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MEMORANDUM

November 10, 2022

To: Irene Borba, Director of Planning and Building

From: M. R. Wolfe & Associates, P.C.
on behalf of Belvedere Residents for Intelligent Growth (BRIG)

cc: Members of the City Council
Members of the Planning Commission
Robert Zadnik, City Manager
Barbara Kautz

Re: Mallard Pointe Project – Request for Relief from Apartment House Prohbition as a "Concession" under State Density Bonus Law

This responds to the October 7, 2022 letter from Ragghianti Freitas LLP, attorneys for Mallard Pointe 1951 LLC, the developer of the proposed Mallard Pointe project ("Project"). The letter asserts that the Project is entitled to relief from the prohibition on apartment houses in the R-2 zone as an "incentive or concession" under the State Density Bonus Law ("DBL"), even if that prohibition is a land use restriction and not a "development standard" otherwise waivable under the DBL. The letter cites correspondence from HCD to the City of San Jose to support this assertion, attaches a memo from a construction company declaring that duplex units would be more costly to build at the site than an apartment building, and claims that this in turn requires the City to forego enforcement of the apartment house prohibition in the R-2 zone. As explained below, this claim is without merit.

Preliminarily, the developer's claim should be viewed in context with the overarching purpose of the DBL. As one court recently affirmed: "the Density Bonus Law reward[s] a developer who agrees to build a certain percentage of low-income housing with the opportunity to build more residences than would otherwise be permitted by the applicable local regulations." (*Bankers Hill 150 v. City of San Diego* (2022) 74 Cal.App.5th 755, 769.) It does so by granting a developer (1) a "density bonus;" (2) "incentives and concessions;" (3) "waivers or reductions" of "development standards;" and (4) prescribed "parking ratios," when it agrees to construct a certain percentage of the units in a housing development for low- or very-

low-income households. (Gov't Code § 65915(b)(1); *Bankers Hill, supra,* at p. 769.) The DBL defines "incentive or concession"[1] as a "reduction in site development standards or a modification of zoning code requirements or architectural design requirements that exceed the minimum building standards ... that results in identifiable and actual cost reductions." (*Id.* at subd. (k)(1).) As the court in *Bankers Hill* explained: "incentives and concessions are intended **to assist in lowering the cost to build a project that includes affordable housing by allowing the developer to avoid development standards**." (*Id.* at p. 770, boldface added.) Thus, the purpose of incentives, concessions, waivers, and reductions is to enable a developer to build more affordable housing units on a site than would be legally or financially feasible without them.

Although the DBL defines the terms "incentives and concessions" as also including "other regulatory incentives or concessions proposed by the developer" (*id.,* subd. (k)(3)), there are no published appellate opinions interpreting or clarifying what "other regulatory incentives or concessions" might include. Regardless, it is clear both from the provision's plain language, and courts' interpretations of the DBL's other provisions governing "incentives and concessions," that **any** such concession must "result in identifiable and actual cost reductions **to provide for affordable housing costs**. . ." as defined. (*Id.,* boldface added.) In other words, relief from a regulatory requirement that a developer proposes must only be granted it if actually reduces the cost of providing affordable housing.

Here, the Mallard Pointe Project includes six large, expensive single-family homes (one with an ADU), ten market-rate duplex units, and a 23-unit apartment building containing 19 market rate units and just four affordable units. Meanwhile, the Project proposes significantly fewer units (40) than the 48 duplex units that could be accommodated at the site at the General Plan density of 20 units/net acre, as BRIG has previously explained. The developer has provided no information or evidence showing that relief from the R-2's apartment house prohibition is necessary to lower the cost of providing four affordable units out of 40 units total.

Neither has the developer or its contractor, Midstate Construction, provided any hard facts or analysis to support the assertion that duplex units would cost 23 percent more per net square foot to build at the site than an apartment building. Midstate's memo simply proffers unsupported assertions that duplex homes in general are more expensive than apartment buildings, with no analysis specific to the Mallard Pointe site. In actuality, it is highly likely given the particular geotechnical characteristics of the site that duplex construction is actually less expensive than the apartment building being proposed. As BRIG's geotechnical consultant Lawrence

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[1] "Incentives" and "concessions" are synonymous under the DBL. (*Schreiber v. City of Los Angeles* (2021) 69 Cal.App.5th 549, 555.)

