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FredNEWS: Real Estate is produced by Fredrikson & Byron attorneys who provide legal advice and assistance on business issues in real estate. Articles discuss new developments in real estate, disputes, and environmental issues and are aimed at both small and large organizations, lenders, real estate developers, property managers, individual owners, and investors.

For more information and contacts within the Real Estate Group, see page 6. An electronic version of this newsletter is available on our web site at www.fredlaw.com. FredNEWS: Real Estate is edited by Mary Ranum.

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Real Estate Legislative Update 2011 Minnesota Legislative Session



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This legislative update contains information on new developments in real estate law from the 2011 Minnesota legislative session that affect real estate developers, property managers, owners, and investors. Two additional articles are included in this newsletter. The first, by Brian McCool, discusses the changes to variance legislation in light of a recent Minnesota Supreme Court case. The second, by Lindsey Hemly, discusses the new environmental permitting requirements. All legislation described below was effective August 1, 2011, unless otherwise noted.

MORTGAGE FORECLOSURE REFORMS

90 Days' Written Notice to Vacate for Tenants in Properties Subject to Foreclosure

The statute requiring 90 days' written notice to tenants in a foreclosed property was clarified to apply only to residential tenants. Minn. Stat. § 504B.285(1). This change prevents commercial tenants from taking advantage of last year's reforms aimed at protecting residential tenants.

Reverse Mortgage Redemptions

While reverse mortgage foreclosures are rare, the redemption period, or the period where the borrower can buy back the property after a foreclosure sale, has been lengthened. Reverse mortgages in foreclosure are now subject to a 12-month redemption period, rather than the more common 6-month redemption period. Minn. Stat. § 559.217. This change became effective on May 25, 2011.

Mortgage Holder Rules

In order for homeowners to find out the identity of the owner of their mortgage note, a transaction agent or servicer must now provide the identity of the current owner of the mortgage, if the transaction agent or servicer has actual knowledge of the identity. The requested identity must be provided within 10 days after written request from the homeowner and must include the address and telephone number of the current note holder. The identifying information must be provided without a fee the first time it is requested in any 12-month period. Minn. Stat. § 58.162.

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HOMEBUILDING AND REMODELING

Lead Poisoning Prevention

The law requiring municipalities to verify lead certification qualifications when issuing permits to licensed residential building contractors, residential remodelers, manufactured home installers, or residential roofers was amended this legislative session. The state or any local government must not impose a fee for the same or similar certification as required by the Federal Environmental Protection Agency. Minn. Stat. § 326B.106(13). This law went into effect on February 18, 2011.

Residential Contractors Being Paid Through Insurance

The legislature amended the law preventing contractors from trying to induce a homeowner to select the contractor when the costs are being paid by insurance by expanding the scope of the law to include roofing and siding work. A contractor under the statute is defined to include residential roofers, residential remodelers, or siding contractors. Under the statute, contractors offering services that will be paid with property or casualty insurance policy proceeds are forbidden from trying to get business by offering to pay the deductible, either directly or indirectly, or offering to compensate the homeowner for agreeing to use their services. In addition to the previous provisions permitting the homeowner or insurance company to sue the contractor, the law now also allows the Commissioner of Labor and Industry to enforce the law. Minn. Stat. § 325E.66(1).

COMMON INTEREST COMMUNITIES

The Minnesota Common Interest Ownership Act (MCIOA) has again been modified. MCIOA regulates common interest communities (CICs) such as townhomes, condominiums, and cooperatives.

Applicability of 2010 Amendments

In 2010, MCIOA underwent a major overhaul. Many of the 2010 changes apply only to CICs created after August 1, 2010. The changes made to MCIOA this year further clarify which requirements apply to CICs created before August 1, 2010, and which apply only to CICs created on or after August 1, 2010. The 2011 changes went into effect on June 1, 2011. Minn. Stat. § 515B.1 102, 103, 110; Minn. Stat. § 515B.2 1101; Minn. Stat. § 515B.3 104, 105, 1141, 115, 1151; Minn. Stat. § 515B.4 102, 1021, 115, 1151.

