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December 19, 2023

Via E-Mail Only

Members of the City Council
City of Belvedere
450 San Rafael Ave
Belvedere, CA 94920

Re: Mallard Pointe - Appeal of Planning Commission CEQA Determination

Dear Members of the City Council:

This letter accompanies the appeal of the November 14, 2023, Planning Commission decision that the Mallard Pointe project ("Project") is not exempt from CEQA.

EXECUTIVE SUMMARY:

1. The Project is exempt from CEQA pursuant to the Infill Exemption.
2. The Planning Commission decision to deny the exemption was not supported by evidence in the record, was based on misstatements of facts and law, and was contrary to the findings of every objective, third-party, professional hired by the City to evaluate the issue.
3. The man-made Belvedere Lagoon is an "urban use" pursuant to case law and codes.
4. The adjacency of the Lagoon does not constitute an "unusual circumstance."
5. The amount of analysis conducted to verify the Project qualified for the exemption is unprecedented and confirmed there were no significant environmental impacts, including impacts to water quality.
6. The City has committed to the development of the Project in the updated Housing Element and describes the area around the Lagoon as "well-suited for additional density."



I. Introduction

From the outset of the November 14th meeting, it was clear that rather than having an unbiased discussion regarding the Project, the Commission was instead aggressively searching for *any* manner in which to delay/deny the Project. Because the Legislature has usurped so much of the City's local control over the processing of multifamily housing projects, the Commission quickly honed in on the only remaining angle of attack: CEQA.

The Commission had to overrule numerous specialized professionals in order to find that the Project was not exempt from CEQA. Specifically, the Commission had to disregard the opinion of:

- The City Planning Director
- The City Attorney
- Two outside attorneys hired by the City to opine on CEQA
- Ascent Environmental, a third-party environmental consulting firm hired by the City to analyze the project

The fact is, the CEQA Infill Exemption is a technical, legal analysis, which is exactly why experts are retained by the City. The Commission's deliberation contained numerous misstatements of law and misunderstandings of the CEQA process, as well as misapplications of the exemption criteria. Corrective comments from staff and the consultants were ignored, as denying the exemption clearly felt like the Commission's last line of attack on the Project.

II. Background

The Project was specifically designed to fit the CEQA infill exemption. A detailed memorandum was submitted with the Project application explaining why the infill exemption applied.

Despite the fact that CEQA does not require *any* documentation for making an exemption determination, the City elected to hire a third-party consultant to analyze the Project. The City charged the applicant over \$100,000 and took a year and a half to produce a memo from Ascent Environmental analyzing the applicability of the infill exemption to the



Project. This memo was perhaps the most comprehensive “exemption confirmation” ever produced. The analysis went well beyond the limited categories of the exemption and instead fully analyzed the categories of the CEQA Initial Study checklist. While this approach was extreme, it guaranteed that the Project did **not** have any significant environmental impacts.

Despite the findings of the Ascent report and recommendations from staff and outside counsel that the Project was exempt, the Planning Commission voted that the exemption did not apply and that the applicant needed “to do a CEQA.” The Commission based its decision on two primary allegations:

1. That the man-made Belvedere Lagoon is not “urban use,” and
2. That the adjacency of the Project to the Lagoon is an “unusual circumstance.”

As will be discussed below, both of these points are legally and factually inaccurate.

III. The Lagoon is an Urban Use

CEQA Guidelines 15332 states that infill development is exempt from CEQA review if among other things:

“The proposed development occurs within city limits on a project site of no more than 5 acres substantially surrounded by **urban uses.**”

The Commission asserted that the Lagoon was not an urban use because it had a connection to the San Francisco Bay and was more akin to a natural feature. In reality, the Lagoon is a water feature that has been substantially modified by the installation of peninsulas, the development of roads, and extensive other geomorphic shaping that isolated the lagoon from the Bay. The entire bank of the Lagoon is developed with homes, roads, and other infrastructure. Despite its historic origins as a piece of the Bay, the Lagoon has functioned for over 70 years as a human-made urban recreational water feature and drainage catchment. Since that time, extensive development and redevelopment has occurred, primarily consisting of single-family homes and duplexes nearly identical to that which is being proposed on the Lagoon at Mallard Pointe, and not



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once has there been a suggestion that the CEQA exemptions used for those projects were inapplicable.

