State of California – Natural Resources Agency
DEPARTMENT OF FISH AND WILDLIFE
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November 24, 2021

Ms. Leslie Mendez
City of San Rafael
1400 5th Avenue, 3rd Floor
San Rafael, CA 94901
Leslie.Mendez@cityofsanrafael.org



Subject: Los Gamos Apartments Development Project, Mitigated Negative Declaration, SCH No. 2021110004, City of San Rafael, Marin County

Dear Ms. Mendez:

The California Department of Fish and Wildlife (CDFW) received a Notice of Intent to Adopt a Mitigated Negative Declaration (MND) from the City of San Rafael (City) for the Los Gamos Apartments Development Project (Project) pursuant to the California Environmental Quality Act (CEQA) and CEQA Guidelines.[1]

CDFW is submitting comments on the MND to inform the City, as the Lead Agency, of potentially significant impacts to biological resources associated with the Project.

**CDFW ROLE**

CDFW is a **Trustee Agency** with responsibility under CEQA 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) or 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.

**PROJECT DESCRIPTION SUMMARY**

**Proponent:** Colin Russell Architects

**Objective:** The Project would develop a 10.24-acre lot into 192 multifamily residential units, a neighborhood market, a community center, and a walking trail. Primary Project activities include grading, excavation, trenching, building construction, concrete pouring, tree-removal, bridge installation, and landscaping.

[1] 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.

**Location:** The Project is located at Los Gamos Drive approximately 0.5 miles south of the intersection of Los Gamos Drive and Lucas Valley Road, in the City of San Rafael, County of Marin. The approximate centroid of the Project is Latitude 38.01509°N, Longitude 122.54327°W and the Assessor's Parcel Numbers are 165-220-06 and 165-220-07.

**Timeframe:** The MND does not specify a timeframe.

## ENVIRONMENTAL SETTING

The Project covers approximately 10.24 acres of undeveloped land consisting of annual and perennial grassland, coyote brush (*Baccharis pilularis*) scrub, coast live oak (*Quercus agrifolia*) woodland, and valley oak (*Q. lobata*) woodland. CDFW considers valley oak woodland a sensitive natural community (CDFW 2021). The Project is adjacent to U.S. Highway 101 and commercial development to the east, and City of San Rafael Open Space to the west. Two ephemeral streams are present in the Project area. Special-status species with the potential to occur in or near the Project area include, but are not limited to, burrowing owl (*Athene cunicularia*), California Species of Special Concern (SSC); pallid bat (*Antrozous pallidus*), SSC; western red bat (*Lasiurus blossevillii*), SSC; American badger (*Taxidea taxus*), SSC; congested-headed hayfield tarplant (*Hemizonia congesta* ssp. *congesta*), California Rare Plant Rank (CRPR) 1B.2[2]; and white-tailed kite (*Elanus leucurus*), a Fully Protected species.

## REGULATORY REQUIREMENTS

### 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. **The MND identifies that the Project will install a pedestrian bridge over an ephemeral stream (MND pages 18 and 47, and Figure 8). Project activities that would substantially alter the bed, bank, or channel, or the riparian habitat, of this ephemeral stream would require LSA Notification, see further recommendations below.** In this case, CDFW would consider the CEQA document for the Project and

[2] CRPR 1B plants are considered rare, threatened, or endangered in California and elsewhere. Further information on CRPR is available in CDFW's *Special Vascular Plants, Bryophytes, and Lichens List* available at https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=109383&inline and on the California Native Plant Society webpage https://www.cnps.org/rare-plants/cnps-rare-plant-ranks.

may issue an LSA Agreement. CDFW may not execute the final LSA Agreement until it has complied with CEQA as a Responsible Agency.

**Raptors and Other Nesting Birds**

CDFW also has jurisdiction over actions that may result in the disturbance or destruction of active nest sites or the unauthorized take of birds. Fish and Game Code sections protecting birds, their eggs, and nests include sections 3503 (regarding unlawful take, possession or needless destruction of the nests or eggs of any bird), 3503.5 (regarding the take, possession or destruction of any birds-of-prey or their nests or eggs), and 3513 (regarding unlawful take of any migratory nongame bird). Migratory birds are also protected under the federal Migratory Bird Treaty Act.

**Fully Protected Species**

Fully Protected species, such as white-tailed kite, may not be taken or possessed at any time (Fish & G. Code, §§ 3511, 4700, 5050, & 5515).

**COMMENTS AND RECOMMENDATIONS**

CDFW offers the 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.

**Lake or Streambed Alteration Notification**

As noted above, the Project would install a new bridge over an ephemeral stream (MND pages 18 and 47, and Figure 8). To comply with California Fish and Game Code section 1600 et seq. and reduce impacts to less-than-significant, CDFW recommends the following mitigation measure.

*Mitigation Measure BIO-2: Notification of Lake or Streambed Alteration*

For Project activities that may substantially alter the bed, bank, or channel of the ephemeral stream, including installation of a new bridge, an LSA Notification shall be submitted to CDFW pursuant to Fish and Game Code section 1602 prior to Project construction. If CDFW determines that an LSA Agreement is warranted, the Project shall comply with all required measures in the LSA Agreement, including but not limited to requirements to mitigate impacts to the ephemeral stream and riparian habitat. Permanent impacts to riparian habitat shall be mitigated by restoration of riparian habitat at a 3:1 mitigation to impact ratio based on acreage and linear distance as close to the project site as possible and within the same watershed. Temporary impacts shall be restored on-site in the same year as the impact.

**Environmental Setting and Related Impact Shortcoming**

***Riparian Habitat, Sensitive Natural Community, and Tree Removal***

The MND identifies that the Project is located within riparian and oak woodland habitat, including valley oak woodland (MND page 48). A fine scale vegetation mapping project in Marin County also classifies portions of the Project site as valley oak woodland (One Tam 2019). The valley oak woodland alliance is state rarity ranked S3, which CDFW considers a sensitive natural community (CDFW 2021). Sensitive natural communities are endemic communities that have limited distribution and are often vulnerable to project impacts (CDFW 2018). Only remnant patches of valley oak woodland remain in California (CIWTG).

The Project would remove approximately 55 trees from the Project area, some which may be from riparian habitat and a sensitive natural community (MND page 48). CDFW recommends that the MND clarify how many trees would be removed from riparian habitat and a sensitive natural community. Additionally, it appears that the Project may impact riparian habitat on and adjacent to the ephemeral streams. While the MND identifies a 25-foot buffer will be implemented from the top-of-bank of the ephemeral streams (MND page 47), the bridge installation would shade existing vegetation and increase human presence and disturbance at the stream, even if the abutments are 25 feet away from the top-of-bank.

The MND identifies that 210 replacement trees will be planted throughout the site and requires no further mitigation for tree removal, impacts to riparian areas, or impacts to the sensitive natural community (MND page 48). CDFW typically recommends replacement planting commensurate with the diameter at breast height (DBH) of the tree removed. Large DBH trees can take decades or longer to grow; therefore, removing large trees causes a temporal habitat loss that cannot be immediately offset. Planting a greater number of trees recovers lost canopy cover more quickly and increases the probability that one of the trees planted will reach the diameter of the removed tree. In addition, mature tree removal removes important food resources such as acorns from the area and removes habitat for a variety of tree nesting birds and tree roosting bats. Human activity and removal of habitat has contributed to the loss of a significant proportion of the total number of birds in the United States and Canada since the 1970s (Rosenburg et al. 2019). Based on the above, the loss of trees, sensitive natural community, and riparian habitat, is a potentially significant impact. To reduce impacts to less-than-significant, CDFW recommends including the following mitigation measure.

*Mitigation Measure BIO-3: Tree Replacement and Monitoring*

Any trees removed or impacted as a result of the Project shall be replaced pursuant to the below ratios. To ensure a successful planting effort, all plantings shall be monitored

and maintained as necessary for a minimum of five years. Oak trees, other trees, and all other plantings shall each have a minimum of 80% survival at the end of the minimum monitoring. If the planting survival is not meeting this goal, then the Project shall implement replacement planting, additional watering, invasive exotic eradication, or any other practice, to achieve these requirements. Replacement plants shall be monitored with the same survival requirements for five years after planting.

Native oak tree replacement ratios:

- 3:1 replacement for trees 5 to 8 inches DBH
- 5:1 replacement for trees greater than 8 inches to 16 inches DBH
- 10:1 replacement for trees greater than 16 inches DBH, which are considered old-growth oaks

Replacement oaks shall come from nursery stock grown from locally sourced acorns, or from acorns gathered locally, preferably from the same watershed in which they are planted. The trees should be able to survive the last two years of a minimum five-year monitoring period without irrigation.

Other tree species replacement ratios:

- 1:1 replacement for non-native trees
- 3:1 replacement for native trees 4 to 6 inches DBH
- 6:1 replacement for native trees greater than 6 inches DBH

***Burrowing Owl***

The Project is within the winter range[3] of burrowing owl, an SSC, and the grassland within and in the vicinity of the Project may provide suitable wintering and foraging habitat. There is a documented occurrence of burrowing owl approximately 1.7 miles northeast of the Project site according to the California Natural Diversity Database (CNDDB). In addition, the California Wildlife Habitat Relationships Predicted Habitat Suitability for the grassland portions of the site is High Suitability for burrowing owls. The MND does not address burrowing owl or identify methods to avoid potential impacts to burrowing owls.

The Project could result in burrowing owl burrow abandonment, injury or mortality of adults, or loss of wintering owls. Burrowing owls are an SSC due to population decline

[3] CDFW maintains range maps and life history accounts for all terrestrial species in California. The burrowing owl range map is available at https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=1872&inline=1

and breeding range retraction. Based on the above, the Project may potentially significantly impact burrowing owls. To reduce impacts to less-than-significant CDFW recommends the following mitigation measures.

*Mitigation Measure BIO-4A: Burrowing Owl Habitat Assessment, Surveys, and Avoidance*

Prior to Project activities, a habitat assessment shall be performed following Appendix C: Habitat Assessment and Reporting Details of the CDFW *Staff Report on Burrowing Owl Mitigation*[4] (CDFW 2012 Staff Report). The habitat assessment shall extend at least 492 feet (150 meters) from the Project site boundary or more where direct or indirect effects could potentially extend offsite (up to 500 meters or 1,640 feet) and include burrows and burrow surrogates. If the habitat assessment identifies potentially suitable burrowing owl habitat, then a qualified biologist shall conduct surveys following the CDFW 2012 Staff Report survey methodology. Surveys shall encompass the Project site and a sufficient buffer zone to detect owls nearby that may be impacted commensurate with the type of disturbance anticipated, as outlined in the CDFW 2012 Staff Report, and include burrow surrogates such as culverts, piles of concrete or rubble, and other non-natural features, in addition to burrows and mounds. Time lapses between surveys or Project activities shall trigger subsequent surveys, as determined by a qualified biologist, including but not limited to a final survey within 24 hours prior to ground disturbance. The qualified biologist shall have a minimum of two years of experience implementing the CDFW 2012 Staff Report survey methodology resulting in detections. Detected burrowing owls shall be avoided pursuant to the buffer zone prescribed in the CDFW 2012 Staff Report and any passive relocation plan for non-nesting owls shall be subject to CDFW review.

Please be advised that CDFW does not consider exclusion of burrowing owls (i.e., passive removal of an owl from its burrow or other shelter) as a "take" avoidance, minimization, or mitigation measure for the reasons outlined below. Therefore, to mitigate the impacts of potentially evicting burrowing owls to less-than- significant, Mitigation Measure BIO-3B outlined below should require habitat compensation with the acreage amount identified in any eviction plan. The long-term demographic consequences of exclusion techniques have not been thoroughly evaluated, and the survival rate of excluded owls is unknown. Burrowing owls are dependent on burrows at all times of the year for survival or reproduction; therefore, eviction from nesting, roosting, overwintering, and satellite burrows or other sheltering features may lead to indirect impacts or "take" which is prohibited under Fish and Game Code section 3503.5. All possible avoidance and minimization measures should be considered before temporary or permanent exclusion and closure of burrows is implemented to avoid "take."

[4] CDFW, then Department of Fish and Game, 2012. https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=83843&inline

*Mitigation Measure BIO-4B: Burrowing Owl Wintering Habitat Mitigation*

If the Project would impact an occupied burrow (where a non-nesting wintering owl would be evicted as described above), the following habitat mitigation shall be implemented prior to Project construction:

Impacts to each burrow site shall be mitigated by permanent preservation of two occupied burrow sites with appropriate foraging habitat within Marin County, unless otherwise approved by CDFW, through a conservation easement and implementing and funding a long-term management plan in perpetuity.

The Project may implement alternative methods for preserving habitat with written acceptance from CDFW.

***American Badger***

The Project is within the range[5] of the American badger, an SSC. The Project is located within grassland habitat that may be suitable for American badger. Badgers range throughout most of California and can dig burrows in a single day; therefore, the species may occupy the Project site and adjacent habitat prior to Project construction (Ministry of Environment Ecosystems 2007 as cited in Brehme et al. 2015). Additionally, the California Wildlife Habitat Relationships Predicted Habitat Suitability for the grassland portions of the site is High Suitability. An unprocessed CNDDB occurrence of a roadkill badger is approximately 4.2 miles north of the Project on Highway 101. This information confirms the species has occurred in the vicinity of the Project site and could use it and adjacent habitat.

The Project may result in injury or mortality to adult or young badgers, or burrow abandonment. Therefore, project impacts to American badger would be potentially significant.

To reduce impacts to less-than-significant, CDFW recommends that the MND: (1) further analyze the potential for American badger to occur on and adjacent to the Project site, and (2) include mitigation measures to ensure impacts are reduced to less-than-significant. These measures may include a qualified biologist surveying for the species including adjacent habitat prior to construction, avoiding occupied burrows including a sufficient buffer approved by CDFW, and preparing and implementing a CDFW-approved relocation plan if badgers are found on or adjacent to the Project site.

[5] The American badger range map is available at https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=2598&inline=1

### *Roosting Bats*

The MND identifies that the Project area may provide habitat for sensitive bats such as pallid bat and western red bat (MND page 46). The trees in the Project area, some of which are proposed for removal, may provide suitable roosting habitat for bats. Tree removal associated with the Project could lead to injury or death of bats, including pallid bat and western red bat, a potentially significant impact. To reduce impacts to less-than-significant, CDFW recommends including the following mitigation measure.

*Mitigation Measure BIO-5: Bat Tree Habitat Assessment and Surveys*

Prior to any tree removal, a qualified biologist shall conduct a habitat assessment for bats. The habitat assessment shall be conducted a minimum of 30 to 90 days prior to tree removal and shall include a visual inspection of potential roosting features (e.g., cavities, crevices in wood and bark, exfoliating bark, and suitable canopy for foliage roosting species). If suitable habitat trees are found, they shall be flagged or otherwise clearly marked and tree trimming or removal shall not proceed unless the following occurs: a) in trees with suitable habitat, presence of bats is presumed, or documented during the surveys described below, and removal using the two-step removal process detailed below occurs only during seasonal periods of bat activity, from approximately March 1 through April 15 and September 1 through October 15, or b) after a qualified biologist conducts night emergence surveys or completes visual examination of roost features that establish absence of roosting bats.

Two-step tree removal shall be conducted over two consecutive days, as follows: 1) the first day (in the afternoon), under the direct supervision and instruction by a qualified biologist with experience conducting two-step tree removal, limbs and branches shall be removed by a tree cutter using chainsaws only; limbs with cavities, crevices or deep bark fissures shall be avoided; and 2) the second day the entire tree shall be removed.

**Mitigation Measures and Related Impact Shortcoming**

### *Special-Status Plants*

The MND identifies that the Project may provide habitat for congested-headed hayfield tarplant, CRPR 1B.2 (MND page 46). The MND includes in mitigation measure BIO-1 a requirement for a rare plant survey for this species. Botanical field surveys should be floristic in nature, meaning that every plant taxon that occurs in the Project area is identified to the taxonomic level necessary to determine rarity and listing status. Focused surveys that are limited to habitats known to support special-status plants or that are restricted to lists of likely potential special-status plants are not considered floristic in nature and are not adequate to identify all plants in a project area to the level necessary to determine if they are special-status plants. In addition, mitigation measure BIO-1 identifies that if special-status plants are identified within the Project area, they will be

transplanted to appropriate nearby areas. Without floristic botanical surveys and further information regarding success criteria for transplanted individuals, the Project would not accurately identify and reduce potential impacts to less-than-significant. To reduce impacts to less-than-significant, CDFW recommends replacing the existing rare plant survey language in mitigation measure BIO-1 with the following mitigation measure.

*Mitigation Measure BIO-6: Special-Status Plant Survey and Avoidance*

A qualified botanist shall conduct surveys during the appropriate blooming period for all special-status plants that have the potential to occur on or adjacent to the Project area prior to the start of ground-disturbing activities and prepare a report documenting survey findings. Habitat adjacent to the Project area should be surveyed if the Project may have indirect impacts off-site as a result of changes to hydrological conditions or other indirect impacts. More than one year of surveys may be necessary. Surveys and reporting shall be conducted following *Protocols for Surveying and Evaluating Impacts to Special-Status Native Plant Populations and Sensitive Natural Communities*[6]. Surveys shall be submitted to CDFW for review and written acceptance. If special-status plants are found during surveys, the Project shall be re-designed to avoid impacts to special-status plants. If impacts to any special-status plants cannot be avoided completely during construction, the Project shall provide mitigation including on-site restoration, off-site habitat preservation, or another method accepted in writing by CDFW. The qualified botanist shall be knowledgeable about plant taxonomy, familiar with plants of the region, and have experience conducting botanical field surveys according to vetted protocols.

**Please be advised that an LSA Agreement obtained for this Project would likely require the above recommended mitigation measures, as applicable.**

## GENERAL COMMENTS

In addition to the above recommendations, CDFW encourages landscaping using native trees and shrubs to benefit native nesting birds and other wildlife. As noted above, the removal of habitat for birds from human activities has contributed to the loss of a significant proportion of birds in the United States and Canada since the 1970s (Rosenburg et al. 2019). Planting native trees and shrubs is an opportunity to improve conditions for birds[7].

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[6] Department of Fish and Wildlife, 2018. https://www.wildlife.ca.gov/Conservation/Survey-Protocols#377281280-plants

[7] For native species recommendations and planting tips, review the Sonoma County Master Gardener document *Gardening Success with California Native Plants*: http://www.marinrcd.org/wp/wp-content/uploads/2015/02/Gardening-Success-with-CA-Natives_UCCE_Sonoma.pdf

CDFW notes that the MND refers to a Biological Technical Report (MND page 45). CDFW recommends that this report be included as an appendix to the MND so that species information and determinations of presence or absence may be thoroughly reviewed by the public and CDFW.

**ENVIRONMENTAL DATA**

CEQA requires that information developed in environmental impact reports and negative declarations be incorporated into a database 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 CNDDB. The CNNDB field survey form, online field survey form, and contact information for CNDDB staff can be found at the following link: https://wildlife.ca.gov/data/CNDDB/submitting-data.

**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 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 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. Amanda Culpepper, Environmental Scientist, at (707) 428-2075 or Amanda.Culpepper@wildlife.ca.gov, or Ms. Melanie Day, Senior Environmental Scientist (Supervisory), at Melanie.Day@wildlife.ca.gov.

Sincerely,

DocuSigned by:
Stacy Sherman for
692D021D81CA4F7...
Stephanie Fong
Acting Regional Manager
Bay Delta Region

ec: Office of Planning and Research, State Clearinghouse (SCH No. 2021110004)
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**REFERENCES**

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