



August 28, 2018

Via E-Mail

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**Re: Dove Hill Medical Care Project (Project Files Nos. PDC14-051 and PD16-019)**

Dear Mayor Liccardo, City Council Members, and Ms. Le:

Please accept these additional supplemental comments on behalf of the Laborers International Union of North America, Local Union 270 and its members living in and around the City of San Jose (“LIUNA”) regarding the Initial Study and Mitigated Negative Declaration (“IS/MND”) prepared for the Dove Hill Medical Care Project (“Project”) (Project Files Nos. PDC14-051 and PD16-019). These comments supplement previous comments dated April 30, 2018 and July 25, 2018 submitted on behalf of LIUNA. LIUNA has retained the services of expert wildlife biologist Dr. Shawn

Smallwood to review the biological review contained in the Project's IS/MND as well as several responses prepared by the City's staff to prior comments submitted by Dr. Smallwood.

Dr. Smallwood has prepared the attached additional comments for the Council's and staff's review. Based on a recent visit he made to the site, Dr. Smallwood has confirmed that numerous ground squirrel burrows are located immediately adjacent to the Project site. Such burrows are commonly used by burrowing owls and indicate there is a likelihood that burrowing owls may be present at or adjacent to the Project site, especially during their nesting season. Likewise, the burrows observed by Dr. Smallwood are the type of burrows utilized by California tiger salamanders as upland habitat and are accessible to tiger salamanders documented near the site. He also observed several other sensitive bird species including Cooper's hawk, red-tailed hawk, and Common yellowthroat foraging and flying at or adjacent to the Project site.

Despite Dr. Smallwood's evidence of the likely presence of burrowing owls immediately adjacent to the site, no burrowing surveys were conducted during the owl's nesting season in order to determine whether or not the owls are actually present at the site. As a result, the IS/MND fails to address the possible impacts the Project's construction and operation may have on nearby burrowing owls and/or their habitat.

Likewise, the IS/MND makes no mention of the potential impacts the Project may have to foraging and other habitat of the sensitive bird species identified by Dr. Smallwood at or adjacent to the Project site, including Cooper's hawk, red-tailed hawk and Common yellowthroat. The IS/MND for the Project does not address potential impacts Cooper's hawk, red-tailed hawk, or San Francisco common yellowthroat. The Cooper's hawk, red-tailed hawk and San Francisco common yellowthroat are not covered by the Santa Clara Valley Habitat Plan ("VHP"). The Cooper's hawk and red-tailed hawk are not addressed at all in either the VHP EIR or 2040 General Plan EIR. Accordingly, no CEQA review of the Project's impacts to these three species has been done.

Additionally, Dr. Smallwood observed the pathways that remain between a known salamander location and the Project site and noted the likelihood that salamanders would be moving through the site to access the numerous ground squirrel burrows on the adjacent hillside. Again, no surveys were conducted by the Project capable of determining whether salamanders already are present in those burrows at certain times of the year.

As discussed below and in Dr. Smallwood's supplemental comments, staff's reliance on conclusory statements by the Project's consultants and components of a habitat conservation plan applicable to statutes other than the California Environmental Quality Act ("CEQA") do not rebut Dr. Smallwood's substantial evidence of a fair argument that the Project may have significant impacts on a number of special status bird species and California salamanders at or adjacent to the site.

**A. Staff's Rebuttal Misstates the Standard Applicable to Determining When an EIR is Required.**

Attempting to rebut Dr. Smallwood, staff applies in incorrect standard for determining when a project's impacts may be significant. Staff asserts that CEQA Guidelines section 15065 provides that "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." Appendix E, p. 2 (emphasis added). However, Guidelines section 15065 is clear that when a project **may** have such impacts, the agency must make a mandatory finding of significance and prepare an EIR.

Where an agency fails to properly investigate an impact, the scope of a fair argument becomes broader. "[U]nder CEQA, the lead agency bears a burden to investigate potential environmental impacts. 'If the local agency has failed to study an area of possible environmental impact, a fair argument may be based on the limited facts in the record. Deficiencies in the record may actually enlarge the scope of fair argument by lending a logical plausibility to a wider range of inferences.'" *Sundstrom v. County of Mendocino* (1988) 202 Cal. App. 3d 296, 311. *County Sanitation Dist. No. 2 v. County of Kern* (2005) 127 Cal. App. 4th 1544.

