State of California – Natural Resources Agency
DEPARTMENT OF FISH AND WILDLIFE
Central Region
1234 East Shaw Avenue
Fresno, California 93710
www.wildlife.ca.gov

GAVIN NEWSOM, Governor
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Governor's Office of Planning & Research

DEC 17 2019

STATE CLEARINGHOUSE

December 17, 2019

Michael Kelly, Associate Planner
San Benito County Resource Management Agency
2301 Technology Parkway
Hollister, California 95023

Subject: County Planning File PLN 180004 (Use Permit/Grading Permit) (Project), Mitigated Negative Declaration (MND)
SCH No. 2019119049

Dear Mr. Kelly:

The California Department of Fish and Wildlife (CDFW) received a supplemental Notice of Intent to Adopt an MND for the Project from San Benito County for the above-referenced 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, CDFW appreciates the opportunity to provide comments regarding those aspects of the Project that CDFW, by law, may be required to carry out or approve through exercise of our 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 our 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

[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.

need to exercise regulatory authority as provided by the Fish and Game Code. For example, 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 & Game Code, § 2050 et seq.), related authorization as provided by the Fish and Game Code will be required.

Nesting Birds: CDFW has jurisdiction over actions with potential to result in the disturbance or destruction of active nest sites or the unauthorized take of birds. Fish and Game Code sections that protect birds, eggs and nests include §§ 3503 (regarding unlawful take, possession or needless destruction of the nest or eggs of any bird), 3503.5 (regarding the take, possession or destruction of any birds-of-prey or their nests or eggs), and 3513 (regarding unlawful take of any migratory nongame bird).

Water Pollution: Pursuant to Fish and Game Code § 5650, it is unlawful to deposit in, permit to pass into, or place where it can pass into "Waters of the State" any substance or material deleterious to fish, plant life, or bird life, including non-native species. It is possible that without mitigation measures, implementation of the Project could result in pollution of Waters of the State from storm water runoff or construction-related erosion. Potential impacts to the wildlife resources that utilize these watercourses include the following: increased sediment input from road or structure runoff; toxic runoff associated with development activities and implementation; and/or impairment of wildlife movement along riparian corridors. The Regional Water Quality Control Board and U.S. Army Corps of Engineers also have jurisdiction regarding discharge and pollution to Waters of the State.

PROJECT DESCRIPTION SUMMARY

Proponent: Nader Javid

Objective: The proponent proposes to develop the property into an assisted care facility for senior adults. The Project includes demolition of the existing residence and outbuildings and subsequent construction of the assisted care facility. The proposed facility will include a total of 155 rooms and 180 beds in two, three-story buildings with a combined area of 136,367 square feet. An existing driveway divides the Project Area into two sites, Site A (west of the driveway) and Site B (east of the driveway). Site A will be developed with a 121,981-square foot main lodge building that includes 136 rooms and 159 beds. The main lodge consists of a lobby/reception area, staff offices, nurse room, staff lounge area, restrooms, dining rooms, kitchen, exercise room, arts and crafts room, and a theater. Laundry facilities and lounge areas will be placed throughout the main lodge building on each level. The main access road on Site A will lead to a parking lot with 41 spaces, a Porte-Co-Chere, and a roundabout. Site B will be developed with a 14,386-square foot smaller building consisting of 19 rooms with 21 beds, a laundry room, and lounge. Site B will also include a parking lot with 24 spaces.

Vehicular access to the Project Area is from Airline Highway, along an existing driveway. The proposed Project includes realignment of the driveway, including replacement of the existing culvert which directs flows from an unnamed intermittent stream. The proposed driveway will form a loop around Site A to provide a 20-foot wide fire access road. A retaining wall up to 293 linear feet and varying in height from 0.3 feet to 8.7 feet will be constructed along the looped driveway. Landscaping will also occur within the stream.

Development of the Project includes grading consisting of approximately 18,700 cubic yards of cut and 7,100 cubic yards of fill. In addition, approximately 17 trees of unspecified species will be removed, including three sycamores and one oak tree. The Project will also include a sewer lift station and force main to pump wastewater from the facility to an existing off-site collection system. Storm water from the Project Area will drain into three underground detention systems and ultimately into the unnamed intermittent stream that traverses the northern portion of the Project Area.

