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Governor's Office of Planning & Research

**Feb 25 2022**

## STATE CLEARING HOUSE

February 24, 2022

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Subject: Monte Vista Memorial Gardens Project Conditional Use Permit (PLN 2017-00194), Draft Environmental Impact Report, SCH No. 2020069045, City of Livermore, Alameda County

Dear Mr. Lopez:

The California Department of Fish and Wildlife (CDFW) has reviewed the Draft Environmental Impact Report (DEIR) for Monte Vista Memorial Gardens Project Conditional Use Permit (PLN 2017-00194) (Project). The Project includes construction of a funeral home with crematorium, interment area (burial lots), an entry plaza, internal roadways, parking, landscaping, new wetlands, lakes, and other associated infrastructure and improvements. The purpose of the DEIR is to evaluate the specific environmental effects of the Project.

CDFW submitted comments, dated July 21, 2020, on the Notice of Preparation (NOP) to inform Alameda County, as the Lead Agency, of our concerns regarding potentially significant impacts to sensitive resources associated with the proposed Project. CDFW is providing these comments on the DEIR and recommendations regarding those activities involved in the Project that are within CDFW's area of expertise and relevant to its statutory responsibilities (Fish & G. Code, § 1802), and/or which are required to be approved by CDFW (CEQA Guidelines, §§ 15086, 15096 & 15204).

### CDFW ROLE

CDFW is a **Trustee Agency** with responsibility under the California Environmental Quality Act (CEQA; Pub. Resources Code, § 21000 et seq.) pursuant to CEQA Guidelines section 15386 for commenting on projects that could impact fish, plant, and wildlife resources. CDFW is also considered a **Responsible Agency** if a project would require discretionary approval, such as permits issued under the California Endangered Species Act (CESA), the Native Plant Protection Act, the Lake and Streambed Alteration (LSA) Program, or other provisions of the Fish and Game Code that afford protection to the state's fish and wildlife trust resources.

Mr. Albert Lopez  
Alameda County Community Development Agency  
February 24, 2022  
Page 2

## **REGULATORY REQUIREMENTS**

### **California Endangered Species Act**

Please be advised that a CESA Permit 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 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, & 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 Incidental Take Permit (ITP)) until it has complied with CEQA as a Responsible Agency.

## **PROJECT DESCRIPTION SUMMARY**

**Proponent:** Monte Vista Memorial Investment Group, LLC (MVMIG)

**Description and Location:** The Project is located at 3656 Las Colinas Road, Livermore, CA in unincorporated Alameda County. Development of the Project would occur on approximately 47 acres in the southern portion of the ±104-acre parcel (Assessor’s Parcel Number 099-0015-016-03) just north of the City of Livermore between the North Livermore Avenue and North First Street exits. The Project site topography consists of a relatively flat lowland valley area to the southeast and gently

Mr. Albert Lopez  
Alameda County Community Development Agency  
February 24, 2022  
Page 3

sloping hills and valleys to the north and west. The valleys in the western portion of the Project site drain toward Arroyo Las Positas, which flows in a southwesterly direction.

The property bordering the Project site to the east of Arroyo Las Positas supports an existing residence and several roadways, while the area west of Arroyo Las Positas is undeveloped and is currently used for grazing and farming. The Project site is accessed on the southeastern corner of the property from Las Colinas Road that connects with Las Positas Road (south of Interstate 580 (I-580)). North of I-580, legally recorded easements provide access to the Project site via county roads.

The proposed Project includes a funeral home with crematorium, 24 acres of burial lots, an entry plaza, 6.8 acres of internal roadways and parking, 9.0 acres of landscaping, 2.9 acres of new wetlands, 2.5 acres of lakes, two bridges, and other associated infrastructure and improvements.

Phase I includes all development east of Arroyo Las Positas, and Phase II includes development west of Arroyo Las Positas. Once approved, the Phase I buildout of the Project would occur over approximately five years. Phase I development would be on the 6.8 acres of the Project site east of Arroyo Las Positas. Development on Phase I would include construction and operation of the funeral home and entry plaza, the single-story "Pavilion" building, the access road, the parking lot, two interment areas (burial lots), and landscaping.

