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VIA REGULAR MAIL AND E-MAIL

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Re: Mallard Pointe Housing Development

Dear Mr. Zadnik and Ms. Borba:

By way of background, the law firm of Aleshire & Wynder, LLP ("A&W" or "Firm") is a full-service public agency law firm with seven offices throughout California and almost 60 attorneys. We represent a broad array of public entities throughout California, including 23 cities (such as Richmond and Suisun City) as their City Attorney, and over 30 special districts, housing authorities, and other public agencies as their general or special counsel. The Firm has an extensive practice in all aspects of land use law, including zoning regulations, the entitlement process, growth management, general plans and specific plans, and implementation of state land use and housing laws such as SB 330, SB 35, and SB 9.

Based on our expertise and experience in land use and zoning matters, we were retained by the Belvedere Residents for Intelligent Growth (BRIG) to analyze the merits of Mallard Pointe 1951, LLC's proposed residential housing development project ("Project") located at 1 – 22 Mallard Road ("Property") in the City of Belvedere. Specifically, this letter analyzes whether Mallard Pointe 1951, LLC ("Developer") is entitled to a waiver of a development standard under the State's Density Bonus Law (Gov. Code §§ 65915-65918) ("DBL"). The DBL allows proposed housing developments that meet certain criteria a waiver of a development standard if said standard "will have the effect of physically precluding the construction of a development". (Gov. Code § 65915(e)(1).) Developer asserted in its application for the Project that it is entitled to build an apartment with 23 units on the Property as a waiver of a development standard imposed by the City, because such prohibition on apartments within the R-2 zone has the effect of otherwise precluding their Project.

1. Developer's Project, Which Includes a 23-Unit Apartment In the R-2 Zone, Is Inconsistent With the City's General Plan And Is Not a Permitted Land Use Without a Zone Change.

In reviewing the relevant planning documents of the City of Belvedere, it is clear that the Property has a land use designation of medium density multi-family residential, which allows between 5 to 20 housing units per net acre and includes the R-2 and R-3/R-3C zoning designations. (City's 2030

General Plan, Land Use Element, p. 20 and Exh. 3 [General Plan Land Use Map].) The Property is located within the R-2 zoning district. The City's 2030 General Plan, Housing Element, further clarifies that the R-2 zone is a residential zoning district allowing only single-family and two-family (duplex) housing, while the R-3/R-3C zone is a residential zoning district allowing structures containing two or more housing units. (2030 General Plan, Housing Element, pp. 45-46; Belvedere Municipal Code ("BMC") §§ 19.12.010(g), 19.12.020.) In other words, within the land use designation of medium density multi-family residential, there are two subcategories of permissible multi-family residential uses: (i) those that allow only up to two-family (duplex) structures (R-2 zone), and (ii) those that allow duplexes or apartments (R-3/R-3C zone).

The BMC further clarifies the permitted land uses within the R-2 zoning district. Sections 19.28.010 through 19.28.030 of the BMC discuss land uses that are permitted by right, land uses permitted by conditional use permit, and land uses prohibited altogether within the R-2 zone. Under Section 19.28.010 of the BMC, uses permitted by right include single-family housing units and two-family housing units, among others. Under Section 19.28.030 of the BMC, land uses that are prohibited altogether in the R-2 zone include hotels, boarding houses, apartment courts, and apartment houses, among others. Thus, structures containing more than two housing units are prohibited. Apartments, which by definition contain more than two housing units, are therefore not allowed in the R-2 zone. They are permitted, however, in the R-3/R-3C zones.

State statutes and case law are abundantly clear that a city's zoning map, and each property within a zone, must be consistent with the city's general plan land use designation and its objectives, goals, and policies. (Gov. Code § 65860(a); *see also, e.g., Building Industry Ass'n v. City of Oceanside* (1994) 27 Cal.App.4th 744, 762 ["Under section 65860, county or city zoning ordinances must be consistent with the entity's general plan, such that '[t]he various land uses authorized by the ordinance are compatible with the objectives, policies, general land uses, and programs specified in such a plan.'"].) Developer's proposed construction of a 23-unit apartment on the Property, which is impermissible in the R-2 zone, renders the Property use inconsistent with the City's zoning map and 2030 General Plan, and consequently violative of State law.

