Ragghianti|Freitas LLP

MEMORANDUM

DATE: March 15, 2022

FROM: Riley F. Hurd III

RE: **Mallard Pointe CEQA review**

QUESTION PRESENTED

What is the legally required level of CEQA review for the Mallard Pointe project?

SHORT ANSWER

The project satisfies the criteria set forth in CEQA Guideline 15332, and is therefore exempt from CEQA review. Furthermore, the project is not subject to any of the statutory exceptions that would make the project ineligible for the exemption.

Project Description

The proposed project ("Project") is a residential infill development on a previously developed 2.8-acre site located on a private road in Belvedere (1-22 Mallard Rd). The Project would replace 22 dated market-rate residential units with 42 new residential units made up of homes, duplexes, ADUs, and an apartment building. The Project site plan follows the existing development pattern of the surrounding area with single-family and duplex homes situated along the Belvedere Lagoon, and an apartment building on the inland portion of the site.

The CEQA Process

CEQA establishes a three-tier environmental review process. The first step is jurisdictional and requires a public agency to determine whether a proposed activity is a "project." If it is, such as Mallard Pointe, the agency proceeds to the second step of the process.

At the second step, the agency must decide whether the project is exempt from CEQA review under either a statutory or categorical exemption. If a project is categorically exempt, it is not subject to CEQA and is processed without an initial study or further CEQA review. (*Holden v. City of San Diego* (2019) 43 Cal.App.5th 404, 409.)

CEQA provides several "categorical exemptions" that are applicable to categories of projects that the Legislature has determined do not pose a risk of significant impacts on the environment. Here, the Project qualifies for the infill exemption pursuant to Title 14 of the California Code of Regulations section 15332 ("CEQA Guidelines 15332").

The CEQA Infill Exemption

CEQA Guidelines 15332 states that infill development is exempt from CEQA review if it meets the following criteria:

> "a) The project is consistent with the applicable general plan designation and all applicable general plan policies as well as with applicable zoning designation and regulations.
>
> b) The proposed development occurs within city limits on a project site of no more than 5 acres substantially surrounded by urban uses.
>
> c) The project site has no value, as habitat for endangered, rare or threatened species.
>
> d) Approval of the project would not result in any significant effects relating to traffic, noise, air quality, or water quality.
>
> e) The site can be adequately served by all required utilities and public services."

As discussed below, the Project meets each of these criteria and is therefore categorically exempt from CEQA. Furthermore, there are no applicable exceptions to the exemption.

a) The project is consistent with the applicable general plan designation and all applicable general plan policies as well as with applicable zoning designation and regulation.

Mallard Pointe consists of three assessor's parcels, each of which has the Medium Density Multifamily Residential (MFR) general plan designation and the R-2 zoning designation. The MFR General Plan designation has a density range of 5 to 20 units per net acre, and anticipates 13.5 to 54 persons per acre. (General Plan, p. 25.) The Project complies with these criteria.

In contrast to the General Plan, the R-2 zoning uses a density formula of lot area/unit, with a requirement that varies based on bedroom count. Units with 2 or fewer bedrooms require 3,000 square feet of lot area, and units with 3 or greater bedrooms require 4,000 square feet of lot area. (BMC 19.28.040.) The R-2 density formula could never achieve the density allowed under the General Plan, and is therefore inapplicable under state law. (Government Code 65915(o)(4).) A project must only comply with "applicable" zoning regulations to fit the infill exemption.

The R-2 zone allows for single family homes and duplexes, but prohibits "apartment courts" and "apartment houses." (BMC 19.28.030.) The R-2 zoning also implements various additional development standards such as setbacks, lot coverage, FAR, and height limits. The Project is entitled to waivers of any of these standards that physically preclude the development. (Government Code 65915(f).)

The use of waivers does not render the infill exemption inapplicable. This issue was squarely addressed and resolved in *Wollmer v. City of Berkeley* (2011) 193 Cal. App. 4th 1329. In *Wollmer*, an opponent of a Berkeley mixed use density bonus project challenged the City's use of the 15332 urban infill exemption on the grounds that the City's modifications and waivers of development standards, as required under the Density Bonus Law, meant that the project was not consistent with existing zoning.

The court rejected the argument, finding that the modifications authorized by the Density Bonus Law did not disqualify the project from claiming the exemption. The court concluded the infill exemption was still appropriate and that environmental review was not required. Waived development standards and regulations are not "applicable" to a qualifying density bonus project.

b) The proposed development occurs within city limits on a project site of no more than 5 acres substantially surrounded by urban uses.

The project site is 2.8 acres and is located within the limits of the City of Belvedere. The Project site is also substantially surrounded by urban uses. It is bordered by existing multifamily housing, Belvedere City Hall, Belvedere Community Park, and the man-made Belvedere Lagoon, which is surrounded on all sides by residential development. This is a textbook example of urban infill.

