State of California – Natural Resources Agency
DEPARTMENT OF FISH AND WILDLIFE
South Coast Region
3883 Ruffin Rd.
San Diego, CA 92123
www.wildlife.ca.gov

GAVIN NEWSOM, Governor
CHARLTON H. BONHAM, Director

July 31, 2020

Kevin Canning
County of Orange
601 North Ross Street
Santa Ana, CA 92701
kevin.canning@ocpw.ocgov.com

Dear Mr. Canning:

LEGACY AT COTO (PROJECT)
MITIGATED NEGATIVE DECLARATION (MND)
SCH# 2020060567

The California Department of Fish and Wildlife (CDFW) received a Notice of Intent to Adopt an MND from the County of Orange (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 alteration regulatory

[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.

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. The Department also administers the Natural Community Conservation Planning (NCCP) program. The County of Orange (County) is a participating landowner under the Central/Coastal Orange County NCCP/Habitat Conservation Plan (HCP).

PROJECT DESCRIPTION SUMMARY

Proponent: County of Orange (County)

Objective: The objective of the Project is to construct a 101-unit active senior living project, including 120 on-site parking spaces. Primary Project activities include clearing, grubbing, grading, demolition, landscaping, construction of a 151,131 square foot building with a subterranean parking facility, and creation of two walking paths. The MND indicates that 93 native and nonnative trees will be removed from the project site.

Location: The Project site is located at 23333 and 23335 Avenida La Caza in unincorporated Orange County. The project site consists of 3.86 acres, bordered to the northwest by Via Alondra, to the southeast by Avenida La Caza, to the east by the existing Coto Valley Country Club, and to the west by existing residential homes and the Silver Bronze Corporation (SBC) tennis courts.

Biological Setting: The Project site contains two separate jurisdictional features in the western and southern portions of the site: both are unnamed tributaries to Canada Gobernadora Creek, which flows south through the Coto de Caza community. The MND indicates that these features will be avoided as part of Project activities and no direct impacts to jurisdictional waters are anticipated. Vegetation communities within the Project site include coast live oak woodland, mixed oak scrub/peppertree woodland, and disturbed/developed land. No sensitive plant or wildlife species were observed on the Project site in the 2019 biological survey. The MND identifies three special status species with a moderate potential to occur within the Project site: pallid bat (*Antrozous pallidus*; California Species of Special Concern (SSC)), western mastiff bat (*Eumops perotis californicus*; SSC), and western red bat (*Lasiurus blossevillii*; SSC). Two special status species have low to moderate potential to occur within the Project site: coastal range newt (*Taricha torosa;* SSC), and coastal whiptail (*Aspidoscelis tigris stejnegeri*; SSC).

Timeframe: The Project is anticipated to be under construction from April 15, 2021 until Fourth Quarter 2022, approximately 18-20 months.

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 mitigation measures, including those CDFW recommends in Attachment A, CDFW concludes that a Mitigated Negative Declaration is appropriate for the Project.

I. Avoidance Measure or Alternative and Related Impact Shortcoming

COMMENT #1: Bat Impacts

Section 8.2, Biological Resources Assessment, Page 19

Issue: Three special status bat species have a moderate potential to occur within the Project site: pallid bat, western mastiff bat, and western red bat. With the current Avoidance Measures proposed, the possibility remains for significant impacts to the three special status bat species.

Specific impact: Although Avoidance Measure BIO-1 described in the MND provides some protection for special status bat species, it does not adequately reduce potential impacts to less than significant. As proposed, Wildlife Avoidance Measure BIO-1 indicates that suitable areas within the Project site and surrounding buffer shall be surveyed for bat roosts prior to construction activities with the following recommendations:

(1) Initial surveys are recommended to be conducted at least 6 months prior to the initiation of vegetation removal and ground disturbing activities, ideally during the maternity season (typically March 1 to August 31), to allow time to prepare mitigation and/or exclusion plans if needed, and

(2) Pre-construction surveys shall be conducted by a qualified bat biologist no more than two weeks prior to the initiation of vegetation removal and ground disturbing activities. Surveys may entail direct inspection of the trees/suitable habitat or nighttime surveys.

