

Subject: Comment on Mallard Pointe proposal and R. Hurd letter re: General Plan and Zoning Ordinance

Date: Wed, 21 Jul 2021 12:44:19 -0700

From: bsilvestri <communityventurepartners@comcast.net>

To: Irene Borba <iborba@cityofbelvedere.org>

CC: Craig Middleton <cmiddleton@cityofbelvedere.org>, Beth Haener <bhaener@cityofbelvedere.org>, James Campbell <icampbell@cityofbelvedere.org>, Sally Wilkinson <swilkinson@cityofbelvedere.org>, James Lynch <jlynch@cityofbelvedere.org>, Nancy Kemnitzer <nkemnitzer@cityofbelvedere.org>, Steve Block <sblock@cityofbelvedere.org>, Mark Wolfe <mrw@mrwolfeassociates.com>

Dear Ms. Borba,

Community Venture Partners, Inc. ("CVP") is a 501(c)(3) nonprofit organization that supports community-serving projects, programs and initiatives that demonstrate the highest principles of economic, social and environmental sustainability. CVP is committed to ensuring a transparent public process that incorporates community voices into planning and government decision-making.

In the past months, we have been contacted by a significant number of Belvedere residents expressing concerns about the proposed development of the Mallard Pointe property and the claims made by the applicant's legal counsel with regard to land use and the consistency of the Belvedere General Plan and Zoning Ordinance. In particular, we refer to the letter from Riley Hurd of Ragghianti & Freitas, LLC, dated March 21, 2021.

In response, we asked our legal counsel to opine on the assertions made by Mr. Hurd so that Belvedere residents and the City can make a fair and impartial assessment of the issues raised.

Please find our attorney's letter, attached.

Thank you in advance for your time and careful consideration. We look forward to hearing your thoughts on this matter.

MEMORANDUM

July 21, 2021

To: Community Venture Partners
 From: Mark Wolfe, M. R. Wolfe & Associates, PC
 Re: Mallard Pointe Development – Need for Rezoning from R-2

You asked whether the multi-family apartment component of the proposed Mallard Pointe Project (“Project”) is permissible “by right” in the City of Belvedere’s R-2 Zoning District, as claimed in a March 15, 2021 memo from the developer’s attorney. For the following reasons we conclude it is not permissible in the R-2 district, and would at a minimum require an amendment to the City’s General Plan and Zoning Code in order to proceed.

The General Plan Designation of the Project Site

The Belvedere General Plan 2030 designates the Project site “Medium Density MFR: 5.0 to 20 units/net acre.” The General Plan’s Land Use Element clearly states that this Medium Density MFR designation applies to lands in **both** the R-2 **and** R-3/R-3C zones. (*See* Land Use Element, p. 25, attached as **Attachment 1** to this memo, and Table, reproduced below.) Note the Table’s use of the conjunction “and” in defining “Medium Density Multi-Family Residential (R-2 **and** R-3/R-3C). In other words, R-2 and R-3/R-3C zoning are both sub-categories of the Medium Density MFR designation.

Residential General Plan land use categories and density and intensity standards are as follows:

Low Density Single Family Residential (R-15 zone)	1 to 3.0 dwelling units per net acre. 2.7 to 8.1 persons per acre. The total floor area permitted, without an Exception Permit, is 33 percent of the lot size, up to a house size cap of 4,850 square feet for R-15 zone.
Medium Density Single Family Residential (R-1L and R-1W zones)	3.1 to 6.0 dwelling units per net acre. 8.2 to 16.2 persons per acre. The total floor area permitted, without an Exception Permit, is 50% percent of the lot size, up to a house size cap of 4,000 square feet in the R-1L (Lagoon Area) zone and 40 percent of the lot size, up to a house size cap of 4,240 square feet in the R-1W (West Shore Road) zone.
High Density Single-Family Residential (R-1C zone)	Over 6.0 units per net acre. More than 16.3 persons per acre. The total floor area permitted, without an Exception Permit, is 50 percent of the lot size, up to a house size cap of 3,500 square feet for R-1C zone.
Medium Density Multi-Family Residential (R-2 and R-3/R-3C zones)	5 to 20 dwelling units per net acre. 13.5 to 54 persons per acre.
High Density Multi-Family Residential (R-3 and R-3/SC-H overlay)	Same as R-3, except density may be increased up to 35 dwelling units per net acre (95 persons per acre) upon Planning Commission’s findings of benefit to the community and lack of environmental impact or on residential properties adjacent to commercially-designated properties.

The General Plan’s Housing Element, meanwhile, acknowledges this distinction in even more detail, clarifying that the R-2 District is a “Two-Family (Duplex)” residential zoning district, and that the separate R-3 and R-3C Zoning Districts are “Multi-Family” residential zoning district:

“The following zoning districts allow residential uses:

- R-1C: Single-family Residential Zoning district for parcels on Corinthian Island
- R-1L: Single-family Residential Zoning district for parcels on the Belvedere Lagoon
- R-1W: Single-family Residential Zoning district for parcels along the Waterfront (West Shore Road)
- R-15: Single-family Residential Zoning district for parcels on Belvedere Island
- R-2: Two-Family (Duplex) Residential Zoning District**
- R-3/R-3C: Multi-Family Residential Zoning Districts**
- C-1: Commercial Zoning District – allows second story residential uses over ground floor commercial”

See Housing Element, pp. 45-46 (**Attachment 2**.)

Therefore, the General Plan’s Land Use Element establishes, and its Housing Element expressly recognizes, that there are **two** distinct sub-categories of “Medium-Density Multi-Family Residential” zoning districts: a two-family/duplex district (R-2), and separate multi-family (apartments) districts (R-3 and R-3C).

The Zoning Code Designation of the Project Site

The City’s Zoning Map (*see* **Attachment 3**) indicates that the entirety of the Project site is zoned “R-2,” indicating that it is in the “Two-Family (Duplex) Residential Zoning District.”

Chapter 19.28 of the Zoning Code, titled “R-2 ZONE,” specifies the permitted land uses, regulations, and development standards that govern within the R-2 Two-Family (Duplex) Zoning District. **Section 19.28.010** (copy attached as **Attachment 4**) lists permissible land uses as follows:

“The following uses are permitted by right (*i.e.* without a use permit) in the R-2 zone:

A. All uses and accessory uses permitted in the R-1 zone and the R-15 zones,¹ subject to the same requirements and regulations provided in Chapters 19.24 and 19.26 of this Title for the R-1 and R-15 zones;

B. Two-family dwellings;

C. Accessory uses necessary to any of the above uses, and accessory buildings located on the same lot;

D. Structures, facilities and uses relating to or convenient or necessary for any function of municipal government;

E. Transitional and supportive housing facilities.

Section 19.28.020 specifies additional uses that are permissible within the R-2 District with a conditional use permit. These are: public buildings, parks and playgrounds; electric substations, and other public utility facilities; large residential or community care facilities serving seven or more individuals; and large family day care. (*See Attachment 4.*)

Notably, **Section 19.28.030**, titled “Prohibited uses,” states that only the uses described above are permissible in the R-2 district, while expressly prohibiting “apartment houses:”

The following uses are prohibited in the R-2 zone: All uses not specified in Sections 19.28.010 or 19.28.020 of this Chapter, specifically including, but not limited to, any business, boarding house, rooming house, **apartment court**, **apartment house**, church, club building, hotel, rental office or any other use. (*See Attachment 4, boldface added.*)

Table 36 in the Housing Element does not establish that multi-family apartments are permissible by right in the R-2 Zoning District.

In a memo dated March 15, 2021 (**Attachment 5**), the law firm of Ragghianti & Freitas, LLP (“Ragghianti”) opines that the inclusion of Table 36, labeled “Housing Types by Residential Zoning Districts,” in the Housing Element’s discussion of how the City has zoned for “a Variety of Housing Types” establishes that multi-family apartments are permissible “by right” in the R-2 district. The memo goes so far as to declare: “[t]his table is unequivocal that multi-family housing is permitted as a matter of right in the R-2 zoning district[.]” Ragghianti Memo at p. 3; *see* graphic, below.

¹ The R-1 and R-15 districts both allow single-family dwellings and accessory structures (BMC Ch. 19.24, 19.26), but with different development standards.

We believe Ragghianti’s opinion is incorrect. Based on the above discussion and analysis of the General Plan and Zoning Code, the General Plan’s Medium Density MFR designation and the Zoning Code’s R-2 (two family duplex) designation together establish that only one category of multi-family dwelling, duplexes, is permissible by right in the R-2 district. Other forms of multi-family housing, *i.e.*, apartments of various sizes, are permissible by right in the R-3 and R3C districts, but not in the R-2 district.

Ragghianti’s reliance on Table 36 in the Housing Element to claim that apartments are permissible “by right” in the R-2 District is misplaced for an additional reason: under the State Planning & Zoning Law (Gov’t Code § 65000 et seq.), a General Plan’s Housing Element cannot legislate or prescribe land use designations; only the Land Use Element can carry out that function. (Gov’t Code § 65302(a) (land use element designates “uses of . . . land for housing, business, industry, open space,” etc.); *compare* § 65580 (housing element “shall consist of an identification and analysis of existing and projected housing needs and a statement of goals, policies, quantified objectives, financial resources, and scheduled programs for the preservation, improvement, and development of housing.”) Viewed in the correct context, and not in isolation, Table 36 is consistent with this mandate. Below is the language from the Housing Element immediately preceding Table 26, which Ragghianti omits from its memo:

“4. Provision of a Variety of Housing Types.

Housing Element law specifies that jurisdictions must identify adequate sites to be made available through appropriate zoning and development standards to encourage the development of various types of housing for all economic segments of the population, including multi-family rental housing, factory-built housing, mobile homes, emergency shelters, and transitional housing.

Table 36 summarizes the housing types currently permitted in each of Belvedere’s residential zoning districts. Multi-family housing is conditionally permitted in Belvedere’s C-1 (Commercial) Zoning District.

Table 36: Housing Types by Residential Zoning Districts

Housing Types Permitted	Residential Zoning District					
	R-1C	R-1L	R-1W	R-15	R-2	R-3, R-3C
Single-family	P	P	P	P	P	P
Multi-Family					P	P
Second Unit	P	P	P	P	P	P
Duplex					P	P
Mfg. Housing	P	P	P	P	P	P
Congregate Housing	P	P	P	P	P	P
Transitional Housing	P	P	P	P	P	P
Supportive Housing	P	P	P	P	P	P
Care Facility (6 or fewer)	P	P	P	P	p	P
Care Facility (7 or more)	C	C	C	C	C	C

P=Permitted, P=Conditionally Permitted

See Housing Element, p. 59 (**Attachment 2**); graphic from Ragghianti Memo, at p. 3 (annotations Ragghianti’s).

