



State of California – Natural Resources Agency

DEPARTMENT OF FISH AND WILDLIFE

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Governor's Office of Planning & Research

**Aug 04 2020**

## STATE CLEARINGHOUSE

July 30, 2020

Ms. Crystal De Castro  
City of Brentwood Community Development Department  
150 City Park Way  
Brentwood, CA 94513  
[cdecastro@brentwoodca.gov](mailto:cdecastro@brentwoodca.gov)

Subject: Inez Estates Subdivision Project, Mitigated Negative Declaration,  
SCH No. 2020069040, City of Brentwood, Contra Costa County

Dear Ms. De Castro:

The California Department of Fish and Wildlife (CDFW) received a Notice of Intent to Adopt a Mitigated Negative Declaration from the City of Brentwood (the City) for the Inez Estates Subdivision Project (Project) pursuant the California Environmental Quality Act (CEQA) and CEQA Guidelines.<sup>1</sup>

Thank you for the opportunity to provide comments and recommendations regarding those activities involved in the Project that may affect California fish and wildlife. Likewise, we appreciate the opportunity to provide comments regarding those aspects of the Project that CDFW, by law, may be required to carry out or approve through the exercise of its own regulatory authority under the Fish and Game Code.

### CDFW ROLE

CDFW is a Trustee Agency with responsibility under CEQA §15386 for commenting on projects that could impact fish, plant or wildlife resources. CDFW is also considered a Responsible Agency if a project requires discretionary approval, such permits issued under the California Endangered Species Act (CESA) and the Native Plant Protection Act, Lake and Streambed Alteration (LSA) Program, and other provisions of the Fish and Game Code that afford protection to the State's fish and wildlife trust resources.

### REGULATORY REQUIREMENTS

#### California Endangered Species Act

Please be advised that a CESA Incidental Take Permit (ITP) must be obtained if the Project has the potential to result in "take" of plants or animals listed under CESA, either during construction or over the life of the Project. Issuance of a CESA Permit is subject

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<sup>1</sup> CEQA is codified in the California Public Resources Code in section 21000 et seq. The "CEQA Guidelines" are found in Title 14 of the California Code of Regulations, commencing with section 15000.

Ms. Crystal De Castro  
City of Brentwood Community Development Department  
July 30, 2020  
Page 2

to CEQA documentation; the CEQA document must specify impacts, mitigation measures, and a mitigation monitoring and reporting program. If the Project will impact CESA listed species, early consultation is encouraged, as significant modification to the Project and mitigation measures may be required in order to obtain a CESA Permit.

CEQA requires a Mandatory Finding of Significance if a project is likely to substantially restrict the range or reduce the population of a threatened or endangered species. (Pub. Resources Code, §§ 21001, subd. (c), 21083; CEQA Guidelines, §§ 15380, 15064, and 15065). Impacts must be avoided or mitigated to less-than-significant levels unless the CEQA Lead Agency makes and supports Findings of Overriding Consideration (FOC). The CEQA Lead Agency's FOC does not eliminate the Project proponent's obligation to comply with Fish and Game Code section 2080.

### **Lake and Streambed Alteration**

CDFW requires an LSA Notification, pursuant to Fish and Game Code section 1600 et. seq., for Project activities affecting lakes or streams and associated riparian habitat. Notification is required for any activity that may substantially divert or obstruct the natural flow; change or use material from the bed, channel, or bank including associated riparian or wetland resources; or deposit or dispose of material where it may pass into a river, lake or stream. Work within ephemeral streams, washes, watercourses with a subsurface flow, and floodplains are subject to notification requirements. CDFW will consider the CEQA document for the Project and may issue an LSA Agreement. CDFW may not execute the final LSA Agreement (or ITP) until it has complied with CEQA as a Responsible Agency.

### **PROJECT DESCRIPTION SUMMARY**

**Proponent:** Cyrus Land Investments, LLC

**Location:** The Inez Estates Subdivision (Project site) includes approximately 4.08 acres located in the northern portion of the City of Brentwood. The site is identified by Assessor's Parcel Numbers (APN) 018-080-022 and 018-080-025. The project site is bounded by Lone Tree Way to the north, Valley Oak Nursery to the west, ranch style residential to the south, and Gann Street to the east.

**Objective:** The Project consists of the subdivision of a 4.08-acre site into 11 single-family residential parcels. The Project includes the dedication of land and construction of a new trail to the City's Trail System (Parcel A). All trees within the center of the Project site and at the southwestern corner will be removed as a part of the Project. With the exception of two trees, the trees along the perimeter of the Project will remain.

Ms. Crystal De Castro  
City of Brentwood Community Development Department  
July 30, 2020  
Page 3

## COMMENTS AND RECOMMENDATIONS

CDFW offers the following comments and recommendations below to assist the City in adequately identifying and/or mitigating the Project's significant, or potentially significant, direct and indirect impacts on fish and wildlife (biological) resources. Editorial comments or other suggestions may also be included to improve the document.

