



## Memorandum

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May 22, 2018

Project #2983-04

**To:** Amie Ashton, David J. Powers & Associates

**From:** Ginger Bolen, H. T. Harvey & Associates

**Subject:** Dove Hill Medical Care Facility Initial Study/Mitigated Negative Declaration  
– Response to Comments from Lozeau Drury LLP on the Biological Resources  
Section

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This memorandum was prepared to provide information to David J. Powers & Associates and the City of San Jose for use in responding to comments on the Initial Study/Mitigated Negative Declaration (IS/MND) for the Dove Hill Medical Care Facility Project. It presents H. T. Harvey & Associates' responses to Lozeau Drury LLP's comments on the biological resources chapter of the IS/MND.

**Response to Comment D-a. The wildlife baseline relied upon by the IS/MND is woefully inadequate.**

The commenter contends that the Project may have significant impacts on several special-status species; that “The IS/MND’s baseline for biological impacts is incomplete, outdated, and understates the biological value at the Project site”; and that “the surveys conducted for the Project do not provide substantial evidence of the presence or absence of species of concern that are known to be present in the vicinity.” Specifically, the commenter states that, for the burrowing owl (*Athene cunicularia*), the Project’s baseline must be informed by protocol-level surveys that can determine the presence or absence of the species on the site.

The burrowing owl is a covered species under the Santa Clara Valley Habitat Plan (VHP)<sup>1</sup>, and the proposed Project is a covered Project under the VHP, which was developed to provide a long-term, coordinated program for habitat restoration and conservation throughout the Santa Clara Valley while improving and streamlining the permit process for endangered species and wetland regulations. Rather than individually conducting exhaustive species surveys, and negotiating/securing mitigation, proponents of VHP-covered projects receive their endangered species permits from the U.S. Fish and Wildlife Service (USFWS) and California Department of Fish and Wildlife (CDFW) by paying a single fee (and/or dedicating land), conducting limited surveys as

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<sup>1</sup> ICF International. 2012. Final Santa Clara Valley Habitat Plan, Santa Clara County, California. Prepared for the County of Santa Clara, City of San José, City of Morgan Hill, City of Gilroy, Santa Clara Valley Water District, and Santa Clara Valley Transportation Authority.

specified by the VHP, adhering to specified conditions to avoid and minimize impacts during construction. The VHP analyzes the effects of future development and other activities that could adversely affect the species that are “covered” by the VHP and describes the process by which conservation actions will be taken to benefit these species. As a result of these conservation actions, the VHP will have a net benefit on all covered species.

The VHP was approved by the USFWS and the CDFW in 2013. An Environmental Impact Statement/Environmental Impact Report (EIS/EIR) analyzing the potential impacts of implementation of the VHP, as well as the benefits of all avoidance, minimization, and mitigation requirements for covered species, was prepared by the federal lead agency (i.e., USFWS), the state lead agencies (i.e., County of Santa Clara, City of San Jose, City of Morgan Hill, City of Gilroy, Santa Clara Valley Water District, and Santa Clara Valley Transit Authority), and the California Environmental Quality Act (CEQA) Responsible Agency (i.e., CDFW) in accordance with the National Environmental Policy Act (NEPA) and CEQA. The Final EIS/EIR was issued in August 2012. For the 18 species covered, including the burrowing owl, adherence to the requirements set forth in the VHP satisfies any mitigation requirements of CEQA.

In conformance with the VHP, the Project proponent would pay all required impact fees in accordance with the types and acreage of habitat or “land cover” impacted, and would implement conservation measures specified by the VHP. Land cover impacts are used because it is the best predictor of potential species habitat, and is applicable to all of the covered species (with the partial exception of the burrowing owl, as described below). Surveys to determine presence/absence of species are not required for all species because, to make the provisions of the VHP simple and predictable, covered species are assumed to occupy suitable habitat in impact areas, and mitigation is based on the assumption of take. Results of land cover mapping are used to determine which pre-construction and construction monitoring surveys are necessary, if any.

For the burrowing owl, habitat surveys (i.e., mapping areas with burrows and all burrows that may be occupied, as indicated by tracks, feathers, egg shell fragments, pellets, prey remains, or excrement) are required only if the study area is located within modeled occupied nesting habitat (see Figure 5-11 of the VHP). Surveys are not required in sites that are mapped as potential burrowing owl nesting or overwintering habitat only. The Project site is not located within modeled occupied nesting habitat for the burrowing owl. Thus, mapping of burrows present on the site is not required under the VHP. Although we agree that reconnaissance surveys conducted for the Project were insufficient to determine presence/absence of the burrowing owl conclusively, it is our judgement that the reconnaissance surveys were sufficient to determine whether potentially suitable habitat for this species is present on the Project site, per the requirements of the VHP. Furthermore, based on decades of experience performing surveys in the Project vicinity, we know that breeding burrowing owls have not been observed in the Project vicinity since the 1990s, and there is no expectation that burrowing owls currently breed on the Project site.

