

CALIFORNIA COASTAL COMMISSION

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AMENDMENT REQUEST
STAFF REPORT AND PRELIMINARY RECOMMENDATION

Application No.: 6-92-203-A4

Applicant: KSL Encinitas Resort Co., LLC Agents: Lynne Heidel and
 McCabe and Company

Original Description: Demolition of 3 single-family residences, relocation of 7 mobile homes and the construction of an approximately 138,460 sq. ft., two-story, 130-unit resort hotel complex with banquet facilities, a restaurant, public access amenities, and 230 space underground parking garage on 4.3 acre blufftop site. Also proposed are the consolidation of 4 lots into 1 lot and the vacation of 2 public access easements totaling .67 acres.

Previously
 Approved

Amendment: Construction of a public beach access stairway on a coastal bluff from the bluff top to the adjacent State Parks parking lot, as required by special condition #2 of the original permit.

Proposed

Amendment: Change in ownership of the 130-unit hotel to a limited term occupancy hotel condominium form of ownership and the placement of approximately 50,000 cu. yds. of sand onto the beach west of the hotel site.

Site: 2100 North Highway 101, Leucadia, Encinitas, San Diego County.
 APN 216-041-26-00.

STAFF NOTES:

The standard of review for the two aspects of this amendment differ. The standard is the City's certified LCP and the public access and recreation policies of Chapter 3 of the Coastal Act (for the change in ownership structure) and all of the Chapter 3 policies of the Coastal Act (for the sand placement).

Summary of Staff's Preliminary Recommendation:

This amendment request is to allow the applicant to convert the originally approved hotel from corporate ownership to a limited-term occupancy condominium hotel form of ownership. The amendment request also includes a request to place up to 50,000 cu. yds. of beach quality sand on the beach near the proposed hotel site. This amendment was originally scheduled on the January 2006 Coastal Commission agenda, but was postponed by the Commission in order to gather additional information concerning "limited-term occupancy condominium hotels" and their consistency with the underlying Limited Visitor-Serving Commercial Zone and applicable Chapter 3 policies of the Coastal Act.

Staff recommends that the Commission take one vote adopting a two-part resolution, which would approve portions of the development and deny other portions of the development. Staff recommends that the Commission **deny** the applicant's request to convert the type of hotel ownership from corporate ownership into a limited-term occupancy condominium hotel. The original hotel approved by the Commission in 1993 authorized a conventional hotel to be sited on a visitor-serving commercial site on the blufftop overlooking the beach and ocean. However, staff has determined that the proposed change in ownership will result in a use on the site that functions, at least to some extent, as a residential use and thus would lessen the overall visitor-serving use of the approved hotel, inconsistent with the certified LCP and the public access and recreation policies of the Coastal Act. In addition, the proposed project raises a concern with regard to the long-term security and viability of retaining visitor amenities on the subject site. Due to its prime location adjacent to the beach, public amenities, accessibility and the fact that it is one of very few visitor-serving commercial sites within the City of Encinitas, staff recommends that the subject site should only be developed with a use that truly and exclusively serves the visiting public by providing year-round overnight accommodations in all rooms such as the hotel originally approved on the site. Therefore, staff recommends that the Commission deny the proposed conversion to a condominium hotel form of ownership.

Staff further recommends the Commission **approve** the applicant's request to place up to 50,000 cu. yds. of beach quality sand on the beach near the proposed hotel site. The proposed receiver site is one of the same approved sand replenishment sites where the San Diego Association of Government's placed approximately 118,000 cu. yds. of sand in 2001. With conditions to limit the work to outside of the summer season, to require submission of constructions staging plans to specified criteria, and for approval by other agencies, impacts to marine resources will be eliminated or mitigated to the maximum

extent possible and consistent with the all applicable policies of Chapter 3 of the Coastal Act.

Substantive File Documents: City of Encinitas Certified LCP; Notice of Decision PBD 2005-32; 04-268 TPM (Dodds); Mitigated Negative Declaration SCH#2003111025, 12/16/03 and Addendum 2/10/04; “Response to Request for Information Regarding the Condominium Resort Hotel” from the applicant dated received September 13, 2005; Draft “Declaration of Covenants, Conditions and Restrictions for the La Costa Beach Resort” received on 10/20/05; “An Overview of the Hotel and the Equity Financing Method” dated February 2006; USA Today, “Hotel-condo hybrid growing trend in Florida, nationwide”, by Mike Scheider dated June 6, 2005; CDP Nos. 6-92-203/Sports Shinko, 5-96-282/Seaview Hotel and 3-90-46-A1/Marchant Enterprises, A-5-RPV-02-324-A3/Long Point Dev.

I. PRELIMINARY STAFF RECOMMENDATION:

The staff recommends that the Commission adopt the following two-part resolution. The motion passes only by an affirmative vote of a majority of the Commissioners present.

MOTION: *I move that the Commission adopt the staff recommendation to approve in part and deny in part Coastal Development Permit Amendment No. 6-92-203-A4, with the approval subject to the conditions recommended by staff, by adopting the two-part resolution set forth in the staff report.*

STAFF RECOMMENDATION OF APPROVAL:

Staff recommends a **YES** vote. Passage of this motion will result in approval of the permit amendment in part, as conditioned, denial of the permit amendment in part, and adoption of the following resolution and findings. The motion passes only by affirmative vote of a majority of the Commissioners present.

RESOLUTION:

Part 1: Approval with Conditions of a Portion of the Development

The Commission hereby **GRANTS, as conditioned**, a coastal development permit amendment for the portion of the project involving the placement of up to 50,000 cu. yds. of beach quality sand on the beach near the proposed hotel site, and adopts the findings set forth below on grounds that the development as conditioned will be in conformity with the policies of Chapter 3 of the Coastal Act, and will not have any significant

adverse effects on the environment within the meaning of the California Environmental Quality Act.

Part 2: Denial of the Change in Ownership to a Limited Term Occupancy Hotel Condominium Form of Ownership

The Commission hereby **DENIES** a coastal development permit amendment for the portion of the project involving the change in hotel ownership to a limited-term occupancy condominium hotel, and adopts the findings set forth below, on the grounds that this development would not be in conformity with the Certified Local Coastal Program and the public access and recreation provisions of Chapter 3 of the Coastal Act, and would result in significant adverse effects on the environment within the meaning of the California Environmental Quality Act.

II. Special Conditions.

This permit amendment is subject to the following conditions:

The following Special Conditions relate to that part of the amendment request involving the placement of beach quality sand onto the beach:

1. Timing of Construction. PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT AMENDMENT #4, the applicant shall submit to the Executive Director for review and written approval, a construction schedule that conforms to the following restriction:

a. The work shall only occur between September 15 and February 15 of any year but not including weekends or holidays.

The applicant shall undertake the development in accordance with the approved construction schedule. Any proposed changes to the approved schedule shall be reported to the Executive Director. No change to the schedule shall occur without a Commission-approved amendment to the permit unless the Executive Director determines that no such amendment is required.

2. Beach Sand Monitoring. PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT AMENDMENT #4, the applicant shall submit to the Executive Director for review and written approval, a detailed beach sand monitoring program for shore and nearshore monitoring at or near the receiver sites. Monitoring at and adjacent to the receiver site shall address the following concerns:

- Whether the as-built project is at the location and of the size and extent proposed and approved by the Commission and if not, what are the changes;
- Seasonal and interannual changes to the receiver sites, in width and length of dry beach, subaerial and nearshore slope, offshore extent of nourished toe, and overall volume of sand in the profile;

- Rate and extent of transport of material up- and down-coast from the receiver site;
 - Time period over which the beach benefits related to the project can be identified as distinct from background conditions.
- a. At a minimum this information shall be provided through field surveys of the receiver site and adjacent areas. Unless otherwise indicated, all profiles shall be from an upland fixed location or monument, across the beach, through the nearshore, to closure depth. Profiles shall be prepared immediately prior to the project, immediately upon completion of the project (this survey may be terminated offshore at the toe of the project rather than going to closure), 3 months after the project, 6 months after the project and every 6 months thereafter until two separate surveys show that the material from the project is undetectable. Timing for the every-6-month survey efforts may be adjusted to coincide with the schedule that has been developed for the San Diego Regional Monitoring Program.
 - b. There shall be a minimum of one profile through the receiver site, and at least one profile up coast and one profile down coast of the receiver site. To the maximum extent practicable, these should occupy the profile locations currently being used in the San Diego Regional Monitoring Program.
 - c. Monitoring information shall be analyzed regularly for any changes that have occurred at the receive site. To the extent practicable, these reports should incorporate information from the San Diego Regional Monitoring Program on both historic changes at the receiver site and on-going regional shoreline trends.

The applicant shall undertake the development in accordance with the approved monitoring program. Any proposed changes to the approved program shall be reported to the Executive Director. No change to the program shall occur without a Commission-approved amendment to the permit unless the Executive Director determines that no such amendment is required.

3. Final Staging Plans. PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT AMENDMENT #4, the applicant shall submit to the Executive Director for review and written approval, final plans that identify the following:

- a. The minimum number of public parking spaces that are required for the staging of equipment, machinery and employee parking, without using space on the sandy beach. The number of public parking spaces utilized shall be the minimum necessary to implement the project.
- b. During the construction stages of the project, the permittee shall not store any construction materials or waste where it will be or could potentially be subject to wave erosion and dispersion. In addition, no machinery shall be placed, stored or otherwise located in the intertidal zone at any time, except for the minimum

necessary to implement the project. Construction equipment shall not be washed on the beach or in the beach parking lots.

The applicant shall undertake the development in accordance with the approved plans. Any proposed changes to the approved plans shall be reported to the Executive Director. No change to the program shall occur without a Commission-approved amendment to the permit unless the Executive Director determines that no such amendment is legally required.

4. Other Permits. Prior to commencement of construction, the applicant shall provide to the Executive Director copies of all other required state or federal discretionary permits for the development herein approved. The applicant shall inform the Executive Director of any changes to the project required by such permits. Such changes shall not be incorporated into the project until the applicant obtains a Commission amendment to this coastal development permit, unless the Executive Director determines that no amendment is legally required.

5. U.S. Army Corps of Engineers Permit. Prior to commencement of construction, the applicant shall provide to the Executive Director a copy of a U.S. Army Corps of Engineers permit, or letter of permission, or evidence that no Corps permit is necessary. The applicant shall inform the Executive Director of any changes to the project required by the U.S. Army Corps of Engineers. Such changes shall not be incorporated into the project until the applicant obtains a Commission amendment to this coastal development permit, unless the Executive Director determines that no amendment is legally required.

6. Mitigated Negative Declaration. The proposed approximately 50,000 cu. yds. of sand placement project approved herein shall be implemented in accordance with the project description and mitigation measures identified in the Mitigated Negative Declaration approved by the City of Encinitas on 12/16/05 and its Addendum approved on 2/110/05.

Any proposed changes to the sand placement project as approved herein shall be reported to the Executive Director. No change to the project implementation shall occur without a Commission-approved amendment to the permit unless the Executive Director determines that no such amendment is required.

7. Prior Conditions of Approval. All other terms and conditions of the original approval of Coastal Development Permit #6-92-203, as amended, not specifically modified by amendment 6-92-203-A4, shall remain in full force and effect and become part of Amended Coastal Development Permit #6-92-203-A1.

III. Findings and Declarations.

The Commission finds and declares as follows:

1. Project History/Amendment Description. The proposed amendment involves two requests. The first request involves a change in the type of ownership of the 130 hotel units to a limited term occupancy hotel condominium form of ownership enabling the hotel owner to sell each hotel unit to an individual buyer. The hotel is proposed to still operate as a hotel available to the general public, but the applicants assert that the change in type of ownership is necessary to finance the construction of the hotel complex. The second amendment request is for the placement of approximately 50,000 cu. yds. of beach quality sand that will be excavated from the hotel site and placed on the beach just west of the hotel site. The original permit required that any graded spoils that are suitable for beach placement be reserved for placement onto the beach and that any necessary permits first be obtained for its placement.

The original project consisted of the demolition of three single-family residences, the relocation of seven mobile homes, and the construction of an approximately 138,460 sq. ft., two-story plus basement level, 30-foot high, 130-unit resort hotel. Also included was the construction of a 5,128 sq. ft. restaurant, a 420 sq. ft. retail shop, 1,600 sq. ft. of meeting rooms, 4,072 sq. ft. of floor area devoted to banquet facilities, a 3-level, 320-space subterranean parking garage, a swimming pool with cabanas, and approximately 92,000 cubic yards of excavation. As proposed, all structures will be set back 55 feet from the edge of the coastal bluff. No structure on the site is permitted to exceed 2 stories or 30 feet in height, and landscaping and color and signage restrictions were included in the original project approval. In addition, the approved development includes the consolidation of 4 lots into 1 lot and the vacation of two public access easements on the site that area no longer viable.

