

October 18, 2021

By E-Mail

Mayor James Campbell
Members of the City Council
c/o Beth Haener, City Clerk
City of Belvedere
450 San Rafael Avenue
Belvedere, CA 94920
bhaener@cityofbelvedere.org

Re: Mallard Pointe Development Proposal

Dear Mayor Campbell and Councilmembers:

We are writing on behalf of our client, Belvedere Residents for Intelligent Growth, in response to certain statements made by Riley Hurd, the attorney for the developer of the proposed Mallard Pointe residential project (“Proposed Project”), at the October 11, 2021 City Council meeting. Among other things, Mr. Hurd asserted that under State law, the Proposed Project’s multi-family apartment component is permissible “by right” notwithstanding the site’s current R-2 (duplex) zoning classification, and that the Belvedere City Council lacks the authority either to require a zone change or to deny entitlements for the apartment component. As explained below, we disagree with Mr. Hurd’s views.

Belvedere General Plan & Zoning Framework

Based on the limited information that has been made publicly available, we understand the Proposed Project would be comprised of single-family homes, accessory dwelling units, duplexes, and apartments. The Belvedere General Plan 2030 designates the Proposed Project site “Medium Density MFR: 5.0 to 20 units/net acre.” The Belvedere Zoning Code places the site within the “R-2 (Duplex) Two-Family Residential” zoning district, which allows single-family and two-family homes, but not multi-family apartments. Mr. Hurd suggested that there was a conflict or inconsistency between the General Plan’s MFR designation and the Zoning Code’s R-2 classification because the development standards applicable to the R-2 zoning

district would not allow development of 20 units/net acre, and that in the event of such a conflict, the General Plan's standards would prevail under State law.

As we explained in our presentation to the City Council on October 11, the General Plan's MFR designation by its express terms includes two distinct zoning classifications, R-2 and R-3/R3-C, the latter comprising the "Multifamily Residential" zoning district. The MFR designation reflects a range of allowable densities, from lower density (5.0 units/net acre) two-family/duplex dwellings in the R-2 district, to higher density (up to 20 units/net acre) multi-family dwellings in the R-3/R3-C district. Therefore, as we also explained, there is no conflict or inconsistency between the General Plan's MFR land use designation and the Zoning Code's R-2 classification. The R-2 classification does not become a nullity simply because the MFR designation allows for 20 units/net acre in the R-3/R-3C.

In sum, the Proposed Project site is subject to the development standards and land use restrictions specified for the R-2 zoning district, which currently allow single-family and two-family residential uses, but prohibit multi-family apartments. *See* Belvedere Municipal Code § 19.280.010

SB 330

While Mr. Hurd did not cite any specific State laws that would mandate approval of the Proposed Project as a ministerial action, he may be referring to SB 330,¹ since that law was cited in the Proposed Project's "preliminary application" submitted to the City on June 18, 2021. Under SB 330, the submittal of a completed "preliminary application" form containing items of information specified in the statute has the practical effect of "locking in" the ordinances, policies, and development standards as they existed in the City's General Plan and Zoning Code as of the date of the submittal. Gov't Code § 65941.1 Simply by virtue of Mallard Pointe's June 18 submittal of the completed form, the Proposed Project cannot (with certain very narrow exceptions for emergency situations and the like) be made subject to any subsequently enacted changes in the applicable City ordinances, policies, and standards. *See* Gov't Code § 65589.5(o)(1). Therefore, only the policies and standards contained in the current Belvedere General Plan and current R-2 zoning classification will apply to the Proposed Project.

However, SB 330 is clear that consistency both with applicable zoning standards and criteria and general plan standards and criteria is required in order for a residential project to qualify for approval under the statute, so long as the zoning for the project site is consistent with the general plan. (Gov't Code §§ 65589.5(j); 65905.5(c).) In this case, the Proposed Project as reflected in the drawings and

¹ SB 330 is codified in various provisions of the California Government Code.

narrative description submitted with the preliminary application does not appear permissible under the existing R-2 zoning classification, which in turn is plainly consistent with the General Plan's MFR designation. The Proposed Project includes a multi-family structure containing 23 apartments, in addition to a mix of single-family residences and duplexes. Section 19.28.010 of the Zoning Code, R-2 zoning allows only two-family dwellings and accessory uses and buildings located on the same lot; government structures and transitional and supportive housing; parks and community facilities; and single-family residential uses allowed in the R-1 and R-15 zoning districts.

With the caveat that further information will likely be forthcoming when the developer submits a final application (see discussion below), we fail to see how the Proposed Project would be permissible "by right" under the existing General Plan and Zoning Code. We therefore do not see how it would qualify for approval as a ministerial action under SB 330.