Location: The proposed Project Area is located at 3586 Airline Highway in unincorporated San Benito County, California; Assessor's Parcel Number 020-330-010; 36.8162, -121.3679. Vehicular access to the Project Area is from Airline Highway, along an existing driveway. The Project Area is comprised of non-native grassland.

Timeframe: Unspecified.

COMMENTS AND RECOMMENDATIONS

CDFW offers the comments and recommendations below to assist San Benito County 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.

The IS/MND prepared for the Project recognizes the presence of an intermittent drainage within the Project Area as well as the potential for several special-status species to occur within or in the vicinity of the Project Area including the State species of special concern burrowing owl (*Athene cunicularia*). As currently drafted, the mitigation measures that address these resources may not be enforceable or sufficient in reducing impacts to a level that is less than significant. In addition, the measures currently included defer mitigation for impacts to these resources to a later date. The IS/MND also discounts the potential for the State and federally threatened California tiger salamander (*Ambystoma californiense*) to occur in the Project Area and does not include any mitigation measures for the species, concluding that the species may potentially be extirpated from the area based on negative findings from a pitfall trap survey conducted within the Project Area in the winter of 2018/2019 and larval sampling

conducted in off-site ponds within the vicinity of the Project Area in the spring of 2019. However, the survey report summarizing California tiger salamander (CTS) survey efforts states that a pond with appropriate hydrological condition to support CTS breeding, and which has been documented as a CTS breeding pond in the past, does lie within the dispersal distance of the Project Area. For this reason, CDFW does not concur with a negative finding for CTS and recommends that additional survey work being conducted to fully evaluate the potential for the Project to result in take of the species.

If results of these additional assessments indicate significant environmental impacts will occur as a result of Project implementation and cannot be mitigated to less than significant levels, an MND may not be appropriate. Further, when an MND is prepared, mitigation measures must be specific and clearly defined and cannot be deferred to a future time. However, when an Environmental Impact Report (EIR) is prepared, provided the lead agency commits to mitigation and establishes performance standards for implementation, the specifics of mitigation measures may be deferred. Regardless of whether an MND or EIR is prepared, the CEQA document must provide quantifiable and enforceable measures as needed that will reduce impacts to less than significant levels.

I. Environmental Setting and Related Impact

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 the United States Fish and Wildlife Service (USFWS)?

COMMENT 1: CTS

Section 4 Biological Resources, Special-Status Amphibians, Page 33

Issue: The IS/MND states that CTS may be extirpated from the Project Area and its vicinity based on negative findings of pitfall trap surveys conducted within the Project Area in the winter of 2018/2019 and larval sampling conducted in five off-site ponds lying within 0.5-miles of the Project Area in the spring of 2019. As a result of these negative findings, the IS/MND, as currently drafted, includes no mitigation measures for CTS. However, the survey report summarizing the findings of this survey effort states that one pond in the vicinity of the Project Area supports suitable hydrologic conditions for CTS breeding. In addition, although these surveys employed methodologies referenced in the USFWS's "Interim Guidance on Site Assessment and Field Surveys for Determining Presence or a Negative Finding of the California Tiger Salamander" (2003) protocol, the full survey protocol was not conducted. Therefore, in the absence of additional survey work, CDFW cannot concur with a negative finding determination.

Specific impact: Without appropriate avoidance and minimization measures for CTS, potential significant impacts associated with the Project's construction include burrow collapse, inadvertent entrapment, reduced reproductive success, reduction in health and vigor of eggs, larvae and/or young, and direct mortality of individuals.

Evidence impact would be significant: Up to 75% of historic CTS habitat has been lost to development (Shaffer et al. 2013). Loss, degradation, and fragmentation of habitat are the primary threats to CTS (CDFW 2015, USFWS 2017). The Project Area is within the range of CTS and is comprised of potentially suitable habitat (i.e. loamy soils with potential to be colonized by fossorial small mammals). As a result, there is potential for CTS to occupy or colonize the Project Area and for the Project to impact CTS.

