IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION TWO

INJ, LLC, and ANTHONY PIAZZA,

Petitioners and Appellants,

v.

CITY OF BELVEDERE et al., Respondents, and DAVID McCLOSKEY, Real Party in Interest,

Respondents.
_____________________________________/

Case no. A164314

Marin County Superior Court
case no. CIV2000065

Honorable Stephen P. Freccero,
Judge of the Superior Court

BRIEF FOR RESPONDENTS

Amy S. Ackerman (SB # 124346)
Ryan P. McGinley-Stempel (SB # 296182)
RENNE PUBLIC LAW GROUP
350 Sansome Street, Suite 300
San Francisco, CA 94104
Telephone: (415) 848-7200
Email: aackerman@publiclawgroup.com
rmcginleystempel@publiclawgroup.com

Attorneys for Respondents CITY OF BELVEDERE et al.

Elliot L. Bien (SB # 90744)
BIEN & SUMMERS
829 Las Pavadas Avenue
San Rafael, CA 94903
Telephone: (415) 472-1500
Email: elb@biencounsel.com

Attorneys for Respondent DAVID McCLOSKEY

TO BE FILED IN THE COURT OF APPEAL **APP-008**

COURT OF APPEAL FIRST **APPELLATE DISTRICT, DIVISION** TWO	COURT OF APPEAL CASE NUMBER: A164314
ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NUMBER: 90744 NAME: Elliot L. Bien FIRM NAME: Bien & Summers STREET ADDRESS: 829 Las Pavadas Avenue CITY: San Rafael STATE: CA ZIP CODE: 94903 TELEPHONE NO.: (415) 472-1500 FAX NO.: (800) 308-9352 E-MAIL ADDRESS: elb@biencounsel.com ATTORNEY FOR (*name*): Respondent David McCloskey	SUPERIOR COURT CASE NUMBER: CIV2000065
APPELLANT/ PETITIONER: INJ, LLC & ANTHONY PIAZZA RESPONDENT/ REAL PARTY IN INTEREST: CITY OF BELVEDERE et al. & DAVID McCLOSKEY	
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Elliot L. Bien
(TYPE OR PRINT NAME)

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I.

PRELIMINARY STATEMENT

After a multitude of hearings, studies and site visits, the City of Belvedere approved a pier and related facilities at the waterfront home of real party in interest David McCloskey ("McCloskey"). Neighbors on both sides already enjoyed such facilities, as did many other homeowners in a city also known as Belvedere Island. But McCloskey's neighbors on one side, appellants Anthony Piazza and his INJ, LLC (together, "Piazza"), claimed the standard type of pier he requested would destroy their views and privacy. The city respectfully disagreed.

After unsuccessfully petitioning below for a writ of administrative mandamus, Piazza now asks this Court to intervene. But his three principal contentions are fundamentally flawed almost on their face.

First, he claims two officials revealed bias at a public hearing and were therefore disqualified from any further role. But he relies solely on opinions they expressed during the hearing in question, and cases cited in his own brief make such reliance unavailing. They hold that a finding of bias would require evidence of a financial interest in the dispute, a previous connection with McCloskey or hostility with Piazza, or aggressive advocacy for McCloskey exceeding mere expressions of opinion at a public hearing. (*Post*, pp. 32-33) Moreover, other cases Piazza cites hold that mere participation in one phase of a case does not bar participation in a later phase. (*Post*, pp. 37-39)

Second, he contends the regulations Belvedere applied are so vague and irrelevant they comprise "no standards at all" for maritime improvements. (AOB 60) But his showing is so incomplete it not only fails to sustain his contention. It forfeits the issue. (*Post*, pp. 40-41) While relying on a comment in two staff reports that the standards were not "specific" (AOB 30), he ignores case law cited below that land use regulations *need not* be specific because of the highly variable and discretionary issues they address. (*Post*, pp. 41-42) And the regulations at issue here easily satisfy that case law, as proven by the many provisions he ignores along with their thoughtful application to maritime improvements by Belvedere's officials. (*Post*, pp. 16-23)

Equally flawed is his reliance on a different set of provisions as proof of the irrelevance of the ones applied. An ordinance governing an R-1W zone in Belvedere, adjacent to his and McCloskey's R-15 zone, does include more specific standards for maritime improvements — for good and unique reasons Piazza also ignores. (*Post*, pp. 23-26) But the way it addresses them flatly refutes his claim. It incorporates the very provisions he insists are irrelevant. It sets forth an unqualified rule that the "size, design and placement" of piers and other maritime improvements in the R-1W zone "shall be subject to design review pursuant to Chapter 20.04." (Belvedere Municipal Code ["BMC"] § 20.06.050(B)) That is the principal chapter Piazza claims was never intended to apply to maritime improvements, and the R-1W ordinance itself proves the contrary.

Piazza's last principal contention is an attack on Belvedere's finding that the requested waterfront facilities would have only a minimal impact on his views and privacy. While he acknowledges the finding is discretionary (AOB 49-50) and subject to substantial evidence review (AOB 40-41) (and see *post*, pp. 44-46), his argument turns the applicable standards of review on their head. He claims a reversal is required by evidence he calls substantial in *his* favor (AOB 37), never even attempting to summarize the evidence and discretionary judgments that support Belvedere's findings. While this brief will summarize the principal supporting evidence calling for an affirmance, Piazza's opening brief calls for a forfeiture holding on this issue, too. (*Post*, pp. 46-48)

For all the reasons documented in this brief for the respondents,[1] the Court should affirm the Superior Court's denial of Piazza's mandamus petition and put this long dispute to rest.

II.

SUMMARY OF THE RELEVANT RECORD

A.

INTRODUCTION

The statement of decision below (1 CT 258-274) contains detailed summaries of the proceedings in Belvedere, the parties'

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[1] The caption to Piazza's writ petition below mentions twelve members of the City Council and Planning Commission but only in parentheses, evidently not naming them as additional respondents. (CT 4) Nor does his opening brief on appeal request any relief against them. (See *post*, pp. 50-51.)

contentions, the applicable standards of review, the governing city ordinances, the case law governing the substance of the issues presented, and the substantial evidence supporting Belvedere's challenged decisions. As the trial court pointed out, for example:

> The Court has reviewed the extensive four volume Administrative Record. As part of the process, the City Council and Planning Commission reviewed numerous photographs, drawings, and diagrams of the properties involved. They also conducted site visits, viewed story poles located in the water, considered the project application, the minutes of all prior Planning Commission meetings, letters and supporting documentation, written staff reports, and extensive information presented at the seven public hearings. Evidence that was considered included placement of the pier, opinions of the neighbors, environmental studies of the marine environment and other impacts from the project in accordance with the Design Review considerations. (1 CT 271:12-19)

Given the narrow scope of Piazza's opening appellate brief, however, the respondents need only summarize the material portions of the administrative record and city ordinances that his brief omits or misstates. And to facilitate the Court's review, our summary follows the order of Piazza's principal contentions rather than the overall chronology. We thus begin with his claim of bias, then his claim of vague and irrelevant standards, and lastly his attack on the city's finding of only minimal effects on his views and privacy.

B.

The Claimed Bias of Two City Officials

1.

Introduction

While mere comments at a public hearing cannot support a bias claim as a matter of law (*post*, pp. 32-34) — even if the comments were "wrong" as Piazza insists repeatedly (AOB 49-53) — we briefly summarize the comments in question to confirm their propriety.

As noted previously, Piazza relies solely on comments made by two city officials at one of the seven public hearings devoted to McCloskey's application. (AOB 22-29) The officials in question are then Mayor Robert McCaskill ("McCaskill") and Vice-Mayor Nancy Kemnitzer ("Kemnitzer"). The June 10, 2019 hearing in question before the City Council (3 AR 1388 *et seq*.) addressed McCloskey's appeal and request to remand a Planning Commission decision.

At the outset, Piazza's opening brief makes a significant concession undermining his claim. A preliminary question before the Council that day was whether to rule on the merits of McCloskey's appeal or remand the project for further consideration as he requested. The comments attacked by Piazza supported the remand option, but his opening brief concedes that option "was proper, notwithstanding [his] objection. . . ." (AOB 45) He thus faces a difficult burden to prove comments supporting that proper disposition somehow evidenced unconstitutional bias.

But the comments themselves make Piazza's burden even harder, as he apparently recognizes by significantly exaggerating them in three ways. First, he claims the remand motion was made "[a]t the behest of McCaskill" (AOB 17), as if the mayor could and did order such a motion. Second, he claims McCaskill "directed" approval of the motion (*ibid*.), not merely supported it. Lastly, he claims McCaskill and Kemnitzer "[i]n effect . . . directed a verdict" approving the pier and location McCloskey sought (AOB 47) — rather than simply making favorable comments about them for the consideration of their colleagues and the Planning Commission on remand.

As we now demonstrate, the hearing transcript (3 AR 1388 *et seq*.) belies all the foregoing characterizations.

2.

The McCaskill Comments

Beginning with Mayor McCaskill's comments, we first cite several that belie his alleged domination of his colleagues and the Planning Commission's decision on remand. Preliminarily, he asked the city attorney whether she agreed, and she did, that "even if we were to decide to remand it, it's within our realm to make *individual* recommendations for the record, for the benefit of the Planning Commission, as to what we think may be the preferred alternative." (*Id*. at 1396; italics added) Later, too, he said "all of us on the City Council have a great deal of respect for the members of the Planning Commission and I would like them to look at it again with our

comments. . . ." (*Id*. at 1400) Then he emphasized that his own comments about the project were strictly his own, "as an individual, not necessarily representing all five Council members. . . ." (*Ibid*.)

The record also refutes Piazza's claim that the motion to remand was made at McCaskill's "behest," meaning by an authoritative command or even pressure. Nothing in the pages Piazza cites for that proposition (3 AR 1370, 1384, & 1398-1401) provide the slightest support. To the contrary, McCaskill made the following neutral statement, quoted in its entirety, after the remaining Council members expressed their own opinions:

> If there are no further comments from Council, would someone like to make a motion? (*Id*. at 1400)

That statement expressed not even a preference, let alone a command or pressure, as to what motion or pier location he wanted. Kemnitzer responded with a motion to remand — without any reference to a pier location — and that limited remand motion passed unanimously. (*Id*. at 1401)

Piazza also ignores the fact that the opening speaker at this hearing, Associate Planner Rebecca Markwick (*id*. at 1388), reported that "Staff [was] recommending that the Council remand the appeal to the Planning Commission. . . ." (*Ibid*.) And McCaskill's comments in question were also preceded by support for a remand by McCloskey's other neighbor, as reported by attorney Elizabeth Brekhus. (*Id*. at 1389-1390)

Finally, Piazza claims McCaskill's alleged bias is proven by two other comments. The first is a perception he shared with his colleagues, "based on what we've heard in the prior hearing, as well as my visit with Mr. Piazza, [that] I didn't get the sense that he would support either location" under consideration. (*Id*. at 1399) Second, Piazza cites a comment that "my own conclusion is that McCloskey is, in fact, entitled to a pier and therefore . . . , in my mind, all I need to do is decide, well what's the preferred location." (*Ibid*.)

Both of those comments, however, make clear the opinions expressed were formed in the course of McCaskill's legitimate public duty: appraising a complicated case before the City Council and attempting to understand and satisfy all relevant parties. Nothing in the transcript or elsewhere in the record suggests his comments reflected any preexisting financial or personal factor raising doubt about his neutrality. Even if he was "wrong" as Piazza insists — incorrectly — that hardly evidences preexisting bias as required by case law. (*Post*, pp. 32-36)

Moreover, the "entitlement" comment is not even subject to a bias claim according to one of Piazza's own cases. (*Post*, p. 34) But it did not suggest McCloskey had an absolute "property right" to a pier as Piazza claims. (AOB 49) McCaskill simply expressed his opinion, subject to further consideration by his colleagues and the Planning Commission on remand, that the standards applicable to the use permit in question were satisfied.

3.

The Kemnitzer Comments

As for Vice-Mayor Kemnitzer's comments, they refute Piazza's bias claim a number of ways. First, she reported having already made one site visit and was considering a second (3 AR 1398), hardly evidencing a biased prejudgment of the issues. Second, she said "reasonable minds may differ" about a remand, that "I really want to hear what my fellow Council Members say," and that "I haven't made a final decision, but that's my thought." (*Ibid*.) Those comments hardly evidence either bias or a "directed verdict" as Piazza puts it.

Finally, Piazza attacks her comment that "it sounds to me like Mr. Piazza would rather remand despite the fact that he says he does not want a remand," because in her judgment "[a] remand would be better [for him] than to grant [McCloskey's] appeal." (*Ibid*.) But whether that perception and judgment were right or wrong, they were manifestly formed in the course of her legitimate public duties in appraising issues before the Council. Nothing suggests a tainted predisposition.

4.

The Trial Court's Comments

We conclude by citing several comments on this issue by the trial court below at the hearing on November 2, 2021:

- "[Piazza has] pulled out two or three disembodied statements from a lengthy meeting in which multiple people were participating" (RT 10:3-4);

- "each member [was] not acting in a vacuum. They're sitting as a council member. I read the transcript." (*Id*. at 9:13-15)
- "It's hard for the Court to view the stray statements in this case as anything comparable" to a "City Council member . . . taking the role of a lobbyist or advocate on behalf of one party." (*Id*. at 15:23 to 16:03; referring to *Petrovich Development Company, LLC. v. City of Sacramento* (2020) 48 Cal.App.5th 963 (review den.) (discussed *post*, pp. 32-33)

C.

THE CLAIMED LACK OF MARITIME STANDARDS

1.

Introduction

Piazza's attack on Belvedere's regulations not only flies in the face of case law he ignores that squarely rejects his claim of unspecificity. (*Post*, pp. 41-42) As we demonstrate here, he also ignores the texts of the regulations in question and the detailed way they were applied, both of which easily refute his claims of vagueness and irrelevance to maritime improvements. In addition, he ignores not only the text of the ordinance governing the adjoining R-1W zone refuting his reliance on it. As we demonstrate here, he also ignores evidence of its rationale and scope that further refutes his reliance on it.

2.

The Standards Actually Applied

We begin by addressing Belvedere's final resolution approving McCloskey's maritime improvements. (4 AR 2301 *et seq*.) It cites and applies two sets of provisions in the Belvedere Municipal Code ("BMC"):

the first addressing conditional use permits (BMC § 19.80.030), the second addressing design review. (BMC Chapter 20.04) Exhibit A to the resolution (4 AR 2305 *et seq.*) then sets forth the findings of the Council on the foregoing provisions. Thereafter, we cite the city's negative declaration adopted previously.

a.

The Conditional Use Provisions

The findings begin by quoting the conditional use provisions, none of which are quoted or even summarized in Piazza's opening brief. The most relevant read as follows:

> . . . The Planning Commission shall not grant any application unless it has found that the requested use will not, under the particular circumstances, be detrimental to the health, safety, morals, comfort, convenience and general welfare of the persons residing or working in the neighborhood of such proposed use, and will not be injurious or detrimental to the property and improvements in the neighborhood of such proposed use, or to the general welfare of the City. . . . (*Id*. at 2305, quoting BMC § 19.80.030)

That focus on neighbors and their property easily refutes Piazza's claim that none of the subject regulations encompassed his views, privacy, or any other interests allegedly affected by the project in question.

