

July 17, 2023

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Robert Zadnik, Belvedere City Manager  
James Lynch, Belvedere Mayor  
450 San Rafael Avenue  
Belvedere, CA 94920

Re: Proposed Mallard Pointe Development

Dear Mr. Zadnik and Mr. Lynch,

On behalf of the Belvedere Lagoon Property Owners Association (“BLPOA”), thank you for the conference call regarding the proposed Mallard Pointe Development (“the Project”) on the shore of the Belvedere Lagoon. BLPOA officers and members appreciated the opportunity to speak with you along with City staff and consultants about the BLPOA’s concerns. As you know the BLPOA is NOT a homeowner association. It is a property owners association. This letter is to follow-up to clarify and elaborate on the BLPOA’s concerns voiced during the call.

It is in a spirit of cooperation and collaboration that we seek a more thorough examination of the Project. Most importantly, we believe the BLPOA and the City share the same objectives and responsibilities when it comes to protecting and preserving the Lagoon.

BLPOA’s concerns arise from its obligations for management and protection of the Lagoon. The Lagoon serves as a recreation area for swimming, boating and fishing; an aesthetic amenity; an ecological resource; and a critical element of storm water management and flood control for Tiburon and Belvedere. BLPOA manages the Lagoon to optimize these values and benefits. It is from this perspective that these comments have been prepared.

After reviewing the Project, BLPOA has concluded that the Project does not, as claimed by the Project proponent, qualify for a categorical exemption from environmental review, and even if it did, there is at the very least a reasonable possibility of significant effects on the environment due to unusual circumstances that preclude application of a categorical exemption.

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### **CEQA Guidelines**

The Project proponents seek an exemption from the California Environmental Quality Act (“CEQA”) as a Class 32 In-Fill Development Project pursuant to Public Resources Code (“PRC”) Section 15332 (“Class 32 Exemption”). Among the conditions for a Class 32 Exemption is the following:

“(d) Approval of the project would not result in any significant effects relating to traffic, noise, air quality or water quality.” PRC Section 15332(d).

Even if the Class 32 Exemption were nominally applicable to the Project, other CEQA provisions would disqualify the Project from exemption:

“(c) A categorical exemption shall not be used for an activity where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances.”

PRC Section 15300.2 (c) (the “Exemption Exception”).

As explained below, the history and conditions of the Project site along the Belvedere Lagoon make it virtually impossible to conclude that the Project would not result in any significant effects to water quality. The Class 32 Exemption is therefore inapplicable. Moreover, and in any event, the unique features of the Lagoon and the location of the Project along its shore present unusual circumstances that evoke the Exemption Exception and disqualify the Project from the Class 32 Exemption.

The information provided by the Project proponent has not been sufficient to allow a meaningful evaluation of the Project’s environmental impacts. BLPOA urges the City to deny the exemption request and to prepare an Initial Study under PRC Section 15063 to examine whether there may be significant environmental impacts from the Project. These comments address these two CEQA provisions.

### **Class 32 Exemption – Inapplicable due to Water Quality Impacts**

As the steward of the Belvedere Lagoon and on behalf of the community, BLPOA actively manages the Lagoon and attends its other concerns with water quality at top of mind. Good water quality is essential to several management objectives, including recreation, habitat, and aesthetics. Lagoon staff regularly tests Lagoon water for salinity, pH, turbidity, dissolved oxygen, and temperature. Additionally, BLPOA must adhere to the mandates and restrictions of its NPDES<sup>1</sup> permit, which include reporting of water quality test results. If there were to be an

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<sup>1</sup> NPDES (National Pollutant Discharge Elimination System) Permits are a requirement of the Federal Clean Water Act, 33 USC 1351 et seq.

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impact to water quality resulting from the Project, the Regional Water Quality Control Board would be expected to turn to BLPOA, as manager of the Lagoon, with questions or to direct an investigation, as it has done in the past.

Given its role and responsibilities for managing and protecting the Lagoon, BLPOA is concerned about the potential impacts to water quality from the Project, including demolition, grading, excavation, construction, and bulkhead repair/replacement, collectively referred to as “Construction Activities.” The primary concern is that Construction Activities will cause a discharge or release of sediment, a pollutant, into the Lagoon. As described below, sediment would be released by slumping or sloughing along the shoreline or under the waterline due to operation of heavy equipment, application of fill, pile-driving, bulkhead failure, stormwater runoff, and settlement of fill material. The high likelihood of sediment release establishes the reasonable possibility that the Project will have a significant impact on water quality in the Lagoon.

