCAC pursuant to Health and Safety Code Section 50199.10, which agreement itself is recorded as a restrictive covenant.

Another example of a government-subsidized affordable housing program is established in the Community Redevelopment Law, which contains provisions relating to both inclusionary housing, and housing assisted with redevelopment set-aside funds.[15] With respect to inclusionary requirements, in a redevelopment project for which a final redevelopment plan was adopted on or after January 1, 1976, and in areas that are added to a project area by amendment to a final redevelopment plan adopted on or after January 1, 1976, at least 15 percent of all new or substantially rehabilitated dwelling units developed within a project area by a public or private entity other than the redevelopment agency must be available at affordable housing cost to persons and families of low- or moderate income levels.[16] At least 40 percent of the dwelling units made available for families of low or moderate income must be made available to very low income households.[17]

For projects funded by redevelopment set-asides, Health & Safety Code Section 33670 authorizes the allocation of any taxes levied upon property in a redevelopment project to a special fund of the redevelopment agency to pay for its indebtedness. A redevelopment agency must use at least 20 percent of all tax increments that are allocated to the agency for the purposes of increasing, improving, and preserving the community's supply of affordable low- and moderate-income housing.[18] Section 33334.3 requires the funds be held in a separate Low- and Moderate-Income Housing Fund until used to "increase, improve, and preserve the supply of low-and moderate-income housing within the territorial jurisdiction of the agency."[19] The fund is intended to "be used to the maximum extent possible to defray the costs of production, improvement, and preservation of low- and moderate- income housing…."

Again, inclusionary units created as part of a redevelopment project and all housing assisted by redevelopment housing set-aside funds must incorporate long-term affordability restrictions. Specifically, Redevelopment Law requires long-term affordability covenants to be maintained on affordable housing units for the longest feasible period of time, but not less than 55 years for rental units and 45 years for owner-occupied units.[20]

In addition to redevelopment projects, payments for affordable housing fees established in local ordinances may be maintained in funds or accounts dedicated to affordable housing for affordable housing programs administered by the locality. As part of any of these programs, similar resale restrictions are typically put in place and enforced by the locality.

III. DEED RESTRICTIONS AS A MEANS OF MAINTAINING LONG-TERM AFFORDABILITY

The affordable housing programs discussed above all require some type of enforceable resale or rental restriction to ensure the vitality of the project as a whole, prevent the original owner of a unit from reaping a financial windfall, and to maintain the affordability of the individual units in furtherance of the important policy goals achieved by the affordable housing program. While the specific program pursuant to which the affordable housing units are developed will dictate the technical details of the resale restrictions, the restrictions themselves are necessarily expressed through recorded deed restrictions. In fact, frequently, a local government's approval of an affordable housing project will be conditioned upon the recording of a deed restriction establishing the specific affordability requirements.

Recorded deed restrictions serve to bind property owners, and any future owners, in a manner consistent with project goals. These deed restrictions frequently contained in a recorded declaration of covenants, conditions, and restrictions, apply to an entire development project and fundamentally limit the individual lot owners' rights with respect to their property. Depending on the nature of the project the deed restriction may, to name a few, limit resale price, permit sale to only qualified low-income households, require owner-occupancy for a certain period of time, or impose an equity sharing agreement. Ultimately, the project developer or local entity must monitor the housing project to ensure a property owner is not violating the deed restrictions.

As recently illustrated in *Alfaro v. Community Housing Improvement System & Planning Association, Inc.*,[21] there are a number of issues that may arise relating to the enforceability of resale and rental restrictions, and municipalities and local project sponsors may face legal challenges from the participants or beneficiaries of affordable housing program. In *Alfaro*, a group of homeowners who acquired their properties through a "sweat equity" program whereby the homeowners worked to construct their own homes in lieu of a down payment, sued the two nonprofit corporations that owned the housing projects, seeking to invalidate a deed restriction that required that all of the units within their affordable housing development be affordable to "very low, low and moderate income households as defined in Section 50093 of the California Health and Safety Code."[22] This requirement, which severely reduced the price at which the homeowners could later sell their properties, was recorded in a deed restriction. The deed restriction provided that it would:

> remain in full force and effect during the period that the said permit, or any modification or amendment thereof, remains effective, and during the period that the development authorized by said permit or any modification of said development, remains in existence in or upon any part of, and thereby confers benefit upon, the subject property described herein, and to that extent, *said deed restriction is hereby deemed and agreed by owner to be a covenant running with the land*, and shall bind owner and all his/her assigns or successors in interest.[23]

The restriction, which was not to be "subordinated to any financing, encumbrance, loan, development agreement, contract, lease or other document," described the property as "[a]ll of Tract No. 1284 of Moro Cojo," which included the entire development project, and thus included plaintiffs' properties.[24]

Upon realizing that the deed restriction prevented them from reselling their homes at market rate, 23 of the homeowners launched a largely unsuccessful, but fairly thorough attack to either invalidate the deed restriction or obtain damages. The court ultimately rejected nearly all of the common law theories upon which the homeowners relied, leaving only one potential cause of action for breach of an implied contract for which the plaintiffs were limited to a remedy of damages. As to a handful of plaintiffs whose deeds did not expressly reference the deed restriction the court held that thier fraud claims were not barred.