The findings that follow, however, not only confirm the quoted provision's broad focus on neighbors' interests. They also confirm its

applicability to maritime improvements and views. We quote all the relevant findings given their importance to this appeal:

> [A]s described below, the project will not be detrimental to the health, safety, morals, comfort, convenience and general welfare of people in the neighborhood, nor will the project be injurious or detrimental to property in the neighborhood, or the general welfare of the City. Moreover, Design Review standards are satisfied, and pier and boating uses are consistent with the Recreational Zone and General Plan designation for the property.
>
> The proposed pier would be compatible with other similar waterfront improvements along Richardson Bay. The proposed improvements are similar in size and type to other marine-related structures installed along shoreline areas in Belvedere, including those immediately adjacent to the proposed Project site. . . . Furthermore, based on a review of the plans and information submitted by the applicant, . . . the proposed distance from the adjacent docks is adequate.
>
> Additionally, the improvements do not substantially impact any neighborhood views, and to the extent the improvements would be visible from any one particular property, the impact is minimal and consistent with the scenery of waterside properties common throughout the City. The size of the pier and improvements are the minimum necessary to achieve boating access during low tides, and are not excessively large or monumental. There are no additions or structural improvements on the pier that are unrelated to providing boat access. For example,

> the project does not involve any outdoor living area improvements, such as outdoor dining or seating.
>
> Based on the above, the proposed pier, dock, boat and platform lifts would not be detrimental to the health, safety, morals, comfort, convenience and general welfare of the persons residing or working in the neighborhood of such proposed use, and would not be injurious or detrimental to the property and improvements in the neighborhood of such proposed use, or to the general welfare of the City, and therefore satisfies the Conditional Use Permit findings of Section 19.80.030. [*Id*. at 2305-06]

Moreover, Piazza ignores the staff report for the hearing in question (4 AR 2015 *et seq*.) that expressly applied these use permit regulations to privacy: "staff suggests that any claimed privacy and view impacts do not rise to the level of being 'injurious or detrimental'" to anyone. (4 AR 2020)

b.

The Design Review Provisions

Despite Piazza's emphasis on Belvedere's design review provisions, contrasting them with the ordinance governing the R-1W zone, he never addresses their content or application by city officials. After a brief introduction (4 AR 2306), the findings quote and then discuss twelve different provisions in the design review chapter. (*Id*. at 2306-2309) Seven of them are declared irrelevant because no landscaping or buildings on land were involved. But as we now

demonstrate — and their ensuing application confirms — the other five are perfectly relevant to the subject maritime improvements:

> **(1)** "**<u>Preservation of existing site conditions</u>. . . . [G]rade changes should be minimized and kept in harmony with the general appearance of the neighboring landscape**." [4 AR 2306, quoting BMC § 20.04.110; original emphasis; numbering and quotation marks added throughout for clarity]
>
> . . . The project is in harmony with the general appearance of the neighboring landscape. The majority of the existing use and site conditions will be preserved. . . . The proposed improvements would be in harmony with the general appearance of the neighboring landscape because docks and lifts are common features of shoreline homes in the project's immediate vicinity, and throughout waterfront properties in the City. Additionally, the project harmonizes with the general appearance of the neighboring landscape because docks and piers are consistent with the Recreational Zone and General Plan designation for the property. [4 AR 2306]
>
> **(2) "<u>Relationship between structures and the site</u>. There should be a balanced and harmonious relationship among the structures on the site, between the structures and the site itself, and between the structures and those on adjoining properties. All new buildings or additions constructed on sloping land should be designed to relate to the natural landforms and step with the slope in order to minimize the building mass and bulk and to integrate the structure with the site**." [4 AR 2306, quoting BMC § 20.04.120]

The project presents a balanced and harmonious relationship between the site, other structures, and adjoining properties. The work associated with this project that relates to waterside improvements are similar improvements in the neighborhood and similar to waterfront properties throughout the City. . . . All proposed marine structures are compatible with the existing character of the site and the surrounding neighborhood. The proposed improvements would not appear excessively large, and would remain compatible with the size and scale of land and marine structures on other properties in the neighborhood. Additionally, the project is consistent with [the] neighborhood, as many properties in the area also have similar improvements such as piers and decks. [4 AR 2306-2307]

(3) "**All new structures and additions should be designed to avoid monumental or excessively large dwellings that are out of character with their setting or with other dwellings in the neighborhood. All buildings should be designed to relate to and fit in with others in the neighborhood and not designed to draw attention to themselves**." [*Id*. at 2307, quoting BMC § 20.04.120(A)]

The work associated with this project that relates to waterside improvements are similar [to] improvements in the neighborhood. . . . All proposed marine structures are compatible with the existing character of the site and the surrounding neighborhood. The proposed improvements would not appear excessively large, and would remain compatible with the size and scale of land and marine structures on other properties in the neighborhood. The size of the pier and improvements are the minimum

necessary to achieve boating access during low tides, and are not excessively large or monumental. There are no additions or structural improvements on the pier that are unrelated to providing boat access. For example, the project does not involve any outdoor living area improvements, such as outdoor dining or seating. Additionally, the project is consistent with [the] neighborhood, as many properties in the area also have similar improvements such as piers and decks. [4 AR 2307]

(4) "**To avoid monotony or an impression of bulk, large expanses of any one material on a single plane should be avoided, and large single plane retaining walls should be avoided. Vertical and horizontal elements should be used to add architectural variety, to break up building planes, and to avoid monotony**." [*Ibid*., quoting BMC § 20.04.120(B)]

. . . The proposed improvements are intended to blend in, keep a low profile and minimize the visual impacts to neighbors. The size of the pier and improvements are the minimum necessary to achieve boating access during low tides, and are not excessively large or monumental. There are no additions or structural improvements on the pier that are unrelated to providing boat access. For example, the project does not involve any outdoor living area improvements, such as outdoor dining or seating. [*Ibid*.]

(5) "**<u>Materials and colors used</u>. Building designs should incorporate materials and colors that minimize the structures' visual impacts, . . . that relate to and fit in with structures in the neighborhood, and that do not**

> **attract attention to the structures themselves**. . . ." [*Ibid*., quoting BMC § 20.04.140(A)]
>
> As conditioned and as described in project plans, the project utilizes materials that . . . will be compatible with the surrounding structures, and will relate to and fit in with the neighborhood. [*Id*. at 2307-2308]

c.

The Negative Declaration Provisions

Finally, as Piazza's counsel Christopher Johns acknowledged to the Planning Commission (1 AR 206-207), other regulations applied by the city expressly addressed neighbors' views and privacy. The "Initial Study/Proposed Mitigated Negative Declaration" executed by the city and McCloskey in July 2018 (*id*. at 54 *et seq*.) provides that his maritime improvements "would not substantially degrade the existing visual character or quality of the site *or its surroundings*." (*Id*. at 65; italics added) And the next page cites a "require[ment] that building placement . . . [be] designed in a manner to preserve the privacy of adjacent structures." (*Id*. at 66) The document then specifies that the Planning Commission would resolve all such questions involving "impacts of projects on neighborhoods. . . ." (*Ibid*.)

3.

Why One City Zone Was Treated Differently

Piazza claims the more specific maritime provisions covering the R-1W or "West Shore" zone in Belvedere, contained in BMC Chapter 20.06, prove the Chapter 20.04 design review provisions applied in this

case are both irrelevant and unacceptably vague. But his argument about Chapter 20.06 is multiply flawed.

First, as noted previously (*ante*, p. 8), Chapter 20.06 actually confirms the relevance and adequacy of the Chapter 20.04 provisions. The former expressly provides that the latter, without qualification, govern the "size, design and placement" of piers and other maritime improvements in the R-1W zone. (BMC § 20.06.050(B)) Unmistakably, therefore, the city regarded the Chapter 20.04 provisions as both relevant and sufficiently clear for that purpose.

Moreover, Piazza ignores the reasons Chapter 20.06 also included more specific provisions on maritime improvements. Instead, he claims its finding that such provisions were "necessary" (BMC § 20.06.010) meant citywide necessity. But the text and other evidence prove otherwise.

To begin with the text, the sentence preceding the "necessary" comment makes clear it was addressing only "waterfront properties in the R-1W zone (West Shore Road)" (*ibid*.), not the entire city. And the ensuing findings of purpose (*ibid*.) and an express section on "Applicability" (*id*., § 20.06.020) likewise refer to properties on West Shore Road alone, not elsewhere in the city.

Piazza also ignores evidence explaining why specific standards were deemed necessary for the R-1W zone, while the more general design review standards in Chapter 20.04 were deemed sufficient elsewhere. The reasons were well summarized by Planning

Commissioner Marsha Lasky addressing this case at a hearing on April 16, 2019:

> I did want to address just for a second the, I think it's 20.[0]6, the Code for the docks on West Shore. The reason, of course, those codes are specifically for West Shore, almost every home has a dock. And the way the boat lifts are oriented, are to allow some views for those homes to the City, mainly is what they do. So they all seem to really work together on that. And all of the homeowners there look at docks because almost everyone has one. . . . and that's why those particular [more general] Codes don't apply to this.
>
> I went around and looked at all the piers and docks that we have on West Shore and also on Beach Road and [on] Beach Road almost every house has one also. They're only two in this area [McCloskey's] on Richardson Bay and I was thinking perhaps it's because the space below Belvedere Avenue there, is just so steep that most people really don't attempt it, which Mr. McCloskey is trying to do. So that's why we, actually, may be one of the reasons why we don't have a specific code for this part of the water frontage. (4 AR 2067-2068)

Commissioner Lasky's comments are further supported by BMC § 19.12.010, the ordinance setting forth all the city's zones by reference to an accompanying map.[2] It reveals that the R-1W zone consists of a single row of waterfront lots much more uniform in shape and

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[2] We attach a copy as an appendix pursuant to Rule of Court 8.204(d). See also https://belvedere.municipal.codes/Code/19.12.020 and a less clear version appearing at 1 AR 605.

orientation to the water, and much smaller overall, than the adjoining waterfront lots at issue here, just a few lots to the south in the R-15 zone. Accordingly, the row of maritime facilities in the R-1W zone are much closer to each other and much more visible to neighbors.

A staff report for another Planning Commission hearing in this case also establishes how few waterfront properties in Belvedere are covered by the R-1W provisions:

> [O]ver 200 lots in Belvedere are partially located in or have direct access to Richardson Bay or Belvedere Cove. . . . [I]mprovements related to maritime activities such as docks, decks, boatlifts, and floats are an important aspect of many Belvedere properties. (2 AR 231)

By contrast, the official zoning map cited above reveals that only 49 lots are contained in the R-1W zone. In other words, the city determined that the great majority of its waterfront properties were sufficiently regulated by the general design review provisions in Chapter 20.04 and other citywide regulations.

4.

The Claimed Inconsistency about Standards

Finally, Piazza claims the city was unconstitutionally inconsistent in applying or not applying the Chapter 20.06 standards. (AOB 63-65) While the final resolution of approval and most others did not even refer to Chapter 20.06, Piazza relies on one early Planning Commission resolution simply stating that McCloskey's project conformed with "the Design Review criteria specified in sections 20.04.005, and 20.04.110

to 20.04.210 and 20.06 of the Belvedere Municipal Code." (2 AR 754; emphasis added)

As shown previously, however, the subject "Design Review criteria" in Chapter 20.04 were also specified in Chapter 20.06. (*Ante*, p. 8) Nor does Piazza cite anything in the resolution in question, or any subsequent resolution in the case, actually applying one of the more specific standards included in Chapter 20.06. Indeed, that would have run afoul of the city attorney's comment at an early Planning Commission meeting "clarif[ying] that BMC § 20.06 applies only to the R1W zone and not the R15 zone. However it may be considered as an analogous guideline when considering this application." (1 AR 189)

In sum, Piazza's claim of inconsistency is unavailing on its face. But he also fails to explain how a single reference to Chapter 20.06 made the entire proceedings unconstitutionally unfair for him.

D.

THE CHALLENGED FINDING ON VIEWS AND PRIVACY

Piazza's last principal contention attacks Belvedere's finding that the proposed pier and related facilities would have only a "minimal impact" on his views and privacy. (AOB 65, citing 4 AR 2305) But his brief ignores most of the supporting evidence, its reasonable construction by the city, and even the criteria the city applied in reaching its challenged finding.

Piazza relies on the mere fact, proven by photos he cites (4 AR 1924-1932), that the proposed pier would be visible from a few of the

many rooms in his three-story home. But that fact hardly stood alone for the city, or satisfies Piazza's heavy burden on appeal. The pier's visibility required, and produced in fact, an exhaustive and multi-factored assessment of its legitimate significance for Piazza, its weight on the scales given McCloskey's interests, and its context in the immediate neighborhood and the city as a whole.

We briefly cite some of the factors Piazza ignores which confirm the appropriateness of an affirmance on this issue or another forfeiture holding. We first cite the overall context of this issue.

As evidenced by an exterior photo of Piazza's three-story home (4 A 2267), it lies so close to the water that views to and from the many legitimate maritime activities there — even without a new pier — are inevitable. Belvedere could thus reasonably conclude that the visual impact of a new pier, too, would be largely self-inflicted. Nor does Piazza cite any promise or representation by the city, the previous owner, or anyone else that the home and lines of sight he was buying would be insulated forever from any maritime facilities for the McCloskey home.

Nonetheless, the same photo supports a reasonable conclusion by the city that the grandeur of Piazza's home, its commanding orientation at the waterfront, and the $13 million price he paid (4 AR 1769) imbued him with a sense of ownership of the entire curved area or cove he shared with two neighbors and the public as well. As Planning Commissioner Larry Stoehr pointed out at a hearing on April 16, 2019:

> I have a problem with [Piazza's home], how the house is oriented on the lot. It's turned not parallel to the property lines, but is actually facing into the center of the cove. And by orienting the house in that manner, it tends to rob . . . the ability of other people that live on that cove to put a dock, if you start talking about views, impacts and privacy. (4 AR 1826)

The city could thus reasonably conclude that Piazza's protestations about his views and privacy were exaggerated, and for that reason too did not outweigh the many factors cited in the findings.

But his contentions are further undermined by the interior photos he cites, showing that the proposed pier would be visible from a few of the many rooms in his home. (4 AR 1924-1932; see also clearer photos at 1 AR 588-603) These photos actually support Belvedere's finding, and site visits by city officials make that support even stronger. (*Post*, pp. 49-50) As Piazza's attorney confirmed in a letter to the city, "each of the Council-Members has already viewed the [McCloskey] story poles from the [Piazza property]." (4 AR 1960) Accordingly, these officials must be presumed to have reached the following conclusions about the visibility issue based in part on their personal observations.

As for Piazza's views, the photos from his rooms first reveal there are maritime facilities across the water, so McCloskey's modestly designed pier would fit in quite naturally. The photos also reveal that the pier would leave Piazza's views of those other facilities and the hills behind them completely unobstructed. And as shown previously, city officials could also conclude reasonably that the pier itself was a natural

and common sight from many waterfront properties. Moreover, as Planning Commissioner Pat Carapiet pointed out in a hearing on January 15, 2019: "I don't feel that [proposed pier] affects his view because when you look at the view, you look out, you look up. You don't necessar[il]y look down at the water." (1 AR 404)

The same photos also support the city's assessment of the privacy issue. They do suggest that someone standing close to an uncovered window could likely be seen from McCloskey's pier. But city officials could reasonably conclude that someone standing in that position, exposed to a public waterway allowing a variety of uses, would not likely have a privacy concern about being seen from there — and that someone standing away from the windows would be much less visible if at all.

The photos also support a reasonable conclusion that, in most instances, someone lying down or even sitting in the rooms in question would not likely be visible from McCloskey's pier. The photos suggest that the height of most of the rooms above the water, requiring people there to look upwards to the windows, makes it likely they could see only the upper portion of the rooms.

As the trial court aptly commented below:

> I went through the entire administrative record, and I don't see any support for a substantial legitimate issue of privacy involved in all of this. . . . I saw a few stray photographs but I don't understand. That's certainly not a substantial basis to come in running to court claiming that

> your constitutional rights have been violated by a city approving an improvement which basically the neighbors have — the petitioner himself has a pier. (RT Nov. 2, 2021 at 21: 14-25)
>
> The record certainly doesn't have any evidence from which the Court could find an infringement of a constitutionally protected right of privacy because the neighbor has a pier out into a waterway. (*Id*. at 22:18-23)

Finally, Piazza string-cites seven other portions of the administrative record, providing not a word of explanation of their purported evidentiary impact. (AOB 66) This Court should therefore disregard such naked citations, and they may not be rescued in a reply brief. (*Post*, p. 41) A quick glance, however, will reveal that they consist mostly of oral and written arguments by Piazza's attorney, site plans focusing on protected eelgrass (1 AR 372) and other issues, and hearing transcripts and minutes on a variety of subjects.

