IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA554/2022
[2024] NZCA 316

BETWEEN	THORNDON QUAY COLLECTIVE INCORPORATED Appellant
AND	WELLINGTON CITY COUNCIL Respondent

Hearing:	1 June 2023 (further submissions received 15 May 2024)
Court:	Courtney, Katz and Ellis JJ
Counsel:	R A Kirkness and H Z Yáng for Appellant N M H Whittington for Respondent
Judgment:	15 July 2024 at 11.30 am

JUDGMENT OF THE COURT

A The applications for leave to file further evidence are granted.

B The appeal is allowed.

C We make a declaration that the Council's decision-making processes in relation to its decision to reconfigure parking on Thorndon Quay from mainly angled parking to entirely parallel parking did not comply with its obligations under s 77(1) of the Local Government Act 2002.

D The respondent must pay the appellant costs for a standard appeal on a band A basis together with usual disbursements. We certify for two counsel.

REASONS OF THE COURT

(Given by Katz J)

Introduction

[1] In June 2021, following a public consultation process, the Wellington City Council decided to reconfigure parking on Thorndon Quay from mainly angled parking to entirely parallel parking (the Decision). The aim was to improve cyclist safety.

[2] The conversion of the parks to parallel parks had the effect of significantly reducing the number of parks available in the key business areas of Thorndon Quay. A number of local businesses were concerned about the adverse impacts of these parking changes on their business. Through the Thorndon Quay Collective Inc (TQC), they filed a judicial review proceeding in the High Court challenging aspects of the Council's decision-making processes under the Local Government Act 2002 (the LGA). The key allegation is that the Council abdicated its decision-making responsibilities by relying on the Council's Road Safety Manager to identify and assess the reasonably practicable options for addressing cyclist safety on Thorndon Quay — a task that TQC says could only be undertaken by the Council or its lawful delegate.

[3] In the High Court, Gendall J found that none of TQC's grounds of review had been made out and accordingly dismissed the judicial review application.[1] TQC now appeals. The key issues on appeal are whether the Judge erred in:

(a) his interpretation of s 76(3) of the LGA;

(b) finding that the Council had complied with its obligations under s 77(1) of the LGA;

(c) finding that the Council had complied with the information requirements for consultation under s 82A of the LGA; and

(d) finding that the Council had met the requirements of s 79 of the LGA.

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1 *Thorndon Quay Collective Inc v Wellington City Council* [2022] NZHC 2356 [judgment under appeal].

[4] The Council's position is that the High Court did not err in any of the ways alleged. It submitted that TQC's interpretation of the LGA's decision-making requirements is overly prescriptive, and that the approach advocated by TQC is not required by the LGA and would impose significant time and resource burdens on local authorities.

Applications for leave to file further evidence

[5] On 21 April 2023 (prior to the hearing), the Council filed an application seeking leave to file evidence updating the Court on events occurring since the High Court judgment was delivered. Admission of that evidence was not opposed. The evidence is potentially relevant to the issue of relief. We are satisfied that the new evidence is fresh, credible and cogent. It is admitted accordingly.

[6] During the hearing we were advised that a further traffic resolution in relation to Thorndon Quay was under consideration. We granted leave to file updating evidence in relation to that traffic resolution. That evidence was filed on 30 August 2023.

[7] More recently, on 15 May 2024. TQC filed an application seeking leave to file updating evidence, namely an affidavit that annexes a draft memorandum from Wellington Water, which shows that as at September 2022, there was more than $9.2 million worth of water pipe renewal work along the Thorndon Quay and Hutt Road corridor that either must be or should be done. It is therefore likely that the road will need to be reopened in order for the work to be carried out sometime into the future. The Council opposes admission of the proposed further evidence.

[8] We accept that this evidence is fresh and credible. Although its cogency is impacted to some extent by the fact that the annexed document is a draft, we accept TQC's submission that the document is potentially relevant to the Judge's concern that quashing the decision would "cause administrative inconvenience and waste". We accordingly admit the evidence.

Factual background

The Thorndon Quay/Hutt Road Project

[9] Let's Get Wellington Moving (LGWM) was a joint initiative between the Council, the Greater Wellington Regional Council | Te Pane Matua Taiao, and the NZ Transport Agency Waka Kotahi (NZTA). It was formed with the aim of developing a transport system for Wellington that reduced reliance on private vehicle travel.

[10] Thorndon Quay/Hutt Road is an important transport route for Wellington, as it is one of the busiest commuter roads in the city. The "Thorndon Quay/Hutt Road Project" was identified as a priority project for LGWM. One of the possible reforms identified, in September 2020, was the conversion of angled parks to parallel parks on Thorndon Quay, largely to address safety concerns for cyclists. Other suggestions for improving cyclist safety included: enforcing and extending the clearway timeframes; completely removing angled parking in favour of dedicated bus and cycle lanes; or changing the angle of the parking to keep or increase parking spaces on or near Thorndon Quay.

NZTA raises concerns about Thorndon Quay

[11] Safety risks posed by the angled parking on Thorndon Quay were identified as an issue of concern by NZTA in audit reports in both 2015 and 2020. On 30 July 2020, NZTA released its draft "Investment Audit Report: Technical and Procedural Audits of Wellington City Council" (NZTA Audit Report). The NZTA Audit Report recommended that the Council pursue the conversion of angled parks on Thorndon Quay to parallel parks as a cycle safety initiative. NZTA's view was that waiting for LGWM to address this issue as part of the Thorndon Quay/Hutt Road Project would take too long, given the safety issues at stake. NZTA urged the Council to act promptly to implement an interim safety measure for cyclists, pending the outcome of the Thorndon Quay/Hutt Road Project. NZTA's identified the major conflict on Thorndon Quay as being the conflict between cyclists and vehicles exiting angled parks and "[a] simple solution is to revise the parking orientation to all parallel car parks to mitigate the conflict".