Dr. Smallwood has provided his expert opinion based on his observations at the site and his extensive knowledge of the habitat needs and behavior of burrowing owls and other bird species and the California salamander, that the Project may have significant direct and cumulative impacts on those species. The biological assessment relied upon by the IS/MND claims "[t]here is a low probability of occurrence of the burrowing owl, a California species of special concern, on the site due to the paucity of California ground squirrel burrows." Dr. Smallwood's observations directly refute that there is a "paucity" of ground squirrel burrows directly adjacent to the Project site. Smallwood Aug. 26, 2018 Comments. As a matter of law, "substantial evidence includes . . . expert opinion." (Pub. Resources Code, § 21080(e)(1); CEQA Guidelines, § 15064(f)(5).) CEQA Guidelines demand that where experts have presented conflicting evidence on the extent of the environmental effects of a project, the agency must consider the environmental effects to be significant and prepare an EIR. (CEQA Guidelines § 15064(f)(5); Pub. Res. Code § 21080(e)(1).

**B. The Santa Clara Valley Habitat Plan Does Not Relieve The City of Performing Biological Surveys Designed to Actually Detect Burrowing Owls and Other Sensitive Species and Ensuring Adequate Mitigation of Impacts Under CEQA.**

Staff relies on the VHP as justifying staff's reliance on imprecise, reconnaissance level surveys. Staff essentially argues that the VHP serves as a stand-in for a thorough investigation of the site and surrounding hillside for the presence of burrowing owls and other species and serves to mitigate any potential biological impacts from the Project. This notion is incorrect as a matter of fact and law.

The only regulatory requirements the VHP assists in streamlining is the need for individual project's to obtain incidental take permits under the federal and state endangered species acts. Nothing in the VHP relieves the City from any requirement or duty to investigate a project site under CEQA. As the California Supreme Court has held:

To the extent the agency is arguing that a technique used for planning under another statutory scheme necessarily satisfies CEQA's requirements for analysis of a project's impacts, we disagree. Except where CEQA or the CEQA Guidelines tie CEQA analysis to planning done for a different purpose (see, e.g., § 21081.2, subd. (a) [CEQA findings on traffic impacts not required for certain residential infill projects that are in compliance with other municipal plans and ordinances]), an EIR must be judged on its fulfillment of CEQA's mandates, not those of other statutes.

*Neighbors for Smart Rail v. Exposition Metro Line Constr. Auth.* (2013) 57 Cal.4th 439, 462. A habitat conservation plan itself does not satisfy CEQA. *Envtl. Council of Sacramento v. City of Sacramento* (2006) 142 Cal.App.4th 1018, 1027.

The EIR prepared for the VHP acknowledges that the VHP is not a stand-in for project-level CEQA review. As the FEIR for the VHP states, “[a]s part of the standard approval process, most projects would require separate, project-level environmental review under CEQA.” VHP FEIR, p. 2-7 (<https://scv-habitatagency.org/DocumentCenter/View/139/Final-Environmental-Impact-Report-Environmental-Impact-Statement-Volume-I>). *See also id.* (Response to Comment 50-66) (“The commenter is correct that project-level CEQA review will still be necessary with the adoption of the Habitat Plan”). The EIR prepared for the VHP only addresses the impacts that implementing the VHP itself would have on the environment. That EIR does not address the direct and cumulative impacts of individual projects. Although the VHP can and should be considered in the context of the Project's environmental review, it cannot be used to alter the City's duty to investigate the Project's potential environmental impacts. By not looking for burrowing owls during the nesting season, the City cannot claim potential impacts to the owl have been evaluated or whether the VHP alone will be sufficient to mitigate potential impacts.

For the foregoing reasons, as well as the reasons articulated in our previous comments and those of Dr. Smallwood, the IS/MND for the Project should be withdrawn, an EIR should be prepared, and the draft EIR should be circulated for public

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review and comment in accordance with CEQA. Thank you for considering these comments.

