OFFICE OF THE HEARING EXAMINER

CITY OF TACOMA

JOHN TOPLIFF, **Appellant,** **v.** **CITY OF TACOMA, ANIMAL CONTROL AND COMPLIANCE,** **Respondent.**	**HEX2021-003** **FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER**

THIS MATTER came on for hearing on August 12, 2021,[1] before JEFF H. CAPELL, the Hearing Examiner for the City of Tacoma, Washington. Prior to the original hearing date of February 11, 2021, the matter was rescheduled at Appellant John Topliff's ("Appellant" or "Topliff") request for an in-person hearing in lieu of a hearing via Zoom teleconference.[2]

Respondent City of Tacoma (the "City") did not object to Appellant's in-person hearing request and the delay it required. Deputy City Attorney Jennifer Taylor represented the City of Tacoma, Animal Control and Compliance (separately "Animal Control" or "ACC") at the

[1] At the conclusion of the hearing held on August 12, 2021, the City was given the opportunity to provide legal authorities concerning hearsay testimony. The City had until the end of business on August 19, 2021, to file its Memorandum, if any, with the Hearing Examiner's office. The City agreed to mail, via USPS, a copy of its Memo to Appellant John Topliff. The City's Memorandum was received in the Office of the Hearing Examiner on August 19, 2021. It is referred to herein as the "City Memo."

[2] Due to National, State of Washington ("State") and City Proclamations of Emergency caused by the COVID-19 virus, the City closed the Tacoma Municipal Building to the public until further notice on or around March 17, 2020. These statewide in-person meeting restrictions were responsible for the resulting delay in holding the hearing in this matter. The hearing on August 12, 2021 was held in-person, as requested, after restrictions were lifted, but with remote access as well via Zoom teleconferencing.

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hearing. Appellant appeared at hearing *pro se*. Witnesses were sworn and testified. Exhibits were submitted and admitted, and arguments were presented and considered.

Witnesses testifying at the hearing were as follows:

Mia Salisbury, Animal Control Officer
Appellant John Topliff.[3]

From the evidence in the hearing record, the Hearing Examiner makes the following:

FINDINGS OF FACT

1. Appellant Topliff currently resides within the city limits of Tacoma at 417 East 44th Street, Tacoma, WA 98404. Topliff is the owner of a tan and black colored, male German Shepherd named Halfin.

2. Animal Control issued a Potentially Dangerous Dog Notice for Halfin dated December 7, 2020 (the "PDDN"). The PDDN imposed restrictions on Halfin. *See Ex. R-1 for the full list of restrictions originally imposed*. Animal Control imposed these restrictions in conformance with applicable provisions of the Tacoma Municipal Code ("TMC") and state law.[4] *Ex.R-1.*

3. The PDDN was issued as the result of an incident reported[5] to have occurred on November 17, 2020, at around 10:30 am, at 421 East 44th Street. *Salisbury Testimony; Exs. R-1~Ex. R-3*.

[3] For ease of reference, and without meaning any disrespect, after initial introduction of parties and witnesses, they may occasionally be referred to by last name only unless more differentiation is needed. In the case of the Nolans, first names are occasionally used to differentiate, again without meaning any disrespect.
[4] TMC 17.01.010.27, TMC 17.04.050 and RCW 16.08.
[5] The Examiner uses the word "reported" with some frequency herein because of the hearsay nature of much of the testimony offered by the City. The legal implications of the hearsay testimony are addressed in the Conclusions of Law section of this decision.

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4. Clyde and Brenda Nolan are next door neighbors to Appellant Topliff and reside at the just mentioned address of 421 East 44th Street in the city of Tacoma. Topliff's yard is fenced; the Nolan yard is not. At the time of the reported incident, the Nolans owned a Yorkie named Puppet. *Salisbury Testimony, Topliff Testimony Exs. R-1~R-4*.[6]

5. According to Topliff, Puppet has a history of inciting Halfin at the fenceline between their properties for several minutes at a time. There was no evidence that at the time of the incident Puppet had engaged in any inciting behavior toward Halfin, however. *Id*.

6. Of all the cast of characters in this appeal, only Clyde Nolan was present during the incident that gave rise to the PDDN being issued, but he did not appear to testify at the hearing. Officer Salisbury testified that Clyde reported the incident, and that it came to ACC through the "pet line" the next day on November 18, 2020. Clyde reported to ACC that on November 17, 2020, at around 10:30 am, he took Puppet outside their home to tend to bathroom duties in their own yard. Clyde reported that while this was happening, Halfin charged Puppet without warning, and attacked her. Nolan reported that he was unable to prevent the attack. After being attacked, Puppet ran back into the Nolan house and Clyde ran Halfin off his property.[7] *Salisbury Testimony; Ex. R-3, R-4A*.

7. Details on why Halfin was loose and able to enter the Nolan's yard are not present in the record. There is some indication in the record that Halfin is left unattended outside on a "tie out" at times, *Ex. A-2*, and that he has escaped the yard unattended previously. *Ex. A-6*.

[6] Unless differentiated, references to Exhibit R-4 will include both R-4A and R-4B.

[7] The Examiner makes his findings here from the Handwritten Statement Form of Clyde Nolan included in the hearing record as Exhibit R-4A. A second Handwritten Statement Form was submitted as Exhibit R-4B which was described as Clyde Nolan making a second recounting of the incident to his wife Brenda Nolan who was not present during the incident. While the reasons given by ACC for the Nolans making a second statement are somewhat understandable, the Examiner relies primarily on Clyde's original statement.

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8. In her investigation of the incident, Officer Salisbury visited with the Nolans and directly saw Puppet's injuries. Officer Salisbury indicated that Puppet seemed despondent and was non-reactive. Salisbury testified that Exhibit R-5 accurately depicts Puppet's injuries as she saw them first-hand. *Salisbury Testimony; Ex. R-3, Ex. R-5*.

9. Puppet's veterinary medical provider reported that Puppet had a large deep laceration that had to be surgically addressed with stitches, along with other lesser wounds. On or around November 23, 2020, ACC was notified that Puppet had been euthanized. Officer Salisbury testified that ACC did not feel that the attack could be linked directly enough to Puppet's euthanization to justify anything other than a PDDN being issued here. *Salisbury Testimony; Ex. R-6*.

10. Topliff presented five letters from neighbors expressing their opinions regarding Halfin, generally commenting that he is a well behaved dog. *Exs. A-1~Ex. A-4, Ex. A-6.* In addition, Topliff submitted a letter from Doctor Ryan Coon, Psy.D., stating that he is a psychologist who has worked with Topliff professionally, and that Halfin "is a significant part of [Topliff's] support network." *Ex. A-5*.

11. Being next door neighbors, Topliff apparently spoke with Clyde after the incident and Clyde told Topliff the same story he had recounted to ACC. *Topliff Testimony*.

12. Topliff testified that he is concerned about the surety bond requirement in the PDDN. He indicated that he is unemployed due to an injury, and that he used settlement money from the injury to pay off his house, but beyond that he only has money for a few more months

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of utilities and other necessities. Because he owns his house outright, he offered to pledge it as security in place of the surety bond required in the PDDN. *Topliff Testimony*.[8]

13. Any Conclusion of Law below which may be more properly deemed or considered a Finding of Fact, is hereby adopted as such.

Based upon the foregoing Findings of Fact, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Hearing Examiner has jurisdiction in this matter pursuant to Tacoma Municipal Code ("TMC") 1.23.050.B.8 and 17.04.032.