Applicability of SB 35

Mr. Hurd may also have been referring to SB 35, a separate statute that provides for fast-tracked, CEQA-exempt ministerial approvals of housing projects that include a relatively large number of units affordable to lower income households. Enacted in 2019, SB 35 provides for a streamlined ministerial approval process (*i.e.*, with no requirements for use permits, public hearings or other discretionary actions by the city) for residential projects in cities like Belvedere that are not meeting Regional Housing Needs Assessments (RHNA). To qualify for a streamlined approval process, the Proposed Project would have to satisfy all the following requirements:

- be on land zoned for residential use. (Government Code § 65913.4(a)(2)(C)).²
- designate at least 10% of units as below market housing if located in localities that did not meet above moderate income RHNA. (§ 65913.4(a)(4)(B)(i).)
- designate at least 50% of units as below market housing in localities like Belvedere that did not meet low income RHNA. (§ 65913.4(a)(4)(B)(ii).)
- not be constructed in an ecologically protected area, on prime farmland, wetlands, high fire hazard zone, flood plain or floodway, coastal zone, or other sites designated unsuitable for residential development generally. (§ 65913.4(a)(6).)

² Further statutory references are to the Government Code unless otherwise indicated.

- be multi-unit and not single-family housing. (§ 65913.4(a)(1).)
- pay construction workers union-level wages. (§ 65913.4(a)(8).)

If the development meets all state mandated criteria, localities must approve the project in either 60 days if the development contains less than 150 housing units or 90 days if the development contains more than 150 units of housing.

There are, however, various exceptions to SB 35's applicability to projects that otherwise nominally qualify for streamlined approval. For example, SB 35 cannot be invoked where:

- less than 75 percent of the perimeter of the project site “adjoins parcels that are developed for urban uses.” (§ 65913.4(a)(2)(B).)
- the development is not consistent with existing objective zoning standards related to housing density, including the maximum density allowed within the site’s current land use designation. (§ 65913.4(a)(5)(A); emphasis added.)
- the development would require the demolition of “housing that has been occupied by tenants within the past 10 years.” (§ 65913.4(a)(7)(A)(iii).)
- the development is within a flood plain as determined by FEMA, unless the development has been issued a flood plain development permit pursuant to Part 59 (commencing with Section 59.1) and Part 60 (commencing with Section 60.1) of Subchapter B of Chapter I of Title 44 of the Code of Federal Regulations. (§ 65913.4(a)(6)(G).)
- the development is within a floodway as determined by FEMA, unless the development has received a no-rise certification in accordance with Section 60.3(d)(3) of Title 44 of the Code of Federal Regulations. (§ 65913.4(a)(6)(H).)

Based on the information available, the Proposed Project appears not to qualify for streamlined approval under SB 35 because: (1) far less than 75% of the site is adjacent to existing urban uses, primarily due to its significant frontage on the Belvedere lagoon; (2) as explained above, the Proposed Project is not consistent with the existing R-2 zoning classification, which does not allow multi-family apartments; and (3) the Proposed Project includes the demolition of existing housing that has been occupied by tenants within the past 10 years. In addition, the site is within a FEMA-designated 100-year flood zone, meaning that the developer would need to

obtain a flood plain development permit after demonstrating an ability to comply with several, onerous technical standards and criteria promulgated by FEMA and codified in the Code of Federal Regulations. Whether the developer can demonstrate that the Proposed Project will comply with such standards and criteria is unknown in the absence of a formal plan.

Other Recent Housing Legislation

Although Mr. Hurd made no specific reference to any of the housing-related bills that were recently signed by the Governor, we offer a very brief summary of some that may superficially appear relevant.

- **SB 7** Extends expedited CEQA review and a fast-tracked CEQA litigation process for certain qualifying small-scale residential projects. Applies to low-income housing projects where at least 15 percent of the units are affordable to low-income households, and where a “net zero” greenhouse gas emissions goal can be achieved.
- **SB 9** Provides for ministerial approvals of residential duplexes on lots currently zoned only for single-family housing. Does not apply to projects requiring demolition of housing currently occupied by tenants.
- **SB 10** Exempts from CEQA a city’s voluntary up-zoning action to allow for residential density of up to 10 units per parcel.
- **AB/SB 140** Provides a CEQA exemption for low-income housing projects funded by HCD’s multi-family housing program.

Again based on the limited information about the Proposed Project that is currently available, it does not appear that any of these new State housing laws would apply to it.

Conclusion

Mr. Hurd did not cite any specific State laws in his presentation to the City Council. Councilmembers may, at the next appropriate opportunity, ask him to do so, as he may very well have intended to reference laws other than those discussed above. That said, based on the limited public information currently available about the Proposed Project, it appears that it will likely need to undergo a standard, discretionary administrative review and approval process, including public hearings before the Planning Commission and City Council.

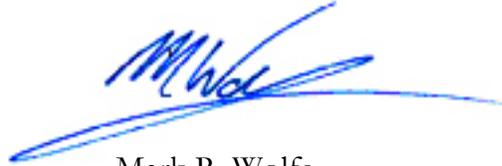
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Thank you for your consideration of these points.

Most sincerely,

M. R. WOLFE & ASSOCIATES, P.C

A handwritten signature in blue ink, appearing to read 'MR Wolfe', with a long, sweeping underline that extends to the right.

Mark R. Wolfe
On behalf of Belvedere Residents for
Intelligent Growth

MRW:sa

cc: Emily Longfellow, City Attorney (elongfellow@cityofbelvedere.org)