

February 15, 2024

Via E-Mail

Mayor Peter Mark
Members of the City Council
City of Belvedere
c/o City Clerk
450 San Rafael Avenue
Belvedere, CA 94920
clerk@cityofbelvedere.org

**Re: Notice of Brown Act Violation and Demand to Cure and Correct
(Government Code § 54960.1)**

Dear Mayor Mark and Members of the City Council:

On behalf of Belvedere Residents for Intelligent Growth (BRIG), this is to call your attention to the Belvedere City Council's violation of the Ralph M. Brown Act, Government Code section 54950 et seq.¹, and to demand that the violation be cured and corrected within 30 days, in accordance with section 54960.1. The nature of the violation is as follows.

In its meeting of January 22, 2024, the City Council took "action," as defined by section 54952.6, to uphold an appeal of the Planning Commission's November 14, 2023 decision regarding the Mallard Pointe Project located at 1-22 Mallard Road (Project), and the project's eligibility for an exemption under the California Environmental Quality Act (CEQA). In so acting, a majority of the City Council voted to adopt a resolution determining that the Project met all applicable criteria for the Class 32 categorical exemption from CEQA for in-fill development projects, including the criterion that "[t]he project is consistent with the applicable general plan designation and all applicable general plan policies, as well as with applicable zoning designation and regulations."

¹ Statutory references are to the Government Code unless otherwise stated.

In adopting the resolution, the City Council explicitly or implicitly found² that the Project, which includes an apartment building that is impermissible under the applicable R-2 zoning designation, was entitled to the waivers and concessions requested by the Applicant pursuant to the State Density Bonus Law, and would therefore be consistent with the City's zoning code. Arguably, the City Council's action constituted a granting of those waivers and concessions or a commitment to do so.³ Prior to and as part of that action, the City Council discussed and deliberated the question whether the Project should be granted such requested waivers and concessions, even though such deliberative process is separately governed by section 19.52.160 of the Belvedere Municipal Code.⁴

The Council's deliberation and action were unlawful under section 54954.2(a)(3) because the subject matter was not sufficiently described in the agenda for the meeting, and the City Council adopted no prior findings pursuant to section 54954.2(b) that urgent action was necessary on a matter unforeseen at the time the agenda was posted. The posted agenda for the January 22, 2024 City Council meeting (attached here as **Attachment 1**) includes the following description of the item to be acted upon:

“5.A. Discussion and Possible Action on an Appeal of the Planning Commission's November 14, 2023 decision regarding the Mallard Pointe project (located at 1-22 Mallard Road) and the project's eligibility for an exemption under the California Environmental Quality Act.”

The agenda makes no mention of the Applicant's request for waivers and concessions under the State Density Bonus law. To the contrary, the Staff Report posted with the

² Despite BRIG's repeated requests, the City so far has not made publicly available copies of the final, attested resolutions.

³ We note that during the City Council's February 13, 2024 meeting, in response to a question from Councilmember Cooper concerning the minutes of the January 22, 2024 meeting, the City Attorney indicated that the Council's vote on the appeal constituted a final determination granting the requested waivers and concessions under the State Density Bonus Law. (*See* 2/13/24 meeting video, beginning at 52:20.)

⁴ Section 19.52.160(B) provides: “The City Council shall grant the concession or incentive requested by the applicant unless the City makes written findings, based upon substantial evidence, as required by California Government Code Section 65915(d)(1). The City Council shall include conditions necessary to meet the purpose and intent of the state density bonus law.

meeting agenda (**Attachment 2**) explicitly states that issues relating to the State Density Bonus Law would **not** be discussed or acted upon at the meeting:

“The issue on appeal is whether the proposed project at 1-22 Mallard Road (‘Project’) is eligible for a Class 32 infill exemption under CEQA. Other issues relating to the Project, including the Housing Accountability Act, **State Density Bonus Law**, potential conditions of approval, and design review under the Belvedere Municipal Code, are not before the Council in this appeal. The Planning Commission did consider many of these issues at its November 14, 2023, hearing. But the decision made at this Planning Commission hearing addressed only the Project’s eligibility for CEQA’s Class 32 infill exemption.”

(Jan. 22, 2024 Staff Report, p. 1, boldface added.)

As the Staff Report explains, the appeal was from the Planning Commission’s determination that the Project did not qualify for the in-fill development exemption from CEQA because: (1) the Belvedere Lagoon was not an “urban use,” and that the Project site therefore was not “substantially surrounded by urban uses;” (2) substantial evidence showed a potentially significant impact to water quality due to failing bulkheads and soil erosion during construction; and (3) there are unusual circumstances applicable to the Project site relating to the deteriorated state of the bulkheads that will result in significant impacts on water quality and habitat in the Lagoon. (Staff Report, p. 5.) Because the Planning Commission undertook no deliberations and took no action with respect to in-fill development exemption’s requirement of general plan and zoning consistency, or on the requested waivers and concessions under the State Density Bonus Law, these topics were not part of the appeal hearing. Indeed, the Applicant’s November 27, 2023 Appeal Notice and December 19, 2023 letter supporting the appeal are entirely silent with respect to these matters (**Attachments 3 and 4**). The public simply had no notice whatsoever that these topics would be discussed at all, let alone acted upon.

Nevertheless, the City Council saw fit to discuss, deliberate, and ultimately take action to adopt a resolution containing an express or implicit finding that the Project was entitled to the requested waivers and concessions, and that with those granted would therefore be consistent with the City’s General Plan and zoning

regulations, and hence qualify for the in-fill development exemption from CEQA.⁵ When the topic was broached by Council members at the hearing, BRIG's counsel expressly objected to further discussion or action on grounds that the matters had not been agendaized for discussion or action. These objections were disregarded.