There is no conflict between the General Plan and Zoning Code.

Ragghianti notes, correctly, that in the event of a conflict or inconsistency between a City's General Plan and Zoning Code the provisions of the former will govern. Ragghianti is also correct that the test for consistency between a general plan and zoning ordinance is whether the ordinance "furthers the objectives and policies of the general plan and does not obstruct their attainment." (*City of Morgan Hill v. Busbey* (2018) 5 Cal.5th 1068, 1080; *see also* Gov. Code § 65860(c); *see also Friends of Lagoon Valley v. City of Vacaville* (2007) 154 Cal.App.4th 807, 817 ("[a]n action, program, or project is consistent with the general plan if, considering all its aspects, it will further the objectives and policies of the general plan and not obstruct their attainment."))

Here, there is no such conflict or inconsistency between the City's Zoning Code provisions governing the R-2 Zoning District and the General Plan. As discussed, the General Plan clearly dictates separate and distinct zoning classifications within the MFR Medium Density land use designation, namely R-2, and R-3/R-3C. The Zoning Code, meanwhile, is clear that only single-family homes or duplexes are permissible in the R-2, a fact corroborated by the Housing Element's clear statement that R-2 is the "Two-Family (Duplex) Residential Zoning District," and the R-3/R-3C is the "Multi-Family Residential Zoning Districts." Furthermore, there is no plausible basis to argue that the Belvedere Zoning Code's R-2 designation, including its prohibition on multi-family dwellings with more than two units, obstructs the attainment of the objectives and policies of the General Plan, when the General Plan itself expressly identifies and acknowledges the R-2 Zoning District as a separate sub-category of MFR medium density land use designation from the R-3 and R-3C Zoning Districts. No conflict or inconsistency between the General Plan and Zoning Code exists.

Conclusion

Ragghianti's twin assertions that the General Plan allows multi-family apartments "by right" within the R-2 Zone, and that Zoning Code's contrary provisions are in conflict with, and are preempted by the General Plan are both incorrect. The General Plan's "Medium Density MFR: 5.0 to 20 units/net acre" land use designation by its own terms expressly includes separate zoning classifications for different types of multi-family dwelling, namely two-unit (duplex) dwellings in the R-2 Zoning District, and three or more-unit apartment buildings in the R-3 and R-3C Zoning Districts.

Therefore, to the extent the Mallard Pointe Project includes a multi-family apartment building containing three or more units, it will require a General Plan Amendment and change in the R-2 zoning, which currently prohibits such uses.

We hope this addresses your question. Please let us know if we can provide any additional information or analysis.

