



State of California – Natural Resources Agency

DEPARTMENT OF FISH AND WILDLIFE

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May 10, 2022

Dana Ayers

Community Development Director

City of Clayton

6000 Heritage Trail

Clayton, CA 94517

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Subject: City of Clayton 6th Cycle Housing Element Update and Associate Land Use Element and Zoning Code Amendment, Notice of Preparation of Draft Environmental Impact Report, SCH No. 2022030086, City of Clayton, Contra Costa County

Dear Ms. Ayers:

The California Department of Fish and Wildlife (CDFW) has reviewed the Notice of Preparation (NOP) of a Draft Environmental Impact Report (EIR) for the City of Clayton (City) 6th Cycle Housing Element Update and Associate Land Use Element and Zoning Code Amendment (Project).

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 and Game Code, §§ 711.7, subd. (a) and 1802; Pub. Resources Code, § 21 070; California Environmental Quality Act (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, § 21 069; CEQA Guidelines, § 15381). CDFW expects that it may need to exercise regulatory authority as provided by the Fish and Game Code. As proposed, for example, the Project may be subject to CDFW's Lake and Streambed Alteration regulatory authority. (Fish and Game Code, § 1600 et seq.). Likewise, to the extent implementation of the Project as proposed may result in "take" as defined by State law of any species protected under the California Endangered Species Act

Ms. Dana Ayers
City of Clayton
May 10, 2022
Page 2

(CESA) (Fish and Game Code, § 2050 et seq.), related authorization as provided by the Fish and Game Code will be required.

Pursuant to our jurisdiction, CDFW has provided concerns, comments, and recommendations regarding the Project herein.

PROJECT DESCRIPTION

The City proposes to update the Housing Element, as well as the associated Land Use Element and Zoning Codes, of the City of Clayton's General Plan for the years 2023 through 2031.

The Housing Element Update establishes programs, policies, and actions to further the goal of meeting the existing and projected housing needs of all income levels of the community; identify how the City plans to accommodate its Regional Housing Needs Allocation (RHNA) of 570 units across approximately 2,460 acres through the year 2031; and identify changes to the General Plan Land Use Element needed to support the required housing capacity. The proposed Land Use changes have the potential to result in increased capacity for as many as 883 new dwelling units, an increase of approximately 20,000 square feet of commercial space, and a reduction of approximately 7,000 square feet of public facilities/institutional space. Potential increases of approximately 2,397 residents and 100 jobs are projected for the 2031 horizon year. Additionally, the City's Zoning Code is proposed to be amended in order to implement the proposed House and Land Use Elements.

PROJECT LOCATION

The City of Clayton is located in north-central Contra Costa County, at the base of the north slope of Mount Diablo. For the purposes of this Project, the planning area of interest includes all properties within the corporate City boundaries and the City's Sphere of Influence (SOI), as defined by the Contra Costa County Local Agency Formation Commission. This planning area is bounded to the south by Mt. Diablo State Park and to the northeast by Black Diamond Regional Preserve. The northern and western planning area boundaries are shared with the City of Concord. The planning area includes the entire City of Clayton (3.84 square miles of land), as well as its SOI (an additional 0.98 square miles).

COMMENTS AND RECOMMENDATIONS

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

Ms. Dana Ayers
City of Clayton
May 10, 2022
Page 3

REGULATORY REQUIREMENTS

California Endangered Species Act and Native Plant Protection Act

Please be advised that a CESA Incidental Take Permit (ITP) must be obtained if the Project has the potential to result in take¹ 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 to obtain a CESA ITP.

Please note that 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 (CEQA Guidelines § 15380, 15064, and 15065). Impacts must be avoided or mitigated to less-than-significant levels unless the CEQA Lead Agency makes and supports Findings of Overriding Consideration (FOC). The Lead Agency's FOC does not eliminate the project proponent's obligation to comply with CESA.

Lake and Streambed Alteration Agreement

Please be advised that CDFW requires a Notification for Lake and Streambed Alteration (LSA), pursuant to Fish and Game Code § 1600 et seq., for any Project-related activities potentially affecting rivers, lakes, or streams, and their 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 generally subject to notification requirements. CDFW, as a Responsible Agency, will consider the CEQA document for the Project and may issue an LSA Agreement. CDFW may not execute the final LSA Agreement until it has complied with CEQA as a Responsible Agency.

Migratory Birds and Raptors

Fish and Game Code, § 3503, 3503.5, and 3513 places protections on birds, their eggs, and nests. CDFW has authority over actions that may disturb or destroy active nest sites or take birds. Fully protected bird species, such as the golden eagle (*Aquila chrysaetos*) and white-tailed kite (*Elanus leucurus*), may not be taken or possessed at

¹ Take is defined in Fish and Game Code section 86 as hunt, pursue, catch, capture, or kill, or attempt any of those activities.

Ms. Dana Ayers
City of Clayton
May 10, 2022
Page 4

any time (Fish and Game Code, § 3511). Additionally, migratory birds are also protected under the federal Migratory Bird Treaty Act.

California Environmental Quality Act

The CEQA Guidelines (Cal. Code Regs., tit. 14, § 15000 et seq.) require that the draft EIR incorporate a full Project description, including reasonably foreseeable future phases of the Project, that contains sufficient information to evaluate and review the Project's environmental impact (CEQA Guidelines, §§ 15124 & 15378). Please include a complete description of the following Project components in the Project description, as applicable:

- Footprints of permanent Project features and temporarily impacted areas, such as staging areas, access routes, and high fire risk zones targeted for vegetation treatment or removal.
- Land use changes that would reduce open space or agricultural land uses and increase residential or other land use involving increased development.
- Area and plans for any proposed buildings/structures, ground disturbing activities, fencing, paving, stationary machinery, landscaping, vegetation treatment for fuel reduction, floodwalls or levees, and stormwater systems.
- Operational features of the Project, including level of anticipated human presence (describe seasonal or daily peaks in activity, if relevant), artificial lighting/light reflection, noise, traffic generation, and other features.
- Construction schedule, activities, equipment, and crew sizes.

Based on the broad scope of the Project, it appears that the draft EIR may be a program EIR (CEQA Guidelines, § 15168). In this case, while program EIRs have a necessarily broad scope, CDFW recommends providing as much information related to anticipated future activities as possible. CDFW recognizes that, pursuant to CEQA Guidelines section 15152, subdivision (c), if a Lead Agency is using the tiering process in connection with an EIR or large-scale planning approval, the development of detailed, site-specific information may not be feasible and can be deferred, in many instances, until such time as the Lead Agency prepares a future environmental document. This future environmental document would cover a project of a more limited geographical scale and is appropriate if the deferred information does not prevent adequate identification of significant effects of the planning approval at hand. The CEQA Guidelines section 15168, subdivision (c)(4) states, "Where the later activities involve site-specific operations, the agency should use a written checklist or similar device to document the evaluation of the site and the activity to determine whether the

Ms. Dana Ayers
City of Clayton
May 10, 2022
Page 5

environmental effects of the operation were within the scope of the program EIR.” Based on CEQA Guidelines section 15183.3 and associated *Appendix N Checklist*, and consistent with other program EIRs, CDFW recommends creating a procedure or checklist for evaluating subsequent project impacts on biological resources to determine if they are within the scope of the program EIR or if an additional environmental document is warranted. This checklist should be included as an attachment to the draft EIR. Future analysis should include all special-status species and sensitive natural communities including but not limited to species considered rare, threatened, or endangered pursuant to CEQA Guidelines, section 15380.

When used appropriately, the checklist should be accompanied by enough relevant information and reasonable inferences to support a “within the scope” of the EIR conclusion. For subsequent Project activities that may affect sensitive biological resources, a site-specific analysis should be prepared by a qualified biologist to provide the necessary supporting information. In addition, the checklist should cite the specific portions of the draft EIR, including page and section references, containing the analysis of the subsequent Project activities’ significant effects and indicate whether it incorporates all applicable mitigation measures from the draft EIR.

ENVIRONMENTAL SETTING

The draft EIR should provide sufficient information regarding the environmental setting (“baseline”) to understand the Project’s, and its alternatives (if applicable), potentially significant impacts on the environment (CEQA Guidelines, § 15125 and 15360).

CDFW recommends that the draft EIR provide baseline habitat assessments for special-status plant, fish, and wildlife species located and potentially located within the Project area and surrounding lands, including but not limited to all rare, threatened, or endangered species (CEQA Guidelines, § 15380). The draft EIR should also describe aquatic habitats, such as wetlands and/or waters of the U.S. or State, and any sensitive natural communities or riparian habitat occurring on or adjacent to the Project site. Sensitive natural communities can be found here: (<https://wildlife.ca.gov/Data/VegCAMP/Natural-Communities#sensitive%20natural%20communities>).

Habitat descriptions and the potential for species occurrence should include information from multiple sources, such as aerial imagery; historical and recent survey data; field reconnaissance; scientific literature and reports; the U.S. Fish and Wildlife Service’s (USFWS) Information, Planning, and Consultation System (<https://ipac.ecosphere.fws.gov/>); findings from positive occurrence databases such as the California Natural Diversity Database (CNDDDB; <https://www.wildlife.ca.gov/Data/BIOS>).

Ms. Dana Ayers
City of Clayton
May 10, 2022
Page 6

SPECIAL-STATUS SPECIES AND NESTING BIRDS

CDFW is concerned regarding potential impacts to special-status species that may be present within the Project area, including, but not limited to, those listed below (CDFW 2022):

- California tiger salamander, central California Distinct Population Segment (*Ambystoma californiense* pop. 1) - State Threatened, Federal Threatened
- California red-legged frog (*Rana draytonii*) - State Species of Special Concern, Federal Threatened
- Foothill yellow-legged frog (*Rana boylei*) - State Endangered, proposed for listing as Threatened under FESA
- San Joaquin kit fox (*Vulpes macrotis mutica*) - State Threatened, Federal Endangered
- San Francisco dusky-footed woodrat (*Neotoma fuscipes annectens*) - State Species of Special Concern
- American badger (*Taxidea taxus*) - State Species of Special Concern
- Pallid bat (*Antrozous pallidus*) - State Species of Special Concern
- Townsend's big-eared bat (*Corynorhinus townsendii*) - State Species of Special Concern
- Golden eagle (*Aquila chrysaetos*) - State Fully Protected
- White-tailed kite (*Elanus leucurus*) - State Fully Protected
- Swainson's hawk (*Buteo swainsoni*) - State Threatened
- Western burrowing owl (*Athene cunicularia*) - State Species of Special Concern
- Loggerhead shrike (*Lanius ludovicianus*) - State Species of Special Concern
- Alameda whipsnake (*Masticophis lateralis euryxanthus*) - State Threatened, Federal Threatened
- Western pond turtle (*Emmys marmorata*) - State Species of Special Concern
- Coast horned lizard (*Phrynosoma blainvillii*) - State Species of Special Concern
- Antioch Dunes evening-primrose (*Oenothera deltoides* ssp. *Howellii*) - State Endangered, Federal Endangered
- Lime Ridge eriastrum (*Eriastrum ertterae*) - State Endangered Candidate

Ms. Dana Ayers
City of Clayton
May 10, 2022
Page 7

Surveys should be conducted for special-status species with potential to occur, following recommended survey protocols. Survey and monitoring protocols and guidelines are available at: (<https://wildlife.ca.gov/Conservation/Survey-Protocols>).

Botanical surveys for special-status plant species, including those with a California Rare Plant Rank (<http://www.cnps.org/cnps/rareplants/inventory/>), must be conducted during the blooming period for all species potentially impacted by the Project within the Project area and adjacent habitats that may be indirectly impacted by, for example, changes to hydrology, and require the identification of reference populations. More than one year of surveys may be necessary given environmental conditions. Please refer to CDFW protocols for surveying and evaluating impacts to rare plants, and survey report requirements (<https://wildlife.ca.gov/Conservation/Plants>).