Accordingly, Developer's Project, which includes a 23-unit apartment building, is prohibited under the General Plan and the City's zoning ordinance. Without a zone change amendment to R-3/R-3C or some other zoning district where apartment uses are permitted, Developer's Project cannot be built on the Property, and allowing Developer to do so would be a violation of the City's own zoning ordinance. (BMC §§ 19.28.010, 19.28.030, 19.92.010.)

2. Presuming Other Conditions Are Met, the State's Density Bonus Law Only Authorizes a Waiver From Development Standards, Not a Waiver From Permissible/Prohibited Land Uses Or Consistency With the General Plan.

As stated above, the DBL allows proposed housing developments that meet certain criteria a waiver of a development standard if said standard "will have the effect of physically precluding

the construction of a development". (Gov. Code § 65915(e)(1).) Under the DBL, a "development standard" is defined 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.
>
> (Gov. Code § 65915(e)(1).)

In this case, it is unclear that Developer's Project is physically precluded from being developed based on the prohibition of apartment houses/courts within the R-2 zone. ***Even so, the City's prohibition on apartments in the R-2 zone is <u>not</u> a development standard – it is a land use restriction***. A land use designation or restriction dictates ***<u>what</u>*** type of uses can and cannot be put on a property, while a development standard dictates ***<u>how</u>*** each of those types of uses is to be developed, built, or improved. The preeminent California land use treatise, Miller & Starr, confirms these basic principles: zoning ordinances regulate both "allowed uses of specific parcels of land [aka land use designation] ***and*** . . . the requirements for the development of improvements in accordance with the specific zoning designation [aka development standards]." (7 Miller & Starr, Cal. Real Est. § 21:3 (4th ed.).)

As provided under the DBL, a "development standard" includes regulations on ***<u>how</u>*** a use is to be developed, built, or improved. Concepts such as height limitation, setback requirements, floor area ratios, and parking standards are unequivocally development standards, as they dictate how a use is to be built on a site. These regulations or development standards are applicable to all types of uses that are permitted within a certain zone. On the other hand, the prohibition on apartments does not fit under the definition of "development standard" under the DBL because it is not a "site or construction condition" and does not dictate how a use is to be developed, built, or improved.

The distinction between land use designations and development standards is made clearer by the fact that the prohibition of apartment houses/courts is listed under BMC Section 19.28.030 entitled "Prohibited Uses" and is among a list of other ***prohibited land uses*** such as hotel, rental office, boarding house, and church. No one will assert that a hotel, boarding house, or rental office is a development standard rather than a type of land use, so it is equally nonsensical for Developer to assert that an apartment is a development standard rather than a type of land use. Furthermore, BMC Section 19.28.040 entitled "Development Standards" lists the standards that apply across the board to all permitted/conditionally permitted uses, including single-family housing units, two-family housing units, community care facilities, and family day cares and dictate how those uses are to be constructed, built, or improved on a site. The development standards under BMC Section 19.28.040 include, but are not limited to, minimum lot size, setback requirements, maximum lot coverage, off-street parking requirements, and usable open space. Such development standards are

exactly the type of "development standards" that can be waived under the DBL. (Gov. Code §§ 65915(e)(1), 65915(o)(1).)

It is important to note that nothing in the DBL, including its definition of "development standard," authorizes a developer not to comply with a city's permitted/prohibited land uses under its general plan and zoning ordinance without an approved general plan or zoning code amendment. Likewise, with the exception of ADUs (Gov. Code § 65852.2), supportive housing (Gov. Code § 65651), and two-family housing units under SB 9 (Gov. Code § 65852.21), nowhere does the Government Code authorize the development of housing uses in violation of a city's permitted/prohibited land uses under its general plan and zoning ordinance. ***Simply put, Developer's proposal to build a 23-unit apartment on the Property as part of the Project is unlawful and a violation of state law without an approved zone change, and the prohibition on apartment uses in the R-2 zone cannot be waived under the DBL regardless of whether or not the Project qualifies for a density bonus.***

3. Case Law Further Supports That the Apartment Prohibition In the R-2 Zone Is A Land Use Restriction, Not A Development Standard.

Case law reviewing a waiver of development standards under the DBL affirms that "development standards" include only those regulations that regulate ***how*** a housing development is constructed, built, or improved, rather than ***what*** type of housing development is developed. For example, the "development standards" considered in *Bankers Hill 150 v. City of San Diego* (2022) 74 Cal.App.5th 755 included a reduced parking standard and setback requirements. (*Id.* at 772.) The developer in *Bankers Hill* did not seek a change in any land use or type of housing use that was allowed within the property's zone and general plan. The court elaborated:

> … A city must offer a waiver or reduction of development standards that would have the effect of physically precluding the construction of a development at the density, or with the requested incentives, permitted by the Density Bonus Law. (§ 65915, subd. (e)(1).) For example, if a city ordinance imposes a building height limitation, a city must waive that limitation for a development that is eligible for a density bonus if imposing the height limit would physically preclude construction of the proposed building with the requested incentives and at the density allowed by the Density Bonus Law.

A building height limitation, parking standard, and setback requirement are examples of standards that regulate ***how*** the proposed housing development will be constructed and improved. None of them regulate the actual type of housing use.

Similarly, in *Wollmer v. City of Berkeley* (2011) 193 Cal.App.4th 1329, the development standards considered for waiver included "height, number of stories and setbacks, granting variances to allow an additional story and a higher building height, and to forego setbacks on two corners." (*Id.* at 1346.) Again, all of the requested waivers relate to ***how*** the proposed housing development will

be constructed and improved, and none of the standards dealt with the actual type of housing being proposed.

Other cases affirm that any change in residential intensity from single-family or two-family to multi-family housing requires a change in zoning from one zoning district to another. (*See, e.g., Mira Development Corp. v. City of San Diego* (1988) 205 Cal.App.3d 1201 [city properly denied a re-zoning application from single family to multi-family use by developer who wanted to develop an apartment project because such change in land use would outstrip the provision of needed public services and improvements to go along with more intense uses]; *Foothill Communities Coalition v. County of Orange* (2004) 222 Cal.App.4th 1302 [city properly approved a zoning amendment from single-family residential zoning to senior (multi-family) residential zoning in order to allow a senior apartment complex].) Accordingly, in order to allow a prohibited use on a property, a property owner or developer must first seek approval of a zoning amendment to change the zone of that property to one where such use is permitted or conditionally permitted. Simply allowing the development of a prohibited use through a "waiver" under the DBL is wholly unsupported by statutory or case law.

4. Classification of the Prohibition of Apartment Uses As a "Development Standard" Would Authorize Said Use On Any Property Within R-1 and R-2 Zones In the City.

Developer's classification of the prohibition on apartment uses within the two-family R-2 zoning district as a "development standard" not only ignores state and local land use laws, but would render residential land use prohibitions in certain zones completely meaningless. If Developer were permitted to proceed with its Project to construct a 23-unit apartment on the Property, which is located within the R-2 zone, then anyone could develop an apartment within the R-1 or R-2 zones of the City under the DBL law, simply by arguing that such prohibition is a development standard that can be waived upon asserting – without any evidence – that a proposed housing development project would be physically precluded from development based on that prohibition. This result is tantamount to transforming R-1 and R-2 zones into multi-family residential zones that are required to accommodate apartments. This is not what the DBL contemplated and would lead to absurd results.

Based on the foregoing, it is abundantly clear that the definition of "development standard" under the DBL does not include a land use designation or restriction, and the prohibition on apartments (like the prohibition on boarding houses, hotels, and churches) in the R-2 zone is a land use restriction. Therefore, Developer's request for a waiver of said prohibition cannot legally be granted under either the DBL or the City's local laws without a zone change to the Property.

Please let me know if you have any questions or would like to discuss the matter further. We appreciate and thank you for your attention to this matter.

Sincerely,

ALESHIRE & WYNDER, LLP

Pam K. Lee, Partner

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