ATTACHMENT 1



City of Belvedere

General Plan 2030

Volume One: Goals, Policies, and Actions

Adopted by the Belvedere City Council

June 9, 2010



www.cityofbelvedere.org

Printed on paper with 100% post-consumer content



EXHIBIT 3: CITY OF BELVEDERE 2030 GENERAL PLAN LAND USE MAP

RESIDENTIAL CATEGORIES

Low Density SFR: 1.0 to 3.0 units/net acre

Medium Density SFR: 3.1 to 6.0 units/net acre

High Density SFR: Over 6.0 units/net acre

Medium Density MFR: 5.0 to 20 units/net acre

High Density MFR: Up to 35 units/net acre



OTHER USES

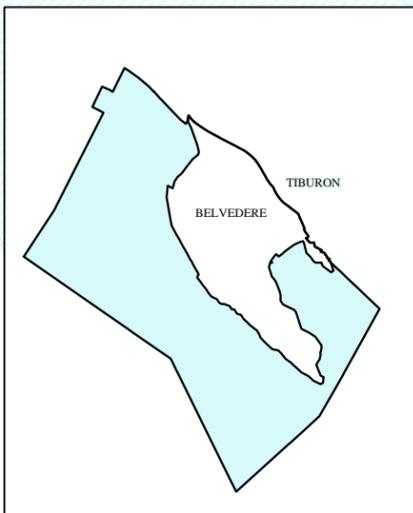
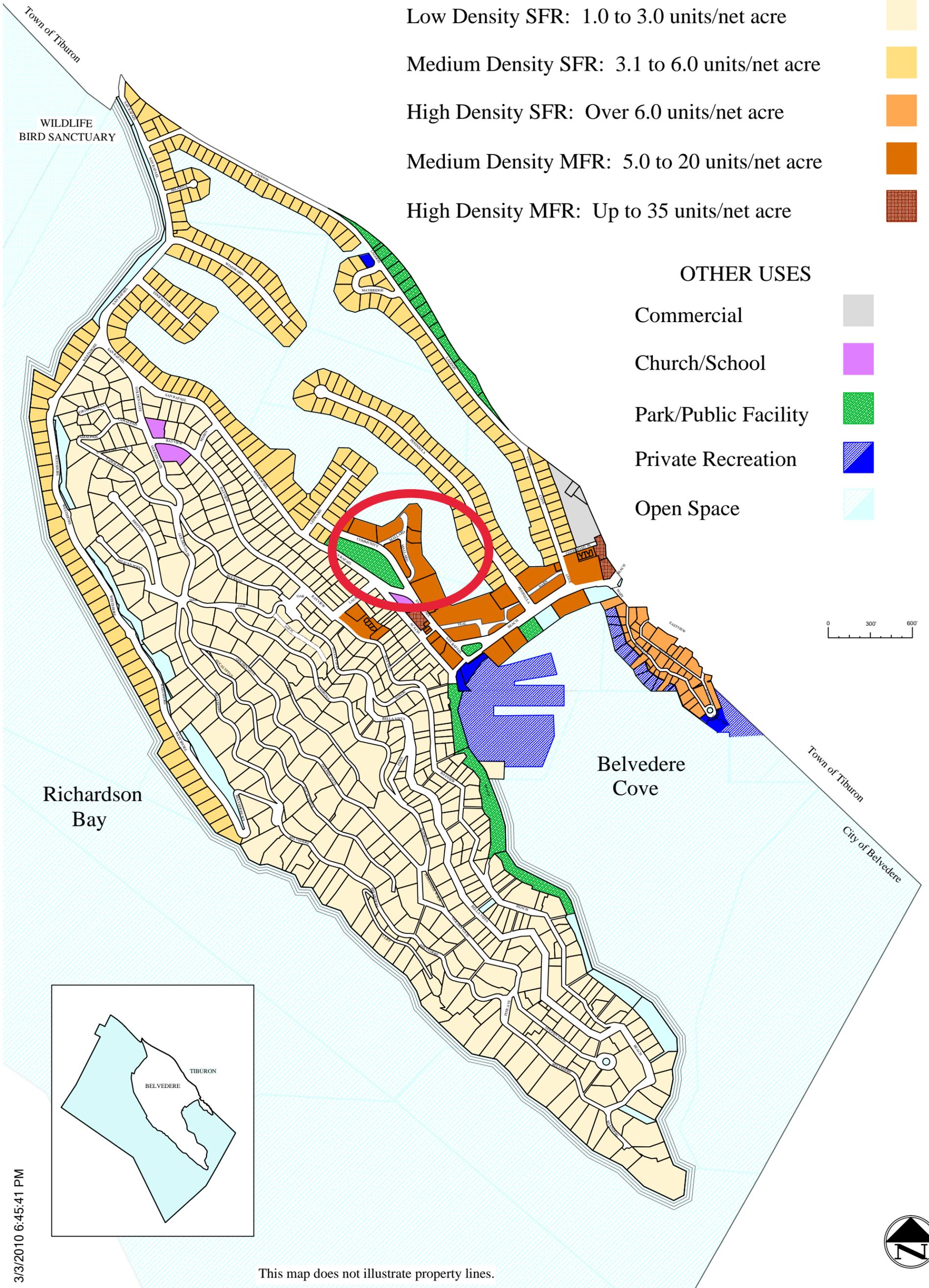
Commercial

Church/School

Park/Public Facility

Private Recreation

Open Space



3/3/2010 6:45:41 PM

This map does not illustrate property lines.



Residential General Plan land use categories and density and intensity standards are as follows:

Low Density Single Family Residential (R-15 zone)	1 to 3.0 dwelling units per net acre. 2.7 to 8.1 persons per acre. The total floor area permitted, without an Exception Permit, is 33 percent of the lot size, up to a house size cap of 4,850 square feet for R-15 zone.
Medium Density Single Family Residential (R-1L and R-1W zones)	3.1 to 6.0 dwelling units per net acre. 8.2 to 16.2 persons per acre. The total floor area permitted, without an Exception Permit, is 50% percent of the lot size, up to a house size cap of 4,000 square feet in the R-1L (Lagoon Area) zone and 40 percent of the lot size, up to a house size cap of 4,240 square feet in the R-1W (West Shore Road) zone.
High Density Single-Family Residential (R-1C zone)	Over 6.0 units per net acre. More than 16.3 persons per acre. The total floor area permitted, without an Exception Permit, is 50 percent of the lot size, up to a house size cap of 3,500 square feet for R-1C zone.
Medium Density Multi-Family Residential (R-2 and R-3/R-3C zones)	5 to 20 dwelling units per net acre. 13.5 to 54 persons per acre.
High Density Multi-Family Residential (R-3 and R-3/SC-H overlay)	Same as R-3, except density may be increased up to 35 dwelling units per net acre (95 persons per acre) upon Planning Commission's findings of benefit to the community and lack of environmental impact or on residential properties adjacent to commercially-designated properties.

b. Commercial Land Use

Commercial uses within the City consist only of the portion of the Boardwalk Shopping Center area that lies within the City boundary and the office spaces found along Beach Road near the San Francisco Yacht Club. Therefore, most neighborhood shopping and services needs are met in the other shopping areas of the Tiburon Peninsula: in downtown Tiburon, the Cove Shopping Center, or at Strawberry Village. No industrial uses are permitted within the City.

Many residents take the bus, ferry, or a car to San Francisco or other Marin County jobs. The employment base within the community is very small, limited to a few offices, retail and service businesses, one restaurant, two yacht clubs, and construction activities. According to the 2000 US Census, 14.4 percent of Belvedere residents work at home, and the mean number of minutes that residents commute to work is 34.8 minutes. The percentage of Belvedere residents commuting by ferry is 10.9 percent, and 6.3 percent walk to work.

Present density and intensity standards (and existing densities) are as follows:

Commercial (C-1 zone)	Floor Area Ratio not in excess of 1:1. Not over 50 percent of lot covered. Minimum lot of 5,000 square feet.
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The Commercial General Plan land use category allows a range of business types including retail, services, restaurants, offices and medical facilities. Industrial uses, single-family homes, duplexes, and motor courts are not allowed.



ATTACHMENT 2

City of Belvedere
Housing Element Update 2015-2023

Adopted
May 11, 2015

SECTION 3: HOUSING CONSTRAINTS

A. Governmental Constraints

As with other cities, Belvedere’s development standards and requirements are intended to protect the long-term health, safety, and welfare of the community. The City of Belvedere charges fees and has a number of procedures and regulations it requires any developer to follow. There are many locally imposed land use and building requirements that can affect the type, appearance, and cost of housing built in Belvedere. These local requirements include zoning standards, development fees, parking requirements, subdivision design standards, and design review. Other building and design requirements imposed by Belvedere follow State laws, the Uniform Building Code, Subdivision Map Act, energy conservation requirements, etc.

1. Land Use Controls

General Plan Land Use Element

Belvedere’s General Plan Land Use Element provides for four residential categories. Densities range from 1 unit per net acre in the Low Density Residential areas to up to 20 units per net acre in Multi-Family Residential areas. Density in the High Density Multi-Family Residential land use category may be increased up to 35 dwelling units per net acre upon Planning Commission’s findings of benefit to the community and lack of environmental impact or on residential properties adjacent to commercially-designated properties. Higher densities can be achieved through State density bonuses. Although the City is largely built-out, quality of life and land use issues continue to be of interest to residents as the City examines what kind of additional development and/or intensification of existing sites can be accommodated.

The City’s residential land use designations facilitate and encourage the provision of a wide range of housing types, including single-family dwellings, second dwelling units, and multi-family units that are appropriate to the topography and location of the individual parcels. Therefore, Belvedere’s land use regulations are not a constraint to residential development.

Zoning Ordinance

The City regulates the type, location, density, and scale of residential development primarily through the Zoning Ordinance. Zoning regulations are designed to protect and promote the health, safety, and general welfare of residents, as well as implement the policies of the General Plan. The following zoning districts allow residential uses:

- R-1C: Single-family Residential Zoning district for parcels on Corinthian Island
- R-1L: Single-family Residential Zoning district for parcels on the Belvedere Lagoon
- R-1W: Single-family Residential Zoning district for parcels along the Waterfront (West Shore Road)
- R-15: Single-family Residential Zoning district for parcels on Belvedere Island
- R-2: Two-Family (Duplex) Residential Zoning District
- R-3 and R-3C: Multi-Family Residential Zoning Districts
- C-1: Commercial Zoning District – allows second story residential uses over ground floor commercial

There are many locally imposed land use and building requirements that can affect the type, appearance, and cost of housing built in Belvedere. The City of Belvedere’s Zoning Ordinance is available to the public on the City’s website (cityofbelvedere.org), and a summary of the Zoning standards for each of Belvedere’s residential districts is also attached to this document as Appendix A.

Zoning regulations do not appear to pose any serious problems to the development of the remaining undeveloped residential sites. Rather, the challenges to developing the remaining sites have more to do with the site topography, available land and construction costs. Regulations concerning building setbacks and open space are not unusually restrictive, and on-site parking is not required to be covered by a carport or garage. The City’s zoning standards have been written with the unique aspects of the community in mind and have attempted to mitigate the issues of topographic and other environmental constraints

The City does receive applications for code exceptions and variances, most of which are due to building on a challenging site with steep terrain. Variances are considered on a case-by-case basis, with environmental problems and design receiving particular attention. It is possible for a single-family dwelling to be built without variances on most of the sites, and the review procedure exists if an exception to the standards is needed due to site constraints.

Single-Family Development (R-15 Zoning District):

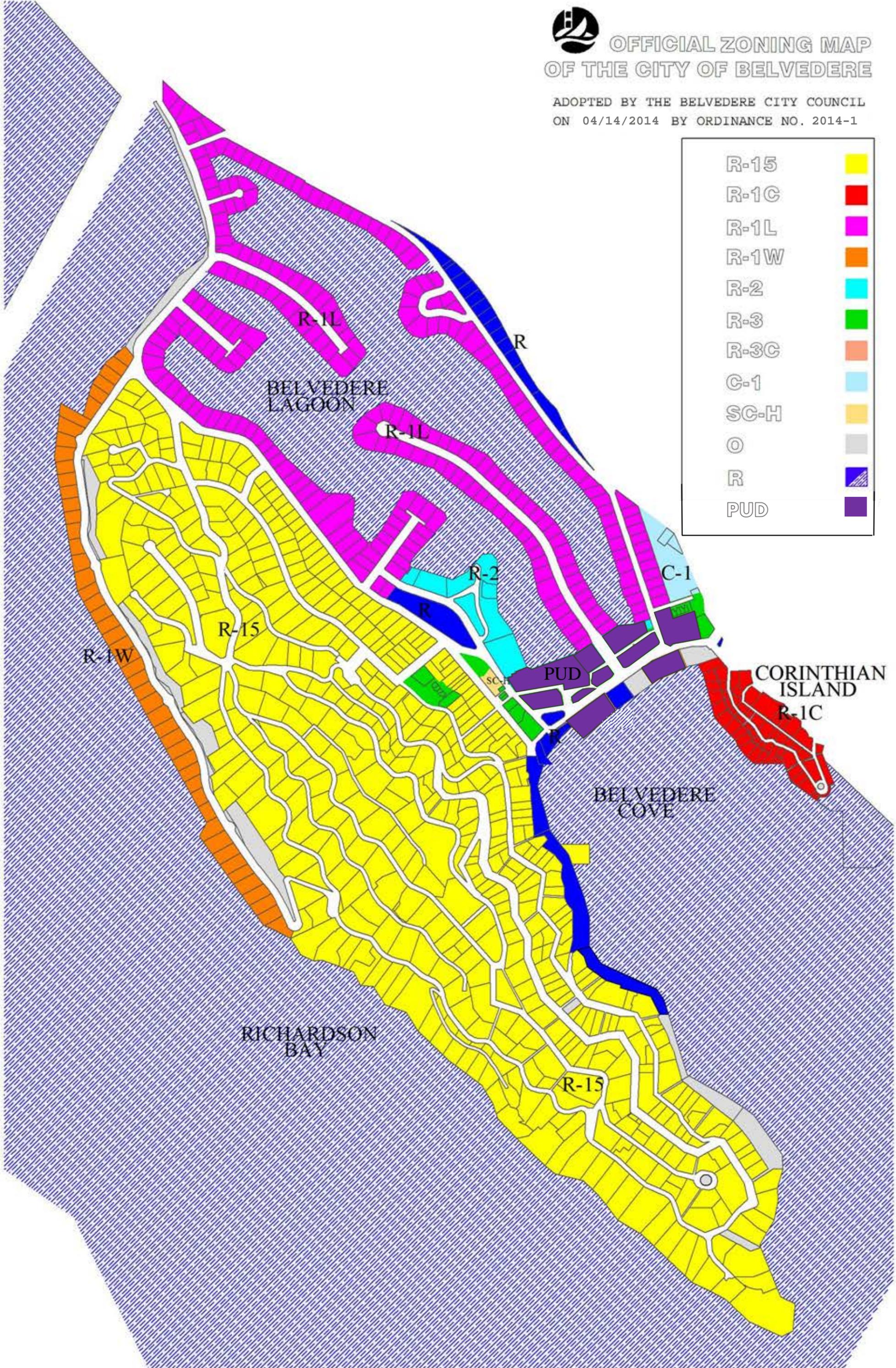
The one development standard that at first may appear to be excessive is the minimum lot area requirement of 15,000 square feet per lot for the R-15 zone (located on Belvedere Island). However, at the time this zoning density was established, virtually all residential lots were already developed, and lot size was directly related to the steep topography of remaining undeveloped land. Belvedere currently has the highest population density, in terms of persons per square mile of land area, of any city in Marin County. Increasing development densities significantly on Belvedere Island would be detrimental to the environment and to the safety of the community, and so therefore has not been modified.



OFFICIAL ZONING MAP OF THE CITY OF BELVEDERE

ADOPTED BY THE BELVEDERE CITY COUNCIL
ON 04/14/2014 BY ORDINANCE NO. 2014-1

R-15	
R-1C	
R-1L	
R-1W	
R-2	
R-3	
R-3C	
C-1	
SC-H	
O	
R	
PUD	



Off-street parking	2 off-street spaces for each single-family dwelling
	1 additional space for second unit

(Ord. 92-8 § 5, 1992; Ord. 89-1 § 1 (part), 1989; Ord. 77-18 § 1 (part), 1977; Ord. 138 NS § 1, 1965; Ord. 60 NS §§ 6, 9, 10, 1950; Ord. 2 NS § 2, 1937.)

19.26.050 Design review required. All new structures, and all exterior remodeling, alteration, addition or other construction, including retaining walls, swimming pools, fences and the like, shall be subject to the design review process as required in Title 20 of this Code. (Ord. 89-1 § 1 (part), 1989.)

Chapter 19.28

R-2 ZONE

Sections:

- 19.28.010 Permitted uses.
- 19.28.020 Uses permitted under permit.
- 19.28.030 Prohibited uses.
- 19.28.040 Development standards.
- 19.28.050 Design review required.

19.28.010 Permitted uses. The following uses are permitted in the R-2 zone:

- A. All uses and accessory uses permitted in the R-1 zone and the R-15 zones, subject to the same requirements and regulations provided in Chapters 19.24 and 19.26 of this Title for the R-1 and R-15 zones;
- B. Two-family dwellings;
- C. Accessory uses necessary to any of the above uses, and accessory buildings located on the same lot;
- D. Structures, facilities and uses relating to or convenient or necessary for any function of municipal government;
- E. Transitional and supportive housing facilities. (Ord. 2014-3 § 8, 2014; Ord. 89-1 § 1 (part), 1989.)

19.28.020 Uses permitted under permit. The following uses are permitted in the R-2 zone with a conditional use permit from the Planning Commission:

- A. Public buildings, parks and playgrounds;
- B. Electric substations, and other public utility facilities.
- C. Large residential or community care facilities serving seven or more individuals;
- D. Large family day care. (Ord. 2011-4 § 17, 2011; Ord. 89-1 § 1 (part), 1989.)

19.28.030 Prohibited uses. The following uses are prohibited in the R-2 zone: All uses not specified in Sections 19.28.010 or 19.28.020 of this Chapter, specifically including, but not limited to, any business, boarding house, rooming house, apartment court, apartment house, church, club building, hotel, rental office or any other use. (Ord. 89-1 § 1 (part), 1989.)

19.28.040 Development standards. The following standards apply to construction within the R-2 zone. The full text of the requirements summarized here are located in Chapters 19.44 through 19.68 of this Title. In addition, all applicable structures must receive Design Review approval pursuant to Chapter 20.04 of the Belvedere Municipal Code. In the event of a discrepancy between the following chart and the Code section, the Code section shall prevail.

Minimum	lot size	6,000 square feet
	lot width	60 foot average
	lot frontage	60 feet
Lot area/unit	3 or more bedrooms	4,000 square feet
	2 or fewer bedrooms	3,000square feet
Front yard setback <i>NOTE: For the full text of these requirements, please see Sections 19.48.010, 19.48.060, and Chapter 19.56 (Height Limits). Maximum Height is only allowed if there is no significant view blockage. See Chapter 19.56.</i>	Building less than 15 feet high within first 40 feet from front property line	5 feet
	Building less than 25 feet high within first 40 feet	10 feet
	Building over 25 feet high within first 40 feet	15 feet
Side yard setback <i>NOTE: See §19.48.145 and Chapter 19.56 (Height Limits). Maximum Heights are only allowed if there is no significant view blockage.</i>	For buildings 15 feet or less in height	5 feet
	For buildings 16-25 feet high	10 feet
	For buildings over 25 feet high	15 feet
Rear yard setback <i>NOTE: See §19.48.170 for additional comments</i>	Abutting another lot	20 feet
	Abutting a street	15 feet
	Abutting water, an alley or private way	10 feet
Setbacks for conditional use	10 feet, or minimum for that yard, whichever is greater	

Maximum lot coverage	Structures, excluding uncovered decks, etc.	40 percent (increases to 50 percent if adjacent to open water)
	Total coverage	60 percent
Maximum height <i>NOTE: See Chapter 19.56 for the full text of Height limitations requirements. Maximum Heights are only permitted if there is no significant view blockage.</i>	22 feet as measured from the highest point of the structure (excluding chimneys) to Base Flood Elevation plus one foot of freeboard. <i>(See §19.56.040)</i>	
	Up to 26 feet as measured from the highest point of the structure (excluding chimneys) to Base Flood Elevation plus one foot of freeboard may be allowed only as follows: A bonus of one foot of additional height may be allowed when an additional foot is added to the second story setbacks, to a maximum height of 26 BFE+1 and not structure may exceed a maximum height of 29 feet from Existing Grade as defined in §19.08.224. <i>(See §19.56.090)</i>	
Usable open space	300 square feet/unit/public	
	450 square feet/unit/private	
Off-street parking	2 spaces per unit, with a minimum of 4 units. Must be on the same lot as main building.	

For all regulations concerning the determination and measurement of slope, height, setbacks, floor area ratio and other development standards, see Chapters 19.44 through 19.68 of this Title. (Ord. 2015-3 Exhibit B, 2015; Ord. 89-1 § 1 (part), 1989.)

19.28.050 Design review required. All new structures, and all exterior remodeling, alteration, addition or other construction, including retaining walls, swimming pools, fences and the like, shall be subject to the design review process as required in Title 20 of this Code. (Ord. 89-1 § 1 (part), 1989.)



Ragghianti|Freitas LLP

MEMORANDUM

DATE: March 15, 2021
FROM: Riley F. Hurd III
RE: Multifamily Housing at Mallard Pointe

Question Presented:

Is a zoning change required to build multifamily housing at Mallard Pointe?

Short Answer:

No. Mallard Pointe is zoned R-2, and the Belvedere General Plan and Housing Element specifically allow multifamily housing in the R-2 zone, not just duplexes. These documents supersede any conflicting portions of the Zoning Code that may purport to prohibit certain multifamily housing types in the R-2 zone. Furthermore, multiple aspects of state law mandate the approval of multifamily housing at Mallard Pointe.

Legal Analysis:

I. Background

Mallard Pointe consists of three assessor’s parcels with the following General Plan and Zoning designations:

Parcel 1: APN 060-072-18	Parcel 2: APN 060-072-27	Parcel 3: APN 060-072-28
Size: 18,824 - 0.43 acre	Size: 95,339 - 2.19 acres	Size: 9,373 - 0.22 acre
General Plan Designation: Medium Density Multifamily Residential (MFR)	General Plan Designation: Medium Density Multifamily Residential (MFR)	General Plan Designation: Medium Density Multifamily Residential (MFR)
Zoning: R-2	Zoning: R-2	Zoning: R-2

A project (“Project”), including a multifamily housing component, is being proposed for Mallard Pointe. The question has arisen as to whether a zoning change is required for the Project in order to accommodate the multifamily housing because the City’s zoning Code purports to prohibit “apartment houses” in the R-2 zone, and to only allow duplexes. As discussed below, the answer is no.

II. The General Plan Controls

Cities are legally required to have a General Plan addressing physical development. (*Government Code* § 65300.) State law requires various mandatory elements of a general Plan, including Land Use and Housing elements. (*Government Code* § 65302.)

It is black-letter law that a city’s General Plan is the “constitution for all future development,” and that any subordinate codes or decisions must be consistent with the general plan. (*Leshar Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal.3d 531, 540, 544; see also *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 570-571 (confirming that general plan is single most important planning document).)