Sincerely,



Michael R. Lozeau  
Lozeau | Drury LLP

**ATTACHMENT**

Shawn Smallwood, PhD

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Thai-Chau Le, Environmental Project Manager  
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26 August 2018

RE: Dove Hill Road Assisted Living Project

Dear Ms. Le,

I write to reply to responses on my comments and previous replies on the biological resources assessment (H. T. Harvey & Associates) prepared for the mitigated negative declaration of the Dove Hill Road Assisted Living Project (City of San Jose 2018). My qualifications were summarized in my comment letter.

### **SITE VISIT**

I visited the proposed project site on 25 August 2018, totaling about 2 hours on the site periphery and around the site. I viewed the site from Dove Road and from Hellyer County Park, and I drove along Thornberry Lane and looked over the remaining patches of open space between housing tracts north of Thornberry Lane. Ground squirrels have obviously long resided on site, as burrow complexes were evident (Figure 1). The burrows on the lower reach of the slope, east of the existing homes, are typical of burrows occupied by burrowing owls that I study in eastern Alameda County. Vegetation cover on other portions of the project site provides structure that is ideal for many species of birds (Figure 2).

By no means was I on site long enough to provide evidence of species absences. But I did verify the presence of a few species I anticipated could be there (Table 1). Of these species, Common yellowthroat is listed by California Department of Fish and Wildlife as a species of special concern and Cooper's hawk (Figure 3) is on the Taxa to Watch List. Red-tailed hawk (Figure 4) and turkey vulture (Figure 5) are protected by California Department of Fish and Game Code 3503.5. The presence of California ground squirrels on the site indicates potential for burrowing owls to breed on site or find refuge during the non-breeding season.

I detected and identified 23 species of bird in little more than two hours (Table 1), which is more than usual in my experience. Had I visited on different dates and different times of day, the species list would grow considerably, and would include more special-status species. Some of the species I detected appear in Figures 6 through 10).

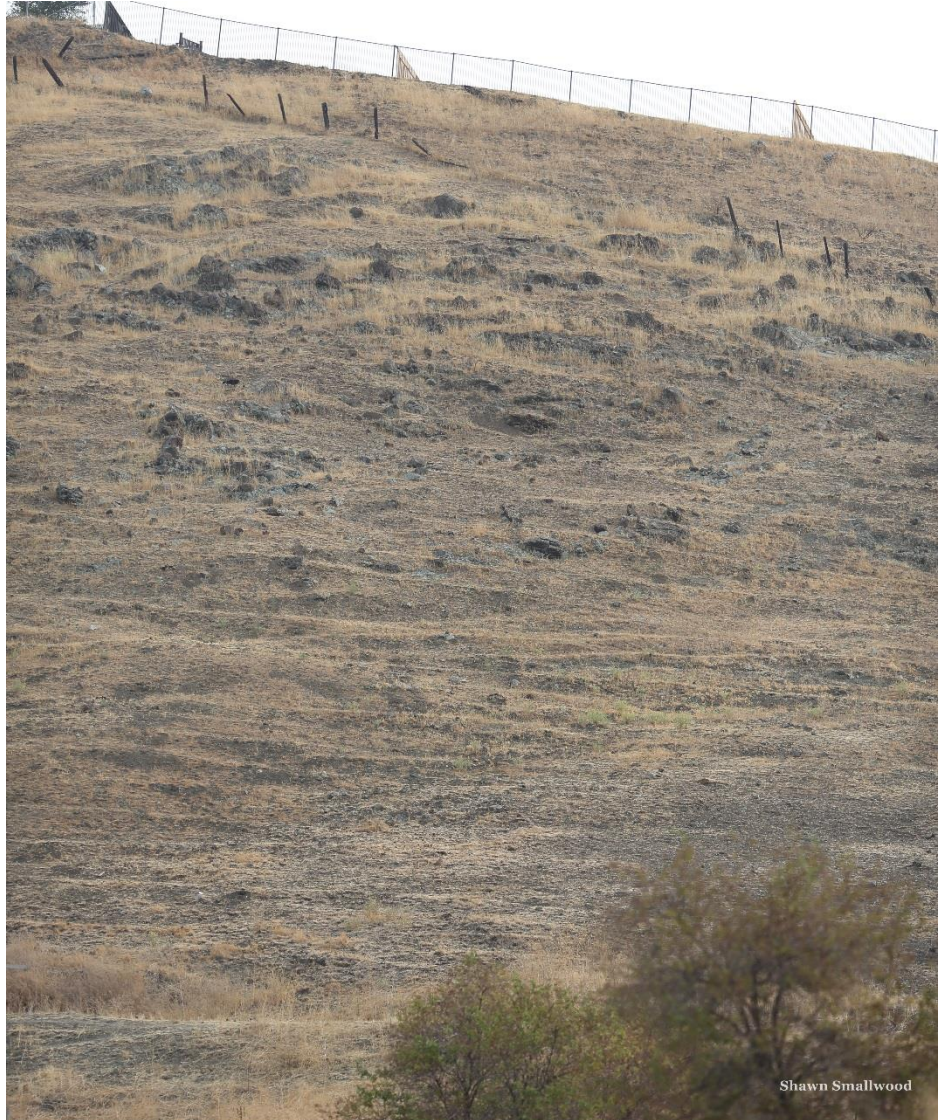
**Table 1.** Species of wildlife I observed during my visit 08:20 to 10:30 hours on 25 August 2018 at the site and surrounds (“nearby”) of the proposed Dove Hill Road Assisted Living Project.

