



State of California – Natural Resources Agency
DEPARTMENT OF FISH AND WILDLIFE
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GAVIN NEWSOM, Governor
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March 7, 2025

Nhu Nguyen, Planner II
City of San Jose
200 East Santa Clara Street, 3rd Floor
San Jose, CA, 95113
Nhu.Nguyen@sanjoseca.gov

Subject: General Plan Amendment and Planned Development Rezoning for the Coleman and Heading Commercial Development Project, Draft Environmental Impact Report, SCH No. 2023080477, City of San Jose, Santa Clara County

Dear Nhu Nguyen:

The California Department of Fish and Wildlife (CDFW) received a draft Environmental Impact Report (EIR) from the City of San Jose (City) for the General Plan Amendment and Planned Development Rezoning for the Coleman and Heading Commercial Development Project (Project) pursuant to the California Environmental Quality Act (CEQA) and CEQA Guidelines.¹ CDFW previously submitted comments in response to the Notice of Preparation of a Draft Environmental Impact Report on September 20, 2023.

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

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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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 proposed, for example, the Project may be subject to CDFW's Lake and Streambed Alteration (LSA) regulatory authority. (Fish & G. 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 (CESA) (Fish & G. Code, § 2050 et seq.), the project proponent may seek related take authorization as provided by the Fish and Game Code.

REGULATORY REQUIREMENTS

California Endangered Species Act

A CESA Incidental Take Permit (ITP) must be obtained from CDFW if the Project has the potential to result in "take" of plants or animals listed under CESA, either during construction or over the life of the Project. Under CESA, "take" means "hunt, pursue, catch, capture, or kill, or attempt to hunt, pursue, catch, capture, or kill." (Fish & G. Code, § 86). CDFW's issuance of an ITP is subject to CEQA and to facilitate permit issuance, any Project modifications and mitigation measures must be incorporated into the CEQA document analysis, discussion, and mitigation monitoring and reporting program. If the Project will impact CESA listed species, early consultation is encouraged, as significant modification to the Project and mitigation measures may be required in order to obtain a CESA permit.

The Project has the potential to impact burrowing owl (*Athene cunicularia*), CESA candidate species, as further described below.

CEQA requires a mandatory finding of significance if a project is likely to substantially impact threatened or endangered species. Pub. Resources Code, §§ 21001, subd. c & 21083; CEQA Guidelines, §§ 15380, 15064 & 15065). In addition, pursuant to CEQA, the Lead Agency cannot approve a project unless all impacts to the environment are avoided or mitigated to less-than-significant levels, or the Lead Agency makes and supports Findings of Overriding Consideration (FOC) for impacts that remain significant despite the implementation of all feasible mitigation. FOC under CEQA, however, does not eliminate the Project proponent's obligation to comply with the Fish and Game Code.

Migratory Birds and Raptors

CDFW has authority over actions that may result in the disturbance or destruction of active bird nest sites or the unauthorized take of birds. Fish and Game Code sections

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protecting birds, their eggs, and nests include section 3503 (regarding unlawful take, possession, or needless destruction of the nests or eggs of any bird), section 3503.5 (regarding the take, possession, or destruction of any birds-of-prey or their nests or eggs), and section 3513 (regarding unlawful take of any migratory nongame bird). Migratory birds are also protected under the federal Migratory Bird Treaty Act (MBTA).

Fully Protected Species

Fully Protected Species (Fish & G. Code § 3511 and 4700) have the potential to occur within or adjacent to the Project area, including, but not limited to: golden eagle (*Aquila chrysaetos*).

Project activities described in the draft EIR should be designed to completely avoid any fully protected species that have the potential to be present within or adjacent to the Project area. Fully protected species may not be taken or possessed at any time and no licenses or permits may be issued for their take except as follows:

- Take is for necessary scientific research;
- Efforts to recover a fully protected, endangered, or threatened species, live capture, and relocation of a bird species for the protection of livestock; or
- They are a covered species whose conservation and management are provided for in a Natural Community Conservation Plan (Fish & G. Code, §§ 3511, 4700, 5050, & 5515).
- Specified types of infrastructure projects may be eligible for an ITP for unavoidable impacts to fully protected species if certain conditions are met (see Fish & G. Code §2081.15).

PROJECT DESCRIPTION SUMMARY

Proponent: City of San Jose

Objective: The Project is a General Plan Amendment and Planned Development rezoning on approximately 11.4 acres of seven City-owned parcels located in the Guadalupe Gardens, a 120-acre area located immediately south of the San José Mineta International Airport. On each of the seven parcels, the existing Envision San José 2040 General Plan Land Use Designation of Open Space Parks Habitat would be changed to Combined Industrial Commercial and each parcel would be rezoned to the Open Space Planned Development Zoning District. With the new General Plan land use designation and rezoning in place, the City intends to market the seven parcels for development that is consistent with the underlying purpose of the parcels for aviation related objectives. The City would retain ownership of the land and would lease the sites to developers.