Therefore, pursuant to Government Code section 54960.1, BRIG respectfully demands that the City Council cure and correct its unlawful action within 30 days of receipt of this demand, or inform BRIG in writing addressed to the undersigned of its decision not to do so. Please note that if the City Council fails to so cure or correct, BRIG will be entitled to seek judicial invalidation of the action pursuant to section 54960.1, and an award of its court costs and reasonable attorneys' fees pursuant to section 54960.5.

BRIG appreciates the City Council's careful consideration of this demand, and for its anticipated prompt response.

Most sincerely,

M. R. WOLFE & ASSOCIATES, P.C



Mark R. Wolfe

On behalf of BRIG

cc: Andrew Shen, City Attorney

⁵ In the event the City Council is considering concluding that the conduct described above did not amount to the taking of "action" for purposes of the Brown Act, please refer to section 54952.6, which defines "action taken" for purposes of the Act very expansively.

ATTACHMENT 1

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**City of Belvedere
City Council Meeting
Revised
Agenda**

Monday, January 22, 2024 – 6:30 PM

City Council Chambers City Hall- 450 San Rafael Avenue, Belvedere CA· Phone 415.435.3838
City of Belvedere Internet Address: <https://www.cityofbelvedere.org>

Note: this version of the agenda includes the Appeal Hearing Procedure set forth at the end of the agenda

NOTICE: Members of the public may attend the meeting in-person at Council Chambers. City Hall and the Council Chambers will be open to members of the public 30 minutes prior to the start of the meeting.

Members of the public may attend the meeting in-person at the Council Chambers 450 San Rafael Avenue, or by visiting <https://us02web.zoom.us/j/81384159398>

Or by phone 1-888-788-0099 (Toll Free) or 1-833-548-0276 (Toll Free)

Enter Webinar ID: 813 8415 9398

If you have called into the meeting and wish to speak, please press *9.

At each meeting, the public has the opportunity to address the City Council on items appearing on the agenda and items not appearing on the agenda, but within the purview of the City Council.

Public Comment may be made live during the meeting in-person, via Zoom or through written comment. The public may also submit comments in advance of the meeting by emailing the City Clerk at: clerk@cityofbelvedere.org. Please write "Public Comment" in the subject line. Any written Public Comment must be received no later than 11:59 p.m. the Sunday prior to the Monday City Council meeting. All written Public Comment submitted by the deadline will be distributed to the City Council no later than 3:00 p.m. on the day of the meeting and will be made part of the official record. Written public comment will not be verbally read out loud.

Council will not entertain comments made in the chat function. Please be advised that those participating in the meeting remotely via Zoom do so at their own risk. The City Council meeting will not be cancelled if any technical problems occur during the meeting.

1. CALL TO ORDER

2. ROLL CALL

3. REPORTS AND PRESENTATIONS

3.A. City Council Reports

3.B. City Manager Report

3.C. Police Chief Report

4. CONSENT CALENDAR

The Consent Calendar consists of items that the City Council considers to be routine, or Council has discussed previously and do not require further discussion. Unless any item is specifically removed by any member of the City Council, the Consent Calendar will be adopted by one motion. Council will take public comment on all items on the Consent Calendar when the Calendar is called.

[4.A. Motion to Approve the Warrants for December 2023](#)

[4.B. Receive and File the Annual Comprehensive Financial Report \(ACFR\) for the fiscal year ending June 30, 2023](#)

[4.C. Approve the Finance Committee's recommendations regarding the FY2022-23 excess reserve and Approve Resolution 2024-03 authorizing a budget amendment to appropriate these funds to staff bonuses, finance department support, website development, and the City's Critical Infrastructure Reserve](#)

[4.D. Motion to Approve Resolution 2024-04 Accepting Updates to the Belvedere Police Department Policy Manual \(Lexipol\)](#)

[4.E. Motion to Adopt an Ordinance Amending the Zoning Code for compliance with the 6th Cycle Housing Element](#)

5. PUBLIC HEARINGS

[5.A. Discussion and Possible Action on an Appeal of the Planning Commission's November 14, 2023 decision regarding the Mallard Pointe project \(located at 1-22 Mallard Road\) and the project's eligibility for an exemption under the California Environmental Quality Act](#)

6. OTHER SCHEDULED ITEMS

[6.A. Discussion and Appointment of Council Members to Regional Boards and Committees](#)

[6.B. Discuss and Consider Approving a Response to Caltrans Regarding the SR131 \(Tiburon Boulevard\) Capital Preventative Maintenance Project](#)

7. OPEN FORUM

This is an opportunity for any citizen to briefly address the City Council on any matter that does not appear on this agenda. Upon being recognized by the Mayor, please limit your oral statement to no more than three minutes. Matters that appear to warrant a more lengthy presentation or Council consideration may be placed on the agenda for further discussion at a later meeting.

8. ADJOURN

APPEAL PROCEDURE

The City Council will follow the following procedure for **item 5.A.**:

1) The Mayor will ask for presentation of the staff report; Council Members will have the opportunity to ask questions in order to clarify any specific points;

- 2) Arguments in favor of the appeal will be presented, not to exceed a total of 15 minutes; Council Members will have the opportunity to ask questions in order to clarify any specific points;
- 3) Arguments opposing the appeal will be presented, not to exceed a total of 15 minutes; Council Members will have the opportunity to ask questions in order to clarify any specific points;
- 4) The Appellant will have the opportunity for rebuttal, not to exceed 5 minutes;
- 5) The public comment period will be opened;
- 6) Members of the public, present or remote, will be allowed to speak, for a maximum of 3 minutes per speaker. A member of the public may cede their speaking time to another speaker, provided that no speaker may speak for more than six minutes in total;
- 7) The public hearing will be closed; and
- 8) Discussion of the appeal will return to the Council with formal action taken to approve, deny or continue review of the appeal.

