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1 **I. INTRODUCTION**

2 The City of Benicia (“City”) approved two development projects known as the Jefferson Ridge  
3 and Park Road projects (collectively, the Projects”) based on an inapplicable exemption from  
4 environmental review requirements under the California Environmental Quality Act (“CEQA”), Public  
5 Resources Code section 21000 et seq. The City violated clear requirements of its own Municipal Code  
6 to approve the two projects, which will lead to demolition of historic resources, will site projects on land  
7 with natural habitats, and will not contain the minimum level of affordable housing required by the  
8 Municipal Code. Government Code section 65913.4 enables housing project developers to choose an  
9 approval process for their proposed projects. Under certain conditions,<sup>1</sup> the Government Code section  
10 65913.4 process exempts projects from CEQA review if the project area lacks certain environmentally  
11 sensitive characteristics such as the presence of wetlands, and if the proposed project avoids causing  
12 specific kinds of environmental damage, such as demolishing a historic “structure.” The City reached  
beyond the limits of the statute’s terms to approve the Projects that do not meet statutory requirements.

13 Developers attempt to use Government Code section 65913.4 procedures to avoid local process  
14 for housing project approvals in return for building projects that include low-income housing. However,  
15 both Projects fail to comply with the statute’s prerequisites. The Projects are proposed squarely within  
16 the National Register listed Benicia Arsenal Historic District, interspersing modern residential  
17 development among buildings specifically designated as historic clusters with protected, historic,  
18 panoramic, and militarily significant views and sightlines. Additionally, the City failed to conduct a  
19 mandatory appeal procedure provided under Public Resources Code section 21151 when its staff  
20 determined that CEQA does not apply to either of the Projects. For these reasons, a writ of mandate  
must be issued to set aside the City’s approvals.

21 **II. STATEMENT OF FACTS.**

22 Both Projects (Administrative Record (“AR”) 1 et seq. [Jefferson Ridge] and 127 et seq. [Park  
23 Road]) are located in the area where the Benicia Arsenal has stood in some form since the late 1840s  
24 (AR 9321, 9334 [chronology] and 6289). These Project sites are on top of the exact location of the  
25 historic district listed in the National Register of Historic Places. (AR 7185 [partial map of Benicia

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26  
27 <sup>1</sup> Government Code section 65913.4 requires: 1) that the development is proposed for an area that has  
28 not approved its allocated share of affordable housing for two years; and 2) the proposed project  
contains at least a minimal amount of affordable housing.

1 Arsenal National Register Historic District “C” with proposed housing superimposed], 7769 [map of  
2 Benicia Arsenal National Register Historic District “C” with lot numbers]; 6289-6290 [pictures of  
3 district]; 6464 [map]; 9321, 9333; Request for Judicial Notice (“RJN”), Exh. A [Arsenal Historic  
4 Conservation Plan], p. 30; RJN, Exh. B [National Register Listing Nomination Form], p. 133.) The  
5 Jefferson Ridge Project proposes to build 22 three-story buildings with 121 residential units (including  
6 only 10% (12) affordable units), 2,000 square foot of commercial space, and associated parking spaces  
7 on a 7.9-acre site located at the intersection of Park Road and Adams Street. (AR 1). The 1451 Park  
8 Road Project proposes development of a single three-story, 17-unit (with 12% (2) affordable units)  
9 apartment complex on a 0.56-acre parcel at 1451 Park Road (AR 127).

9 **A. Historic Benicia Arsenal.**

10 The Benicia Arsenal is unique among California and national historic sites in the depth and  
11 significance of its history. The Benicia Arsenal was established in 1849, shortly before California’s  
12 statehood, on 345 acres of land east of the City, adjacent to the Carquinez Strait, - gateway to inland  
13 California. (RJN, Exh. A, pp. 21-22 [City of Benicia Arsenal Historic Conservation Plan (“AHCP”), p.  
14 iii]; AR 6288; 9321; 9328 [picture].) The Arsenal began in 1849 when the 2nd Infantry Division set up  
15 camp to establish Benicia Barracks. (RJN, Exh. B [National Register Listing], pp. 125 and 128.) After  
16 115 years of active use, the Arsenal was deactivated in 1964. (RJN, Exh. A, p. 21 [ACHP, p. ii].) The  
17 Defense Department transferred ownership by way of a surplus land mortgage paid for by Benicia  
18 Industrial Association (BIA) on behalf of the City of Benicia which held title to the Arsenal lands.  
19 Over the years, Arsenal land was sold to BIA which in turn subdivided and sold to private parties.  
20 (RJN, Exh. F, p. 259, [Benicia General Plan, p. 101].)

21 Throughout its operation, Benicia Arsenal played an important role in the nation's history:  
22 “Among the many famous people associated with the Arsenal are General William Tecumseh Sherman,  
23 General Ulysses S. Grant, Commodore Matthew Perry, General J. Pershing, and the Benet family.”  
24 (RJN, Exh. A, p. 22 [ACHP, p. iii].) “That the Arsenal retains some of its distinctive character and  
25 separation from the rest of the city is both cause for celebration and for planning for its future.” (RJN,  
26 Exh. A, p. 22; [ACHP, p. ii].) The Benicia Arsenal is listed on the National Register of Historic Places  
27 (number 76000534), recognizing its national importance. (RJN, Exh. B.) The Arsenal is also within  
28

1 the boundaries of the Sacramento San Joaquin Rivers Delta National Heritage Area (the first National  
2 Heritage Area on the west coast); it is listed as State Historical Landmark No. 176. (RJN, Exhs. D, E.)

3 The Benicia Arsenal Historic District was established as an historic overly district by the City  
4 pursuant to its zoning ordinance in 1987. The Arsenal Historic Conservation Plan (AHCP) was adopted  
5 in 1993 to implement the zoning Historic Overlay District. (RJN, Exh. A.) The City’s 1999 General  
6 Plan affirmed the value and importance of these cultural and historic resources. (RJN, Exh. F, pp. 258-  
7 262.) The overarching goal of the General Plan is sustainable development – meeting the needs of the  
8 present without compromising the ability of future generations to meet their own needs. The City  
9 designated the Arsenal District as “Lower Arsenal Mixed Use” including the policy of compatible uses.  
10 (RJN, Exh. F, p. 249 [General Plan, p. 28].) The Plan described the Arsenal area as “characterized by  
11 older, historic buildings, and a multiplicity of uses and tenants, including studios, small professional  
12 offices, and small industrial activities, such as cabinet making.” (RJN, Exh. F, p. 251.)

13 The Arsenal “adds character and diversity to the City and allows for alternative living and  
14 working arrangements quite different from those available in other parts of the community.” (RJN, Exh.  
15 F, p. 252 [General Plan, p. 47].) Policy 2.11.2 of the General Plan allows for live/work uses in the lower  
16 Arsenal only where it can be “demonstrated that adequate buffers exist, including noise buffers, and  
17 that the presence of residents would not significantly constrain industrial operations, including the flow  
18 of goods and materials.” (*Ibid.*)

### 19 **B. Project Proposals Within the Historic District.**

20 Both Projects are proposed within the Lower Arsenal Mixed Use General Plan land use  
21 designation. The sites are located within the Arsenal Historic Subdistrict C, known as the Jefferson  
22 Ridge Officers’ Row. This sub-district, which includes three large officers' residences along Jefferson  
23 Street and the original Arsenal storehouse (Clocktower Building), houses “the most outstanding  
24 ensemble of historic buildings in the district.” (RJN, Exh. A, p. 80 [AHCP, p. 57].) Future development  
25 “on the slope south of Jefferson Street and on the slopes below the promontory is of particular  
26 concern.” (*Ibid.*) The Arsenal Historic Conservation Plan gives special significance to the panoramic  
27 views of Carquinez Strait available at this location. (RJN, Exh. A, p. 60 [AHCP, p. 37].) The AHCP  
28 also protects views, sightlines, and view corridors, from, to, and among historic buildings. (*Ibid.*) It

1 also designates and protects the specimen trees and ornamental landscaping surrounding the three  
2 officer's residences on the ridgetop, mature street trees which line Jefferson Street, and the embankment  
3 above Adams and Washington Streets that been planted with oak trees, including the “seldom seen”  
4 cork oak. (RJN, Exh. A, p. 34 and 58 [AHCP, p. 11 and 35].)

### 5 **1. The Jefferson Ridge Project Site.**

6 The Jefferson Ridge Project site is bounded to the south by Adams Street, to the east by City-  
7 owned open space containing the Commanding Officers Quarters, to the west by Park Road and the  
8 Lieutenant’s Quarters, and to the north by a fossil fuel pipeline corridor with easement. (AR 6464;  
9 7769.) It is entirely within the Benicia Arsenal National Register Historic District. (AR 7769.) The  
10 Jefferson Ridge Project site is zoned Commercial Office. (AR 1.) There are also over one hundred  
11 trees on the site, 24% of which are cork oak, creating a “grove.” (AR 3122 [Applicant Arborist Report,  
12 2014, p. 3].) Based on the City’s definition, 78 of the 103 trees on-site are considered “Protected” trees.  
13 (AR 3123.) The habitat is capable of supporting numerous special-status animal species that have the  
14 potential to occur within the area, including White-tailed kite (*Elanus leucurus*); Northern harrier  
15 (*Circus cyaneus*); Cooper’s hawk (*Accipiter cooperii*) and two species of bats. (AR 4370). Prior  
16 environmental surveys done by LSA Associates also described and mapped two seasonal wetlands  
17 along the north boundary of the site, and recommended that a formal wetland delineation be conducted  
18 before approval of any development project on Jefferson Ridge/Officers’ Row. (AR 4370-4371.)

### 19 **2. The Park Road Project Site.**

20 The Park Road Project is located on the northwest corner of Jefferson Street and Park Road,  
21 entirely within the Benicia Arsenal National Register Historic District. (AR 7769.) The Park Road  
22 Project site is bounded to the south by Jefferson Street, to the east by Park Road, and to the north by a  
23 private road (Madison Street). The site is relatively flat with increased elevation on the far north side.  
24 There is a steep down-grade on the south side of the property towards the Carquinez Strait. A 24-foot-  
25 tall oak tree on the southwestern side of the property is designated as a “Significant Tree” under the  
26 Arsenal Historic Conservation Plan. (RJN, Exh. A, p. 58 [AHCP, p. 35].) Pedestrian and vehicular  
27 circulation must also be adequately planned for any new development, given the “lack of sidewalks,  
28 blocked access and private ownership of portions of Jefferson Street.” (RJN, Exh. A, p. 80 [AHCP, p.



57].) A building “at the northwest corner of Jefferson Street and Park Road [would interrupt] the continuity of the residential officer’s row.” (RJN, Exh. A., p. 80 [AHCP, p. 57.]

### **3. The Administrative Process for the Projects.**

For both Projects, the City originally identified many inconsistencies with its objective planning and zoning standards. It subsequently removed, without providing findings, several of these standards from consideration, on the grounds they were not applicable, or not objective. For example, after reviewing the Jefferson Ridge Project, the City published a Draft Evaluation of Consistency with Applicable Adopted Objective Standards that identified various inconsistencies with City Objective Planning and Zoning Standards. This included conflicts with Policy 2.20.1 (AR 1917) (“Maintain at least Level of Service D on all city roads, street segments, and intersections”), Policy 2.36.1 (“Approve development only when a dependable and adequate water supply to serve the development is assured”), Goal 2.40: (“Ensure adequate wastewater treatment capacity to serve all development shown in the General Plan”) (AR 1918), and Policy 3.1.3 (“Preserve historic trees and landscapes”) (AR 1918). The City also noted conflicts with setback and private open space requirements, and conflicts with standards from the Arsenal Historic Conservation Plan, among others, and made multiple requests for more information. (AR 2224, 2227.) The City also found the Jefferson Ridge Project conflicted with Municipal Code Section 17.28.020 zoning designation, noting “Multifamily Residential Not permitted on ground level.” The City further found conflict with Municipal Code Section 17.100.020 subdivision (C), which requires grading be less than 5,000 cubic yards, stating, “Grading exceeds 5,000 CY. Provide information in accordance with 17.100.020.” The City also identified a number of other conflicts. (AR 1919 [soil stability]; AR 1919 [noise]; AR 1920 [landscaping].)

Members of the community highlighted several conflicts with the AHCP and Objective Planning and Zoning Standards for both Projects. This included several standards that the City asserted demonstrated project consistency. For example, in the Park Road Project, the City found consistency with the requirement that a project provide residential type landscaping consisting of a front lawn and landscaping and accent planting. (AR 149.) Yet, the Project’s Preliminary Planting Plan (Sheet L-2.0) shows no landscaping for the area between the picket fence and buildings except for two new trees on Jefferson Street. (AR 175.)

1 The City subsequently and inexplicably, without any motion or hearing, deleted many of the  
2 standards it had identified as conflicting with the Projects as proposed. The City also failed to  
3 incorporate many standards from the AHCP.

4 Despite these various inconsistencies with objective standards that remained unresolved, on  
5 August 26, 2022, the City issued ministerial approvals for both Projects. The City refused to hold  
6 hearings on appeals of the approvals (AR 4347), contrary to state law (Pub. Resources Code § 21151  
7 subd. (c)).

### 8 **III. STANDARD OF REVIEW**

9 Petitioner brought this action pursuant to Code of Civil Procedure section 1094.5, alleging that  
10 the City of Benicia’s approval of the Projects was a discretionary act, subject to CEQA, and that the  
11 City’s approval violated CEQA. As an administrative writ of mandate, the standard of review is  
12 whether the City made appropriate findings under the statute, and whether substantial evidence in the  
13 record supports those findings.

14 The issue of whether the development project “would require the demolition of a historic  
15 structure that was placed on a national, state, or local historic register” has both a legal and a factual  
16 component. (Gov. Code § 65913.4, subd. (a)(7)(C).) Whether there is a “historic structure” within the  
17 meaning of section 65913.4, subdivision (a)(7)(C), is a question of statutory interpretation, a legal issue  
18 that is reviewed de novo. (*Ruegg & Ellsworth v. City of Berkeley* (2021) 63 Cal.App.5th 277, 301.)

19 Government Code section 65913.4 purports to ban any exercise of discretion by the approving  
20 agency (here, the City), and to make approval of a project a ministerial act only if the project meets  
21 certain requirements and complies with “objective planning standards.” (Govt. Code § 65913.4 subd.  
22 (a).) But the Projects here do not qualify for processing under Government Code section 65913.4 and,  
23 therefore, this is a project subject to CEQA and review for abuse of discretion by the approving agency.  
(Public Res. Code §§ 21167 and 21168).

### 24 **IV. ARGUMENT**

#### 25 **A. Government Code Section 65913.4 Must be Interpreted to Harmonize with CEQA, 26 Including Allowing For CEQA’s Appeal Process to Elected Decision-making Bodies.**

27 Where an unelected person or body (such as the Community Development Director in this case)  
28 “determines that a project is not subject to [CEQA], that ... determination may be appealed to the  
agency’s elected decision-making body, if any.” (Pub. Resources Code § 21151 subd. (c).) CEQA’s

1 procedural requirements must be observed “scrupulously.” (*Vineyard Citizens for Responsible Growth v.*  
2 *City of Rancho Cordova* (2007) 40 Cal.4<sup>th</sup> 412, 435.) Government Code section 65913.4 does not  
3 explicitly or implicitly repeal Public Resources Code section 21151 subdivision (c).

4 Here, the City’s Community Development Director decided that neither the Jefferson Ridge nor  
5 the Park Road Projects was subject to CEQA (AR 4347, 4358). Petitioner’s members filed a timely  
6 appeal to the City Council as explicitly authorized by CEQA (AR 4356-4357), thereby triggering the  
7 application of Public Resources Code section 21151 subdivision (c). The City’s Community  
8 Development Director declined to hear the appeal (AR 4347-4348 [October] and 4358-4359  
9 [September]), arguing that the appeal was precluded by Government Code section 65913.4’s  
10 streamlined, purportedly non-discretionary, approval process, and that CEQA did not apply. The City  
11 staff incorrectly determined that the Projects had met Benicia’s objective planning and design standards,  
12 and that the City Council lacked discretion to evaluate the approval or to reverse staff’s decision. (AR  
13 4358.)

14 Government Code section 65913.4 does not explicitly preempt or repeal Public Resources Code  
15 section 21151 subdivision (c). Nor does Government Code section 65913.4 impliedly preempt or repeal  
16 this section and its appeal hearing requirement that ensures accountability by elected officials. In a  
17 situation where statutes appear to be in conflict, basic statutory interpretation requires that the statutes  
18 must be harmonized, with a reading of either or both statutes that could allow them both to operate  
19 simultaneously. (*State Dept. of Public Health v. Superior Court* (2015) 60 Cal.4<sup>th</sup> 940, 955 [“A court  
20 must, where reasonably possible, harmonize statutes, reconcile seeming inconsistencies in them, and  
21 construe them to give force and effect to all of their provisions.” (Internal citations omitted.)])

22 CEQA Section 21151 subdivision (c) mandates that where an unelected person or body  
23 determines that a project is not subject to CEQA, “that ... determination may be appealed to the  
24 agency’s elected decision-making body, if any.” Benicia’s City Council is the elected body, so in  
25 response to public appeals pursuant to Public Resources Code section 21151 subdivision (c), the City  
26 must hold a hearing on whether Government Code 65913.4 properly applies to the Jefferson Ridge and  
27 Park Road Projects to exempt them from CEQA. The City improperly refused to do so.  
28

1  
2 **B. The Jefferson Ridge Project Does Not Comply With Benicia’s Municipal Code.**

3 **1. The Jefferson Ridge Project Provisions for Parking on the Ground Floor**  
4 **Violate Applicable Municipal Code Requirements.**

5 The Jefferson Ridge Project is proposed to be built in the Commercial/Office (CO) zone. (AR1.)<sup>2</sup>  
6 The Benicia Municipal Code’s (“BMC”) zoning ordinance, at section 17.28.020, specifies land uses that  
7 are and are not permitted in the CO zone. (RJN, Exh. C, pp. 202-205.) The Table of Uses in that section  
8 states that “multi-family residential” and “single-family residential” uses are permissible in the CO zone  
9 but are subject to a limitation (“L1”) that such residential uses explicitly are “Not permitted on ground  
10 level.” (*Id.*, p. 206.) Under Municipal Code section 17.28.020, multi-family or single-family residential  
11 uses cannot be permitted in the CO on the ground floor even with a permit; they are simply not  
12 authorized at all. Presumably, this prohibits parking that is an intrinsic part of the residential uses.

13 The Findings for the Jefferson Ridge Project’s permit approval specifically state that the Project  
14 will comply with *all* applicable ordinances, plans, and specification of municipal law. (Finding 46, AR 8  
15 and AR 4259, and AR 23 [Finding of compliance with zoning ban on residential uses on the ground  
16 floor].) But “99% of the proposed floor area” of the Jefferson Ridge Project is designated for  
17 “residential use” (AR 12), thus compelling the conclusion that residential uses are unlawful on the  
18 ground floor. Plans claim that virtually *all* of the Project’s square footage will be residential, while at  
19 the same time claiming that *no* residential use will be allowed on the ground floor of the Project.  
20 Applying the standard of review in Government Code 65913.4 subdivision (c)(3), no reasonable person  
21 could conclude that substantial evidence supports the Project’s compliance with applicable zoning.

22 The Proponent baselessly asserts (AR 6518), and the City made a Finding (AR 15), that the  
23 Jefferson Ridge Project will have allowable *accessory* uses - including parking for the residents - on the  
24 ground floor. The Project proponent cites correspondence with the City’s Zoning Administrator that  
25 discusses a Zoning Code’s prohibition on ground-floor residential. (AR 6518.) The Zoning  
26 Administrator apparently advocated that parking could be considered an “accessory use” and not a  
27 residential use. (AR 5842.) This decision is erroneous.

28 Benicia Municipal Code section 17.28.020 does not support this erroneous interpretation. Rather,  
the Table in this section explicitly enumerates the “accessory uses” permitted in the CO zone, namely  
“donation and collection bins.” (RJN, Exh. C, p. 205.) The fact that the Zoning Code specifically

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<sup>2</sup> The Park Road Project is proposed in the “Planned Development” zone. (AR 127.)

1 enumerates the “accessory uses” that are permissible in the CO zone implies clearly that there are no  
2 accessory uses permissible in that zone other than the ones listed. (*State Board of Education v. Levit*  
3 (1959) 52 Cal.2d 441, 461; *Estate of Pardue* (1937) 22 Cal.App.2d 178, 181.) The Zoning  
4 Administrator’s interpretation that parking is an “accessory use” rather than a residential one is not  
5 reasonable and it cannot be applied because it is not “uniformly verifiable and knowable by” both the  
6 development applicant or proponent and the public official prior to submittal as required by Government  
7 Code section 65913.4. (Govt. Code § 65913.4 subd. (a)(5).)

## 8 **2. Jefferson Ridge and Park Road Buildings are Proposed in Protected View** 9 **Corridors.**

10 Benicia’s Arsenal Historic Conservation Plan (AHCP) designates certain historically significant  
11 views for protection. (AR 4274; 4277-4280; AR 10814; 10815; RJN, Exh. A, pp. 59-61[AHCP].) The  
12 proposed buildings of the Jefferson Ridge Project obstruct these protected views. (AR 72-74  
13 [photosimulations]; AR 7185 [showing obstruction of Lieutenant’s Quarters and Command Building  
14 sightlines], 7769, 6289.) The Park Road development would disrupt visual continuity of Officer’s Row.  
15 (AR 1748; AR 9554.) The protected views are designated in the National Register listing and the AHCP  
16 for their historic importance, which is tied to their military and functional significance as views between  
17 officers’ quarters and sentry posts as well as views of component locations of the Arsenal and panoramic  
18 views of the Carquinez Strait. Blocking these protected views violates the specific prohibitions in the  
19 AHCP.

## 20 **3. The Jefferson Ridge Project Does Not Comply With Benicia’s Inclusionary** 21 **Housing Ordinance.**

22 The City’s approval of the Projects specifies that the Projects must comply with the City’s  
23 inclusionary housing ordinance, found at BMC 17.70.320, which requires certain minimum amounts and  
24 types of affordable housing. (AR 14; RJN Exhibit C, pp. 208 et seq.) This ordinance is quite detailed. It  
25 requires, as is relevant here, that 10% of rental properties over 10 units and 15% of for-sale properties  
26 over 100 units be provided “as inclusionary units.” (RJN, Exh. C, p. 209.) It further required, at times  
27 relevant to this case, that the percentage of inclusionary units in a project covered by the ordinance must  
28 be 20% one-bedroom, 40% two-bedroom, 25% three-bedroom, and 5% four-bedroom (5%) units. (AR  
29 29 and 10801.) The remaining 10% of units may have any number of bedrooms. (*Ibid.*)

The Jefferson Ridge Project’s plans do not comply with this ordinance since it is a for-sale  
property (AR 1) that is required to provide 15% affordable units (RJN, Exh. C, p. 209) but instead it  
only provides 10% (AR 1). It also does not comply since the Jefferson Ridge Project’s inclusionary

1 units are *all* designated as having at least three bedrooms. (AR 6931.) They do not comply with the  
2 20%-40%-25%-5%-10% unit mix specified in the ordinance.

3 The City purports to deal with these discrepancies by stating that the inclusionary ordinance's  
4 required percentages of the various numbers of bedrooms will be covered by the Standard Condition of  
5 Approval No. 16, to which the Project will have to conform to receive its construction permits. (AR  
6 10895 [Jefferson Ridge].) This facile assertion does not constitute substantial evidence that the Project  
7 will in fact comply with the inclusionary ordinance. The Projects' physical plans will need to be  
8 drastically changed in order to comply with this ordinance, by adding additional affordable units and  
9 changing three-bedroom units into one, two, or four-bedroom units. No site plans have been provided  
10 showing how that could be possible. Merely recognizing a condition without showing that it can and  
11 will be carried out, is not substantial evidence of compliance with the condition. The City has not shown  
12 that the inclusionary requirements will be met, thus invalidating its Jefferson Ridge Project approval.

13 The City uses a Standard Condition of Approval to state that "[s]ome standards may be fulfilled  
14 through standard conditions of approval which carry forward into permitting." (AR 1288.) This  
15 procrastinating and evasive tactic was applied to a wide range of topics, including such vital functions as  
16 demonstrations that water supply, sewage transport and treatment capacity standards would be met. (AR  
17 10913.) Affordable housing is the most noticeable area where future compliance with standard  
18 conditions of approval was substituted for actual record evidence that requirements can and will be met.  
19 The same tactic was used for dispersion throughout the Project of affordable units, eligibility of tenants  
20 or owners, and control of resale of the affordable units. (AR 10895-95.) But this deferral technique does  
21 not provide evidence to support a finding that sufficient numbers and types of affordable housing will be  
22 provided to comply with the City's inclusionary housing ordinance.

23 **C. The Jefferson Ridge Project Site Contains Habitat for Protected Species and**  
24 **Wetlands, Thus Rendering It Ineligible for Government Code 65913.4.**

25 Government Code section 65913.4 cannot be used where the site provides "[h]abitat for  
26 protected species identified as candidate, sensitive, or species of special status by state or federal  
27 agencies, fully protected species, or species protected by the federal Endangered Species Act, the  
28 California Endangered Species Act, or the Native Plant Protection Act. (Citations omitted.)" (Gov.  
Code § 65924.4 subd. (a)(6)(J).) Similarly, Government Code section 65913.4 does not apply to any  
project located on a site that contains "[w]etlands" as defined by federal manuals. (Gov. Code §  
65924.4 subd. (a)(6)(C).)

Both protected habitat and wetlands were found by the environmental impact report (EIR) done by the City for the adoption of the Lower Arsenal Mixed Use Specific Plan, and showing habitat for such special status species. (AR 4361 [habitat present]; AR 4362 [seasonal wetlands present].) Government Code section 65913.4 does not demand that land actually *contain* special status species, only that it provides *habitat* that such species could use. The Lower Arsenal Mixed Use Specific Plan EIR examined this land and concluded that it could provide suitable habitat for various protected plant and animal species. (AR 4361-4362.) City staff comments that the Projects' sites are surrounded by urban uses and are "not likely" habitat. (AR 1273.) However, this equivocal and somewhat speculative answer is not substantial evidence, nor does it cite to substantial evidence. Instead, it is an inference, based solely on the nature of surrounding uses as "urban." That urban status does not limit the direct evidence of the presence of habitat and wetlands and it is not accurate since both projects abut non-urban areas.

There are also over one hundred trees on the Jefferson Ridge site, 24% of which are cork oak, creating a "grove." (AR 3121.) Based on the City's definition, 78 of the 103 trees on-site are considered "Protected" trees. (AR 3123.) That habitat can support numerous special-status animal species that have the potential to occur within the area. (AR 4370). Prior environmental surveys done by LSA Associates for the City of Benicia further noted the presence of two seasonal wetlands along the north boundary of the site, and recommended that a formal wetland delineation be conducted before approval of any development project on Jefferson Ridge/Officers' Row. (AR 4370-4371.)

**D. The Projects Would Destroy Historic "Structures," Thus Disqualifying Them From Relying on Government Code Section 65913.4.**

Government Code 65913.4 expressly disqualifies any site where a project would "require the demolition of a historic structure that was placed on a national, state, or local historic register." (Govt. Code § 65913.4 subd. (a)(7)(C).) The Projects here do so.

**1. The Structure of the Benicia Arsenal Historic District Would be Destroyed.**

The record is replete with letters and evidence warning that the Projects would harm the Benicia Arsenal, resulting in the Arsenal's listing on the National Register of Historic Places being rescinded. The Arsenal, and particularly the collective structure that is Officers' Row, is unique in the nation. The State Historic Preservation Officer in 1975 (see RJN, Exh. B, p. 126) nominated *all* the buildings of the Officers' Enclave for placement on the National Register of Historic Places as a historic subdistrict. (RJN, Exh. B, p. 122 [Buildings 24, 33, 34, and 35 are clustered a representing "a grouping of wooden frame residences of the late 19<sup>th</sup> century which served as officers quarters" and Buildings 25, 26, 27, 28,

1 and 29 are clustered as a “unity of period and setting of the mid 19<sup>th</sup> century and represents the more  
2 impressive homes of the major personnel of the post”]; RJN, Exh. B, p. 133 [sketch map of district].)  
3 The Keeper of the National Register listed the district on the National Register. (RJN, Exh. B, p. 126.)