The Transport and Infrastructure team assess the options

[12] The Council had previously considered converting the angled parking on Thorndon Quay to parallel parks but had not pursued the matter. The NZTA Audit Report prompted further consideration of the issue. Bradley Singh, the Council's Manager — Transport and Infrastructure, was the Council officer with primary responsibility for road safety issues. In his evidence in the High Court he explained that angled parking encroaches on the road more than parallel parking does, meaning that cyclists are pushed further into the road and run greater risk of collision with moving traffic. This is a particular hazard where there is not enough space for a buffer between the angled parks and the moving traffic, such as was prevalent on Thorndon Quay. Angled parking can also reduce a driver's visibility, meaning that they need to reverse slightly to see past the cars parked either side of them. This can impact cyclists who are attempting to ride on the left so far as possible.

[13] Mr Singh and his team held five meetings or workshops between June 2020, when the NZTA Audit Report was received, and June 2021, when the Council's delegate, the Planning and Environment Committee (the Planning Committee) met to consider the proposed parking changes. Several options, including changing the angles of the existing parking, using "reverse in" angled parking, installing mirrors, changing clearway times, and installing another clearway were discounted by Mr Singh and his team for various reasons during these sessions. Ultimately, their preferred option was to change the angled parking to parallel parking. Mr Singh's evidence was that he was reluctant to pursue any long-term solutions that were high cost due to the risk that such solutions would not align with LGWM's final designs for Thorndon Quay.

The Council's Traffic Bylaw

[14] All roads in Wellington City are under the Council's control.[2] The Council has various powers to determine and make changes to the layout of roads including carriageways, footpaths, and cycle and bus lanes.[3] The Council can also make bylaws

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2 Local Government Act 1974, s 317.
3 Sections 319, 331–333, and 591.

regarding various matters including parking on roads.[4] The Council exercised this authority by enacting its Traffic Bylaw.[5] This provided for the content of and process by which the Council makes traffic resolutions as to the layout of roads, including parking spaces. For present purposes key aspects of the Traffic Bylaw include that:[6]

(a) The Council may impose "prohibitions, restrictions, controls or directions concerning the use by traffic or otherwise of any road",[7] including any "defined part of a road, including, any defined footpath, carriageway or lane";[8] and

(b) Proposed traffic resolutions are made after public consultation by placing the proposed resolution on the Council's website and giving the public at least 14 days to comment in writing. Any person may provide comments, in writing, on the proposed resolution and those comments will be considered by the Council before it makes a resolution. Any person who has made written comments may request to be heard by the Council and it is at the Council's sole discretion whether to allow that request.[9]

The Regulatory Committee meeting

[15] Following the NZTA Audit Report, Cycle Action Network had organised a petition urging action to address safety concerns for cyclists on Thorndon Quay. It asked the Council to proceed with the angled parking conversion separately, and ahead of, the LGWM programme. Cycle Action Network's petition was submitted to the Council's Regulatory Processes Committee (the Regulatory Committee) at its 14 April 2021 meeting, together with a report from Council officers confirming that work was already underway to address safety issues along the route, in response to the

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4 Land Transport Act 1998, s 22AB.

5 At the relevant time the Traffic Bylaw was found in Part 7 of the Wellington City Council Consolidated Bylaw 2008. The Traffic Bylaw has since been replaced by the Wellington City Council Traffic and Parking Bylaw 2021 which came into force on 27 August 2021. The new bylaw's provisions on the process for making traffic resolutions are to the same effect as the Traffic Bylaw.

6 Wellington City Council Consolidated Bylaw, cl 11.

7 Clause 11.1.

8 Clause 11.2(e).

9 Clause 12.1.

NZTA Audit Report. The report from Council officers suggested that the necessary changes could be implemented through the Council's traffic resolution process, which would give the community an opportunity to share their views, for Councillors' consideration.

[16] The Regulatory Committee agreed to proceed via the traffic resolution process, and to align this process with consultation that LGWM was separately intending to run in relation to the Thorndon Quay/Hutt Road Project. Councillors also decided that, if the proposed LGWM consultation was delayed, the traffic resolution process would continue regardless.

The public consultation process

[17] On 11 May 2021, as part of the Council's traffic resolution process, a public consultation document was released — "TR53-21 Thorndon Quay Pipitea — Convert angled parking to parallel parking" (the Consultation Paper). The Consultation Paper outlined a proposal to convert the angled parking on Thorndon Quay to parallel parking. The reasons for the proposed changes were explained, and the Consultation Paper detailed the expected impacts on safety, parking, bus access, pedestrians, parking revenue, and the social cost of injuries. The Consultation Paper claimed that the angled parking conversion would improve cyclist safety, as follows:

> With the increase in people cycling along Thorndon Quay, the number of injuries incidents relating to cyclists have increased over the last five years. A major contributor to incidents on Thorndon Quay relates to conflicts between cyclists and motorists using the angled car parks particularly in the section between Moore Street and Tinakori Road.
>
> Changing the parking layout from angled to parallel will improve safety for cyclists along this section of Thorndon Quay.

[18] Attached to the Consultation Paper was a further paper titled the "Thorndon Quay Crashes & Parking Analysis" (the Parking Analysis Paper) which aimed to analyse the past decade's crashes and how the conversion would impact safety and parking usage. The Parking Analysis Paper concluded that "converting angle parking to parallel parking on Thorndon Quay has the potential to improve both safety and parking usage without negatively affecting visitors to businesses". This was related to its conclusion that "parking on Thorndon Quay is mostly underused".

[19] A total of 1,613 submissions were received as part of the consultation process, of which 66 per cent agreed with the proposal to convert angled parking to parallel parking.

[20] As noted above at [16], the Council's traffic resolution process was conducted in parallel with LGWM's ongoing work on its Thorndon Quay/Hutt Rd Project. Accordingly, during the Council's submission period, members of TQC also met twice with LGWM (on 19 May 2021 and 3 June 2021) to discuss LGWM's vision for Thorndon Quay. At those meetings the LGWM representatives emphasised that broader long-term improvements along Thorndon Quay were inevitable as part of LGWM and that those improvements would supersede any short-term changes the Council made to parking.