BIO-1(a): If active bat roosts are present, a qualified bat biologist shall determine the species of bats present and the type of roost (i.e., day roost, night roost, maternity roost). If the biologist determines that the roosting bats are not a special-status species and the roost is not being used as a maternity roost, then the bats may be evicted from the roost by a qualified bat biologist experienced in developing and implementing bat mitigation and exclusion plans.

BIO-1(a)(i): If special-status bat species or a maternity roost of any bat species is present, but no direct removal of active roosts will occur, a qualified bat biologist shall

determine appropriate avoidance measures, which may include implementation of a construction-free buffer around the active roost.

BIO-2(a)(ii): If special-status bat species or a maternity roost of any bat species is present and direct removal of habitat (roost location) will occur, then a qualified bat biologist experienced in developing bat mitigation and exclusion plans shall develop a mitigation plan to compensate for the lost roost site. Removal of the roost shall only occur when the mitigation plan has been approved by the County and only when bats are not present in the roost. The mitigation plan shall detail the methods of excluding bats from the roost and the plans for a replacement roost in the vicinity of the Project site. The mitigation plan shall be submitted to the County for approval prior to implementation.

The plan shall include: (1) a description of the species targeted for mitigation; (2) a description of the existing roost or roost sites; (3) methods to be used to exclude the bats if necessary; (4) methods to be used to secure the existing roost site to prevent its reuse prior to removal; (5) the location for a replacement roost structure; (6) design details for the construction of the replacement roost; (7) monitoring protocols for assessing replacement roost use; (8) a schedule for excluding bats, demolishing of the existing roost, and construction of the replacement roost; and (9) contingency measures to be implemented if the replacement roosts do not function as designed.

BIO-1(b): If the pre-construction survey determines that no active roosts are present, then trees/suitable habitat shall be removed within two weeks following the pre-construction survey.

BIO-1(c): All potential roost trees shall be removed in a manner approved by a qualified bat biologist, which may include presence of a biological monitor.

BIO-1(d): All construction activity in the vicinity of an active roost shall be limited to daylight hours.

Why impact would occur: Surveys conducted outside of the maternity season may not accurately assess presence or absence of a maternity colony. CDFW recommends that the initial bat surveys be conducted during maternity season (March 1 to August 31) by a qualified bat biologist to confirm if any maternity colonies have been established within the Project site. Surveys should include both a visual inspection and at least one evening emergence and acoustic survey, as a simple visual inspection may not sufficiently identify bat presence. Furthermore, because bats tend to move roosts frequently, CDFW recommends that pre-construction surveys be conducted no more than three days prior to ground disturbing activities or removal of trees/suitable roosting habitat.

Recommended Potentially Feasible Mitigation Measure(s) (Regarding Mitigation Measure or Alternative and Related Impact Shortcoming)

Mitigation Measure #1:

To reduce impacts to less than significant: The initial bat surveys should be conducted during maternity season (March 1 to August 31) by a qualified bat biologist to confirm if any maternity colonies have been established within the Project site. Survey protocol should include an appropriate combination of inspection and sampling, as well as at least one evening emergence and acoustic survey. Any ground disturbance or removal of vegetation/suitable roosting habitat should be conducted no more than three days after pre-construction surveys are completed. Furthermore, eviction of any bats found day-roosting during the maternity season should be avoided. If an active roost is identified during maternity season, CDFW requests the opportunity to review any mitigation and exclusion plans for concurrence prior to implementation.

To reduce potential impacts on pallid bat, western mastiff bat, and western red bat to less than significant, CDFW recommends that Avoidance Measure BIO-1 be amended to read as follows (additions noted in **bold**):

(1) Initial surveys are recommended to be conducted at least 6 months prior to the initiation of vegetation removal and ground disturbing activities. ***Surveys shall be completed during the maternity season*** *(typically March 1 to August 31), to allow time to prepare mitigation and/or exclusion plans if needed, and*

(2) Pre-construction surveys shall be conducted by a qualified bat biologist ***no more than three days prior to*** *the initiation of vegetation removal and ground disturbing activities.* ***Surveys shall include a combination of suitable habitat inspection and sampling, as well as at least one nighttime emergence and acoustic survey.***

BIO-1(a): If active bat roosts are present, a qualified bat biologist shall determine the species of bats present and the type of roost (i.e., day roost, night roost, maternity roost). ***If it is outside of the maternity season (March 1 to August 31)*** *and the biologist determines that the roosting bats are not a special-status species and the roost is not being used as a maternity roost, then the bats may be evicted from the roost by a qualified bat biologist experienced in developing and implementing bat mitigation and exclusion plans.* ***If a roost is identified during maternity season, the bat biologist shall contact CDFW for additional coordination.***

BIO-1(a)(i): If special-status bat species or a maternity roost of any bat species is present, but no direct removal of active roosts will occur, a qualified bat biologist shall determine appropriate avoidance measures, which may include implementation of a construction-free buffer around the active roost. ***Combustion equipment such as generators, pumps, and vehicles shall not be parked or operated under or adjacent to the roost habitat. Vibration and noise shall be avoided, and personnel shall not be present directly under the colony.***

BIO-2(a)(ii): If special-status bat species or a maternity roost of any bat species is present and direct removal of habitat (roost location) will occur, then a qualified bat biologist experienced in developing bat mitigation and exclusion plans shall develop a mitigation plan to compensate for the lost roost site. Removal of the roost shall only

*occur **outside of maternity season**, when the mitigation plan has been approved by the County **and by CDFW**, and only when bats are not present in the roost. The mitigation plan shall detail the methods of excluding bats from the roost and the plans for a replacement roost in the vicinity of the Project site. The mitigation plan shall be submitted to the County **and by CDFW** for **review and** approval prior to implementation.*

The plan shall include: (1) a description of the species targeted for mitigation; (2) a description of the existing roost or roost sites; (3) methods to be used to exclude the bats if necessary; (4) methods to be used to secure the existing roost site to prevent its reuse prior to removal; (5) the location for a replacement roost structure; (6) design details for the construction of the replacement roost; (7) monitoring protocols for assessing replacement roost use; (8) a schedule for excluding bats, demolishing of the existing roost, and construction of the replacement roost; and (9) contingency measures to be implemented if the replacement roosts do not function as designed.

*BIO-1(b): If the pre-construction survey determines that no active roosts are present, then trees/suitable habitat shall be removed within **three days** following the pre-construction survey.*

BIO-1(c): All potential roost trees shall be removed in a manner approved by a qualified bat biologist, which may include presence of a biological monitor.

BIO-1(d): All construction activity in the vicinity of an active roost shall be limited to daylight hours.

COMMENT #2: Coastal Range Newt and Coastal Whiptail Impacts

Section 8.2, Biological Resources Assessment, Page 20

Issue: Two special status species have low to moderate potential to occur within the Project site: coastal range newt and coastal whiptail. The pre-construction survey described in Avoidance Measure BIO-2 is insufficient to identify the presence or absence of these special status species.

Specific impact: Avoidance Measure BIO-2 indicates that a pre-construction presence/absence survey for coastal range newt and coastal whiptail will be performed within 30 days prior to the initiation of construction. That timeframe is inadequate to identify presence of coastal range newt and coastal whiptail in the Project area because it allows for the possibility of those species to move on site after the survey and prior to construction.

Mitigation Measure #2:

To reduce impacts to less than significant:

Pre-construction surveys for coastal range newt and coastal whiptail should be conducted the same day as commencement of construction related activities. To reduce potential impacts on coastal range newt and coastal whiptail to less than significant, CDFW recommends that the Avoidance Measure be amended to read as follows:

A pre-construction presence/absence survey for Coastal Range newt and coastal whiptail shall performed by a qualified biologist on the day that construction activities, including demolition and grading activities, occur within the Project site where suitable habitat is present. The survey methodology shall be consistent with accepted protocols or guidelines for determining presence of sensitive reptile and/or amphibian species in southern California. If either species is detected within the Project site during the survey, avoidance and minimization measures shall be implemented such as temporary fencing.

Construction personnel shall conduct daily inspection of trenches and holes for entrapped wildlife each morning prior to the onset of Project construction, and inspection of pipes, culverts, and similar construction material for entrapped wildlife at the beginning and end of the day.

Commented [EWO1]: What is the protocol if they find them and its in the grading footprint? Would suggest they get a SCP and collect and move individuals.

COMMENT #3: Species Relocation Plan

Section 8.2, Biological Resources Assessment, Page 20

Issue: A Species Relocation Plan may be an appropriate addition to the MND to indicate protocol should any species be found.

Specific impact: In addition to CESA, the Department currently implements its authority to issue permits for the take or possession of wildlife, including mammals, birds, and the nests and eggs thereof, reptiles, and amphibians, fish, certain plants, and invertebrates for scientific, educational, and propagation purposes through Section 650, Title 14, California Code of Regulations, by issuing Scientific Collecting Permits. If wildlife is to be physically touched and/or moved, the County should provide a Species Relocation Plan to the Department for approval prior to the commencement of construction activities. The Department generally does not support the use of relocation, salvage, and/or transplantation as mitigation for impacts to species, as studies have shown that these efforts are experimental in nature and largely unsuccessful.

Mitigation Measure #3:

To reduce impacts to less than significant:

On site biologists shall be required to obtain, as applicable, Scientific Collecting Permits (SCP). The Species Relocation Plan may include protocol for the SCP-holding biologist to capture unharmed and release found species in appropriate habitat an adequate distance from the project site, unless they are a federally and/or state-listed species in

which coordination and direction from United States Fish and Wildlife Service and/or CDFW, respectively, shall be required.

ENVIRONMENTAL DATA

CEQA requires that information developed in environmental impact reports and negative declarations be incorporated into a data base 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 (CNDDB). The CNNDB field survey form can be found at the following link: http://www.dfg.ca.gov/biogeodata/cnddb/pdfs/CNDDB_FieldSurveyForm.pdf. 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: http://www.dfg.ca.gov/biogeodata/cnddb/plants_and_animals.asp.

FILING FEES

The Project, as proposed, would have an impact on fish and/or wildlife, and 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 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 Jessie Lane, Environmental Scientist at (858) 636-3159 or Jessie.Lane@wildlife.ca.gov.

Sincerely,

DocuSigned by:
Erinn Wilson-Olgin
B6E58CFE24724F5...

Erinn Wilson-Olgin
Environmental Program Manager
South Coast Region

ec: Office of Planning and Research, State Clearinghouse, Sacramento

Attachments

A. Draft MMRP (CDFW 2020)

Attachment A:

CDFW Draft Mitigation, Monitoring, and Reporting Plan and Associated Recommendations

Biological Resources			
	Mitigation Measures	**Timing**	**Responsible Party**
MM-BIO-1	(1) Initial surveys are recommended to be conducted at least 6 months prior to the initiation of vegetation removal and ground disturbing activities. Surveys shall be completed during the maternity season (typically March 1 to August 31), to allow time to prepare mitigation and/or exclusion plans if needed, and (2) Pre-construction surveys shall be conducted by a qualified bat biologist no more than three days prior to the initiation of vegetation removal and ground disturbing activities. Surveys shall include a combination of suitable habitat inspection and sampling, as well as at least one nighttime emergence and acoustic survey. BIO-1(a): If active bat roosts are present, a qualified bat biologist shall determine the species of bats present and the type of roost (i.e., day roost, night roost, maternity roost). If it is outside of the maternity season (March 1 to August 31) and the biologist determines that the roosting bats are not a special-status species and the roost is not being used as a maternity roost, then the bats may be evicted from the roost by a qualified bat biologist experienced in developing and implementing bat mitigation and exclusion plans. If a roost is identified during maternity season, the bat	Prior to Construction	County of Orange

	biologist shall contact CDFW for additional coordination. BIO-1(a)(i): If special-status bat species or a maternity roost of any bat species is present, but no direct removal of active roosts will occur, a qualified bat biologist shall determine appropriate avoidance measures, which may include implementation of a construction-free buffer around the active roost. Combustion equipment such as generators, pumps, and vehicles shall not be parked or operated under or adjacent to the roost habitat. Vibration and noise shall be avoided, and personnel shall not be present directly under the colony. BIO-2(a)(ii): If special-status bat species or a maternity roost of any bat species is present and direct removal of habitat (roost location) will occur, then a qualified bat biologist experienced in developing bat mitigation and exclusion plans shall develop a mitigation plan to compensate for the lost roost site. Removal of the roost shall only occur outside of maternity season, when the mitigation plan has been approved by the County and by CDFW, and only when bats are not present in the roost. The mitigation plan shall detail the methods of excluding bats from the roost and the plans for a replacement roost in the vicinity of the Project site. The mitigation plan shall be submitted to the County and by CDFW for review and approval prior to implementation. The plan shall include: (1) a description of the species targeted for mitigation; (2) a description of the existing roost or roost sites; (3) methods to be used to exclude the		

	bats if necessary; (4) methods to be used to secure the existing roost site to prevent its reuse prior to removal; (5) the location for a replacement roost structure; (6) design details for the construction of the replacement roost; (7) monitoring protocols for assessing replacement roost use; (8) a schedule for excluding bats, demolishing of the existing roost, and construction of the replacement roost; and (9) contingency measures to be implemented if the replacement roosts do not function as designed. BIO-1(b): If the pre-construction survey determines that no active roosts are present, then trees/suitable habitat shall be removed within three days following the pre-construction survey. BIO-1(c): All potential roost trees shall be removed in a manner approved by a qualified bat biologist, which may include presence of a biological monitor. BIO-1(d): All construction activity in the vicinity of an active roost shall be limited to daylight hours.		
MM-BIO-2	A pre-construction presence/absence survey for Coastal Range newt and coastal whiptail shall performed by a qualified biologist on the day that construction activities, including demolition and grading activities, occur within the Project site where suitable habitat is present. The survey methodology shall be consistent with accepted protocols or guidelines for determining presence of sensitive reptile and/or amphibian species in southern California. If either species is detected within the Project site during the survey, avoidance and minimization measures	Prior to and During Construction	County of Orange

	shall be implemented such as temporary fencing. Construction personnel shall conduct daily inspection of trenches and holes for entrapped wildlife each morning prior to the onset of Project construction, and inspection of pipes, culverts, and similar construction material for entrapped wildlife at the beginning and end of the day. A Species Relocation Plan may be an appropriate addition to the MND to indicate protocol should any species be found. On site biologists shall be required to obtain, as applicable, Scientific Collecting Permits (SCP). The Species Relocation Plan may include protocol for the SCP-holding biologist to capture unharmed and release found species in appropriate habitat an adequate distance from the project site, unless they are a Federally and/or State-listed species in which coordination and direction from USFWS and/or CDFW, respectively, shall be required. In addition to CESA, the Department currently implements its authority to issue permits for the take or possession of wildlife, including mammals, birds, and the nests and eggs thereof, reptiles, and amphibians, fish, certain plants, and invertebrates for scientific, educational, and propagation purposes through Section 650, Title 14, California Code of Regulations, by issuing Scientific Collecting Permits. If wildlife is to be physically touched and/or moved, the County should provide a Species Relocation Plan to the Department for approval prior to the commencement of construction activities. The Department		

	generally does not support the use of relocation, salvage, and/or transplantation as mitigation for impacts to species, as studies have shown that these efforts are experimental in nature and largely unsuccessful.		
MM-BIO-3	On site biologists shall be required to obtain, as applicable, Scientific Collecting Permits (SCP). The Species Relocation Plan may include protocol for the SCP-holding biologist to capture unharmed and release found species in appropriate habitat an adequate distance from the project site, unless they are a federally and/or state-listed species in which coordination and direction from United States Fish and Wildlife Service and/or CDFW, respectively, shall be required.	Prior to and During Construction	County of Orange