Recommended Potentially Feasible Mitigation Measure(s) (Regarding Environmental Setting and Related Impact)

To evaluate potential impacts to CTS associated with the Project, CDFW recommends conducting the following evaluation of the Project Area and including the following mitigation measures as conditions of Project approval.

Recommended Mitigation Measure 1: Focused CTS Surveys

Because (1) the survey report concluded that a pond within 0.5 miles of the Project Area is potentially suitable to support breeding CTS, (2) small mammal burrows were found within the Project Area, and (3) the full survey protocol was not completed, CDFW recommends that a qualified biologist implement the full survey protocol outlined in the USFWS 2003 "Interim Guidance on Site Assessment and Field Surveys for Determining Presence or a Negative Finding of the California Tiger Salamander." Specifically, an additional spring larval sampling effort of the off-site ponds in the vicinity of the Project Area is necessary to fully evaluate potential Project-related impacts to CTS. Alternatively, in the absence of conducting additional spring larval surveys, CDFW recommends that a pre-construction survey for small mammal burrows (a requisite upland habitat feature for CTS) be conducted to inform an avoidance strategy.

Recommended Mitigation Measure 2: CTS Avoidance

In the absence of additional larval surveys, CDFW advises a minimum 50-foot no-disturbance buffer delineated around all small mammal burrows within or adjacent to the Project construction footprint. If avoidance is not feasible, consultation with CDFW is warranted to determine if the Project can avoid take.

Recommended Mitigation Measure 3: CTS Take Authorization

If through surveys it is determined that CTS are occupying the Project Area and take cannot be avoided, take authorization may be warranted prior to initiating ground-disturbing activities. Take authorization would occur through issuance of an Incidental Take Permit (ITP) by CDFW, pursuant to Fish and Game Code § 2081(b). Alternatively, in the absence of protocol surveys, the applicant can assume presence of CTS within the Project Area and obtain an ITP from CDFW.

COMMENT 2: Burrowing Owl (BUOW)

Section 4 Biological Resources, Mitigation Measures BIO-3, Page 39

Issue: The IS/MND prepared for the Project recognizes the potential for BUOW to occur on or in the vicinity of the Project Area and requires a two-visit (i.e. morning and evening) presence/absence survey for the species be conducted no less than 14 days prior to initiation of construction. If BUOW are detected during the survey, the IS/MND requires consultation with CDFW to develop an avoidance and minimization approach, deferring mitigation to a later date. As a result, this measure may not be effective in evaluating the potential for the Project to impact BUOW and may not be enforceable.

Specific impact: Potentially significant direct impacts associated with the Project's construction include burrow collapse, inadvertent entrapment, nest abandonment, reduced reproductive success, reduction in health and vigor of eggs and/or young, and direct mortality of individuals.

Evidence impact is potentially significant: BUOW rely on burrow habitat year-round for their survival and reproduction. The Project Area is within the range of BUOW and suitable burrow habitat is present on or in the vicinity of the Project Area. Habitat loss and degradation are considered the greatest threats to BUOW in California's Central Valley (Gervais et al. 2008). Therefore, the Project has the potential to significantly impact local BUOW populations. In addition, and as described in CDFW's "*Staff Report on Burrowing Owl Mitigation*" (CDFG 2012), excluding BUOW is considered a potentially significant impact under CEQA.

Recommended Potentially Feasible Mitigation Measure(s) (Regarding Environmental Setting and Related Impact)

To evaluate potential Project-related impacts to BUOW, CDFW recommends conducting the following species-specific evaluation of the Project Area prior to construction and editing the Project's CEQA document to include the following measures.

Recommended Mitigation Measure 4: BUOW Surveys

CDFW recommends assessing presence/absence of BUOW by having a qualified biologist conduct surveys following the California Burrowing Owl Consortium's "*Burrowing Owl Survey Protocol and Mitigation Guidelines*" (CBOC 1993) and CDFW's *Staff Report on Burrowing Owl Mitigation*" (CDFG 2012). In addition, CDFW advises that surveys include a 500-foot buffer around the Project Area.