Certification of Current Taxes for Recording

The 2011 MCIOA amendments clarified that when a Declaration is amended to modify the boundary of a unit, certification of current and delinquent taxes is required only for the units whose boundaries have changed. Minn. Stat. § 515B.1 116.

Common Elements in CICs

The 2010 amendments confirmed the ability to grant exclusive licenses for portions of the common elements for use for items such as parking places, storage lockers, etc. The 2011 amendments to MCIOA provide that when a unit owner is granted a license for a common element, the unit owner must be provided with the license and a copy must be provided to the association. This change went into effect June 1, 2011. Minn. Stat. § 515B.2 109.

Special Declarant Rights

MCIOA permits the developer of a CIC to reserve certain rights (Special Declarant Rights). The 2011 amendments to MCIOA provide that an instrument transferring Special Declarant Rights must be recorded against all units in a CIC in order to be effective. Minn. Stat. § 515B.3 1041.

Severance From CICs

This year, the legislature amended MCIOA to make it clearer what percentage of the voting power of the unit owners must approve a severance of a portion of a CIC. Typically, when a portion of a CIC is being severed from the balance of a CIC and the severed portion will be a part of a new CIC, 80 percent of the units involved must approve a new Declaration for the CIC. The 2011 amendments are intended to make it clear that changes that required unanimous agreement from the owners of the existing CIC will require unanimous agreement by all unit owners in the new community. The matters now requiring unanimous consent include creating, extending, or increasing Special Declarant Rights; increasing the number of units or changing unit boundaries; changing the formulation for allocation of interests; changing the use of a unit; or changing the form of the CIC. Minn. Stat. § 515B.2 124(g). This change went into effect on June 1, 2011.

Associations Terminating Contracts, Leases, or Licenses

The provisions of MCIOA authorizing an association to terminate certain kinds of

contracts, leases, or licenses entered into before expiration of the declarant control period was amended to make it clear that licenses of portions of the common elements for items like parking places and storage lockers were exempt from this provision. This change went into effect on June 1, 2011. Minn. Stat. § 515B.3 1051.

Association Records

Common interest community associations must keep certain records and make them available to unit owners or their representatives on request. This session, the Minnesota Legislature modified provisions on making records available in two ways. First, MCIOA was clarified to make it clear that records from closed board meetings did not have to be made available to requesting parties. Board meetings can be closed for three reasons: personnel matters, certain matters relating to litigation, and certain matters relating to crimes. The second change relates to the cost and format of delivery of records requests. Copies of records must be provided in the format, either electronic or paper, requested by the owner or representative, unless the record is not kept in an electronic format. Additionally, the association can ask the requestor to pay for costs of reproducing and delivering the records by billing the actual cost or, if the request is for less than 100 pages of non-color copies, no more than 25 cents per page. Minn. Stat. § 515B.3 118.

GREEN ACRES

The legislature amended the Green Acres statute in 2011 to clarify the purpose of the program. The law now states that the purpose of the statute is to encourage and preserve farming by preventing high-level assessments from forcing farmers to sell their land. Minn. Stat. § 273.111. This amendment took effect on April 16, 2011.

RURAL PRESERVE PROPERTY TAX PROGRAM

Qualifying for the Rural Preserve Property Tax Program

The legislature also made changes to the Rural Preserve Property Tax Program (Rural Preserve Program) this year, in an effort to correct some of the 2008 changes to the Green Acres statute that rendered some lands ineligible for the program. The statute revises eligibility for the property tax

benefits of the program. The amendments apply to land that is classified as “class 2b,” meaning rural, non-agricultural land. Class 2b land can be enrolled in the Rural Preserve Program in one of two ways: (1) class 2b land properly enrolled in Green Acres for taxes payable in 2008 may be enrolled in the Rural Preserve Program without consideration of its homestead status as long as it is contiguous to class 2a land and is under the same ownership that is also enrolled in Green Acres; or (2) class 2b land that was not properly enrolled in Green Acres for taxes payable in 2008 may be enrolled in the Rural Preserve Program, but it must be part of an agricultural homestead, contiguous to class 2a land, and under the same ownership as the land enrolled in Green Acres. In addition to those requirements, property taxes must be current and the property is not permitted to also be enrolled in the Minnesota Open Space Property Tax Law Program, Green Acres, Sustainable Resource Management Incentive, or Metropolitan Agricultural Preserves. Minn. Stat. § 273.114(2). Importantly, there is no longer a requirement to have a conservation assessment plan completed to enroll in the Rural Preserve Program. The statute also terminates any covenants entered into for the purpose of enrolling in the Rural Preserve Program. Minn. Stat. § 273.114(6). The conservation assessment repeal took effect on April 16, 2011, while the remainder of the legislation is effective for taxes payable in 2012 and after.

