



State of California – Natural Resources Agency

DEPARTMENT OF FISH AND WILDLIFE

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July 29, 2025

David Horwitz, Associate Planner
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San Jose, CA 95110
David.Horwitz@pln.sccgov.org

Subject: California Avenue Two-Lot Subdivision, Initial Study/Mitigated Negative Declaration, SCH No. 2025061337, Santa Clara County

Dear David Horwitz:

The California Department of Fish and Wildlife (CDFW) received an Initial Study/Mitigated Negative Declaration (IS/MND) from Santa Clara County (County) for the 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

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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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. € & 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 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.

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PROJECT DESCRIPTION SUMMARY

Proponent: Santa Clara County

Objective: The objective of the Project is a two-lot subdivision of a 10-gross-acre parcel into two lots (Parcel 1 and 2) of approximately five-gross-acres, each. Primary Project activities include:

- Grading the Project site which would involve approximately 80 cubic yards of cut and 74 cubic yards of fill on both future properties to establish the building pad for the residence and to construct a driveway on each lot.

Once the property is subdivided, Parcel 1 and Parcel 2 could be developed with a single-family residence, an accessory dwelling unit (ADU), and a junior accessory dwelling unit (JADU). Future Project activities include:

- Construction of a shared well on Parcel 1, and septic system and fire protection improvements on each parcel.

No tree removal is proposed. No construction of residences is proposed as a part of this subdivision.

Location: The Project is bound by Harding Avenue to the west, California Avenue to the north, and Colony Avenue to the east in the City of San Martin, Santa Clara County. The coordinates for the approximate center of the Project are 37°05'25.2"N latitude 121°37'09.0"W longitude (WGS 84). The Assessor's Parcel Number is 779-08-001.

Timeframe: Not noted in the Initial Study

COMMENTS AND RECOMMENDATIONS

CDFW offers the comments and recommendations below to assist the 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. Based on the Project's avoidance of significant impacts on biological resources with implementation of migration measures, CDFW concludes that a MND is appropriate for the Project.

I. Project Description and Related Impact Shortcoming

COMMENT 1: Biologist Report

Issue: The IS/MND references a Biologist Report (pages 12, 13, 14, and 15), as part of the proposed Project, but the document was not provided as an attachment on

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CEQAnet or at the Planning & Development website (<https://plandev.santaclaracounty.gov/services/planningservices/projects/current-planning-projects>) provided in the Notice of Intent to Adopt a MND. Without a clear understanding of the environmental setting and biological baseline conditions, it is not possible to determine potentially significant impacts the Project could have on the environment.

Specific impacts, why they would occur, and evidence they would be significant: Without a clear understanding of the environmental setting and biological baseline conditions of all aspects of the Project, it is challenging for CDFW to provide sufficient review of the IS/MND, assess all potential impacts of the Project, and provide adequate mitigation measures to offset the impacts.

Recommendations: CDFW recommends that, at minimum, the Biologist Report be provided in a recirculated IS/MND for CDFW's review.

II. 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 (USFWS)?

COMMENT 2: Burrowing Owl

Issue: While the IS/MND acknowledges that burrowing owl have a moderate potential of occurrence due to the presence of ground squirrel (*Marmotini*) burrows on the property (pages 13 and 15), biological mitigation measures BIO-MIT 8, 9, and 11 may not adequately mitigate impacts to burrowing owl to less-than-significant.

Specific impacts, why they would occur, and evidence they would be significant: BIO-MIT 8 does not reference the *Department of Fish and Game* [currently CDFW] *Staff Report on Burrowing Owl Mitigation* (2012) (CDFW 2012 Staff Report), which outlines habitat assessment and reporting details. The survey distance of 250 feet required by BIO-MIT 9 (pages 16 and 17) 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-MIT 9 of 250 feet (pages 16-17) may be too small to fully avoid impacts to burrowing owl, especially during the nesting season. Lastly, BIO-MIT 11 describes passive relocation activities (pages 17 and 18). 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

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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 and supports ground squirrel burrows on the property which may provide potential foraging habitat for burrowing owl as well as suitable nesting and roosting habitat where California ground squirrel burrows are present. Additionally, the Project could impact resident, wintering, and nesting burrowing owl in burrows or other suitable refugia within 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 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). Burrowing 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 the following:

Incorporate the bolded wording into BIO-MIT 8.

BIO-MIT 8: Burrowing Owl Habitat Assessment. A habitat assessment for burrowing owl shall be conducted within 30 days of grading, or construction

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activities that shall result in ground disturbance or vegetation removal, to confirm that habitat for burrowing owl is absent from the site. If the habitat assessment confirms that habitat for this species is absent from the site, then no further mitigation for burrowing owl would be required. **A qualified biologist shall conduct a habitat assessment according to methods described in Appendix C of the Department of Fish and Game Staff Report on Burrowing Owl Mitigation (2012) (<https://wildlife.ca.gov/Conservation/Survey-Protocols#377281284-birds>). A habitat assessment report shall be submitted to CDFW for review prior to Project activities.**

Incorporate the information below into BIO-MIT 9.

Mitigation Measure BIO-1.1 (Burrowing Owl Habitat Assessment and Surveys): A qualified biologist shall conduct surveys, following the *Department of Fish and Game Staff Report on Burrowing Owl Mitigation (2012)* methodology 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.

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

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(1,640 feet). Any detected owl shall be monitored by the qualified biologist to ensure it is not disturbed during construction activities.

Incorporate the information below into BIO-MIT 11.

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.

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.)


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CONCLUSION

CDFW appreciates the opportunity to comment on the IS/MND to assist the County 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
Regional Manager
Bay Delta Region

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

ec: Office of Land Use and Climate Innovation (SCH No. 2025061337)
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
Mammals	
American badger (<i>Taxidea taxus</i>)	State Species of Special Concern
Amphibians	
California tiger salamander - central California, Distinct Population Segments (DPS, <i>Ambystoma californiense</i> pop. 1)	Federal Threatened, State Threatened, State Watch List
Invertebrates	
Crotch's bumble bee (<i>Bombus crotchii</i>)	State Candidate Endangered