Phase II development would be on the 40.3 acres of the Project site west of Arroyo Las Positas. Phase II buildout would occur over approximately 100 years. Development during Phase II would include construction and operation of the remaining interment areas (burial lots) and roads, new wetland features, lakes, and landscaping. The main cemetery with lakes, a flowing waterway, and monuments to the west of Arroyo Las Positas, would be accessed from the funeral home via two 24-foot-wide clear-span bridges designed for both pedestrian and vehicle use. These bridges would provide freeboard of at least one foot above the 500-year floodplain.

Phase II includes two proposed "lakes" or ponds connected by a perennial linear waterway (i.e., creek) that would be the primary landscape feature of the cemetery. A proposed wetland feature is also planned on the south side of the cemetery grounds near the southern property boundary on the north side of I-580. The burial area itself would have an extensive sub-drainage system draining to the lower lake feature to maximize onsite water re-use. The two lakes would be connected by a man-made perennial creek that would drain from the upper lake to the lower lake. The water would be re-circulated back to the upper lake via by a water pump. During summer months, an on-site groundwater well would supplement water in the upper lake's pool, and during winter months the lakes would capture precipitation as surface water runoff from the remainder of the Project site west of the creek.

Mr. Albert Lopez  
Alameda County Community Development Agency  
February 24, 2022  
Page 4

The Project site and the adjacent private property have had several violations caused by the MVMIG's representative over the past 8 years including a Notice of Violation (NOV) letter issued by CDFW and dated September 29, 2015 regarding the unlawful fill of wetlands and habitat for special-status species. CDFW recommends the EIR include a condition that all violations be resolved and cleared prior to Project approval.

## **COMMENTS AND RECOMMENDATIONS**

CDFW offers the below comments and recommendations to assist the County in adequately identifying and/or mitigating the Project's significant, or potentially significant, direct and indirect impacts on fish and wildlife (biological) resources.

### **General Comments**

The DEIR does not address the remaining 57 acres of the Property. Please note, Project study area is described in the DEIR as 103 acres although the property is 104 acres. In an October 6, 2020 conference call with CDFW staff Marcia Grefsrud, a representative of the Project stated the undeveloped annual grassland area was proposed to be converted to vineyard. If the remainder of the Project site will be converted to vineyards, this conversion should be fully disclosed and the impacts analyzed as part of the DEIR. The DEIR also states Phase II would be developed in subphases and build-out would occur over approximately 100 years, but the DEIR isn't clear on the timing of construction activities such as initial ground disturbing and site preparation, creation of aquatic features and landscaping. The DEIR should provide specific timing of Phase II development in order for CDFW to evaluate types of impacts (e.g., one-time initial impacts or sequential and cumulative on a temporal scale). The DEIR should then fully analyze all direct, indirect, and reasonably foreseeably impacts of future development activities on biological resources.

The DEIR, Appendix D Biological Resources and Wetland Assessment (BRWA) states "A Barnett Environmental biologist surveyed the Study Area in October 2020 for special status plant and wildlife species and their habitats that could be supported onsite." The term "Study Area" is not defined, but Figure 2 shows the Study Area includes 103 acres. The BRWA also does not provide details on number of site visits, staff, or methodology used in conducting any survey or delineation. This information should be provided in the BRWA. Please be advised that CDFW does not consider a one-day site visit as adequate to determine absence of any special-status species.

DEIR Section 2.7, Regulatory Requirements, Permits and Approvals, should state that the Project proponent will obtain state and federal incidental take permits prior to the start of construction. The County should also include a requirement that the Project proponent obtain a CESA ITP for each phase of the Project as a Condition of Approval of the Conditional Use Permit.

Mr. Albert Lopez  
Alameda County Community Development Agency  
February 24, 2022  
Page 5

CDFW is concerned that the DEIR and Appendix D dismiss the potential for occurrence of 10 special-status plants based on lack of suitable habitat, such as saline soil habitat, alkali grasslands or alkali soil despite identifying salt grass flats in the southwestern portion of the Study Area. The DEIR, p. 3.3-18, and Appendix D Section 5.2 describes three special-status plants with a potential to occur but dismisses them because they were not observed during the October 2020 survey. The discussions for heartscale (*Atriplex cordulata*) and long-styled sand-spurrey (*Spergularia macrotheca* var. *longistyla*) state neither of these species were observed in “existing irrigation ditches during the field survey”; however, there are no irrigation ditches within the Study Area. Furthermore, as stated above in this letter, one site visit does not constitute a protocol-level survey and therefore does not confirm absence. CDFW recommends following guidance outlined in CDFW’s *Protocols for Surveying and Evaluating Impacts to Special-Status Native Plant Populations and Sensitive Natural Communities* (March 2018) <https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=18959> .

The DEIR and Appendix D contain several errors regarding species status. For example, Appendix D states white-tailed kite (*Elanus leucurus*) is State threatened; however, it is also a State Fully Protected Species. Tricolored blackbird (*Agelaius tricolor*) is State listed as threatened, not endangered. Also, neither San Joaquin coachwhip (*Coluber flagellum* ssp. *ruddocki*) nor western pond turtle (*Emys marmorata*) are listed as federally or state threatened, but both are a State Species of Special Concern.

### **Streams and Wetlands**

The DEIR p. 3.8-14 states that in addition to the proposed man-made lakes, the Project proposes to install a 2.6-acre seasonal wetland area west of Arroyo Las Positas along the southern boundary of the central portion of the Project site. Water in this wetland area would come from direct precipitation. The wetland would be designed to only receive supplemental surface runoff in the event of very large storm events, along with discharge from the lower lake during storm events. The water would be detained in this wetlands area and then discharged at 10-year and 100-year pre-development flows via a stabilized outfall structure into Arroyo Las Positas. The size of the proposed new wetlands is not clear; pp. ES-8, 2-13 and p. 3.8-14 state the wetland will be 2.6 acres, but Table 1, p.2-4 and Figure 2-2 states it will be 2.9 acres. The EIR should correct this discrepancy.

The DEIR and BRWA conflict regarding existing wetlands and streams on the Project site. The DEIR p. 3.8-7 states the “Phase II area of the Project site currently drains via surface runoff and shallow groundwater seepage via several ephemeral channels southward into Arroyo Las Positas.” However, the BRWA, Table 1, does not include ephemeral streams and p. 10 states that the California Aquatic Resources Inventory (CARI) map, (Figure 3), “shows a number of other streams as well as a wide swath of vernal pools through the site” but the mapping “was not reflected by Barnett

Mr. Albert Lopez  
Alameda County Community Development Agency  
February 24, 2022  
Page 6

Environmental's (and earlier) wetland delineations of the site and clearly does not reflect current conditions." However, the Hydrologic Analysis, Appendix G, Figure 4, depicts what appear to be the same drainages as shown in the CARI map. These drainages appear to be at least a partial source of water to fill the proposed lakes. As mentioned above, work within ephemeral streams, and floodplains are subject to notification requirements pursuant to Fish and Game Code section 1600 et. seq. Construction of outfalls and bridges are also subject to the same notification requirements. The DEIR should analyze loss of the ephemeral drainages and potential for loss of vernal pools as depicted in the CARI map. CDFW recommends that the DEIR be revised to include an accurate description of all streams, drainages, wetlands and other waterbodies that could be impacted both directly and indirectly by the proposed Project, avoidance and minimization measures to offset those impacts and effective compensatory mitigation for all impacts that cannot be completely avoided.

In addition, the DEIR states the existing 2.1-acre of wetlands will not be impacted by the Project but, comparing Figure 3.3-4, Project Area Wetlands and Other Waters Of The U.S, to Figure ES-2 Site Plan shows SW-A no longer present (covered by roads and/or landscaping) and SW-B, SW-C, and SW-D replaced with a larger wetland bisected by a walkway. SW-E is not represented in the Site Plan and without a legend it is difficult to tell what the dark green dotting represents. The DEIR should be revised and provide a delineation conducted by a certified wetland delineator.

### **Construction of Lakes and Wetlands**

The Project proposes to install artificial lakes and new wetlands. As noted in the CDFW NOP comment letter, artificial water bodies such as lakes, reservoirs, ornamental ponds, and bioretention basins can create an attractive nuisance for both the federally threatened and State Species of Special Concern California red-legged frog (*Rana draytonii*) and the federally and State threatened California tiger salamander (*Ambystoma californiense*). California tiger salamanders and California red-legged frogs have been documented to breed, or attempt to breed, in these aquatic features. This can result in amphibians becoming trapped or cause desiccation of eggs, larvae or adults. Conversely, the aquatic features could become suitable breeding habitat in an environment where the upland area no longer supports enough suitable habitat to maintain a viable population. Since California tiger salamanders rely on burrows constructed by fossorial mammals, as described above, the Project site will no longer provide suitable upland habitat post-construction. In addition, ornamental ponds, reservoirs and other perennial aquatic habitat can attract invasive non-native species such as American bullfrogs (*Lithobates catesbeianus*) as well as human introduced species such as red-eared sliders (*Trachemys scripta elegans*), goldfish (*Carassius auratus*) and pond koi. American bullfrogs present a significant threat to our native species such as California red-legged frog, California tiger salamander and western pond turtle through predation and resource competition.

Mr. Albert Lopez  
Alameda County Community Development Agency  
February 24, 2022  
Page 7

## **Water Rights**

Please be advised that capturing and storing surface water flow requires a water right. Riparian rights usually come with owning a parcel of land that is adjacent to a source of water. A riparian right entitles the landowner to use a correlative share of the water flowing past his or her property. Riparian rights do not require permits, licenses, or government approval, but they apply only to the water which would naturally flow in the stream. Riparian rights do not entitle a water user to divert water to storage in a reservoir for use in the dry season or to use water on land outside of the watershed.

All diverters of surface water, with certain exceptions, are required to file a Statement of Water Diversion and Use with the State Water Resources Control Board (SWRCB) (see Division 2 of Part 5.1 of the California Water Code). The requirement applies to water diverted under claim of riparian right and to appropriations initiated prior to December 19, 1914, the effective date of the California Water Commission Act. Small domestic use includes normal domestic use, plus incidental stockwatering of domestic animals and incidental irrigation of one-half acre or less of lawn, garden, and pasture at any single establishment, not exceeding 4,500 gallons per day by direct diversion or 10 acre-feet per annum by storage, the latter including incidental aesthetic, recreational, or fish and wildlife enhancement purposes. Refer to the SWRCB's booklet, "How to File an Application/ Registration to Appropriate Water in California" for specific information on filing for a permit or for registering a small domestic use appropriation. More information on water rights can be found here:

[https://www.waterboards.ca.gov/waterrights/publications\\_forms/forms/#:~:text=To%20access%20the%20online%20form,and%20return%20to%20complete%20later.](https://www.waterboards.ca.gov/waterrights/publications_forms/forms/#:~:text=To%20access%20the%20online%20form,and%20return%20to%20complete%20later.)

Anyone who intends to divert water from surface waters or subterranean streams flowing in known and definite channels, either (1) directly to use on land which is not riparian to the source, (2) to storage in a reservoir for later use on either riparian or non-riparian land, or (3) for direct use of water which would not naturally be in the source, should apply with the SWRCB for a permit or small domestic use registration as the first step toward securing an appropriative water right. Persons diverting water under riparian or pre-1914 claims of right, with certain exceptions, are required to file a Statement of Water Diversion and Use with the SWRCB.

The EIR should fully analyze all potential impacts of the diversion of surface water on flow downstream of the Project site in Arroyo Las Positas Creek. The EIR should also state that the Project proponent will notify CDFW, pursuant to Fish and Game Code section 1600 et. seq, regarding the diversion.

Mr. Albert Lopez  
Alameda County Community Development Agency  
February 24, 2022  
Page 8

### **Western Pond Turtle**

The DEIR and Appendix D state the western pond turtle has a low potential for occurrence given the “open grassland” on the Project site. However, the DEIR and Appendix D fails to mention two western pond turtle occurrences documented in the California Natural Diversity Database (CDFW 2022) in Arroyo Las Positas, less than 500 feet downstream of the Project site. In addition, Stebbins 2012 describes western pond turtle terrestrial habitat ranging from grassland and cropland to open forest. Basking sites include open bank areas, partially sunken logs, and emergent vegetation mats. In areas where pond turtles hibernate, they utilize the burrows of California ground squirrel (*Spermophilus beecheyi*) where the aquatic substrate is not appropriate for hibernation. Nests have been found over 328 feet (100 meters) from the water on hillsides. In a telemetry study conducted on western pond turtles (Rathbun *et al.* 1992), all six terrestrial locations where a radio-equipped female was found during the nesting season were in open, grassy areas with a southern exposure, which is typical for the species (Holland 1994). According to Holland (1994), nest distance from the watercourse ranges from as little as 9.8 feet (3 meters) to over 1,319 feet (402 meters) and hatchlings may remain in the nest over the winter and emerge in the spring.

Due to the proximity of documented western pond turtle occurrences to the Project site and presence of suitable nesting habitat within the Project footprint, CDFW recommends establishing a no-impact buffer of 1,400 feet from the top of the bank to the uplands on both sides of Arroyo Las Positas through the Project site.

