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April 4, 2022

Governor's Office of Planning & Research

Apr 05 2022

Shannon Hill, Environmental Project Manager
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STATE CLEARINGHOUSE

Subject: 0 Seely Avenue Mixed-Use Project, Notice of Preparation of a Draft Environmental Impact Report, SCH No. 2022020565, City of San José, Santa Clara County

Dear Shannon Hill:

The California Department of Fish and Wildlife (CDFW) received a Notice of Preparation (NOP) of a draft Environmental Impact Report (DEIR) from the City of San José (City) for the 0 Seely Avenue Mixed-Use Project (Project) pursuant the California Environmental Quality Act (CEQA) and CEQA Guidelines.¹

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 California's **Trustee Agency** for fish and wildlife resources and holds those resources in trust by statute for all the people of the State. (Fish & G. Code, §§ 711.7, subd. (a) & 1802; Pub. Resources Code, § 21070; CEQA Guidelines § 15386, subd. (a)). CDFW, in its trustee capacity, has jurisdiction over the conservation, protection, and management of fish, wildlife, native plants, and habitat necessary for biologically sustainable populations of those species. (*Id.*, § 1802). Similarly, for purposes of CEQA, CDFW is charged by law to provide, as available, biological expertise during public agency environmental review efforts, focusing specifically on projects and related activities that have the potential to adversely affect fish and wildlife resources.

CDFW is also submitting comments as a **Responsible Agency** under CEQA. (Pub. Resources Code, § 21069; CEQA Guidelines, § 15381). CDFW expects that it may need to exercise regulatory authority as provided by the Fish and Game Code. As

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.

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proposed, for example, the Project may be subject to CDFW's lake and streambed alteration regulatory authority (Fish & G. Code, § 1600 et seq.).

PROJECT DESCRIPTION SUMMARY

Proponent: The Hanover Company

Objective: The Project is the development of 1,470 residential units, 52,000 square feet of retail space, a public park, and installation of a domestic water well to service these facilities.

Location: The Project is located adjacent to Seely Avenue in the City of San José. The coordinates for the approximate center of the Project are 37.397633° N latitude and 121.917652 W longitude (NAD 83 or WGS 84). The Assessor's Parcel Numbers are 097-15-033 and 097-15-034.

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. Based on potential for the Project to have a significant impact on biological resources, CDFW concludes that an Environmental Impact Report is appropriate for the Project.

Mitigation Measures and Impacts

Would the Project have a substantial adverse effect, either directly or through habitat modifications, on any species identified as a candidate, sensitive, or special status species in local or regional plans, policies, or regulations, or by CDFW or U.S. Fish and Wildlife Service (USFWS)?

COMMENT #1: Biological Resources, page 2

Issue: The NOP does not discuss potential impacts of the Project to western burrowing owl (*Athene cunicularia*, State Species of Special Concern). In review of Google Earth aerials, the Project site includes row-crop agriculture and open land with ruderal grass and herbaceous vegetation. Ruderal grass and herbaceous vegetation are also located adjacent to and along the eastern border of the Project site. Please be advised that there are known western burrowing owl occurrences within 0.2 miles of the Project site (CDFW 2022). The Project site and adjacent grassland areas could potentially support western burrowing owl foraging and/or nesting habitat. The Project is also located within the Santa Clara Valley Habitat Plan Natural Community Conservation Plan/Habitat Conservation Plan (SCVHP)

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permit boundary. However, the NOP does not state if the Project will be covered by the SCVHP.

Specific impact: Direct mortality through crushing of adults or young within burrows, loss of nesting burrows, loss of nesting habitat, loss of foraging habitat resulting in reduced nesting success (loss or reduced health or vigor of eggs or young), nest abandonment, and reduced frequency or duration of care for young resulting in reduced health or vigor of young.

Why impact would occur: The proposed Project includes construction of buildings, parking lots, recreational parks, and other permanent structures in ruderal grass and herbaceous vegetation that is potential burrowing owl nesting and foraging habitat. The Project would include impacts such as noise, groundwork, and movement of workers that would have the potential to significantly impact nesting or overwintering owls.

Evidence impact would be significant: Take of nesting birds, birds in the orders Falconiformes or Strigiformes, and migratory nongame bird as designated in the Migratory Bird Treaty Act is a violation of Fish and Game Code (§ 3503, 3503.5, 3513). Burrowing owl is designated by CDFW as a California Species of Special Concern due to population decline and breeding range retraction. The species has also experienced a severe population decline in Santa Clara County. Project impacts may result in take of burrowing owls, unmitigated habitat loss resulting in further species population decline and cumulative impacts resulting in the restriction in the range of the species.

Recommended Potentially Feasible Mitigation Measures to reduce impacts to less-than-significant:

Mitigation Measure #1: Habitat Assessment and Surveys

The DEIR should include a thorough habitat assessment of potential burrowing owl habitat within the Project area and surrounding areas. A qualified biologist should conduct a field assessment that includes all areas that could be directly or indirectly impacted by the Project and include data such as vegetation type, vegetation structure and presence of burrows.

A qualified biologist should conduct protocol-level surveys in all suitable burrowing owl habitat within the Project area and surrounding areas where Project activities could adversely affect burrowing owls during both the nesting (February 1 to August 31) or overwintering season.

Specific information on habitat assessment, burrowing owl survey methods, buffer distances and mitigation is provided in the *CDFW Staff Report on Burrowing Owl*

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Mitigation, dated March 7, 2012, and available at <https://wildlife.ca.gov/Conservation/Survey-Protocols#377281284-birds>.

Mitigation Measure #2: Burrowing Owl Avoidance

The DEIR should state that if burrowing owls are detected during surveys within or near the Project area, a protective buffer in which construction activities will be avoided will be established. Appropriate buffers typically have a 50- to 500-meter radius and vary depending on the level of disturbance and timing of construction. If the burrowing owls show signs of distress (e.g., defensive vocalizations and/or flying away from the nest), the buffer distance should be increased.

Mitigation Measure #3: Compensatory Mitigation

If permanent or temporary impacts of the proposed Project to burrowing owl foraging and/or nesting habitat cannot be completely avoided, the DEIR should include measures to minimize the impacts of construction on owls and their habitat, and effective compensatory mitigation to offset all habitat loss. A mitigation plan should be prepared in consultation with CDFW.

Mitigation Measure #4: SCVHP Burrowing Owl Compliance

The City should determine if the Project would be covered by the SCVHP. If the Project is expected to be covered under the SCVHP, the DEIR should state that payment of appropriate SCVHP impact fees will be made to the Santa Clara Valley Habitat Agency, which is the entity implementing the SCVHP, and that all SCVHP burrowing owl conditions will be followed.

COMMENT #2: Biological Resources, page 2.

Issue: The NOP does not discuss potential impacts to the golden eagle (*Aquila chrysaetos*, State Fully Protected and Federally Protected under the Bald and Golden Eagle Protection Act). Please be advised that a golden eagle pair has successfully nested within the past several years approximately 2.5 miles from the Project site (Menzel and Higgins 2020, Menzel and Higgins 2022). The Project area and surrounding grasslands are within a typical golden eagle pair's home range (Katzner et al. 2012a, Katzner et al. 2012b) and could potentially support eagle nesting and foraging habitat. See also Comment #3 below on nesting habitat.

Specific impact: Loss of nesting and foraging habitat resulting in take or reduced nesting success (loss or reduced health or vigor of eggs or young).

Why impact would occur: The Project includes construction of buildings, parking lots, recreational parks, and other permanent structures in ruderal grass and

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herbaceous vegetation that is potential golden eagle foraging habitat, and proposes loss of trees.

Evidence impact would be significant: Take of nesting birds, birds in the orders Falconiformes or Strigiformes, and migratory nongame bird as designated in the Migratory Bird Treaty Act is a violation of Fish and Game Code (§ 3503, 3503.5, 3513). The golden eagle is a Fully Protected Species under California Fish and Game Code (§ 3511). Project impacts may result in unmitigated foraging habitat loss, impacts to nesting golden eagles, and cumulative impacts resulting in the restriction in the range of this species.

Recommended Potentially Feasible Mitigation Measures to reduce impacts to less-than-significant:

Mitigation Measure #1: Habitat Assessment and Surveys

The DEIR should include a thorough habitat assessment of potential golden eagle nesting and foraging habitat within the Project area and surrounding areas. A qualified biologist should conduct a field assessment that includes all areas that could be directly or indirectly impacted by the Project and include data such as vegetation type, vegetation structure, and evidence of type and abundance of prey.

A qualified biologist should conduct protocol-level surveys in all suitable golden eagle habitat within the Project area and surrounding areas where Project activities could adversely affect eagles during the nesting season (late January to August).

Guidance and resources can be found on our website at [Golden Eagles in California](#) and in consultation with the USFWS Migratory Bird Program.

Mitigation Measure #2: Compensatory Mitigation

If permanent or temporary impacts of the proposed Project to golden eagle nesting or foraging habitat cannot be completely avoided, the DEIR should include effective compensatory mitigation to offset all eagle habitat loss. A mitigation plan should be prepared in consultation with CDFW and USFWS.

COMMENT #3: Biological Resources, page 2

Issue: The NOP states that 584 trees will be removed from the Project site. Additionally, the Project is located adjacent to Coyote Creek riparian habitat. Trees located on the Project site and within adjacent riparian habitat are potential habitat for nesting birds.

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Specific impact: Direct mortality, nest abandonment, reduced reproductive success, and loss or reduced health or vigor of eggs or young.

Why impact would occur: The Project proposes to remove 584 trees from the Project site. The Project would also include impacts such as noise, groundwork, and movement of workers that may occur adjacent to riparian habitat and may potentially significantly impact nesting birds.

Evidence impact would be significant: Take of nesting birds, birds in the orders Falconiformes or Strigiformes, and migratory nongame bird as designated in the Migratory Bird Treaty Act is a violation of Fish and Game Code (§ 3503, 3503.5, 3513). Project impacts may potentially substantially reduce the abundance and diversity of avian species within the riparian corridor.

Recommended Potentially Feasible Mitigation Measures to reduce impacts to less-than-significant:

Mitigation Measure #1: Nesting Bird Surveys

If Project-related work is scheduled during the nesting season (typically February 15 to August 30 for small bird species such as passerines; January 15 to September 15 for owls; and February 15 to September 15 for other raptors), a qualified biologist should conduct a minimum of two surveys for active nests of such birds within 14 days prior to the beginning of Project construction, with a final survey conducted within 48 hours prior to construction. However, species-specific survey protocols may be available and should be followed. Appropriate minimum survey radii surrounding the work area are typically the following: i) 250 feet for passerines; ii) 500 feet for small raptors such as accipiters; and iii) 1,000 feet for larger raptors such as buteos. Surveys should be conducted at the appropriate times of day and during appropriate nesting times.

Mitigation Measure #2: Active Nest Buffers

If the qualified biologist documents active nests within the Project area or in nearby surrounding areas, an appropriate buffer between the nest and active construction should be established. The buffer should be clearly marked and maintained until the young have fledged and are foraging independently. Prior to construction, the qualified biologist should conduct baseline monitoring of the nest to characterize “normal” bird behavior and establish a buffer distance which allows the birds to exhibit normal behavior. The qualified biologist should monitor the nesting birds daily during construction activities and increase the buffer if the birds show signs of unusual or distressed behavior (e.g., defensive flights and vocalizations, standing up from a brooding position, and/or flying away from the nest). If buffer establishment is not possible, the qualified biologist or construction foreman should have the authority

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to cease all construction work in the area until the young have fledged and the nest is no longer active.

Would the Project interfere substantially with movement of any native resident or migratory fish or wildlife species or with established native resident or migratory wildlife corridors, or impede use of native wildlife nursery sites?

COMMENT #4: Biological Resources, page 2

Issue: The NOP does not discuss the height of buildings to be constructed within the Project area. In review of the NOP Figure 4 Rendering, the computer-generated drawing of the constructed Project shows residential and/or retail buildings that would be approximately 7 stories high. The buildings would be constructed adjacent to the Coyote Creek riparian area (measured in Google Earth to be 120 to 290 feet between the buildings and the riparian area). The tall buildings located near the Coyote Creek riparian area could result in avian collisions with the buildings.

Specific impact: Direct mortality or injury and potential inability to reproduce or reduced reproductive success due to injury.

Why impact would occur: The presence of buildings, including glass windows, close to the Coyote Creek riparian movement corridor may result in avian collision with the buildings.

Evidence impact would be significant: Project impacts may potentially substantially reduce the abundance and diversity of avian species within the riparian corridor.

Recommended Potentially Feasible Mitigation Measures to reduce impacts to less-than-significant:

Mitigation Measure #1: Assessment of Building Height and Location

CDFW recommends that the DEIR include building height and location alternatives that reduce environmental impacts such as locating tall buildings at a biologically appropriate distance away from the riparian area.

Mitigation Measure #2: Building Design Assessment

The DEIR should analyze all potential impacts on avian species resulting from building height, types of materials used on the exterior façade of buildings, and other design features, and include avoidance and minimization measures that reduce those impacts to a less-than-significant level.

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Would the Project have a substantial adverse effect on any riparian habitat or other sensitive natural community identified in local or regional plans, policies, regulations, or by CDFW or USFWS?

COMMENT #5: Biological Resources, pages 1-2

Issue: The NOP, page 1, states that a domestic water well will be constructed. The NOP does not discuss the impacts of well operation on Coyote Creek.

Specific impact: Well operation could result in diversion of water from Coyote Creek.

Why impact would occur: NOP Figure 3, Conceptual Site Plan, shows a well located in the southeastern corner of the Project site. As measured in Google Earth, the well would be located approximately 130 feet from the Coyote Creek channel.

Evidence impact would be significant: Unauthorized diversion of natural flow from Coyote Creek would be a violation under Fish and Game Code §1602.

Recommended Potentially Feasible Mitigation Measures to reduce impacts to less-than-significant:

Mitigation Measure #1: Hydrology Analysis

The DEIR should include a hydrological analysis to determine if well operation would adversely affect surface or subsurface flow in Coyote Creek, including a written report of results. If well operation could adversely affect aquatic or riparian resources, the DEIR should include adequate avoidance, minimization, and/or mitigation measures to reduce the impacts to less than significant levels.

Mitigation Measure #2: Notification of Lake and Streambed Alteration

Fish and Game Code §1602 requires an entity to notify CDFW prior to commencing any activity that may (a) substantially divert or obstruct the natural flow of any river, stream, or lake; (b) substantially change or use any material from the bed, bank, or channel of any river, stream, or lake; (c) deposit debris, waste or other materials that could pass into any river, stream, or lake. Operation of the well may require that the Project proponent submit a notification of Lake and Streambed Alteration to CDFW. CDFW is required to comply with CEQA in the issuance of a Lake and Streambed Alteration Agreement. Additional information can be found at <https://www.wildlife.ca.gov/Conservation/LSA>.

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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 California Natural Diversity Database (CNDDDB). The CNDDDB field survey form can be filled out and submitted online at the following link: <https://wildlife.ca.gov/Data/CNDDDB/Submitting-Data>. The types of information reported to CNDDDB can be found at the following link: <https://www.wildlife.ca.gov/Data/CNDDDB/Plants-and-Animals>.

ENVIRONMENTAL DOCUMENT FILING FEES

The Project, as proposed, would have an impact on fish and/or wildlife, and assessment of environmental document 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 environmental document filing 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 comment on the NOP to assist the City in identifying and mitigating Project impacts on biological resources.

Questions regarding this letter or further coordination should be directed to Kristin Garrison, Environmental Scientist, at (707) 944-5534 or by email at Kristin.Garrison@wildlife.ca.gov; or Brenda Blinn, Senior Environmental Scientist (Supervisory), at (707) 339-0334 or Brenda.Blinn@wildlife.ca.gov.

Sincerely,

DocuSigned by:

Erin Chappell
Regional Manager
Bay Delta Region

ec: Office of Planning and Research, State Clearinghouse, Sacramento

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REFERENCES

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