First, the homeowners in *Alfaro* attempted to invalidate the deed restriction by claiming that it was improperly recorded because the restriction was not contained in their grant deed and did not describe their property with particularity. Consequently, the plaintiffs alleged they did not have proper notice of the resale restriction. The court rejected this argument, citing *Citizens for Covenant Compliance v. Anderson*,[25] where the enforceability of recorded restrictions was upheld despite claims that individual owners were not directly made party to the restrictions. In *Anderson*, the California Supreme Court clarified the recording requirements for a valid covenant or equitable servitude:

> [I]f a declaration establishing a common plan for the ownership of property in a subdivision and containing restrictions upon the use of the property as part of the common plan is recorded before the execution of the contract of sale, describes the property it is to govern, and states that it is to bind all purchasers and their successors, subsequent purchasers who have constructive notice of the recorded declaration are deemed to intend and agree to be bound by, and to accept the benefits of, the common plan....[26]

The Court in *Anderson* further noted that, "running covenants generally enhance alienability, and therefore many authorities feel that they should be encouraged. [] Having a single set of recorded restrictions that apply to the entire subdivision would also no doubt fulfill the intent, expectations, and whishes of the parties and community as a whole."[27] So long as recording occurs prior to execution of the sales contract, the restrictions will "not [be] unenforceable merely because they are not *additionally* cited in a deed or other document at the time of the sale."[28] In addition, a properly recorded deed restriction provides subsequent purchasers with constructive notice of its contents.[29]

The *Alfaro* court found *Anderson* controlling in this situation because the deed restriction was recorded prior to the execution of plaintiffs' sales contracts. That the restriction was not also included in the grant deed did not alter the fact that plaintiffs had constructive notice of the restriction. In describing the entire subdivision, the deed restriction necessarily encompassed each individual lot within the development.[30]

Second, the homeowners also alleged that the deed restriction was an unreasonable restraint on alienation. Civil Code section 711 provides, "[c]onditions restraining alienation, when repugnant to the interest created, are void."[31] It is long settled, however, that in California "only *unreasonable* restraints on alienation are invalid."[32] Determining whether a restraint on alienation is unreasonable requires the court to "balance the justification for the restriction against the quantum of the restraint. The greater the restraint, the stronger the justification must be to support it."[33]

The court found that the deed restriction was a reasonable restraint on alienation, especially in light of State policy favoring the availability of affordable housing for low income persons. This policy is also expressed in Civil Code Section 711.5, which authorizes local entities to take certain measures to maintain the existence of affordable housing.[34] Under Section 711.5, a state or local public entity directly or indirectly providing housing purchase or rehabilitation loans shall have the authority to deny assumptions, or require the denial of assumptions, by a subsequent purchaser who is ineligible for affordable housing. The entity also has the authority to accelerate the principal balance of the loan, making it all due and payable upon sale or transfer of the property.[35]

Third, the plaintiffs also claimed that waiver and estoppel applied because some of the homeowners were able to refinance their properties so as to encumber title with debt in excess of an "affordable" sales price.[36] Plaintiffs based this argument on the section in the recorded restriction which prohibited subordination of the deed restriction to any encumbrance. Enforcement of a restrictive covenant may be deemed waived when there are "a sufficient number of waivers so that the purpose of the general plan is undermined."[37] The plaintiffs asserted that because the resale restrictions, if enforced, would prevent the homeowner from selling at a price sufficient to pay off these loans, the restrictions must have necessarily been waived by the city or the project developer. The plaintiffs also alleged that because "several" of the plaintiffs encumbered title in excess of the affordable resale price, they collectively decided to "abandon" that particular restriction.[38] The court rejected this argument for two reasons. Only "several" of the 22 plaintiffs' properties, out of 175 single family residences at the project, were allegedly refinanced so as to encumber the title with debt greater than an "affordable" sales price.[39] Furthermore, the deed restriction did not prohibit homeowners from transforming their "sweat equity" into real cash through refinancing.[40] Thus, refinancing in excess of the affordable price could not serve as a basis for waiver as it was not in violation of the restriction. Accordingly, the waiver and estoppel claimed failed because the deed restriction did not restrict refinancing and only a handful of the property owners refinanced.

