



# Council Agenda Report

To: Mayor Silverstein and the Honorable Members of the City Council

Prepared by: Mayor Silverstein and Councilmember Stewart

Approved by: Steve McClary, City Manager

Date prepared: December 30, 2022 Meeting date: January 9, 2023

Subject: Proposed Policy Requiring the City to Obtain a Report from an Independent Consultant Whenever an Application Subject to a Public Hearing Before the Planning Commission Requires a Consultant's Report for Geological and/or Seismic, Biological, Environmental, Historical, or Traffic Matters (Mayor Silverstein and Councilmember Stewart)

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**RECOMMENDED ACTION:** At the request of Mayor Silverstein and Councilmember Stewart, direct staff to bring a resolution to the City Council establishing a policy that would require the City to obtain a report from an independent consultant retained by the City whenever an application subject to a public hearing before the Planning Commission requires a consultant's report for geological and/or seismic, biological, environmental, historical, or traffic matters.

**FISCAL IMPACT:** There is no fiscal impact associated with the recommended action.

**WORK PLAN:** This item was not included in the Adopted Work Plan for Fiscal Year 2022-2023.

**DISCUSSION:** City Manager's Note: The analysis in this report was provided by Mayor Silverstein and Councilmember Stewart. This report does not contain analysis or recommendations prepared by the City staff.

Currently, an applicant who is required to establish compliance with complicated biological, geological, engineering, and/or other requirements hires a private consultant, works with the consultant to obtain a report that supports the proposed project, and then submits the report to the City for review in a public hearing before the Planning Commission.

Just as computer programs are “garbage in / garbage out,” a good consultant can justify most results a client desires. This applies with equal force to a consultant hired by an objector to establish non-compliance with the applicable requirements – although they are rare, because (i) most objectors cannot afford a consultant to provide a counter-report, and (ii) objectors often lack the right to have their own consultants access the subject property without the applicant’s permission, which most applicants will not provide.

By contrast, an independent consultant, who is selected by the City and who is answerable to the City, is more likely to provide an impartial and objective analysis of the proposed project, without bending in favor of any particular position. This will provide the Planning Commission with a more reliable basis upon which to make an informed decision. That greater reliability flows up to the Planning Commission, the City Council and/or the California Coastal Commission if there is an appeal to one or more of those bodies.

In litigation, opposing “expert reports” are often widely divergent, and some judges appoint independent consultants (at the parties’ expense) to help the court make heads or tails of the competing reports of the parties. It is submitted that this is an apt analogy, as it helps to accomplish fair and impartial justice to all concerned – which ought to be the City’s objective when considering proposed development.

Another way to look at this may be to consider a loan application for a complicated project. Would a prospective lender prefer a valuation performed by a consultant hired by the loan applicant, and who worked with the applicant to develop the valuation, or would the lender prefer an independent consultant whose fiduciary responsibility is owed to the lender and its depositors and investors?

Mayor Silverstein and Councilmember Stewart are proposing that the Council establish a policy that would impose the actual cost of an independent consultant’s report upon the applicant for the permit that requires such a report. Among other things, the proposed policy also should preclude the applicant from communicating with the City’s independent consultant without the express written authorization of the City, and further provide that the City Manager or such other member(s) of the City Staff as the City Manager may designate shall develop and promulgate (i) the process for the City to select and engage the consultant, (ii) how the City shall interact with the consultant, (iii) a list of the types of reports that shall be subject to the policy, which list may include reports for complex matters beyond those identified by the City Council, and (iv) what procedures, if any, should be in place when an applicant or other third-party seeks to engage with the Consultant. The further policy developed by the City Manager or other designated staff member(s) should be submitted to the City Council for approval as a Consent Item.

It is proposed that the policy should apply to all non-residential development and multi-family residential development, without exception. With respect to single family residential

development, the policy should provide for the Planning Department or other department (as the case may be) to waive the requirement of an independent consultant and permit an applicant to submit a report of the applicant's own consultant in matters the Department Director determines to be non-controversial, but not in a situation where there is an objection by the owner of a property that may be negatively impacted by the proposed development of the required consultant report should be inaccurate.

Should the Council agree to adopt the proposed policy, it shall direct staff to bring back a resolution to the City Council at the next scheduled Regular Meeting. A draft resolution prepared by Mayor Silverstein and Councilmember Stewart is attached for reference.

ATTACHMENT: DRAFT Proposed Resolution

RESOLUTION NO. 23-\_\_

A RESOLUTION OF THE CITY OF MALIBU ESTABLISHING A POLICY THAT REQUIRES THE CITY TO OBTAIN A REPORT FROM AN INDEPENDENT CONSULTANT RETAINED BY THE CITY WHENEVER AN APPLICATION SUBJECT TO A PUBLIC HEARING BEFORE THE PLANNING COMMISSION REQUIRES A CONSULTANT'S REPORT FOR GEOLOGICAL AND/OR SEISMIC, BIOLOGICAL, ENVIRONMENTAL, HISTORICAL, OR TRAFFIC MATTERS

The City Council of the City of Malibu does hereby find, resolve and order as follows:

SECTION 1. Recitals

A. Currently, an applicant who is required to establish compliance with complicated biological, geological, engineering, or other requirements hires a private consultant, works with the consultant to obtain a report that supports the proposed project, and then submits the report to the City for review in a public hearing before the Planning Commission.

B. Just as computer programs are “garbage in / garbage out,” a good consultant can justify most results a client desires. This applies with equal force to a consultant hired by an objector to establish non-compliance with the applicable requirements – although they are rare, because (i) most objectors cannot afford a consultant to provide a counter-report, and (ii) objectors often lack the right to have their own consultants access the subject property without the applicant's permission, which most applicants will not provide.

C. By contrast, an independent consultant, who is selected by the City and who is answerable to the City, is more likely to provide an impartial and objective analysis of the proposed project, without bending in favor of any particular position. This will provide the Planning Commission with a more reliable basis upon which to make an informed decision. That greater reliability flows up to the Planning Commission, the City Council and/or the California Coastal Commission if there is an appeal to one or more of those bodies.

SECTION 2. The City Council hereby establishes a policy requiring that the City shall obtain a report from an independent consultant retained by the City whenever an application subject to a public hearing before the Planning Commission requires a consultant's report for geological and/or seismic, biological, environmental, historical, or traffic matters. The policy shall also state that: 1) The cost of the independent consultant's report shall be borne by the applicant for the permit that requires such a report; 2) the applicant shall be prohibited from communicating with the City's independent consultant without the express written authorization of the City; 3) the City Manager or such other member(s) of the City Staff as the City Manager may designate shall develop and promulgate (i) the process for the City to select and engage independent consultants, (ii) how the City shall interact with such consultants, (iii) a list of the types of reports that shall be subject to the policy, which list may include reports for complex matters beyond those identified by the City Council, and (iv) what procedures, if any, should be in place when an applicant or other third-party seeks to engage with the City's independent consultant; 4) the further policy developed by the City

Manager or other designated staff member(s) shall be submitted to the City Council for approval as a Consent Item at a City Council Regular meeting; and 5) the Policy shall apply to all non-residential development and multi-family residential development, without exception, and the Planning Department or other department (as the case may be) shall have discretionary authority to waive the requirement of an independent consultant and permit an applicant to submit a report of the applicant's own consultant in matters related to single family residential development which the Department Director determines to be non-controversial, but not in a situation where there is an objection by the owner of a property that may be negatively impacted by the proposed development if the required consultant report should be inaccurate.

SECTION 3. The City Clerk shall certify to the passage and adoption of this Resolution and enter it into the book of original resolutions.

PASSED, APPROVED, and ADOPTED this \_\_ day of \_\_\_\_\_ 2023.

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BRUCE LEE SILVERSTEIN, Mayor

ATTEST:

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KELSEY PETTIJOHN, City Clerk  
(seal)

APPROVED AS TO FORM:

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TREVOR RUSIN, Interim City Attorney