In regards to bats, the commenter states that no surveys were performed that could detect bats and without having looked for bats, “... the IS/MND cannot have disclosed their presence or the extent of any impact to that species.”

The potential presence of bat roosts on the Project site is acknowledged on page 14 of the Biotic Assessment<sup>2</sup> included as Appendix B of the IS/MND, as well as Impact Statement BIO-3 of the IS/MND. In addition, for the purposes of the analysis of potential impacts of the Project on bats, bats are assumed to occupy suitable habitat in the impact area, and mitigation measures to reduce impacts on bats to a less-than-significant level are provided based on the assumption that impacts could potentially occur. Therefore, because bats are assumed to be potentially present and impacts on bats are assumed to be potentially significant, additional focused surveys are not warranted for the purpose of analysis of significant impacts under CEQA.

Regarding the white-tailed kite (*Elanus leucurus*) and loggerhead shrike (*Lanius ludovicianus*), the commenter asserts that “Following careful consideration by resource agency and non-agency wildlife biologists working on these species, it has been determined that every loss of individuals or pairs of these species is significant. H. T. Harvey & Associates’ opinion is contrary to the State of California and most other wildlife biologists with expertise on white-tailed kite and loggerhead shrike.”

Both the white-tailed kite and the loggerhead shrike are designated as Species of Special Concern by the CDFW. Per the CDFW<sup>3</sup>, “Species of Special Concern’ is an administrative designation and carries no formal legal status. The intent of designating Species of Special Concern is to:

- focus attention on animals at conservation risk by the Department, other State, local and Federal governmental entities, regulators, land managers, planners, consulting biologists, and others;
- stimulate research on poorly known species;
- achieve conservation and recovery of these animals before they meet California Endangered Species Act criteria for listing as threatened or endangered”

Further, as stated by the CDFW, Sections 15063 and 15065 of the CEQA Guidelines, which address how an impact is identified as significant, are particularly relevant to Species of Special Concern. Project-level impacts to listed (rare, threatened, or endangered) species are generally considered significant. In assigning "impact significance" to populations of non-listed species (e.g., Species of Special Concern), analysts usually consider factors such as population-level effects, proportion of the taxon's range affected by a project, regional effects, and impacts to habitat features.

Thus the analysis of potential project impacts on white-tailed kites and loggerhead shrikes based on impacts on habitat features (e.g., nesting habitat) and population-level effects (i.e., potential loss of up to one pair of each species based on known nesting territory size) is consistent with the CDFW’s stated purpose of the Species of Special Concern designation.

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<sup>2</sup> H. T. Harvey & Associates. 2015. Biotic Assessment (2015 Update), Dove Hill Road Assisted Living Project, San Jose, California.

<sup>3</sup> [CDFW] California Department of Fish and Wildlife. 2018. Species of Special Concern. Available at <https://www.wildlife.ca.gov/Conservation/SSC#394871319-how-are-sscs-addressed-under-the-california-environmental-quality-act>

The white-tailed kite is also designated as fully protected as defined under Section 3511 of the California Fish and Game Code. Fully Protected species may not be taken or possessed at any time and no licenses or permits may be issued for their take except for collecting these species for necessary scientific research and relocation of the bird species for the protection of livestock. In addition, as stated on page 55 of the IS/MND "...migratory birds, including nesting raptors, are protected under the Migratory Bird Treaty Act (MBTA) and the California Department of Fish and Game Code." Further, per Condition 1 of the VHP, actions conducted under the VHP must comply with the provisions of the MBTA and California Fish and Game Code. Mitigation Measure BIO-2.1 of the IS/MND specifies measures to be implemented by the Project to avoid impacts on individuals and active nests of migratory birds, including the white-tailed kite and loggerhead shrike. Thus, with implementation of mitigation measures, the Project is not expected to result in the loss of any white-tailed kites or loggerhead shrikes.

The commenter further asserts that the IS/MND does address the Project's impacts on foraging habitat for loggerhead shrikes and white-tailed kites.

As described in the IS/MND, the proposed Project would result in the disturbance of up to 3.0 acres of weedy non-native annual grasses and forbs (potential foraging habitat) and developed habitats and would be replaced with developed and landscaped areas associated with the assisted living facility. Land use throughout the remainder of the approximately 21-acre Project site would remain largely unchanged and would be maintained as undeveloped, permanent private open space. Thus, the approximately 18-acres of open space would continue to provide foraging habitat of equal quality relative to that currently present on the site. In addition, the landscaped areas around the new facility would provide foraging habitat similar in value to the landscaped habitats currently on the site. Further, due to the widespread nature of ruderal grassland and landscaped habitats in the Project region, the disturbance of 3.0 acres of such habitats would not rise to the level of a substantial impact on regionally available foraging habitat for the animal species that occur on the Project site. Therefore, loss of foraging habitat is not considered a significant impact under CEQA.