Fourth, the *Alfaro* plaintiffs also alleged that the defendants, as sellers of realty and as fiduciaries, breached a duty to disclose the deed restriction, a fact materially affecting the value of the property.[41] A seller of real property has a common law duty to disclose "where the seller knows of facts materially affecting the value or desirability of the property which are known or accessible only to him and also knows that such facts are not known to, or within the reach of the diligent attention and observation of the buyer…."[42] Fraud based on nondisclosure may arise when there is a confidential relationship, when the defendant has made a representation that is likely to mislead absent a disclosure, when there is active concealment of the undisclosed matter, or "when one party to a transaction has sole knowledge or access to material facts and knows that such facts are not known to or reasonably discoverable by the other party."[43] Furthermore, there is a statutory duty to disclose deed restrictions in a real estate transfer disclosure statement.[44] It is fraud to suppress a fact with intent to induce a person to enter a contract to acquire realty.[45]

As discussed above, a purchaser of realty is chargeable with constructive notice of a deed restriction if its contents are properly recorded prior to execution of the sales contract.[46] Valid restrictions and restrictive covenants contained in a deed or separate document may be recorded and are enforceable covenants running with the land.[47] Notice imparted by recording, however, does not relieve a vendor of real estate from their duty to disclose the existence of a deed restriction which materially affects the value of the realty—there must be some affirmative disclosure of the deed restriction. In the case of most of the *Alfaro* plaintiffs, defendants disclosed the deed restriction by referencing it in the grant deed. Some of the plaintiffs' grant deeds, however, did not reference the deed restriction. In most cases the restrictions were reflected in the preliminary reports received by homeowners prior to purchasing their homes. The court rejected the argument that this was insufficient disclosure, holding that persons who receive information about a recorded document are charged with knowledge of the terms of the document and cannot plead ignorance by failing to read it.[48]

In those limited exceptions where neither the deed nor the preliminary report disclosed the restriction, however, the plaintiffs were allowed to proceed under a fraud theory for damages, but not invalidation of the restriction.

Finally, the homeowners alleged that they entered implied unwritten contracts with defendants, including the terms that, "if plaintiffs contributed their time and labor to construct their homes and assumed the necessary indebtedness, defendants 'would convey to Plaintiffs title to the homes free from [a] restriction prohibiting Plaintiffs from selling their homes at fair market value."[49] Although the court conceded this claim might have merit under the facts of the case, success on this claim would only entitle the plaintiffs to damages, not invalidation of the deed restriction.

While the statute of frauds requires agreements for the sale of real property be in writing, "part performance by the purchaser is a well-recognized exception to [this rule]."[50] With regard to the vendor's duty to disclose the deed restriction, the court explained that most of the plaintiffs discovered the deed restriction when it was referenced in their grant deed. For the plaintiffs who received grant deeds that did not reference the deed restriction, however, a claim for breach of implied contract was viable.[51]

IV. CONCLUSION

Critical to the success of affordable housing programs is the ability to enforce the restrictions imposed to implement the program. While *Alfaro* involved relatively sympathetic facts, the court's refusal to invalidate the restrictions demonstrates a recognition that giving credence to such challenges would essentially render a developer or local agency's ability to meet the requirements for affordable housing projects impossible. Moreover, upholding such challenges would undermine the public policies served by extensive statutory schemes. Despite the generally positive outcome of the decision for the public agencies and developers of such projects, *Alfaro* suggests that sellers and public agencies involved in such projects should take care to assure that the nature of the restriction is clearly disclosed in all sales and marketing materials used in the project.

NOTES

1. Gov. Code, §65583.
2. Gov. Code, §65915.
3. Health & Saf. Code, §§50199.4 to 50199.22, Rev. & Tax. Code, §§12205, 12206, 17057.5, 17058, 23610.4 and 23610.5.

4. Gov. Code, §§65915 to 65918.
5. Gov. Code, §65915, subd. (b)(1). The Health and Safety Code Sections refer to the qualifying limits for lower income, very low income and moderate income families as established pursuant to Section 8 of the United States Housing Act of 1937, and to be published in the California Code of Regulations as soon as possible after adoption by the Secretary of Housing and Urban Development. In the event the federal standards are discontinued, the department of Housing and Community Development is to establish income limits at 80 percent of area median income for lower income families and 50 percent of area median income for very low income. Families of low or moderate income are those whose income does not exceed 120 percent of area median income.
6. *Id.*, §65915, subd. (g).
7. Gov. Code, §65917.
8. *See Building Industry Assn. v. City of Oceanside*, 27 Cal. App. 4th 744, 33 Cal. Rptr. 2d 137 (4th Dist. 1994).
9. Gov. Code, §65915, subd. (c); *see also* Gov. Code, §65916 ["Where there is a direct financial contribution to a housing development pursuant to Section 65915 through participation in cost of infrastructure, write-down of land costs, or subsidizing the cost of construction, the city, county, or city and county shall assure continued availability for low- and moderate-income units for 30 years."].
10. Gov. Code, §65915, subd. (c)(2).
11. Gov. Code, §65915, subd. (c)(2).
12. The federal tax credit for low-income rental housing is established in Internal Revenue Code §42, and the state tax credit is provided in California Rev. & Tax. Code, §§12205, 12206, 17057.5, 17058, 23610.4 and 23610.5.
13. *See* 4 Cal. Code Regs. §§10300 *et seq.* for California Tax Credit Allocation Committee Regulations Implementing the Federal and State Low Income Housing Tax Credit Laws.
14. Internal Revenue Code § 42(h)(6); 4 Cal. Code Regs., § 10327, subd. (c)(5)(C).
15. Health & Saf. Code, §§33000 to 33753.
16. Health & Saf. Code, §33413.
17. *Id*.
18. *Id.*, §33334.2, subd. (a). Affordability standards are set forth in California Health & Saf. Code, §§50052.5 and 50053 and the maximum housing costs for units that are affordable to very low, low, and moderate income households are established in Section 6920 of Title 25 of the California Code of Regulations.
19. *Id.*, §33334.3, subd. (d).
20. Health & Saf. Code, §33413.
21. *Alfaro v. Community Housing Imp. System & Planning Ass'n, Inc.*, 171 Cal. App. 4th 1356, 89 Cal. Rptr. 3d 659 (6th Dist. 2009), as modified on denial of reh'g, (Mar. 18, 2009) and review denied, (May 13, 2009). Note: This opinion was previously at 171 Cal. App. 4th 263, to which pinpoint cites are used because page numbers have not yet been incorporated into the republished opinion.
22. *Id.* at 271.
23. *Id.* at 272 (emphasis added).
24. *Id.*
25. *Citizens for Covenant Compliance v. Anderson, supra*, 12 Cal. 4th 345, 349, 47 Cal. Rptr. 2d 898 (1995) ("*Anderson*").
26. *Anderson, supra*, 12 Cal. 4th 345 at 349.
27. *Anderson, supra*, 12 Cal. 4th at 364.
28. *Anderson, supra*, 12 Cal. 4th at 349.
29. *See* Civ. Code, §§1213, 1215.

30. *Alfaro , supra*, 171 Cal. App. 4th at 282.
31. Civ. Code, §711.
32. *City of Oceanside v. McKenna*, 215 Cal. App. 3d 1420, 1427, 264 Cal. Rptr. 275 (4th Dist. 1989) ("*McKenna*").
33. *McKenna, supra*, 215 Cal. App. 3d at 1427.
34. *See* Civ. Code, §711.5. Section 711.5 was not discussed by the court in *Alfaro*.
35. *See* Civ. Code, §711.5.
36. *Alfaro, supra*, 171 Cal. App. 4th at 284.
37. *Kapner, supra*, 116 Cal. App. 4th at 1189-1190.
38. *Alfaro, supra*, 171 Cal. App. 4th at 284.
39. *Alfaro, supra*, 171 Cal. App. 4th at 284.
40. *Alfaro, supra*, 171 Cal. App. 4th at 284.
41. *Alfaro, supra*, 171 Cal. App. 4th at 285.
42. *Lingsch v. Savage*, 213 Cal. App. 2d 729, 735, 29 Cal. Rptr. 201, 8 A.L.R.3d 537 (1st Dist. 1963).
43. *Alfaro, supra*, 171 Cal. App. 4th at 285; *Goodman v. Kennedy*, 18 Cal. 3d 335, 347, 134 Cal. Rptr. 375, 556 P.2d 737, Fed. Sec. L. Rep. (CCH) P 95829 (1976).
44. Civ. Code, §1102.6.
45. Civ. Code, §§1572, subd. 3, 1710, subd. 3.
46. *Anderson, supra*, 12 Cal. 4th at 349.
47. 8 Miller & Starr, *Cal. Real Estate* (3d. ed. 2001) §24:11.
48. *Alfaro*, *supra*, 171 Cal. App. 4th at 302.
49. *Alfaro, supra*, 171 Cal. App. 4th at 302.
50. *Alfaro, supra*, 171 Cal. App. 4th at 302; *see* Civ. Code, §1624, subd. (a)(3).
51. *Alfaro, supra*, 171 Cal. App. 4th at 302.

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