THIS MEETING WAS PROPERLY NOTICED AND POSTED AT THE FOLLOWING LOCATIONS IN ACCORDANCE WITH THE NOTICING STANDARD REQUIREMENTS
 The City of Belvedere website – www.cityofbelvedere.org
 City Hall Bulletin, 450 San Rafael Avenue, Belvedere CA

NOTICE: WHERE TO VIEW AGENDA MATERIALS

Staff reports and other materials distributed to the City Council are available for public inspection at the following locations:

- Online at www.cityofbelvedere.org/archive.aspx
- Belvedere City Hall, 450 San Rafael Avenue, Belvedere. (Materials distributed to the City Council after the Thursday before the meeting will be posted on the City’s website and will be available at this location.)
- Belvedere-Tiburon Library, 1501 Tiburon Boulevard, Tiburon.

To request automatic mailing of agenda materials, please contact the City Clerk at clerk@cityofbelvedere.org or (415) 435-3838

NOTICE: AMERICANS WITH DISABILITIES ACT

The following accommodations will be provided, upon request, to persons with a disability: agendas and/or agenda packet materials in alternate formats and special assistance needed to attend or participate in this meeting. Please make your request at the Office of the City Clerk or by calling (415) 435-3838. Whenever possible, please make your request four working days in advance.

ATTACHMENT 2

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City of Belvedere
City Council Meeting
Monday, January 22, 2024

To: Mayor and City Council

From: Rebecca Markwick, Planning and Building Director

Reviewed by: Robert Zadnik, City Manager
Andrew Shen, City Attorney
Barbara Kautz, Special Counsel

Subject: **Item No.5.A. – Appeal of a Planning Commission decision made on November 14, 2023 denying CEQA Class 32 Categorical Exemption for the Project located at 1-22 Mallard Road.**
Appellant: Mallard Pointe 1951, LLC (represented by Riley Hurd III)

Item Description

1. That the City Council (“Council”) conduct the public hearing and determine whether or not the project qualifies for the Class 32 infill exemption under the California Environmental Quality Act (“CEQA”), Cal. Public Resources Code §§ 21000 et seq.

Background

The issue on appeal is whether the proposed project at 1-22 Mallard Road (“Project”) is eligible for a Class 32 infill exemption under CEQA.

Other issues relating to the Project, including the Housing Accountability Act, State Density Bonus Law, potential conditions of approval, and design review under the Belvedere Municipal Code, are *not* before the Council in this appeal. The Planning Commission did consider many of these issues at its November 14, 2023, hearing. But the decision made at this Planning Commission hearing addressed only the Project’s eligibility for CEQA’s Class 32 infill exemption.

CEQA requires government agencies to examine potential environmental impacts when those agencies make a discretionary decision regarding a proposed project. Under CEQA, a government agency must review potential environmental impacts *before* any approval of the proposed project. Thus, the Planning Commission properly considered the Project’s eligibility for the Class 32 infill exemption before any of the required project approvals. After determining the Project was ineligible, the Planning Commission continued those substantive approvals, and they remain pending while this appeal proceeds.

Under CEQA, the amount of required environmental review turns on the scope of the potential environmental impacts and specific statutory provisions and regulations that may exempt projects from further environmental review.

Given the potentially broad reach of CEQA – that is, to any project subject to discretionary approval that may have an environmental impact – California law has established a number of

exemptions. These exemptions are part of CEQA by design. The California Secretary of Resources has established 33 "categorical exemptions" for projects that it has determined not to have a significant effect on the environment and are thus be categorically exempt from further review.¹ CEQA requires that public agencies first determine whether a project qualifies for an exemption before proceeding with further environmental review.

If a project is not eligible for an exemption, a government agency must conduct an Initial Study to review the project's effects on the environment. The agency may determine that the project would not have any significant impacts and could then, consistent with CEQA, issue a Negative Declaration. Alternatively, an agency could determine that a project's environmental impacts would be less than significant if mitigation measures are adopted and in that instance, the agency may issue a Mitigated Negative Declaration ("MND"). If there is substantial evidence of a fair argument that the project may have significant impacts, despite the inclusion of mitigation measures, the agency must prepare an Environmental Impact Report ("EIR") that provides a fuller analysis, as well as mitigation measures to address significant environmental impacts.

With respect to its CEQA obligations, the Project sponsor, Mallard Pointe 1951, LLC, has asserted that the Project is eligible for one of those 33 categorical exemptions – the Class 32 exemption for "Infill Development Projects" (CEQA Guidelines Section 15332).² Under CEQA Guidelines Section 15332, to be eligible for the Class 32 infill exemption, a project must meet five criteria:

1. The project is consistent with the applicable general plan designation and all applicable general plan policies, as well as with applicable zoning designation and regulations.
2. The proposed development occurs within the city limits on a project site of no more than five acres substantially surrounded by urban uses.
3. The project site has no value as habitat for endangered, rare, or threatened species.
4. Approval of the project would not result in any significant effects relating to traffic, noise, air quality, or water quality.
5. The site can be adequately served by all required utilities and public services.

In addition, a project does not qualify for the infill exemption if:

1. The cumulative impact of successive projects of the same type in the same place, over time is significant,
2. There is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances;
3. The project may result in damage to scenic resources within a highway officially designated as a state scenic highway;
4. The project is located on a site which is included on any list compiled pursuant to Government Code Section 65962.5 (hazardous waste sites); or
5. The project may cause a substantial adverse change in the significance of a historical resource.

(CEQA Guidelines Section 15300.2.)

¹ In addition to these categorical exemptions adopted by the California Natural Resources Agency, the Legislature has created another set of CEQA exemptions referred to as "statutory exemptions."

² The California Natural Resources Agency's CEQA regulations are referred to as the "CEQA Guidelines."