[21] TQC made a submission on the Consultation Paper. It also presented in person before the Planning Committee at its public meeting on 22 June 2021. TQC questioned the parking analysis that had been undertaken by the Council (as set out in the Parking Analysis Paper). TQC also suggested that the Council had failed to consult adequately and expressed concern that the proposed changes would adversely impact the businesses represented by TQC. TQC outlined five possible alternatives to the Council's proposal:

> 115.1 Repainting the angled parks on a relaxed angle, so that cars exiting parks would have a clearer line of site of oncoming cyclists.
>
> 115.2 Reducing the speed limit on Thorndon Quay to 40 km/h (or 30 km/h) in line with other speed reductions around Wellington, which would reduce the speed at which cars and cyclists interact and create more time to react and avoid potential conflicts.
>
> 115.3 Installing mirrors in areas where visibility of oncoming cyclists is low so that exiting vehicles could see oncoming cyclists.
>
> 115.4 Enhancing the cycle corridor painting on Thorndon Quay to make it more obvious to all users that the space is intended for use by cyclists.
>
> 115.5 Introducing a northbound clearway running between 4:30 pm and 6:00 pm, which would prevent conflict between vehicles and cyclists during the time when the greater number of cyclists travel along Thorndon Quay (a southbound clearway already operates on Thorndon Quay between 7:00 am and 9:00 am).

The Planning Committee's decision

[22] Following the conclusion of the consultation process, the traffic resolution was considered by the Planning Committee at its meeting on 24 June 2021. A report from Mr Singh, supporting the traffic resolution, was provided. It recommended a change from angle parking to parallel parking to improve cycle safety on Thorndon Quay "to address a number of crashes involving cyclists along Thorndon Quay and implement a best practice parking design on this arterial corridor". Mr Singh's report advised that Council officers were confident that if the traffic resolution was approved it would improve the safety of cyclists on Thorndon Quay and would contribute to the Council's transport network objectives of safety, accessibility, efficiency, and sustainability. The report analysed the public feedback and noted that:

> Feedback received from consultation generally supports the proposed parking changes as an interim safety measure to be implemented ahead of wider, more comprehensive corridor changes proposed by LGWM that will improve the service levels for public transport, cyclists, and pedestrians.

[23] The Report further advised that:

> We are not suggesting that the conversion of angle parking to parallel parking will eliminate hazards for cyclists, but it will make it safer in the short term due to the extra lateral space whilst long term decisions are made.

[24] Mr Singh attended the meeting to present the proposal and answer questions. He was asked by Councillors about other options that had been considered for addressing cyclist safety issues, including the options that had been proposed by TQC. These had not been addressed in his written report. Mr Singh explained to Councillors that a number of options had been considered and briefly explained why some (but not all) of the alternative proposals put forward had been rejected.

[25] The Planning Committee passed the traffic resolution by a 10 to five vote. The parking changes were implemented in September 2021.

Events since the appeal hearing

[26] Updating evidence was filed on 30 August 2023 advising that on 24 August 2023 the Regulatory Committee had adopted a traffic resolution implementing certain changes recommended as part of LGWM's Thorndon Quay/Hutt

Road project. It provided for peak hour bus lanes on Thorndon Quay and the continuation of a two-way cycleway from Hutt Rd along Thorndon Quay. The supporting report to the Regulatory Committee noted that all options considered as part of the Thorndon Quay/Hutt Road project required the removal of angle parking on Thorndon Quay to improve safety, but that this had now been implemented as a result of the 24 June 2021 decision of the Planning Committee.

Overview of decision-making under the LGA

[27] We consider the relevant provisions of the LGA in further detail below. By way of brief overview, the LGA requires all local authorities to conduct their business in an open, transparent and democratically accountable manner.[10] This includes, amongst other things, making themselves aware of and having regard to the views of the various communities within their district or region.[11] One of the ways in which the LGA promotes democratic decision-making is by providing a framework for effective decision-making and community consultation. Specifically, pt 6 of the LGA ("Planning, decision-making, and accountability") sets out the general statutory obligations of local authorities in relation to their decision-making processes, including in relation to consultation with interested and affected persons.[12]

[28] Section 76 (which is set out below at [35]) is a key provision. It provides that every decision made by a local authority under the LGA must be made in accordance with each of the provisions of ss 77 (requirements in relation to decisions), 78 (community views), 80 (inconsistent decisions), 81 (contributions by Māori) and 82 (consultation) as are applicable.[13] However, the obligations in ss 77 and 78 are subject to the "judgments" of the local authority under s 79 about how to achieve compliance with those sections which "is largely in proportion to the significance of the matters affected by the decision".[14]

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10 Local Government Act 2002, s 14(1)(a)(i).
11 Section 14(1)(b).
12 Section 75(a) and (c).
13 Section 76(1).
14 Section 76(2) and 79(1)(a).

[29] Section 77(1) is also a key provision. Relevantly, it requires a local authority, in the course of its decision-making process, to:

> (a) seek to identify all reasonably practicable options for the achievement of the objective of a decision; and
>
> (b) assess the options in terms of their advantages and disadvantages; …

[30] Section 78(1) requires a local authority to give consideration to the views and preferences of persons likely to be affected by, or to have an interest in, the matter under consideration. A local authority is not required by s 78 alone, however, to undertake a consultation process.[15] Rather, consultation is one of the available options for obtaining information about the views and preferences of those affected or with an interest.[16] Here, consultation was required by the Traffic Bylaw.

[31] Section 79(1) provides that it is the responsibility of the local authority to make, in its discretion, judgments about how to achieve compliance with ss 77 and 78 in proportion to the significance of the matters affected by the decision. "Significance" is defined in s 5 as meaning:

> … the degree of importance of the issue, proposal, decision, or matter, as assessed by the local authority, in terms of its likely impact on, and likely consequences for,—
>
> (a) the current and future social, economic, environmental, or cultural well-being of the district or region:
>
> (b) any persons who are likely to be particularly affected by, or interested in, the issue, proposal, decision, or matter:
>
> (c) the capacity of the local authority to perform its role, and the financial and other costs of doing so[.]

[32] "Significant" is similarly defined, as meaning, "in relation to any issue, proposal, decision, or other matter, … that the issue, proposal, decision, or other matter has a high degree of significance". Every local authority must adopt a "significance and engagement policy" that, amongst other things, sets out the local authority's general approach to determining the significance of proposals and decisions in relation

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15 Section 78(3).

16 *Wellington City Council v Minotaur Custodians Ltd* [2017] NZCA 302, [2017] 3 NZLR 464 at [36].

to issues, assets, and other matters; and any criteria or procedures that are to be used by the local authority in assessing the extent to which issues, proposals, assets, decisions, or activities are significant or may have significant consequences.[17] It is common ground that the decision at issue in this appeal was not a "significant" one in terms of the LGA.

[33] When a local authority is required to consult in relation to a decision, or chooses to consult, certain principles of consultation apply. These are set out in s 82(1). They include that those affected should have access to relevant information in an appropriate format and be encouraged to present their views, having been given clear information as to both the purpose of the consultation and the scope of any likely decision.[18] Further, a local authority must ensure that interested or affected parties have a reasonable opportunity to present their views, and that those views are received by the local authority with an open mind.[19]

Did the Judge err in his interpretation of s 76(3) of the LGA?

[34] The first issue on appeal is whether the Judge erred in his interpretation of s 76(3) of the LGA. TQC submitted that the Judge misunderstood what s 76 of the LGA requires of a local authority decision-maker, and that this led him into error.

The High Court decision

[35] Section 76 relevantly provides:

> **76 Decision-making**
>
> (1) Every decision made by a local authority must be made in accordance with such of the provisions of sections 77, 78, 80, 81, and 82 as are applicable.
>
> (2) Subsection (1) is subject, in relation to compliance with sections 77 and 78, to the judgments made by the local authority under section 79.

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17 Local Government Act, s 76AA.
18 Section 82(1)(a)–(c).
19 Section 82(1)(d)–(e).

(3) A local authority—

(a) must ensure that, subject to subsection (2), its decision-making processes promote compliance with subsection (1); and

(b) in the case of a significant decision, must ensure, before the decision is made, that subsection (1) has been appropriately observed.

…

[36] The Judge observed that s 76(1) makes it clear that every decision made by a local authority must be made in accordance such of the provisions of ss 77, 78, 80, 81 and 82 as are applicable.[20] He then summarised s 76(3) in this way:[21]

> [62] Section 76(3) provides that a local authority must ensure that its decision-making processes "promote compliance" with subs (1), and in the case of a "significant" decision, that subs (1) has been "appropriately observed". Subsection (3) thus creates in respect of a local authority's decision-making under subs (1) what the Court of Appeal in *Minotaur [Custodians]* described as "two standards of performance". As the Court of Appeal said there, the first, and higher, standard is to ensure that in respect of "significant decisions", the provisions contained in subs (1) have been "appropriately observed". The second, lower, standard applies in respect of a decision which is not "significant", in which case decision-making is only required to "promote compliance" with those provisions.

[37] The Judge observed that as the Decision was one of "medium significance", the Council was required to ensure its decision-making processes "promoted compliance with" the requirements for decision-making under s 76(1), subject to s 76(2). The Council did not need to ensure that all provisions had been "appropriately observed", as it would for a significant decision.[22]

[38] Subsequently, when addressing whether the Council had failed to properly exercise its judgment pursuant to s 79 of the LGA, the Judge stated further that:

> [135] In the present proceeding, as noted earlier, the [Planning] Committee assessed the Decision in question as one of "medium" significance. This meant the [Planning] Committee, as delegate for the Council, was required to "promote compliance" with the decision-making provisions, but not necessarily to ensure that those provisions had been "appropriately observed" (which would have been the situation had the Decision been classed as

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20 Judgment under appeal, above n 1, at [61].

21 Footnote omitted.

22 Judgment under appeal, above n 1, at [63].

> "significant"). There is a clear distinction made in the legislation between those types of decision. Only in respect of "significant" decisions must there be full observance of each decision-making provision. The *Whakatane District Council* case involved a significant decision; the present proceeding does not. The standard of compliance in respect of the present Decision is lower and less burdensome than that required in *Whakatane*.

Submissions on appeal

[39] The passage from this Court's decision in *Minotaur Custodians* that the Judge was referring to (as quoted at [36] above) is as follows:

> [33] … In respect of "significant decisions", the local authority must ensure that the provisions contained in subs (1) have been "appropriately observed". This is the higher of the two standards. Where the matter is not "significant", the standard is more aspirational: decision-making is only required to "promote compliance" with the provisions referred to in subs (1). Even that lower standard is subject to s 79 as noted. It is common ground that the decision in question in this appeal was not a "significant decision" in terms of the statutory definition. Accordingly, the "promote compliance" standard applied.

[40] It was common ground on appeal that, correctly interpreted, s 76(3) relates solely to matters of process and is not intended to qualify or limit the substantive obligation in s 76(1) that every decision made by a local authority *must* be made in accordance with such of ss 77, 78, 80, 81, and 82 as are applicable (for ease of reference we will refer to these sections as "the decision-making provisions"). It was also common ground that this Court's decision in *Minotaur Custodians*, when read in its entirety, is consistent with such an interpretation.

[41] TQC submitted, however, that the quoted passage from *Minotaur Custodians*, when read in isolation, lacks clarity and is open to misinterpretation. It submitted that this has resulted in conflicting interpretations of the passage in the High Court. Here, TQC submitted, the Judge wrongly interpreted s 76 as not imposing a *substantive* obligation on local authorities to comply with the decision-making provisions provided, in relation to non-significant decisions, that they have put in place decision-making processes that promote compliance with those provisions. On this approach, s 76 is about process, not substance. If decision-making processes that promote compliance with the decision-making provisions have been put in place, it is irrelevant if substantive compliance is achieved.

[42] The Council did not accept that the Judge had misinterpreted either s 76(3) or this Court's decision in *Minotaur Custodians* and submitted that this is apparent from the Judge's overall approach and reasoning. Specifically, when he considered each cause of action, the Judge addressed whether there had been actual compliance with the relevant decision-making provisions and did not limit his inquiry to whether appropriate decision-making processes had been put in place.

Discussion

[43] We accept that the passage in *Minotaur Custodians*, quoted above at [39], is potentially open to differing interpretations, which could give rise to some confusion. We accordingly take the opportunity to clarify and confirm the correct interpretation of s 76.

[44] Section 76(1) states unequivocally that every decision made by a local authority *must be made* in accordance with such of the provisions of ss 77, 79, 80, 81 and 82 as are applicable. The mandatory nature of compliance with the decision-making provisions is reflected in the use of the word "must" not only in ss 76(1), but also in ss 77(1), 78(1), 80(1), 81(1) and 82(1). In relation to ss 77 and 78, although compliance is mandatory, the local authority has a broad discretion as to how to best achieve compliance, relative to the significance of the decision in issue.

[45] In addition to the substantive obligation in s 76(1), s 76(3) imposes two additional procedural requirements, each of which reinforces the importance of local authorities complying with the decision-making provisions of the LGA:

(a) First, s 76(3)(a) provides that a local authority must ensure that its decision-making processes "promote compliance" with the requirements in s 76(1). Hence, for example, if the Council adopts a standard decision-making process in relation to traffic resolutions, it must ensure that the process is one that will promote compliance with relevant LGA decision-making and consultation obligations. The "promote compliance" obligation is universal — it applies to all local authority decisions, whatever their level of significance.

(b) Section 76(3)(b) imposes an additional procedural requirement that applies to significant decisions only. In respect of such decisions, a local authority must *ensure*, before the decision is made, that s 76(1) has been appropriately observed. This reflects the importance of significant decisions to the community. In respect of such decisions, in addition to putting in place decision-making processes that promote compliance, the local authority must also stand back and consider whether compliance has in fact been achieved, before making the relevant significant decision. Only if satisfied it has been, can the local authority proceed to make the relevant decision.

[46] Accordingly, as TQC submitted (and the Council accepted), the requirement in s 76(3)(a) to adopt decision-making processes that "promote compliance" is an additional procedural requirement to facilitate good local authority decision-making. It is not a substitute for substantive compliance with the decision-making provisions of the LGA. Hence, a claim that a decision was not made in accordance with one or more of the decision-making provisions would not be immune from challenge simply because a local authority could show that it had adopted decision-making processes aimed at promoting compliance with those provisions. The statutory requirement is actual compliance. Obviously, however, adopting decision-making processes that promote compliance will enhance the likelihood of actual compliance being achieved.

[47] We accept TQC's submission that the Judge's description of what s 76 requires was inaccurate to the extent that he appears to suggest that, correctly interpreted, s 76 only required the Council to adopt decision-making processes that promote compliance with the decision-making provisions, rather than achieve substantive compliance with those provisions. When the judgment is considered in its entirety, however, it is apparent that the Judge approached and analysed TQC's claims on the basis that actual compliance with ss 77, 78 and 82 was required (and, in his view, had been achieved). Accordingly, although the Judge may have inaccurately described the requirements of s 76, his analysis was not limited to whether the Council had put in place processes to promote compliance. Rather, he (correctly) considered whether actual compliance had been achieved. Accordingly, any misstatement as to the correct interpretation of s 76 did not ultimately impact the outcome of the case.

Did the Judge err in finding that the Council had complied with its obligations under s 77(1) of the LGA?

[48] The next issue is whether the Judge erred in finding that the Council had discharged its obligation to identify and assess all reasonably practicable alternatives for the achievement of the objective of its decision (cyclist safety), as required by s 77(1) of the LGA. This issue lies at the heart of the appeal.

[49] Section 77(1) provides:

> (1) A local authority must, in the course of the decision-making process,—
>
> (a) seek to identify all reasonably practicable options for the achievement of the objective of a decision; and
>
> (b) assess the options in terms of their advantages and disadvantages; …

The High Court decision

[50] The Judge summarised the evidence given by Mr Singh that he and his team had considered various options over the course of five meetings or workshops, namely: changing the angles of the existing angled parking; using "reverse in" angled parking; installing mirrors; changing clearway times; and installing another clearway.[23] The Judge noted that:[24]

> [93] … Ultimately two reasonably practicable options were identified. The first was to change the configuration from angled parking to parallel parking until LGWM made further changes. The second was the status quo until LGWM made changes.

[51] The Judge saw no difficulty with the Council "seeking to identify" all reasonably practicable options through one of its officers:

> [94] … Indeed, it is strongly arguable that there is a greater chance of the Council identifying all reasonably practicable options if this work is done by an experienced officer within whose job description such a task falls. In my view, if the Council utilises one of its officers to identify all reasonably practicable options, and the officer then presents to the specific decision-maker the results of their identification of all reasonably practicable options, it will have fulfilled the requirement under s 77 to "seek to identify" such.

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23 At [92].

24 Footnote omitted.

[52] The Judge rejected TQC's submission that an error had occurred because the Planning Committee did not have before it all the information it would have needed to make its own assessment of the advantages and disadvantages of the various options considered by Mr Singh and his team. Rather, the Judge found that it was acceptable for particular options to be considered and discarded as not reasonably practicable by Council officers; "[t]he legislation does not require that the specific decision-maker has before them all options".[25]

[53] The Judge reviewed a transcript of the Planning Committee meeting held on 24 June 2021 which showed that Mr Singh had been questioned extensively by the Planning Committee members.[26] The Judge noted that Mr Singh was specifically asked about the assessment that had been undertaken of the options and provided explanations as to some (but not all) of the rejected options that had been discarded as not reasonably practicable.[27] Mr Singh's explanations were regarded as "sufficiently fulsome" by the Judge.[28]

[54] The Judge concluded that the Council, through the Planning Committee, had sought to identify all reasonably practicable alternatives for the achievement of the objective of the Decision, and had assessed the advantages and disadvantages of those options.[29] It was not necessary for the Planning Committee to itself undertake a full assessment of all potential options. Rather:[30]

> [103] … It is necessary only that the [Planning] Committee was properly satisfied that Mr Singh and his team had undertaken an adequate analysis into whether all reasonably practicable alternatives had been considered, and assessment made of their advantages and disadvantages.