The 4.3-acre bluff-top lot is located along the west side of Highway 101, just south of Batiquitos Lagoon in the northernmost portion of the City of Encinitas. Access. The site is bounded by South Carlsbad State Beach Parking Lot to the north, Highway 101 to the east, a large condominium development and restaurant to the south and the beach and Pacific Ocean to the west.

The project was approved by the Commission on December 10, 1992 with a number of special conditions including requirements for revised plans to include a 25-foot inland (non-coastal) blufftop setback, an extensive public access program including construction of a blufftop overlook, a new public access stairway and dedication of a public access easement, and payment of a minimum \$156,000 fee to be used for the acquisition of land and/or construction of low-cost visitor-serving overnight accommodations. Each of these special conditions was complied with and the permit has been issued. The permit was vested as a result of lot consolidation and the construction of public access improvements. As required by the special conditions, the applicant has paid 10% of the \$156,000 fee for acquisition of land/or construction of low-cost visitor-serving overnight accommodations. As required by Special Condition #6 of the original permit, the balance of the fee will need to be paid prior to occupancy of the hotel.

As originally approved, the project provided for the installation of several public access amenities that included a blufftop overlook, public access through the site, and a stairway

to the state park parking lot. Special Condition #2 of the original permit specifically required construction of a stairway; however, there was insufficient information at the time the project was approved to give final approval of a stairway; therefore, the condition also required that a separate coastal development permit for the stairway be obtained. The amendment for the stair was approved in July of 2000 and the stairway has subsequently been constructed (Ref. 6-92-203-A1/Encinitas Resort Hotel). Two other amendments involving the placement of the proposed 50,000 cu. yds. of the sand were withdrawn by the applicant (the City of Encinitas) in 2003 and 2005 (Ref. 6-92-203-A2 and A3/City of Encinitas).

The City of Encinitas has a certified Local Coastal Program (LCP), however, the applicant is amending a previously-approved permit issued by the Commission prior to certification of the City's LCP, and as such, the proposed improvement falls under the Commission's purview. The standard of review is the City's certified LCP and the public access and recreation policies of Chapter 3 of the Coastal Act since the project site is located between the sea and the first coastal roadway.

A. APPROVAL FINDINGS AND DECLARATIONS

The findings in this section apply only to that portion of the development that is described in Part 1 of the Commission's resolution on this permit amendment, which portion is therefore being conditionally approved.

Placement of Sand on the Beach

This part of the subject amendment request involves the placement of approximately 50,000 cu. yds. of beach quality sand that will be excavated from the hotel site and placed on the beach just west of the hotel site. The proposed placement of sand will occur on and across the public beach within the Commission's coastal development permit jurisdiction. Therefore, the standard of review for the placement and transportation of the sand is the Coastal Act. (The grading onsite of the hotel has already been approved by the original permit, CDP #6-92-203/Sports Shinko.)

1. Public Access. The following Coastal Act policies are most applicable to the proposed development and state, in part:

Section 30210

In carrying out the requirement of Section 4 of Article X of the California Constitution, maximum access, which shall be conspicuously posted, and recreational opportunities shall be provided for all the people consistent with public safety needs and the need to protect public rights, rights of private property owners, and natural resource areas from overuse.

Section 30211

Development shall not interfere with the public's right of access to the sea where acquired through use or legislative authorization, including, but not limited to, the use of dry sand and rocky coastal beaches to the first line of terrestrial vegetation.

Section 30212

(a) Public access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects except where:

(1) it is inconsistent with public safety, military security needs, or the protection of fragile coastal resources,

(2) adequate access exists nearby...

Section 30213

Lower cost visitor and recreational facilities shall be protected, encouraged, and, where feasible, provided. Developments providing public recreational opportunities are preferred....

Section 30214(a)

(a) The public access policies of this article shall be implemented in a manner that takes into account the need to regulate the time, place, and manner of public access depending on the facts and circumstances in each case including, but not limited to, the following:

(1) Topographic and geologic site characteristics.

(2) The capacity of the site to sustain use and at what level of intensity.

(3) The appropriateness of limiting public access to the right to pass and repass depending on such factors as the fragility of the natural resources in the area and the proximity of the access area to adjacent residential uses.

(4) The need to provide for the management of access areas so as to protect the privacy of adjacent property owners and to protect the aesthetic values of the area by providing for the collection of litter.

Section 30220

Coastal areas suited for water-oriented recreational activities that cannot readily be provided at inland water areas shall be protected for such uses.

In addition, Section 30604(c) of the Coastal Act requires that a specific access finding be made in conjunction with any development located between the sea and the first public

roadway, indicating that the development is in conformity with the public access and public recreation policies of Chapter 3. In this case, such a finding can be made.

As previously described, the applicant is requesting to place approximately 50,000 cu. yds. of excavated beach quality sand onto the public beach. The original permit required that any graded spoils that are suitable for beach placement be reserved for placement onto the beach (Ref. Special Condition #12 of CDP #6-92-203, attached as Exhibit #3). The proposed hotel will be located on an approximately 4.3 acre site immediately south of Batiquitos Lagoon and immediately east of the beach that is managed by the City of Encinitas. The sand material will be extracted from the site during the excavation for the hotel's subterranean garage. The receiver site is identified as being approximately 50 ft. in width and 1,390 ft. in length in the intertidal zone between +5 and -2 feet Mean Lower Low Water and approximately 900 feet south of the Batiquitos Lagoon inlet. The receiver site is the same site used by the San Diego Association of Government's (SANDAG) sand replenishment project of 2001 that placed approximately 2 million cu. yds. of sand on 12 local San Diego County beaches (Ref. 6-00-38/SANDAG). Approximately 118,000 cu. yds. of sand was placed on the subject receiver site in 2001 by the SANDAG project.

