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MEMORANDUM

August 10, 2022

To: Irene Borba, Director of Planning and Building

From: M. R. Wolfe & Associates, P.C.
on behalf of Belvedere Residents for Intelligent Growth (BRIG)

cc: Members of the City Council
Members of the Planning Commission
Robert Zadnik, City Manager
Barbara Kautz

Re: Mallard Pointe Project – Revised Density Bonus Application and forthcoming General Plan & Zoning Consistency Review

This memo supplements our July 1, 2022 memo sent on behalf of BRIG.

On June 23, 2022 the Director of Planning and Building determined that Mallard Pointe 1951, LLC's application for development entitlements for the Mallard Pointe residential development project ("Project") was complete. The Director found, however, that the Project did not include the minimum percentage of affordable units to be eligible for waivers and concessions from City standards under the State Density Bonus Law ("SDBL"). Accordingly, on July 20, 2022 the Director documented the Project's ineligibility for such waivers and concessions, and provided a detailed list of the Project's inconsistencies with various provisions and standards in the R-2 zone, as set forth in Chapter 19.28 of the Belvedere Municipal Code.

On July 18, 2022 the developer submitted a modified development application that nominally removed two accessory dwelling units ("ADUs") from the Project, resulting in a total of 40 units, including four for lower income households. The developer submitted a revised density bonus application, asserting that 56 units are currently allowed at the site, and again seeking waivers and concessions from City standards including "[t]he prohibition on apartment courts and/or apartment houses in the R-2 zone." As discussed below, the revised density donus application is flawed,

and the developer cannot legally force the City to waive the prohibition on apartment houses.

First, as BRIG has previously explained, the City's General Plan designates the Project site "Medium Density MFR: 5.0 to 20 units/**net acre**," meaning up to 20 residential units per **net** acre may permissibly be developed on it. The General Plan expressly defines "net acreage" as including "**only** the size of the actual developable parcels themselves" distinguishing this term from "gross acreage," which "typically includes all acreage across a land use designation, including rights-of-way such as streets and sidewalks." (General Plan Land Use Element, p. 40, boldface added.) As the developer has repeatedly acknowledged in its own submittals, the net acreage of the Project site is 2.4 acres, and the gross acreage is 2.8 acres. (*See* Jan. 20, 2020 Memorandum from Riley Hurd, p. 2; May 23, 2022 Tentative Subdivision Map submittal, "Title Sheet"). Thus, the maximum number of units allowable under the applicable General Plan density standard is **48**, not 56 as the developer continues to assert.

Second, it remains abundantly clear from the plain language of both the SDBL and the Belvedere Zoning Code that the prohibition of apartment buildings in the R-2 zone is a **use prohibition**, and by no means a "development standard" that can or must be waived under the SDBL for density bonus-eligible projects. The SDBL defines "development standard" as follows:

> "Development standard" includes a site or construction condition, including, but not limited to, a height limitation, a setback requirement, a floor area ratio, an onsite open-space requirement, or a parking ratio that applies to a residential development **pursuant to any ordinance, general plan element, specific plan, charter, or other local condition, law, policy, resolution, or regulation**. (§ 65915(o)(1), boldface added.)

Thus, a "development standard" for purposes of the SDBL is, by definition, a construction or design standard contained in a local general plan, zoning code, or similar local ordinance. In other words, whether a particular standard constitutes a "development standard" under the SDBL is determined by whether the governing local general plan or zoning ordinance defines it as such.

The Belvedere Zoning Code lists prohibited uses in the R-2 zone in an entirely separate code section from its list of development standards in this same zone. The prohibition on apartment houses/apartment courts appears in Section 19.28.030, "Prohibited uses," while Section 19.28.040, "Development standards," lists building design and site layout restrictions such as minimum lot size, width, and area per unit; front, side, and rear yard setbacks; minimum lot coverage; maximum height; usable open space; and off-street parking requirements. Absent from the enumeration of

"development standards" in Section 19.28.040 is the prohibition of apartment buildings (or indeed of any other use). Please note that the Zoning Code consistently distinguishes "prohibited uses" from "development standards" across all zoning districts. (*See, e.g.,* §§ 19.20.30 ("Prohibited uses") and 19.20.035 ("Summary of development standards") in the "R" Zone; §§ 19.16.040 ("Prohibited uses") and 19.16.050 ("Development standards") in the "O" Zone; §§ 19.24.030 and 19.24.040-060 (same) in the R-1 Zone, etc.) Thus, the City Council in adopting the Zoning Code plainly viewed use prohibitions and development standards to be entirely separate and distinct categories of land use regulation.

Furthermore, as BRIG has previously observed, on May 24, 2022 the developer submitted a table titled "Mallard Pointe Project Data Sheet – Comparison of Proposed Plan to R-2 Development Standards." The Table mirrors the list of development standards in Section 19.28.040 and states whether each of the Project's 12 lots complies with each such development standard. Notably absent from the developer's table of applicable "R-2 Development Standards" is any mention of the apartment prohibition. Thus, the developer's own conduct shows that it is well aware that the R-2's prohibition on apartments is not a "development standard." In sum, under the plain language of the SDBL, which requires waivers only of "development standards" that are specified as such in a local general plan or zoning ordinance (here the Belvedere Zoning Code), the apartment prohibition is simply not a "development standard" that can or must be waived under the SDBL.[1]

Finally, the developer's revised density bonus application makes no effort to show how requiring compliance with the R-2's apartment prohibition would have the effect of "physically precluding the construction" of a project eligible for a density bonus, *i.e.,* by including a percentage of affordable units at the densities permitted by the SDBL. (Gov't Code § 65915(e).) The developer continues to provide no facts, evidence, or documentation to support its claim that General Plan density cannot be achieved with only duplex structures as expressly allowed in the R-2 zone. To the contrary, BRIG provided a schematic drawing by Alex Seidel, FAIA (Seidel Associates), showing the placement of 48 duplex units on the Project site that meet all development standards in the R-2 zone, with no waivers or variances needed. (*See* Attachment 5 to our July 1, 2002 letter.) There accordingly is no evidence showing that the R-2 zoning's apartment prohibition would "physically preclude" construction of a residential project at the General Plan-allowed density. Thus, even if the

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[1] The rules of statutory interpretation apply equally to state legislation and local ordinances. (*County of Madera v. Superior Court* (1974) 39 Cal.App.3d 665, 668.) If language is clear and unambiguous, "there is no need for judicial construction and a court may not indulge in it." (*Friends of the Juana Briones House v. City of Palo Alto* (2010) 190 Cal.App.4th 286, 303; *Diamond Multimedia Systems, Inc. v. Superior Court* (1999) 19 Cal.4th 1036, 1047).

apartment prohibition were to constitute a "development standard" under the SDBL (which it does not), the City would not be required to waive it for this Project.

The conclusion is inescapable and irrefutable: Even as modified by the developer's July 18 submission, the Project continues to be inconsistent with Belvedere Zoning Code Section 19.28.030. This means that for the Project to be approved, a rezoning would be required following all applicable requirements of the State Planning & Zoning Law. Moreover, the Project may not lawfully be approved under the streamlined process provided under SB 330 since it is not consistent with the City's Zoning Code.

Thank you for your consideration of these additional points.

MRW: