



State of California – Natural Resources Agency
DEPARTMENT OF FISH AND WILDLIFE
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GAVIN NEWSOM, Governor
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October 18, 2024

James Willis, Senior Planner
City of Fremont
39550 Liberty Street
Fremont, CA 94538
JWillis@fremont.gov

Subject: 38134 Temple Way Residential Project, Initial Study, SCH No. 2024090765,
City of Fremont, Alameda County

Dear James Willis:

The California Department of Fish and Wildlife (CDFW) received a Notice of Intent to Adopt an Initial Study (IS) from the City of Fremont (City) for the 38134 Temple Way Residential 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 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

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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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.

CEQA requires a mandatory finding of significance if a project is likely to substantially impact threatened or endangered species. Pub. Resources Code, §§ 21001, subd. € & 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.

Lake and Streambed Alteration

CDFW requires an LSA Notification, pursuant to Fish and Game Code section 1600 et seq., for Project activities affecting rivers, lakes or streams and associated riparian habitat. Notification is required for any activity that may substantially divert or obstruct the natural flow; change or use material from the bed, channel, or bank (including associated riparian or wetland resources); or deposit or dispose of material where it may pass into a river, lake, or stream. Work within ephemeral streams, drainage ditches, washes, watercourses with a subsurface flow, and floodplains is generally subject to notification requirements. In addition, infrastructure installed beneath such aquatic features, such as through hydraulic directional drilling, is also generally subject to notification requirements. Therefore, any impact to the mainstems, tributaries, or floodplains or associated riparian habitat caused by the proposed Project will likely require an LSA Notification.

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 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

Several Fully Protected Species (Fish & G. Code § 3511 and 4700) have the potential to occur within or adjacent to the Project area.

Project activities described in the IS 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).

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- 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).

CDFW also recommends the IS analyze potential adverse impacts to fully protected species due to habitat modification, loss of foraging habitat, and/or interruption of migratory and breeding behaviors. CDFW recommends that the City include in the analysis how appropriate avoidance, minimization and mitigation measures will reduce indirect impacts to fully protected species. Project proponents should consult with CDFW early in the Project planning process.

PROJECT DESCRIPTION SUMMARY

Proponent: City of Fremont

Objective: The Project proposes to demolish the existing vacant church and parking lot and develop 27 two-story, single-family residences, 10 percent (3) of which are proposed to be offered as affordable housing. Residential units would each include an alley-loaded two-car garage and a private yard and would face public streets or a walkway internal to the residential block.

Location: The Project site is located at 38134 Temple Way, at the corner of Temple Way and Peralta Boulevard in the City of Fremont, Alameda County (County). The coordinates for the approximate center of the Project are 37°33'48.7"N latitude 121°59'12.6"W longitude (WGS 84). The Assessor's Parcel Numbers are 501-1278-50 and -51.

Timeframe: Project construction is estimated to occur over approximately 20 months, with a start date potentially as early as late 2024.

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.

ENVIRONMENTAL SETTING

Sufficient information regarding the environmental setting is necessary to understand any potentially significant impacts on the environment of the proposed Project (CEQA Guidelines, §§15063 & 15360). CDFW recommends that a full list or table is included in the updated Biological Resources Section of the IS that notes species common name, scientific name, state and federal listing status (as applicable), habitat type preference and determination on presence, for all special-status species with the potential to occur within the Project area.

CDFW recommends the IS provide baseline habitat assessments for special-status plant, fish and wildlife species located and potentially located within the Project area and surrounding lands, including all rare, threatened, and endangered species (CEQA Guidelines, §15380). The IS should describe aquatic habitats, such as wetlands or waters of the U.S. or State, and any sensitive natural communities or riparian habitat occurring on or adjacent to the Project area (for sensitive natural communities see: [https://wildlife.ca.gov/Data/VegCAMP/NaturalCommunities#sensitive %20natural%20communities](https://wildlife.ca.gov/Data/VegCAMP/NaturalCommunities#sensitive%20natural%20communities)), and any stream or wetland set back distances the City or County may require.

CDFW recommends that the California Natural Diversity Database (CNDDDB), as well as previous studies performed in the area, be consulted to assess the potential presence

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of sensitive species and habitats. A nine U.S. Geologic Survey 7.5-minute quadrangle search is recommended to determine what may occur in the region, larger if the Project area extends past one quad (see Data Use Guidelines on the Department webpage <https://wildlife.ca.gov/Data/CNDDDB/Maps-and-Data>). Please review the webpage for information on how to access the database to obtain current information on any previously reported sensitive species and habitat, including Significant Natural Areas identified under Chapter 12 of the Fish and Game Code, in the vicinity of the Project. CDFW recommends that CNDDDB Field Survey Forms be completed and submitted to CNDDDB to document survey results. Online forms can be obtained and submitted at: <https://wildlife.ca.gov/Data/CNDDDB/Submitting-Data>. Please note that CDFW's CNDDDB is not exhaustive in terms of the data it houses, nor is it an absence database. CDFW recommends that it be used as a starting point in gathering information about the potential presence of species within the general area of the Project site. Other sources for identification of species and habitats near or adjacent to the Project area should include, but may not be limited to, State and federal resource agency lists, California Wildlife Habitat Relationship System, California Native Plant Society Inventory, agency contacts, environmental documents for other projects in the vicinity, academics, and professional or scientific organizations. Only with sufficient data and information can the City adequately assess which special-status species are likely to occur in the Project vicinity.

According to Biogeographic Information and Observation System (BIOS) records, the Project site contains positive detections of several special-status species and has the potential to support numerous special-status species and their associated habitat. Species with potential to occur on-site include but are not limited to those listed in Attachment 1.

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 USFWS?

COMMENT #1: Nesting Birds

The IS states that the Project has the potential to disturb nesting habitat for birds and raptors and including the removal of 34 trees. However, the IS does not adequately mitigate potential impacts to nesting birds protected under the MBTA and/or Fish and Game Code because it does not identify suitable nesting seasons or buffers for active nests within or near the Project area.

Cooper's hawk (*Accipiter cooperii*) occurrences have been documented within the vicinity of the Project area (CDFW 2024, CNDDDB 2024). Northern harrier (*Circus hudsonius*), golden eagle (*Aquila chrysaetos*), and white-tailed kite (*Elanus leucurus*) have seen historic observations occur elsewhere in the County and at nearby parks (e.g., Lake Elizabeth and Niles Community Park) within the last three years.

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

Recommended Mitigation Measure #1: Nesting Bird Surveys

CDFW recommends the qualified biologist adopt the following protocol. If Project-related work is scheduled during the nesting season (early January through early September), CDFW recommends that a qualified biologist with applicable species and habitat experience should conduct two surveys for active nests. No more than fourteen days prior to the start of ground or vegetation disturbance a qualified biologist shall conduct a survey to establish a behavioral baseline of all identified nests. A final survey

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shall be conducted forty-eight hours prior to Project activities to maximize the probability that nests that could potentially be impacted are detected. Appropriate minimum survey buffer 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 shall be conducted at the appropriate times of day and during appropriate nesting times.

Recommended Mitigation Measure #2: Buffer Zones

CDFW recommends the qualified biologist adopt the following protocol. CDFW recommends a minimum no-disturbance buffer of 250 feet around active nests of non-listed bird species and a 500-foot no-disturbance buffer around active nests of non-listed raptors. These buffers are advised to remain in place until the breeding season has ended or until a qualified biologist has determined that the birds have fledged and are no longer reliant upon the nest or on-site parental care for survival.

Recommended Mitigation Measure #3: Reporting

CDFW recognizes that pursuant to Chapter 18.215 of the City of Fremont's Municipal Code, a tree removal permit is required prior to removing, damaging, or relocating protected trees on private property. CDFW also understands the project would include the planting of 69 new trees, which is anticipated to satisfy tree removal permit requirements.

CDFW recommends that prior to any tree removal and Project activities, the qualified biologist shall submit a report indicating the results of the survey and any designated buffer zones to CDFW.

COMMENT #2: Bats

The IS states that the Project includes the removal of 34 trees. However, the IS does not mention, nor does it adequately mitigate potential impacts to roosting bats. Bats are considered non-game mammals and are protected by state law from take and/or harassment (Fish and Game Code §4150, CCR §251.1).

The Project area could provide habitat for Pallid bat, Townsend's big-eared bat, Hoary bat, and other bat species. Construction activities may result in the disturbance of hibernation or maternal roost sites, which may result in the harm, death, displacement of individual bats and/or the disruption of reproductive success of nursery colony roosts. Proposed activities may result in the disturbance and/or loss of hibernation or maternal roost sites, which may result in the harm, death, displacement of individual bats and/or the disruption of reproductive success of nursery colony roosts.

To determine the extent to which impacts may occur to bats and determine where habitat loss may occur from the removal of trees, the IS should propose measures to conduct a bat habitat assessment of suitable bat roosting habitat.

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

Recommended Mitigation Measure #4: Bat Habitat Monitoring

CDFW recommends that a qualified biologist with applicable species and habitat experience should conduct a survey from March 1 to April 1 or August 31 to October 15 prior to construction activities. The habitat assessment shall include a visual inspection of features within the work area for potential roosting features including trees, crevices, parking garages, siding or roofs of buildings, and hollow areas (bats need not be present). The surveys should occur at least two seasons in advance of Project initiation.

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If the focused survey reveals the presence of roosting bats, then the appropriate exclusionary or avoidance measures will be implemented prior to construction during the period between March 1 to April 15 or August 31 to October 15.

Recommended Mitigation Measure #5: Avoidance

If active bat roosts are observed during environmental assessments or during construction, at any time, all Project activities should stop until a qualified biologist develops a bat avoidance plan to be implemented at the Project site. The bat avoidance plan should utilize seasonal avoidance, phased construction as well as temporary and permanent bat housing structures developed in coordination with CDFW.

Recommended Mitigation Measure #6: Reporting

Prior to Project activities, the qualified biologist shall submit a report to CDFW that discusses the results of the suitable habitat assessment and if any bats or signs of bats (feces or staining at entry/exit points) are discovered.

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>.

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. (Seem 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 IS to assist City in identifying and mitigating Project impacts on biological resources.

Questions regarding this letter or further coordination should be directed to Marcus Griswold, Senior Environmental Scientist (Specialist), at (707) 815-6451 or Marcus.Griswold@wildlife.ca.gov.

Sincerely,

DocuSigned by:

B77E9A6211EF486
Erin Chappell
Regional Manager
Bay Delta Region

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

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cc: Office of Planning and Research, State Clearinghouse, (SCH No. 2024080035)
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. Biogeographic Information and Observation System (BIOS). <https://www.wildlife.ca.gov/Data/BIOS>. Accessed August 22, 2024.

California Natural Diversity Database (CNDDDB). September 2024. Special Animals List. California Department of Fish and Wildlife. Sacramento, CA.

Cornell Lab of Ornithology. 2024. eBird. <https://ebird.org/about>. Accessed October 6, 2024.

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ATTACHMENT 1: Special-Status Species

Species	Status
Birds	
Cooper's hawk (<i>Accipiter cooperii</i>)	State Watch List (SWL)
golden eagle (<i>Aquila chrysaetos</i>)	FP
northern harrier (<i>Circus hudsonius</i>)	SSC
white-tailed kite (<i>Elanus leucurus</i>)	FP
Mammals	
pallid bat (<i>Antrozous pallidus</i>)	SSC
Townsend's big-eared bat (<i>Corynorhinus townsendii</i>)	SSC