The applicant proposes to perform the grading and place the sand on the beach sometime between September 15, 2006 and February 15, 2007 so as not conflict with the summer vacation period. Although the work will occur outside of the summer months, activity associated with the project will temporarily affect public access to and along the shoreline, along the haul route, and at the receiver site. The applicant estimates that the hauling process and sand placement may take two months to complete. The removal of the approximately 50,000 cu. yds. of sand will necessitate the transport of the sand in 35-ton dump trucks and the use of paddlewheel scrapers and bulldozers to distribute the sand. It is estimated that approximately 5,000 trips will be required to transport the sand from the hotel site, across a public parking lot and across the beach to the receiver site. The applicant is not proposing to access Highway 101 or other public streets as part of the sand placement. The haul route is identified in the City approved Mitigated Negative Declaration (SCH#2003111025 dated 12/16/03) as being from the northeast corner of the hotel site, across the State Beach paved parking lot to the beach. The use and public access of the South Carlsbad State Beach parking lot will be somewhat limited during the hauling operation. Neither the applicant nor State Parks is proposing closure of the entire parking lot, but will propose blockage of the haul route as a safety measure.

The proposed project will provide benefits to the public in the form of additional sand that can be used for public access and recreation. Additional sand may also provide some additional protection to upland development from the effects of marine erosion. However, the proposed sand placement will result in temporary impacts to public access. Therefore, the Commission must weigh these temporary impacts against the benefits provided by the sand. To assure that whatever limited, temporary impacts to public access are effectively reduced, Special Condition #1 has been attached which limits the project construction period to assure no work will occur during the summer months. Special Condition #2 has been attached to require submittal of information about the as-

built design and post-construction monitoring of sand retention and movement to provide information on project benefits and efficacy of design. In addition, Special Condition #3 has been attached which requires that the applicant provide the Executive Director final staging and construction schedule that includes identification of all public parking spaces within South Carlsbad State Beach that are needed for construction activity and that limits those spaces to the minimum necessary to implement the project. The applicant and State Parks do not anticipate the need to close South Carlsbad State Beach parking lot entirely, however, Special Condition #3 also requires that such closure periods be identified and that any closure be the minimum necessary to perform the work. Although the Department of Parks and Recreation supports the project, Special Condition #4 has also been attached to require submission of any other state or local permits that might be required to assure that any conditions imposed by those permits do not conflict with the subject amendment. With these conditions, any temporary impacts to public access and recreation will be mitigated to maximum extent possible.

In summary, the proposed project will have short-term impacts on public access and recreation, which have been minimized by conditions requiring that construction be scheduled outside of the summer season and that minimum public parking be affected. The project overall will have a positive impact on public access and recreation. Therefore, as conditioned, the proposed project can be found consistent with the public access and recreation policies of the Coastal Act.

2. Biological Resources/Water Quality. Section 30230 of the Act states:

Marine resources shall be maintained, enhanced, and where feasible, restored. Special protection shall be given to areas and species of special biological or economic significance. Uses of the marine environment shall be carried out in a manner that will sustain the biological productivity of coastal waters and that will maintain healthy populations of all species of marine organisms adequate for long-term commercial, recreational, scientific, and educational purposes.

Section 30231 of the Act states in part:

The biological productivity and the quality of coastal waters, streams, wetlands, estuaries, and lakes appropriate to maintain optimum populations of marine organisms and for the protection of human health shall be maintained and, where feasible, restored through, among other means, minimizing adverse effects of waste water discharges and entrainment, controlling runoff...

Section 30233 of the Act states in part:

(a) The diking, filling, or dredging of open coastal waters, wetlands, estuaries, and lakes shall be permitted in accordance with other applicable provisions of this division, where there is no feasible less environmentally damaging alternative, and where feasible mitigation measures have been provided to minimize adverse environmental effects, and shall be limited to the following:

(1) New or expanded port, energy, and coastal-dependent industrial facilities, including commercial fishing facilities.

(2) Maintaining existing, or restoring previously dredged, depths in existing navigational channels, turning basins, vessel berthing and mooring areas, and boat launching ramps.

(3) In wetland areas only, entrance channels for new or expanded boating facilities; and in a degraded wetland, identified by the Department of Fish and Game pursuant to subdivision (b) of Section 30411, for boating facilities if, in conjunction with such boating facilities, a substantial portion of the degraded wetland is restored and maintained as a biologically productive wetland. The size of the wetland area used for boating facilities, including berthing space, turning basins, necessary navigation channels, and any necessary support service facilities, shall not exceed 25 percent of the degraded wetland.

(4) In open coastal waters, other than wetlands, including streams, estuaries, and lakes, new or expanded boating facilities and the placement of structural pilings for public recreational piers that provide public access and recreational opportunities.

(5) Incidental public service purposes, including but not limited to, burying cables and pipes or inspection of piers and maintenance of existing intake and outfall lines.

(6) Mineral extraction, including sand for restoring beaches, except in environmentally sensitive areas.

(7) Restoration purposes.

(8) Nature study, aquaculture, or similar resource dependent activities.

(b) Dredging and spoils disposal shall be planned and carried out to avoid significant disruption to marine and wildlife habitats and water circulation. Dredge spoils suitable for beach replenishment should be transported for such purposes to appropriate beaches or into suitable long shore current systems.

[...]

Section 30240 of the Act states:

(a) Environmentally sensitive habitat areas shall be protected against any significant disruption of habitat values, and only uses dependent on those resources shall be allowed within those areas.

(b) Development in areas adjacent to environmentally sensitive habitat areas and parks and recreation areas shall be sited and designed to prevent impacts which would significantly degrade those areas, and shall be compatible with the continuance of those habitat and recreation areas.

These Coastal Act policies require the Commission to address the impacts on marine resources by considering the timing of the deposition of the material on the beach, the location of the receiver beach and the presence of environmentally sensitive resources. Deposition of material onto the beach can affect marine life through the burial of organisms on the beach and in the nearshore environment, and by increasing turbidity in adjacent waters.

The Mitigated Negative Declaration (MND) for the project reviewed the potential project impacts from the direct placement of sand, from turbidity and from long-term sediment transport. The MND relied on the research performed before and after the SANDAG project as well as comments from the Department of Fish and Game (DFG) to assure any adverse impacts to environmentally sensitive resource are eliminated or adequately mitigated. The applicant proposes to perform the grading and place the sand on the beach sometime between September 15, 2006 and February 15, 2007. This period has been chosen so as not to impact the breeding and nesting periods of the California least tern, western snowy plover and Belding's savannah sparrow which inhabit the nearby Batiquitos Lagoon or the spawning period of grunion.

One of the effects of the placing of the graded sand material onto the beach where it will make contact with the ocean is the resulting turbidity around the contact point. Turbidity can indirectly impact plankton, fish, marine mammals, birds, vegetated reefs, and benthic invertebrates. Turbidity results from suspended particles in the water column that can reduce ambient light levels, which can impact primary production of plankton and inhibit kelp and algae growth. However, in this case, the amount of turbidity is expected to be minimal and will not exceed the turbidity levels of the previously approved SANDAG replenishment project which occurred on the proposed receiver site in 2001. However, to assure that the turbidity level does not exceed the levels Army Corps of Engineer set for the larger SANDAG project, the California Regional Water Quality Control Board (CRWQCB) issued an Order for Low Impact Certification which requires daily monitoring of the turbidity plumes and weekly submission of the monitoring to assure the turbidity does not exceed the limits set on the previous SANDAG project (Ref. CRWQCB File 03C-124). Therefore, the project herein approved will be monitored by the applicant consistent with the requirements of the CRWQCB which will minimize or eliminate all adverse water quality impacts consistent with Section 30231 of the Coastal Act. Special Condition #4 requires that any changes required by other state or federal action shall be reported to the Executive Director in order to determine if an amendment to this permit will be required.

In addition, the Army Corps of Engineers (ACOE) has reviewed the grain size sampling data and color characteristics of the sand that is proposed for disposition and has generally concluded that the size and color is consistent with the requirements of the

ACOE. Special Condition #5 requires that the final approval or determination by ACOE of the grain size and color be submitted for Executive Director review prior to commencement of construction.

Based on the SANDAG monitoring of the sand placement at the subject receiver site in 2001, the only other potential adverse affect resulting from the placement of sand at this location involves the amount of the sand that ultimately becomes deposited by the ocean onto the flood shoal of Batiquitos Lagoon. The DFG estimates that approximately 8.8% of the proposed 50,000 cu. yds. of sand will ultimately be deposited by the ocean into the flood shoal of Batiquitos Lagoon since that is the percentage that was estimated to have resulted from the SANDAG project. The DFG has routinely performed dredging operations of the lagoon as part of a Batiquitos Lagoon enhancement project. Since the City of Encinitas and its beach visitors will be the beneficiaries of this proposed sand placement by the hotel, the City has agreed as part of it's approval of the Mitigated Negative Declaration (Ref. MND, 12/16/05 and as amended 2/10/04) to pay for the cost of dredging the approximately 4,400 cu. yds. (8.8%) from the lagoon at a future date through a separate coastal development permit process.

Although the City approved the Mitigated Negative Declaration for the proposed sand project, the City did not require any additional discretionary action that would have required implementation of the findings and assumptions made in the Mitigated Negative Declaration. To assure the project proposed by the applicant is implemented consistent with the description and assumptions of the MND, Special Condition #6 has been attached. Special Condition #6 requires the project approved by the Commission is implemented in the manner described in the MND and that any change in the project as described in the MND or as approved herein will require an amendment to this permit unless the Executive Director determines an amendment is unnecessary.

Construction equipment used for the project has the potential to contaminate the sand and/or ocean waters. Special Condition #3 prohibits the storage of construction material in the surf zone, and washing vehicles on the beach. As conditioned, no significant impacts to water quality are expected.

Special Conditions #4 and #5 require the applicant to submit a copy of any other state or federal permits required, including the Army Corps of Engineers permit for the project, to ensure any additional mitigation required is incorporated in the subject permit. However, mitigation measures that resulted in a substantial change to the project would require an amendment to this permit.

The proposed project has been designed to avoid significant adverse impacts on biological resources. As conditioned, the Commission finds that the proposed project will ensure that all environmental impacts are minimized and adequately mitigated. Therefore, the proposed project can be found consistent with resource protection policies of the Coastal Act.

3. Local Coastal Planning. In November of 1994, the Commission approved, with suggested modifications, the City of Encinitas Local Coastal Program (LCP). Subsequently, on May 15, 1995, coastal development permit authority was transferred to the City.

As described above, the proposed project, as conditioned will not have an adverse impact on public access or recreation in conflict with the policies of the Coastal Act. Therefore, the Commission finds that approval of the placement of approximately 50,000 cu. yds. of sand on the beach will not prejudice the ability of the City of Encinitas to continue to implement its certified LCP.

4. Consistency with the California Environmental Quality Act (CEQA). Section 13096 of the Commission's Code of Regulations requires Commission approval of Coastal Development Permit Amendments to be supported by a finding showing the permit amendment, as conditioned, to be consistent with any applicable requirements of the California Environmental Quality Act (CEQA). Section 21080.5(d)(2)(A) of CEQA prohibits a proposed development from being approved if there are feasible alternatives or feasible mitigation measures available which would substantially lessen any significant adverse effect which the activity may have on the environment.

The proposed project has been conditioned in order to be found consistent with the public access and visual resource policies of the Coastal Act. Mitigation measures, including conditions addressing timing of construction and public access, restrictions on use of the hotel by its various owners will minimize all adverse environmental impacts. As conditioned, there are no feasible alternatives or feasible mitigation measures available which would substantially lessen any significant adverse impact which the activity may have on the environment. Therefore, the Commission finds that the proposed project is the least environmentally-damaging feasible alternative and is consistent with the requirements of the Coastal Act to conform to CEQA.

B. DENIAL FINDINGS AND DECLARATIONS

The findings in this section apply only to that portion of the proposed development that is described in Part 2 of the Commission's resolution on this permit amendment, which portion is therefore being denied.

Conversion of Hotel to Hotel Condominium

1. Public Access/Visitor-serving Commercial.

The proposed conversion to limited term occupancy condominium hotel requires a permit because it involves a subdivision of land and results in a change in intensity of use for the site. The proposed development lies between the first public road (Highway 101) and the sea and, therefore, pursuant to Coastal Act section 30604(c), can only be approved if it is found to be consistent with the following public access and recreation policies of the Coastal Act as well as to the following policies of the City's certified LCP:

Coastal Act Policies

Section 30210

In carrying out the requirement of Section 4 of Article X of the California Constitution, maximum access, which shall be conspicuously posted, and recreational opportunities shall be provided for all the people consistent with public safety needs and the need to protect public rights, rights of private property owners, and natural resource areas from overuse.