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The project also includes the removal of the seven parcels from the Guadalupe Gardens Master Plan.

Location: The Project is located north of West Taylor Street, east of Coleman Avenue, south of Nimitz Freeway, and west of Guadalupe Parkway in the City of San Jose, Santa Clara County (County). The coordinates for the approximate center of the Project are 37°20'47.17"N latitude, 121°54'40.25"W longitude (WGS 84). The Assessor's Parcel Numbers are Parcel 1: 259-02-130, Parcel 2: 259-02-131, Parcel 3: 259-08-072, Parcel 4: 259-08-101, Parcel 5: 259-08-102, Parcel 6: 230-38-076, and Parcel 7: 230-38-092.

Timeframe: Not noted in the draft EIR.

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. Editorial comments or other suggestions may also be included to improve the document. Based on the Project's avoidance of significant impacts on biological resources with mitigation measures, including those CDFW recommends, CDFW concludes that an EIR is appropriate for the Project.

I. Environmental Setting and Related Impact Shortcoming

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?

COMMENT 1: Burrowing Owl

Issue: There are sixteen CNDDDB records of burrowing owl occurring within three miles of the Project, with the closest record approximately 0.25 miles north of the Project. The Project is also within the burrowing owl year-long range according to the California Wildlife Habitat Relationships model. While the draft EIR acknowledges that burrowing owl have the potential to occur as a breeder or non-breeding forager in the California annual grassland within the Project area (pages 60, 63-64, 68-70), mitigation measure (MM) BIO-1.1 may not adequately mitigate impacts to burrowing owl to less-than-significant. Additionally, the draft EIR also acknowledges that MM BIO-1.1 is based on Condition 15 of the Santa Clara Valley Habitat Plan (VHP). However, as discussed in the draft EIR, the Project is located within the VHP permit area but is not a "covered project," as the subject parcels are part of lands controlled by San José International Airport, which is excluded from the

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VHP. Therefore, the project is not subject to compliance with VHP conditions, avoidance, minimization, or compensatory mitigation measures.

Specific impacts, why they would occur, and evidence they would be significant: MM BIO-1.1 includes a survey for burrowing owl, however the two preconstruction surveys required by MM BIO-1.1 (page 71) is inconsistent with the surveys recommended in the *Department of Fish and Game [currently CDFW] Staff Report on Burrowing Owl Mitigation (2012)* (CDFW 2012 Staff Report), which requires at least four surveys. The survey distance of 250 feet required by MM BIO-1.1 (page 71) would not detect owls up to 500 meters (1,640 feet) from the Project site, the distance at which the species could be impacted by auditory and visual disturbances, pursuant to the CDFW 2012 Staff Report. The buffer distance in MM BIO-1.1 of 250 feet (pages 72-73) may be too small to fully avoid impacts to burrowing owl, especially during the nesting season. Lastly, MM BIO-1.1 describes passive relocation activities (pages 73-74). CDFW does not consider passive relocation to be a take avoidance measure because the long-term demographic consequences of exclusion techniques have not been thoroughly evaluated, and the survival rate of excluded owls is unknown. Burrowing owl 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 CESA and Fish and Game Code section 3503.5.

Burrowing owl is a candidate for listing under CESA and is afforded the same legal protections as a CESA-listed species while under review (Fish and Game Code § 2068). The Project is comprised of California annual grasslands which provide potential foraging habitat for burrowing owl as well as suitable nesting and roosting habitat where California ground squirrel (*Otospermophilus beecheyi*) burrows are present. Implementation of the Proposed Project would result in permanent loss of 9.11 acres of California annual grassland, which may provide suitable habitat for burrowing owl nesting, roosting, and foraging. Additionally, the Project could impact resident, wintering, and nesting burrowing owl in burrows or other suitable refugia on or within up to 500 meters (1,640 feet) of the Project site, which could result in burrowing owl nest abandonment, loss of young, reduced health and vigor of owlets, injury or mortality of adults, and permanent wintering (i.e., non-nesting) or nesting habitat loss.

Burrowing owl population viability and survival are adversely affected by risk factors such as precipitous declines from habitat loss, fragmentation, and degradation; evictions from nesting sites without habitat mitigation; wind turbine mortality; human disturbance; and eradication of California ground squirrel resulting in a loss of suitable burrows required by burrowing owl for nesting, protection from predators, and shelter (Shuford and Gardali 2008; CDFW 2012 Staff Report; personal communication, CDFW Statewide Burrowing Owl Coordinator Esther Burkett, May

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13, 2022). Preliminary analyses of regional patterns for breeding populations of burrowing owl have detected declines both locally in their central and southern coastal breeding areas, and statewide where the species has experienced breeding range retraction (CDFW 2012 Staff Report). Borrowing owl have been extirpated from 16 percent of their former range and are at risk of being extirpated from another 13 percent of their range in the State (CDFW 2024).

Based on the foregoing, if burrowing owl are wintering or nesting on or within 500 meters (1,640 feet) of the Project site, the Project may result in a substantial reduction in the number of a CESA candidate species, which is considered a Mandatory Finding of Significance pursuant to CEQA Guidelines sections 15065, subdivision (a)(1) and 15380.

Recommended Mitigation Measures: To reduce potential impacts to burrowing owl to less-than-significant and comply with CESA and Fish and Game Code section 3503.5, CDFW recommends replacing MM BIO-1.1 with the mitigation measures below.

Mitigation Measure BIO-1.1 (Burrowing Owl Habitat Assessment and Surveys): A qualified biologist shall conduct a habitat assessment and surveys, following the *Department of Fish and Game Staff Report on Burrowing Owl Mitigation (2012)* methodology (<https://wildlife.ca.gov/Conservation/Survey-Protocols#377281284-birds>) and prepare a report documenting the survey results, and submit the report to CDFW for review prior to Project construction. The qualified biologist shall have a minimum of two years of experience implementing the above methodology resulting in burrowing owl detections. Based on the habitat assessment, if suitable burrows are present, surveys for nesting burrowing owl shall be conducted if Project construction starts during nesting season (February 1 to August 31), and surveys for wintering burrowing owl shall be conducted if the construction starts during the wintering season (September 1 to January 31). The habitat assessment and surveys shall encompass the Project site and a sufficient buffer zone to detect owls nearby that may be impacted, which is up to 500 meters (1,640 feet) around the Project site pursuant to the above methodology. Habitat assessments and surveys shall occur annually for the duration of the Project, as conditions may change annually and suitable refugia for burrowing owl, such as small mammal burrows, can be created within a few hours or days, unless otherwise approved in writing by CDFW.

Time lapses between surveys or Project activities shall trigger subsequent surveys including, but not limited to, a final survey within 24 hours prior to ground disturbance. If the habitat assessment does not identify suitable habitat and surveys are not conducted, an additional habitat assessment should be conducted within 14 days prior to construction. If new refugia are present, surveys should be conducted as described above, unless otherwise approved in writing by CDFW.

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The Project shall immediately notify CDFW if burrowing owl is detected and implement a construction avoidance buffer around any detected burrowing owl pursuant to the buffer distances outlined in the *Department of Fish and Game Staff Report on Burrowing Owl Mitigation* (2012), which may be up to 500 meters (1,640 feet). Any detected owl shall be monitored by the qualified biologist to ensure it is not disturbed during construction activities.

If the Project cannot ensure burrowing owl and their burrows are fully avoided, the Project shall consult with CDFW and obtain a CESA take authorization or otherwise demonstrate compliance with CESA. Take is likely to occur and the Project shall obtain an ITP if: 1) burrowing owl surveys of the Project area detect burrowing owl occupancy of burrows or burrow surrogates, or 2) there is sign of burrowing owl occupancy on the Project area within the past three years and habitat has not had any substantial change that would make it no longer suitable. Occupancy means a site that is assumed occupied if at least one burrowing owl has been observed occupying a burrow or burrow surrogate within the last three years. Occupancy of suitable burrowing owl habitat may also be indicated by burrowing owl sign including its molted feathers, cast pellets, prey remains, eggshell fragments, or excrement at or near a burrow entrance or perch site. If burrowing owl, or their burrows or burrow surrogates, are detected within 500 meters (1,640 feet) of the Project site during burrowing owl surveys, but not on the Project site, the Project shall with CDFW to determine if avoidance is feasible or an ITP is warranted.

COMMENT 2: Nesting Birds

Issue: CDFW acknowledges and appreciates the incorporated mitigation measures MM BIO-2.2, MM BIO-2.3, and MM BIO-2.4 to minimize impacts to nesting birds during Project activities. These mitigation measures may not be sufficient to avoid potentially significant impacts to nesting birds during Project activities.

Specific impacts, why they would occur, and evidence they would be significant: Implementation of the Project would result in the permanent removal of approximately 67 trees and loss of 9.11 acres of California annual grasslands, that may provide suitable nesting habitat for birds. Nesting birds may be disturbed by habitat removal and Project noise and visual disturbances, which could result in active nest loss or abandonment, reduced reproductive success or loss, reduced health or vigor of eggs or young, or direct take of nesting birds, *a potentially significant impact*. Take of nesting birds, birds in the orders Falconiformes or Strigiformes, and migratory nongame bird as designated in the federal MBTA is a violation of Fish and Game Code (§ 3503, 3503.5, 3513).

