

**AGENDA
LEBANON CITY COUNCIL
MARCH 20, 2019**

9. NEW BUSINESS:

**9.B – DISCUSSION AND SET PUBLIC HEARING FOR MAY 1, 2019:
ORDINANCE #2019-04 TO AMEND CITY CODE CHAPTER 152,
STREETS AND SIDEWALKS, ARTICLE II, EXCAVATIONS**

BACKGROUND

Ordinance #2019-04 proposes amendments to the City's Excavation Regulations (City Code Chapter 152, Streets and Sidewalks, Article II, Excavations). Amendments include but are not limited to: additional definitions; an increase in the application fee; the imposition of a Roadway Degradation Fee and "Greenbelt" Excavation Fee; general language clarifications; and new language regarding the Protection of Streets and Sidewalks, which limits the type of work that can take place in public ways where pavement less than seven (7) years old. Please see attached memo from City Manager Shaun Mulholland for more details.

Legal review of the proposed amendments is required and will be completed in advance of the public hearing, which we are requesting take place in May.

ACTION

Should the Council wish to move forward with proposed Ordinance #2019-04, the following motion is offered for consideration:

MOVED, that the Lebanon City Council hereby schedules a public hearing for Wednesday, May 1, 2019, beginning at 7:00pm at the Lebanon Middle School Cafeteria, 3 Moulton Avenue, for the purpose of receiving public input and taking action on proposed Ordinance #2019-04, to amend City Code Chapter 152, Streets and Sidewalks, Article II, Excavations.

Included in this Section:

1. March 13, 2019 Memo from City Manager Shaun Mulholland re: Amendments to Excavation Regulations
2. Proposed Ordinance #2019-04
3. Existing City Code Chapter 152, Article II: Excavations

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CITY MANAGER'S OFFICE
City of Lebanon, NH
51 North Park Street
Lebanon, NH 03766
(603) 448-4220 fax (603) 966-3122

TO: Mayor Prentiss and City Councilors
FROM: City Manager Shaun Mulholland
DATE: March 13, 2019
RE: Amendments to the Excavation Regulations

Through language proposed in Ordinance 2019-04, I am suggesting several changes to Chapter 152 of the City Code relative to excavation within City public ways. The most significant change is the addition of imposition of roadway degradation fees, proposed at \$5 per square foot of roadway and sidewalk impacted (to include a three-foot (3') zone of influence).

BACKGROUND

The existing provisions of Chapter 152 require any private entity which excavates any portion of a paved section of a City roadway to restore the roadway by repaving the area where pavement is removed. We commonly experience bumps and dips in repaved portions of roadways within a short period of time after such excavations and repairs occur. These provisions would remain in the code.

Several cities in New Hampshire (Manchester, Concord and Dover) as well as across the country (San Diego, Phoenix, Charlotte and Los Angeles) have implemented roadway degradation fees to offset the long-term impacts of these roadway cuts. The Cities of Manchester and Concord were recently successful in a NH Supreme Court case in which these fees were challenged.

Ordinance 2019-04 contains language that implements the proposed roadway degradation fees. These fees would require all non-governmental entities that excavate in a public way to pay a degradation fee if they conduct excavations within 7 years of the roadway (or other portions of the public way) being re-surfaced. This fee is graduated based upon when the resurfacing was last completed, i.e. the \$5 per square foot of area disturbed is multiplied three times if pavement is less than two (2) years old, multiplied by two times if pavement is between 2 and 5 years old, and the base rate only if pavement is between 5 and 7 years before. The amendment also includes a \$2.50 "Greenbelt" Excavation Fee. The greenbelt is the portion of a public way that is not actually paved.

The degradation fee will not apply to work that is performed by the City or by those contracted to do work on behalf of the City. It only applies to private entities or persons who would be conducting excavations within City public ways. Fees received would be placed in a to-be established Special Revenue Fund (Roadway Infrastructure SRF) and would be used to maintain roadways and sidewalks.

The fee for an excavation permit would also be increased from \$25 to \$200, which is more in line with the cost to the City for processing the application and inspecting the work that was completed. Insurance requirements are being increased to meet the current standards. The penalties section was re-worked to provide a graduated fine schedule for violations of the code.