| <b>Species</b>                | <b>Scientific name</b>            | <b>Status<sup>1</sup></b> | <b>Location</b> | <b>Note</b>         |
|-------------------------------|-----------------------------------|---------------------------|-----------------|---------------------|
| California ground squirrel    | <i>Spermophilus beecheyi</i>      |                           | Site            | Many burrows        |
| Northern shoveler             | <i>Anas clypeata</i>              |                           | Site            | 2 flew over         |
| Turkey vulture                | <i>Cathartes aura</i>             | CDFW 3503.5               | Site            | Foraging            |
| Red-tailed hawk               | <i>Buteo jamaicensis</i>          | CDFW 3503.5               | Site            | 2 foraging together |
| Cooper’s hawk                 | <i>Accipiter cooperi</i>          | CDFW 3503.5, TWL          | Site            | Flyover             |
| Mourning dove                 | <i>Zenaita macroura</i>           |                           | Site            | Multiple            |
| Rock pigeon                   | <i>Columba livea</i>              |                           | Nearby          | Non-native          |
| Eurasian collared-dove        | <i>Streptopelia decaocto</i>      |                           | Site            | Non-native          |
| Anna’s hummingbird            | <i>Calypte anna</i>               |                           | Nearby          | Multiple            |
| Black-chinned hummingbird     | <i>Archilochus alexandri</i>      |                           | Nearby          | Multiple            |
| Acorn woodpecker              | <i>Melanerpes formicivorus</i>    |                           | Nearby          |                     |
| Downy woodpecker              | <i>Picoides pubescens</i>         |                           | Nearby          |                     |
| Nuttall’s woodpecker          | <i>Picoides nuttallii</i>         |                           | Nearby          | Multiple            |
| Black phoebe                  | <i>Sayornis nigricans</i>         |                           | Nearby          | 3 birds or more     |
| American crow                 | <i>Corvus brachyrhynchos</i>      |                           | Nearby          | Many                |
| California scrub-jay          | <i>Aphelocoma californica</i>     |                           | Site            | Multiple            |
| Northern rough-winged swallow | <i>Stelgidopteryx serripennis</i> |                           | Nearby          | Foraging            |
| Bushtit                       | <i>Psaltiparus minimus</i>        |                           | Nearby          | Flock               |
| White-breasted nuthatch       | <i>Sitta carolinensis</i>         |                           | Nearby          | Many                |
| Western bluebird              | <i>Sialia mexicana</i>            |                           | Nearby          | Fledglings          |
| European starling             | <i>Sturnus vulgaris</i>           |                           | Nearby          | Non-native          |
| Common yellowthroat           | <i>Geothlypis trichas sinuosa</i> | SSC3                      | Nearby          |                     |
| California towhee             | <i>Pipilow crissalis</i>          |                           | Site            | Multiple            |
| House finch                   | <i>Carpodacus mexicanus</i>       |                           | Nearby          | Multiple            |

<sup>1</sup> Listed as SSC3 = Species of Special Concern priority 3, CDFW 3503.5 = California Department of Fish and Game Code 3503.5 (Birds of prey), TWL = Taxa to Watch List (Shuford and Gardali 2008).