The issue of what constitutes an urban use has been considered by the courts before. In *Banker's Hill, Hillcrest, Park West Community Preservation Group v. City of San Diego*, (2006) 139 Cal.App.4th 249, the court analyzed whether a project that had obviously urban uses on some sides, but then was located adjacent to a park on another side, was precluded from relying on the infill exemption because the park did not constitute an "urban use." The court turned to case law that defined the term "urban uses" as used in the Community Redevelopment Law, specifically *Friends of Mammoth v. Town of Mammoth Lakes Redevelopment Agency* (2000) 82 Cal.App.4th 511.

In *Friends of Mammoth*, the court explained that the term "urban" means "characteristic of, or taking place in a city." The court found that "urban" refers more to the location of a use than to the type of use. Based on this guidance, the *Banker's Hill* court determined that **a park qualified as an "urban use" because it was surrounded by populated areas and was an urban amenity.** This is the exact scenario here, the Lagoon is literally in the middle of Belvedere.

In *Bankers Hill 150 v. City of San Diego* (a different *Bankers Hill* case), the court discussed the other *Banker's Hill* case cited above, in analyzing whether the city's **general plan** considered a park as being part of the "natural environment" for the purposes of mandated minimal development on parcels adjoining par. ((2022) 74 Cal.App.5th 755, 780.) In this newer case, the court stated that "while a particular park may be considered part of the 'natural environment' because it includes 'natural features' based on its unique characteristics, not all parks fall within that category." Importantly, the court noted that the city's **general plan** stated that the park "**modified the natural environment,**" implying it is **no longer a purely natural environment.**" Thus, the court held that the park was not a "natural feature" just as in *Banker's Hill* the court held that the park was a "developed urban park" and thus constituted an "urban use" of land. So, a key factor is a City's own discussion within the General Plan of the feature in question.

Here, the City's General Plan explicitly discussed how the Lagoon is a modification of the natural environment in several places:



“The City is urbanized, and does not contain large expanses of open space that could be utilized by special status plant and wildlife species. Terrestrial habitat is fragmented and has been altered from its native state. **Belvedere Lagoon is considered low-quality habitat for biological resources.** The pump station does not generally allow for safe and effective passage of fish species in and out of the Lagoon. **In addition, the residential use and treatment of the Lagoon with dyes to control algal growth reduces the viability of aquatic habitat in Belvedere Lagoon.**” (General Plan, Page 93.)

“Recreation areas in Belvedere include:

- **Belvedere Lagoon.**” (General Plan, Page 109.)

“In addition to the public park facilities and the public schools, Belvedere is home to three other recreation facilities: the San Francisco Yacht Club, **the Belvedere Lagoon**, and the Corinthian Yacht Club. **These are private facilities and require membership for access and use.**” (General Plan, Page 112)

The Belvedere Lagoon neighborhood is the most extensively graded area within the City limits. The elevated areas that now support the streets and residential lots in the lagoon neighborhood was created in the mid-to late 1940's by construction of dikes at Beach Road and San Rafael Avenue and draining of the original interior lagoon. **Native soils were excavated from the existing lagoon areas, and placed as fills to form elevated streets and building pads.** (General Plan, Page 157.)

The City's own General Plan confirms:

- The Lagoon is man-made.
- The native soils were removed from the original Lagoon and used to fill it and create roads and building sites.
- The Lagoon is a recreational facility, is private, and requires membership for access and use.
- The Lagoon is totally surrounded by development.
- The Lagoon is treated with chemicals.



It's very clear that what used to be a natural resource was heavily modified by humans for the purpose of development and is now an urban use. The operation of the Lagoon by the BLPOA to remove sediment, vegetation, and other deleterious materials is specially intended to *keep* the Lagoon from returning to its natural state. Similar examples of urban lagoons are found throughout the Bay Area in both smaller scale (Larkspur and Corte Madera) and larger scale (Oakland, San Mateo, Redwood Shores and Foster City), and routinely utilize CEQA exemptions for all types of development.