On November 14, 2023, the [Planning Commission](#) considered the Project's applications for Design Review, Demolition Permit, Tentative Subdivision Map, and Revocable License approval. The Project is further discussed and described in the attached Planning Commission staff report (**Attachment 1**). The Planning Commission heard presentations from staff, the Project sponsor, and their attorneys and consultants. The public hearing was opened, and there were numerous residents who spoke about the Project (**Attachment 2, Draft Minutes**).

The staff recommended approval of the Project and that the Planning Commission find that the project is eligible for the Class 32 infill exemption. The staff recommendation for approval of the exemption was based primarily on an analysis of 13 reports submitted by the applicants and their consultants, an analysis of General Plan and zoning consistency prepared by staff, and a peer review and analysis of those reports as prepared by Ascent Environmental (**Attachment 3**). During its peer review, Ascent requested numerous changes and clarifications in the applicant's reports. The reports are listed on page 1 of the Ascent memo and include a biological site assessment, preliminary geotechnical investigation, stormwater control plan, drainage strategy, construction noise impacts study, and transportation study.

After the public hearing, the Planning Commissioners first discussed the Class 32 categorical exemption. They then approved a motion finding that the Project is ineligible for the Class 32 infill exemption, for the reasons stated by the Commissioners (7-0). While the Commissioners did express slightly varying positions, they generally agreed that the Project did not qualify for the Class 32 exemption because:

- the site is not substantially surrounded by urban uses;
- the analysis of potential effects on water quality did not adequately consider the failing bulkheads and potential soil erosion during construction; and
- the project presents unusual circumstances, in that it has a shoreline of nearly 900 feet next to the Belvedere Lagoon, is located in a flood zone and on Bay mud susceptible to liquefaction and settlement, with failing bulkheads, and that substantial evidence had been presented that these unusual circumstances may cause sedimentation into the Lagoon and have a significant effect on water quality and Lagoon habitat.

The Planning Commission continued the remaining items pending completion of environmental review.

Appeal of Planning Commission Decision

Pursuant to Belvedere Municipal Code section 20.04.070, any interested person or applicant may file an appeal with the City Council from any denial, approval or conditional approval of any application by the Planning Commission. Said appeal shall be in writing and shall be filed with the City Clerk not later than the 10 calendar days after the Planning Commission's action.

On November 27, 2023, Mr. Bruce Dorfman, on behalf of 1951 Mallard Pointe 1951, LLC, filed a timely appeal from the Planning Commission's November 14, 2023,³ decision (**Attachment 4**).

³ Because the meeting extended into November 15, 2023, when the Commission took its action, the appeal period expired on November 27.

Thereafter, on December 19, 2023, Riley Hurd III, the Project sponsor's legal representative, provided a further explanation of appellant's arguments (**Attachment 5**).

Mr. Dorfman's notice and Mr. Hurd's further correspondence lists the same six bases for this appeal:

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."

For the purposes of this report, staff focuses on issues 3-5:

- whether the Belvedere Lagoon is an "urban use";
- whether the adjacency of the Belvedere Lagoon constitutes an "unusual circumstance"; and
- impacts on water quality.

Issue 1 above states the desired outcome rather presenting a separate factual or legal issue for the Council to consider. Issue 2 expresses appellant's general disagreements with the Planning Commission's decision, and we will address those disagreements in the context of issues 3-5.

With respect to Issue 6, staff notes the Planning Commission's decision on November 14, 2023, does not preclude the Project from going forward. Rather, the Planning Commission's decision, and the City Council's decision on this appeal, only addresses the Project's eligibility for the Class 32 infill exemption. As noted by some of the Planning Commissioners themselves at the November 14 hearing, the City understands – as demonstrated by the housing element – that Mallard Pointe is an appropriate site for housing development. But that does not obviate the need to carefully consider the appropriate level of environmental review.

Legal Standards

Whether a project qualifies for a categorical exemption must be supported by substantial evidence that the project meets each of the criteria. The courts will affirm the necessary factual determinations so long as they are supported by substantial evidence. The courts do not weigh conflicting evidence in determining whether substantial evidence has been provided. (*See, e.g., Protect Tustin Ranch v. City of Tustin* (2021) 70 Cal.App.5th 951, 960-961.) However, as the factfinder, the City may weigh conflicting evidence in reaching its conclusions and making its findings. (*Id.* at 960 (citing *Western States Petroleum Ass'n v. Superior Court* (1995) 9 Cal.4th 559, 576.))

"Substantial evidence" is defined in the CEQA Guidelines as "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a

conclusion, even though other conclusions might also be reached...Substantial evidence shall include facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts.” (CEQA Guidelines Section 15384.) If facts and other substantial evidence support the conclusions, the courts will not review conflicting evidence that may contradict those conclusions. “Substantial evidence” does not include argument, speculation, unsubstantiated opinion, or evidence that is clearly erroneous or inaccurate. It must be “reasonable in nature, credible, and of solid value.” (*Id.* (citation omitted).)

However, if a court is interpreting the scope of a categorical exemption, the court will review this as a question of law, subject to de novo review. (*Walters v. City of Redondo Beach* (2016) 1 Cal.App.5th 809, 817.)

Given the issues in this appeal, the basis for denial of the categorical exemption must be one of the following:

1. The Project is not within the scope of the infill exemption;
2. The evidence supporting the infill exemption is not substantial, or there is substantial evidence that one or more requirements have not been met; or
3. There is substantial evidence that: (a) the Project is unusual because it has some feature that distinguishes it from others eligible for the exemption, such as size or location; and (2) there is a reasonable possibility of a significant effect due to the unusual circumstance.