In sum, Piazza's opening brief comes nowhere near the type of showing required to establish an abuse of discretion or lack of substantial evidence regarding his views or privacy. The record amply supports Belvedere's determination that, on consideration of a multitude of factors, any impact was indeed too minimal to compel a rejection or modification of the approved version of McCloskey's maritime facilities.

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III.

LEGAL ARGUMENT

A.

MERE OPINIONS STATED AT A PUBLIC HEARING DO NOT SUPPORT A BIAS CLAIM OR DISQUALIFY PARTICIPATION IN SUBSEQUENT HEARINGS

1.

INTRODUCTION

Almost every contested hearing includes comments by officials on both sides' positions. But in Piazza's view, any such comment is fair game for a bias accusation by the losing side. Fortunately California courts disagree, because Piazza's approach would hobble government agencies with multiple bias accusations. As stated in *Andrews v. Agricultural Labor Relations Bd*. (1981) 28 Cal.3d 781, 792, overly lax bias criteria would let "disgruntled or dilatory litigants wreak havoc with the orderly administration of dispute-resolving tribunals."

2.

MERE OPINIONS ARE INSUFFICIENT

Not surprisingly, then, none of the cases cited by Piazza supports his reliance on statements of opinion at a hearing. To the contrary, those very cases bar such reliance.

At the outset, Piazza cites the holding in *Petrovich Development Company, LLC. v. City of Sacramento*, *supra,* 48 Cal.App.5th 963, 973, that "a party seeking to show bias or prejudice on the part of an administrative decision maker [must] prove the same with concrete

facts." (Quoting *BreakZone Billiards v. City of Torrance* (2000) 81 Cal. App.4th 1205, 1237) While respondents agree that question calls for *de novo* appellate review, case law makes it difficult to stretch the term "concrete fact evidencing bias" to cover a mere statement of opinion at a public hearing on an issue legitimately presented there.

More specifically, though, *BreakZone* sets forth a *definition* of bias that excludes such a statement of opinion:

> What is bias and how is the principle to be applied? The categories of bias include: (1) Interest in the outcome . . . (2) strong bias about a party arising from an unofficial source . . . . (3) precommitment based on knowledge of the facts of the case learned in advance of the adjudicatory proceeding that leads the decision maker to find only those facts to be true. (81 Cal.App.4th at 1234, n. 23)

Nor does anything in *BreakZone* or any other case Piazza cites — or we could find — suggest the foregoing definition of bias is too narrow when it comes to opinions expressed at a hearing. *Petrovich*, for example, predicates bias on an official's aggressive advocacy well prior to the relevant hearing: counting or even lining up votes in advance, covering up his pre-hearing contacts with agency colleagues, preparing "talking points" for use by the parties he supported, and implementing their joint decision in advance to have him make the required motion. (48 Cal.App.5th at 974-976)

Similarly, Piazza cites *Nasha v. City of Los Angeles* (2004) 125 Cal.App.4th 470 but it is no more availing. It predicates bias on an

official's undisclosed authorship of a newsletter article opposing a project coming up soon before his agency, his misrepresentation of the article at the hearing as purely informational, and his further misrepresentation that he had no previous contact with the party opposed to the project.

By contrast, Piazza relies on nothing but opinions at a public hearing and undisputedly formed in the course of official duties. And the Supreme Court held in *City of Fairfield v. Superior Court* (1975) 14 Cal.3d 768 that even pre-hearing statements made by City Council members opposing a project were insufficient to establish disqualifying bias. As the opinion explains: "[a] councilman [sic] has not only a right but an obligation to discuss issues of vital concern with his constituents and to state his views on matters of public importance" (*Id*. at 780) Accordingly, if stating views prior to a hearing is insufficient to show bias, doing so at the hearing itself is even less sufficient. The whole purpose of the hearing Piazza singles out for criticism was to discuss procedural matters, provide direction to the Planning Commission on remand, and assist the parties in reaching agreement. As Council member Claire McAuliffe stated at this same hearing: "the ideal solution always is one where as many parties can agree as possible." (3 AR 1400)

Finally, *BreakZone*, *supra*, teaches that Mayor McCaskill's comment about entitlement, "[a] point of view about a question of law or policy," is therefore "not a disqualification by itself. . . ." (81 Cal.App. 4th at 1234, n. 23)

3.

PIAZZA DOES NOT COME CLOSE TO MEETING CASE LAW REQUIREMENTS FOR A BIAS CLAIM

Finally, case law eliminates any further doubt about Piazza's bias contention on appeal. As held in *BreakZone*, *supra*, "[a] mere suggestion of bias is not sufficient to overcome the presumption of integrity and honesty." (81 Cal.App.4th at 1235) And *Nasha*, *supra*, sets forth as follows:

> The standard of impartiality required at an administrative hearing is less exacting than that required in judicial proceedings. It is recognized that administrative decision makers are drawn from the community at large. Especially in a small town setting they are likely to have knowledge of and contact or dealings with parties to the proceeding. Holding them to the same standard as judges, without a showing of actual bias or the probability of actual bias, may discourage persons willing to serve and may deprive the administrative process of capable decision makers. (125 Cal.App.4th at 483, citing *Gai v. Selma* (1998) 68 Cal.App. 4th 213, 219)

Nasha also holds that "bias and prejudice are never implied and must be established by clear averments." (*Id*. at 483) *BreakZone, supra*, adds that "[a] mere suggestion of bias is not sufficient to overcome the presumption of integrity and honesty." (81 Cal.App.4th at 1235)

Piazza briefly cites *Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152 (review den.) only on the standard of review (AOB 39), but it well illustrates the insufficiency of his reliance on mere

comments at a public hearing. The court predicated a bias finding on a council member's common-law conflict of interest and extreme personal animosity against one party, as concretely evidenced by yelling "loud, obnoxious noises in the morning" and urinating on that party's home. (*Id*. at 1172-1173, n. 12)

By contrast, *Hauser v. Ventura County Board of Supervisors* (2018) 20 Cal.App.5th 572 rejected a bias claim based solely on the fact that members of the zoning board had contacts with the parties and members of the public prior to the hearing in violation of the board's policy. As the court pointed out:

> Unless a decision maker has a financial interest in the outcome of the hearing, he or she is presumed to be impartial. . . . [¶] The contacts Board members received from the public are the ordinary sort of contacts with elected public officials approved in *Todd* [*v. City of Visalia* (1967) 254 Cal.App.2d 679] and [*City of Fairfield v. Superior Court* (1975) 14 Cal.3d 768]. There is no evidence that Board members had any personal bias against Hauser or were in favor of the project opponents. That Board members may have violated paragraphs a. and b. of the policy manual is insufficient to show bias against Hauser. They did not promise to vote a particular way. Finally, they complied with paragraph c. of the policy manual by disclosing the contacts. (20 Cal.App.5th at 580)

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4.

PARTICIPATION IN ONE PHASE OF A MATTER DOES NOT DISQUALIFY PARTICIPATION IN A SUBSEQUENT PHASE

Finally, Piazza attempts to shore up his position by emphasizing that McCaskill and Kemnitzer, following the remand hearing he attacks, later participated in a City Council hearing reviewing the post-remand decision by the Planning Commission. (AOB 46-48) He calls this unacceptable appellate judging of one's own case.

But *BreakZone* and other cases he cites, *Withrow v. Larkin* (1975) 421 U.S. 35 and *Griggs v. Board of Trustees* (1964) 61 Cal.2d 93, refute his contention that mere participation in one phase of a proceeding disqualifies participation in a later phase. A section of the *BreakZone* opinion entitled "Prejudgment of adjudicative facts" (81 Cal.App.4th at 1235) summarizes as follows, and with approval, *Withrow*'s holding that "participation in the charging function" in a proceeding, and gaining "advance knowledge" of the facts that way, "do not disqualify the members of an adjudicatory body from adjudicating a dispute. . . ." (*Id*. at 1236) Similarly, *Griggs* holds that "the combination of adjudicating functions with prosecuting or investigating functions will ordinarily not constitute a denial of due process." (*Id*. at 98)[3]

BreakZone also quotes *Withrow's* reasoning with approval, and it is directly in point here:

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[3] Although *Griggs* was later superseded by an Education Code provision limited to its specific subject (see *Feist v. Rowe* (1970) 3 Cal. App.3d 404, 412) its holding as to the "ordinary" rule remains valid.