#### 1. Construction Activities Will Release of Sediment to the Lagoon

The fill used to create the Project site when the Lagoon was constructed over 70 years ago<sup>2</sup> includes dredged bay mud, which is fine-grained material that causes turbidity when suspended in water. Disturbance of this fill material during demolition, excavation, surface grading, or construction is more than likely to result in the release of sediment to the Lagoon. Sediment (and legacy pollutants possibly within the fill material) may be transported by both wind and storm runoff into the Lagoon. Slumping evident along the shoreline of the site and the aged condition of the bulkhead indicate fill material, below water as well as above, will be prone to sloughing off or collapsing into the Lagoon during site Construction Activities. Visual inspection of the bulkhead along the roughly 920 linear feet of Project shoreline shows that the entire area is already showing signs of slumping and bulkhead failure, which will be unable to withstand the high impact and stress load from the Construction Activities.

Additionally, modern methods of fill engineering in practice now were not employed in the 1940s, and consequently, the site and surrounding properties will be vulnerable to liquefaction and settlement during construction from vibration associated with heavy equipment use and pile driving. These activities can also resuspend sediment in the Lagoon, either directly, or by accelerating slumping of shoreline sediment or the existing bulkhead.

#### 2. Bulkhead Work Will Release Sediment to the Lagoon

Work associated with the bulkhead, including excavation, removal, repair, or replacement of the existing bulkhead, will undoubtedly release sediment directly into the Lagoon. BLPOA is

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<sup>2</sup> The Belvedere Lagoon was impounded and dredged in 1947.

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particularly concerned about the scale of in-water work associated with the bulkhead. Because the affected bulkhead is some 920 linear feet (three times the length of a football field), the sediment released and resulting turbidity may overwhelm the Lagoon and compromise water quality for weeks or months.

It is not only *how* this is done that will affect the Lagoon, but also *when* it is done. Bulkhead work undertaken as a final phase of site construction, as proposed, causes great concern because of the likelihood of damage to or even failure of the existing bulkhead during construction. If the bulkhead is not replaced first, heavy equipment use during demolition, grading and pile-driving may damage or cause the collapse of weak or unstable portions of the existing bulkhead, potentially resulting in a substantial release of sediment to the Lagoon, reducing its capacity and degrading water quality. Given the definition of sediment as a “Pollutant,” sediment-laden water cannot be released from the Lagoon to Richardson Bay. If a construction-caused incident were to occur in Spring or Summer, turbidity would be present during the season of high recreational use. More critically, if an incident were to occur from Fall through Spring, turbidity could prevent BLPOA’s seasonal drawdown of the Lagoon for flood control, putting hundreds of homes and other public and private property in the AE Flood Zone at risk of flooding.<sup>3</sup>

BLPOA has other concerns related to the bulkhead. The bulkhead serves as an important structural element at the interface of the Lagoon and the Project site. A structurally sound bulkhead protects the water quality of the Lagoon, and protects the structural stability of the fill behind it, controlling settlement, providing seismic stability, and limiting movement of groundwater from fill material into the Lagoon, which could transport any contaminants in the fill. Settlement and slumping of the existing bulkhead indicate not only that its structural integrity is compromised (probably along its full length), but that it does not provide an effective barrier between the fill and the Lagoon. As a result, given that the bulkhead is the original construction dating from the 1950s, without any lateral support across its 920-foot length, and at a high risk of failure causing substantial damage, it should be replaced in its entirety. At present, it appears the Project proponent’s intent is to merely shore it up. BLPOA has seen no plans showing bulkhead design or any information about how it will be constructed to protect the Lagoon from negative water quality impacts and loss of capacity. It appears the Project proponent intends to put off plans for the bulkhead until *after* Project approval, working out the design and structural elements in coordination with the City Building Department. BLPOA is

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<sup>3</sup> Also within the 100-year flood hazard zone are the lower parking lot and entrance to the Belvedere Police Department, Community Center and City Hall, a pre-school, and commercial center.

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very concerned that without a fully vetted plan from the outset, the Building Department process will result in unintended consequences to the Lagoon for decades to come.

### 3. Additional Fill Could Release Additional Sediment

The shoreline elevation of the Mallard Point site is one of the two lowest locations on the Lagoon. We understand that up to four feet of additional fill may be necessary to satisfy FEMA requirements or City Floodplain Management Requirements.<sup>4</sup> BLPOA is concerned that the weight of any additional fill may, over time, squeeze sediment and contaminants in the fill directly into the Lagoon.

There are other ramifications of building on historic fill prone to settlement, including, for example, the need to install pilings to provide a stable building foundation, which not only causes noise interference to neighboring properties, but as noted above, may cause liquefaction and settlement, damaging structures and bulkheads on neighboring properties and discharging sediment into and within the Lagoon.

The Preliminary Geotechnical Report dated January 2, 2022, submitted by the Project proponent and “updated” on October 6, 2022, lacks site-specific information and is too general to enable meaningful evaluation of risks.<sup>5</sup> A “preliminary report” may suffice for a small, simple project; but the proposed Project along 920 linear feet of Lagoon shore is a substantial project in size and scope given its location. No project of this size has occurred on the Lagoon since the Lagoon was developed in the 1950s.

Without an understanding of the plans for bulkhead work or the structural integrity of the existing fill in this location, it is impossible for the City to determine that the Project will meet the conditions of Class 32 Exemption (i.e., not result in any significant effects relating to water quality or noise.) Project approval should not proceed without a proper substantive geotechnical study of the Project Site.

### 4. Sediment Impairs Water Quality

Sediment is widely recognized as a water pollutant that causes turbidity, compromises water quality, and impairs the beneficial uses of receiving waters. It is defined as a “pollutant” in federal, state and local laws regulating water quality,<sup>6</sup> and a release of sediment above

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<sup>4</sup> See, e.g., Municipal Code 16.20.020-16.20.035; 16.20.300-16.20-320.

<sup>5</sup> BLPOA’s concerns are heightened by the April 16, 2022 comments of Dr. Lawrence B. Karp submitted April 27, 2022 and June 16, 2023 to the City by the Belvedere Residents for Intelligent Growth (“BRIG”). BLPOA is not a member of BRIG.

<sup>6</sup> For example, suspended sediment, known as total suspended solids or TSS, is a conventional pollutant under the Federal Clean Water Act (40 CFR 401.16). The State NPDES General

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permitted thresholds into the Lagoon would violate federal, state and local laws (including the Belvedere Municipal Code.)

Suspended sediment degrades wildlife habitat and interferes with biological processes such as by clogging fish gills, impeding larval development, curtailing photosynthesis, and disrupting natural food chains. Decaying vegetation, particularly in warmer water, depletes dissolved oxygen, potentially to levels too low to support fish and other aquatic organisms. It is also possible the fill material contains legacy contaminants, as has been found elsewhere in the Bay Area, that could be released to the Lagoon. Depending on the type of contaminants, their release into the Lagoon could pose a risk to human health and safety for those in water-contact recreation, as well as for wildlife and habitat.

Because of the unique features of the Belvedere Lagoon and the fine grain size of bay mud, sediment released by the Project to the Lagoon will persist in suspension for an extended period, perhaps many weeks, potentially aggravated by windy conditions. Unlike other enclosed waters in the Bay Area, the Belvedere Lagoon is not tidal, but is effectively isolated from San Francisco Bay, except for seasonal management of water levels.<sup>7</sup> Because of this, there is no regular flushing of the water to the Bay. Additionally given that sediment is a recognized pollutant, the existence of suspended sediment in Lagoon waters could prevent BLPOA from releasing water into Richardson Bay as needed and expected by BLPOA and the Cities of Belvedere and Tiburon for stormwater management and flood prevention.

