

CITY OF BELVEDERE

RESOLUTION NO. 2024 -05

**A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF BELVEDERE GRANTING
APPEAL OF PLANNING COMMISSION'S DETERMINATION REGARDING
CALIFORNIA ENVIRONMENTAL QUALITY ACT ("CEQA") EXEMPTION**

WHEREAS, Mallard Pointe 1951, LLC ("Mallard Pointe"), has applied to the City for approval of a project to be located at 1-22 Mallard Road; and

WHEREAS, among other approvals, Mallard Pointe has sought approval of design review, a tentative subdivision map, and a revocable license; and

WHEREAS, Mallard Pointe has taken the position that the project qualifies for a Class 32 Infill Exemption, established by CEQA Guideline 15332; and

WHEREAS, the City engaged Ascent Environmental, an environmental consulting firm, to assist in the evaluation of Mallard Pointe's eligibility for a Class 32 Infill Exemption; and

WHEREAS, at its November 14, 2023, meeting, the Planning Commission considered written and oral reports from City Staff, together with written and oral presentations from Mallard Pointe representatives, Ascent Environmental, and the public, and thereafter denied a Class 32 Infill Exemption for the project; and

WHEREAS, on November 17, 2023, Mallard Pointe filed a timely appeal of the Planning Commission's CEQA determination; and

WHEREAS, on January 22, 2024, the City Council held a duly noticed public hearing regarding the appeal, considered written and oral reports from City staff, together with written and oral presentations from Mallard Pointe and its representatives, and the public comment; and

NOW, THEREFORE, BE IT RESOLVED that the City Council of the City of Belvedere does hereby determine that the project is categorically exempt from CEQA under 14 Cal. Code Regs. 15332, subject to the following condition:

1. Mallard Pointe shall hold the City of Belvedere and its officers harmless in the event of any legal action related to or arising from the granting of this appeal, shall cooperate with the City in the defense of any such action, and shall indemnify the City for any and all claims, demands, obligations, damages, actions, causes of action, suits, losses, judgments, fines, penalties, liabilities, costs, and expenses (including without limitation, attorney's fees, disbursements and court costs) of every kind and nature whatsoever (collectively "Claims") that are caused by any third party challenges to the City's granting of this appeal or any other approvals of the Mallard Pointe project. This indemnification shall include, but not be limited to, damages awarded against the City, if any, costs of suit, attorneys' fees, and

other expenses incurred in connection with such claim, action, causes of action, suit, or proceeding whether incurred by the applicant, the City, and/or the parties initiating or bringing such proceeding. Mallard Pointe shall indemnify the City for all City costs, attorneys' fees, and damages that the City incurs in enforcing the indemnification provisions set forth in this condition. Mallard Pointe shall pay to the City upon demand any amount owed to the City pursuant to the indemnification requirements prescribed in this condition. Counsel for the City in any such legal action shall be selected by the City in its sole discretion.

PASSED AND ADOPTED at a regular meeting of the Belvedere City Council on January 22, 2024, by the following vote:

AYES: Lynch, Wilkinson, Mark
NOES: Cooper
ABSENT None
RECUSED: Kemnitzer

APPROVED: _____
Peter Mark, Mayor

ATTEST: _____
Beth Haener, City Clerk

EXHIBIT A
CEQA Findings for Class 32 Exemption

The findings below summarize the City Council’s conclusions regarding the project’s eligibility for the Class 32 CEQA exemption (CEQA Guidelines Section 15332) and the evidence included in the record, including but not limited to the memo dated October 13, 2023 and all attachments prepared by Ascent Environmental (the “Ascent Memo”); all staff reports, written and oral, along with all attachments and exhibits; written and oral presentations from all parties; all information posted on the City’s website; and all written information submitted to the Planning Commission in advance of its November 14, 2023 special meeting, and the City Council in connection with the appeal considered at its January 22, 2024 regular meeting.

To be eligible for the Class 32 exemption, there must be substantial evidence in the record that a project meets five criteria, and the project cannot be excluded by the exceptions to the use of categorical exemptions listed in Guidelines Section 15300.2. The five criteria are listed in items A – E below, along with a summary of the substantial evidence in the record that supports the finding. Section F below lists the exceptions to the use of categorical exemption and includes a summary of the substantial evidence demonstrating that none of the exceptions apply.

