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Riley F. Hurd III
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October 7, 2022

Via E-Mail Only

Irene Borba
Director of Planning & Building
City of Belvedere
450 San Rafael Ave
Belvedere, CA 94920

Re: Mallard Pointe - Application update

Dear Ms. Borba:

Our office continues to represent Mallard Pointe 1951 LLC in connection with this project. We are writing to modify certain aspects of this application. Specifically, we are now seeking a waiver from a portion of the City's open space requirement, and a concession for relief from the prohibition on apartment homes in the R-2 zone.

There has been significant local commentary regarding whether the prohibition on apartment homes is a "development standard" eligible for a waiver. Much of this discussion is moot because the Government Code is very clear that an applicant is entitled to the maximum allowable residential density under the general plan. Here, said density could only be achieved with a multifamily apartment project, thereby obviating the need for a concession or waiver on this issue. However, given the strong opposition to new housing in Belvedere and the constant threats of litigation, we are taking a very thorough approach by now also seeking a concession for relief from the prohibition on apartment homes in the R-2 zone.

Pursuant to Government Code 65915 (d), this project is entitled to an incentive or concession. Government Code 65915 (k)(3), defines an incentive or concession as, among other things:



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- “a reduction in site development standards or a modification of zoning code requirements or architectural design requirements,” and,
- “other regulatory incentives or concessions proposed by the developer ... that result in identifiable and actual cost reductions to provide for affordable housing costs, as defined in Section 50052.5 of the Health and Safety Code, or for rents for the targeted units to be set as specified in subdivision (c).”

As demonstrated by this definition, concessions can be used for much broader types of regulations than just “development standards.” In fact, it has been confirmed by HCD that concessions can be applied to use restrictions, in addition to traditional development standards. (See December 14, 2021, HCD letter attached as **Exhibit A**.) Accordingly, we hereby seek a concession to allow the multifamily apartment component of the project. It is well-established that building apartments is more cost-effective on a per-unit basis than building duplexes or other less dense products. However, for the sake of certainty, attached as **Exhibit B** is a letter from Midstate Construction verifying the “actual cost reductions” that result from building apartments. The difference is not trivial, there is a 23% cost reduction amounting to \$3.75 million. This is exactly why the legislature instituted the concession process.

The previously requested open space concession is now sought as a waiver. While all of the single family and duplex lots contain the required amount of open space, a waiver is necessary for the apartment lot. The City’s code is convoluted in regards to the required amount of open space, but the project proposes 2,868 square feet where it appears 10,350 square feet is required for the apartment lot. Providing the full amount would make the project impossible to build.

Cal. Gov’t Code 65915 (e)(1) specifically states, “In no case may a city, county, or city and county apply any development standard that will have the effect of physically precluding the construction of a development meeting the criteria of subdivision (b) at the densities or with the concessions or incentives permitted by this section.” Here, providing the full amount of required open space would drastically reduce the density of the project and physically preclude the units from being built.



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Attached as **Exhibit C** is a graphical demonstration of the impact of providing the remaining 7,500 square feet of open space. Half the parking lot and 11 of the housing units would be eliminated from the apartment building. The eligibility for a waiver is clear. It should be noted that contrary to letters submitted by counsel for BRIG, case law has very clearly established that the applicant does **not** have to prove that a project could not be built in some other way that would lessen the need for waivers. (See *Wollmer v. City of Berkeley* (2011) 193 Cal.App.4th 1329, 1346 - 1347 and *Bankers Hill 150 et al., v. City of San Diego* (2022) 74 Cal.App.5th 755.)

The preliminary application for this project was made in June of 2021. The formal application was submitted in January of 2022. As of today's date, there has been no CEQA determination and no hearings held regarding the project. The changes to the application requested herein are technical in nature only, and do not change any physical aspect of the project or the plans.

We would ask that the City please promptly schedule a hearing on this project.

Thank you.

Very Truly Yours,

A handwritten signature in blue ink that reads 'Riley F. Hurd III'. The signature is written in a cursive, slightly slanted style.

Riley F. Hurd III

CC: Client
Barbara Kautz
Ann Danforth

EXHIBIT A

**DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT
DIVISION OF HOUSING POLICY DEVELOPMENT**

2020 W. El Camino Avenue, Suite 500
Sacramento, CA 95833
(916) 263-2911 / FAX (916) 263-7453
www.hcd.ca.gov



December 14, 2021

Chris Burton, Director
Planning, Building, and Code Enforcement Department
City of San Jose
200 E. Santa Clara Street
San Jose, CA 95113

Dear Chris Burton:

RE: City of San Jose – State Density Bonus Law, Letter of Inquiry and Technical Assistance

The California Department of Housing and Community Development (HCD) is responsible for administering State Density Bonus Law (SDBL). (Gov. Code, § 65915.) HCD is aware that the City of San Jose (City) is currently reviewing a housing development application for a 271-unit affordable housing project located at 1007 Blossom Hill Road (Project). The purpose of this letter is to inquire as to the status of the Project's SDBL application and to provide technical assistance to the City regarding the application of SDBL.

Background

On May 10, 2021, JEMCOR Development Partners (Applicant) submitted a preliminary housing development application to the City pursuant to Chapter 654, Statutes of 2019 (Senate Bill 330). On May 17, 2021, within the 180-day timeframe outlined in statute¹, the Applicant submitted a full application. The City is currently reviewing the full application.

The Project consists of 271 units (268 affordable units and three manager units). Due to the affordable units included in the Project, the applicant requests concessions, incentives², and waivers as allowed by SDBL. Two of the requested concessions are relief from:

- General Plan (GP) Policy IP-5.12, specifically, paragraph 3: "Development that demolishes and does not adaptively reuse existing commercial buildings should substantially replace the existing commercial square footage."

¹ Gov. Code, § 65941.1, subd. (d).

² The terms "concessions" and "incentives" are interchangeable. For purposes of this letter, HCD will use the term "concessions."

- City Council (CC) Policy 1-16: “The City of San Jose (the ‘City’) shall be the issuer of all bonds financing multifamily housing rental projects (a ‘Project’ or ‘Projects’) within the City except as provided...”

In the City’s September 29, 2021, correspondence to the Applicant, the City states that GP Policy IP-5.12 is ineligible as a concession under SDBL as the policy addresses a *use* requirement, not a *development standard*. [Emphasis added.] The statement implies the City believes concessions are limited to development standards. This is an incorrect interpretation of SDBL.

The September 29, 2021, correspondence is silent regarding the eligibility or approval of CC Policy 1-16 as a concession. Nor does the correspondence address whether the project falls under one of the exception categories described within the policy. The City has indicated to HCD³, “We have spoken to JEMCOR and the matter is under consideration.”

Under SDBL, concessions are not limited to development standards

While waivers are restricted to development standards under SDBL,⁴ Government Code section 65915, subdivision (k) provides a definition for concessions that is intentionally broad.

(k) For the purposes of this chapter, concession or incentive means any of the following:

(1) A reduction in site development standards or a modification of zoning code requirements or architectural design requirements that exceed the minimum building standards approved by the California Building Standards Commission as provided in Part 2.5 (commencing with Section 18901) of Division 13 of the Health and Safety Code, including, but not limited to, a reduction in setback and square footage requirements and in the ratio of vehicular parking spaces that would otherwise be required that results in identifiable and actual cost reductions, to provide for affordable housing costs, as defined in Section 50052.5 of the Health and Safety Code, or for rents for the targeted units to be set as specified in subdivision (c).

(2) Approval of mixed-use zoning in conjunction with the housing project if commercial, office, industrial, or other land uses will reduce the cost of the housing development and if the commercial, office, industrial, or other land uses are compatible with the housing project and the existing or planned development in the area where the proposed housing project will be located.

(3) Other regulatory incentives or concessions proposed by the developer or the city, county, or city and county that result in identifiable and actual cost

³ November 18, 2011 email from Kemit Mawakana to Robin Huntley.

⁴ Gov. Code, § 65915, subd. (e).

reductions to provide for affordable housing costs, as defined in Section 50052.5 of the Health and Safety Code, or for rents for the targeted units to be set as specified in subdivision (c).

The City's density bonus ordinance specifies the use of terms as they are defined in SDBL.⁵ The SDBL definition clearly indicates that requirements beyond development standards are eligible as concessions. In subparagraph 3, the statute clearly identifies *regulatory* requirements that are proposed by the applicant and result in identifiable and actual cost reductions as eligible incentives or concessions under SDBL.

SDBL allows the City to require reasonable documentation to establish eligibility for the requested concession, including documentation that demonstrates an identifiable and actual cost reduction. It is HCD's understanding that the Applicant has provided documentation to the City demonstrating cost reduction for both requested concessions.

Under SDBL, concessions shall be granted

Government Code section 65915, subdivision (d) requires cities to approve concessions unless specified written findings based on substantial evidence are made.⁶ The only reasons to deny a concession are:

- The concession does not result in identifiable and actual cost reductions.
- The concession would have a specific, adverse impact (as defined) upon public health and safety or the physical environment or on real property listed in the California Register of Historical Resources, and there is no feasible method to mitigate or avoid the impact.
- The concession would be contrary to state or federal law.

As GP Policy IP-5.12 and CC Policy 1-16 are eligible concessions, the City may only deny the request for concessions if one of the three preceding written findings are made.

Notably, Government Code section 65915, subdivision (r) declares, "This chapter shall be interpreted liberally in favor of producing the maximum number of total housing units." Therefore, if ever in doubt regarding SDBL, the City should make the decision that facilitates housing development.

Potential changes to City requirements

HCD is aware that the City is considering amending GP Policy IP-5.12. The December 14, 2021 City Council Staff Report for agenda item 10.4, on both page 5⁷ and page 12,⁸

⁵ San Jose Municipal Code Chapter 20.190.020-Definitions, subdivision A.

⁶ Gov. Code, § 65915, subd. (d)(1).

⁷ "Staff noted that currently, affordable housing projects are using concessions under density bonus law to significantly reduce the amount of commercial the projects would otherwise be required to provide and concessions may further reduce the commercial requirement."

⁸ "Staff found that projects which provide a certain level and number of affordable units can use density bonus law to reduce commercial obligations, providing flexibility under existing regulations."

confirms the eligibility of density bonus projects to use concessions to reduce the requirements of GP Policy IP-5.12. The statements imply the City has historically allowed relief from GP IP-5.12 as a concession under SDBL. Therefore, the City should not hesitate to approve a concession for relief from GP Policy IP-5.12 for the Project.

Additionally, language is proposed to exclude GP Policy IP-5.12 from eligibility under SDBL concessions or waivers.⁹ City ordinances do not supersede state laws. Therefore, given the broader context of concessions as defined in SDBL¹⁰, relief from GP Policy IP-5.12 would continue to be eligible as a concession regardless of an ordinance's declaration to the contrary.

As a reminder, under SB 330, the City may only apply ordinances, policies, and standards adopted and in effect when a preliminary application was submitted.¹¹ Therefore, applicability of GP Policy IP-5.12 is limited to the requirements in effect on May 10, 2021.

Conclusion

The City should identify GP Policy IP-5.12 and CC Policy 1-16 as eligible concessions under SDBL and deem the Project's application complete without further delay. Additionally, the City should advise the Applicant and HCD of its decisions regarding the Project.

As a reminder, AB 72 (Chapter 370, Statutes of 2017) expanded and clarified HCD's enforcement authority. Accordingly, HCD may review local government's actions and inactions to determine consistency with state law. If HCD finds that a city's act or omission does not substantially comply with state law, HCD may revoke its compliance finding for the housing element and may notify the California Office of the Attorney General that the local government is in violation of state law.¹²

If you have any questions, would like to discuss the content of this letter, or consult for technical assistance regarding SDBL, please contact Robin Huntley, of our staff, at Robin.Huntley@hcd.ca.gov.

Sincerely,



David Zisser
Assistant Deputy Director
Local Government Relations and Accountability

⁹ December 14, 2021 City Council Staff Report, Agenda Item 10.4, p. A-1.

¹⁰ Gov. Code, § 65915, subd. (k).

¹¹ Gov. Code, § 65589.5, subd. (o).

¹² Gov. Code, § 65585.

EXHIBIT B

MIDSTATE CONSTRUCTION

Building Relationships

October 4, 2022

To whom it may concern:

Midstate Construction estimated the cost of building duplex homes and apartments per the proposed plan for Mallard Pointe. Our analysis indicated that the duplex homes would cost approximately \$800 per net square foot and the apartment building would cost approximately \$650 per net square foot.

This 23% cost difference is due to a number of factors, most notably:

- The duplexes homes have more exterior skin per net square foot of interior space;
- The single-level apartments are more efficient to build than the multi-level duplexes;
- Rather than having individual utility services for each home, the apartment building has a single point of service;
- The parking solution for the apartment building (one garage for all the units) is less expensive to build than individual garages that are incorporated into the duplexes;
- The foundation and roof design of the apartments is simpler and more efficient for the apartments; and
- There is less earthwork, landscaping, and exterior decking for the apartments than for the duplexes.

Consequently, if the same square footage of the apartments (25,000 net square feet) were built in duplex formats, the cost would increase by **\$3,750,000**. Please note that this analysis does not take into account the smaller unit sizes of the apartments, which if replicated in a duplex, would create further inefficiencies and result in an even greater cost differential.

Let me know if you have any questions. We look forward to building this project.

Sincerely,

MIDSTATE CONSTRUCTION



Pat Draeger
Vice President, Estimating

EXHIBIT C



Ground Floor Context Plan

MALLARD POINTE

Belvedere, California

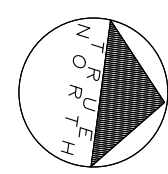
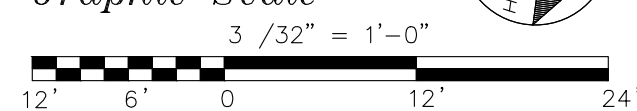
MALLARD POINTE
1951 LLC
Project Sponsor



MF1

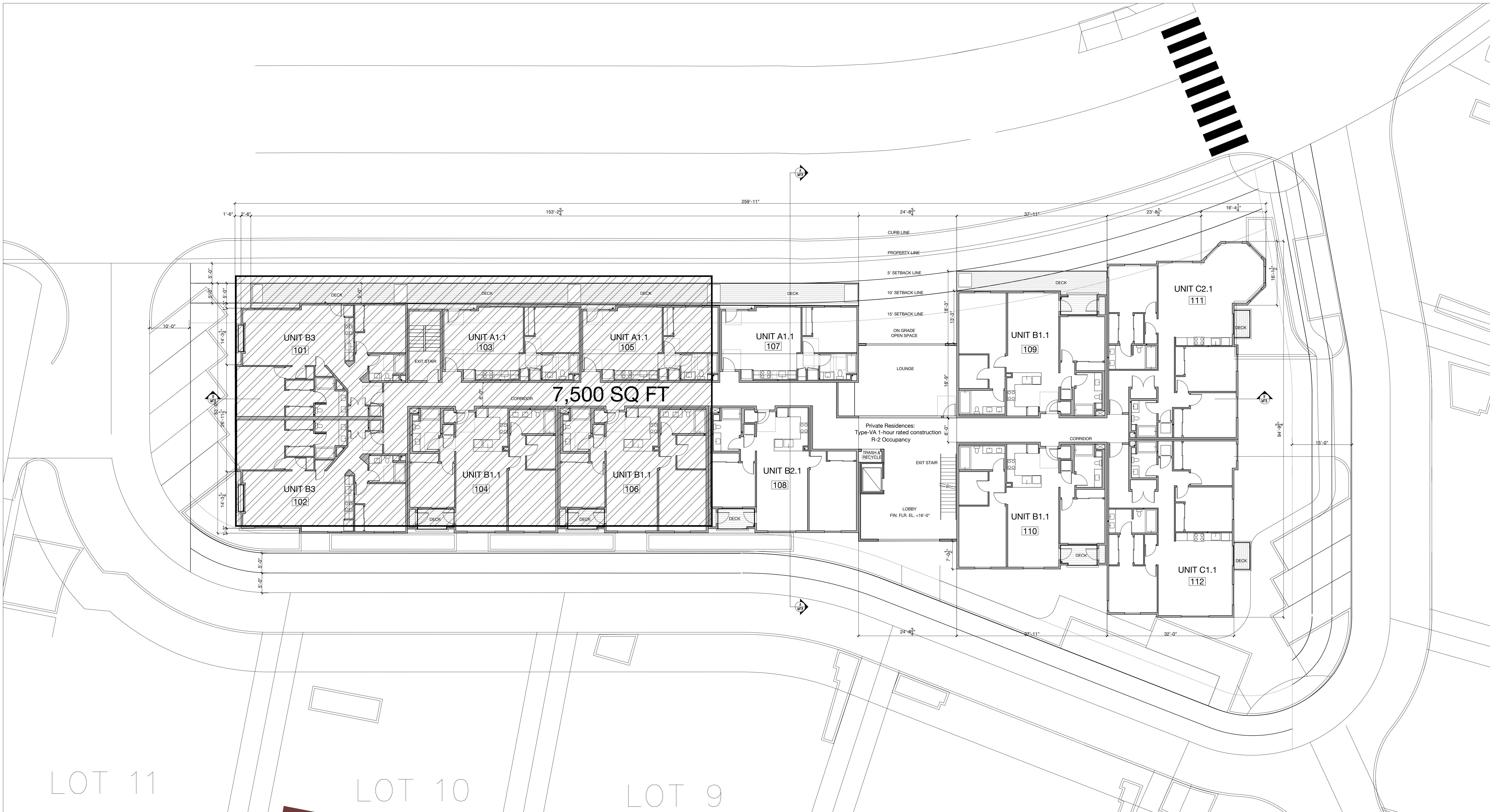
May 23, 2022

Graphic Scale



Francis Cough
Architect, Inc.

415.613.5822
francis@fcg.com



First Floor Context Plan

MALLARD POINTE

Belvedere, California

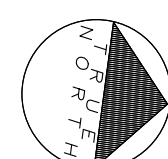
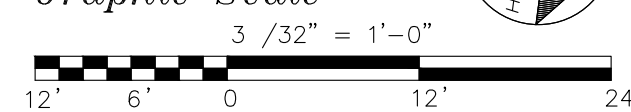
MALLARD POINTE
1951 LLC
Project Sponsor



MF2

May 23, 2022

Graphic Scale





Second Floor Context Plan

MALLARD POINTE

Belvedere, California

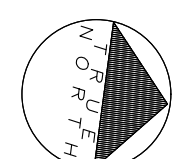
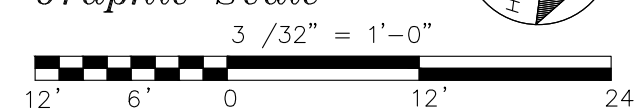
MALLARD POINTE
1951 LLC
Project Sponsor



MF3

May 23, 2022

Graphic Scale



FRANCIS GOUGH
ARCHITECT INC.

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