RECOMMENDATION

I am requesting the Council adopt Ordinance 2019-04 to amend Chapter 152 as proposed. These changes will help to offset the cost to taxpayers regarding excavations in the City's public ways.

**CITY OF LEBANON
ORDINANCE #2019-04**

AN ORDINANCE TO AMEND the Code of the City of Lebanon, Chapter 152, Streets and Sidewalks, Article II, Excavations, Sections 152-5 thru 152-16.

BE IT ORDAINED, by the City Council or the City of Lebanon, as follows:

Section 1

The Code of the City of Lebanon is hereby amended to revise Chapter 152, Streets and Sidewalks, Article II, Excavations, Sections 152-5 thru 152-16 as follows:

§ 152-5. Declaration of policy.

The purpose of this article is to establish rules and regulations as authorized by RSA 236:10 and RSA 47:17 to govern the excavation and restoration within any public way.

§ 152-6. Definitions.

As used in this article, the following terms shall have the meanings indicated:

DESIGNEE – That person designated by the Public Works Director to oversee and administer the Excavation Permit Process, up to and including the authority to issue and revoke permits for excavation.

EXCAVATION — The removal of soil, rock or pavement surface by any mechanical machine or device or by manual means, including but not limited to discharge of explosives on or within any public way.

EXCAVATION PERMIT CONDITIONS AND CONSTRUCTION REQUIREMENTS – Those guidelines developed by the Department of Public Works to administer and enforce the provisions of City Code Chapter 152, Article II: Excavations

EXCAVATOR/CONTRACTOR — Person (as defined ~~above~~below) with an excavation permit.

GREENBELT – The area outside of the paved portion of a public way and other unpaved portions of City-owned property.

PERSON — Any individual, firm, corporation or partnership proposing to make or contract for excavation.

PUBLIC WAY — Any surface improved for travel, including roadways, sidewalks, shoulders, greenbelt areas, ditches, embankments, or within or on any land held by the city as easements or rights-of-way.

PUBLIC WORKS DIRECTOR — ~~The City Engineer who is hereby appointed as the Public Works Director. The City Engineer may appoint a representative to act in his/her absence.~~That person with managerial authority over personnel employed in the Department of Public Works.

§ 152-7. Permit required; exception for emergencies.

No person shall excavate within the public way of the City of Lebanon without a written permit from the Public Works Director or his/her ~~delegated representative designee~~. ~~A permit will not be required in the case of an emergency, where the public health or safety is endangered and immediate action must be taken, but in such case the person directing or taking such action shall notify the Public Works Director.~~

Nothing in this article shall be construed to prevent excavations from occurring as may be necessary for the preservation of life or property in an emergency situation. An emergency is classified as a situation where public health or safety is endangered, and immediate action must be taken. In the case of an emergency the Department of Public Works and Lebanon Dispatch should be notified immediately by telephone. A permit shall be obtained no later than one business day after such emergency excavation.

§ 152-8. Application for permit; fee

A. Any person desiring to excavate within the public way of the City of Lebanon shall submit a completed application a minimum of 72 hours prior to starting work planned start date, excluding Saturdays, Sundays and holidays. For any excavation that requires the complete closure of a roadway, a completed application must be submitted a minimum of 10 days in advance planned start date. All applications for excavations in the public way shall contain such information and specifications as the Public Works Director or his/her designee may require and shall be accompanied by plans and profiles and a nonrefundable permit fee of \$25, all to be filed in duplicate.

B. Fees:

- (1) Excavation Permit Fee - \$200 (nonrefundable)
- (2) Roadway Degradation Base Fee - \$5.00 per square foot of roadway and sidewalk impacted (to include a three-foot (3') zone of influence) as follows:
 - a. Street or sidewalk pavement less than two (2) years old: Three (3) times Roadway Degradation Base Fee
 - b. Street or sidewalk pavement from two (2) to five (5) years old: Two (2) time Roadway Degradation Base Fee
 - c. Street or sidewalk pavement from five (5) to seven (7) years old: Roadway Degradation Base Fee as established
- (3) Greenbelt Excavation Fee - \$2.50 per square foot of excavation occurring within the greenbelt portion of the public way or on City property

Work conducted with the public way that is performed by City departments or those contracted by the City are exempt from fees.

~~BC~~. The excavator shall not make or cause to be made any excavation in the public way other than that described in the application and plans or authorized by the permit. The excavator shall comply with the provisions of this article as well as all requirements of local, state and federal law.

~~CD~~. New permits shall not be issued after November 1 each year unless the applicant can prove to the satisfaction of the Public Works Director or his/her designee that satisfactory repairs can be made prior to the onset of winter.

1. Editor's Note: The City of Lebanon ~~Engineering Department Guidelines for Excavators~~Excavation Permit Conditions and Construction Requirements is on file in the office of the Public Works Director.

§ 152-9. Bond.

The Public Works Director or his/her designee may require as a ~~prior~~ condition to issuing a permit that the person making application shall post a bond or other security satisfactory to the City Manager in an amount sufficient to provide for the satisfactory restoration of the highway, as determined by the Public Works Director or his/her designee. Such bond or security shall be held by the City of Lebanon for a period of ~~one~~two years following completion of the project to compensate the city for repair, refilling or regrading that may be required as a result of the excavation, ~~as directed by the Public Works Director,~~ to restore the surface to its prior condition.

§ 152-10. Restoration.

It shall be a condition of the permit that any person who excavates or disturbs any public way shall restore the public way to substantially the same condition, or better, than it was ~~in~~ prior to such excavation or disturbance. It shall further be a condition of the permit that if during the next three years after the completion of the restoration any depressions occur or the highway shall be unreasonably washed as a result of the excavation and/or disturbance covered by the permit, then such person who obtained the permit shall compensate the city for refilling or grading the area subject to excavation or disturbance.

After the excavator has restored the excavation and placed temporary hot bituminous pavement patch, a minimum thirty (30) days settlement period will be required before permanently restoring the excavation work area.

The following permanent patching schedule will be observed:

<u>Work done between:</u>	<u>To be permanently patched by:</u>
<u>April 15th – May 31st</u>	<u>July 1st</u>
<u>June 1st – June 30th</u>	<u>August 1st</u>
<u>July 1st – July 31st</u>	<u>September 1st</u>
<u>August 1st – August 31st</u>	<u>October 1st</u>
<u>September 1st – October 31st</u>	<u>November 1st</u>
<u>November 1st – March 31st</u>	<u>May 1st</u>

§ 152-11. Repairs.

A. Upon notice from the Public Works Director or his/her representative designee, the excavator shall repair any portion of the right-of-public way damaged as a result of the excavator's work, including deterioration to the road surface. Repairs shall be made within 24 hours of notice of all damages which, in the opinion of the Public Works Director or his/her representative designee, constitute a public hazard. All other damages shall be repaired within a seventy-two-hour period after the completion of the work or within 72 hours of receiving notice from the Public Works Director or his/her designee, whichever is later.

B. In the event that repairs are not made within the time limits set forth above, the Public Works Director or his/her designee is authorized to make the necessary repairs and charge the excavator all costs, plus 20% overhead.

§ 152-12. Protection of Streets and Sidewalks.

A. In an effort to protect the City's investment in its infrastructure, excavations in newly constructed, reconstructed, rehabilitated, or overlaid pavements within a public way or on City property, are prohibited for seven (7) years after the effective date of notice of completion or acceptance of the new, reconstructed, rehabilitate, or overlaid improvements except as follows:

(1) Excavations to remedy a public emergency or a situation that creates an imminent threat to public safety, health, or welfare.

(2) Repair or modification to prevent interruption of essential utility services where no reasonable alternatives are available to avoid excavation in new pavements.

(3) Relocation work that is mandated by State or Federal legislation.

(4) Utility services for new buildings or parcels without existing utility services where no other reasonable means of providing service exists, as determined by the Public Works Director/Designee.

(5) Excavations within protected streets or sidewalks where the City has scheduled the reconstruction within one year due to the failure of the original pavement.

(6) Other situations deemed by the City Manager to be in the best interest of the general public.

B. For permits issued subject to any of the above criteria, a Roadway Degradation Fee will be charged pursuant to §152-8.B.

§ 152-1213. Time limit for completion of work.

All work shall be completed within the time limit set forth in the permit. This time limit may be extended by the Public Works Director for a reasonable period of time for good cause. In the event that all work is not completed within the stated time limit, the Public Works Director is authorized to complete the work and charge the excavator all costs, plus 20% overhead.