Analysis

The Planning Commission’s determination that the project was not eligible for the Class 32 exemption was largely based on three dispositive issues. The Council may deny the appeal if it agrees with the Planning Commission’s decision on any of the following:

1. The Planning Commission concluded that the project was not within the scope of the Class 32 exemption because the site is not substantially surrounded by “urban uses,” in that the Belvedere Lagoon is not an “urban use.’
2. The Planning Commission concluded that substantial evidence had been presented that there may be a significant impact on water quality due to failing bulkheads and soil erosion during construction.
3. The Planning Commission also concluded that there were unusual circumstances applicable to the site, in particular the shoreline of nearly 900 feet adjacent to the Lagoon and the deteriorating bulkheads, and that extensive testimony had been presented that, because of this unusual circumstance, the project may have a significant environmental impact on water quality and habitat by causing sedimentation into the Lagoon.

These conclusions have been challenged by the appellant, as discussed below.

In considering this appeal, the Council is not required to defer to the Planning Commission’s factual or legal determinations. In other words, the Council may engage in a “de novo” review of the Planning Commission’s decision with respect to the infill exemption and associated criteria.

Discussion of Issues

1. Is the Belvedere Lagoon an “Urban Use”?

The second required criterion for the infill exemption is that the Project site consists “of no more than five acres” and that the site is “substantially surrounded by urban uses.” There is no dispute the Project is less than five acres in site and that it is “substantially surrounded” by residential and public uses (such as City Hall and Belvedere Park) to the west and south of the Mallard Road. But approximately 900 feet of the project’s boundary, representing approximately 57 percent of the project boundary, fronts the Belvedere Lagoon. Because the project must be “substantially surrounded” by urban uses to qualify for the categorical exemption, the issue is whether the Belvedere Lagoon – which constitutes over half the boundary of the site – is an “urban use.”

a. Standard of review.

Whether the Belvedere Lagoon is an “urban use” is a question of “scope,” since the Project must be “substantially surrounded” by urban uses to qualify for the infill exemption in the first instance. There are no substantial disagreements about the facts. Thus, if a court were to review City’s determination on this issue, it would be subject to “de novo” review.

b. Arguments in favor of finding that the Belvedere Lagoon is an urban use.

The appellant presents case law and evidence, largely based on the City’s General Plan, that the Belvedere Lagoon is an urban use because it (1) is located in the middle of the City and thus surrounded by populated areas, and (2) is a man-made feature used for private recreation.

The appeal argues, citing *Banker’s Hill, Hillcrest Community Preservation Group v. City of San Diego* (2006) 139 Cal.App.4th 249 and *Friends of Mammoth v. Town of Mammoth Lakes Redevelopment Agency* (2000) 82 Cal.App.4th 511, that any use “surrounded by populated areas” is an urban use. And since the Belvedere Lagoon is surrounded by residences and other developed areas, that compels the conclusion that the Lagoon is an urban use.

The appeal additionally argues, citing *Bankers Hill 150 v. City of San Diego* (2022) 74 Cal.App.5th 755, that the Belvedere Lagoon is an urban use because it is not a “natural environment.” (Note that this *Bankers Hill* case does not address CEQA or the infill exemption’s requirement regarding “urban uses.” It instead analyzed whether a proposed project was consistent with a city’s general plan policy.)

- “The City is urbanized, and does not contain large expanses of open space that could be utilized by specific status plant and wildlife species. . . . Belvedere Lagoon is considered low-quality habitat for biological resources.” (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.)
- “Native soils were excavated from the [Belvedere] lagoon areas, and placed as fills to form elevated streets and building pads.” (General Plan, Page 157.)

Quite obviously, these selected statements from the City's General Plan were not intended to be conclusions about whether the Belvedere Lagoon is an "urban use," especially for the purposes of CEQA. But these are relevant data points addressing the Belvedere Lagoon's suitability as wildlife habitat, its recreational uses, and how it was first constructed.

The memorandum prepared by Ascent Environmental presented arguments in favor of and against classifying the Belvedere Lagoon as an "urban use." In favor of this classification, the memorandum stated:

The Lagoon is maintained and operated as a human-made recreational water feature, including periodic dredging and application of algicides. Its entire bank is developed with structures, 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.

c. Arguments against finding that the Belvedere Lagoon is an urban use.

That same memorandum from Ascent Environmental presented arguments against classifying the Belvedere Lagoon as an urban use:

On the other hand, the definition of "qualified urban uses" in CEQA includes only "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 Belvedere Lagoon is not a public facility, includes none of the listed uses, and so is not a "qualified urban use." "Substantially surrounded" is defined in the CEQA Guidelines to mean that at least 75 percent of the perimeter of the project site adjoins, or is separated only by an improved public right of way, from parcels that are developed with qualified urban uses. (Guidelines Section 21159.25(a)(2).) The Belvedere Lagoon occupies more than 25 percent of the perimeter of the site. The Lagoon is also considered to be a lake under the jurisdiction of the US Army Corps of Engineers, Regional Water Quality Control Board, and other state agencies.

In advance of the Planning Commission's hearing, Belvedere Residents for Intelligent Growth ("BRIG") submitted correspondence in support of this position. In its November 13, 2023, letter, BRIG's representative, Mark Wolfe, concurred with the statement above and added:

Although engineered by humans over decades for flood protection and water quality preservation, the Lagoon originated as an arm of San Francisco Bay . . . and to this day remains a "water of the United States" subject to the regulatory jurisdiction of the U.S. Army Corps of Engineers and Regional Water Quality Control Board pursuant, respectively, to the federal Clean Water Act and the State Porter-Cologne Water Quality Control Act.

As support for these statements, Mr. Wolfe's letter also included a historical photo of the Lagoon area showing its origin as a connection to the Bay (see Attachment 6). At the November 14, 2023, Planning Commission hearing, Mr. Wolfe reiterated these points. At the hearing, Wendy Manley, appearing on behalf of the Belvedere Lagoon Property Owners Association ("BLPOA") stated that the organization agreed with BRIG regarding this issue.