[55] The Judge considered that as the Planning Committee had voted in favour of the traffic resolution, it must have been satisfied an adequate analysis of the options

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25 Judgment under appeal, above n 1, at [94].
26 At [100].
27 At [102].
28 At [103].
29 At [106].
30 At [103].

had been undertaken by Mr Singh and his team.[31] The Judge was satisfied the Planning Committee acted proportionately and was entitled to proceed as it did.[32]

Submissions on appeal

[56] TQC submitted that it was not in accordance with the Council's obligations under the LGA for it to, in effect, delegate to Mr Singh (who was not an authorised sub-delegate) the responsibility for determining which options were reasonably practicable and which were not. This was the responsibility of the Planning Committee under s 77(1)(a). While it may have been appropriate for Council staff to identify possible options, once this had been done the proper course was for all of the identified options to be submitted to the Planning Committee, together with sufficient information to enable it to determine, in respect of each option, whether it was reasonably practicable. This did not occur. Mr Singh initially only provided the Planning Committee with information about his preferred option. In response to questioning, he orally provided information about some (but not all) of the other options that he and his team had considered and discarded. The Planning Committee had no information at all before it (either written or oral) in relation to some of the options considered and rejected by Mr Singh and his team, including: using reverse-in angled parking; changing clearway times; and installing another clearway.

[57] TQC also submitted that there was a sequencing or timing issue that invalidated the Council's decision-making process. The Council, it submitted, was required to identify all reasonably practicable options prior to any consultation taking place. Here, however, the Planning Committee did not consider the reasonably practicable options until its 24 June 2021 meeting, when it (in effect) simply accepted Mr Singh's advice as to what those options were.

[58] The Council supported the Judge's finding that the Council had complied with its obligations under s 77(1) of the LGA, largely for the reasons he gave. There was no requirement under s 77(1)(a) for all options to be presented to the decision-maker, especially ones that were not reasonably practicable. Further, all reasonably

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31 At [104].
32 At [107].

practicable options were made available for public consultation and the Planning Committee's consideration. The LGA does not require non-practical options to be consulted on or considered.

Discussion

[59] It was common ground that the Planning Committee is a lawful delegate of the Council for the purposes of s 77(1), but that Mr Singh is not. TQC's position, however, is that for all practical purposes the Planning Committee delegated its obligations under s 77(1) to Mr Singh, which it was not entitled to do.

[60] In *Borrowdale v Director-General of Health*, this Court considered whether the Director-General of Health had unlawfully delegated to other officials the responsibility for making decisions regarding what businesses could remain open during the COVID-19 lockdowns. The Court found that a Minister or other public official does not delegate their decision-making power by relying on briefings and recommendations that have been prepared by officials.[33]

[61] Similarly, in *R v Thompson*, this Court held that when a decision-maker makes a decision based on information obtained, collated, or collected by other authorised persons, they have not delegated their powers provided they keep within the responsibility reposed in them by statute.[34] In that case, the Commissioner of Police was required to certify certain facts under s 13A(3) of the Evidence Act 1908, namely whether an undercover police officer appearing as a witness for the prosecution had been convicted of any offences. This Court found that the Commissioner of Police was not personally required to search official conviction records. It was sufficient if he set up a system pursuant to which another person made the necessary inquiries to elicit the required facts.[35] The Court noted that the obligation of the Commissioner was to certify certain facts, and that he had done so. "How he arrives at those facts is a matter for him to determine in keeping with the responsibility reposed in him by the statute".[36]

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33 *Borrowdale v Director-General of Health* [2021] NZCA 520, [2022] 2 NZLR 356 at [177].
34 *R v Thompson* [1990] 2 NZLR 16 (CA) at 20–21.
35 At 21.
36 At 20.

[62] This case differs from either *Borrowdale* or *Thompson* however, in that the relevant provisions of the LGA are not solely substantive but are also procedural. This is not, for example, a case where a discretion has been conferred on the Council to make a decision provided certain criteria are met, or certain circumstances exist. Section 77(1) imposes specific procedural obligations on the Council, namely that it must seek to identify all reasonably practicable options for the achievement of the objective of a decision and assess those options in terms of their advantages and disadvantages. Obviously, this does not mean that the Council (or its delegate) must undertake all the legwork themselves. Indeed, as the Judge observed, it is strongly arguable that there is a greater chance of the Council identifying all reasonably practicable options if this work is done by an experienced officer within whose job description such a task falls.

[63] We disagree with the Judge, however, that if the decision-maker uses a Council employee to assist in the identification of all reasonably practicable options, the employee is only required to present to the decision-maker those that in their view meet the criteria of being "reasonably practicable". We accept TQC's submission that such a process comes perilously close to an unlawful sub-delegation, because it may well not result in the decision-maker having sufficient information to satisfy itself that the recommended options are indeed the only reasonably practicable ones.

[64] Obviously, some degree of pragmatism is called for. For example, if clearly fanciful and unrealistic options are put forward during the public consultation process, a degree of judgement may have to be exercised by the relevant Council employees. Here, for example, if it had been suggested that Thorndon Quay be closed entirely to vehicle traffic to protect cyclists Mr Singh could hardly be criticised for not including such an option in his report to the Planning Committee. The situation is different, however, where reasonable arguments can be made that a particular proposal is reasonably practicable, even if those arguments have failed to persuade the relevant Council employee. In such circumstances, the appropriate course is for all such options to be put before the decision-maker, together with a brief explanation as to why the Council employee does not view certain options as reasonably practicable in the circumstances.

[65] The process that was followed here resulted, in effect, in only one option being put before the Planning Committee, namely the preferred option of Mr Singh and his team. The second option was simply the status quo. Indeed, Mr Singh's reference (in response to a question from a Councillor) to the conversion of angled parks to parallel parks as being his team's "preferred" option raises the possibility that the process undertaken by Mr Singh and his team may have been focussed on identifying a preferred option, rather than identifying all reasonably practicable options, as the LGA required. In any event, his report to the Committee did not address the other options that had been considered, including the options that had been advanced by TQC. Only through oral questioning of Mr Singh were the Committee members able to obtain some fairly limited information about some (but not all) of the other options that had been considered. The Committee's consideration of these options, however, would likely have been hampered by the fact that they had no advance notice of them, and no written information regarding them, prior to the meeting.

[66] We accept that it is inevitable (and indeed desirable) that most of the detailed work and analysis that underpins Council decisions will need to be undertaken by Council staff. The business of local government would be impeded if that were not so. Here, Mr Singh and his team considered various options, across five meetings or workshops. The depth of engagement suggests that at least some of the other options must have warranted relatively careful consideration and analysis, even if they were ultimately rejected. There can be no objection to Mr Singh and his team identifying a preferred option and explaining in their report which, in their view, other options are not reasonably practicable. The consequence of only submitting the preferred option to the Planning Committee, however, was that the Committee had insufficient information to reach a properly informed view of the reasonably practicable options, or to assess their advantages and disadvantages, as required by s 77(1).

