



QORTI TA' L-APPELL

**ONOR. IMHALLEF
MARK CHETCUTI**

Seduta ta' l-20 ta' Gunju, 2013

Appell Civili Numru. 137/2012

Josephine Curmi

vs

L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar

Il-Qorti,

Rat ir-rikors tal-appell ta' Josephine Curmi tal-20 ta' Awwissu 2012 kontra d-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar l-Appell dwar l-Ippjanar tal-31 ta' Lulju 2012 mir-rifjut tal-applikazzjoni PA 1091/07 "to sanction land reclamation, deposition of soil, formation of water reservoir, agricultural store, aviary and rubble walls";

Rat ir-risposta tal-Awtorita li ssottomettiet illi d-decizjoni tat-Tribunal kellha tigi konfermata u l-appell michud;

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Rat l-atti kollha u semghet id-difensuri tal-partijiet;

Rat id-decizjoni tat-Tribunal li tghid hekk:
Ikkunsidra:

B'applikazzjoni tal-15 ta' Frar 2007 - Full Development Permission - PA/01091/07 fejn l-appellant, f'Site at Is-Saqwi, l/o Fontana (Gozo) talab:

"To sanction land reclamation, deposition of soil, formation of water reservoir, agricultural store, aviary and rubble walls."

Illi l-Awtorita cahdet it-talba ghall-hrug tal-permess relattiv ghar-ragunijiet segwenti:

"1 The site is located within a Special Area of Conservation of International Importance. The proposed development is not necessary to the management of the Special Area of Conservation, nor does it seek to improve the Special Area of Conservation. The proposal is therefore unacceptable as it conflicts with Article 13.1 of Legal Notice 257 of 2003.

2 The proposal does not satisfy Policies 1.3C, 1.3H, 1.3I, 2.4A(6) and 2.6A(3) of the Agriculture, Farm Diversification and Stables draft Policy and Design Guidance (2007). The proposal therefore infringes local Plan Policy GZ-AGRI-3, which only allows agricultural development as long as the proposal complies with the requirements of the Agriculture, Farm Diversification and Stables draft Policy and Design Guidance (2007).

3 The proposal is not essential to the needs of agriculture in that the applicant is not a registered full-time arable farmer. The application does not therefore satisfy the criteria set out in paragraph 11.4 of the Structure Plan Explanatory Memorandum and so the proposal runs counter to Structure Plan policies AHF 5 and SET 11.

4 There is no justification for the development of this site as required by Structure Plan policy SET 12. It is apparent

that there are no reasons from a planning point of view why the proposed development can not be located in an area designated for development or in an existing built up area.

5 Structure Plan policy RCO 4 provides that, particularly within Rural Conservation Areas, areas of scenic value will be protected and enhanced. The area in which the site is located is of considerable scenic value. The proposal would detract from this, and so it would conflict with Structure Plan policy RCO 4.

6 The proposal would infringe the Gozo and Comino Local Plan Policies GZ-RLCN-1 and GZ-RLCN-2 which do not allow inappropriate development in areas designated as Category A Valleys and Areas of High Landscape sensitivity.

7 The proposal makes no provision for soft landscaping on the site. It would therefore detract from the visual amenity of the area and would not comply with Structure Plan policy BEN 17 which requires the landscaping of development."

Illi l-Perit Emanuel Vella pprezenta l-aggravji tal-appellanti inter alia kif gej:

"1 Principle of development:

The size of the agricultural store is very small. It is only 2.4m x 2.4m, i.e. 5.76 sq.mts. and 8 courses high. Furthermore, both the store and aviary, being surrounded by trees are hidden from long distance views. The reservoir, which is not more than 1 meter deep, has been formed by earth mounds. No construction works were carried out. The rubble walls were properly constructed in traditional style and are in accordance to regulations.

2 Justification:

Applicant is a registered part-time and cultivates over 7 tumoli of land registered in her name and in fact the Department of Agriculture did not find an objection to the proposed development.

3 Visual aspect:

As stated above the structures are hidden from long distance by the existing trees. This can be verified from the photos submitted with the application.

In view of the above reasons, we kindly request the Appeals Board to revoke the refusal issued by the DCC and approve the proposed development."