A. 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.

As described in the staff report submitted to the Planning Commission, dated November 14, 2023, regarding General Plan and Zoning compliance, and in the Ascent Memo, and in Attachment A to the Ascent Memo, there is substantial evidence in the record that the project is consistent with the applicable General Plan designation and all applicable general plan policies, as well as with applicable zoning designations and regulations. Under State Density Bonus Law, the project has requested one concession as a modification of a zoning standard to allow an apartment house in the R-2 zone; and waivers of various development standards, as described in the Planning Commission staff report. Consistent with case law, and for the reasons described in the Planning Commission staff report, the zoning standards that are waived or that are modified by the concession are not “applicable” to the project and the requirements of this provision are therefore met. (See *Wollmer v. City of Berkeley* (2011) 193 Cal.App.4th 1329.)

B. The proposed development occurs within city limits on a project site of no more than five acres substantially surrounded by urban uses.

The project site is within the Belvedere city limits on a site of less than five acres. The site is

adjacent to other residential uses and public streets for about 43 percent of its perimeter and bounded by the Belvedere Lagoon for the remaining 57 percent.

The Guidelines for the Class 32 exemption do not define “urban uses” nor what is meant by “substantially surrounded.” Based on the interpretation of “urban use” applied in *Banker’s Hill, Hillcrest, Park West 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, to refer to the location and varying characteristics of a use rather than the type of use, the City Council finds that there is substantial evidence that the Lagoon is an “urban use” because it is a human-made, urban recreational water feature that is dredged and located in the middle of the City, surrounded by a densely populated residential area and other urban uses (residential, governmental, transit, and churches). In addition, the site currently contains residences, which are urban uses. The City Council also finds that the definition of “qualified urban use” found in the Public Resources Code does not apply to the Class 32 exemption because the term is not used in the exemption itself and was not referenced in the *Banker’s Hill* case, which was decided after the definition of “qualified urban use” was added to the Public Resources Code.

C. The project site has no value as a habitat for endangered, rare, or threatened species.

No natural vegetation communities or native plant habitats are present in the project area, and the project site, including the portion extending into the Lagoon, does not provide suitable habitat conditions for any special status species known to occur in the region. Additional analysis is provided in Section 1.4.2 of the Ascent Memo and in Attachment D to the Memo.

D. Approval of the project would not result in any significant effects relating to traffic, noise, air quality, or water quality.

Traffic: Projects generating Vehicle Miles Traveled (VMT) 15 percent below that in the County or the City is considered to have an insignificant traffic impact. The City is currently utilizing the City VMT threshold in evaluating the environmental impacts of the Housing Element. Because the project would generate VMT more than 15 percent below the existing average City VMT per capita, the project would not have a significant VMT effect. The project will also improve pedestrian access, does not create any hazardous conditions, and will not impede emergency access. Additional analysis is provided in Section 1.4.7 of the Ascent Memo and in Attachment M to the Memo.

Noise: The project would not result in any significant effects relating to noise. Compliance with the City's permissible hours of construction and the project's intended compliance with the recommendations in the engineering report to use helical piles would ensure that temporary increases in noise levels would not result in disruptive noise, and associated adverse effects, to nearby receptors. Operational traffic noise also would not result in a perceptible increase in noise. Additional analysis is provided in Section 1.4.5 of the Ascent Memo and in Attachment L to the Memo.

Air Quality: No activities during construction or operation would substantially affect air quality. Additional analysis is provided in Sections 1.4.1 and 1.4.3 of the Ascent Memo and in Attachment C to the Memo.

Water Quality: The project would reduce the amount of impervious surface on the site and includes plans to install bioretention basins to reduce the amount of runoff into the Lagoon during storms, as required by region-wide permits. The project also would include a Stormwater Pollution Prevention Plan (SWPPP) and Post-Construction Stormwater Management Plan. All water runoff would also be treated through filtered bioswales. In addition, standard erosion control measures during construction would avoid water quality effects.

Any potential water quality effects relating to the bulkheads would be addressed before construction or demolition could begin. The City addresses bulkhead replacement at the time of building permit submittal. The building permit application would require a final geotechnical report prepared by an engineer regarding potential bulkhead replacement, subject to peer review by the City Engineer. The applicant has agreed to replace the bulkhead, when and as required by the City's building department and other agency review. Any subsequent development approval would be subject to this condition

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 Army Corps of Engineers and may also require permits or authorization from the California Department of Fish & Wildlife. 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 effects are caused by dock construction.

The City has no evidence that replacement and construction of bulkheads and docks in the Lagoon create significant water quality effects. Additional analysis is provided in Section 1.4.4 of the Ascent Memo and in Attachments G, J, and K to the Memo.