### **East Alameda County Conservation Strategy**

As discussed in the CDFW comment letter for the NOP, the Project site is located within the Conservation Zone 4 of the Eastern Alameda Conservation Strategy (EACCS). The EACCS mitigation guidance sections (Chapter 3) for grassland, California tiger salamander, western burrowing owl, California red-legged frog, San Joaquin kit fox, and American badger all include mitigation in the form of habitat conservation for the loss of species habitat when it cannot be avoided.

Several of the species potentially impacted by this Project are included as focal species in the EACCS, such as the California red-legged frog, California tiger salamander, western pond turtle, the federally endangered and State threatened San Joaquin kit fox (*Vulpes macrotis mutica*), western burrowing owl, and the State Species of Special concern American badger (*Taxidea taxus*). The EACCS mitigation guidance sections (Chapter 3), for grassland, California tiger salamander, western burrowing owl, California red-legged frog, San Joaquin kit fox, and American badger all include mitigation in the form of habitat conservation for the loss of species habitat when it cannot be avoided. To be consistent with the EACCS and to offset permanent habitat



Mr. Albert Lopez  
Alameda County Community Development Agency  
February 24, 2022  
Page 9

loss or conversion, the EIR should include permanent habitat conservation as an enforceable mitigation measure for these special-status species.

### **Pollinators**

As noted in the CDFW NOP comment letter, urbanization continues to alter the landscape and changing habitats provide challenges for pollinators. It is more difficult for pollinators to thrive in areas where fewer nest sites and host plants are available, and artificial structures and traffic make foraging riskier and more difficult. The DEIR fails to include measures to increase use by pollinators such as preserving riparian areas, protecting native plant remnants and the planting of native species essential to the survival of bees and decrease use of herbicides and pesticides. The Project should be designed to optimize a balance between urban ornamental landscaping, drought resistant plants, and native plants. Bioswales can be planted with deep-rooted native flowers and grasses that capture and filter storm water, build topsoil, and provide abundant and healthy food for bees and other insects that provide critical services to our food and agricultural systems. CDFW recommends the EIR fully analyze the impacts of the Project on pollinators and include adequate and effective avoidance, minimization and mitigation measures.

### **DEIR Mitigation Measures**

CEQA requires that, for each potentially significant impact identified in the DEIR, the CEQA document must discuss feasible measures or revisions in the proposed project made by, or agreed to by, the applicant to avoid or substantially reduce the project's significant environmental effects.

Under Cal. Code Regs. tit. 14 § 15370 "Mitigation" includes:

- a) Avoiding the impact altogether by not taking a certain action or parts of an action.
- b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.
- c) Rectifying the impact by repairing, rehabilitating, or restoring the impacted environment.
- d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.
- e) Compensating for the impact by replacing or providing substitute resources or environments, including through permanent protection of such resources in the form of conservation easements.

Mr. Albert Lopez  
Alameda County Community Development Agency  
February 24, 2022  
Page 10

***Mitigation Measure 3.3.1a: Pre-Construction Surveys***

Mitigation Measure 3.3.1a: Pre-Construction Surveys, requires a qualified biologist to confirm presence or absence of species of special concern within two weeks of planned construction. CDFW considers this mitigation measure too vague and general. Depending on the time of year, some Species of Special Concern, such as western pond turtle, may be difficult to find during a pre-construction survey based on their life history and use of terrestrial habitat. The measure should provide details on number of surveys, methodology, timing, level of effort, and address the CEQA requirements listed above.

***Mitigation Measure 3.3.1d: San Joaquin Coachwhip and other Special-Status Reptiles and Amphibians***

Mitigation Measure 3.3.1d: San Joaquin Coachwhip and other Special-Status Reptiles and Amphibians, requires intensive surveys for reptiles (not amphibians) within 30 days prior to construction. Based on survey results an exclusion fence would be installed around the perimeter of the construction areas. If the temporary fencing is installed the site would be surveyed again for coachwhip and any special-status reptiles or amphibians encountered within the fenced area would be captured and trans-located by the qualified biologist to similar suitable habitat on the Project site, in areas not adversely affected by Project activities. It is unclear what is meant by “intensive surveys” and what would trigger the requirement to install temporary exclusion fencing. The measure should provide details on number of surveys, methodology, timing, level of effort, and address the CEQA measures listed above. As noted above, western pond turtles could be nesting or hibernating in the uplands. CDFW recommends that temporary exclusion fencing be installed around the perimeter of the Project site prior to ground disturbing activities and the site surveyed for special-status species, in accordance with the appropriate permits.

***Mitigation Measure 3.3.1g: California Tiger Salamander***

Mitigation Measure 3.3.1g: California Tiger Salamander, requires a qualified biologist to conduct presence/absence surveys prior to ground-disturbing activities and during construction during the species’ active/breeding season – starting October 15 or when rain occurs. This measure is unclear what is meant by “presence/absence”. CDFW considers Mitigation Measure 3.3.1g to be highly inadequate to detect California tiger salamander for several reasons. First, California tiger salamanders spend much of their lives in underground retreats, often in burrowing mammal (ground squirrel, pocket gopher, and other burrowing mammal) burrows (U.S. Fish and Wildlife Service (USFWS) 2004). California tiger salamanders are only known to be active on the surface of the terrestrial habitat 1) during juvenile dispersal into the uplands and adult breeding during fall and winter rain events and 2) when metamorphs emerge from the pond in the spring and summer (Searcy and Shaffer 2011). Salamanders migrate and

Mr. Albert Lopez  
Alameda County Community Development Agency  
February 24, 2022  
Page 11

disperse over land to and from breeding habitat. This is not a mass “one night” migration event but occurs over several months during both movement periods described above. Based on their life history, it is highly unlikely any salamanders would be found during a pre-construction survey, such as Mitigation Measure 3.3.1d, unless the surveys included actions such as, burrow excavation, pitfall traps and drift fencing over multiple seasons, as authorized under CESA. Further, immature salamanders may not migrate to a breeding pond and instead remain in the upland until they are sexually mature, which could be between 3-5 years, so they would be undetected even with a pitfall trap survey during the rainy season. Searcy and Shaffer 2011 used 15,212 capture events to estimate that 95% of California tiger salamanders are within 1867 meters (6125 feet) of their breeding pond. The Project site is within 1867 meters from at least four known or potential breeding ponds, so it is highly likely that California tiger salamanders are dispersed throughout the entire Project site. The DEIR should therefore assume presence of California tiger salamander over the entire Project site and the County should require, as a Condition of Approval, that the Project proponent obtain both federal and state take permits and provide compensatory mitigation for impacts to this species.

Mitigation Measure 3.3.1g also states mitigation could be achieved through the purchase of credits at a USFWS)-approved mitigation bank or an in-lieu fee payment through the “Natural Resources Conservation District” and the Alameda County Conservation Partnership. CDFW considers this measure unclear and insufficient. Mitigation measures should include actions such as, preserving off-site habitat through either purchasing California tiger salamander habitat credits at a CDFW- approved conservation bank (see <https://www.wildlife.ca.gov/Conservation/Planning/Banking/Approved-Banks>), or by placing a conservation easement over lands providing habitat, including funding an endowment for managing the lands for the benefit of California tiger salamander in perpetuity, and preparation and implementation of a long-term management plan. There is no in-lieu fee program for California tiger salamander through the Natural Resources Conservation Service or the Alameda County Resource Conservation District. Further, in-lieu fee payments as contemplated in the DEIR would not meet the full mitigation threshold required by CESA.

Due to the potential presence of this CESA-listed species and the potential for Project-related take, including but not limited to, installation of exclusion fencing, grading, trenching, use of water trucks, and proposed construction of the lakes and wetlands, CDFW advises that the Project proponent obtain a CESA Permit (pursuant to Fish and Game Code Section 2080 et seq.) in advance of Project implementation. Issuance of a CESA Permit is subject to CEQA documentation; therefore, the CEQA document should specify impacts, mitigation measures, and fully describe a mitigation, monitoring and reporting program. Early consultation is encouraged, as significant modification to the Project and mitigation measures may be required in order to obtain a CESA Permit.

Mr. Albert Lopez  
Alameda County Community Development Agency  
February 24, 2022  
Page 12

More information on the CESA permitting process can be found on the CDFW website at <https://www.wildlife.ca.gov/Conservation/CESA>.

***Mitigation Measure 3.3.1j Burrowing Owl***

CDFW considers Mitigation Measure 3.3.1j: Burrowing Owl confusing and recommends it be revised. The measure also appears to be referencing the “1995 Staff Report On Burrowing Owl Mitigation” which was replaced in 2012. As noted in our NOP comments, CDFW recommends that surveys be conducted following the methodology described in Appendix D: Breeding and Non-breeding Season Surveys of the 2012 CDFW Staff Report on Burrowing Owl Mitigation (Staff Report), which is available at <https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=83843>.

Burrowing owl surveys should be conducted by a qualified CDFW-approved biologist. In accordance with the Staff Report, a minimum of four survey visits should be conducted within 500 feet of the Project area during the owl breeding season which is typically between February 1 and August 31. A minimum of three survey visits, at least three weeks apart, should be conducted during the peak nesting period, which is between April 15 and July 15, with at least one visit after June 15. Pre-construction surveys should be conducted no-less-than 14 days prior to the start of construction activities with a final survey conducted within 24 hours prior to ground disturbance.

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”.

CDFW recommends the EIR include effective measures to avoid or minimize loss of burrowing owl foraging habitat, and mitigation for loss of breeding and foraging habitat that cannot be fully avoided. As described above, widespread burrowing mammal control as may be required in grassy areas such as cemeteries, may also pose threats to the burrowing owl. The East Alameda County Conservation Strategy Mitigation Guidance (p.3-66) for burrowing owl recommends mitigating the loss of habitat by protecting habitat in accordance with the mitigation guidelines outlined in Table 3-10 (BUOW-3) through acquiring parcels, through fee title purchase or conservation easement, where known nesting sites occur or where nesting sites have occurred in the previous three nesting seasons (BUOW-1 and BUOW-2).

Mr. Albert Lopez  
Alameda County Community Development Agency  
February 24, 2022  
Page 13

### **Mitigation Measure 3.3.2 Special-Status Plants**

Mitigation Measure 3.3.2 requires special-status plant species presence/absence surveys within areas proposed for grading or modification in accordance with *Protocols for Surveying and Evaluating Impacts to Special-Status Native Plant Populations and Natural Communities* (November 24, 2009). The current protocol, *Protocols for Surveying and Evaluating Impacts to Special-Status Native Plant Populations and Sensitive Natural Communities* (March 2018), replaces the May 8, 2000 and the 2009 guidelines. While use of the protocols is not mandated under code or regulation, the purpose of the protocols is to facilitate a consistent and systematic approach to botanical field surveys and assessments of special status plants and sensitive natural communities so that reliable information is produced and the potential for locating special-status plants and sensitive natural communities is maximized; therefore, using the most recent version is highly recommended. Additionally, annual weather variance, including but not limited to the drought conditions may require the necessity for additional floristic surveys to be performed.

Botanical field surveys should be comprehensive over the entire Project area, including areas that will be directly or indirectly impacted by the Project. Adjoining properties should also be surveyed where direct or indirect Project effects could occur, such as those from fuel breaks, potential conversion of annual grassland to vineyard, herbicide application, invasive species, and altered hydrology. Surveys restricted to known locations of special-status plants may not identify all special-status plants and sensitive natural communities present, and therefore do not provide a sufficient level of information to determine potential impacts of the Project.

According to the referenced CDFW protocols, to meet adequate disclosure of potential impacts the following items should be included in the botanical survey reports prepared for the environmental review process.

1. A discussion of the potential for a false negative botanical field survey;
2. A discussion of how climatic conditions may have affected the botanical field survey results;
3. A discussion of how the timing of botanical field surveys may affect the comprehensiveness of botanical field surveys;
4. Any use of existing botanical field surveys and a discussion of their applicability to the Project;
5. The deposition locations of voucher specimens, if collected; and
6. A list of references used, including persons contacted and herbaria visited.

Mr. Albert Lopez  
Alameda County Community Development Agency  
February 24, 2022  
Page 14

7. A discussion of the significance of special status plant populations in the project area considering nearby populations and total range and distribution;
8. A discussion of the significance of sensitive natural communities in the project area considering nearby occurrences and natural community distribution;
9. A discussion of project related direct, indirect, and cumulative impacts to special-status plants and sensitive natural communities;
10. A discussion of the degree and immediacy of all threats to special-status plants and sensitive natural communities, including those from invasive species;
11. A discussion of the degree of impact, if any, of the project on unoccupied, potential habitat for special-status plants; and
12. Recommended measures to avoid, minimize, or mitigate impacts to special-status plants and sensitive natural communities.

CDFW recommends that all reporting requirements in the CDFW protocols be disclosed in a more thorough impact analysis. The EIR should consider that the entire Project site is occupied by all special-status plant species that both historically occurred on or adjacent to the site and with the potential to occur on-site.

Mitigation Measure 3.3.2 also requires that if any sensitive plant species are found during “presence/absence” surveys and they would be impacted by Project activities, CDFW and USFWS would be consulted and mitigation such as avoidance or relocation within the Project site would occur. The avoidance measures as written in Mitigation Measure 3.3.2 are insufficient to ensure full avoidance from the Project's direct and indirect impacts. If the Project is to achieve full avoidance of indirect impacts to any individual special-status plants identified on-site, then Mitigation Measure 3.3.2 should be revised to include establishment of a buffer area by a qualified botanist. The buffer area should be of an area in size as to ensure that viable populations will persist into the foreseeable future, any seedbank is protected and will not be encroached upon by defensible space buffers, and that connectivity with nearby populations is maintained.

If the Project is unable to achieve full avoidance of impacts to special-status plants, then Mitigation Measure 3.3.2 as currently written fails to reduce these impacts to a level of less-than-significant. To reduce direct impacts to special-status plant species to a level of less-than-significant, CDFW recommends that Measure 3.3.2 be revised to require protection and management in perpetuity through a conservation easement an area equivalent to a 3:1 mitigation ratio (conserved area to impact area) for permanent loss of special-status plant habitats that are identified. A qualified botanist should calculate the area of permanent loss and their contemplation of seedbank and seed/plant dispersal should be included in the calculations. If the Project collects seeds and

Mr. Albert Lopez  
Alameda County Community Development Agency  
February 24, 2022  
Page 15

replants off-site according to the recommendations by CDFW below then the mitigation ration may be reduced to 2:1.

### ***Mitigation Measure 3.3.3a Wetlands***

Mitigation Measure 3.3.3a requires the Project avoid all impacts to the 2.1 acres of on-site wetlands and establishing appropriate buffers and development setbacks. As noted above, based on Figure ES-2 all the existing wetlands on-site will be impacted by Project activities. CDFW agrees that impacts to wetlands should be avoided and appropriate development setbacks established. The EIR should accurately describe the wetlands that will completely avoided and development setbacks that will be implemented pursuant to Mitigation Measure 3.3.3a.

### **FILING FEES**

The Project, as proposed, would have an impact on fish and/or wildlife, and assessment of filing fees is necessary. Fees are payable upon filing of the Notice of Determination by the Lead Agency and serve to help defray the cost of environmental review by CDFW. Payment of the fee is required in order for the underlying project approval to be operative, vested, and final. (Cal. Code Regs., tit. 14, § 753.5; Fish & G. Code, § 711.4; Pub. Resources Code, § 21089).

### **CONCLUSION**

CDFW appreciates the opportunity to provide comments on the DEIR to assist the County in identifying and mitigating Project impacts on biological resources. CDFW recommends the County correct the issues identified in this letter to ensure the DEIR fully describes the Project and analyzes the Project's significant or potentially significant impacts on biological resources and especially on CESA-listed species and their habitats adequately. Furthermore, CDFW recommends the DEIR disclose and evaluate reasonably foreseeable cumulative impacts, such as change in adjacent land use and additional loss of terrestrial habitat for special-status species, and evaluate the indirect effects to special-status species from construction and operation of perennial lakes. Finally, CDFW recommends using the best available science to assess impacts to special-status plants, western pond turtle, California tiger salamander, and impacts to wetlands.

As noted above, issuance of an LSA Agreement or CESA Permit is subject to CEQA documentation; the CEQA document must specify impacts, mitigation measures, and a mitigation monitoring and reporting program. If these are not adequately addressed in the CEQA document, significant modification to the Project and mitigation measures may be required to obtain an LSA Agreement or CESA Permit. Therefore, to ensure significant impacts are adequately mitigated to less-than-significant levels, CDFW recommends incorporating additional mitigation measures to reduce impacts to less-than-significant levels into the final CEQA document.

Mr. Albert Lopez  
Alameda County Community Development Agency  
February 24, 2022  
Page 16

Questions regarding this letter or further coordination should be directed to Marcia Grefsrud, Environmental Scientist, at (707) 644-2812 or [Marcia.Grefsrud@wildlife.ca.gov](mailto:Marcia.Grefsrud@wildlife.ca.gov); or Brenda Blinn, Senior Environmental Scientist (Supervisory), at (707) 339-0334 or [Brenda.Blinn@wildlife.ca.gov](mailto:Brenda.Blinn@wildlife.ca.gov).

Sincerely,

DocuSigned by:  
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Erin Chappell  
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