§ 152-13. Protective measures and traffic.

Requirements for protective measures and traffic control shall be as specified in the City of Lebanon Excavation Permit Conditions and Construction Requirements and the Manual of Uniform Traffic Control Devices (MUTCD).

A. Prior to the commencement of any street improvement or alteration, ~~including but not limited to the following: laying of water, sewer, electrical or any type of telecommunications equipment, cable TV, or any other type of underground utilities or the installation of aboveground utilities~~ which would interfere with the normal and regular flow of traffic within the City of Lebanon, the primary contractor ~~or company~~ responsible for the work being performed shall be required to provide adequate traffic control. A traffic control plan must be approved by the Public Works Director or his/her designee as part of the issuance of the excavation permit.

~~(1) In determining the level of traffic control needed, the following should be taken into consideration:~~

- ~~(a) The safety of the public.~~
- ~~(b) The safety of the workers.~~
- ~~(c) The ease of traffic flow.~~

~~(2) The primary contractor or company must develop a traffic control plan, using the recommendations outlined in the Manual of Uniform Traffic Control Devices, including the use of adequate warning and control signs. The contractor or company must take into consideration the location of the work site and the necessity of employing civilian traffic control personnel or uniformed police officers to promote the safe and orderly flow of traffic in and around the work site. In all areas where traffic volume is heavy, special consideration should be given to employing uniformed police officers to heighten the awareness of passing motorists to improve safety through the work zone.~~

~~(3) B.~~ The contractor shall not interfere with any existing utility without the written consent of the Public Works Director and the owner of the utility. All costs relating to the relocation and protection of utilities shall be paid by the contractor.

~~B. In any case where the effectiveness of the traffic control is questioned, the Lebanon Police Department will be responsible for assessing the effectiveness of the traffic control being used. If it is determined the traffic control is not effective, the shift supervisor will notify the Chief of Police or designee. The Chief of Police or designee shall have the authority to require the contractor or company to take all reasonable steps necessary to improve its effectiveness, including the hiring of uniformed police officers. If a uniformed police officer is detailed, the contractor or company shall be responsible for payment of such services, at the contractual rate as billed by the City of Lebanon for coverage until the work is completed.~~

C. If the contractor ~~or company~~ does not comply with the approved traffic control plan, directions of the Chief of Police or designee, a notice of violation ~~order~~ may be issued to prevent any further work as it relates to the interference of vehicular and/or pedestrian traffic.

D. Exception. This section does not apply to the Lebanon Public Works Department, the New Hampshire Department of Transportation, or their employees while so employed. This exception does not apply to subcontractors of either agency. If there is any question as to the application of this exception, the Chief of Police, in conjunction with the Public Works Director, will make the final determination.

§ 152-14. Suspension of permit; cease-and-desist order.

In the event the excavator violates any condition or requirement of the permit, the Public Works Director or his/her designee may suspend the permit and issue a cease-and-desist order to prevent any further work done on the excavation. The excavator shall comply with any requirements of the Public Works Director or his/her designee contained in the cease-and-desist order for the purpose of protecting the traveler or pedestrian. In the event the excavator does not so comply, then the city shall be entitled to recover from the excavator all costs and expenses incurred for such protective measures.

§ 152-1415. Insurance.

The excavator shall hold the city harmless from any and all claims, demands, liabilities and damages which the city may sustain or which may be made upon the city by reason of the excavation, and the excavator shall obtain general liability insurance in the amount of ~~\$300,000/\$500,000 bodily injury and \$25,000 property damage coverage~~ \$1,000,000/\$2,000,000 aggregate and shall provide the ~~city~~ city with a certificate of insurance outlining the above coverages and naming specifically the city as an additional named insured as its interest may appear.

~~§ 152-15. Suspension of permit; cease-and-desist order.~~

~~In the event the excavator violates any condition or requirement of the permit, then the Public Works Director shall suspend the permit, and issue a cease-and-desist order to prevent any further work done on the excavation. The excavator shall comply with any requirements of the Public Works Director contained in the cease-and-desist order for the purpose of protecting the traveler or pedestrian. In the event the excavator does not so comply, then the city shall be entitled to recover from the excavator all costs and expenses incurred for such protective measures.~~

§ 152-16. Penalties for offenses.