4 The Projects would demolish the structure of the Benicia Arsenal Historic District as well as  
5 existing structures on the ground. Officers’ Row was nominated *as a district*. (AR 9562; AR 6289,  
6 showing District C’s command buildings; RJN, Exh. B, pp. 122 [description] and 133 [map].) Similarly,  
7 the Arsenal was listed by the State of California Historic Landmarks in 1935 on its list of Historic  
8 Landmarks as Historic Landmark number 176, listing the set of “some 15 stone and frame buildings”  
9 that comprise the Arsenal *as a whole*. (RJN, Exh. D.)

10 It is a common practice to treat groups of historic buildings on a specific site as a whole  
11 structure: California’s Historic Building Code, at Public Resources Code section 18950 defines a  
12 “structure” as “any structure, collection of structures, and their *associated site*.”<sup>3</sup> Government Code  
13 section 65913.4 must be read in this context as it extends its protections to “a historic *structure* that was  
14 placed on a national, state, or local historic register,” rather than limiting its protection to just individual  
15 *buildings*. (Govt. Code 65913.4 subd. (a)(7)(C), italics added.) The Benicia Arsenal Officers’ Row is  
16 such a structure, with all of the buildings located and inter-related with military logic and precision. (AR  
17 9321-22 [buildings “can be seen all together as they were meant to be seen- as a unit- and appreciated  
18 for the expression of military order and hierarchy”], 9326-9327 [“Meticulously planned by the  
19 Army....Sight lines from each of the officers’ living quarters to their appropriate administration  
20 buildings were carefully calculated in accordance with officers’ ranks and duties”].)

21 The Arsenal has a glorious and unique history from the earliest days of the state of California.  
22 (AR 7165, 7169.) The Jefferson Ridge and Park Road Projects, by sandwiching new residential  
23 buildings in between the historic buildings of the Officers’ Row, would create a loss of integrity and  
24 cohesiveness of Arsenal District C, and could result in the delisting of the Arsenal from the National  
25 Register of Historic Places. (AR 6287 [“High-density infill with buildings up to 4 stories high  
26 sandwiched between and among the Landmark structures and obliterating their historic landscape  
27 settings, would cause the obstruction and probable de-listing of a major historic resource...”]). This is  
28 particularly true in that many of the Jefferson Ridge Project buildings would be taller than the Officers’

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<sup>3</sup> See also, Public Resources Code section 5024 subd. (h), which defines “structure” as “an immovable work constructed by man [sic] having interrelated parts in a definite pattern.”



1 Row buildings, and views of individual building and from one to another of them (i.e., the whole  
2 structure) could or would be obscured by the Project. (AR 6287-6288.)

3 Retired civil engineer and archaeological historian<sup>4</sup> Jane Lauder King opined that the Projects  
4 would lead to delisting the Benicia Arsenal Historic District from the National Register. (AR 7197 [“the  
5 high density infill developments currently proposed for District C... would invalidate the National  
6 Register status of this unique and uniquely important historic resource defined by its consistent  
7 architecture and the visual relationships among the buildings and between them and the Carquinez  
8 Straits.”]; see also, AR 9552 [same].) The Officers’ Row was listed as District C of the Benicia Arsenal  
9 on the National Register as a District, with internal integrity. The degree to which the Project would  
10 insert new buildings between the existing structures and disrupt or destroy that internal integrity is only  
11 partially shown by the representations supplied by Project proponents (AR 4277-4280 and AR 72-74  
12 [photosimulations]). Broader, panoramic views (RJN, Ex. A, p. 56 [“dramatic views of the Carquinez  
13 Strait”]) are not depicted and would be impacted, as would be militarily and historically significant  
14 views in and among the buildings themselves. New, taller buildings would be sandwiched into gaps  
15 between the lower Officers’ Row buildings, disrupting the original logical arrangement and  
16 complementary height of the Officers’ Row residences that are part of the structure of Historic Sub-  
17 District C.

18 Both Projects would therefore demolish the structure and cohesiveness of the Benicia Arsenal  
19 Historic District, endangering its listing on the National Register and status as a California Landmark.<sup>5</sup>  
20 Such a demolition would impair the historical significance of the Arsenal *as a District*, and Officers’  
21 Row *as a single multi-part inter-related structure*. Such a demolition would violate Government Code  
22 section 65913.4’s mandate that a project is not eligible for the statute’s ministerial approval procedure if  
23 it would demolish a historic structure.

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24 <sup>4</sup> Ms. Jane Lauder King’s curriculum vitae is found at AR 7201 and establishes her credentials.