### Special-Status Plants

The MND states that the Project site was previously used for agriculture. It is concluded that this history, in conjunction with routine mowing, precludes the establishment of special-status plant species. A reconnaissance survey of the site conducted in December 2019 did not identify any special-status plant species on-site. While disturbance and mowing can decrease the likelihood of special-status plant species occurring on-site, they do not necessarily preclude the presence of such species. Furthermore, a single survey conducted once outside of the appropriate blooming period is insufficient to determine a species' absence from the survey area. CDFW recommends that the Project area be surveyed for special-status plants by a qualified botanist following the "Protocols for Surveying and Evaluating Impacts to Special-Status Native Plant Populations and Natural Communities," which can be found online at <https://wildlife.ca.gov/Conservation/Survey-Protocols>. This protocol, which is intended to maximize detectability, includes identification of reference populations to facilitate the likelihood of field investigations occurring during the appropriate floristic period. The IS/MND should be revised and recirculated to include the reporting elements and results from protocol-level surveys and the impact analysis revised to incorporate and disclose these results to the public and CDFW as a Trustee Agency.

If a state-listed or state Rare<sup>2</sup> plant is identified during botanical surveys, consultation with CDFW is warranted to determine if the Project can avoid take. If take cannot be avoided, acquisition of take authorization through an ITP issued by CDFW pursuant to Fish and Game Code Sections 2081(b) and/or Section 1900 et seq is necessary to comply with Fish and Game Code CESA and the Native Plant Protection Act.

### San Joaquin Kit Fox (*Vulpes macrotis mutica*)

The MND identifies potentially significant impacts to San Joaquin kit fox and offers mitigation in the form of pre-construction surveys and a mitigation plan developed in consultation with the U.S. Fish and Wildlife Service (USFWS) and CDFW should San Joaquin kit foxes and/or suitable dens be identified in the survey area (Mitigation Measure BIO-1). The MND should include fully enforceable measures to mitigate potentially significant impacts and should not defer these measures to a future time

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<sup>2</sup> In this context, "Rare" means listed under the California Native Plant Protection Act.

Ms. Crystal De Castro  
City of Brentwood Community Development Department  
July 30, 2020  
Page 4

(CEQA Guidelines § 15126.4). CDFW recommends the City incorporate quantifiable and enforceable measures into the MND to minimize impacts to Project site.

### **Western Burrowing Owl (*Athene cunicularia*)**

The MND identifies potentially significant impacts to western burrowing owls and offers mitigation in the form of pre-construction surveys (Mitigation Measure BIO-2A), and nest avoidance or passive relocation (Mitigation Measure BIO-2B). Please be advised that CDFW does not consider exclusion of burrowing owls or “passive relocation” as a “take” avoidance, minimization or mitigation method, and considers exclusion as a significant impact. The long-term demographic consequences of exclusion techniques have not been thoroughly evaluated, and the survival rate of evicted or excluded owls is unknown. All possible avoidance and minimization measures should be considered before temporary or permanent exclusion and closure of burrows is implemented in order to avoid “take”.

The CEQA document for the Project should also include measures to avoid or minimize loss of burrowing owl foraging habitat, and mitigation for loss of habitat that cannot be fully avoided. Please note that the permanent loss of habitat is considered significant in and of itself and should be mitigated regardless of current level of disturbance or reconnaissance survey results. To offset this significant permanent impact, the Project proponent should be required to purchase and protect in perpetuity compensatory mitigation lands at a minimum of a 1:1 mitigation ratio as a condition of Project approval. If active burrows or winter roosts are found on-site and take cannot be avoided, the mitigation ratio should be increased to a minimum of 3:1 (mitigation: loss) and the conserved lands should be currently occupied by the species during all season(s) of the owls’ life history stages that the site may support.

### **Swainson’s Hawk (*Buteo swainsoni*)**

The MND identifies potential nest trees for Swainson’s hawk on the Project site, as well as a known occurrence of the species within a mile of the Project site. However, the document concludes that it is unlikely that the species will nest on or near the site in the future as the Project site is located in the “extreme west edge of the Swainson’s hawk nesting range” and prescribes mitigation in the form of pre-construction nesting bird surveys (Mitigation Measure BIO-3). This conclusion is unfounded; Swainson’s hawks have been observed to nest in the vicinity of the Project area, as well as areas north and west of the Project. Furthermore, Mitigation Measure BIO-3 does not sufficiently describe the survey protocols used to detect Swainson’s hawks that may be impacted as a result of project activities, nor does it offer a nest buffer sufficient to avoid nest disturbance. As such, Mitigation Measure BIO-3 fails to mitigate the potentially significant impacts to Swainson’s hawks to less-than-significant.