Illi permezz ta' rapport l-Awtorita ressqet il-kummenti taghha inter alia kif gej:

"DIRECTORATE'S COMMENTS ON GROUNDS FOR APPEAL

- Scheduling

The site of the proposed development is located Outside Development Zone, and is scheduled as an Area of Ecological Importance (Level 2) and an Area of High Landscape Value - as per GN856/00 - and as a Special Area of Conservation - as per GN223/05 - and is thus protected through LN257/03, LN311/06, and various Structure Plan and Local Plan policies. Urban development on the site is clearly ruled out by Structure Plan Policies SET11, SET12, RC02, RC012 and RC029 and by Gozo and Comino Local Plan Policy GZ-SETL-2, in view of the site's designation as a Strategic Open Space Gap. Meanwhile, agriculture related development on site is also opposed as set out in Policies 1.3C, 1.3D, 1.3G, 1.3H, 1.3I, 1.3J, 2.4A(6) and 2.6A(3),(5) and (9) of Policy and Design Guidance - Agriculture, Farm Diversification and Stables, 2007.

- Visual Impact

The proposed development creates a negative visual impact on the surroundings, especially when considering that the area is designated as an Area of High Landscape Sensitivity. The proposed development falls in a Category A Valley as established by the Gozo and Comino Local Plan. The proposal runs counter to the relative Local Plan Policies GZ-RLCN-1 and GZ-RLCN-2, Structure Plan

Policy RC04, and Policy and Design Guidance - Agriculture, Farm Diversification and Stables, 2007, Policies 1.3A, 1.3D, 1.3J

- Illegal Development

Enforcement notice - ECF053/07 - states: "Ghandek zvilupp minghajr permess fi proprjeta skedata li jikkonsisti fi tfigh u livellar ta' materjal, kamra/store, guva, formazzjoni ta' 'pond', hitan u strutturi ohra." The proposal seeks to sanction the deposition of soil, the construction of room and aviary, the creation of reservoir, and the construction of rubble walls, however no attempt to sanction other structures on site has been made. Photographs submitted at document 1A in file PA1091/07 show concrete paving, a low room and the formation of steps, which are not shown on proposed drawing. The provisions of Circular PA 2/96, thus apply.

- Conclusion

No justification for the location of the proposed development on this site has been submitted, however it is evident that in view of the site's sensitive location, the development sought to be sanctioned is not acceptable."

Illi l-Perit Vella ressaq il-kummenti tieghu inter alia kif gej:

" In this appeal we are proposing the sanctioning of

a) land reclamation by the deposition of soil - The site consists of agricultural land and the soil was deposited on an area of only 230 square meters, i.e. only 2.7 % of the total site area. This soil was deposited because there was not enough soil for this field to be cultivated. In fact, the Agriculture Department found no objection.

b) the formation of a water reservoir - The reservoir is only one (1) meter deep. It has been formed by earth mounds and no construction works were carried out.

c) a small agricultural store and aviary - The size of the store is only 2.4m x 2.4m, i.e. 5.76 square meters and 8 courses high. Both the agricultural store and aviary are

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hidden from long distance views since they are surrounded by mature trees.

d) construction of rubble walls - The rubble walls have been constructed in traditional style and are in accordance to regulations.

The proposed development is justified in view of the fact that applicant is registered part-time farmer cultivating over 7 tumoli of land registered in her name. This is confirmed by the Department of Agriculture who in fact did not find an objection to the proposed development.

In view of the above reasons, we kindly request the Appeals Board to revoke the refusal issued by the DCC and approve the proposed development."

Illi permezz tat-Tieni Statement taghha l-Awtorita rrilevat kif gej:

"The Appeals Board may wish to note that the is scheduled as an Area of Ecological Importance (Level 2) and an Area of High Landscape Value - as per GN856/00 - and as a Special Area of Conservation - as per GN223/05 - and is thus protected through LN257/03, LN311/06. In addition to the scheduling constraints, the proposals fails to meet the criteria of relevant policies for agricultural development stipulated by the Policy Guidance:

Agriculture Farm Diversification and Stables, 2007; and goes against the provisions of PA Circular PA2/96 since the proposal is not making an attempt to sanction all the illegalities found on site. The appeals report explains in details the breach of the proposal in terms of the relevant policies of the Structure Plan, Local Plan and the Policy Guidance: Agriculture, Farm Diversification and Stables, 2007.

The arguments raised in the architect's submissions are not acceptable since there is no justification for such a proposal within a scheduled area. There is no

contestation that the applicant is a registered part-time farmer with just over 7 tumoli of land registered on her name. However, apart from the limitations resulting from the scheduling the proposal exceeds the standards for similar agricultural development permitted by the Policy Guidance: Agriculture, Farm Diversification and Stables, 2007 and the application goes against the provisions of PA Circular PA 2/96.

Finally, the Appeals Board may wish to note that the DCC has carried out an inspection on site - see minute 39 - and concluded that the 'development is highly objectionable'."

Illi fl-udjenza tat-3 ta' Marzu 2011 l-Awtorita irrilevat illi peress li l-area hija skedata, skond l-Artikolu 70 u s-6 Skeda tal-Att X tal-2010, ma jistax jinhareg permess ghall-issanzjonar.

Illi fl-access tat-3 ta' Marzu 2011 it-Tribunal ikkonstata li s-sit huwa parti minn art agrikola ta' area konsiderevoli li l-appellant iddikjara li jahdem regolarment. It-Tribunal ra l-aviary li hija fformata minn wire netting pero tahta hemm kamra mdawwra bil-vegetazzjoni. Ra wkoll pond iffurmat mill-hamrija u mghotti bil-membrane li fih ilma baxx ta' mhux izjed minn metru li jintuza mill-papri tal-appellant.

Ikkunsidra ulterjorment:

Wara li kkonsidra il-premess u minn ezami tal-pjanti, ritratti u dokumenti li hemm fil-files PAB 4/08 u PA 1091/07, it-Tribunal jikkumenta kif gej:

Il-mertu ta' dan l-appell jirrigwarda talba ghall-issanzjonar ta' art reklamata, tfigh ta' hamrija, l-izvilupp ta' gibjun ghall-ilma, store agrikolu, aviary u hitan tas-sejjegh.

Is-sit mertu ta' dan l-appell jinsab ODZ gewwa area li hija skedata f'Is-Saqwi, limiti ta' Fontana, Ghawdex.

Skond l-Awtorita is-sit huwa immarkat bhala Candidate Special Area of Conservation u Level 2 Area of Ecological Importance and an Area of High Landscape Value

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(GN856/00) waqt li bil-legal notice GN877/03 is-sit sar Special Area of Conservation - International Importance.

Is-sit huwa kopert minn enforcement notice ECF 053/07.

Din l-applikazzjoni giet rifjutata peress li l-proposta tmur kontra l-artikolu 13.1 tal-avviz legali 257 tal-2003, l-policy tal-pjan lokali GZ-AGRI-3, l-policies tal-pjan ta' struttura AHF 5 u SET 11, SET 12, RCO 4, l-policies GZ-RLCN-1 u GZ-RLCN-2 tal-pjan lokali ghal Ghawdex u Kemmuna kif ukoll il-policy BEN 17 tal-pjan ta' struttura.

L-argumenti li tqajmu mill-partijiet fil-kors tas-smigh ta' dan l-appell jistghu jigu migburin fil-qosor kif gej:

L-appellanti tissottometti li:

- hija registrata bhala part-time farmer u tahdem izjed minn seba' ti tmiem raba registrati f'isimha;
- Id-Dipartiment tal-Agricoltura m'oggezzjonax ghall-izvilupp propost;
- L-agricultural store huwa zghir hafna;
- L-istore u l-aviary ma jidhrux;
- Ir-reservoir gie ffurmat direttament mill-hamrija; u
- Ir-rubble walls huma skond il-policy.

L-Awtorita tissottometti li:

- Is-sit huwa ODZ, skedat u protett permezz ta' numru ta' avvizi legali u Government Notices u jinsab gewwa Strategic Open Gap . Ghaldaqstant dan l-izvilupp jikser numru ta' policies tal-pjan ta' struttura u tal- Policy and Design Guidance - Agriculture, Farm Diversification and Stables, 2007
- Il-proposta tikkrea negative visual impact u ghalhekk din tmur kontra l-policies GZ-RLCN-1 u GZ-RLCN-2 tal-pjan lokali, RCO 4 tal-pjan ta' struttura u l-policies 1.3A, 1.3D 1.3J tal-Policy and Design Guidance - Agriculture, Farm Diversification and Stables, 2007; u
- Peress li jezisti zvilupp fuq is-sit li ma gietx inkluza fit-talba ghas-sanzjonar u li jinkludi concrete paving, kamra baxxa u l-formazzjoni ta' tarag, tapplika c-cirkolari PA 2/96.

Fl-access tat-3 ta' Marzu 2011 it-Tribunal innota li s-sit huwa parti minn art agrikola ta' area konsiderevoli li l-appellant iddikjara li jahdem regolarment. It-Tribunal ra l-aviary li hija fformata minn wire netting pero tahta hemm kamra mdawwra bil-vegetazzjoni. Ra wkoll pond iffurmat mill-hamrija u mghotti bil-membrane li fih ilma baxx ta' mhux izjed minn metru li jintuza mill-papri tal-appellant.

Mill-premess jirrizulta li waqt li mhux eskus li l-appellanta hija part time farmer u li jista jkun ukoll li ghandha operazzjoni agrikola ta' certu kobor pero jibqa' l-fatt li hemm numru ta' dubji fuq din l-applikazzjoni li ma gewx iccarati bizzejjed fil-kors tas-smigh ta' dan l-appell!. Dawn huma:

- Mill-access li ghamel it-Tribunal fis-sit in ezami u anke mir-ritratti li hemm fil-file tal-applikazzjoni, l-izvilupp ghandu xehta urbanizzanti li partijiet minnhu izjed jaqblu f'xi gnien ippjanat milli f'zona li hi suppost esklussivament rurali u ta' sensitivita amjentali konsideravoli;
- Jidher ukoll li l-izvilupp qed jintuza ghal uzu li izjed ghandu x'jaqsam mad-delizzju tad-trobbija tal-ghasafar u mhux max-xoghol tal-agrikultura;
- L-appellanta ma taghtix informazzjoni dwar ix-xoghol agrikolu taghha biex tissostanzja fil-principju l-htiega taghha ghal dan l-izvilupp skond il-policy 2.4 tal-Policy and Design Guidance on Agriculture, Farm Diversification and Stables;
- L-appellanta Prattikament ghamlet il-progett kollu illegalment qabel ma spicca kellha tapplika wara li hareg enforcement notice;
- L-appellanta ma appellatx kontra dan l-enforcement notice;
- L-interventi illegali kienu ta' natura pjuttost goffa meta wiehed jikkunsidra li qed nitkellmu fuq sit li jinsab ODZ u li skond l-Awtorita huwa ta' natura sensitiva hafna;
- L-applikazzjoni biex jigi ssanzjonat dan l-izvilupp ma tkoprix ix-xogholijiet kollha;
- L-appellanta ma taghti ebda spjegazzjoni teknika f'termini ta' ippjanar ghax-xogholijiet u kif dawn jincidu mal-produzzjoni agrikoli li qed tippjana li taghmel.

Jigi rrilevat partikolarment li fin-nota taghha l-Awtorita qed tqajjem il-punt li fuq is-sit mertu ta' dan l-appell jezistu numru ta' irregolaritajiet li ma gewx inkluzi fl-applikazzjoni PA 1091/07. Fil-kors tas-smigh ta' dan l-appell l-appellanta imkien ma irribatiet din id-dikjarazzjoni.

F'dawn il-kazi jigifieri meta jkunu jezistu irregolaritajiet fuq is-sit in kwistjoni, l-applikant, skond il-artikolu 14 tal-L.N 514, huwa obligat li inehhi l-istess qabel ma japplika.

Johrog car mill-premess li f'dawn ic-cirkostanzi, fejn f'dan is-sit li, skond il-policies vigenti tal-ippjanar, huwa ODZ u ta' sensittivita ambjentali konsiderevoli, l-appellanta ma gabitx ragunijiet tajbin bizzejjed f'termini ta' ippjanar biex tiggustifika t-talba taghha, dan l-appell ma jistax jintlaqa'.