Applying for the Rural Preserve Program

This year, the legislature also updated the application process for the Rural Preserve Program. Applications must be filed by May 1 before the qualifying tax year, except that in 2011 the deadline is August 1, 2011. Applications must include specified documentation that clearly delineates the land to be enrolled. Minn. Stat. § 273.114(5). This statute took effect on April 16, 2011.

Re-Enrolling Land in the Rural Preserve Program or Green Acres

Land that was removed from the Green Acres program can apply to re-enter Green Acres or the Rural Preserve Program. Landowners who withdrew properly enrolled class 2a land from Green Acres at any time since May 21, 2008, may reapply by August 1, 2011, to be eligible for Green Acres, if current enrollment requirements are met. Landowners who withdrew properly enrolled class 2b land from Green Acres at any time since May 21, 2008, have until August 1, 2011, to put those

acres into the Rural Preserve Program and be treated as if the acreage had been enrolled in Green Acres continuously. Landowners who withdrew any class 2a land from Green Acres after May 21, 2008, as well as any class 2b land after August 16, 2010, and paid deferred taxes are eligible for a refund on only those acres that are re-enrolled in Green Acres or the Rural Preserve Program before the August 1 deadline. Minn. Stat. § 273.114(5). The tax refund portion of the statute became effective on April 16, 2011, while the remaining provisions take effect on August 1, 2011.

Other Changes to the Rural Preserve Program

A few other changes were made to the Rural Preserve Program this legislative session. First, once property is enrolled in the Rural Preserve Program, it will remain enrolled until it no longer qualifies or is withdrawn. Second, when land no longer qualifies for the Rural Preserve Program, the landowner will be required to pay taxes equivalent to the difference between the tax rate based on the market value of the land and the tax rate paid during enrollment in the Rural Preserve Program for the current tax year, plus the two previous tax years. Minn. Stat. § 273.114(6). Finally, the law now calls for a study of agricultural and rural vacant land valuations by the Commissioner of Revenue. A report describing methodologies to be used for tax year 2012 and beyond is due to the legislature by February 15, 2012. Minn. Stat. § 273.114(7). These provisions became effective on April 16, 2011.

REAL ESTATE PROFESSIONALS

Broker Price Opinions

New legislation makes substantial changes to the preparation and use of broker price opinions (BPOs). These changes include defining BPOs, limiting their use, and regulating their preparation.

“BPOs may no longer be used as the primary basis to determine the value of a parcel of property for residential mortgage loan originations.”

The statute now defines BPOs as estimates prepared by a real estate broker, real estate salesperson, or licensed real estate appraiser that details the probable selling price of a piece of real estate. A BPO includes information on comparable sales, the property’s condition, and the market or neighborhood, but a BPO does not include an automated valuation model. An automated valuation model is a computerized model used by mortgage companies to determine the current balance of a mortgage secured by someone’s home. Minn. Stat. § 82.55(1).

BPOs may no longer be used as the primary basis to determine the value of a parcel of property for residential mortgage loan originations. When appraisers are preparing BPOs, they must disclose that they are not acting as an appraiser, that the opinion is not an appraisal, and that they are, therefore, not subject to the Uniform Standards of Professional Appraisal Practice. Minn. Stat. § 82B.035.