2. Pursuant to TMC 17.04.032.B, in appeal proceedings before the Hearing Examiner challenging a Potentially Dangerous Dog declaration, Animal Control bears the burden of proving, by a preponderance of the evidence, that the animal in question meets the definition of a Potentially Dangerous Dog. This definition is as follows:

> [A] "potentially dangerous dog" means any dog which:
>
> a. unprovoked, bites or injures a human or domestic animal on public or private property; or
>
> b. unprovoked, chases or approaches a person or domestic animal upon the streets, sidewalks, or any public or private property in a menacing fashion or apparent attitude of attack; or
>
> c. has a known propensity, tendency, or disposition to attack unprovoked, to cause injury, or to otherwise threaten the safety of humans or domestic animals. *TMC 17.01.010.27.*

[8] The City did not offer any testimony as to why it required the surety bond in the PDDN. Legal counsel did state that Officer Salisbury could answer any questions regarding the bond requirement, but the Examiner did not see the need to do so at that moment in the hearing. Topliff's testimony regarding his financial situation came later in the hearing process.

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3. The above criteria are disjunctive. As a result, the City must only prove that one of the three criteria were met for a designation to be upheld on appeal. Animal Control alleged that subsection a. was the basis for its PDDN. *See Ex. R-1*.

4. When a dog is declared potentially dangerous, and that declaration is upheld after a hearing, the Hearing Examiner has the authority to impose conditions or restrictions in conformance with TMC Title 17 and RCW 16.08. *TMC 17.04.032, TMC 17.04.050*. State law, at RCW 16.08.080(9), gives a local authority a fair amount of latitude in placing additional restrictions upon owners of dangerous, and presumably potentially dangerous dogs.

5. Although provocation can be a defense to conduct that would otherwise make a dog potentially dangerous, there was no evidence of provocation here. Puppet's past antics at the fence line do not provide cover for what happened on November 17, 2020. The evidence from that day showed by a preponderance that Halfin bit Puppet causing injuries while Puppet was present on her owner's private property. Any evidence regarding provocation from the day of the incident would have, by necessity, had to come from questioning Clyde who was the only person present at the incident. His not being present at the hearing made that impossible.

6. "Preponderance of the evidence" means that the trier of fact is convinced that it is more probable than not that the fact(s) at issue is/are true.[9] The City may meet this burden through direct or circumstantial evidence.[10] Circumstantial evidence is as reliable as direct evidence.[11] Circumstantial evidence is "evidence of facts or circumstances from which the

[9] *Spivey v. City of Bellevue*, 187 Wn.2d 716, 733, 389 P.3d 504, 512 (2017); *State v. Paul,* 64 Wn. App. 801, 807, 828 P.2d 594 (1992).
[10] *In re Disciplinary Proceeding Against Jones*, 182 Wn.2d 17, 41-42, 338 P.3d 842, 854 (2014); *Sam v. Okanogan County Sheriff's Office*, 136 Wn. App. 220, 229, 148 P.3d 1086 (2006).
[11] *State v. Jackson*, 145 Wn. App. 814, 818, 187 P.3d 321, 322 (2008) *citing State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

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existence or nonexistence of other facts may be reasonably inferred from common experience."[12] "A trier of fact may rely exclusively upon circumstantial evidence to support its decision."[13] "Whether or not that evidence is sufficient to prove the *case* will depend on the evidence as a whole."[14] The preponderance of the evidence standard is at the low end of the spectrum for burden-of-proof evidentiary standards in the U.S. legal system, and is not particularly difficult to meet.[15]

7. The more or less free passage to admission of the City's file under HEXRP 1.12(b) is not a determiner of what weight the Examiner must give any "evidence" that is part of that file. The City is apparently aware of this fact based on its acknowledgment that "it is a matter for the trier of fact to determine what weight to give the evidence."[16]

8. The City's practice of "[a]lways [including] a written declaration, submitted under penalty of perjury, from a complaining party,… [as] part of the official ACC file"[17] likewise is not a constraint on what weight the Examiner gives to that written declaration. The commonness of the practice does not necessarily elevate the credibility that attaches thereto, especially when the declarant is not present to be questioned at the hearing. Simply including the phrase "under penalty of perjury" in the City's declaration form does not necessarily make the contents of that statement any more reliable unless the ACC officer soliciting the statement

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[12] *Id.; State v. O'Hara*, 167 Wn.2d 91, 107, 217 P.3d 756, 765 (2009).
[13] *State v. Jackson*, 145 Wn. App. at 818.
[14] *In re F5 Networks, Inc., Derivative Litig.*, 166 Wn.2d 229, 241, 207 P.3d 433, 439 (2009). Emphasis in the original.
[15] *In re Custody of C.C.M.*, 149 Wn. App. 184, 202-203, 202 P.3d 971, 980 (2009). Another somewhat recent case referred to it thusly: "The lowest legal standard of proof [in the U.S. legal system] requires the proponent to prove its case by a preponderance of the evidence." *Mansour v. King County*, 131 Wn. App. 255, 266, 128 P.3d 1241, 1246-1247 (2006).
[16] *City Memo* at p. 2 of 6.
[17] *Id.*

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were to specifically point the statement and its full implications out to the declarant prior to the declaration being given.[18] There was no testimony at the hearing of whether this explanation was made or if the declarant was even aware that the form included this language. In any event, a written statement cannot be cross-examined, which cannot do otherwise than lessen its overall evidentiary importance when that statement is taken alone. The City pronouncement that "This hearsay evidence is reliable and is the kind of evidence that ACC has relied on for many years"[19] does not necessarily persuade the Examiner of its credibility without more.

9. As already alluded to above at footnote 5, a good deal of the City's evidence in this hearing comes from what Clyde Nolan either wrote down at ACC's request or reported verbally to Officer Salisbury, and is therefore hearsay when used to "prove the truth of the matter asserted." *ER 801*. Washington State Evidence Rule ("ER") 801 provides, in part, as follows:

> The following definitions apply under this article:
>
> (a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.
>
> (b) Declarant. A "declarant" is a person who makes a statement.
>
> (c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

[18] Similar to being sworn in at the hearing prior to giving testimony, this would be an affirmation that the declarant is aware of the "under penalty of perjury" representation and the importance of declaring truthfully.
[19] *Id.,* continuing to p. 3 of 6.

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Under ER 801, Clyde's statements made outside of the hearing[20] offered as proof of the elements of a potentially dangerous dog are hearsay.

9. HEXRP 1.11(a) does allow the admission of (and presumably reliance on)[21] hearsay evidence "if in the judgment of the Examiner it is the kind of evidence upon which reasonably prudent persons are accustomed to rely in the conduct of their affairs."[22] As stated in the City Memo, ACC relies on the this kind of hearsay evidence in the conduct of its affairs, and to some extent reasonably prudent persons, who are not ACC officers, rely on medical reports, photographs and recorded statements in the conduct of their affairs to establish facts.

10. Applicable Washington State court decisions have held that "An administrative hearing officer may rely on hearsay for her decision if the hearsay is not the sole basis for the decision."[23] While the evidence most germane to the elements the City must prove here is, in fact, hearsay, it is not the only evidence present in the record upon which the Examiner relies.

11. There are many exceptions to the hearsay rule under ER 803[24] and ER 804,[25] and certain statutes specified therein. The City did not establish that Clyde was unavailable as that term is defined under ER 804, so ER 804 hearsay exceptions do not apply here.[26] The City

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[20] Which is essentially all of them since he did not appear to testify.
[21] *See* reference to the *Pappas* case below at Conclusion of Law ("COL") 10.
[22] This provision of the HEXRP is taken verbatim from RCW 34.05.452(1), the section of the State Administrative Procedure Act (the "APA") that addresses the applicability of the ER in administrative proceedings. Although the APA does not directly govern this particular City proceeding, the Examiner looks to the APA as a guide in procedural and evidentiary questions in the City's administrative hearings. RCW 34.05.452(2) states "If not inconsistent with subsection (1) of this section, the presiding officer shall refer to the Washington Rules of Evidence as guidelines for evidentiary rulings." The Examiner follows this approach.
[23] *Pappas v. Emp't Sec. Dep't*, 135 Wn. App. 852, 854, 146 P.3d 1208 (2006).
[24] Hearsay Exceptions; Availability of Declarant Immaterial.
[25] Hearsay Exceptions; Declarant Unavailable.
[26] There were comments made at the hearing off the record that Clyde did not appear because he did not want Halfin to be put down. While his concern was based on a mistaken perception of the possible outcome of the hearing as charged, his having voluntarily absented himself certainly does not make him "unavailable" under the ER 804 definition of that term.