In konkluzjoni, kif jidher mill-fatti li hargu fil-kors tas-smigh ta' dan l-appell, billi jirrizulta li l-proposta ta' l-appellant tikser numru ta' policies ta' l-iStructure Plan, il-pjan lokali u kif ukoll il-Policy and Design Guidelines on Agriculture, Farm Diversification and Stables, u anke ghaliex f dan il-kas japplika l-artikolu 14 tal L.N 514, dan l-appell ma jirrizultax fondat u ma jimmeritax kunsiderazzjoni favorevoli;

It-Tribunal, ghalhekk, qieghed jichad dan l-appell u jikkonferma ir-rifjut mahrug mill-Awtorita tal-applikazzjoni, PA/01091/07, "To sanction land reclamation, deposition of soil, formation of water reservoir, agricultural store, aviary and rubble walls."

Ikkunsidrat

L-aggravji tal-appellant huma s-segwenti:

1. It-Tribunal ma ddegretax rikors tal-11 ta' Gunju 2012 maghmul mill-appellant u dan sabiex jigi kancellat verbal ta' access tas-7 ta' Novembru 2007 nonostante li r-rikors gie notifikat lil Awtorita fuq ordni tat-Tribunal u dan jirrendi d-decizjoni nulla;
2. It-Tribunal ikkwota Avviz Legali 514 artikolu 14 li jitkellem dwar tnehhija ta' irregolaritajiet qabel ssir applikazzjoni minghajr ma gie specifikat b'mod precís is-

sena tal-Avviz Legali. In oltre dan l-Avviz Legali ssemma in konnessjoni ma sottomissjoni tal-Awtorita li qabel saret l-applikazzjoni kellhom jitnehew l-irregolaritajiet. L-appellant jissottometti illi l-applikazzjoni saret fl-2007 meta l-Avviz Legali li l-appellant qed tipprezumi hu 514/2010 dahal in vigore wara u ghalhekk l-applikant ma setghetx tottempera ruhha mieghu u ma kinitx obbligata li taghmel hekk. Fit-tielet lok it-Tribunal naqas li jindika liema kienu l-irregolaritajiet u sostna biss li l-appellant ma rribadietx din is-sottomissjoni tal-Awtorita;

3. It-Tribunal accetta s-sottomissjoni li l-area hi skedata skond l-artikolu 70 u Skeda 6 tal-Att X tal-2010 u ghalhekk ma setghax jinhareg permess ta' sanzjonar minghajr ma vverifika jekk dan kienx minnu.

L-ewwel aggravju

Hu minnu illi jezisti nuqqas fl-atti ta' din l-applikazzjoni u r-rikors li sar fl-2011 ghal isfilz tal-verbal tal-ewwel access li sar fl-2007 qatt ma gie degretat. B'daqshekk pero l-Qorti ma tistax taqbel mal-appellant li dan irendi l-process null. Dan il-verbal tal-access jirreferi ghal access li sar fl-2007 mentri r-rikors ghal isfilz sar erba' snin wara. Dan minnu nnifsu hu gia censurabbli u jista' jfisser akkwiexxenza ta' dak verbalizzat. Pero t-Tribunal odjern ma semma' dan l-access inkien fid-decizjoni tieghu u rrefera biss ghal access li zamm l-istess Tribunal kif kompost fid-decizjoni odjerna liema access sar fl-2011. Biex l-appellant ikollu ragun fl-aggravju irid jipprova li n-nuqqas irrenda prgudizzju serju u illi d-digriet fuq tali rikors seta' influixxa sostanzjalment fuq l-ezitu. Jirrizulta bil-kontra bhala fatt ghax it-Tribunal sahhah il-kostatazzjonijiet fattwali tieghu fuq l-access li zamm hu fl-2011 li fl-ebda hin ma hu qed jigi kontestat mill-appellant.

Ghalhekk dan l-aggravju ma fih ebda siwi.

It-tieni aggravju

L-appellant issostni illi t-Tribunal naqas li jidentifika b'mod car l-Avviz Legali 514 billi ma semmiex is-sena. Dan hu minnu pero jidher car lil hu rizultat ta' lapsus calami u r-

referenza cara hi li t-Tribunal kien qed isemmi l-Avviz Legali 514/2010 li l-istess appellant tikkoncedi li kien l-intendiment tat-Tribunal u li l-istess Tribunal mhux biss semmih izda rrefera ghal paragrafu specifiku cioe paragrafu 14 u l-kontenut tal-istess paragrafu li ma halla ebda dubbju dwar dak li kien qed jirreferi ghalih it-Tribunal. Dan kien nuqqas legger li ma biddel xejn mis-sentenza.

L-appellant issostni li t-Tribunal zbalja meta sostna li l-izvilupp illegali mhux soggett ghal applikazzjoni ta' sanzjonar ma tnehhix qabel saret l-applikazzjoni kif jitlob l-artikolu 14 tal-Avviz Legali 514/2010. Dan hu minnu u l-Qorti tikkondividi dan mill-punto di vista strettament legali. Pero xorta wahda l-Qorti tqis illi t-Tribunal kellu kull ragun japplika l-istess Avviz Legali 514/2010 billi t-Tribunal kien obligat li japplika l-policies u pjanijiet u ligijiet fiz-zmien tad-decizjoni u ghalhekk l-appellant kellha l-obbligu li titlob li dawk l-irregolaritajiet li ma kienux qed jintalbu li jigu sanzjonati, jitnehew minnha qabel tinghata d-decizjoni biex tkun in regola. In-nuqqas taghha ma tistax titfghu fuq it-Tribunal li ghalkemm applika l-Avviz Legali rilevanti, naqas meta qal illi t-tnehhija kellha ssir qabel saret l-applikazzjoni mentri l-fatti juru li l-appellant ma setghet taghmilha f'dan iz-zmien izda setghet tottempera ruhha fil-mori bla ebda sanzjoni kontriha.

L-appellant issostni wkoll illi t-Tribunal naqas ukoll li jispecifika l-irregolaritajiet li ma tnehewx u li ma ntabx sanzjoni. Dan mhux minnu billi t-Tribunal fl-apprezzament tal-fatti f'pagna 10 tad-decizjoni jindika dawn l-irregolaritajiet li semmiethom l-Awtorita konsistenti f'concrete paving, kamra baxxa u formazzjoni ta' tarag. Dan kollu u l-izviluppi soggett ghal applikazzjoni ta' sanzjoni kienu koperti b'enforcement notice u li in konsegwenza tal-enforcement notice saret it-talba ghal sanzjonar, izda mhux tal-irregolaritajiet mhux koperti b'permess, minghajr ma ndaga aktar, meta l-istess appellant imkien ma nnega din is-sottomissjoni tal-Awtorita rinforzata b'enforcement notice ECF 53/07 li t-Tribunal irrefera ghalha fid-dettal meta kien qed isemmi

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d-dettalji tal-istess notice skond ma ssottomettiet l-Awtorita.

Ghalhekk dan l-aggravju qed jigi michud.

It-tielet aggravju

Dan l-aggravju wkoll ma fihx siewi. L-appellant qed tilmenta li ma nvestigax jekk is-sit kienx skedat kif issottomettiet l-Awtorita fl-udjenja tat-3 ta' Marzu 2011 quddiem it-Tribunal b'referenza ghal artikolu 70 u Skeda 6 tal-Att X tal-2010. It-Tribunal ikkondivida din is-sottomissjoni. Il-Qorti ma tifhimx x'qed tippretendi l-appellant b'dan l-aggravju billi jekk kien hemm xi cahda jew oppozizzjoni li ssir, dan kellu jsir mill-istess appellant li tissottometti r-ragunijiet kontra dak li ssottomettiet l-Awtorita. Izda l-appellant ma ghamlet xejn minn dan u l-Qorti ma tqis li ghandha b'xi mod ticcensura lit-Tribunal.

Ghalhekk dan l-aggravju qed jigi michud.

Decide

Il-Qorti taqta' u tiddeciedi billi tichad l-appell ta' Josephine Curmi u tikkonferma d-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tal-31 ta' Lulju 2012. Bl-ispejjez kontra l-appellant.

< Sentenza Finali >

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