

Appendix C
Biological Resources RTC
Memorandum



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MEMORANDUM

To: Juliet Martin, Circlepoint
From: Sadie McGarvey, Integral Consulting Inc.
Date: April 29, 2024
Subject: 0 Seely Avenue – Response to DEIR Public Comments

This memo has been prepared to respond to comments presented in the March 11, 2024 comment letter from Adams Broadwell Joseph & Cardozo (herein referred to as the ABJC letter) regarding the 0 Seely Avenue Mixed-Use Project in San Jose, California. The below responses to this comment letter have been prepared to address the comments provided by Adams Broadwell Joseph & Cardozo and their biological resources consultant Scott Cashen. S. Cashen’s comment letter (which comprises a majority of the source material for the ABJC letter) is separately referred herein as Cashen letter. Responses were developed using information presented within the Draft EIR circulated by Santa Clara County between January and April 2024 (DEIR), as well as the Biological Resource Analysis for the 0 Seely Avenue Mixed-Use Project, San Jose, Santa Clara County, California (prepared by Johnson Marigot Consulting, LLC [now Integral Consulting, Inc.], dated December 2022) (2022 BRA).

Comments

Comments re: Impacts to Coyote Creek: ... the DEIR concludes that compliance with the City’s Riparian Corridor Protection and Bird-Safe Design Policy would ensure a less than significant impact. However, as demonstrated by Mr. Cashen’s comments, these measures will not be sufficient because the Project does not actually comply with these policies. Most notably, the Project fails to comply with the policies’ 100-foot riparian setback requirement. As Mr. Cashen demonstrates, considerably more of the Project would lie within the 100-foot setback if the setback is properly measured in accordance with the terms of the Riparian Corridor Protection and Bird-Safe Design Policy. Mr. Cashen explains, “This is important because a setback (buffer) of at least 100 feet is needed to protect water quality, riparian biotic communities, and habitat values of riparian corridors—larger buffers are needed in areas with steep slopes or high intensity land uses.” (ABJC letter, Page 14, ¶ 4)

The measurements that were taken to make the determination that only a sliver of the Project overlaps with the 100-foot setback are flawed because they were taken from either

the low flow channel or riparian tree canopy along the eastern side of the Coyote Creek corridor—not the top of bank or edge of riparian vegetation (whichever is greater) on the west side of the corridor.... considerably more of the Project would lie within the 100-foot setback if the setback is measured in accordance with the terms of the Riparian Corridor Protection and Bird-Safe Design Policy and SCVHP. This is important because a setback (buffer) of at least 100 feet is needed to protect water quality, riparian biotic communities, and habitat values of riparian corridors—larger buffers are needed in areas with steep slopes or high intensity land uses. (Cashen letter, Page 3, ¶ 3)

Response: The term “riparian” generally refers the transition zone between wetlands and uplands, often referring to the primarily woody vegetation associated with both lentic and lotic systems. The California Department of Fish and Wildlife (CDFW) defines riparian vegetation as “native vegetation occurring naturally along banks or margins of lakes or streams¹. The United States Fish and Wildlife Services (USFWS) further defines riparian areas as “plant communities contiguous to and affected by surface and subsurface hydrologic features of perennial or intermittent lotic and lentic water bodies (rivers, streams, lakes, or drainage ways)” that exhibit “distinctly different vegetative species than adjacent areas and/or “species similar to adjacent areas but exhibiting more vigorous or robust growth forms”².

The aerial photo of the Coyote Creek corridor included in Mr. Cashen’s letter appears to have erroneously identify the flooded condition of the expanded engineered floodplain as the flowline of Coyote Creek. The aerial photo utilized by Mr. Cashen is dated February 22, 2017; this photo was taken 4 days following an historic storm event that caused a breach of the Anderson Dam in San Jose and resulted in widescale flooding of neighborhoods along Coyote Creek. The 2017 flood displaced 14,000 residents in San Jose and was estimated to cause \$100 million in damages. The 2017 flood event overtopped and overflowed the top of the bank elevation of Coyote Creek. While this event did overtop the banks of Coyote Creek, it was contained within the engineered floodplain, behind the flood control levy, as visible in the photo provided by Mr. Cashen. Flooding events severe enough to cause upstream dam failures do not define the limits of the riparian corridor, nor do they define the top of the bank. This erroneous identification of the creek’s flowline is further demonstrated by Mr. Cashen’s interpretation that the edge of riparian vegetation shown in the Biological Constraints Analysis (prepared by Johnson Marigot Consulting in 2022) occurs on the east side of Coyote Creek (when it in fact is mapped on the west side of the creek).

An aquatic resource delineation was not conducted for the site-adjacent portion of Coyote Creek or the expanded engineered floodplain. The extent of the Coyote Creek riparian corridor was preliminarily mapped as the top of bank or the outer dripline of riparian

¹ California Department of Fish and Game. 1994. A Field Guide to Lake and Streambed Alteration Agreements Sections 1600-1607 California Fish and Game Code. 226 pps.

² U.S. Fish and Wildlife Service. 2019. A System for Mapping Riparian Areas in The Western United States. 36 pp.

vegetation (whichever was greater at the time of the February 2021 assessment). The engineered floodplain occurs outside of the riparian corridor and was created to receive channel overflows during rare episodic flood events. This area is dominated by upland grasses and appears to potentially support seasonal wetlands and/or seasonal wetland swales. The expanded engineered floodplain would not be considered a linear feature with a bed, bank, or channel, and does not support riparian vegetation. The initial estimate of the extent of top of bank or riparian vegetation is properly mapped, and the 100-foot riparian setback is properly measured.

Comments re: Wildlife Present on Project Site: *The DEIR fails to accurately disclose the baseline environmental conditions related to the Project's biological impacts; namely, the state of wildlife resources at the project site. As a result, the DEIR lacks the necessary baseline information against which to measure the Project's environmental impacts with regard to biological resources.* (ABJC letter, Page 7, ¶ 3)

...as Mr. Cashen explains, "Although the DEIR provides a list of plant species observed during reconnaissance level surveys of the Project site, it does not list (or otherwise identify) the wildlife species that were observed during the surveys. This precludes understanding of the wildlife resources that could be directly impacted by the Project." Similarly, the DEIR also does not provide any information on the wildlife species that occur or could occur in the Coyote Creek riparian corridor, thus precluding any understanding of potential indirect Project impacts on wildlife. (ABJC letter, Page 7, ¶ 4)

Response: Lists of plant species are provided within the 2022 BRA to provide site description information regarding land cover and vegetation communities present on the site. The onsite land cover types and vegetation communities are sufficiently static that the site description provided in the 2022 BRA appropriately conveys current conditions such that one can assess 1) the presence of special-status vegetation communities; and 2) the suitability for onsite vegetation communities/habitats to support special-status plant and wildlife species. These descriptions are the industry standard in describing habitat conditions specifically because of the mobile nature of wildlife. Habitat descriptions are utilized to identify potential for wildlife species to occur on a site, with follow up presence/absence surveys often conducted following identification of appropriate habitat conditions, or identification of new distribution data.

As noted in section 3.2 of the 2022 BRA, wildlife species present on the site at any point may be cryptic, generally difficult to detect, transient, nocturnal, or migratory, such that they may only occur within the Project site for short or fleeting time periods. Accordingly, wildlife lists associated with land cover types and vegetation communities would not be considered inclusive of all species that do or could occur on the site that could be impacted by implementation of a project. Further, common species not protected by local, state, or federal law are not considered in a CEQA analysis.

As the Project would not result in impacts to the Coyote Creek corridor, no assessment of impacts to plants or animals that may occur therein is warranted.

Comments re: Burrowing Owl: ... the DEIR's Biological Resources Analysis (Appendix D) ("BRA") did not conduct the surveys needed to determine presence of burrowing owls. Instead, it erroneously dismisses the potential presence of burrowing owls due to the absence of ground squirrel burrows. However, this overlooks alternative nesting and roosting habitats such as debris piles within the Project site, which could support burrowing owl populations. (ABJC letter, Page 7, ¶ 5)

The Project site contains debris piles, which provide potential nesting and roosting habitat for burrowing owls. The Project site also contains fallow fields, which provide potential foraging habitat for burrowing owls. The Applicant's biological resources consultant, Johnson Marigot Consulting, did not conduct the surveys needed to determine presence (or absence) of burrowing owls. (Cashen letter, Page 7, ¶ 4)