The “propriety of virtually any local decision affecting land use and development depends upon consistency with the applicable general plan and its elements.” (*Orange Citizens for Parks & Recreation v. Superior Court* (2016) 2 Cal. 5th 141, 153.)

Accordingly, Belvedere’s treatment of multifamily housing in the R-2 zone within the City’s General Plan, including the Land Use and Housing elements, is critical to analyze in order to ascertain whether a zoning change is needed for the Project.

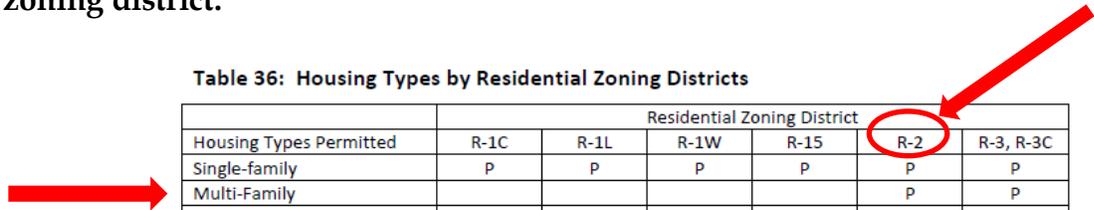
III. Belvedere’s General Plan Allows Multifamily Housing in the R2 Zone

Each of the three parcels at Mallard Pointe has the Medium Density Multifamily Residential (MFR) general plan designation, and each of the parcels has the R-2 zoning designation. The City’s Land Use element distinguishes the MFR designation from other single-family designations throughout the City, and assigns a density range of 5 to 20 dwelling units per net acre for the MFR. (Belvedere General Plan, Page 25.)

Importantly, multiple sections of the City’s General Plan, specifically within the Housing Element, explicitly state that multifamily housing, not just duplexes, is allowed in the R-2 zoning district. These specific citations are set forth below.

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

Table 36: Housing Types by Residential Zoning Districts



Housing Types Permitted	Residential Zoning District					
	R-1C	R-1L	R-1W	R-15	R-2	R-3, R-3C
Single-family	P	P	P	P	P	P
Multi-Family					P	P
Second Unit	P	P	P	P	P	P
Duplex					P	P
Mfg. Housing	P	P	P	P	P	P
Congregate Housing	P	P	P	P	P	P
Transitional Housing	P	P	P	P	P	P
Supportive Housing	P	P	P	P	P	P
Care Facility (6 or fewer)	P	P	P	P	p	P
Care Facility (7 or more)	C	C	C	C	C	C

P=Permitted, P=Conditionally Permitted

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

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

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

The City’s General Plan allows all types of multifamily housing in the R-2 zone.

IV. The Zoning Ordinance is Inconsistent

The City’s zoning ordinance purports to prohibit “apartment houses” in the R-2 zone and to only allow single family homes and duplexes. (BMC 19.28.) This zoning code language is in direct conflict with the clear terms of the City’s General Plan, and is therefore overridden and inapplicable.

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

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

It is noted that the municipal code section applicable to the R-2 zoning district, Title 19.28, was adopted in 1989, while the current Housing Element was adopted on May 11, 2015. It would appear that the zoning code simply has not been timely updated to be consistent with the general plan as required by *Government Code*, Section 65860(c).

V. State Law Requires Multifamily Housing to be Allowed

The proposed Project is a “housing development” as defined by Government Code, Section 65915. Because the Project will incorporate a percentage of Below Market Rate units, multiple sections of state law are applicable.

For example, Government Code 65915(o)(4) defines, “Maximum allowable residential density” as:

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

This definition incorporates the well-settled law regarding general plans controlling over zoning ordinances when there is a conflict, but it also has specific implications for the Project.

The R-2 zoning district density requirement is 3,000-4,000 square feet of land area per unit depending on bedroom count. When this standard is applied to Mallard Pointe in conjunction with the multiple other R-2 standards, such as lot coverage, setbacks, and height, it becomes immediately clear that there is zero chance of achieving the General Plan MFR density of 20 units per acre if only duplex structures were allowed. The site would be quickly consumed by buildings before getting anywhere close to the allowable density.

A more traditional multifamily building is necessary to ever achieve the site's base density yield of nearly 50 units as calculated per the attached Site Area and Site Coverage exhibits and site plan that was presented at the Joint Study Session on February 2, 2021.

The need for a multifamily building to meet the allowable density also implicates Government Code 65915(e)(1), which states: **"In no case may a city ... apply any development standard that will have the effect of physically precluding the construction of a development"** that includes a certain percentage of BMR units.

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

*"a site or construction condition, including, but not limited to, a height limitation, a setback requirement, a floor area ratio, an onsite open-space requirement, or a parking ratio that applies to a residential development pursuant to any ordinance, general plan element, specific plan, charter, **or other local condition, law, policy, resolution, or regulation.**"*

Here, there are multiple development standards within the R-2 zone that would physically preclude a project at the "maximum allowable residential density" for Mallard Pointe. Of particular relevance to this memorandum is the standard prohibiting apartment houses, and only allowing duplexes. The City would be obligated to waive these standards pursuant to state law even if they did apply.

VI. Conclusion

For the reasons discussed above, traditional multifamily development is already allowed at Mallard Pointe, and a zoning change is not required. The City should confirm this conclusion and the Project can then move forward with the multiple other steps in the entitlement process.

Thank you.