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presented no evidence that would support ***most*** ER 803 exceptions either. Clyde's statements to Salisbury were made well after the incident (*FoF 6*) so they are not present sense impressions, *ER 803(a)(1)*, and this same separation in time, from the incident to the time it was reported to ACC the next day, works against the statements being excited utterances, *ER 803(a)(2)*.[27] The City presented no evidence that Clyde was still "under the stress of excitement caused by the event or condition." *ER 803(a)(2)*.

12. Exhibit R-6 falls under ER 803(a)(4) as "Statements for Purposes of Medical Diagnosis or Treatment," for Puppet, and therefore can come out from under the hearsay stigma to a certain degree, if for no other reason than to corroborate Clyde's otherwise hearsay statements regarding the incident and Puppet's injuries. *FoF 8*.

13. Officer Salisbury saw Puppet's injuries in person and confirmed that Exhibit R-5 accurately depicted these injuries. That testimony helps to corroborate the otherwise hearsay statements in the exhibits and in Officer Salisbury's testimony. The evidence presented in Exhibits R-5 and R-6 takes the City's case out of the prohibition in the *Pappas* case that hearsay must not be the sole basis for an administrative decision.[28]

14. In addition, Officer Salisbury essentially stated that her Exhibits R-1 through R-4 were "made in the regular course of [ACC] business, at ***or near*** the time of the act, condition or event," which allows RCW 5.45.020, **Business records as evidence**, to provide some cover to the otherwise hearsay statements in these exhibits because the Examiner concludes that "the

[27] The Examiner is aware that case law does not necessarily require an exited utterance to be contemporaneously made with the incident that causes the excitement. *See e.g., Warner v. Regent Assisted Living, 132 Wn. App. 126, 138-42, 130 P.3d 865, 872-74 (2006)*.
[28] *Pappas*, 135 Wn. App. at 854.

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sources of information, method and time of preparation [are] such as to justify [ ] admission" as well as to give these exhibits some evidentiary weight when combined with the other corroboration in the record.

15. When taken as a whole, the evidence in the record does show, that it is more likely than not that Halfin attacked Puppet without provocation, as set forth in the record, thereby meeting the definition of being a potentially dangerous dog.

16. This leaves only the question of what restrictions are best suited to deter additional incidents. Leaving the surety bond aside for the moment, all other conditions ACC imposed in the PDDN will serve to protect members of the community from dangerous behavior and attacks because a dog so restricted should not be able to get loose and engage in dangerous behavior if the restrictions are met. The restrictions also serve to protect the life of the dog from coming into possible jeopardy by preventing future attacks that could lead to more severe consequences than those imposed here. As such, they are upheld.

17. It is not clear from the record whether Topliff has a five-sided enclosure in the yard at 417 East 44th Street. Although the Topliff yard is fenced, that fence alone does not seem to guarantee keeping Halfin out of trouble, and the tie-out may not have been 100% effective either. Topliff commented at the hearing that he keeps Halfin inside now. To that end, Halfin is not to be outside the house at 417 East 44th Street unattended or off leash unless there is a five-sided secure enclosure for him to occupy. ACC should inspect any such enclosure if one is proposed for use. Leaving Halfin on any kind of tie-out unattended is prohibited by this Decision and Order.