The penalty for the violation of this ordinance shall be a fine not to exceed \$1,000 as provided in RSA 47:17.

Persons who operate without a permit or violate the provisions of any permit required by this section shall be assessed penalties as outlined below. In addition, the excavation permit may be revoked by the Public Works Director or his/her designee for noncompliance with any of the required provisions.

(1) A fine not to exceed one hundred dollars (\$100.00) for the first violation; and

(2) A fine not to exceed five hundred dollars (\$500.00) for a second violation within one year from the date of the first violation, and will not be granted an excavation permit for one (1) year; and

(3) A fine not to exceed one thousand dollars (\$1,000.00) for a third violation and each additional violation within one year from the date of the first violation and will not be granted an excavation permit for five (5) years.

Section 2: Severability

The provisions of this ordinance are declared to be severable, and if any section, subsection, sentence, clause or part thereof is, for any reason, held to be invalid or unconstitutional by a court of competent jurisdiction, such decision shall not affect the validity of the remaining sections, subsections, sentences, clauses or part of this ordinance.

Section 3

Effective date: this Ordinance shall be effective upon passage.

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§ 152-5. Declaration of policy.

The purpose of this article is to establish rules and regulations as authorized by RSA 236:10 and RSA 47:17 to govern the excavation and restoration within any public way.

§ 152-6. Definitions.

As used in this article, the following terms shall have the meanings indicated:

EXCAVATION — The removal of soil, rock or pavement surface by any mechanical machine or device or by manual means, including but not limited to discharge of explosives on or within any public way.

EXCAVATOR — Person (as defined above) with an excavation permit.

PERSON — Any individual, firm, corporation or partnership proposing to make or contract for excavation.

PUBLIC WAY — Any surface improved for travel, including roadways, sidewalks, shoulders, ditches, embankments, or within or on any land held by the city as easements or rights-of-way.

PUBLIC WORKS DIRECTOR — The City Engineer who is hereby appointed as the Public Works Director. The City Engineer may appoint a representative to act in his/her absence.

§ 152-7. Permit required; exception for emergencies.

No person shall excavate within the public way of the City of Lebanon without a written permit from the Public Works Director or his/her delegated representative. A permit will not be required in the case of an emergency, where the public health or safety is endangered and immediate action must be taken, but in such case the person directing or taking such action shall notify the Public Works Director.

§ 152-8. Application for permit; fee.¹

- A. Any person desiring to excavate within the public way of the City of Lebanon shall submit a completed application 72 hours prior to starting work, excluding Saturdays, Sundays and holidays. All applications for excavations in the public way shall contain such information and specifications as the Public Works Director may require and shall be accompanied by plans and profiles and a nonrefundable permit fee of \$25, all to be filed in duplicate.

1. Editor's Note: The City of Lebanon Engineering Department Guidelines for Excavators is on file in the office of the Public Works Director.

- B. The excavator shall not make or cause to be made any excavation in the public way other than that described in the application and plans or authorized by the permit. The excavator shall comply with the provisions of this article as well as all requirements of local, state and federal law.
- C. New permits shall not be issued after November 1 each year unless the applicant can prove to the satisfaction of the Public Works Director that satisfactory repairs can be made prior to the onset of winter.

§ 152-9. Bond.

The Public Works Director may require as a prior condition to issuing a permit that the person making application shall post a bond or other security satisfactory to the City Manager in an amount sufficient to provide for the satisfactory restoration of the highway, as determined by the Public Works Director. Such bond or security shall be held by the City of Lebanon for a period of one year following completion of the project to compensate the city for repair, refilling or regrading that may be required as a result of the excavation, as directed by the Public Works Director, to restore the surface to its prior condition.

§ 152-10. Restoration.

It shall be a condition of the permit that any person who excavates or disturbs any public way shall restore the public way to substantially the same condition, or better, that it was in prior to such excavation or disturbance. It shall further be a condition of the permit that if during the next three years after the completion of the restoration any depressions occur or the highway shall be unreasonably washed as a result of the excavation and/or disturbance covered by the permit, then such person who obtained the permit shall compensate the city for refilling or grading the area subject to excavation or disturbance.

§ 152-11. Repairs.

- A. Upon notice from the Public Works Director or his/her representative, the excavator shall repair any portion of the right-of-way damaged as a result of the excavator's work, including deterioration to the road surface. Repairs shall be made within 24 hours of notice of all damages which, in the opinion of the Public Works Director or his/her representative, constitute a public hazard. All other damages shall be repaired within a seventy-two-hour period after the completion of the work or within 72 hours

of receiving notice from the Public Works Director, whichever is later.

- B. In the event that repairs are not made within the time limits set forth above, the Public Works Director is authorized to make the necessary repairs and charge the excavator all costs, plus 20% overhead.

§ 152-12. Time limit for completion of work.

All work shall be completed within the time limit set forth in the permit. This time limit may be extended by the Public Works Director for a reasonable period of time for good cause. In the event that all work is not completed within the stated time limit, the Public Works Director is authorized to complete the work and charge the excavator all costs, plus 20% overhead.

§ 152-13. Protective measures and traffic. [Amended 2-18-2004 by Ord. No. 2004-1]

- A. Prior to the commencement of any street improvement or alteration, including but not limited to the following: laying of water, sewer, electrical or any type of telecommunications equipment, cable TV, or any other type of underground utilities or the installation of aboveground utilities which would interfere with the normal and regular flow of traffic within the City of Lebanon, the primary contractor or company responsible for the work being performed shall be required to provide adequate traffic control.

(1) In determining the level of traffic control needed, the following should be taken into consideration:

- (a) The safety of the public.
- (b) The safety of the workers.
- (c) The ease of traffic flow.

(2) The primary contractor or company must develop a traffic control plan, using the recommendations outlined in the Manual of Uniform Traffic Control Devices, including the use of adequate warning and control signs. The contractor or company must take into consideration the location of the work site and the necessity of employing civilian traffic control personnel or uniformed police officers to promote the safe and orderly flow of traffic in and around the work site. In all areas where traffic volume is heavy, special consideration

should be given to employing uniformed police officers to heighten the awareness of passing motorists to improve safety through the work zone.

- (3) The contractor shall not interfere with any existing utility without the written consent of the Public Works Director and the owner of the utility. All costs relating to the relocation and protection of utilities shall be paid by the contractor.
- B. In any case where the effectiveness of the traffic control is questioned, the Lebanon Police Department will be responsible for assessing the effectiveness of the traffic control being used. If it is determined the traffic control is not effective, the shift supervisor will notify the Chief of Police or designee. The Chief of Police or designee shall have the authority to require the contractor or company to take all reasonable steps necessary to improve its effectiveness, including the hiring of uniformed police officers. If a uniformed police officer is detailed, the contractor or company shall be responsible for payment of such services, at the contractual rate as billed by the City of Lebanon for coverage until the work is completed.
- C. If the contractor or company does not comply with the directions of the Chief of Police or designee, a notice of violation order may be issued to prevent any further work as it relates to the interference of vehicular and/or pedestrian traffic.
- D. Exception. This section does not apply to the Lebanon Public Works Department, the New Hampshire Department of Transportation, or their employees while so employed. This exception does not apply to subcontractors of either agency. If there is any question as to the application of this exception, the Chief of Police, in conjunction with the Public Works Director, will make the final determination.

§ 152-14. Insurance.

The excavator shall hold the city harmless from any and all claims, demands, liabilities and damages which the city may sustain or which may be made upon the city by reason of the excavation, and the excavator shall obtain general liability insurance in the amount of \$300,000/\$500,000 bodily injury and \$25,000 property damage coverage and shall provide the city with a certificate of insurance outlining the above coverages and naming specifically the city as an additional named insured as its interest may appear.

§ 152-15. Suspension of permit; cease-and-desist order.

In the event the excavator violates any condition or requirement of the permit, then the Public Works Director shall suspend the permit, and issue a cease-and-desist order to prevent any further work done on the excavation. The excavator shall comply with any requirements of the Public Works Director contained in the cease-and-desist order for the purpose of protecting the traveler or pedestrian. In the event the excavator does not so comply, then the city shall be entitled to recover from the excavator all costs and expenses incurred for such protective measures.

§ 152-16. Penalties for offenses.

The penalty for the violation of this ordinance shall be a fine not to exceed \$1,000 as provided in RSA 47:17.

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