The legislature detailed several situations in which BPOs may be used. Minn. Stat. § 82.735. Licensed brokers are allowed to prepare BPOs and may charge for the preparation of a BPO, so long as their license is active and in good standing. BPOs may be prepared for existing or potential sellers and buyers of real property; for parties making decisions or performing due diligence related to the potential listing, offering, sale, exchange, option, lease, or acquisition price of a piece of real estate; or for an existing or potential lien holder or other third party of any purpose other than loan origination for a residential mortgage. Finally, when a BPO is prepared for third parties or lenders, unless the requestor requires a specific report, a written report meeting the following requirements must be prepared:

- Statement of the intended purpose of the broker price opinion;
- Brief description of the property and property interest being priced;
- The basis of reasoning used to research the opinion, including applicable market data;
- Any assumptions or limiting conditions;
- Disclosure of any existing or contemplated interest of the person preparing the opinion;
- Name of the brokerage the individual is acting on behalf of;

- The date of the opinion;
- A disclaimer, containing the language, "This opinion is not an appraisal of the market value of the property, and may not be used in lieu of an appraisal. If an appraisal is desired, the services of a licensed or certified appraiser must be obtained"; and
- Copies of the report, along with supporting documents and materials, must be retained when preparing the report for third parties or lenders.

Exclusive Agreements

The language regarding exclusive broker agreements was clarified by the legislature in 2011. Brokers continue to be prohibited from negotiating a lease, sale, exchange, or listing of any property when they know the owner or lessor has a written, exclusive contract with another broker. The legislature clarified this statute so that the prohibition applies only when the contract with a different broker is for the same transaction. Minn. Stat. § 82.81(9).

UNIFORM COMMERCIAL CODE

The Uniform Commercial Code, a model code for commercial transactions adopted by all 50 states, is designed to provide a consistent framework of rules for commercial transactions. In response to changes made by the National Conference of Commissioners on Uniform State Laws to the Uniform Commercial Code, Minnesota Law was changed to mirror those changes.

Recording Mortgages as Financing Statements

The new law changes the requirements for recording a mortgage as a financing statement. While most requirements remain the same, the law was clarified to specify that the financing statement does not need to indicate that it will be filed with real property records. Minn. Stat. § 336.9 502(c) (3). Additionally, the record must adequately state the name of the debtor. This can be done in the following ways:

- In the case of an individual, the name of the debtor is sufficient if the financing statement provides: (1) the individual name of the debtor; (2) the surname and first personal name of the debtor; (3) or the name of the individual indicated on an unexpired Minnesota driver's license or

identification card or on the most recent license or identification card issued if more than one card has been issued.

- For registered organizations, the name on the financing statement is sufficient if it is the name of the registered organization stated on the most recent public organic record, which is a publicly available filing or registration record. The record must be filed with or issued by the registered organization's jurisdiction of organization.
- For collateral being administered by the personal representative of a decedent, the financing statement sufficiently provides the name of the debtor if it provides the name of the decedent as the debtor and also indicates that a personal representative is administering the collateral.
- For collateral held in a trust that is not a registered organization, the financing statement must indicate the name specified in the organic record of the trust and that the collateral is held in trust. If the organic record does not specify a name, the financing statement must indicate the name of the settler or testator, additional information sufficient to distinguish the trust from other trusts that may have the same settlers or testator, and an indication that the collateral is held in a trust. Minn. Stat. § 336.9 503.

“New legislation makes it easier to initiate cancellation of a purchase agreement for residential real estate when one party fails to meet their obligations.”

CORRECTING DEFECTIVE TITLE

This session, the legislature amended the statute regarding the recording of a deed to correct title. The county attorney may now accept other satisfactory evidence establishing the need for the corrective deed, rather than just an abstract of title as previously required. Minn. Stat. § 272.15.

CANCELLING A PURCHASE AGREEMENT

New legislation makes it easier to initiate cancellation of a purchase agreement for residential real estate when one party fails to meet their obligations. The amendment prevents individuals from avoiding cancellation by being unavailable to receive the paperwork to begin the cancellation, or begin a responsive cancellation, the so-called dueling cancellation. The new statute supersedes any contradictory terms in the purchase agreement. When service of process to notify of the initiation of the cancellation agreement is sent by first class mail, it is now effective upon delivery at the address. Additionally, an attorney authorized to serve a cancellation notice is also authorized to receive notice of cancellation sent by the other party to the agreement. These notices can be sent in person or by first class mail. Minn. Stat. § 559.217.