#### 5. Sediment Could Reduce Lagoon Capacity

In the winter, the Lagoon serves as a catch basin for stormwater runoff from portions of Belvedere and Tiburon, preventing flooding of buildings (including some 250 Belvedere homes), public streets and utilities. Any sediment released to the Lagoon ultimately settles in the Lagoon, making it shallower and reducing its capacity for stormwater runoff. A significant release of sediment from the Project will hasten that process. Ultimately, sedimentation in the Lagoon will require the Cities of Belvedere and Tiburon to reduce their reliance on the Lagoon

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Permit for Stormwater Discharges Associated with Construction and Land Disturbance Activities, NPDES No. CAS000002, which defines TSS in Attachment B, is largely focused on preventing the discharge of sediment from construction sites. Sediment is within the scope of "Pollutant" under the Belvedere Municipal Code (Sec. 8.36.030 P.).

<sup>7</sup> In the fall, BLPOA lowers the level of the Lagoon significantly to provide catchment capacity for storm runoff to prevent flooding of surrounding properties, roads and portions of the greater Belvedere and Tiburon communities. Additional releases of water may occur throughout the rainy season as needed following, or in advance of, storm events to maintain the catchment capacity. In the spring, the Lagoon is filled with saline bay water, and topped off periodically over the summer to replace evaporated water and maintain optimal levels.

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for flood control, reroute runoff away from the Lagoon, or undertake dredging of the Lagoon, which will be very costly. Additionally, FEMA may revise its map to expand the flood zone, designating a larger number of homes vulnerable to flooding.

#### 6. Water Quality of Stormwater Runoff

BLPOA is concerned about the quality of stormwater runoff to the Lagoon over the long-term following construction. Recognizing that current requirements for site features to address stormwater quality post-construction are far superior to the era of original construction, BLPOA is optimistic that as a result of the Project, the water quality of stormwater runoff from the Project site may be improved. However, the constituents in fill material should be taken into consideration, along with the discharge of water pumped from the underground garage of the apartment building, which would contain vehicle-related pollutants such as petroleum, volatile organic compounds, and heavy metals. New construction materials may leach contaminants as well. A high level of stormwater treatment will be necessary to protect Lagoon water quality. And, the volume of stormwater discharged from the Project site to the Lagoon will increase if the area of impervious surface is greater. BLPOA has insufficient information to know whether this will be significantly more than at present.

#### 7. Further Investigation of Water Quality Issues is Essential to Evaluate Applicability of the Class 32 Exemption

The City initiated a biological investigation to determine if the Project site contains any habitat for endangered, rare or threatened species (*see*, PRC Section 15332(c)), although as a fully developed site, this would appear unlikely. By contrast, the disturbance of fill material and Lagoon sediment in the demolition and construction of the Project would seem quite likely to release contaminants to the Lagoon, and should prompt a site-specific geotechnical investigation *before* Project approval. Just as the City sought an investigation to determine if the Project meets condition (c) of the Class 32 Exemption, it should undertake an investigation to determine if the Project meets condition (d) of the Class 32 Exemption (*see*, PRC Section 15332(d)).

With uncertainty about a potential environmental impact, it is incumbent on the City to err on the side of environmental review and find the Class 32 Exemption inapplicable. *See*, *Sierra Club v. County of Sonoma* (1992) 6 Cal.App 4<sup>th</sup> 1307, 1316-17 (In the context of the initial preparation of an EIR, Section 21151 “reflects a preference for resolving doubts in favor of environmental review when the question is whether such environmental review is warranted.”)



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### **Class 32 Exemption – Inapplicable to Project Not Substantially Surrounded by Urban Uses**

The fundamental assumption of the Class 32 Exemption is that urban infill projects meeting the criteria of the exemption typically do not have significant environmental impacts. One criterion is that Projects exempt by Class 32 Exemption must be “substantially surrounded by urban uses,” which means at least 75% of the perimeter adjoins urban uses. PRC Sections 15332(b), 21159.25(a)(2). The Project is not even close to being substantially surrounded by urban uses -- only 44% of the Project perimeter is adjacent to urban use. The balance of the perimeter is bordered by the Lagoon. BLPOA refers to and agrees with BRIG’s analysis and finding that the Lagoon is NOT an urban use.<sup>8</sup> The Class 32 Exemption is thus not applicable to the Project.

### **The Exception to the Categorical Exemption Applies**

Even if the Project were eligible for the Class 32 Exemption – which it is not – the CEQA Guidelines provide that a categorical exemption “shall not be used for an activity where there is a **reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances.**” PRC Section 15300.2 (c); boldface type added for emphasis. The inquiry is analyzed in two steps.

First, unusual circumstances may be established by some feature of the proposed project that distinguishes it from others in its exempt class, such as size or location. *Berkeley Hillside Preservation v. City of Berkeley*, 3/2/2015, 60 Cal.4th 1086, 1105; 184 Cal.Rptr.3d 643, 658. Additionally, the determination of unusual circumstances can be based on conditions in the immediate vicinity of a proposed project. *Berkeley Hillside* at 60 Cal.4th 1118, 184 Cal.Rptr.3d 669. This is essentially a factual inquiry. *Berkeley Hillside* at 60 Cal.4th 1114, 184 Cal.Rptr.3d 665.

The second question is whether the unusual circumstances give rise to a reasonable possibility that the project will have a significant effect on the environment. *Berkeley Hillside* at 60 Cal.4th 1105, 184 Cal.Rptr.3d 658. It is sufficient to show a potential environmental effect, and agencies should find for the exception if there is a fair argument for a potential environmental effect. *Berkeley Hillside* at 60 Cal.4th 1115, 184 Cal.Rptr.3d 666.

As explained below, the unusual circumstances of the proposed Project relate primarily to its location on historic fill and adjacent to a unique, enclosed waterbody, and its large scale in the context of the local neighborhood. There is a reasonable possibility of significant environmental effects due to these factors, including water quality of the Lagoon, damage to nearby structures

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<sup>8</sup> See the Letter from Mark Wolf dated April 27, 2022, pages 4-5.



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including the bulkhead, diminished floodwater capacity of the Lagoon, and flood risk due to operational constraints during construction.

### 1. Unusual Circumstances Distinguish the Project from Typical Infill Development.

The location of the Project on historic fill along the shore of Belvedere Lagoon is an unusual circumstance for typical “infill” developments subject to Class 32 Exemption. First, as noted above, the site is on historic fill that was not engineered as it would be today. While projects on historic fill are not uncommon in the Bay Area, most “infill” projects are surrounded by developed land in urban use. The proposed Mallard Pointe Project, in contrast, is on historic fill adjacent to a waterbody (a non-urban use) on 56% of its perimeter, and separated by a 70-year-old bulkhead. Thus, unlike most urban infill projects that are physically supported by surrounding land, the Project is weakly supported by an aged bulkhead.

Belvedere Lagoon itself is unique among enclosed or semi-enclosed waters in the Bay Area. It is the only enclosed waterway in the San Francisco Bay Area that is physically and, with limited exception, hydraulically isolated from San Francisco Bay.<sup>9</sup> It is not subject to the daily fluctuations of the tides, unlike all other similarly situated waters.

The Project is unusual within the context of the Lagoon. First, other Lagoon projects are undertaken for individual homes, not multiple homes. There has not been a major residential project of this size since the original development in the 1950s. Second, most of the lots on the Lagoon typically border the Lagoon on only one of four sides. Size and scope of a project in the context of conditions in the immediate vicinity are appropriate in the evaluation of unusual circumstances under Section 15300.2 (c). *Citizens for Environmental Responsibility v. State ex rel. 14th Dist. Ag. Assn.* CA Court of Appeal, Third District 11/23/2015, 242 Cal.App.4th 555, 195 Cal.Rptr.3d 168. The Project thus has much greater potential to impact the Lagoon because six large single-family homes, one with an ADU, five duplexes, and a multi-story 23-unit apartment house with a subterranean garage will be under construction exposing 920 linear feet of Lagoon shoreline to Construction Activities.

### 2. Significant Environmental Impacts Due to the Unusual Circumstances

As explained above, fill material is vulnerable to settlement, subsidence and liquefaction. These processes are accelerated and magnified by vibrations of heavy equipment and pile driving from Construction Activities, resulting in structural weakening of fill material and damage to, or

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<sup>9</sup> As described above, gates are kept closed except for a short period in spring to allow Bay water to enter, and seasonally in fall and during the rainy season to allow Lagoon water to exit to maintain flood control catchment capacity.

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even failure of, the aging bulkheads. Under these conditions, sediment and legacy pollutants in fill material may be released to the Lagoon.

Fine sediment in the water column creates turbidity, which compromises water quality of the Lagoon. Without the tidal flushing of most estuarine waterways, Lagoon waters would be expected to remain turbid for an extended period.

Without a final, comprehensive geotechnical study of the Project site, the pile driving and other work necessary to stabilize soils for support of building foundations is unknown. Due to the Project's size and location on the Lagoon, and its disproportionately larger interface with Lagoon waters, the environmental impacts of the Project, including to water quality, will be disproportionately larger and more significant than for any other prior projects since the original construction of the Lagoon over 70 years ago.

Significant water quality impacts are due to the unusual circumstances of the Project's location on historic fill adjacent to a non-tidal waterbody separated by a degraded bulkhead.

### 3. The Project Presents a Reasonable Possibility of Significant Environmental Impacts

The potential environmental impacts of the Project are not merely speculative, but are based on well-known processes along with long-term understanding of Belvedere Lagoon. The evidence indicates the environmental impacts to water quality of the Lagoon are not just a reasonable possibility, but rather have a relatively high likelihood, as described above. Based on the presence of legacy pollutants throughout much of San Francisco Bay, there is a reasonable possibility that those pollutants could adversely impact the Lagoon if released from fill material.

Long term observations of settlement of fill material informs our understanding of the potential impacts of pile driving and other Construction Activities on soils and nearby structures. Moreover, as referenced in Footnote 4, BLPOA is aware of, and supports, Dr. Lawrence Karp's opinion that there is a reasonable possibility that the Project will cause significant impacts due to unusual circumstances relating to geology and soils, and that the Project is therefore not exempt from CEQA. As Dr. Karp's explains, the Project's long, narrow apartment building will likely experience differential settlement and subsidence unless major subgrade foundation systems are implemented. Installing such systems, which may include pile driving, is environmentally intrusive, and will very likely cause significant adverse impacts in the form of damage to structures and bulkheads on neighboring property, and the release of sediment to the Lagoon.

### Conclusions

The Project does not qualify for the Class 32 Exemption because it will result in significant effects relating to water quality of Belvedere Lagoon. Additionally, the Project is not substantially surrounded by urban uses, also disqualifying it from the Class 32 Exemption.

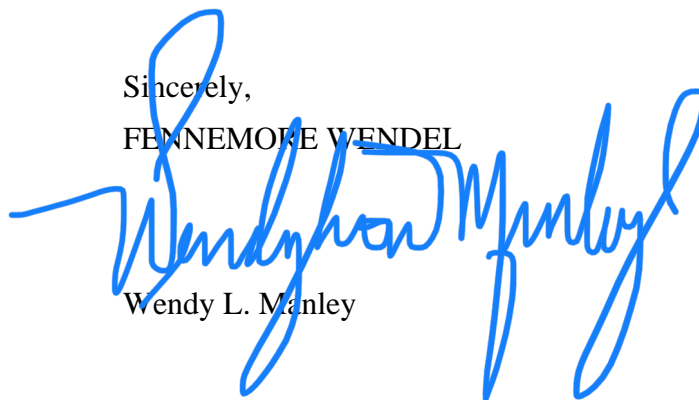
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Even if the Class 32 Exemption did apply – which it does not – the Project would be subject to the Exemption Exception because significant environmental impacts are reasonably possible due to unusual circumstances. The Project is located on historic fill adjacent a unique waterbody that provides flood control for the greater surrounding community, and is a large Project in the context of the immediate vicinity. Due to these factors, there is a reasonable possibility of significant environmental effects including water turbidity in the Lagoon, damage if not failure to the bulkhead and nearby structures, sedimentation of the Lagoon causing diminished floodwater capacity, and interference with flood management during the wet season.

Current information about the Project, including specifically a geotechnical understanding of the site and draft plans of bulkhead improvement, is inadequate to conclude that the Project will not have significant impacts on the environment. BLPOA therefore requests that the Project proponent's request for categorical exemption be denied and that the City prepare an Initial Study as contemplated by CEQA to determine whether the Project may have one or more significant environmental effects. If such effects are found, then a full environmental impact report will be required before the City may lawfully act to approve the Project.

The BLPOA appreciates the opportunity to present its concerns to the City and welcomes any requests for further information.

Sincerely,  
FENNEMORE WENDEL



Wendy L. Manley

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cc Ken Johnson, President  
BLPOA Board of Directors