Other parts of CEQA confirm that the infill exemption applies to the Project site. For example, CEQA's definition of "infill site" includes any site that has **previously been developed for "qualified urban uses."** (Public Resources Code Section 21061.3(b).) Qualified urban uses are defined as, "any **residential**, commercial, public institutional, transit or transportation passenger facility, or retail use, or any combination of those uses." (Public Resources Code Section 21072.) The Project site is currently developed with residences, which are a "qualified urban use," and is therefore an infill site.

IV. The Project and the Lagoon are not "Unusual Circumstances"

The Planning Commission alleged that adjacency of the man-made Lagoon, the 900-feet of Project "shoreline," and the presence of fill and Bay mud constituted unusual circumstances such that the Infill Exemption would not apply. This argument was made because a project will not qualify as exempt if, among other things:

"There is a reasonable possibility that the activity will have a **significant effect** on the environment due to **unusual circumstances.**"

This exception to the exemption is a 2-pronged test considering:

1. Whether the project presents unusual circumstances; **and**
2. Whether there is a reasonable possibility of a significant effect on the environment due to those unusual circumstances.

This is a conjunctive test, where both elements must be present in order for the exemption to not apply. Here, neither element is satisfied, and there is no exception to the exemption.



There is nothing unusual about the Project or its location. The entire Lagoon is surrounded by development that routinely utilizes CEQA exemptions. The frontage of the Project site is actually being subdivided as part of the Project and each lot will have standard frontage widths. Even if the frontage remained at 900-feet, nothing about that fact is unusual or causes a significant environmental effect. Finally, development occurs all over the Bay Area on fill and Bay mud, in fact, the entirety of the Lagoon neighborhood is constructed under similar conditions, including multiple existing multifamily housing developments.

Case law strongly affirms that, even when opponents point to distinctive aspects of a project or its location, a typical project such as this is not subject to the “unusual circumstances” exception. (See, e.g., *Berkeley Hillside Pres. v. City of Berkeley*, 241 Cal. App. 4th 943, 955 (2015) (no “unusual circumstances” despite claims of unusual size, environmental setting, and inconsistency with general plan); *Protect Tustin Ranch v. City of Tustin*, 70 Cal. App. 5th 951, 962 (2021) (no “unusual circumstances” despite claims of unusually large project configuration); *Wollmer v. City of Berkeley*, 193 Cal. App. 4th 1329, 1336 (2011) (98-unit mixed use development affirmed under Class 32 exemption despite claimed unusual location and traffic issues).) Also, the memorandum prepared by Ascent Environmental confirmed that the Project has no significant environmental impacts. Accordingly, the second prong of the conjunctive test is not satisfied and the exception to the exemption would not apply even if this were considered an unusual circumstance.

V. There is no Significant Effect on Water Quality

In order to qualify for the Infill Exemption, a Project cannot have a significant effect on water quality. The Planning Commission claimed that the Project *would* have a significant effect on the water quality of the Lagoon. This argument failed to consider the actual design of the Project, and ignored the voluminous conditions already applicable to the Project that would completely safeguard water quality. The Planning Commission position was also difficult to reconcile with the fact that the Lagoon is treated with herbicides on a regular basis thereby preventing the growth of environmentally beneficial eelgrass and other aquatic plants.

First, the project would reduce the amount of impervious surface on the site and would install bioretention basins and bioswales to reduce the amount of, and treat, runoff into the Lagoon. Because runoff from the site currently entirely untreated and uncontrolled,



this would improve the quality of stormwater flowing into the Lagoon. The same cannot be said for the large volume of surface water runoff from both Belvedere and Tiburon that flows into the Lagoon by design. Because the Lagoon is a floodwater detention basin characteristic of an urban environment, it has to be managed by dredging and an annual water release to make room for the runoff during the wet season. The Lagoon is clearly an urban amenity.