Recommended Mitigation Measure 5: BUOW Avoidance

Because BUOW occupy burrow habitat year-round, CDFW recommends seasonal no-disturbance buffers, as outlined in the "*Staff Report on Burrowing Owl Mitigation*" (CDFG 2012), be implemented prior to and during any ground-disturbing activities associated with Project implementation. Specifically, CDFW's Staff Report recommends that impacts to occupied burrows be avoided in accordance with the following table unless a qualified biologist approved by CDFW verifies through non-invasive methods that either: 1) the birds have not begun egg laying and incubation; or 2) that juveniles from the occupied burrows are foraging independently and are capable of independent survival.

Location	Time of Year	Level of Disturbance		
		Low	Med	High
Nesting sites	April 1-Aug 15	200 m*	500 m	500 m
Nesting sites	Aug 16-Oct 15	200 m	200 m	500 m
Nesting sites	Oct 16-Mar 31	50 m	100 m	500 m

* meters (m)

Recommended Mitigation Measure 6: BUOW Passive Relocation and Mitigation

If BUOW are found to occupy the Project Area and avoidance is not possible, it is important to note that according to the Staff Report (CDFG 2012), exclusion is not a take avoidance, minimization, or mitigation method and is considered a potentially significant impact under CEQA. However, if necessary, CDFW recommends that burrow exclusion be conducted by qualified biologists and only during the non-breeding season, before breeding behavior is exhibited and after the burrow is confirmed empty through non-invasive methods, such as surveillance. CDFW recommends replacement of occupied burrows with artificial burrows at a ratio of 1 burrow collapsed to 1 artificial burrow constructed (1:1) as mitigation for the potentially significant impact of evicting BUOW. BUOW may attempt to colonize or re-colonize an area that will be impacted; thus, CDFW recommends ongoing

surveillance of the Project Area during Project activities, at a rate that is sufficient to detect BUOW if they return.

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

COMMENT 3: Lake and Streambed Alteration

Section 4 Biological Resources, Mitigation Measures BIO-6, Page 42

Issue: An unnamed intermittent stream traverses the northern portion of the Project Area. Project activities include replacement of an existing culvert which directs flows to this stream, directing storm water drainage into the stream, installing landscaping within the stream, and contouring the existing driveway and placement of a retaining wall within the stream. As currently drafted, the IS/MND concludes that the Project is not anticipated to impact the stream and therefore likely does not require a permit from CDFW for impacts to this feature. This conclusion is based on an observed lack of riparian or wetland vegetation along the portion of the stream that lies within the Project Area during reconnaissance surveys. However, conducting the activities described above within this feature may fall under the regulatory authority of CDFW pursuant CDFW's lake and streambed alteration regulatory authority in accordance with Fish and Game Code § 1602. In addition, Mitigation Measure BIO-6 defers mitigation for these impacts by requiring consultation with CDFW to determine if Notification is warranted at a later date.

Specific impact: Work within streams has the potential to result in substantial diversion or obstruction of natural flows; substantial change or use of material from the bed, bank, or channel (including removal of riparian vegetation); deposition of debris, waste, sediment, toxic runoff or other materials into water causing water pollution and degradation of water quality.

Evidence impact is potentially significant:

<u>Lake and Streambed Alteration</u>
Activities within streams may be subject to CDFW's lake and streambed alteration regulatory authority. Construction activities within these features have the potential to impact downstream waters. Streams function in the collection of water from rainfall, storage of various amounts of water and sediment, discharge of water as runoff and the transport of sediment, and they provide diverse sites and pathways in which chemical reactions take place and provide habitat for fish and wildlife species. Disruption of features such as these can have significant physical, biological, and chemical impacts that can extend into the adjacent uplands adversely effecting not

only the fish and wildlife species dependent on the stream itself, but also the flora and fauna dependent on the adjacent upland habitat for feeding, reproduction, and shelter.