The commenter suggests that live-trapping for the San Francisco dusky-footed woodrat (*Neotoma fuscipes annectens*) is necessary to determine the species' presence on the site.

San Francisco dusky-footed woodrats build large, complex nests of sticks and other woody debris that are highly detectable in the habitat types present on the Project site. As stated in the Biotic Assessment, a focused survey for nests of the San Francisco dusky-footed woodrat conducted on February 9, 2009 detected no nests or other evidence of this species on the site.

The commenter suggests that the IS/MND fails to address the Project's possible impacts on the non-breeding habitat of the California tiger salamander (*Ambystoma californiense*) and California red-legged frog (*Rana draytonii*).

The Project site does not provide suitable breeding habitat for the California tiger salamander or the California red-legged frog. Thus, for California red-legged frogs or California tiger salamanders to be present on the site, potential breeding habitat must occur within the known dispersal distance for this species (2.0 miles for the California red-legged frog and 1.3 miles for the California tiger salamander), and there must be no barriers to

dispersal between the breeding site and the Project site. As stated in the Biotic Assessment, no waterbodies providing suitable breeding habitat for either species are present on or immediately adjacent to the Project site. Although the California tiger salamander previously bred in a pond north of the site, southeast of the Yerba Buena Road/U.S. 101 interchange, that pond was filled in the 1990s. A pond southeast of the intersection of Hassler Parkway and Dove Hill Road south of the Project site was recently constructed as a stormwater management feature for the Ranch on Silver Creek Project. However, the perennial conditions in this pond and in a pond just upstream likely support bullfrogs (*Rana catesbeiana*), and possibly fish, which would inhibit the establishment or persistence of a population of California tiger salamanders or California red-legged frogs. Furthermore, the developed area in which Project construction would occur does not provide suitable upland habitat for these special-status amphibians. Therefore, the California tiger salamander and California red-legged frog are not expected to occur within the Project's impact areas, and likely do not occur on-site at all.

Nevertheless, both the California red-legged frog and California tiger salamander are covered species under the VHP. As described above, covered species are assumed to occupy suitable habitat in impact areas, and mitigation is based on the assumption of take. Thus, the Project's adherence to the requirements of the VHP, including payment of required land cover impact fees, would reduce impacts on this species and its habitat, including foraging habitat, to a less-than-significant level.

Finally, the commenter asserts that the IS/MND understates the range of animal species that likely are present on the site.

Under State CEQA Guidelines section 15065, a project's effects on biotic resources are deemed significant where the project would (1) substantially reduce the habitat of a fish or wildlife species, (2) cause a fish or wildlife population to drop below self-sustaining levels, (3) threaten to eliminate a plant or animal community, or (4) reduce the number or restrict the range of a rare or endangered plant or animal. Under CEQA, a project is not required to identify every species of plant and animal potentially occurring on a project site. The IS/MND, which incorporates the Biotic Assessment for the project as Appendix B, specifically addresses the potential for the project to result in significant impacts on those special-status animal species determined to potentially occur on the project site, as well as the potential for project impacts to substantially impact common species (e.g., nesting birds).

#### **Response to Comment D-b. The IS/MND fails to address the Project's potential significant impacts on wildlife movement.**

The commenter expresses concern that the IS/MND and Biotic Assessment fail to address impacts on wildlife movement.

As discussed in the IS/MND, the vast majority of the Project footprint is currently developed and highly disturbed. Weedy non-native annual grasses and forbs and developed habitats that currently exist in the approximately 3.0-acre Project footprint would be disturbed during redevelopment and would be replaced with developed and landscaped areas associated with the assisted living facility. However, no aquatic habitat is present in the development footprint or within the wider Project site. Thus, the Project would not interfere

with the movement of any aquatic wildlife species. In addition, land use throughout the remainder of the approximately 21-acre Project site would remain largely unchanged and would be maintained as undeveloped, permanent private open space. Thus, we expect wildlife use of the open space portion of the Project site following Project implementation to be similar to existing conditions. Avian and bat species that currently forage on the site are expected to continue to forage throughout the majority of the Project site, which will consist of open space.