Ms. Crystal De Castro  
City of Brentwood Community Development Department  
July 30, 2020  
Page 5

CDFW recommends that a qualified biologist conduct surveys prior to any construction activities that may impact Swainson's hawk in accordance with the Swainson's Hawk Technical Advisory Committee's (TAC) *Recommended Timing and Methodology for Swainson's Hawk Nesting Surveys in California's Central Valley* (2000), available on CDFW's webpage at <https://www.wildlife.ca.gov/Conservation/Survey-Protocols#377281284-birds>. Survey methods should be closely followed by starting early in the nesting season (late March to early April) to maximize the likelihood of detecting an active nest (nests, adults, and chicks are more difficult to detect later in the growing season because trees become less transparent as vegetation increases). Surveys should be conducted: 1) within a minimum 0.25-mile radius of the Project area or a larger area if necessary to identify potentially impacted active nests, and 2) for at least the two survey periods immediately prior to initiating Project-related construction activities. Surveys should occur annually for the duration of the Project. The qualified biologist should have a minimum of two years of experience implementing the TAC survey methodology. If an active nest is identified, a 0.25-mile buffer shall be maintained around the nest until the young fledge. If take of Swainson's hawk cannot be avoided, the Project proponent should be required to obtain a CESA ITP as a condition of Project approval.

The MND for the Project should also include measures to avoid or minimize loss of Swainson's hawk foraging habitat, and mitigation for loss of habitat that cannot be fully avoided. Foraging habitat should be mitigated if Swainson's hawk activity (foraging, not just nests) is identified on or near the Project site. Mitigation lands should be protected in perpetuity under a conservation easement and be managed in perpetuity through an endowment with an appointed land manager. The easement should be held by a governmental entity, special district, non-profit organization, for-profit entity, person, or another entity to hold title to and manage the property provided that the district, organization, entity, or person meets the requirements of Government Code sections 65965-65968, as amended. As the state's trustee for fish and wildlife resources, CDFW should be named as a third-party beneficiary under the conservation easement.

If active nests are discovered within 0.25 miles of the Project site and cannot be avoided, the City should pursue further mitigation and incidental take coverage **prior** to the initiation of Project construction.

### **Migratory and Nesting Birds**

Potentially significant impacts to nesting and migratory birds are not discussed within the MND. However, the MND does offer Mitigation Measure BIO-3 for nesting and migratory birds. An MND should be prepared with a sufficient degree of analysis to provide decision makers with information which enables them to make a decision which intelligently takes account of environmental consequences (CEQA Guidelines §15151). To allow full contemplation of potentially significant impacts and the efficacy of associated mitigation measures, CDFW recommends the City revise the MND to include a description of all potentially significant impacts to migratory and nesting birds.

Ms. Crystal De Castro  
City of Brentwood Community Development Department  
July 30, 2020  
Page 6

Mitigation Measure BIO-3 requires pre-construction nesting bird surveys within 30 days prior to any ground disturbing construction activities. For most passerines and many raptors, 30 days is more than sufficient time to establish nests and begin rearing young. CDFW recommends that Mitigation Measure BIO-3 be revised to require pre-construction nesting bird surveys by a Qualified Biologist within 5 days of ground or vegetation disturbing Project activities. Mitigation Measure BIO-3 later specifies an up-to-250-foot non-disturbance radius around any active migratory bird nests. Depending on the species, nest stage, and site conditions, 250 feet may not be sufficient to prevent disturbance-related nest failure. The no-disturbance buffer should be determined by a Qualified Biologist. Nests should be monitored daily during Project-related activities by a Qualified Biologist to determine the sufficiency of the buffer and whether it should be expanded to protect the nest based on disruptions to an individual bird's natural nesting behaviors.

## ENVIRONMENTAL DATA

CEQA requires that information developed in draft environmental impact reports be incorporated into a data base which may be used to make subsequent or supplemental environmental determinations. [Pub. Resources Code, § 21003, subd. (e)]. Accordingly, please report any special-status species and natural communities detected during Project surveys to the California Natural Diversity Database (CNDDDB). The CNDDDB field survey form can be found at the following link:

<https://wildlife.ca.gov/Data/CNDDDB/Submitting-Data#44524420-pdf-field-survey-form>.

The completed form can be mailed electronically to CNDDDB at the following email address: [CNDDDB@wildlife.ca.gov](mailto:CNDDDB@wildlife.ca.gov). The types of information reported to CNDDDB can be found at the following link: <https://wildlife.ca.gov/Data/CNDDDB/Plants-and-Animals>.

## CONCLUSION

CDFW appreciates the opportunity to comment on the MND to assist the City in identifying and mitigating Project impacts on biological resources. Questions regarding this letter or further coordination should be directed to Ms. Jennifer Rippert, Environmental Scientist, at (707) 428-2069 or [Jennifer.Rippert@wildlife.ca.gov](mailto:Jennifer.Rippert@wildlife.ca.gov); or Ms. Melissa Farinha, Senior Environmental Scientist (Supervisory), at (707) 944-5579 or [Melissa.Farinha@wildlife.ca.gov](mailto:Melissa.Farinha@wildlife.ca.gov).

Sincerely,

DocuSigned by:  
  
BE74D4C93C604EA...  
Gregg Erickson  
Regional Manager  
Bay Delta Region

cc: State Clearinghouse