Comments have been made that the adjacency of an urban park or artificial lagoon may impact the Project's eligibility for the exemption. This issue has been squarely addressed by the courts.

In *Banker's Hill, Hillcrest, Park West Community Preservation Group v. City of San Diego,* (2006) 139 Cal.App.4th 249, the court analyzed whether a project that had obviously urban uses on some sides, but then was located adjacent to a park on another side, was precluded from relying on the infill exemption because the park did not constitute an "urban use." The court turned to case law that defined the term "urban uses" as used in the Community Redevelopment Law, specifically *Friends of Mammoth v. Town of Mammoth Lakes Redevelopment Agency* (2000) 82 Cal.App.4th 511.

In *Friends of Mammoth*, the court explained that the term "urban" means "characteristic of, or taking place in a city." The court found that "urban" refers more to the location of a use than to the type of use. Based on this guidance, the *Banker's Hill* court determined that a park qualified as an "urban use" because it was surrounded by populated areas and was an urban amenity.

Here, Belvedere Community Park and the artificial Lagoon are centrally located in the City and next to City Hall and other multifamily housing projects. Accordingly, this prong of the exemption is satisfied.

c) The project site has no value, as habitat for endangered, rare or threatened species.

The site is currently developed and bordered by residential development and a man-made lagoon. The Project has no value as habitat for endangered, rare, or threatened species. This fact has been confirmed by a Biological Site Assessment prepared by FirstCarbon Solutions and submitted to the City.

d) Approval of the project would not result in any significant effects relating to traffic, noise, air quality, or water quality.

The Project would not result in any significant effects relating to traffic, noise, air quality, or water quality. This has been confirmed through technical studies regarding each of these categories that have been submitted to the City.

e) The site can be adequately served by all required utilities and public services.

The Project would continue to be adequately served by City and regional services. All local utilities have confirmed capacity within their overall systems necessary to accommodate the project.

No Exceptions to the Exemption Apply

If a project falls within a categorical exemption, then the lead agency must determine whether the categorical exemption is unavailable because the project is subject to an exception to the categorical exemptions. (CEQA Guidelines § 15300.2.) A project will not qualify as exempt if it is subject to one of the six exceptions provided below:

(a) Location. Classes 3, 4, 5, 6, and 11 are qualified by consideration of where the project is to be located.

(b) Cumulative Impact. All exemptions are inapplicable when the cumulative impact of successive projects of the same type in the same place, over time is significant.

(c) Significant Effect. A categorical exemption shall not be used for an activity where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances.

(d) Scenic Highways. A categorical exemption shall not be used for a project which may result in damage to scenic resources within a highway officially designated as a state scenic highway.

(e) Hazardous Waste Sites. A categorical exemption shall not be used for a project located on a site which is included on any list compiled pursuant to Section 65962.5 of the Government Code.

(f) Historical Resources. A categorical exemption shall not be used for a project which may cause a substantial adverse change in the significance of a historical resource.

Here, none of the exceptions to the exemption apply.

a. Location. Section 15300.2(a) does not apply to a Class 32 infill exemption.

b. Cumulative Impact. There is no evidence of a potential significant cumulative impact because successive projects of the same type in the same place have not been approved and are not currently contemplated or proposed. In fact, Belvedere has not seen any meaningful housing development for decades.

c. Significant Effect and Unusual Circumstances. This exception has 2 prongs:

1. Whether the project presents unusual circumstances; and

2. Whether there is a reasonable possibility of a significant effect on the environment due to those unusual circumstances.

There is nothing unusual about the Project. It is a textbook infill development outside of sensitive areas. Case law strongly affirms that, even when opponents point to distinctive aspects of a project or its location, a typical project such as this is not subject to the "unusual circumstances" exception. (See, e.g., *Berkeley Hillside Pres. v. City of Berkeley*, 241 Cal. App. 4th 943, 955 (2015) (no "unusual circumstances" despite claims of unusual size, environmental setting, and inconsistency with general plan); *Protect Tustin Ranch v. City of Tustin*, 70 Cal. App. 5th 951, 962 (2021) (no "unusual circumstances" despite claims of unusually large project configuration); *Wollmer v. City of Berkeley*, 193 Cal. App. 4th 1329, 1336 (2011) (98-unit mixed use development affirmed under Class 32 exemption despite claimed unusual location and traffic issues).)

d. Scenic Highways. Section 15300.2(d) does not apply to the Project site as the site is not located adjacent to or visible from a designated scenic highway in the State of California's Scenic Highway program.

e. Hazardous Waste Sites. Section 15300.2(e) does not apply because the site is not a state designated hazardous waste site.

f. Historical resources. Section 15300.2(f) does not apply because there are no historical resources located on the proposed Project site. This has been confirmed through the following technical studies submitted to the City:

- Historic Resource Evaluation prepared by Preservation Architecture
- Archaeological Resources Technical Report for Mallard Pointe prepared by Kleinfelder