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18. Given the restrictions imposed by this Decision and Order, as listed in the Order section below, the Examiner concludes that the PDDN's requirement for a surety bond is not necessary to impose here. Topliff testified that he is concerned about the cost of the bond in his current financial circumstances and offered his house as collateral instead. The City is not in a position to take a security interest in Topliff's house as a guarantee against Halfin's potential further bad behavior, and the Examiner concludes that perhaps depriving Topliff of his companion due to financial limitations is not justified. There was no evidence presented as to why ACC imposed this particular condition. Putting Topliff in financial jeopardy in order to keep his dog, at this moment in time, does not seem warranted in light of the other additional conditions the Examiner imposes here. Topliff should be fully aware, however, that if there are further incidents with Halfin, it is possible that his financial security could be jeopardized through legal process regardless of the lifting of the bond requirement.

19. Any Finding of Fact, which may be more properly deemed or considered a Conclusion of Law, is hereby adopted as such.

Based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner issues the following:

ORDER

Based on the above Findings and Conclusions, the present appeal is DENIED and the City of Tacoma's Potentially Dangerous Dog Notice issued to Halfin is UPHELD. Halfin is subject to the following restrictions which must be adhered to at all times:

> 1) The dog Halfin must not be outside the house of his owner unattended unless there is a proper (as inspected and approved by ACC) five-sided enclosure on the premises of the owner for Halfin to occupy;

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2) The dog Halfin must not go beyond the proper enclosure on the premises of the owner (either being in the house or a five-sided enclosure) unless he is securely leashed and humanely muzzled in a manner that will prevent him from biting any person or animal and is under the physical control of a responsible person;

3) A clearly visible warning sign informing that there is a potentially dangerous dog on the property must be posted conspicuously and such sign must include a warning symbol that informs children of the presence of a potentially dangerous dog; and

4) Leaving Halfin on any kind of tie-out in the yard unattended by a responsible person is prohibited.

The following notification obligations of the PDDN also remain in full force and effect:

The owner shall immediately notify Tacoma Animal Control, followed by written notice, when a dog which has been classified as potentially dangerous:

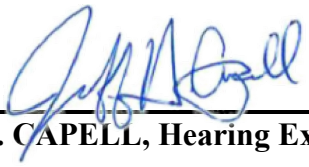
A. is loose or unconfined; provided that, the owner shall first call 911;

B. has bitten a human being or attacked another animal; provided, the owner shall first call 911;

C. is sold or given away, or dies; or

D. is moved to another address.

DATED this 31st day of August, 2021.



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NOTICE

RECONSIDERATION/APPEAL OF EXAMINER'S DECISION

RECONSIDERATION TO THE OFFICE OF THE HEARING EXAMINER:

Any aggrieved person or entity having standing under the ordinance governing the matter, or as otherwise provided by law, may file a motion with the Office of the Hearing Examiner requesting reconsideration of a decision or recommendation entered by the Examiner. A motion for reconsideration must be in writing and must set forth the alleged errors of procedure, fact, or law and must be filed in the Office of the Hearing Examiner within l4 calendar days of the issuance of the Examiner's decision/recommendation, not counting the day of issuance of the decision/recommendation. If the last day for filing the motion for reconsideration falls on a weekend day or a holiday, the last day for filing shall be the next working day. The requirements set forth herein regarding the time limits for filing of motions for reconsideration and contents of such motions are jurisdictional. Accordingly, motions for reconsideration that are not timely filed with the Office of the Hearing Examiner or do not set forth the alleged errors shall be dismissed by the Examiner. It shall be within the sole discretion of the Examiner to determine whether an opportunity shall be given to other parties for response to a motion for reconsideration. The Examiner, after a review of the matter, shall take such further action as he/she deems appropriate, which may include the issuance of a revised decision/recommendation. (*Tacoma Municipal Code 1.23.140.*)

NOTICE

This matter may be appealed to Superior Court under applicable laws. If appealable, the petition for review likely will have to be filed within thirty (30) days after service of the final Order from the Office of the Hearing Examiner.

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