Several Planning Commissioners explicitly addressed the issue of "urban use." Commissioner Kevin Burke succinctly summarized these views in concluding that Belvedere Lagoon is a lake connected to the Bay, contains an ecosystem, and is unlike the open space considered in the *Banker's Hill* case.

d. Further staff analysis.

The issue of what constitutes an “urban use” in this context has not been clearly determined by either the CEQA Guidelines or a court. Given this uncertainty, staff recommended to the Planning Commission that the Lagoon be considered an “urban use” because it is a human-made urban recreational water feature, but recognized that the issue is unresolved.

There is little disagreement about the facts regarding the location of the Lagoon and its creation and current uses, only whether it meets the definition of an “urban use.” The Ascent memo contains an extensive discussion of this issue without reaching a conclusion. There is no definition in the Class 32 exemption of “urban uses,” nor what is meant by “substantially surrounded,” nor any reference to other definitions in the CEQA Guidelines.

In the only case to consider the definition of “urban uses,” the Court of Appeal considered an urban use to be “characteristic of a city or a densely populated area.” The Court characterized Balboa Park in the City of San Diego to be a “quintessential urban park, heavily landscaped, surrounded by a densely populated area, and containing urban amenities such as museums, theaters, and restaurants,” and concluded it constituted an urban use. (*Banker’s Hill, Hillcrest, Park West Community Preservation Group v. City of San Diego* (2006) 139 Cal.App.4th 249, 272.)⁴ Here, while the Lagoon is surrounded by developed properties, was man-made, and is used for recreation by homeowners, it is not landscaped, does not contain urban amenities, is considered a “lake” and wetland regulated by the Regional Water Quality Control Board, and may require permits from the Army Corps of Engineers and Department of Fish and Wildlife.

Given the absence of binding legal authority, the Council may deny or approve the appeal on this issue based on the arguments above, or other arguments it wishes to advance at the appeal hearing. As we noted, any court reviewing this decision will likely exercise “de novo” review over this question and the City’s determination would not receive any deference in a legal challenge.

2. Potential Impacts on Water Quality

The water quality issues addressed in the prior hearing concerned potential water quality impacts that would occur during construction of the Project and after the Project’s completion.

a. Standard of Review.

To qualify for the infill exemption, the project applicant must provide substantial evidence that the Project would not have a substantial impact on water quality. The City, however, may weigh substantial conflicting evidence in determining whether the Project will have impacts on water quality.

b. Substantial evidence that there would be no significant impacts on water quality.

In this appeal, the Project sponsor states that:

- During construction, both regulatory agencies and the City would establish erosion control measures that would limit any silt that would flow into the lagoon.
- After the project is completed, it would reduce the amount of impervious surface on the site and improve the quality of any stormwater flowing into the Belvedere Lagoon.

⁴ The appeal discusses another Banker’s Hill case regarding the definition of “natural environment,” but, as noted previously, this is different from the definition of an “urban use” and did not include an analysis of the infill exemption.

This position is consistent with the conclusions set forth in the Ascent Environmental memorandum (pp. 12-13):

Water Quality. As discussed in Section 1.4.4, “Hydrology and Water Quality,” the project would reduce the amount of impervious surface on the site and would install bioretention basins to reduce the amount of runoff into the Belvedere Lagoon during storms. All runoff must also be treated through filtered bioswales. Because runoff from the site in the existing condition is entirely untreated and uncontrolled, this would improve the quality of stormwater flowing into the Lagoon. In addition, standard erosion control measures are required to avoid water quality impacts during construction.

Any maintenance, replacement, removal, or construction of docks or repair of the bulkheads in the Lagoon will require authorization from the Regional Water Quality Control Board (RWQCB) and 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.

The further discussion of these issues can be found on pages 19-20 of the memorandum. This section notes additionally that the project is required to comply with numerous requirements during construction to insure that erosion into the Lagoon does not occur, including California Construction General Permit Order 2022-0057-DWQ, which requires preparation of a Stormwater Pollution Prevention Plan utilizing Best Management Practices (BMPs). In the proposed conditions of approval presented to the Planning Commission, City Public Works staff attached additional standard conditions related to soil erosion.

In support of these conclusions, reports prepared by experts were provided as appendices to Ascent Environmental’s memorandum:

- Appendix G (geotechnical report dealing with erosion and other soils issues, submitted by Miller Pacific Engineering Group)
- Appendix J (stormwater control plan, submitted by BKF Engineers)
- Appendix K (preliminary drainage study, submitted by BKF Engineers)

The stormwater control plan and preliminary drainage study address potential water quality impacts after the project is completed. The geotechnical report includes recommendations to prevent erosion similar to those referenced in the Ascent memo.

In response to concerns about potentially vulnerable bulkheads, Miller Pacific completed a visual inspection of the existing bulkhead conditions (**Appendix B** to the geotechnical report). In that evaluation, Miller Pacific stated that no new fill will be placed on the site during development and no new loading will be imposed on the existing bulkheads. As a consequence, Miller Pacific opined that “it does not appear that a global repair is warranted or needed for the existing timber bulkheads” and “recommend[ed] repair of the exposed bulkheads on an as-needed basis.” Mr. Hurd’s letter states that any bulkhead replacement would be subject to RWQCB permits and requirements set by the Army Corps of Engineers or California Department of Fish & Game. This argument is consistent with the conclusions set forth in the Ascent Environmental memorandum.

c. Evidence that there may be significant impacts on water quality.

In a letter dated July 17, 2023 the BLPOA focused on the potential water quality issues that may arise during construction and afterwards (**see Attachment 7**).

In particular, the BLPOA's letter focused on the impact of sediment during construction due to potentially failing bulkheads:

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.