Furthermore, the Project site is not located in an area that is particularly important for wildlife movement. To the west, Coyote Creek represents an important wildlife movement pathway, but the Project site is separated from Coyote Creek by Highway 101, a complete barrier to dispersal between the site and Highway 101. Any meaningful, regional movement of animals between the southwest and northeast sides of Highway 101 in the Project vicinity would occur via the large undercrossing to the south, where Highway 101 crosses over the creek south of Hellyer Avenue. To the east, large-scale, biologically important movement by animals occurs along Coyote Ridge and along the eastern side of the urban San Jose area. However, the Project site is located at the extreme northwestern edge of Coyote Ridge (due to the barrier formed by Highway 101 and surrounding development to the north and south), and animals involved in regional movements are not expected to occur on the Project site.

Thus, construction of the hospital facility would not interfere substantially with the movement of any native resident or migratory fish or wildlife species or with established native resident or migratory wildlife corridors, including those identified in the *Coyote Valley Landscape Linkage* report<sup>4</sup>, or impede the use of native wildlife nursery sites.

**Response to Comment D-c. The Project may have significant effects on wildlife resulting from collisions with the vehicles associated with the Project.**

The commenter expresses concern that the IS/MND does not identify or evaluate the impact of increased traffic on wildlife.

We acknowledge that increased traffic as a result of the Project could result in a rise in the number of animals killed in the Project vicinity. However, the vast majority of such species are expected to be common, urban-adapted species, and any increase in traffic associated with the proposed Project is not expected to result in a substantial impact on the regional populations of these common wildlife species. Furthermore, traffic on Highway 101 immediately adjacent to the site represents a far greater source of vehicular collisions, and any contributions of traffic from the Project to traffic in the vicinity would be negligible from the perspective of risk of wildlife collisions. In addition, as described above, the proposed Project would pay all fees required by the VHP. These fees will contribute to the implementation of the VHP's regional conservation strategy, which is designed to create a fully functioning Reserve System that would benefit not only special-status species

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<sup>4</sup> Santa Clara Valley Open Space Authority and Conservation Biology Institute. 2017. *Coyote Valley Landscape Linkage: A Vision for a Resilient, Multi-benefit Landscape*. Santa Clara Valley Open Space Authority, San José, CA. 74p.

covered by the VHP, but also common wildlife species through the preservation of approximately 46,920 acres of land for the benefit of natural communities, biological diversity, and ecosystem function.

**Response to Comment D-d. The IS/MND fails to address the Project's potential cumulative impacts on habitat fragmentation.**

The commenter states that the IS/MND does not assess the likelihood of cumulative impacts to wildlife especially from habitat fragmentation in the vicinity.

Similar to the existing development on the site, the proposed Project would involve development on only the westernmost approximately 3.0 acres of the approximately 21-acre site. Ruderal and developed habitats that currently exist would be replaced with developed and landscaped areas associated with the assisted living facility. Land use throughout the remainder of the approximately 21-acre Project site would remain largely unchanged and would be maintained as undeveloped, permanent private open space.

Also, as noted above in the Response to Comment D-b, the Project site is located at the very edge of vast open space along Coyote Ridge. There are no large areas of habitat to the north, west, or south of the Project site that would be cut off from Coyote Ridge due to development of the Project. Thus, the Project would not result in any increase in habitat fragmentation and would not contribute to a cumulative impact on habitat fragmentation.

**Response to Comment D-e. The pre-construction surveys identified in the IS/MND are not sufficient to address potential impacts on bats and birds that may be present at the site.**

The commenter expresses concern that pre-construction surveys identified in the IS/MND mitigation measures will come too late either to disclose the Project's anticipated impacts or to fully mitigate impacts to birds and bats. The commenter asserts that detection surveys need to be performed to professional standards and that information used to disclose potential impacts and to inform the pre-construction surveys.

As described under Response to Comment D-a, bats are assumed to potentially occupy suitable habitat in the impact area, and mitigation to reduce impacts on bats to a less-than-significant level is provided based on the assumption of impacts. Further, per Mitigation Measure BIO-3.1, if the required pre-construction survey for roosting bats is conducted during the non-breeding season and evidence of a bat day roost is observed, then prior to building demolition, a follow-up survey shall be completed during the breeding season (March 1 to August 31) to determine whether a maternity roost is present. Further, Mitigation Measure BIO-3.2 assumes a maternity roost may be present and describes the measures necessary to reduce impacts on a maternity roost to a less-than-significant level.

Similarly, it was assumed that active nests of birds protected under the MBTA and California Fish and Game Code would be present on the Project site if work were conducted during the typical avian nesting period. Mitigation Measure BIO-2.1 of the IS/MND specifies measures to be implemented by the Project to avoid loss of migratory birds, including the white-tailed kite and loggerhead shrike, and their active nests. Thus, with

implementation of mitigation measures, the Project is not expected to result in the loss of any individuals of bird species protected by the MBTA or California Fish and Game Code.