IMPACT ANALYSIS

Based on the data and information from the habitat assessment, the draft EIR should adequately assess which special-status species are likely to occur on or near the Project site, and whether they could be impacted by the Project. The draft EIR should also adequately analyze and discuss what measures are proposed to avoid, minimize, or mitigate for potential impacts. The draft EIR should include the reasonably foreseeable direct and indirect changes (temporary and permanent) that may occur with implementation of the Project (CEQA Guidelines, § 15126, 15126.2, and 15358). This includes, but is not limited to, evaluating and describing impacts such as:

- Encroachments into and alterations to riparian habitats, wetlands, or other sensitive areas and habitats.
- Potential impacts to special-status species or sensitive natural communities. This may include:
 - Inadvertent entrapment or impingement;
 - Permanent and temporary habitat disturbance, fragmentation, or loss; and
 - Loss or modification of breeding, nesting, dispersal and foraging habitat, including vegetation removal, alteration of soils and hydrology, and removal of habitat structural features (e.g., snags, rock outcrops, overhanging banks);
 - Loss of connectivity and/or obstruction of movement corridors, fish passage, or access to water sources and other core habitat features;
 - Decreased ability to reproduce or reduced reproductive/breeding success (loss or reduced health or vigor of eggs or young);
 - Interference with list-species recovery plan(s);

Ms. Dana Ayers
City of Clayton
May 10, 2022
Page 8

- Permanent and temporary habitat disturbances associated with ground disturbance, noise, lighting, reflection, air pollution, traffic, or human presence resultant from the project.
- Direct mortality.
- Indirect impacts from Project activities should also be considered. This might include, but is not limited to:
 - Impacts arising from the need for new infrastructure to support Project activities, such as installation of new roads, water systems, sewage treatment facilities, or other utilities.
 - Reduced groundwater infiltration due to increased impermeability from the installation of new structures, which has the potential to impact both surface and subsurface stream flows, which can deteriorate riparian habitats that can no longer access subsurface flows; create an influx of runoff during heavy rain events, which can contribute to streambank erosion; and contribute to surface water pollution, which poses a multitude of concerns for riparian health and biodiversity.

The draft EIR should also identify reasonably foreseeable future projects in the Project vicinity, disclose any cumulative impacts associated with these projects, determine the significance of each cumulative impact, and assess the significance of the project's contribution to the impact (CEQA Guidelines § 15355). Although a project's impacts may be less-than-significant individually, its contributions to a cumulative impact may be considerable; a contribution to a significant cumulative impact, e.g., reduction of habitat for a special-status species should be considered cumulatively considerable.

AVOIDANCE, MINIMIZATION, AND MITIGATION MEASURES

Based on the comprehensive analysis of the direct, indirect, and cumulative impacts of the Project, the CEQA Guidelines direct the Lead Agency to consider and describe all feasible measures to avoid potentially significant impacts in the draft EIR and mitigation of potentially significant impacts of the Project on the environment (CEQA Guidelines, § 15021, 15063, 15071, 15126.4, and 15370). This includes a discussion of impact avoidance and minimization measures for special-status species, which are recommended to be developed in early consultation with CDFW, USFWS, and the National Marine Fisheries Service (NMFS). These measures should be incorporated as enforceable Project conditions to reduce impacts to biological resources to less-than-significant levels. Fully protected species such as the Golden eagle and the White-tailed kite may not be taken or possessed at any time (Fish and Game Code, § 3511, 4700, 5050, and 5515). Therefore, the draft EIR should include measures to ensure complete avoidance of these species.

Ms. Dana Ayers
City of Clayton
May 10, 2022
Page 9

CDFW recommends that the draft EIR include development of a robust mitigation plan that will reduce the impacts of the Project to a less-than-significant level and provide benefits to local or on-site resources and species.

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 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>.

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 & Game Code, § 711.4; Pub. Resources Code, § 21089).

CONCLUSION

CDFW appreciates the opportunity to comment on the NOP to assist the City of Clayton in identifying and mitigating Project impacts on biological resources.

Questions regarding this letter or further coordination should be directed to Sabrina Dunn, Environmental Scientist, at (707) 428-2069 or Sabrina.Dunn@wildlife.ca.gov; or Michelle Battaglia, Senior Environmental Scientist (Supervisory), at (707) 339-6052 or Michelle.Battaglia@wildlife.ca.gov.

Sincerely,

DocuSigned by:

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Erin Chappell
Regional Manager
Bay Delta Region

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

Ms. Dana Ayers
City of Clayton
May 10, 2022
Page 10

LITERATURE CITED

California Department of Fish and Wildlife (CDFW). 2022. Biogeographic Information and Observation System (BIOS). Accessed April 1, 2022