Second, numerous standard erosion control measures are required to avoid water quality impacts during construction. Part of the Commission's water quality discussion centered on a theory that somehow the construction of the Project would result in silt entering the Lagoon. This discussion ignored the fact that this is a "regulated" project pursuant to the Bay Area Stormwater Management Agencies Association and therefore the applicant must submit a "Stormwater Control Plan" detailing the stormwater facilities that will be integrated into the planning, design, construction, operation, and maintenance for stormwater compliance. Also, even the City's own Public Works Department required the submittal of an Erosion and Sediment Control Plan for approval by the City prior to the issuance of a Building Permit.

Furthermore, because the Project site is greater than 1 acre in size, the Project must comply with the California Construction General Permit Order 2022-0057-DWQ, which requires the preparation of a Stormwater Pollution Prevention Plan prior to construction which outlines best management practices that the project would implement in order to minimize impacts to water quality. Compliance with these existing regulations would require treatment of runoff before discharge from the site and ensure that there are no significant impacts to water quality.

Finally, much of the Commission's discussion centered around bulkheads and docks at the Project site. Similar to the siltation water quality issues, there are many conditions already applicable to the Project that would safeguard water quality in the event of dock or bulkhead work. Any maintenance, replacement, removal, or construction of docks or repair of the bulkheads in the Lagoon would now have to comply with a new requirement that hasn't been previously enforced by the City - permitting by the Regional Water Quality Control Board (RWQCB) and in addition, may require permits or authorization from the Army Corps of Engineers or California Department of Fish & Game. The General Requirements for Construction and Maintenance of Overwater Structures (Order No. R2-2018-0009) adopted by the RWQCB contain standard



requirements that must be met to ensure that no water quality impacts are caused by dock construction.

Water quality is one of the most-regulated environmental issues. This Project will not, and cannot, have significant water quality impacts.

VI. There is no Significant Effect on Geology and Soils

A detailed geotechnical investigation report was prepared by Miller Pacific Engineering and submitted with the Project. This report was thoroughly reviewed by Ascent Environmental and it was confirmed that there are no unusual geological circumstances at the Project site and that there is no reasonable possibility of a significant effect on the environment due to unusual circumstances. Much ado was made at the Planning Commission regarding the presence of Bay mud at the Project site, and other alleged geotechnical issues. These comments ignored the fact that development in such conditions occurs regularly all over the Bay Area, including longstanding multifamily developments already adjacent to the Lagoon.

The Project as-proposed would follow the recommendations of the Miller Pacific report and would also be subject to the provisions of the 2022 California Building Code, and City of Belvedere Building Code, all of which have foundation and strengthening requirements that address the Project location and soil conditions. Because the Project site was filled 70 years ago, the Bay mud has completed most of its primary consolidation settlement under the loads from the existing fill and structures already on site. Helical piers and certain foundation options ensure that the Project will not have a significant effect on the environment and that the exemption remains applicable. The Council is encouraged to read Pages 34-36 of the October 13, 2023, Ascent Environmental report for an extremely detailed explanation of the geologic conditions at the subject property and how the Project proactively addresses such conditions.

VII. Conclusion

The Project fully conforms to the requirements of the infill exemption, which is routinely used for exponentially larger projects throughout the State. The Commission's decision was not supported by findings or accurate evidence, and the hearing appeared more like a focused interrogation of the objective, third-party consultants who specialize in CEQA with the sole goal of denying the exemption. The Commission's discussion wholly ignored the fact that Mallard Pointe is a project listed in the City's Housing Element, and



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also that significant further density is proposed around the Lagoon in order to meet the City's housing obligations. If this Project's mild increase of 18-units is supposedly so impactful, this jeopardizes the City's entire housing program.

The heavily researched and thorough Ascent memo concluded that this Project will have no significant environmental impacts. This conclusion will not change simply because the Commission voted to deny the exemption and proceed with an Initial Study. The vote only adds delay and cost in an attempt to thwart the project, and forces the developer into a more intense alternative development program.

We would ask that the Council overturn the Commission's decision, find the Project exempt from CEQA, and hold a merits hearing.

Thank you.

Very Truly Yours,

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

Riley F. Hurd III

CC: Client
Barbara Kautz
Ann Danforth