Section 30211

Development shall not interfere with the public's right of access to the sea where acquired through use or legislative authorization, including, but not limited to, the use of dry sand and rocky coastal beaches to the first line of terrestrial vegetation.

Section 30213

Lower cost visitor and recreational facilities shall be protected, encouraged, and, where feasible, provided. Developments providing public recreational opportunities are preferred. . . .

Section 30221

Oceanfront land suitable for recreational use shall be protected for recreational use and development unless present and foreseeable future demand for public or commercial recreational activities that could be accommodated on the property is already adequately provided for in the area.

Section 30222

The use of private lands suitable for visitor-serving commercial recreational facilities designed to enhance public opportunities for coastal recreation shall have priority over private residential, general industrial, or general commercial development, but not over agriculture or coastal-dependent industry.

Land Use Plan Policies of the Certified LCP:

POLICY 1.13: The visitor-serving commercial land use shall be located where it will not intrude into existing residential communities. This category applies in order to reserve sufficient land in appropriate locations expressly for commercial recreation and visitor-serving uses such as:

- tourist lodging, including campgrounds (bed and breakfast facilities may be compatible in residential areas)

- eating and drinking establishments
- specialty shops and personal services
- food and beverage retail sales (convenience)
- participant sports and recreation
- entertainment

The above listed uses and other uses specifically intended to serve the needs of visitors shall be the principal uses allowed within the visitor-serving land use designation. All other permitted or conditionally permitted uses specified in the Zoning Code for areas zoned as visitor-serving commercial, shall be considered as ancillary uses to the allowable principal uses. Ancillary or non-principal uses and required off-street parking shall not occupy or utilize more than 30% of the ground floor area.

POLICY 1.14: The City will maintain and enhance the Hwy 101 commercial corridor by providing appropriate community-serving tourist-related and pedestrian-oriented uses.

Visitor-Serving Commercial

The Visitor-Serving Commercial designation specifically applies to those commercial activities that serve persons visiting the City. Land uses within this category are an important source of sales tax revenue for the City. This designation is also important in implementing Coastal Act policies that call for the identification of hotels, resorts, and other establishments that serve visitors utilizing the City's coastal amenities. The maximum permitted floor area ratio for uses in this category is up to 1.0.

Implementation Plan Requirements of the Certified LCP

Section 30.08.010(B) . . .

L-VSC: Limited Visitor-serving Commercial is intended to provide for hotel/motel uses as the primary use and ancillary uses specifically intended to serve the needs of persons visiting the City.

VSC: Visitor-Serving Commercial is intended to provide for commercial activities which are specifically intended to serve the needs of persons visiting the City for business and recreational purposes.

North Highway 101 Specific Plan:

Section 3.1.2.G.1 Limited Visitor-Serving Commercial (N-L-VSC)

This zone is intended to provide for hotel/motel uses as the primary use, with uses specifically intended to serve the needs of persons visiting the City as ancillary uses.

In addition, Section 30.09 of the certified Implementation Plan contains the Zoning Matrix for the City which provides a listing of various land uses which are allowed by right or use permit and those that are prohibited within each of the City's zoning categories. In the case of N-L-VSC, the zoning matrix allows hotel/motels by right and prohibits all dwelling-unit/residential uses.

As previously described, in 1992 the Commission approved the construction of an approximately 138,460 sq. ft., 130-unit resort hotel that includes meeting and banquet facilities, a restaurant and retail shop on the approximately 4.3 acre blufftop lot overlooking the Pacific Ocean in Encinitas that is the subject of this amendment request. The project is located on a site designated by the Land Use Plan for Visitor-Serving Commercial (VSC) use and zoned as Limited Visitor-serving Commercial (N-L-VSC) within the North Highway 101 Specific Plan, which serves as the Certified Implementation Plan for the North Highway 101 corridor where the subject site is located. As cited above, the primary use in the L-VSC and the N-L-VSC zones is hotels/motels. All other uses are intended to be ancillary to these primary uses with the purpose of serving visitors.

The subject site is the only property zoned N-L-VSC within the North Highway 101 Specific Plan. The North Highway 101 Specific plan generally applies to the first lots on either side of Highway 101 from Encinitas Blvd. to the northern border of Encinitas. Within the City overall, only three other properties are zoned Limited Visitor-serving Commercial. Each of these three sites is located adjacent to Interstate 5 approximately one mile east of the shoreline. The subject site is the only Limited Visitor-serving Commercial (N-L-VSC or L-VSC) site located adjacent to the beach and upon completion of the hotel, will be the only hotel located immediately adjacent to the beach in Encinitas.

The Commission has reviewed and approved similar requests in other areas of the state for conversion of a previously approved hotel to the condominium form of ownership in Rancho Palos Verdes (Ref. A-5-RPV-02-324-A3/Long Point Dev.) and Half Moon Bay (Ref. CDP 3-90-46-A1/Marchant Enterprises). In addition, the Commission approved the construction of a limited term occupancy condominium hotel in Hermosa Beach (Ref. CDP 5-96-282/Seaview Hotel). These hotels were located on general commercial or visitor-serving commercial zoned sites, however, none of the condo hotels were located on Limited Visitor-Serving Commercial zones where hotel/motel use is the primary intended use.

In addition the subject site is unique in that the original hotel approval included public access along the blufftop and to the beach and ocean through the hotel site as well as parking spaces for use by the public. Access to the site is via La Costa Avenue a primary coastal access road from Interstate 5 or from Highway 101. Thus, because of its unique

proximity to the shoreline, its accessibility, the minimal amount of area in the City designated specifically for hotel/motel uses and the LCP requirement that the primary use on the site be a hotel/motel use, it is critical that the hotel/motel use of the site be protected from a change to a use that would lessen its visitor-serving function such as a residential use or some other exclusive, non-visitor-serving use. In addition, as cited above, the Coastal Act provides that visitor and recreation serving facilities shall be given priority over other private uses such as residential, general industrial or general commercial particularly on oceanfront land such as the subject site.

As previously cited, the City's zoning matrix (Section 30.09 of the certified Implementation Plan) allows hotel/motel use by right but prohibits all types of residential use. Since each condominium hotel owner can use their unit as a vacation home for up to 90 days per year, it has the characteristic of residential use, i.e. a second home. Therefore, what the applicant proposes is some form of a mixed-use hotel/condominium vacation home, which is not a listed permitted use.

In approving the hotel in 1992, the Commission recognized the importance of protecting the visitor-serving commercial function of the hotel because of its unique location adjacent to the beach. The approval included a number of special conditions to the permit to encourage and enhance the visitor-serving use, public access and recreational opportunities. These included numerous public access improvements that included among other things, public access paths, a stairway to the beach, public parking, an offer to dedicate public access to and along the shoreline and public access signage (Ref. Exhibit #2). In addition, as an indication of how important it is to maintain the hotel as a conventional hotel facility, the Commission also included a special condition which specifically prohibited the conversion of the hotel or its associated facilities to exclusive use (Ref. Special Condition #6 on Exhibit #3) without an amendment. The hotel as approved by the Commission was not proposed as a low-cost visitor-serving hotel but rather as a luxury hotel with room rates that were estimated in 1992 to be between \$200 to \$300 dollars per night. As such, to mitigate for this deficiency, the Commission also required that the applicant provide an in-lieu fee of \$156,000 to be used for land acquisition and/or construction of a low cost visitor-serving accommodation such as a hostel or campground facility. In addition, the hotel includes facilities that are open to the public as well as hotel guests such as the restaurant, retail shop, public parking and beach access stairways.

The primary concern raised by the proposed hotel conversion to a condominium form of ownership is whether the hotel will continue to operate as a conventional hotel affording the same level of visitor-serving use anticipated by the Commission when it approved the hotel originally (and as required by the LCP) or will it function more, or in any part, as a residential use (inconsistent with the LCP). In other words, will the proposed condominium form of ownership result in the same amount of hotel rooms available to the general public at all times?

To address this concern, the applicant asserts that the change in ownership will not result in a residential use and will have no effect on the operation of the hotel especially with

the safeguards they propose as part of the Covenants, Conditions and Restrictions (CC&R's) that apply to each unit along with the conditions imposed by the City in approving the tentative parcel map. The applicant identifies that each hotel unit owner will be restricted to use of their unit for no more than 90 days per year and for no more than 25 days within any preceding 50 day time period. When the units are not occupied by the owners, the applicant asserts the unit will be made available for use by the general public. In terms of operation as a luxury resort hotel, the applicant asserts the hotel will function entirely like a hotel. All reservation of the units by the public or the owners must go through the hotel's reservation system. Owners will need to check into their rooms the same as hotel guests using the hotel's electronic key system, and the same guest services will be available to hotel unit owners and the general visiting public. While most of the marketing and advertising of the hotel rooms will likely be performed by the hotel operator, each individual owner would retain the right to market or advertise their unit on their own. In addition, the applicant identifies that any violation of the regulations can be enforced through use of the CC&R's or through the City of Encinitas code compliance procedures.

Since each condominium owner could use their unit for up to 90 days per year, there is a significant concern since that would significantly reduce the availability of hotel units to the general public. In addition, although each owner would be limited to no more than 25 days within any preceding 50 day time period, there remains the potential for owners to use their unit for vacation purposes during the summer when hotels room for the general public are in highest demand. For instance under the applicant's suggested time use restriction, condominium owners could use their units for 25 days in June, wait 25 days and then use the units again in late July or August for an additional 25 days. With 130 individual owners it is not possible to accurately know the extent of use that might occur. However, as designed by the applicant's restrictions, there remains the potential that up to ¼ of the hotel units will be unavailable over a 1-year time period.

The applicant has provided documentation suggesting that the buyers of the units will not be purchasing them for residential/vacation use but rather as an investment with the owners receiving income from the rental of their units. To support this contention, the applicant has submitted documentation of use by owners of the Seaview Hotel in Hermosa Beach, a hotel previously approved by the Commission as a limited term occupancy condominium hotel (Ref. CDP Nos. 5-96-282/Seaview Hotel). According to this information, no more than 6% of the owners use their unit during the peak summer months with a yearly monthly range from a low of 1.5% in January to a high of 5.7% in August. The applicant indicates that "[t]he low rate of owner occupancy could stem from a number of factors, the most salient being that owners treat the hotel units as investments, and will realize higher dividends if their units are occupied to the greatest extent possible by regular guests" (Ref. "Response to Request for Information Regarding the Condominium Resort Hotel" from the applicant dated received September 13, 2005). However, this information only applies to a single hotel and the applicant has not provided any information that suggests all condominium hotels operate at the same rate. The applicant does assert that this experience "is corroborated by information from [other] equity-financed hotel rooms operated by KSL. The La Costa Resort in Carlsbad,

La Quinta Resort in Palm Springs and the Arizona Biltmore in Phoenix all contain equity-financed hotel rooms.” (Ref. Page 7 of “An Overview of the Hotel and Equity Financing Method” dated February 2006). The applicant identifies that “equity-financed hotel rooms” is the same as the proposed condominium form of ownership. Although the applicant operates these other hotels, they have not provided the documentation to support this “corroboration” of use pattern.

The applicant has indicated that the primary reason for the proposed change in ownership of the 130-unit hotel to a limited term occupancy hotel condominium form of ownership is because there is little or no financing available for construction of a “traditional” hotel. However, the Commission believes that there is traditional financing available for construction of the approved hotel, but understands why the limited term occupancy condominium type of financing proposed by this amendment is preferred by the applicant, as it spreads out the financial “risk” among multiple owners as opposed to just one.

The information provided by the applicant suggests that the condominium hotel owners in Hermosa Beach rely on their units for investment purposes rather than as vacation homes. However, because of Securities and Exchange Commission regulations, the applicant has also identified that the subject condo hotel units will be marketed for sale as luxury condominium vacation units, not as investments or securities. According to the applicant, SEC regulations require if the units are marketed as an investment, the condominiums would be required to be registered as securities and be required to follow SEC regulations. In an Associated Press article from June 6, 2005, reporter Mike Schneider examined the growing number condo-hotels in Florida (Ref. USA Today, “Hotel-condo hybrid growing trend in Florida, nationwide”, by Mike Scheider). Mr. Scheider explained the issue of SEC regulation this way:

The Securities and Exchange Commission considers the condo offering a "security" if income and expenses from the rental units are pooled and if a condo unit is sold to the buyer with the explicit expectation the buyer will earn money or derive tax benefits from it. If the development is structured as a security, it can only be sold by a securities broker and it is easier for an investor to sue the developer under the SEC's anti-fraud rules, according to Los Angeles attorney Jim Butler.