Water Diversion
Water diversions can impact flow regimes. Prolonged low flows can cause water features to become degraded and cause channels to become disconnected from floodplains (Poff et al. 1997). This process decreases available habitat for aquatic wildlife species. In addition, alterations to flows can affect the health of riparian vegetation, reducing habitat quality for wildlife species.

Recommended Potentially Feasible Mitigation Measure(s)

Recommended Mitigation Measure 7: Stream and Wetland Mapping, and Lake and Streambed Alteration

CDFW recommends that formal stream mapping and wetland delineation be conducted by a qualified biologist to determine the location and extent of streams (including any floodplain) and wetlands within and adjacent to the Project Area to help inform how the Project will impact or avoid hydrological alteration. Please note that, while there is overlap, State and Federal definitions of wetlands as well as what activities require Notification pursuant to Fish and Game Code § 1602 differ. Therefore, it is advised that the wetland delineation identify both State and Federal wetlands in the Project Area as well as what activities may require Notification to comply with Fish and Game Code. Fish and Game Code § 2785 (g) defines wetlands; further, § 1600 et seq. applies to any area within the bed, channel, or bank of any river, stream, or lake. It is important to note that while accurate wetland delineations by qualified individuals have resulted in more rapid review and response from the U.S. Army Corps of Engineers and CDFW, substandard or inaccurate delineations have resulted in unnecessary time delays for applicants due to insufficient, incomplete, or conflicting data. CDFW advises that site map(s) designating wetlands as well as the location of any activities that may affect a lake or stream be included with any Project Area evaluations.

Recommended Mitigation Measure 8: Notification of Lake or Streambed Alteration

Fish and Game Code § 1600 et seq. requires an entity to notify CDFW prior to commencing any activity that may (a) substantially divert or obstruct the natural flow of any river, stream, or lake; (b) substantially change or use any material from the bed, bank, or channel of any river, stream, or lake (including the removal of riparian vegetation): (c) deposit debris, waste or other materials that could pass into any river, stream, or lake. “Any river, stream, or lake” includes those that are ephemeral

or intermittent as well as those that are perennial. CDFW is required to comply with CEQA in the issuance of a Lake and Streambed Alteration Agreement. For additional information on Notification requirements, please contact our staff in the Lake and Streambed Alteration Program at (559) 243-4593.

II. Editorial Comments and/or Suggestions

Federally Listed Species: CDFW recommends consulting with the USFWS on potential impacts to federally listed species including, but not limited to, CTS. Take under the Federal Endangered Species Act (FESA) is more broadly defined than CESA; take under FESA also includes significant habitat modification or degradation that could result in death or injury to a listed species by interfering with essential behavioral patterns such as breeding, foraging, or nesting. Consultation with the USFWS, in order to comply with FESA, is advised well in advance of any ground-disturbing activities.

ENVIRONMENTAL DATA

CEQA requires that information developed in EIRs and negative declarations be incorporated into a database that 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 (CNDDB). The CNNDB field survey form can be found at the following link: https://www.wildlife.ca.gov/Data/CNDDB/Submitting-Data. The completed form can be mailed electronically to CNDDB at the following email address: CNDDB@wildlife.ca.gov. The types of information reported to CNDDB can be found at the following link: https://www.wildlife.ca.gov/Data/CNDDB/Plants-and-Animals.

FILING FEES

If it is determined that the Project will impact fish and/or wildlife, an assessment of 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 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 Project to assist San Benito County in identifying and mitigating the Project's impacts on biological resources.

More information on survey and monitoring protocols for sensitive species can be found at CDFW's website (https://www.wildlife.ca.gov/Conservation/Survey-Protocols). Questions regarding this letter or further coordination should be directed to Jim Vang, Environmental Scientist, at the address provided on this letterhead, by telephone at (559) 243-4014 extension 254, or by electronic mail at Jim.Vang@wildlife.ca.gov.

Sincerely,

Julie A. Vance
Regional Manager

ec: Jim Vang
Jim.Vang@wildlife.ca.gov

Jeff Cann
Jeff.Cann@wildlife.ca.gov

REFERENCES

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