CHANGES TO HOMESTEAD LAW

The legislature changed how the homestead tax is calculated. Instead of basing the homestead tax on a tax credit, the law now provides for an exclusion based on market value. For homes valued up to \$76,000, the exclusion is equal to 40 percent of market value. For homes valued between \$76,000 and \$413,800, the exclusion is \$30,400 minus 9 percent of the value over \$76,000. At \$413,800 and above, the exclusion is zero. The exclusion is similar to the credit because it mimics the formula under the credit system. The new formulation will provide the same benefit for homestead property as the credit. Minn. Stat. § 273.13(35).

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Cities Are Back in the Variance Business

LEGISLATURE REMOVES ROADBLOCK TO VARIANCE APPLICATIONS BY MAKING MUCH-NEEDED CHANGES TO VARIANCE STATUTES



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In 1989, the Minnesota Court of Appeals issued its decision in *Rowell v. Board of Adjustment of Moorhead*. In this decision, the Court of Appeals adopted an interpretation of Minnesota's municipal variance statute that

provided a flexible, owner-friendly standard for cities to use when evaluating variance applications. Following the *Rowell* decision, business was good for those applying for variances. While not every variance was granted under the standard adopted in *Rowell*, the standard was sufficiently lenient that variances became a tool that owners and developers routinely used to obtain approvals for their projects and developments.

The game changed in June 2010, however, when the Minnesota Supreme Court issued its decision in *Krummenacher v. City of Minnetonka*. In *Krummenacher*, the Supreme Court rejected the variance standard that the Court of Appeals had announced more than twenty years earlier in *Rowell*. Instead, the *Krummenacher* Court strictly applied the statutory language in Minn. Stat. § 462.357, and held that cities could grant variances only upon a showing of "undue hardship," which the Supreme Court made clear was an exacting standard. The Minnesota Supreme Court noted it knew that the *Krummenacher* decision would make it difficult for municipalities to grant variances, but the Supreme Court punted the problem to the Minnesota Legislature for a fix.

Following the Supreme Court's issuance of the *Krummenacher* decision, Minnesota cities were effectively out of the variance business altogether because owners and developers recognized that it was nearly impossible to show "undue hardship" for most variances. So, from the very beginning of the recent legislative session, the real estate community went to work on seeking a legislative fix to this situation. After several months of negotiations and maneuvering, on May 5, 2011, Governor Dayton signed Chapter 19 into law, which legislation made several changes to the municipal and county variance statutes. The are the three most significant of these changes.

1. Variances may be granted with a showing of "practical difficulties."

The Legislature's most important change to the municipal variance statute was that it fixed the specific problem created by the *Krummenacher* decision. The legislature removed the "undue hardship" standard from Minn. Stat. § 462.357 and replaced it with a new standard that now allows an applicant to receive a variance if it can demonstrate that there are "practical difficulties" that prevent the applicant from complying with the applicable zoning ordinance. To show "practical difficulties," an applicant must show three things: (1) the owner proposes to use the property in a reasonable manner; (2) the owner's plight is due to circumstances unique to the property that were not created by the owner; and (3) the requested variance will not alter the essential character of the locality. This new three-prong "practical difficulties" standard is substantially more lenient than the "undue hardship" standard it replaced. In practice, owners and developers should find this new standard providing nearly the same flexibility that they enjoyed with variance applications prior to June 2010.

2. Conditions in variances must be related and proportional to the impact created by the variance.

Over the years, many cities have inserted conditions in variances to exact various concessions from and to impose restrictions on owners and developers. Occasionally these conditions have had little to do with the variance itself. The legislature attempted to address this issue in its revision of Minn. Stat. § 462.357. Under the revised statute, any condition that a city now includes in a variance must be directly related to and must bear a rough proportionality to the impact created by the variance. Although this statutory change is really only a formal statement of what Minnesota law already requires when cities are creating and imposing conditions in variances, owners and developers will now be able to point to this language if a city goes too far with the conditions it attempts to impose as part of its approval of a variance.

3. The requirements for obtaining a variance from a city and a county are now virtually identical.

Variance applications in Minnesota cities and counties have long been governed by different statutes: Minn. Stat. § 462.357 for cities and § 394.27 for counties. The language of these statutes have long differed, which has resulted occasionally in different outcomes in cities and counties for nearly identical variance applications. The divide between the outcomes in cities and counties became greater in 2008 with the Minnesota Supreme Court's decision in *In re Stadsvold*. In that decision, the Supreme Court interpreted Minn. Stat. § 394.27 to require a different showing for variances than was required under the *Rowell* standard, which was the standard that most cities were then using. Then, when the Supreme Court rendered its decision in *Krummenacher* in June 2010, the differences between cities and counties was only amplified further. Fortunately, the Minnesota Legislature brought an end to this confusion with its recent legislation. Following the statutory amendments, the substantive provisions of these two statutes are now essentially the same. Variance applications in cities and counties will now be processed under the same standards, and owners and developers will (hopefully) now see a greater similarity between the outcomes achieved on variance applications in cities and counties.

All of the changes to Minn. Stat. §§ 462.357 and 394.27 discussed in this article became effective on May 6, 2011. The long-awaited legislative relief to the problems created by the Supreme Court's decision in *Krummenacher* has arrived. While it is still to be seen exactly how cities and counties will deal with these legislative changes, there is no question that these revisions will provide more clarity to an area of law that has long been plagued by an uncertain legal landscape.

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Environmental-Review Reforms

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In Minnesota, certain projects that have the potential to significantly impact the environment and involve government action must undergo an environmental-review process. Two review documents are used in the process: the Environmental Impact Statement (EIS) and its shorter companion, the Environmental Assessment Worksheet (EAW).

Following reports of delay and duplication, the legislature amended the Minnesota Environmental Policy Act (MEPA), Minnesota Statutes Chapter 116D, in an effort to streamline the process.

If a project requires an EIS, MEPA now allows project proposers to submit a preliminary draft EIS to the responsible government agency for its review, modification, and determination of completeness. Previously, MEPA did not provide for a preliminary draft EIS in the environmental-review process. The preliminary draft EIS must identify or include as an appendix all studies relied upon to substantiate the preliminary draft EIS's analysis. The responsible governmental agency may require additional studies and information, if necessary, to complete its review. This provision does not affect EAW preparation. Minn. Stat. § 116D.04, Subd. 2a(i).

The legislature also amended MEPA to allow appeals of final decisions relating to the need for an EAW, the need for an EIS, or the adequacy of an EIS to the Minnesota Court of Appeals. Previously, final decisions by a responsible governmental agency were first reviewed by a declaratory judgment action in district court. Under most circumstances, the review will be confined to the record. Minn. Stat. § 116D.04, Subd. 10.

Finally, the legislature amended MEPA to shorten the time period in which responsible government agencies have to make final permit decisions following final EIS approval. Prior to the amendment's passage, agencies had 90 days after final EIS approval to make a final permit decision; that time period has now been shortened to 30 days, although under certain circumstances, the 30-day time period may be extended. Minn. Stat. § 116D.04, Subd. 10.

ENVIRONMENTAL-PERMITTING REFORMS

Permitting Efficiency Goal and Reporting

Minnesota has established as a goal that the Minnesota Department of Natural Resources and the Minnesota Pollution Control Agency issue or deny environmental permits within 150 days of receiving a completed permit application. In light of the 150-day permitting goal, both agencies must prepare semiannual permitting-efficiency reports that discuss achievement of the goal. If the goal has not been met in regard to a particular application, the responsible agency must provide an explanation for the delay. Additionally, beginning July 1, 2011, the two agencies have 30 days from application submission to review a permit application and notify the applicant of the application's completeness. If the application is incomplete, the agency must identify the deficiencies and advise the applicant as to how those deficiencies can be remedied. Minn. Stat. § 84.027, Subd. 14a, and § 116.03, Subd. 2b.

WASTEWATER DISPOSAL SYSTEMS

The legislature amended Minn. Stat. § 115.07 to allow construction, installation, or extension of projects with wastewater discharge components to commence prior to receipt of national or state discharge permits. Minnesota law previously required that national and state wastewater discharge permits be issued prior to project construction. A written permit is still required before someone may begin operating a wastewater discharge system or discharging pollutants into the waters of the state.

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