> “The risk of bias or prejudgment in this sequence of functions has not been considered to be intolerably high or to raise a sufficiently great possibility that the adjudicators would be so psychologically wedded to their complaints that they would consciously or unconsciously avoid the appearance of having erred or changed position.” (81 Cal.App.4th at 1241, quoting *Withrow* at 421 U.S. 56-57)

Furthermore, any such presumption of bias:

> must overcome a presumption of honesty and integrity in those serving as adjudicators; and it must convince that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.” (*Id*. at 1235, quoting *Withrow* at 421 U.S. 47)

So here. Piazza cites no evidence overcoming the presumption of honesty and integrity on the part of Belvedere’s officials, or suggesting that their reasons for approving a remand to the Planning Commission improperly “wed” them to affirm its ultimate findings and decision that Piazza appealed. Moreover, Belvedere’s ordinance governing that appeal (BMC § 20.04.070) made the City Council’s review de novo: “at all times being guided by the criteria set forth in this Chapter” (on design review) rather than any deference to the decision being appealed or any prior decision by the Council itself.

We note, finally, that Piazza's theory of improper appellate judging cannot be squared with the practices of California's own appellate courts. For example, this Court's Internal Operating Practices and Procedures (eff. April 2, 2007) provide the following exception to the general rule of random assignment of cases to Divisions:

> If, subsequent to the initial assignment of an appeal or writ petition to a division, it is determined that it arises from the same trial court action or proceeding as a prior appeal or writ petition, the administrative presiding justice may transfer the later appeal or writ petition to the same division to which the first appeal or writ petition was assigned." (Part III(A)2))

There is no exception to that exception if the prior appeal or writ petition had resulted in a decision of any kind. And the same rule applies to the assignment of cases to panels within a Division:

> Appeals are assigned randomly without regard to subject matter, except that an appeal may be assigned to the same panel to which a related appeal or writ petition was previously assigned. (Part III(B)(1))

Again, it matters not whether the previous appeal or writ petition had resulted in a decision of any kind.

In sum, Piazza's claim that prior involvement in a dispute bars any further involvement flies in the face of both municipal law and California's judicial administration.

B.

PIAZZA'S ATTACK ON BELVEDERE'S STANDARDS IS REFUTED BY CASE LAW, ORDINANCE TEXTS, AND DETAILED FINDINGS ALL OF WHICH HE IGNORES

1.

HIS INCOMPLETE PRESENTATION FORFEITS THE ISSUE

Piazza claims the standards Belvedere applied to this dispute are both vague and irrelevant to maritime improvements. But his presentation is so materially incomplete as to appear evasive. He ignores (1) case law cited below approving much more broadly-worded land use standards; (2) the standards applied here that easily pass muster and easily apply to maritime improvements; (3) the detailed findings so confirming; and (4) material text and facts about the ordinance governing an adjoining zone he cites as proof of the inadequacy of the standards applied here.

Such an incomplete presentation in an opening brief calls for a holding of forfeiture by this Court. *Singh v. Lipworth* (2014) 227 Cal. App.4th 813 (review den.) holds that, because the appellants' opening brief contained no "meaningful legal analysis supported by citations to authority and citations to facts in the record that support the claim of error. . . . [w]e consider all points asserted in this appeal to be forfeited as unsupported by adequate factual or legal analysis." (*Id*. at 817; cits. and internal quots. omitted) (See also, *Holden v. City of San Diego* (2019) 43 Cal.App.5th 404, 420 ["[b]ecause [the appellant] does not provide any proper substantive legal analysis on his [statutory] claim, we

consider it to be forfeited or waived and therefore disregard it and do not address its merits"; and *In re Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 830 ["[t]he absence of cogent legal argument or citation to authority allows this court to treat the contention as waived.")

Finally, a reply brief was also filed in *Singh v. Lipworth, supra* (see 227 Cal.App.4th at 824, n. 7), but settled law supports the opinion's focus on the opening brief. As held in *Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764: "[o]bvious considerations of fairness in argument demand that the appellant present all of his points in the opening brief. To withhold a point until the closing brief would deprive the respondent of his opportunity to answer it or require the effort and delay of an additional brief by permission." That result would be guaranteed in this case if Piazza were allowed to fill in the many gaps in his opening presentation with a reply brief.

2.

THE OMITTED MATERIAL SUPPORTS AN AFFIRMANCE IF NOT A FORFEITURE

As a precaution, however, we briefly address the authorities and record omitted from Piazza's brief to confirm the appropriateness of an affirmance on this issue if not a forfeiture.

a.

The Omitted Case Law

The respondents' opposition memorandum below (CT 122 *et seq*.) cited and explained seven cases holding that land use regulations

not only may, but "*must* be drafted broadly enough to allow administrative bodies to have substantial discretion." (*Id*. at 144:15-17; italics added) As held in one of those cases, *Sacramentans for Fair Planning v. City of Sacramento* (2019) 37 Cal.App.5th 698 (review den.):

> [D]ue process rights are not violated because zoning and licensing ordinances . . . state somewhat imprecise guidelines for issuing a permit or license or vest a large degree of discretion in the issuing agency. California courts permit vague standards because they are sensitive to the need of government in large urban areas to delegate broad discretionary power to administrative bodies if the community's zoning business is to be done without paralyzing the legislative process. . . . [I]n California, the most general zoning standards usually are deemed sufficient. (*Id*. at 713; cits. and internal quots omitted)

Division Five of this Court likewise held in *Novi v. City of Pacifica* (1985) 169 Cal.App.3d 678, 682, that "a substantial amount of vagueness is permitted in California zoning ordinances" for the reasons stated above.

While ignoring that established authority, Piazza relies on a case requiring specific standards in disciplinary proceedings (*Wheeler v. State Bd. of Forestry* (1983) 144 Cal.App.3d 522), and an equally irrelevant statement in *Tahoe-Sierra Preservation Council v. State Water Resources Control Bd*. (1989) 210 Cal.App.3d 1421, 1439 (review den.) that "[a] standard that has no content is no standard at all and is unreasonable." (AOB 61) The only relevance of those cases here is that a forfeiture is required by Piazza's omission of the settled case law on land use standards.

b.

The Omitted Standards and their Application

This brief previously quoted three sets of provisions refuting Piazza's claim of "no standards at all," together with their detailed application to the maritime improvements at issue in this case. (*Ante*, pp. 16-23) There is no need to revisit that material here given Piazza's silence about them.

As for their sufficiency, however, they are far more specific and extensive than the terse general standards approved in the case law Piazza ignores. As set forth in the respondents' opposition memorandum below, one case approves a "general welfare" and anti-"monotonous" land use standard because "the administrative body is required to make its decision in accord with the general health, safety and welfare standard." (*Novi*, *supra*, 169 Cal.App.3d at 682) Another case cited there approves a standard requiring "respect [for] the existing privacy of surrounding properties." (*Briggs v. City of Rolling Hills Estates* (1995) 40 Cal.App.4th 637, 643 (review den.)) And the *Sacramentans for Fair Planning* case cited previously approves a "significant community benefit" standard for land use decisions. (37 Cal.App.5th at 713-714)

No more need be said about the standards applied and the case law Piazza omits on that subject.

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c.

The Omitted Text and Reasons for the Unique R-1W Ordinance

Finally, Piazza places heavy reliance on the inclusion of more specific maritime standards in the ordinance governing the R-1W zone. But he ignores the two serious problems with that reliance previously cited here: the text of the R-1W ordinance incorporating citywide design review standards (*ante*, p. 8) and the zoning map and Planning Commissioner's comments evidencing the reasons for the unique R-1W standards. (*Ante*, pp. 23-26) Any fair opening brief would have to address those matters and at least attempt to explain them away. Piazza's brief does neither.

C.

PIAZZA'S INCOMPLETE PRESENTATION ABOUT HIS VIEWS AND PRIVACY IGNORES SETTLED REQUIREMENTS FOR CLAIMS OF ABUSE OF DISCRETION OR INSUFFICIENT EVIDENCE

1.

THE STANDARDS OF REVIEW OF LAND-USE DECISIONS

The approval of development entitlements, such as design review and conditional use permits, are "quasi-adjudicatory" actions reviewable under the "abuse of discretion" standard in Code of Civil Procedure section 1094.5, subdivision (b). As set forth in that provision: "[a]buse of discretion is established if the respondent [agency] has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence."

Young v. City of Coronado (2017) 10 Cal.App.5th 408 (review den.) also holds as follows:

> The petitioner in an administrative mandamus proceeding has the burden of proving that the agency's decision was invalid and should be set aside, because it is presumed that the agency regularly performed its official duty. . . . [¶] It is for the agency to weigh the preponderance of conflicting evidence, as [reviewing courts] may reverse its decision only if, based on the evidence before it, a reasonable person could not have reached the conclusion reached by it. (*Id*. at 419

Similarly, while Piazza quotes at length from *Harrington v. City of Davis* (2017) 16 Cal.App.5th 420, he omits its holding that the City's interpretation of its Municipal Code was entitled to "great weight and respect" because its "decisions were entwined with issues of fact, policy, and discretion." (*Id*. at 435, internal quots. omitted.) Furthermore:

> the City's decisions were the product of an agency charged with regulating zoning practices and ensuring compliance with the Building Code. In reaching its decisions, the City was required to balance the requirements of the zoning and building codes against the interests of the applicant and neighbors, taking into account the historical uses of the Property, the residential character of the neighborhood, and the evolving needs of the community. (*Ibid*.)

Finally, while Piazza claims "fundamental rights" of due process, property and privacy are at stake (AOB 59-60), he acknowledges elsewhere that, even "where a fundamental right is at issue, . . . the

appellate court determines whether substantial evidence supports the trial court decision." (*Id*. at 40, correctly citing *Bixby v. Pierno* (1970) 4 Cal.3d 130, 143, n. 10) In any event, *Cadiz Land Co., Inc. v. Rail Cycle, L.P.* (2000) 83 Cal.App.4th 74 explains that "[t]he courts have rarely upheld the application of the independent judgment test to land use decisions. . . . The test typically applies to classic vested rights, such as the right to continued operation of one's business." (*Id*. at 111, cit. and internal quots. omitted) *Cadiz* thus holds that a proposed landfill development was subject to substantial-evidence review despite the appellant neighbor's claims of "significant adverse impacts on its agricultural operations . . . and groundwater." (*Id*. at 81)

2.

THE APPLICABLE BRIEFING REQUIREMENT AND THE CONSEQUENCE OF IGNORING IT

As shown previously, "California courts permit vague standards" in land use regulations because of the need "to delegate broad discretionary power to administrative bodies." (*Sacramentans for Fair Planning v. City of Sacramento, supra,* 37 Cal.App.5th at 713) Piazza therefore faced an especially high burden to demonstrate an abuse of discretion in Belvedere's appraisal of his views and privacy — and not in a vacuum as he suggests, but along with many other factors bearing on McCloskey's application.

To begin with, Division Four of this Court held as follows in *Schmid v. City and County of San Francisco* (2021) 60 Cal.App.5th 470:

> Because the administrative agency has technical expertise to aid it in arriving at its decision, we should not interfere with the discretionary judgments made by the agency. It is for the agency to weigh the preponderance of conflicting evidence, as we may reverse its decision only if, based on the evidence before it, a reasonable person could not have reached the conclusion reached by it. (*Id*. at 484; cits. and internal quots. omitted)

It follows that Piazza's opening brief had to demonstrate that *all* the evidence before the Belvedere City Council, not just evidence he singled out, establishes an abuse of discretion. As Division Five held in *Coyne v. De Leo* (2018) 26 Cal.App.5th 801, 814: "*all* of the relevant circumstances" must be considered to determine if "[a]n abuse of discretion occurs. . . ." (*Id*. at 814; italics added)

Similar requirements apply to Piazza's contention that substantial evidence is lacking. As set forth in *Schmid*, *supra*:

> it is presumed that the findings and actions of the administrative agency were supported by substantial evidence. . . . Thus, . . . the burden is on appellant to show there is no substantial evidence whatsoever to support the findings of the Board." (60 Cal.App.5th at 484)

Division One thus held in *Verrazono v. Gehl Company* (2020) 50 Cal. App.5th 636 (review den.) that the appellant "must cite the evidence in the record *supporting* the judgment and explain why such evidence is insufficient as a matter of law. . . . (*Id*. at 652; italics added; cits. and internal quots. omitted)

Finally, *Verrazono* specifies the consequence when, as here, the appellant's "opening brief . . . presented a one-sided discussion of the evidence. . . ." (*Id*. at 653) "Verrazono's failure to set forth all material evidence forfeited his substantial evidence claims." (*Id*. at 677)

3.

THE FINDINGS AND OTHER EVIDENCE IGNORED IN PIAZZA'S OPENING BRIEF SUPPORT AN AFFIRMANCE IF NOT A HOLDING OF FORFEITURE

The detailed findings quoted earlier in this brief (*ante*, pp. 16-23) do not merely confirm the sufficiency of the standards Belvedere applied. They also demonstrate that the city relied on a number of criteria not even mentioned in Piazza's opening brief. It is therefore not the task of these respondents, or this Court, to track down all the evidence missing from his brief, fairly summarize it, and analyze its sufficiency as substantial evidence supporting an exercise of exceptionally broad discretion.

As a precaution, however, we first demonstrate that the criteria Piazza ignores on the view issue proves he likewise ignores an abundance of supporting evidence. Thereafter, we demonstrate that the external-view and line-of-sight photos cited previously, together with the site visits by city officials, constitute sufficient evidence supporting the city's finding on the both the view and privacy issues.

To begin with, Piazza ignores all of Belvedere's following determinations about the pier visible from a few of his many rooms:

• it would be "compatible with other similar waterfront improvements . . . including those immediately adjacent;"

• it would "not substantially impact any neighborhood views;"

• as "visible from any one particular property, the impact is minimal and consistent with the scenery of waterside properties common throughout the City;"

• its size is "not excessively large or monumental;"

• it was strictly limited to "providing boat access;"

• it "would not be detrimental to [anyone's] comfort [or] convenience" or "injurious or detrimental to the property and improvements the neighborhood;"

• it is "in harmony with the general appearance of the landscape;"

• it "presents a balanced and harmonious relationship between the site, other structures, and adjoining properties;"

• it "would not appear excessively large, and would remain compatible with the size and scale of land and marine structures on other properties in the neighborhood;"

• its "proposed marine structures are compatible with the existing character of the site and the surrounding neighborhood;"

• "[t]he size of the pier and improvements are the minimum necessary to achieve boating access during low tides;"

• "[t]he proposed improvements are intended to blend in, keep a low profile and minimize the visual impacts to neighbors;" and

• the materials used "will be compatible with the surrounding structures, and will relate to and fit in with the neighborhood."

Finally, the external-view and line-of-site photos discussed previously (*ante*, pp. 28-30) constitute substantial evidence even by

themselves — wholly aside from the site visits by city officials — supporting Belvedere's discretionary finding about Piazza's privacy as well as his views. It is well settled, however, that reviewing courts appropriately treat site visits by administrative or judicial fact-finders as supporting evidence. (*E.g.*, *Palm Springs Turf Club v. California Horse Racing Bd*. (1957) 155 Cal.App.2d 242, 248 [treating "the board's visit to the area" as supporting evidence]; *Mendez v. Rancho Valencia Resort Partners, LLC* (2016) 3 Cal.App.5th 248, 281 [treating trial court's "first-hand observations" as supporting evidence].) In this case, accordingly, the site visits by city officials lend strong support for Belvedere's conclusion that Piazza's views and legitimate privacy interests would not be significantly impaired.

D.

THE COURT SHOULD NOT GRANT ANY RELIEF AGAINST THE OFFICIALS MENTIONED IN THE CAPTION TO PIAZZA'S WRIT PETITION

As noted at the outset, the caption to Piazza's writ petition mentions twelve members of the City Council and Planning Commission but only in parentheses, evidently not naming them as respondents. (CT 4) His opening brief on appeal also requests no relief against them, not even a remand to consider such relief. On the bias issue, for example, he asks only that Belvedere be ordered to exclude two officials from any further role, not that any relief be granted against them. Because it is too late to do so for the first time in a reply brief (*Reichardt v. Hoffman,*

supra, 52 Cal.App.4th 754, 764) the Court should consider this matter closed.

IV.

CONCLUSION

For all the foregoing reasons, the Court should affirm the order below denying Piazza's petition for a writ of mandamus. He chose to live in a waterfront neighborhood, not a private island or peninsula with no other inhabitants. Belvedere thus reasonably allowed his neighbor McCloskey to enjoy maritime facilities as Piazza and another neighbor already did, all subject to sufficient regulations. Finally, the officials deliberated publicly, exhaustively and fairly in reaching that conclusion, without the slightest evidence of bias as required by case law.

DATED: August 2, 2022

Respectfully submitted,

RENNE PUBLIC LAW GROUP

By: /S/
RYAN P. MCGINLEY-STEMPEL
Attorneys for Respondents
CITY OF BELVEDERE et al.

BIEN & SUMMERS

By : /S/
ELLIOT L. BIEN
Attorneys for Respondent
DAVID McCLOSKEY

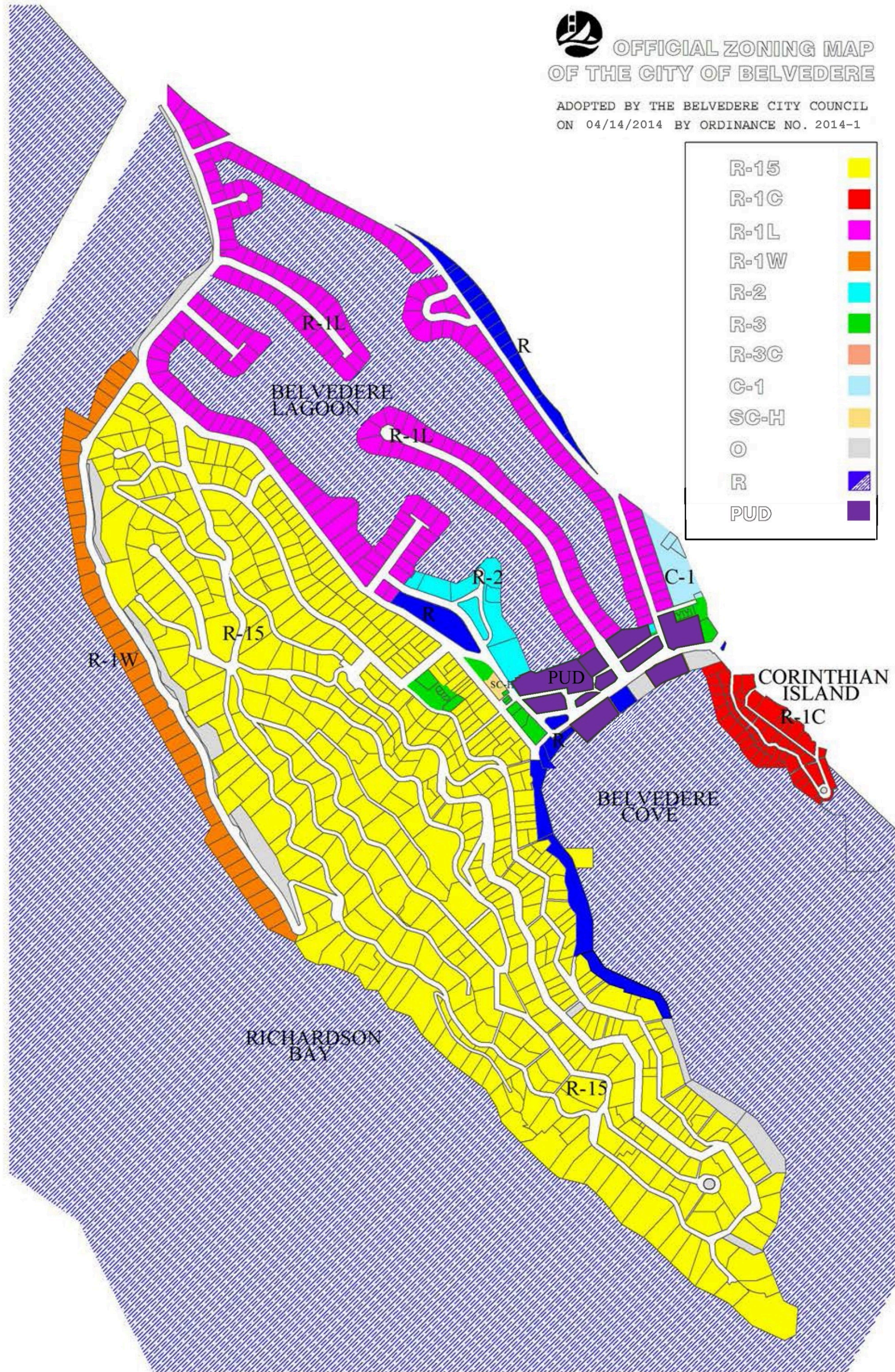
19.12.020 Zone boundaries and zoning map.

A. The boundaries of the various zones established by this Chapter shall be as shown on the map entitled "Official Zoning Map of the City of Belvedere."

B. The original of such zoning map shall be kept on file with the Deputy City Clerk, together with all subsequent amendments and additions thereto, and shall constitute the original record.

C. The most recent edition of the Official Zoning Map of the City of Belvedere, as amended and adopted by the City Council on April 14, 2014, is here faithfully reproduced:

APPENDIX TO RESPONDENTS' BRIEF


OFFICIAL ZONING MAP
OF THE CITY OF BELVEDERE
ADOPTED BY THE BELVEDERE CITY COUNCIL
ON 04/14/2014 BY ORDINANCE NO. 2014-1
R-15
R-1C
R-1L
R-1W
R-2
R-3
R-3C
C-1
SC-H
O
R
PUD
R-1L
R
BELVEDERE
LAGOON
R-1L
R-2
C-1
R
R-15
R-1W
PUD
CORINTHIAN
ISLAND
R-1C
R
BELVEDERE
COVE
RICHARDSON
BAY
R-15

(Ord. 2014-1 § 2, 2014; Ord. 2012-2 § 2, 2012; Ord. 2010-1 § 2, 2010; Ord. 89-1 § 1, 1989.)

The Belvedere Municipal Code is current through Ordinance 2022-03, passed March 14, 2022.

Disclaimer: The City Clerk's office has the official version of the Belvedere Municipal Code. Users should contact the City Clerk's office for ordinances passed subsequent to the ordinance cited above.

Note: This site does not support Internet Explorer. To view this site, Code Publishing Company recommends using one of the following browsers: Google Chrome, Firefox, or Safari.

City Website: www.cityofbelvedere.org
Code Publishing Company

CERTIFICATE OF LENGTH OF BRIEF

The undersigned, counsel for the respondent named above, hereby certifies pursuant to Rule 8.204(c)(1), California Rules of Court, that the foregoing brief is proportionately spaced, has a 13-point typeface, and contains 10,393 words as computed by the word processing program (WordPerfect 2021) used to prepare the brief.

DATED: August 2, 2022

/S/

ELLIOT L. BIEN

CERTIFICATE OF SERVICE

The undersigned declares:

I am over the age of 18 years and am not a party to or interested in the above entitled cause. I caused to be served:

BRIEF FOR RESPONDENTS

(1) by requesting TrueFiling service of same on all registered counsel at the time I submitted the document for filing through TrueFiling; and

(2) by enclosing a copy of the brief in a postage-prepaid envelope addressed as follows, and placing it for delivery by the United States Postal Service in my usual manner:

Clerk of the Marin County Superior Court
For Delivery to the Hon. Stephen P. Freccero
3501 Civic Center Drive
San Rafael, CA 94903

The foregoing is true and correct. Executed under penalty of perjury at San Rafael, California.

DATED: August 2, 2022

/S/
ELLIOT L. BIEN