[67] Turning to the timing or sequencing issue, we do not accept that local authorities must invariably identify and assess all reasonably practicable options prior to any consultation taking place. Indeed, as exemplified by this case, consultation may actually identify additional options that should be considered and assessed by the decision-maker. The practicalities of local government necessitate some degree of

procedural flexibility and pragmatism. Section 77(1) refers to a "decision-making process" rather than the specific point in time at which the final decision is made.

Did the Judge err in finding that the Council had complied with the information requirements for consultation under s 82A of the LGA?

[68] The next issue is whether the Judge erred in finding that the Council had, through Mr Singh and his team, complied with the information requirement for consultation in s 82A(2)(b) of the LGA.

[69] Given our finding that the Council failed to comply with its s 77(1) obligation to seek to identify all reasonably practicable options for the achievement of the objective of cyclist safety on Thorndon Quay, and to assess those options in terms of their advantages and disadvantages, this issue is moot. We will, however, briefly address whether s 82A applied at all in this context.

[70] Section 82A sets out information requirements for consultation material and relevantly states that:

> (1) This section applies if this Act requires a local authority to consult in accordance with, or using a process or a manner that gives effect to, the requirements of section 82.
>
> (2) The local authority must, for the purposes of section 82(1)(a) and (c), make the following publicly available:
>
> ...
>
> (b) an analysis of the reasonably practicable options, including the proposal, identified under section 77(1); …

[71] In the High Court, the Council accepted that s 82A applied to its consultation process but argued (and the Court found) that it had met the requirements. On appeal, the Council submitted that s 82A only applies to certain consultations, namely those undertaken where the LGA expressly requires it. That is because s 82A is expressed to apply "if this Act requires a local authority to consult in accordance with, or using a process or a manner that gives effect to, the requirements of section 82". The LGA includes 12 such provisions,[37] all of which were inserted into the LGA by the same

[37] Local Government Act 2002, ss 17(4), 56(1), 76AA(5), 95(2), 102(4), 106(6), 108(4A), 109(2A), 110(2A); 139(5)(b), 150(3)(b) and 156(2).

legislation through which s 82A was inserted, the Local Government Act 2002 Amendment Act 2014.[38] The Council further submitted that if s 82A applied to every consultation undertaken by a local authority, s 82A would clash with the less specific requirements of s 82.

[72] We accept that submission. It follows that, if the Council had complied with its s 77(1) obligation (which we have found it did not), s 82A would not have applied to the consultation process it undertook in respect of the proposed traffic resolution.

Did the Judge err in finding that the Council had complied with s 79 of the LGA?

[73] The final issue we must determine relates to s 79 of the LGA. Specifically, whether the Judge erred in finding that the Council had fulfilled its responsibility under s 79 of the LGA to make the required "judgments" as to how to comply with its decision-making obligations under ss 77 and 78 of the LGA.

[74] Section 79 provides:

> **79 Compliance with procedures in relation to decisions**
>
> (1) It is the responsibility of a local authority to make, in its discretion, judgments—
>
> (a) about how to achieve compliance with sections 77 and 78 that is largely in proportion to the significance of the matters affected by the decision as determined in accordance with the policy under section 76AA; and
>
> (b) about, in particular,—
>
> (i) the extent to which different options are to be identified and assessed; and
>
> (ii) the degree to which benefits and costs are to be quantified; and
>
> (iii) the extent and detail of the information to be considered; and
>
> (iv) the extent and nature of any written record to be kept of the manner in which it has complied with those sections.
>
> …

[38] Local Government Act 2002 Amendment Act 2014, ss 11, 18, 20, 33, 37–41, 45, 46 and 48.

The High Court decision

[75] The Judge noted that there was no specific record before the Court of the Council, either itself or through its delegate the Planning Committee, making any express judgments under s 79 as to how it would achieve compliance with ss 77 and 78. It was significant in the Judge's view, however, that the Council had nevertheless achieved compliance with those decision-making provisions. Thus, despite there being no specific record of any "judgments" as to how to appropriately achieve compliance, the matters which s 79 is designed to achieve had been appropriately met. In these circumstances, the Judge was satisfied that there was no reviewable error on the part of the Council in relation to its exercise of discretion under s 79.[39]

Submissions on appeal

[76] In oral submissions, counsel for TQC accepted the Council's argument that the Traffic Bylaw (described above at [14]) constituted a judgment by the Council as to how to achieve compliance with its s 78 obligation to give consideration to community views. TQC submitted, however, that there is no evidence of the Council making any s 79 judgments as to how to achieve compliance with its s 77 obligation. TQC submitted it was not open to the Judge to infer from his finding that s 77 had been complied with that the necessary judgments must have been made under s 79.

[77] The Council supported the Judge's decision. It submitted that it can be inferred from the Decision and the process leading up to it that the Council had made the necessary judgments. Specifically, the Council's judgments are reflected in the Traffic Bylaw and were also evident during specific questioning of Council officers at the public meeting on 24 June 2021. Further, as the Judge noted, actual compliance with the decision-making provisions was achieved and the matters which s 79 is aimed at were appropriately met.

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[39] Judgment under appeal, above n 1, at [143].

Discussion

[78] Section 79 confers a deliberately broad discretion on local authorities to determine how they are going to discharge their ss 77 and 78 obligations in a way that is largely in proportion to the matters affected by the decision. Section 79(1)(b)(iv) also reserves to local authorities a discretion as to the nature and extent of any written record kept of the manner in which it has complied with those sections.

[79] Given the large number of decisions that must be made by local authorities, of varying degrees of significance, we do not accept that s 79 necessarily envisages or requires local authorities to adopt a high level of formality in relation to the making of s 79 judgments. Undue formality would likely slow down local government decision-making significantly. As Williams J noted in *Minotaur Custodians*, the Council "cannot be required to meticulously record reasons for its approach to procedural detail as if it were a court" as this would create "too heavy a burden on a busy council".[40]

[80] In relation to the Council's s 78 consultation obligation, the Council has, in effect, made a global "judgment" under s 79 as to how best to achieve compliance with s 78 in respect of traffic resolutions. The process set out in the Traffic Bylaw will apply by default, subject to any further procedural decisions or judgments made or approved by the Council in relation to a particular decision. Here, for example, the public was given an extended period of 20 working days to make submissions, rather than the 14 days provided for in the Traffic Bylaw,[41] and TQC was given a further two days' additional time to prepare and lodge its submission.

[81] As for the Council's s 77 obligation to identify and assess the reasonably practicable options, in our view the Judge was correct to conclude that it can be inferred from the process the Planning Committee followed in relation to the identification and assessment of the reasonably practicable options that it had (informally) made judgments to the effect that the process it followed would be appropriate in the circumstances. The Planning Committee was not required to have

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40 *Minotaur Custodians*, above n 16, at [59].
41 Wellington City Council Consolidated Bylaw, cl 12.1.

a preliminary meeting to formally make the required judgments. Nor was it required to make a written record of them. Rather, it can be inferred that in the Planning Committee's judgment the process that it followed (including the five meetings/workshops undertaken by Mr Singh and his team and the oral questioning of Mr Singh at the 24 June 2021 meeting) would be sufficient to enable the Planning Committee to meet its obligation to identify and assess all reasonably practicable options.

[82] With the benefit of hindsight, the Planning Committee erred in reaching that view. But we are not persuaded that, in addition to failing to meet its substantive s 77(1) obligation, the Planning Committee also erred procedurally, by failing to make the required judgments under s 79. Not every decision will require a detailed and formal approach to the making of the necessary judgments, including a preliminary meeting at which the Council makes formal decisions or judgments about how to achieve compliance with ss 77 and 78. In many (possibly most) cases a less formal, and more iterative, process will be appropriate, particularly for decisions of low or medium significance. Decision-making is a process, not a specific point in time. Further, as this Court observed in *Minotaur Custodians*, the practical constraints faced by local authorities (including limited time and resources) must be acknowledged. Requiring exhaustive compliance with procedural details for every decision would be impractical and burdensome.[42] A flexible approach is required, allowing local authorities to exercise their judgment in a pragmatic way as the decision-making process progresses, having regard to the context and significance of the decision.

Relief

[83] We have found that the Council failed to comply with its obligations under s 77(1) of the LGA to seek to identify and assess all reasonably practicable options for improving cyclist safety on Thorndon Quay. It is therefore necessary to consider the appropriate relief.

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[42] *Minotaur Custodians*, above n 16, at [59].

The High Court decision

[84] The relief sought by TQC in the High Court included a declaration that the decision was unlawful and invalid, an order quashing it, and an order requiring the Council to return all carparks along Thorndon Quay to their configuration before the decision. Because the Judge found that there was no error on the part of the Council, the question of relief did not need to be considered. The Judge stated, however, that if he had found for TQC, he would not have quashed the Decision because: first, the final layout of Thorndon Quay would be determined by the LGWM process, the "foreseeable" outcome of which was that there would only be parallel parks anyway;[43] second, the former parking configuration was unsafe for cyclists;[44] and third, quashing the decision would cause "administrative inconvenience and waste".[45]

Submissions on appeal

[85] TQC submitted that the starting point for public law relief is that it should follow where unlawfulness is found. There must be "extremely strong reasons" to decline to grant relief, especially where there is substantial prejudice to the applicant.

[86] The Council submitted that if this Court finds that a material error or errors have been made, a declaration to that effect is appropriate, but not an order that the angled parking be reinstated pending any reconsideration of the Decision.

Our view

[87] In our view the appropriate relief is a declaration that the Council's decision-making processes did not comply with its obligations under s 77(1) of the LGA. It is not appropriate, in our view, to formally quash the Decision or direct that the angled parking on Thorndon Quay be restored. Our reasons for reaching this view are that:

(a) Matters have moved on since the decision was made in 2021 and the Decision appears to have been largely superseded by subsequent

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43 Judgment under appeal, above n 1, at [198].
44 At [199].
45 At [200].

events. The Decision was intended to be an interim or stop-gap measure, pending the development and implementation of the Thorndon Quay/Hutt Road project. As noted above at [26], on 24 August 2023, the Regulatory Committee adopted a further traffic resolution implementing certain changes recommended as part of LGWM's Thorndon Quay/Hutt Road project. It provided for peak hour bus lanes on Thorndon Quay and the continuation of a two-way cycleway. Implementation of this further traffic resolution would require removal of the angled parking, if that had not already been undertaken pursuant to the Decision.

(b) Further (and importantly), the evidence before the Court from road safety experts is that the road configuration prior to the Decision was unsafe and that the current configuration provides a greater degree of safety for cyclists. Even if the Decision has not been superseded by subsequent events, it would not be appropriate for this Court to order the Council to take steps that would potentially put the safety of cyclists at risk in the interim, while the various alternatives for improving cyclist safety are explored.

[88] The further evidence that has been filed demonstrates the evolving nature of the development of Thorndon Quay. If, however, the Decision had not been superseded by subsequent events, the appropriate course now would have been for the Council to reconsider the Decision, following a process that complied with its obligations under s 77(1) of the LGA. On the evidence before us, however, we do not consider it to be in the public interest to formally quash the decision or order the reinstatement of angled parking on Thorndon Quay pending any further reconsideration. Rather, the declaration we propose to make, together with the guidance we have given in this judgment, will hopefully ensure that any future decisions made by the Council in relation to Thorndon Quay will be made in accordance with a process that complies with the Council's obligations under s 77(1) of the LGA.

Result

[89] The applications for leave to file further evidence are granted.

[90] The appeal is allowed.

[91] We make a declaration that the Council's decision-making processes in relation to its decision to reconfigure parking on Thorndon Quay from mainly angled parking to entirely parallel parking did not comply with its obligations under s 77(1) of the Local Government Act 2002.

[92] The respondent must pay the appellant costs for a standard appeal on a band A basis together with usual disbursements. We certify for two counsel.

Solicitors:
Gibson Sheat, Wellington for Appellant
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