Karp, PhD explained in a letter addressing the Project's CEQA compliance submitted to the City on April 27, 2022, 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.

As a result, 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, as the Belvedere Lagoon Property Owners Association (BLPOA) has explained to the City in the past. Additional systems will also be required to prevent flooding in the proposed apartment building's below-grade garage, to safely pump any stormwater offsite, and to install a post-tensioned concrete slab over the garage area to support the structure above. These engineering and design features, which would not be necessary with a duplex-only project with at-grade, wood-framed garages, will almost certainly render **this** apartment house significantly more costly to build **at this site**. Thus, even if the apartment prohibition were waivable in the first instance as a "concession" under the DBL – which it is not -- the City would not be required to waive it here, as concessions may properly be denied if they do not "result in identifiable and actual cost reductions. . . to provide for affordable housing." (Gov't Code § 65915(d).)

Furthermore, the letter from HCD's Assistant Deputy Director of Local Government Relations to the City of San Jose does not serve as legal authority for the developer's claim that it is entitled to relief from the apartment house prohibition.[2] That letter addressed, in relevant part, a developer's request for relief from a General Plan policy requiring that "[d]evelopment that demolishes and does not adaptively reuse existing commercial buildings should substantially replace the

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[2] As a matter of law, an opinion of an HCD Assistant Deputy Director, while arguably informative, is by no means binding on any court, and therefore is of limited utility in addressing whether the R-2's apartment prohibition may be waived as a "concession" in the current situation. (*See Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 11 ("[b]ecause an interpretation is an agency's legal opinion, however "expert," rather than the exercise of a delegated legislative power to make law, it commands a commensurably lesser degree of judicial deference"). Or, as the court explained in *State Building & Construction Trades Council of California v. Duncan* (2008) 162 Cal.App.4th 289, 304: "[w]here the meaning and legal effect of a statute is the issue, an agency's interpretation is one among several tools available to the court. Depending on the context, it may be helpful, enlightening, even convincing. It may sometimes be of little worth."

existing commercial square footage." The HCD staffer opined that the under the DBL, concessions are not limited to development standards, and that "regulatory requirements" proposed by an applicant that result in identifiable actual cost reduction are eligible incentives or concessions under the DBL.

Moreover, the affordable housing project addressed in HCD's letter shares virtually nothing in common with Mallard Pointe. Functionally, it was a 100-percent affordable project (268 affordable units, three manager units, 271 units total), with no market-rate units to offset development costs. (HCD Letter, p. 1.) Requiring an affordable housing developer to replace any demolished commercial square footage as part of its project would have added substantial costs that would have almost certainly rendered the development of a 100-percent affordable project financially infeasible. That is obviously not the situation at Mallard Pointe, where 90-percent of the units will be market-rate, with six being multimillion-dollar, Lagoon-fronting single-family homes. Furthermore, the San Jose General Plan policy in question was not a categorical land use prohibition like the R-2's apartment building prohibition. It simply provided that a development project that demolishes commercial uses "should" replace the lost commercial square footage. By contrast, R-2 zoning flatly states that "apartment houses" and "apartment courts" are prohibited uses.

Again, the purpose of the DBL is to "reward a developer who agrees to build a certain percentage of low-income housing with the opportunity **to build more residences than would otherwise be permitted by the applicable local regulations**." (*Bankers Hill 150 v. City of San Diego* (2022) 74 Cal.App.5th 755, 769, boldface added.) That is plainly not the case at Mallard Pointe, where the developer is actually proposing to build <u>fewer</u> units than would otherwise be permitted by applicable local regulations. Granting the developer relief from the R-2's apartment prohibition will not result in identifiable cost reductions that will provide more affordable housing, or more units in general, than are otherwise permissible under the General Plan and Zoning Code. The City is therefore under no obligation to grant "relief" from the prohibition as a concession under the DBL.

Thank you for your consideration of these points.

MRW: