

May 16, 2023

MEMORANDUM

To: Robert Zadnik, Belvedere City Manager

cc: Bradley Evanson, Community Development Advisor
Andrew Shen, City Attorney
City Council Members
Planning Commissioners

From: Mark Wolfe, M. R. Wolfe & Associates, PC

Re: HCD Comments on Housing Element/Mallard Pointe

By letter dated May 1, 2023 the Department of Housing and Community Development (HCD) notified the City of Belvedere that the Housing Element it had adopted and submitted in January required various revisions in order to be found in compliance with the State Housing Element Law. The purpose of this memorandum, sent on behalf of BRIG, is to address certain problematic statements in HCD's letter concerning the proposed Mallard Pointe project (Project) and to point out the likely sources of HCD's evident misreading of Belvedere's General Plan and Zoning Code.

HCD's letter states on page 8:

"HCD also understands that in a letter on inconsistency related to the application on Mallard Point, the City found that the R-2 zone prohibits the use of apartment homes. **Not only is this inconsistent with the General Plan, but also is inconsistent with the density and capacity estimates cited on page D-14.** The element should clarify what types of housing is allowed in the R-2 zone and **include a program to correct any inconsistency with the land use and housing element of the General Plan.**" [Boldface added.]

You will note that HCD offers no citations or analysis of any kind to support this rather startling declaration that the City's Zoning Code is inconsistent with its General Plan, and that the City is misinterpreting its own longstanding land use regulations. This begs the question of how did the HCD staffers authoring the letter arrive at these necessarily legal conclusions?

The answer becomes evident upon review of the email correspondence sent between HCD staff and the Mallard Pointe developer's representatives¹ while the Housing Element was under review. A disproportionate number of the emails sent to HCD during this period were from two individuals: Joanna Julian of Thompson Dorfman Partners, the developer of Mallard Pointe; and Riley Hurd, Thompson Dorfman's land use attorney. In these emails, most of which bear the subject line "Re: Mallard Pointe," Ms. Julian and Mr. Hurd supplied HCD with Mallard Pointe application materials, correspondence with the City relating to the application, and the developer's own legal analysis of the City's planning and zoning laws and the Project's status under CEQA. In one email sent January 8, 2023 (copy attached), Mr. Hurd forwards several items to an HCD staffer, including his own "January 20, 2022 memo explaining the housing laws to the City," which was accompanied by the highlighted notation: "**if you read anything, please read this one.**" The referenced memo proffered the arguments that R-2 zoning's prohibition of apartment buildings conflicts with the City's General Plan, and that achieving the General Plan density of 20 units per net acre cannot be achieved without an apartment building. It is reasonable to conclude that the HCD staffer in fact did read Mr. Hurd's memo, and that this was the source for the corresponding assertion in HCD's May 1, 2023 letter.

It thus would appear that HCD is merely repeating a legal theory proffered by the Mallard Pointe developer's attorney in an email. Again, HCD provides no analysis or explanation to support this assertion in its letter. Indeed, none exists. As BRIG has documented at length and on repeated occasions, the General Plan density of 20 units/net acre can be readily achieved with duplex units, and without a prohibited

¹ This correspondence is posted on the City's website at:
<https://www.cityofbelvedere.org/DocumentCenter/View/8819/592023-Comments-Redacted>

apartment house, consistent with R-2 zoning.² This has been the case since the R-2 zone was first established in 1989. The Belvedere City Council, and ultimately the courts, determine whether the R-2 zone's apartment prohibition is inconsistent with the General Plan - not a developer or HCD.

It is unfortunate that a staffer at HCD would so uncritically accept and repeat a developer's self-interested interpretation of Belvedere's General Plan and Zoning Code. However, the City need not uncritically accept each and every finding or directive made by HCD staff in its letter. The law is clear that upon receiving HCD's determination that its Housing Element does not substantially comply with the State Housing Element Law, the City "shall take one of the following actions:

(1) Change the draft element or draft amendment to substantially comply with this article.

(2) Adopt the draft element or draft amendment without changes. The legislative body shall include in its resolution of adoption written findings which explain the reasons the legislative body believes that the draft element or draft amendment substantially complies with this article despite the findings of the department." (Gov't Code § 65585(f).)

The City accordingly may properly decline to modify its Housing Element "to include a program to correct any inconsistency [of the R-2's apartment building prohibition] with the land use and housing element of the General Plan" so long as it explains to HCD, as BRIG has done repeatedly, that the apartment prohibition is fully consistent with the General Plan's allowable density of 20 units per net acre.

MRW:

² See BRIG Memo re: Mallard Pointe General Plan & Zoning Consistency Review, July 1, 2022, available at: https://www.cityofbelvedere.org/DocumentCenter/View/8194/BRIG-Ltr-to-City-re-Mallard-Pointe_7-1-22-1; BRIG Memo re: Mallard Pointe Project – General Plan Density, September 20, 2022, available at: https://www.cityofbelvedere.org/DocumentCenter/View/8427/BRIG-Memo-re-Mallard-Pointe-Density_9-20-22-1