Response: All components of the onsite land cover types and vegetation communities, including the woody debris piles present on the Project site in 2021, were assessed for potential to support special-status species. The site visits conducted by qualified wildlife biologist Sadie McGarvey in February and October 2021 were consistent with the initial steps of the habitat assessment and survey guidelines provided by CDFW within the 2012 Staff Report on Burrowing Owl Mitigation³ (i.e., Habitat Assessment Data Collection and Reporting). During these site visits, no ground squirrel burrows were observed on the Project site, and the onsite wooden debris piles were partially vegetated with tall vegetation and did not appear to provide openings of sufficient size to act as an alternative nesting site for burrowing owls. No evidence of occupation by burrowing owls was observed within or near these debris piles (e.g., molted feathers, white-wash [excrement] or pellet piles, or eggshell fragments on the ground or woody debris near a potential entrance). Since this assessment presented within the 2022 BRA, these debris piles appear to have become entirely overgrown with ruderal species and would continue to be unsuitable nesting habitat for burrowing owls.

Follow-on surveys for burrowing owls are recommended *whenever burrowing owl habitat or sign is encountered on or adjacent to (within 150 meters) a project site*¹. Consistent with CDFW's staff report, as no suitable nesting habitat and no sign of burrowing owl occupation was detected onsite during the habitat assessment, follow-up surveys were not recommended. While the onsite fallow fields provide suitable foraging habitat for burrowing owls, suitable foraging habitat is not a protected resource if burrowing owls are not nesting therein, and its presence alone does not equate to the presence of burrowing owls.

³ California Department of Fish and Game. 2012. Staff Report on Burrowing Owl Mitigation.

Further, impacts to nesting birds and raptors will be avoided through implementation of Mitigation Measure (MM) BIO-1 which includes preconstruction nesting bird and raptor surveys and implementation of a non-disturbance buffer if nesting birds or raptors are observed on the Project site and/or within the zone of influence of Project activities.

Comments re: Golden Eagle: ... the DEIR dismisses the presence of golden eagle because it states that the Project doesn't provide the necessary habitat for golden eagles. However, as Mr. Cashen states, that conclusion is inconsistent with Appendix C, the Arborist Report, which identifies the presence of several large trees at the Project site. The California Department of Fish & Wildlife ("CDFW") also highlighted the potential for golden eagle nesting and foraging habitat within the project area. Thus, the DEIR overlooks the habitat suitability and viability for golden eagles, thereby potentially missing potential impacts to the species. (ABJC letter, Page 8, ¶ 2)

In addition, much of the Project site is comprised of open areas that provide potential foraging habitat for golden eagles... (Cashen letter, Page 8, ¶ 2)

Response: Golden eagles construct large platform nests on cliffs or in large trees with unobstructed views over large open areas, typically avoiding nesting near urban habitat. Pairs will often use and enlarge the same nest each year, with one or more alternative nests within their breeding territory.⁴ The Project site is an urban infill site. Accordingly, while the fallow field and the adjacent Coyote Creek expanded engineered floodplain provide small areas of potentially suitable foraging habitat, they are unlikely to represent sufficiently large open spaces necessary to support golden eagles. Further, these small areas of undeveloped land in the middle of urban San Jose do not sufficiently buffer the Project site from urban disturbances that deter golden eagles from nesting in such locations.

As golden eagles build large platform nests, averaging 5-6 feet wide, that are often reused year after year, a golden eagle nest would have been visible at the time of S. McGarvey's site visits. No raptor nests of any kind were observed onsite. Further, impacts to all nesting raptors will be avoided through implementation of MM BIO-1 which includes preconstruction nesting raptor surveys and implementation of a non-disturbance buffer if nesting raptors are observed on the Project site and/or within the zone of influence of Project activities.

Comments re: Crotch Bumble bee: ...the DEIR's assertion that the Crotch Bumble Bee is unlikely to occur at the project site contradicts available evidence. As highlighted by Mr. Cashen, despite the BRA's claim that the species' range excludes the project area,

⁴ U.S. Fish and Wildlife Service. 2010. Interim Golden Eagle Inventory and Monitoring Protocols; and Other Recommendations

recent occurrence records and CDFW survey guidelines suggest otherwise. (ABJC letter, Page 8, ¶ 3)

Similarly, the DEIR fails to address and mitigate potentially significant impacts to Crotch Bumble Bee, which is a candidate for listing under the California Endangered Species Act (“CESA”).⁵² As Mr. Cashen explains, at least some of the ecological features that Crotch Bumble Bee inhabit occur at the Project site. Consequently, ground disturbance activities associated with construction of the Project could destroy bumble bee nests, and they would remove floral resources needed for persistence of the bumble bee colony. Despite these concerns, the DEIR fails to address or mitigate these potentially significant impacts. (ABJC letter, Page 11, ¶ 3)

The BRA acknowledges the Project site provides potentially suitable habitat for the Crotch bumble bee, which is a candidate for listing under the California Endangered Species Act (“CESA”) However, the BRA then states that the species is not expected to occur on or near the Project site because “the updated extent of occurrence [species range] is estimated to exclude much of the San Francisco Bay Area, including the City of San Jose.” This statement is not supported by a scientific citation and is inconsistent with CDFW’s (2023) survey guidelines, which depict the Project site as being within the current range of the Crotch bumble bee. In addition, the iNaturalist database has 12 “Research Grade” records of the Crotch bumble bee occurring in Santa Clara County between 2019 and 2023. These occurrence records (two of which are within four miles of the Project site) provide substantial evidence that the Project site lies within the current range of the Crotch bumble bee. (Cashen letter, Page 9, ¶ 2)

Crotch bumble bees nest in thatched grasses, abandoned rodent burrows or bird nests, brush piles, rock piles, and logs. At least some of these features occur at the Project site. Consequently, ground disturbance activities associated with construction of the Project could destroy bumble bee nests, and they would remove floral resources needed for persistence of the bumble bee colony. (Cashen letter, Page 11, ¶ 3)

Response: The 2022 BRA included an assertion that the current extant range of Crotch bumble bee does not overlap with urban San Jose, based on the Change in Extent of Occurrence for Crotch bumble bee presented in the 2014 *IUCN Assessments for North American Bombus spp. for the North American IUCN Bumble Bee Specialist Group*⁵, the 2018 listing petition for Crotch bumble bee⁶, and a lack of extant occurrences in the region

⁵ Hatfield, Rich & Colla, Sheila & Jepsen, Sarina & Richardson, Leif & Thorp, Robbin & Foltz, Sarah. 2014. IUCN Assessments for North American Bombus spp. for the North American IUCN Bumble Bee Specialist Group.

⁶ A Petition to the State of California Fish and Game Commission to List The Crotch bumble bee (*Bombus crotchii*), Franklin’s bumble bee (*Bombus franklini*), Suckley cuckoo bumble bee (*Bombus suckleyi*), and western bumble bee (*Bombus occidentalis occidentalis*) as Endangered under the California Endangered Species Act, The Xerces Society for Invertebrate Conservation, Defenders of Wildlife, Center for Food Safety (2018)

documented within the California Natural Diversity Database (an inventory maintained by CDFW and partners re: the status and locations of rare plants and animals in California). To-date, the CNDDDB documents a single historic record (from 1903) for Crotch bumble bee occurrences within 10 miles of the Project site.

In June of 2023 (6 months after the 2022 BRA was prepared), CDFW released Survey Considerations for California Endangered Species Act (CESA) Candidate Bumble Bee Species⁷ (2023 Survey Considerations) identifying an expanded maximum current geographic extent for this species. It is of note, however, that upon review of the metadata associated with the range polygon cited therein, this range is reported to include 1) a 10km buffer surrounding occurrences used in map preparation, and 2) areas not currently occupied by the species. As such, inclusion of the Project site within the newly developed range map does not inherently mean that the species occurs onsite.

Mr. Cashen cites iNaturalist for species occurrence data regarding locally occurring Crotch bumble bee records dating back to 2019. All of the local observations cited in iNaturalist are foraging records in areas where this species is not generally expected to occur and sustained populations are not feasible (i.e., highly developed and/or intensely managed areas, surrounded by urban development, several occurring immediately adjacent to the San Francisco Bay). As acknowledged in CDFW's 2023 Survey Considerations, iNaturalist is a citizen science platform which includes data that may or may not be verified by expert taxonomists, and is not considered a "reliable data source". As documented within the 2022 BRA and herein, multiple reliable data sources were used to develop determinations on the likelihood of Crotch bumble bee to occur onsite.

Crotch bumble bee is known to inhabit warm and dry open grassland and scrub habitats in California; however, little is known about the key habitat components required for this species. Mr. Cashen's assertion that Crotch's bumble bee nesting habitat components occur onsite is an erroneous interpretation of data presented within the 2023 Survey Considerations that explicitly states that there is little data describing the nesting of Crotch bumble bee.

The 2022 BRA identifies fallow fields on the Project site as potentially providing suitable habitat for Crotch bumble bee. The large majority of the onsite fallow fields are intensely managed (including routine disking), and do not provide suitable bumble bee foraging or nesting resources. Approximately 1.5 acres of areas originally identified as fallow field with interspersed trees along the eastern Project site boundary are less intensely managed (subjected to regular mowing) and provide potentially marginal habitat for Crotch bumble bee. While many flowering plants occur within the other vegetation communities on the Project site, urban ornamentals and row crops are not protected

⁷ California Department of Fish and Wildlife. 2023 Jun 6. Survey Considerations for California Endangered Species Act (CESA) Candidate Bumble Bee Species.

habitats for special-status species, and the potential use of these flowers as food sources does not indicate that the site is occupied by special-status bumble bees.

The onsite agricultural use of the site includes an apiary housing active honeybee hives. Research cited in the 2018 listing petition⁶ identifies the presence of honeybees as having a negative effect on native bee populations via competition for nectar and pollen resources, change in plant community use, and disease transmission, stating that honeybees are regularly using, and depleting, the most abundant resources in the surrounding environment.

Comments re: Oak Trees: ... the DEIR's characterization that oak trees on the site are not part of a sensitive natural community is flawed. Mr. Cashen points out data from the Arborist Report that indicates clustering of oak trees that meet the criteria for woodland classification. Therefore, the DEIR's conclusion that the Project will not have a significant impact on sensitive natural communities is unsupported. (ABJC letter, Page 8, ¶ 3)

The DEIR's statement that the oak trees are not part of a woodland is inconsistent with the data provided in the Arborist Report, which indicates most of the oak trees on the Project site are clustered in the northwest corner of APN 097-15-033. According to the membership rules in the Manual of California Vegetation, an area qualifies as a woodland if it has at least 10 percent canopy cover, and it qualifies as an oak woodland if oaks comprise 50% relative cover in the tree canopy. The oaks in the northwest corner of APN 097-15-033 satisfy these conditions. (Cashen letter, Page 9, ¶ 3)

Response: The trees present within the northwestern corner of APN 097-15-033 include coast live oaks (*Quercus agrifolia*) and California black walnut (*Juglans hindsii*) interspersed within remnant orchard and rural residential fruiting species (e.g., apple, pear, almond, and chestnut) and invasive species (e.g., tree of heaven [*Ailanthus altissima*] and privet [*Ligustrum lucidum*]). These trees are clustered around the abandoned residential structures and abandoned antique farm equipment that remain onsite. As noted in the arborist report, the oaks trees comprise a minor component of this area (roughly 30% of the individual trees mapped onsite, including several oaks with trunk diameters of 1 inch).

The *Quercus agrifolia* Forest & Woodland Alliance, as defined within the Manual of California Vegetation⁸, includes coast live oak as a dominant species, co-occurring with *Acer macrophyllum*, *Arbutus menziesii*, *Juglans californica*, *Quercus douglasii*, *Quercus engelmannii*, *Quercus kelloggii*, *Quercus lobata* and *Umbellularia californica*. Membership within this alliance requires a minimum of 10% canopy cover, with coast live oak comprising a minimum of 50% of the canopy. While canopy cover within the northwestern

⁸ California Native Plant Society. A Manual of California Vegetation Online. *Quercus agrifolia* Forest & Woodland Alliance. Available at: <https://vegetation.cnps.org/alliance/78>.

corner of APN 097-15-033 exceeds 10%, the onsite clustering of trees is not dominated by coast live oak co-occurring with other native upland woodland species. Accordingly, the plant community associated with the *Quercus agrifolia* Forest & Woodland does not occur onsite.

Comments re: Bats: ... with respect to the DEIR's analysis on special-status bats, Mr. Cashen underscores the importance of considering the full extent of direct and indirect impacts on special-status bats, beyond the DEIR's limited focus on habitat during maternity roosting seasons. As Mr. Cashen states, "Significant impacts also could occur if roost sites are removed when bats are hibernating because the metabolic cost of waking bats from hibernation can be very high and enough to reduce their energy supply to the point where survival is not possible." Because bats spend over half their lives at roosts, and when bats are evicted from a roost (as proposed in the DEIR), recovery or recolonization is slow if it occurs at all. (ABJC letter, Page 10, ¶ 5)

... MM BIO-2, which addresses bats, does not require implementation of the techniques necessary to locate bats that roost in concealed locations. It also fails to identify when the site surveys would be conducted in relation to construction activities or how the surveys should be conducted. As a result, the mitigation measure is too vague to ensure impacts to bat roosts are avoided. Further, MM BIO-2 doesn't implement the proper technique to minimize impacts to tree-roosting bats. As Mr. Cashen explains, "minimizing impacts to tree-roosting bats requires 'soft-felling,' whereby all potential bat roost features in trees are felled in one piece and carefully lowered to the ground by rope, then left in-situ on the ground for at least 24 hours before being removed." (ABJC letter, Page 16, ¶ 2)

Response: MM BIO-2 prescribes roosting bat surveys to be conducted by a qualified bat specialist or wildlife biologist no more than 30 days prior to the start of construction activities. MM BIO-2 further prescribed avoidance of maternity roosts, exclusion of single or adult-only bat roosts prior to impacts to roost sites, and removal of suitable roosting habitat in a manner that will not impact roosting bats, as recommended by a qualified bat specialist/wildlife biologist depending on roost type. This mitigation measure is consistent with roosting bat protections for other development projects in San Jose and CDFW guidance on bat surveys.

Standard practice for bat surveys includes conducting daytime and evening acoustic surveys in addition to extensive visual surveys of potential habitat for special-status bats between 7 and 30 days prior to initiation of Project activities. Further, recent CDFW recommendations for removal of potential roosting refugia does not include "soft-felling" techniques for minimizing impacts to bats, but rather the 2-stage removal methodology prescribed below:

To ensure that special-status bats have left potential roosting refugia, work shall occur over the course of two days. On the first day, smaller limbs or items from the identified

trees or structures shall be brushed back or modified in the late afternoon. This disturbance should cause any potential roosting bats to seek other roosts during their nighttime foraging. The remainder of the refugia item can then be further limbed or removed as needed on the second day as late in the afternoon as feasible. Comparable demolition techniques shall be used to dismantle occupied structures on the Project site.

Comments re: Habitat Loss: ... *neither mitigation measure [MM BIO-1 and BIO-2] addresses the Project's permanent impacts on habitat (i.e., habitat loss). As Mr. Cashen points out, habitat loss is the primary threat to most bird and bat populations. "Indeed, because habitat loss has a permanent (negative) effect on population recruitment, the Project's permanent impacts to habitat are much more significant than its impacts to bird nests or bat roosts during an individual reproductive cycle." Therefore, it is imperative that the mitigation measures properly address the Project's permanent destruction of bird and bat habitat, an impact that the DEIR is required to evaluate and mitigate.* (ABJC letter, Page 16, ¶ 3)

Response: In accordance with the City's Tree Removal Policy, Project plans include the replacement of the 584 trees removed from the Project site by either 1) planting of 803 trees either onsite or at a City-approved offsite location; or 2) payment of Off-Site Tree Replacement Fee(s) to the City to be used by the City to plant trees at alternative site. This tree replacement reduces impacts to suitable nesting/roosting habitat for tree-nesting birds and tree-roosting bats. In addition to habitat replacement as part of Project implementation, impacts to nesting birds and roosting bats will be avoided through implementation of Mitigation Measures BIO-1 and BIO-2 which includes preconstruction nesting bird and raptor surveys and preconstruction bat surveys, respectively, with non-disturbance buffers if nesting birds/raptors are observed on the Project site and/or within the zone of influence of Project activities, and avoidance measures if bat roosts are observed onsite.

Comment re: Nursery Sites: *In answering whether the project would impede the use of native wildlife nursery sites, the DEIR concludes that "[t]he project site includes partially developed land and does not support native resident or wildlife species." However, as Mr. Cashen points out, [T]his statement is inconsistent with the DEIR's determination that the Project could support nesting birds protected under the Migratory Bird Treaty Act, and that it could contain maternity (nursery) roosts of four special-status bat species. Bird nests and bat roosts qualify as wildlife nursery sites. The permanent loss of these nursery (nest or roost) sites due to Project construction is a potentially significant impact that is not mitigated by the mitigation measures incorporated in the DEIR. In addition, the severity of the impact has not been disclosed to the public because no surveys were conducted to identify the bird and bat species that are using the Project area as a nursery site. As a result, the Project's permanent impacts to wildlife nursery sites are not mitigated and remain potentially significant.* (ABJC letter, Page 12, ¶ 1)

Response: As identified in the 2022 BRA, a nursery site is an area where juveniles occur at higher densities, avoid predation more successfully, or grow faster there than in a different habitat⁹. While the Project site does provide suitable nesting and roosting habitat, the presence of suitable nesting/roosting habitat alone does not render the Project site or a vegetation community therein as a nursery site. Suitable nesting habitat for birds occurs in/on areas that are suboptimal for survival and avoidance of predation including urban backyards, office buildings, and construction equipment left idle over a weekend. Similarly, bats are known to roost in chimneys and attics in urban homes. As an urban infill site, subject to high levels of regular disturbance, the Project site is not buffered from the adjacent urban landscape, and does not provide enhanced protection, foraging habitat, or nesting/roosting substrates that would be components of nursery sites.

Regardless, impacts to nesting birds and roosting bats will be avoided through implementation of Mitigation Measures BIO-1 and BIO-2 which includes preconstruction nesting bird and raptor surveys and preconstruction bat surveys, respectively, with non-disturbance buffers if nesting birds/raptors are observed on the Project site and/or within the zone of influence of Project activities, and avoidance measures if bat roosts are observed onsite.

Comments re: Nesting Birds: ... *MM BIO-1, which calls for avoiding construction during nesting season, is incapable of implementation because construction would begin in June 2024 (i.e., during the avian nesting season) and would occur continuously through October 2028 (i.e., during four additional nesting seasons). Further, MM BIO-1 fails to establish standards for nest searching techniques, minimum survey effort, and qualifications of surveyors, rendering it incapable of ensuring the identification and protection of all nests. Additionally, MM BIO-1's proposed buffer sizes for active nests are smaller than those specified by the City's consultants in the BRA and for other development projects in San Jose, as well as CDFW guidance. Accordingly, the DEIR lacks evidence to support that MM BIO-1 will reduce impacts to a less than significant level.* (ABJC letter, Page 16, ¶ 1)

Response: MM BIO-1 calls for construction activities to be limited to the non-nesting season, and if that is not possible, it secondarily calls for preconstruction surveys (conducted by a qualified biologist) for nesting birds prior to initiation of construction activities. Additional avoidance measures will be implemented if nesting birds or raptors are observed on the Project site and/or within the zone of influence of Project activities, including the creation of a non-disturbance buffer. As stated within MM BIO-1, a sufficient non-disturbance buffer size to prevent disturbance to birds nesting in the urban

⁹ M.W., K.L. Heck, K.W. Able, D.L. Childers, D.B. Eggleston, B.M. Gillanders, B. Halpern, C.G. Hays, K. Hoshino, T.J. Minello, R.J. Orth, P.F. Sheridan, M.P. Weinstein. 2001. The Identification, Conservation, and Management of Estuarine and Marine Nurseries for Fish and Invertebrates: A better understanding of the habitats that serve as nurseries for marine species and the factors that create site-specific variability in nursery quality will improve conservation and management of these areas. *BioScience*, Volume 51, Issue 8, August 2001, Pages 633–641, [https://doi.org/10.1641/0006-3568\(2001\)051\[0633:TICAMO\]2.0.CO;2](https://doi.org/10.1641/0006-3568(2001)051[0633:TICAMO]2.0.CO;2)

environment is generally considered to be 200 feet for raptors and 50 feet for other birds. While these proposed buffers vary slightly from the typical buffers described within the 2022 BRA, the prescription includes the caveat that these buffer sizes may be increased or decreased, as determined by the qualified ornithologist/biologist, depending on the bird species and the level of disturbance anticipated near an occupied nest. This mitigation measure is sufficient to avoid impacts to nesting birds/raptors and is consistent with nesting bird protections for other development projects in San Jose.

Comment re: Bird Safety Design: The Project, as currently proposed, does not comply with Citywide design standards and guidelines for bird safety, nor does the DEIR incorporate mitigation requiring adherence to Citywide design standards and guidelines. (Cashen letter, Page 2, bullet point 7)

Response: The Project has been designed in conformance with the San Jose Citywide Design Standards and Guidelines (Design Guidelines), including the Bird Safety building elements (Section 3.3.6 of the Design Guidelines). As such, additional mitigation measures regarding implementation of the Bird Safety building elements are not appropriate for inclusion in the DEIR.