25 <sup>5</sup> The identity and function of the Benicia Arsenal was originally based, in part, on its visual presence:  
26 the flagpole and Officers’ Row were built on a ridge and were visible for miles up and down the  
27 coastline (AR 9328, see map at AR 234), marking the area as under US control and protection at a time  
28 when California was not yet a state, the area was untamed, and the US’s hold on the area was contested  
and tenuous. The appearance and sight lines of the Arsenal are part and parcel of its historic value.  
(RJN Exh. C, pp. 59-61 [AHCP, p. 36-38].)

1  
2                   **2.       The Remnants of Historic Tennis Court and Sidewalk Structures Would be Destroyed.**

3           Portions of the Benicia Arsenal’s tennis courts, curbs and sidewalks are still present onsite. (AR  
4 10134; AR 10135.) The Jefferson Ridge Project places buildings on top of the location of tennis courts,  
5 curbs and sidewalks associated with the historic use of the site. Thus, the project would require  
6 demolition of what is left of the historic structures that are still in place on the site.

7                   **3.       As-Yet Undiscovered Historic Structures Might be Destroyed.**

8           Studies cited in the record describing other structures that existed on the Officers’ Row indicate  
9 that the Arsenal is highly likely to contain “historic and archaeological resources, including remnants of  
10 a large flagpole- a prominent feature of the historic U.S. Army post at the Arsenal.” (AR 5789; see AR  
11 6289 [depicting “Garrison Flagpole Site”]; 9328 [early picture including flagpole].) The studies are (1)  
12 the August 21, 2006 “Report on the History of Vacant Properties Located on Officers’ Row at The  
13 Benicia Arsenal” by Nancy E. Stoltz, AIA, AICP and (2) the July 2007 Lower Arsenal Mixed Use  
14 Specific Plan Public Review Draft EIR by LSA Associates. These were cited in a public comment  
15 regarding the Jefferson Ridge Project. (AR 5789-5790.) There has never been an analysis of the  
16 information available in these studies of historic resources.

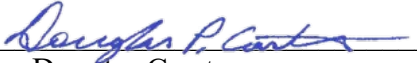
17                   **V.       CONCLUSION.**

18           This may be the first case in which Government Code section 65913.4 has been applied to a  
19 National Register-listed historic site. The Benicia Arsenal’s history stretches back as far as the earliest  
20 days of California, having been established in 1849 shortly before California’s statehood. Before  
21 impacts are allowed to such a precious historic resource that would imperil its listing as a National  
22 Register and state listed historic resource, proper environmental review that includes impacts analysis  
23 and mitigation must be conducted. The City, by relying upon an inapplicable exemption from CEQA,  
24 short-circuited the public environmental review process for two projects that do not qualify for such a  
25 short cut. The City should be directed to hold a hearing on the appeals pursuant to Public Resources  
26 Code section 21151, and to set aside its approvals of the two projects that violate the City’s Municipal  
27 Code and do not qualify for an exemption from CEQA under Government Code section 65913.4.

28 DATED: February 28, 2024

Respectfully Submitted,

CARSTENS, BLACK & MINTEER LLP

By:   
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1 **PROOF OF SERVICE**

2 I am employed by Carstens, Black & Minter LLP in the County of Los Angeles, State of  
3 California. I am over the age of 18 and not a party to the within action. My business address is  
4 2200 Pacific Coast Highway, Ste. 318, Hermosa Beach, CA. On February 28, 2024, I served the  
within documents:

5 **OPENING BRIEF**

6 ☐ **VIA UNITED STATES MAIL.** I am readily familiar with this business' practice  
7 for collection and processing of correspondence for mailing with the United States  
8 Postal Service. On the same day that correspondence is placed for collection and  
9 mailing, it is deposited in the ordinary course of business with the United States  
Postal Service in a sealed envelope with postage fully prepaid. I enclosed the  
10 above-referenced document(s) in a sealed envelope or package addressed to the  
11 person(s) at the address(es) as set forth below, and following ordinary business  
practices I placed the package for collection and mailing on the date and at the  
place of business set forth above.

12 ☐ **VIA OVERNIGHT DELIVERY.** I enclosed the above-referenced document(s) in  
13 an envelope or package designated by an overnight delivery carrier with delivery  
14 fees paid or provided for and addressed to the person(s) at the address(es) listed  
below. I placed the envelope or package for collection and overnight delivery at  
an office or a regularly utilized drop box of the overnight delivery carrier.

15 ☒ **VIA ELECTRONIC SERVICE.** By submitting an electronic version  
16 of the document(s) via email.

17 ☐ **VIA EMAIL OR ELECTRONIC SERVICE.** Based on a court order or an  
18 agreement of the parties to accept service by electronic transmission, I caused the  
19 above-referenced document(s) to be sent to the person(s) at the electronic  
address(es) listed below.

20 I declare that I am employed in the office of a member of the bar of this court whose  
21 direction the service was made. I declare under penalty of perjury under the laws of the State of  
22 California that the above is true and correct. Executed on February 28, 2024, at Hermosa  
Beach, California.

23  
24 /s/ Cynthia Kellman

25 Cynthia Kellman

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