Because most current developers choose not to sell their projects as securities to avoid the SEC complications, they are prohibited from discussing with a prospective buyer the economic or tax benefits from a rental arrangement, and they can't make projections on how much a condo unit can earn in rental income.

Therefore, if the applicant is prohibited by SEC regulations from selling and marketing the subject 130 units as anything other than a luxury condominium vacation unit, it should follow that the units have been purchased for vacation use by the owners for up to 90 days per year. While the applicant suggests use patterns by owners will be comparable to those of the Seaview Hotel in Hermosa Beach, i.e. limited use by the

owners during the summer months, there really has been no substantial evidence submitted to support that conclusion in the case of the subject hotel. Not only do we have insufficient evidence, but there is also very little information available to document the “track record” for these type of facilities. The Commission is concerned that the conversion of the hotel to a hotel condominium form of ownership may significantly reduce the supply of hotel units to the general public when owners make use of the units.

In addition, depending on how it is used, an individual condo hotel unit, such as that proposed, could, for tax purposes, be considered a second residence. Thus, as proposed by the applicant, the owner of an individual condo hotel unit could use his/her individual unit for up to 90 days per year and then potentially “write-off” mortgage interest, etc. based on the unit being a “second residence.” This further supports the Commission’s contention that the hotel condominium form of ownership is a quasi-residential use and not consistent with the primary hotel use required in the Limited Visitor-Serving zone.

Further, splitting the hotel ownership among 130+ owners raises other concerns as well that have not been adequately addressed by the applicant. For instance, if an individual owner files for bankruptcy, divorce or otherwise initiate legal action concerning their units, what is the potential that their unit will be taken out the hotel pool of rooms available to the general public?

The applicant has suggested that the Commission could regulate the operation of the hotel and its owners through a series of special conditions such as were imposed in the case of the Rancho Palos Verdes, Hermosa Beach and Half Moon Bay Hotels (Ref. A-5-RPV-02-324-A3/Long Point Dev.; CDP 3-90-46-A1/Marchant Enterprises; CDP 5-96-282/Seaview Hotel). These conditions involved controls on use, rental and marketing of the units and prohibited conversion to timeshare or residential use. While such conditions could be applied, the problem would be enforcement of those conditions. After the Commission authorizes the conversion to condominium form of ownership and the 130 units are sold, it would be impossible for the Commission to require the hotel to convert back to a conventional hotel ownership if the special conditions were to be ineffective or difficult to enforce. The applicant indicates that if an owner violates the conditions and regulations of the CC&R’s, the owner can be subject to legal action. If the owner violates the terms of the Special Conditions imposed by the Commission or local government, again the applicant suggests the owner can be subject to legal action. However, enforcing violations of permit conditions can be difficult and time consuming when a single applicant is involved. With 130 owners plus the hotel operator, enforcement could be impractical. Such difficulty in enforcement could ultimately lead to, among other things, the provision of visitor-serving amenities being compromised.

In summary, the hotel proposed to be converted will be located on the only Limited Visitor-Serving zoned parcel adjacent to the ocean in the City of Encinitas. As a Limited Visitor-serving zoned site, pursuant to the certified LCP, the primary use on the site must be a hotel/motel. The project as originally approved by the Commission includes substantial public access improvements including public overlooks, stairway access to the beach and public parking. The hotel was approved as a conventional hotel that offered

130 rooms to the public at all times. The proposed change in ownership to condominium form of ownership will have the effect of reducing the number of hotel rooms available to the public. The extent of that reduction cannot be determined, but any reduction would be inconsistent with the certified LCP, the public access and recreation policies in Chapter 3, and the Commission's original permit approval which was designed to maximize the visitor-serving nature of the hotel at this unique ocean blufftop site. In addition, the applicant has failed to adequately demonstrate that the hotel will continue to operate as a conventional hotel/motel and not result in the conversion of the units to a "quasi-residential" use, which is not permitted or appropriate on the subject site. Without that evidence the conversion to a condominium form of ownership cannot be found to be consistent with the Limited Visitor-serving zone of the certified LCP which provides that hotel/motel use is the primary use within the zone. Lastly, it should be noted that not only does the City of Encinitas have minimal area devoted to providing high priority visitor-serving uses, the City has also recently considered prohibiting vacation rentals in residential zones within the City which, if approved, would serve to further reduce the number of units available to the public for overnight accommodations. Therefore, Commission denies the proposed condominium hotel ownership conversion request.

2. Local Coastal Planning. In November of 1994, the Commission approved, with suggested modifications, the City of Encinitas Local Coastal Program (LCP). Subsequently, on May 15, 1995, coastal development permit authority was transferred to the City. The project site is located within the City's permit jurisdiction, therefore, the standard of review is the City's LCP. However, the project site is also located between the first public road and the sea and thus, the public access and recreation policies of Chapter 3 of the Coastal Act are also applicable.

As described above, the proposed project will have an adverse impact on the visitor-serving requirements of the Coastal Act and will be inconsistent with the certified LCP as it relates to the Limited Visitor-Serving Zone within the North Highway 101 Specific Plan. Therefore, the Commission finds that approval of the conversion of the hotel to a condominium hotel will prejudice the ability of the City of Encinitas to continue to implement its certified LCP.

3. California Environmental Quality Act (CEQA). Section 13096 of the Commission's Code of Regulations requires Commission approval of coastal development permits to be supported by a finding showing the permit to be consistent with any applicable requirements of the California Environmental Quality Act (CEQA). Section 21080.5(d)(2)(A) of CEQA prohibits a proposed development from being approved if there are feasible alternatives or feasible mitigation measures available, which would substantially lessen any significant adverse effect that the activity may have on the environment.

As described above, the proposed project would have adverse environmental impacts. There are feasible alternatives or mitigation measures available such as the no project alternative that would substantially lessen any significant adverse impacts that the activity may have on the environment by ensuring the hotel develops as a conventional

hotel. In this case, a no project alternative would result in the construction of a hotel on the site. Therefore, the proposed project is not consistent with CEQA or the policies of the Coastal Act because there are feasible alternatives, which would lessen significant adverse impacts, which the activity would have on the environment. Therefore, the project must be denied.

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