Further, even if the Project addresses the bulkheads themselves, the BLPOA letter stated:

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...

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.

The letter also expressed concern that additional fill could release additional sediment and stormwater quality after construction could be compromised. The letter did not include any engineering data regarding these and other issues.

d. Further staff analysis.

The Miller Pacific report states that additional fill will not be placed on the site and provides substantial evidence that the area occupied by impervious surfaces will be reduced and stormwater quality improved after construction is complete.

The primary appeal argument is related to the condition of the existing bulkheads, the potential need for full replacement, and potential environmental impacts regarding bulkhead replacement and potential failure during construction.

The City typically addresses bulkhead replacement at the time of building permit submittal. A component of a building permit application consists of a final geotechnical report prepared by an engineer which recommends whether or not the bulkhead is required to be replaced. The final geotechnical report is routed to the City Engineer, who will peer review the determination made by the applicant's engineer. If the bulkheads are required to be replaced, the City will not issue a building permit until the plans have been approved by the Regional Water Quality Control Board (RWQCB) and, if required, the Army Corps of Engineers.

The Council may weigh the conflicting evidence regarding the potential impacts of the bulkheads' condition on water quality and determine whether substantial evidence has been submitted to support the conclusion that, given their condition, the Project will have no significant effects on water quality. If the Council concludes that the evidence is not substantial in support of this conclusion, then it may determine that the project is not eligible for the Class 32 infill exemption.

3. Unusual Circumstances

A categorical exemption like the Class 32 exemption cannot 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. During the Planning Commission hearing, the discussion of potential unusual circumstances focused on several factors that, in combination, may result in a significant environmental impact: the size of the Project (especially the size of the proposed apartment building), its location next to the Belvedere Lagoon with a shoreline of nearly 900 feet, the deteriorating bulkheads along the shoreline, the Project site's location on Bay fill and mud, and the site's location in a FEMA flood zone.

a. Standard of Review.

Under *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1104-1107, the categorical exemption will not apply if:

1. There is substantial evidence that: (a) the Project is unusual because it has some feature that distinguishes it from others eligible for the exemption, such as size or location; and (2) there is a reasonable possibility of a significant effect due to the unusual circumstance. The environmental impacts may be considered only if some project circumstance is unusual; or
2. There is substantial evidence that the project *will* have a significant environmental impact.

b. Arguments that there are no unusual circumstances.

Both the appellant and the Ascent Environmental memorandum conclude that there are no unusual circumstances, because similar construction adjacent to the Lagoon involving sites with similar soils conditions, on sites similarly susceptible to flooding, is common in Belvedere and Tiburon.

Mr. Hurd's letter notes that Belvedere (and similar jurisdictions, such as Tiburon) routinely develop property on similar Bay fill and mud for residential use. At the hearing, Miller Pacific, reiterated that development on similar sites is common in Belvedere. The Ascent Environmental memorandum similarly observes:

- Most of the residences located on the Belvedere Lagoon are also located within a Special Flood Hazard Area as shown on FEMA's Flood Maps. The site's location within a FEMA-designated Special Flood Hazard Area is not unusual in Belvedere. In addition, location in a flood hazard area is considered an impact of the environment on the project, which is not an environmental impact under CEQA. (*Calif. Bldg. Industry Ass'n v. Bay Area Air Quality Mgmt. Dist.* (2015) 62 Cal.4th 369.)

- “... the entire Belvedere Lagoon neighborhood, areas adjacent to San Rafael Avenue, and downtown Tiburon are all constructed on artificial fill, deposited on dredged, filled, and flooded marshland. Most residences in the Belvedere Lagoon have docks. The existing apartments in the City are all constructed on artificial fill. Construction on dredged, filled, and flooded marshland is not unusual in Belvedere....[T]he effect of the fill and Bay mud on the apartment house is an impact of the environment on the project and is not an environmental impact under CEQA.

c. Arguments that there are unusual circumstances.

The Planning Commission heard substantial testimony regarding the unusual length of the property adjacent to the Lagoon and the deteriorating conditions of the bulkheads, and determined that these were unusual conditions affecting the property. The Commission also determined that this testimony, as discussed in the previous section, presented a fair argument that these unusual conditions may result in sedimentation into the Lagoon and a significant impact on water quality. Consequently, the Commission concluded that this presented another reason why the project did not qualify for the Class 32 infill exemption.

The BLPOA's July 17, 2023 letter states that there are unusual circumstances for the following reasons:

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.

BRIG's November 13, 2023 correspondence also argues for a finding of unusual circumstances, but based on the opinion offered by Dr. Lawrence Karp regarding potential settlement due to Bay Mud and relatively large size of the proposed apartment building:

... the building site is both unusual and problematic in that it consists of marshland that was dredged, filled, and flooded in the 1950s, and is highly prone to settlement. Dr. Karp explained that duplex structures are “settlement forgiving,” meaning they have length-to-width aspect ratios that are close to equal, such that settlement occurs uniformly across the structure. By contrast, as Dr. Karp noted, the Project's proposed apartment building would be approximately five times as long as it is wide, with no structural or design features that would accommodate large differential settlements.

Given these circumstances, BRIG argues that:

... the Project's long, narrow apartment building will likely experience differential settlement and subsidence unless major subgrade foundation systems are implemented. Such systems are likely to include sinking multiple support pilings into the substrate, and engineering larger or sturdier bulkheads capable of withstanding the additional, concentrated weight of this structure.

Dr. Karp also offered testimony at the November 14, 2023 hearing, stating that the proposed helical piles would not sufficiently address any settlement – especially of the apartment building.

d. Further staff analysis.

As discussed in the Ascent memo, the area of the site proposed for the apartment house is underlain by shallow Bay mud with minimal settlement expected. In any case, issues regarding the effect of the soils on building settlement and the Project's location in the flood hazard zone are effects of the environment on the Project and not considered environmental impacts under CEQA. While these issues may not be germane to CEQA, City staff will more fully examine any potential settlement issues at the building permit stage when it would have the opportunity to review construction plans and consult with engineers, as needed.

The Planning Commission found that the length of the Lagoon shoreline and the condition of the bulkheads were unusual conditions that could have a significant impact on water quality, as discussed in the previous section. The Council may determine whether these conditions are "unusual" or typical of construction adjacent to the Belvedere Lagoon. If the Council determines that the conditions are not unusual, then the project will be eligible for the Class 32 exemption. If it concludes that these conditions are unusual, and substantial evidence has been presented of a fair argument that these unusual conditions may create water quality impacts, then it may determine that the project is not eligible for the Class 32 infill exemption.

Conclusion

The City Council should review the appeal and determine whether the project qualifies for the Class 32 infill exemption. In particular, the Council may wish to review:

1. Whether the project is "substantially surrounded by urban uses" and thus within the scope of the exemption.
2. Whether the project would impact water quality.
3. Whether there are unusual circumstances applicable to the project that may result in a significant impact on the environment.

Should the Council approve the appeal, Attachment 8 includes a resolution containing findings to support a Class 32 exemption.

Should the Council deny the appeal, Attachment 9 includes a resolution determining that the Project is not eligible for the Class 32 exemption. It will be completed based on the reasons for the Council's determination.

Attachments

1. Planning Commission Staff Report
2. Draft Planning Commission Minutes
3. Memo Prepared by Ascent Environmental
4. Appeal
5. Letter dated December 19, 2023 in support of appeal
6. Letter from Mark Wolfe on behalf of BRIG dated November 13, 2023
7. Letter from Wendy Manley on behalf of BLPOA dated July 17, 2023
8. Resolution Approving Appeal
9. Resolution Denying Appeal
10. [Link to all correspondence received](#)

ATTACHMENT 3

ATTACHMENT 3

ATTACHMENT 3

ATTACHMENT 3

RECEIVED

NOV 27 2023

City of Belvedere



APPEAL OF PLANNING COMMISSION ACTION

CITY OF BELVEDERE • CITY COUNCIL
450 SAN RAFAEL AVE • BELVEDERE, CA 94920-2336
PH. 415-435-3838 • FAX 415-435-0430 • WWW.CITYOFBELVEDERE.ORG

FOR STAFF USE ONLY

Appeals must be checked for sufficiency by the Office of the City Attorney before they are accepted by Staff.

Date: 11/27/2023 Rec'd. by: R.M. Amount: \$1,000 Receipt No.: _____

APPEAL PROCEDURE

Appeals of actions taken by the Planning Commission are governed by Section 20.04.070 of the Belvedere Municipal Code and must conform to the provisions thereof:

The applicant or any interested person may file an appeal with the City Council from any denial, approval or conditional approval of any application by the Planning Commission pursuant to this Chapter. Said appeal shall be in writing and shall be filed with the City Clerk not later than the tenth calendar day after the Planning Commission's action. Appeals shall set forth the alleged inconsistency or nonconformity with procedures or criteria set forth in this Chapter, and shall be accompanied by a filing fee as is hereafter fixed from time to time by City Council resolution. The City Clerk shall, not less than ten calendar days prior to the date set for the Council hearing on the appeal, give written notice to the appellant or his representative, and to the property owner, of the date, time and place of the hearing. The Council may affirm, reverse or modify the decision of the Planning Commission, at all times being guided by the criteria set forth in this Chapter. The Building Official, Planning Consultant, and Planning Commission shall each be advised of the Council decision.

The appeal fee is nonrefundable.

To protect the rights of all parties, the appeal will normally be scheduled for hearing at the next available City Council meeting occurring not less than two weeks after the appeal is filed, providing that the necessary noticing requirements can be met. Any request for delay or continuance of the hearing is subject to approval by the property owner and the City Council.

APPELLANT INFORMATION

Appellant is: Property owner Other interested party

Name of Appellant: Mallard Pointe 1951, LLC

Mailing: Thompson Dorfman Partners Daytime phone: 415-381-3001

Address: 39 Forrest St. Suite 202 Fax: _____

Mill Valley, CA 94941 Email: bd@thompsondorfman.com

Appellant's representative (Optional): Bruce Dorfman
Mailing Same as above Daytime phone: _____
Address: _____ Fax: _____
_____ Email: _____

BASIS OF APPEAL

Date of Planning Commission action: November 14, 2023 Agenda Item No.: D.1
Address of property: 1-22 Mallard Rd., Belvedere, CA
Action you are appealing: Planning Commission decision that the Mallard Pointe project ("Project") is not exempt from CEQA.

State the inconsistency or nonconformity you are alleging with procedures or criteria set forth in Chapter 20, *Architectural & Environmental Design Review*, and/or Chapter 19, *Zoning*, of the Belvedere Municipal Code (you may attach additional pages and/or exhibits in support of your appeal):

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 or geotechnical conditions.
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, the undersigned, hereby make appeal of the Planning Commission action cited, and I hereby certify that the facts, statements and information presented herein and in the attached exhibit(s) are true and correct to the best of my knowledge and belief.

I understand the contents of this document are a Public Record.

Signature:  _____

Name: Mallard Pointe 1951, LLC
By: TDP-Belvedere-2020, LLC, its Managing Member
By: Bruce Dorfman, Manager

Date: November 27, 2023

ATTACHMENT 4

ATTACHMENT 4

ATTACHMENT 4

ATTACHMENT 4



Ragghianti|Freitas LLP

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Riley F. Hurd III
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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



Ragghianti|Freitas LLP

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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, slightly slanted style.

Riley F. Hurd III

CC: Client
Barbara Kautz
Ann Danforth