E. The site can be adequately served by all required utilities and public services.

The project site currently receives utility services from Marin Municipal Water District, Sanitary District No. 5 of Marin County, and Pacific Gas & Electric, and public services from the City of Belvedere, Tiburon Fire Protection District, and Reed and Tamalpais School Districts. It is anticipated that the existing water and wastewater systems, as well as the natural gas and electricity lines providing service to the project site, will have the capacity to service the project. Similarly, police, fire, parks, and other public services have adequate capacity to serve the project. Additional analysis is provided in Sections 1.4.6 and 1.4.8 of the Ascent Memo and in Attachment N of the Memo.

F. Exceptions to the Use of Categorical Exemptions

- a. **Location. Categorical exemption Classes 3, 4, 5, 6, and 11 are qualified by consideration of where a project is to be located.**

This exception does not apply to a Class 32 exemption.

- b. **Cumulative Impact. All exemptions for these classes are inapplicable when the cumulative impact of successive projects of the same type in the same place, over time is significant.**

No projects of the same type, in the same place, are currently proposed in the City or in downtown Tiburon. Therefore, no cumulative impacts would occur, and the project would not contribute to cumulative impacts related to air quality, greenhouse gas emissions, biological resources, historic resources, hazardous materials, hydrology and water quality, noise, public services, transportation, and utilities and service systems.

- c. **Unusual Circumstances/Significant Effect. A categorical exemption shall not be used for an activity where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances.**

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

1. The project presents unusual circumstances; and there is a fair argument that, because of the unusual circumstances, the project may have a significant

environmental impact. 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.

The City Council concludes that no unusual circumstances exist that are applicable to the project. The City Council further finds there is no reasonable possibility of significant environmental effects on water quality due to any alleged unusual circumstances.

The City Council also concludes that no substantial evidence exists that the project *will* have a significant effect on the environment.

The entire Lagoon neighborhood and downtown Belvedere and Tiburon are located in a flood hazard zone on filled marshland underlain by Bay mud, so this is not an unusual condition; and, for the purposes of the proposed construction, piles of various types have often been used for other homes near the Lagoon.

The effect of Bay mud on the proposed construction and the site's location in a flood zone are considered effects of the environment on the project and are not environmental impacts under CEQA. (*Calif. Bldg. Industry Ass'n v. Bay Area Air Quality Mgmt. Dist.* (2015) 62 Cal.4th 369.) Housing surrounds the Belvedere Lagoon, and such housing projects may require replacement of bulkheads, which are routinely reviewed by the City and require permits from the Regional Water Quality Control Board and possibly Army Corps of Engineers. The City has approved twenty bulkhead replacements in the past eight years, involving an estimated 2,000 feet of construction adjacent to the Lagoon, which has not caused slumping into the Lagoon. In addition, the size of this project is modest compared with other projects that have been found to be eligible for the Class 32 exemption, such as the 14-story building reviewed in *Banker's Hill*. While the size of the project may be unusual for Belvedere, housing projects of similar scope are common in the Bay Area and elsewhere in California.

Additional analysis is provided in Section 1.5 of the Ascent Memo and in Attachment G to the Memo.

No substantial evidence has demonstrated that the project *will* have a significant effect on the environment.

- d. Scenic Highways. A categorical exemption shall not be used for a project which may result in damage to scenic resources, including but not limited to, trees, historic buildings, rock outcroppings, or similar resources, within a highway officially designated as a state scenic highway.**

The project site is not located within or adjacent to a highway designated as a state scenic highway. Highway 101 is the closest state scenic highway to the project site, and the site is not visible from Highway 101. The project would therefore have no effect on a scenic resource within a state scenic highway.

- e. Hazardous Waste Sites. A categorical exemption shall not be used for a project located on a site which is included on any list compiled pursuant to Section 65962.5 of the Government Code.**

The project is not located on a site which is included on any list compiled pursuant to Section 65962.5 of the Government Code. Additional information is provided in Attachment I to the Ascent Memo.

- f. Historical Resources. A categorical exemption shall not be used for a project which may cause a substantial adverse change in the significance of a historical resource.**

The project would not cause a substantial adverse change in the significance of a historical resource. The existing buildings are not listed on the California Register of Historical Resources, or the City's historic register and the buildings do not meet requirements for either of these historic registers. The buildings are not directly associated with events or persons that made a significant contribution to broad patterns of local or regional history, do not individually or collectively embody distinctive characteristics of a type, period, region or method of construction or represent the work of a master architect, and do not appear to have any potential to yield information of any historical importance. The buildings located at 1-22 Mallard Road are not historic resources under CEQA, and the project would not result in impacts to a historical resource. Additional analysis is provided in Attachment E to the Ascent Memo.