Recommended Mitigation Measures: To reduce potential impacts to nesting birds to less-than-significant and comply with Fish and Game Code sections 3503,

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3503.5, and 3513 and the federal MBTA, CDFW recommends several additions (as shown as underlined text) or modifications (as shown as lined out text) to MM BIO-2.2, MM BIO-2.3, and MM BIO 2.4.

Mitigation Measure BIO-2.2 (Pre-Construction Surveys): If construction activities cannot be scheduled between September 1st and January 31st (inclusive), pre-construction surveys for nesting birds will be completed by a qualified ornithologist to ensure that no nests shall be disturbed during project implementation. This survey must be completed no more than 14 days prior to the initiation of construction activities during ~~the early part of the breeding season (February 1st through April 30th inclusive)~~ and no more than 30 days prior to the initiation of these activities ~~during the late part of the breeding season (May 1st through August 31st inclusive)~~. During this survey, the qualified ornithologist shall inspect all trees and other possible nesting habitats, including the ground and buildings, in and immediately adjacent to the Project construction areas for nests. If a lapse in Project-related work of 14 days or longer occurs, another survey shall be conducted before Project work can be reinitiated.

Mitigation Measure BIO-2.3 (Construction Buffer): If, during the survey described in MM BIO-2.2, the qualified ornithologist finds an active nest sufficiently close to work areas to be disturbed by construction, the qualified ornithologist, in consultation with the California Department of Fish and Wildlife, shall determine the extent of a construction free buffer zone to be established around the nest, typically 250 feet, to ensure that raptor or migratory bird nests shall not be disturbed during project construction. The buffer distances shall be specified to protect the bird's normal behavior to prevent nesting failure or abandonment and comply with Fish and Game Code section 3500 et seq. and the federal MBTA. Abnormal nesting behaviors which may cause reproductive harm include, but are not limited to, defensive flights/vocalizations directed towards Project personnel, standing up from a brooding position, and flying away from the nest. The qualified biologist shall have authority to order the cessation of all nearby Project activities if the nesting birds exhibit abnormal behavior which may cause reproductive failure (nest abandonment and loss of eggs and/or young) until an appropriate buffer is established.

The qualified biologist shall monitor the behavior of the birds (adults and young, when present) at the nest site to ensure that they are not disturbed by Project work. Nest monitoring shall continue during Project work until the young have fully fledged (have completely left the nest site and are no longer being fed by the parents), as determined by the qualified biologist, unless otherwise approved in writing by CDFW.

Mitigation Measure BIO-2.4 (Survey Result Reporting): Prior to any tree removal, or approval of any grading or demolition permits (whichever occurs first), the ornithologist shall submit a report indicating the results of the survey and any

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designated buffer zones to the satisfaction of the City's Director of Planning, Building and Code Enforcement or the Director's designee, and the California Department of Fish and Wildlife.

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 draft EIR to assist the City in identifying and mitigating Project impacts on biological resources.

Questions regarding this letter or further coordination should be directed to Melony Wood, Environmental Scientist at (707) 428-2002 or Melony.Wood@Wildlife.ca.gov.

Sincerely,

DocuSigned by:

Erin Chappell

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Erin Chappell
Regional Manager
Bay Delta Region

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Attachment 1: Special-Status Species and Commercially/Recreationally Important Species

cc: Office of Planning and Research, State Clearinghouse, (SCH No. 2023080477)
Craig Weightman, CDFW Bay Delta Region – Craig.Weightman@wildlife.ca.gov
Jason Faridi, CDFW Bay Delta Region – Jason.Faridi@wildlife.ca.gov

REFERENCES

- California Department of Fish and Wildlife (CDFW). 2024. Petition Evaluation for Western Burrowing Owl (*Athene cunicularia hypugaea*). Report to the Fish and Game Commission. California Department of Fish and Wildlife, Post Office Box 944209, Sacramento, CA.
- California Department of Fish and Wildlife (CDFW). 2012. Department of Fish and Game Staff Report on Burrowing Owl Mitigation. State of California Natural Resources Agency, Sacramento, CA.
- Shuford, W. D., and Gardali, T., editors. 2008. California Bird Species of Special Concern: A ranked assessment of species, subspecies, and distinct populations of birds of immediate conservation concern in California. Studies of Western Birds 1. Western Field Ornithologists, Camarillo, California, and California Department of Fish and Game, Sacramento.

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ATTACHMENT 1: Special Status Species

Species	Status
Birds	
burrowing owl (<i>Athene cunicularia</i>)	State Candidate for Listing as Endangered or Threatened (SC)
Cooper's hawk (<i>Accipiter cooperii</i>)	State Watch List (SWL)
golden eagle (<i>Aquila chrysaetos</i>)	State Fully Protected (FP), SWL