



Ragghianti|Freitas LLP

MEMORANDUM

DATE: January 20, 2022
FROM: Riley F. Hurd III
RE: Housing Law Analysis for Mallard Pointe

EXECUTIVE SUMMARY

1. The Mallard Pointe project proposes 39 new residential units and 3 ADUs in place of 22 dated market-rate residential units.
2. The General Plan allows for 56 units at the property. To ever come close to reaching this unit count, some form of multifamily (i.e. apartment) housing would be required in order to fit the units on the site.
3. The Housing Element, a part of the General Plan, states that multifamily housing is allowed in the R2 zone. In contrast, the older zoning code prohibits "apartment houses."
4. It is well-settled law that general plans control when in conflict with a zoning ordinance, and that general plans are required to be internally consistent.
5. More importantly, state law is clear that if the density allowed under the zoning ordinance is inconsistent with the density allowed under the general plan, the general plan density shall prevail.
6. As a housing project providing a percentage of affordable units, Mallard Pointe is entitled to waivers of any local law, policy, or regulation that physically precludes development at the allowable density. This includes a purported ban on apartments, height limits, and any other standard that prevents the full project.

Introduction

The purpose of this memorandum is to analyze the framework of state and local housing laws applicable to the Mallard Pointe project. These laws inform the planning process for the project, which is also addressed herein.

The Project

Mallard Pointe (the "Project") is a proposed new residential development to be located on Mallard Road in Belvedere, CA (the "Property"). The size of the Property is 2.8 gross acres, and 2.4 net acres (subtracting Mallard Road).

The Project proposes 39 new residential units on 12 newly configured lots. Of these units, 23 would be apartments contained in a single building, 10 would be contained in a series of 5 duplexes, and the remaining 6 would be freestanding single-family homes. Of the single-family homes, 3 are proposed to have Accessory Dwelling Units ("ADUs") on their respective lots. ADUs are not counted towards density calculations pursuant to state law and Belvedere Municipal Code ("BMC") 19.79.050(G).

Of the 39 units, 2 are currently proposed to be restricted to very low-income occupants, and 2 are currently proposed to be restricted to moderate income residents.

General Plan and Zoning

The Property is designated as Medium Density Multifamily Residential (MFR) in the City's General Plan, and is zoned R-2. The MFR General Plan designation has a density range of 5 to 20 units per net acre, and anticipates 13.5 to 54 persons per acre. (General Plan, p. 25.)

In contrast to the General Plan, the R-2 zoning uses a density formula of lot area/unit, with a requirement that varies based on bedroom count. Units with 2 or fewer bedrooms require 3,000 square feet of lot area, and units with 3 or greater bedrooms require 4,000 square feet of lot area. (BMC 19.28.040.) The R-2 zoning also implements various additional development standards such as setbacks, lot coverage, FAR, and height limits.

The R-2 zone allows for single family homes and duplexes, but prohibits “apartment courts” and “apartment houses.” (BMC 19.28.030.) However, multiple sections of the City’s General Plan, specifically within the Housing Element, explicitly state that multifamily housing, not just duplexes, is allowed in the R-2 zoning district.

Table 36 on page 59 in the Housing Element identifies the “permitted” and “conditionally permitted” housing types in the various Belvedere zoning districts. This table is unequivocal that multi-family housing is permitted as a matter of right in the R-2 zoning district:

Table 36: Housing Types by Residential Zoning Districts

Housing Types Permitted	Residential Zoning District					
	R-1C	R-1L	R-1W	R-1S	R-2	R-3, R-3C
Single-family	P	P	P	P	P	P
Multi-Family					P	P
Second Unit	P	P	P	P	P	P
Duplex					P	P
Mfg. Housing	P	P	P	P	P	P
Congregate Housing	P	P	P	P	P	P
Transitional Housing	P	P	P	P	P	P
Supportive Housing	P	P	P	P	P	P
Care Facility (6 or fewer)	P	P	P	P	P	P
Care Facility (7 or more)	C	C	C	C	C	C

P=Permitted P=Conditionally Permitted

Importantly, Table 36 distinguishes between “multi-family” and “duplex” housing types, and allows both in the R-2 zone.

The Housing Element doubles down on the allowance of multifamily housing in the R-2 zone on page 61 with the following statement:

“The Zoning Ordinance provides for multi-family developments by-right in the R-2 and R-3 Zoning Districts,”

It is well-settled that zoning codes must be consistent with general plans. (*Government Code* § 65860(a).) This concept is known as “vertical consistency,” and requires that the subservient document, the zoning code, be consistent with the document at the top of the hierarchy, the general plan. The test for consistency is whether the zoning ordinance “furtheres the objectives and policies of the general plan and does not obstruct their attainment.” (*City of Morgan Hill v. Bushey*, (2018) 5 Cal.5th 1068, 1080; See also, *Gov. Code* §65860(c).)

It is self-evident that a zoning code provision prohibiting “apartment houses” does not further the clear policy of the general plan allowing not just duplexes, but true multifamily development in the R-2 zone. The R-2 prohibitions clearly obstruct the attainment of the relevant General Plan goals and policies (particularly the density), are vertically inconsistent with the General Plan, and are therefore inapplicable to the Project.

To the extent a general plan is internally inconsistent, the zoning is invalid. (*Sierra Club v. Bd. of Supervisors* (1981) 126 Cal.App.3d 698, 704.) Here, there is an arguable contradiction between the Land Use Element of the General Plan and the Housing Element. However, each of these elements are of equal legal status; the recently adopted Housing Element cannot be read as subordinate to the previously adopted Land Use Element. The two must be reconciled, and the proper reconciliation is that multifamily use is allowed in the R-2 zone.

It is noted that the municipal code section applicable to the R-2 zoning district, Title 19.28, was adopted in 1989, while the current Housing Element was adopted on May 11, 2015. Clearly, the zoning code has not been timely updated to be consistent with the general plan as required by *Government Code*, Section 65860(c). Also, the Housing Element was a commitment to the State, and the promises therein are what led to certification by HCD.

As will be discussed below, the issue of inconsistencies within the City’s planning documents is squarely addressed by state housing law, thereby somewhat obviating the need to rely on the traditional general plan case law cited above to establish what the maximum density is for the Property and that true multifamily housing is allowed in order to achieve said density.

Density

Pursuant to the MFR General Plan Designation, the Property has an allowable density range of 12 to 48 units if Mallard Rd were to remain. However, in a development program that no longer utilized an interior roadway, the allowable density would range from 14 to 56 units. Determining the allowable density under the R-2 zoning is a less precise calculation because the lot area/unit formula would need to be applied to a hypothetical project and bedroom count. Assuming a reasonable mix of unit sizes and duplexes only, the R-2 lot would yield between approximately 28 and 32 units after considering the necessary minimum lot sizes.

If there is a disparity between the density permitted under the General Plan, and that of the zoning, the General Plan prevails. The Project is a "housing development" as defined by Government Code, Section 65915. Because the Project will incorporate a percentage of Below Market Rate units, Government Code 65915(o)(4) applies, which defines the "Maximum allowable residential density" as:

"the density allowed under the zoning ordinance and land use element of the general plan, or, if a range of density is permitted, means the maximum allowable density for the specific zoning range and land use element of the general plan applicable to the project. If the density allowed under the zoning ordinance is inconsistent with the density allowed under the land use element of the general plan, the general plan density shall prevail."

The "Maximum allowable residential density" definition above confirms two things:

1. If there is a disparity between the density permitted under the General Plan, and that of the zoning, the General Plan prevails.
2. If there is a range of density set forth in the General Plan, the top end of the range is the applicable density.

Accordingly, the allowable base density for the Property is 56 units (48 units if the road remains.)

State Density Bonus Law

Because the Project is a "housing development" that will incorporate a percentage of Below Market Rate units, the applicants can avail themselves of the provisions of the State Density Bonus Law ("SDBL"). (Government Code 65915 et seq.)

Because the Project includes 5% Very Low income units, the Project is entitled to a density bonus of 20%. (Government Code 65915(f)(2).) Accordingly, **68 units are permitted on the Property** (56 + 20%). However, the applicant has elected not to seek the additional units, and is applying for 39 at this time.

Although the Project does not seek the density bonus units, it is still entitled to waivers, concessions, reduced parking standards, and all other provisions of the SDBL because of the inclusion of the Below Market Rate units. (Government Code 65915(f).)

Government Code 65915(e)(1), states: "In no case may a city ... apply any development standard that will have the effect of physically precluding the construction of a development" that includes a certain percentage of BMR units.

Government Code 65915(o)(1) defines "Development standard" as:

"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."

Here, there are multiple development standards within the R-2 zone that would physically preclude a project at the "maximum allowable residential density." Perhaps the most significant is the standard prohibiting apartment houses, and only allowing duplexes. As noted above, only 28-32 units could be built if only duplexes were allowed. Accordingly, the apartment prohibition *must* be waived by the City, as it physically precludes the development.

The same rationale applies to the height limit, certain required setbacks, the lot area/unit calculation, and lot coverage on a per lot basis, each of which must be waived in order to fit the Project on the Property.

If a city refuses to grant a needed waiver or reduction of development standards, an applicant is entitled to recover reasonable attorney's fees and costs of suit in any enforcement action. (Government Code 65915(e)(1).)

SB 330 Preliminary Application

The Project applicant submitted a complete Preliminary Application pursuant to SB 330 on August 6, 2021. The primary effect of submitting the Preliminary Application is that the Project is only subject to Belvedere's ordinances, policies, standards, and fees in place as of August 6, 2021. (Govt. Code 65589.5 (o)(1).) For example, assuming the full Project application is submitted within 180 days of August 6, 2021, the Objective Design and Development Standards (ODDS) currently being considered for adoption by the City would not be applicable to the Project, as they were not in place as of August 6, 2021.

Project Processing

Multiple provisions of state law govern the City's processing of the Project. Certain key provisions include the following:

- The Project is only required to comply with objective development standards.
- The Property does not need to be rezoned if the zoning is inconsistent with the General Plan.
- The City may only deny the Project, or reduce it in size, if there is a specific, adverse impact on public health or safety that cannot be mitigated.
- The Project may only be considered at a maximum of 5 hearings.
- The Project must be approved within certain timeframes based on the level of environmental review.

The Housing Accountability Act ("HAA") greatly limits a city's ability to reject or reduce housing development projects that comply with "applicable, objective general plan and zoning standards and criteria." (Govt. Code § 65589.5(j).)

Very importantly, a proposed housing development project is **not** inconsistent with the applicable zoning standards and criteria, **and shall not require a rezoning**, if the housing development project is consistent with the objective general plan standards and criteria, but the zoning for the project site is inconsistent with the general plan. A local agency may require a project to comply with the objective standards and criteria of the zoning that **are** consistent with the general plan, however, the standards and criteria shall be applied to **facilitate and accommodate development at the density allowed on the site** by the general plan and proposed by the proposed housing development project. (Govt. Code § 65589.5(j)(4).) Accordingly, because the R-2 zoning is inconsistent with the MFR General Plan designation, **a rezoning is not required for the Project.**

It is important to note that AB 1584 amended the HAA to clarify that the receipt of an incentive, concession, waiver, or reduction of development standards under the SDBL is **not** a valid basis on which to find a proposed housing development project inconsistent with an applicable plan, program, policy, ordinance, standard, requirement, or other similar provision for purposes of the HAA.

Once it is established that a project complies with applicable objective standards, a city's discretion to disapprove or reduce the density of the project is very limited. A City can only disapprove a project or reduce its density if the city can prove, based on a preponderance of the evidence, that the project will have **unavoidable public health and safety impacts**, which "must be a "significant, quantifiable, direct, and unavoidable impact, based on objective, identified written public health or safety standards, policies, or conditions as they existed on the date the application was deemed complete." (Govt Code 65589.5 (j)(1)(B).) Furthermore, it must be proven that any such impacts cannot be mitigated. The State Legislature has emphasized its expectation that this type of "public health or safety" impact will "arise infrequently." (Govt Code 65589.5(a)(3).) So, other than determining noncompliance with applicable objective standards, **this is the only manner in which the Project could be denied or reduced by the City.**

Conclusion

- The allowable density for the Property is 48-56 units, with an opportunity to go higher with a density bonus.
- A zoning change is not required in order to allow an apartment building at the Property.
- Only objective development standards consistent with the General Plan can be considered by the City.
- Any development standards that physically preclude the construction of the Project must be waived.
- The Project can only be denied if it does not comply with the objective development standards or if it poses a significant threat to public health or safety that cannot be mitigated.