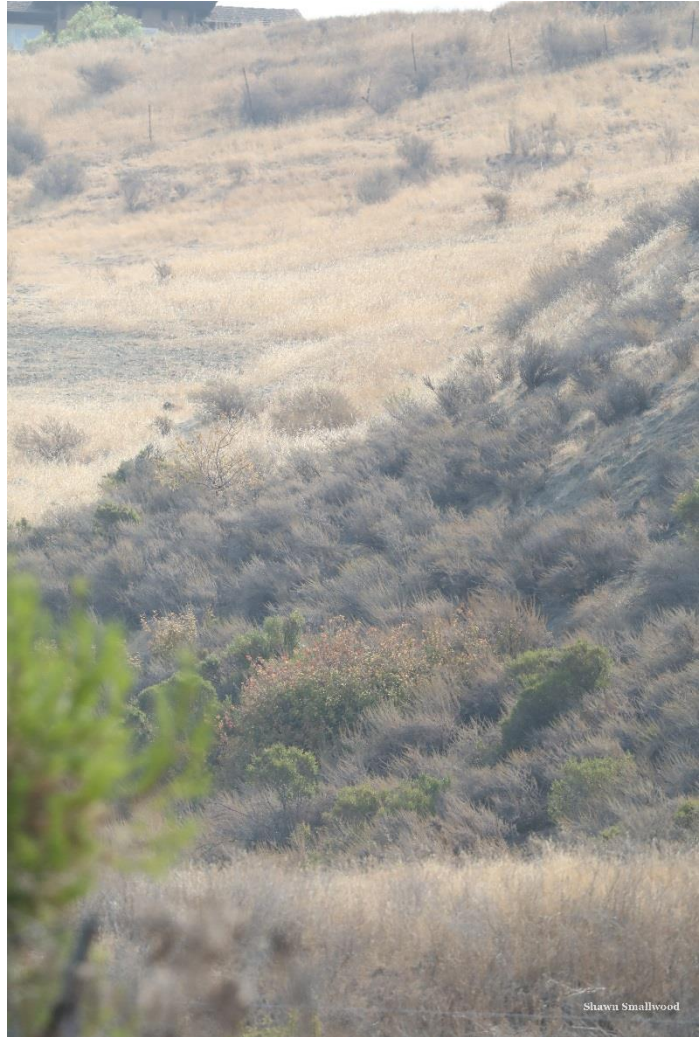


**Figure 1.** Eastern slope of Dove Hill site, including ground squirrel burrow systems on lower half of the slope. In eastern Alameda County I have many times seen burrowing owls occupy burrows on slopes like this one.



Shawn Smallwood

**Figure 2.** *Vegetation cover on one portion of the proposed project site on 25 August 2018.*



**Figure 3.** *Cooper's hawk having just left the proposed project site, 25 August 2018. I also saw this or another Cooper's hawk at the intersection of Hassler Parkway and Trestlewood Drive and just north of the north end of Thornberry Lane.*





**Figure 4.** A red-tailed hawk seen against a residential background (left photo) and after having begun soaring (right photo) just northeast of the proposed project site on 25 August 2018. I also saw two red-tailed hawks forage together over the proposed project site, both soaring and kiting.

**Figure 5.** One of multiple turkey vultures foraging over and around the proposed project site on 25 August 2018.



**Figure 6.** White-breasted nuthatches were more abundant around the proposed project site than I can recall seeing them anywhere. The nuthatches appeared to thrive on old trees providing many holes and crevices, and lots of peeling bark.



**Figure 7.** I saw numerous California scrub-jays around the proposed project site, including at least one fledgling. California scrub-jays cache acorns and other large seeds food stores in concealed locations numbering up to a couple thousand, and then remember these locations for later retrieval. The species is symbiotic with California's oaks, spreading their seeds over large areas.





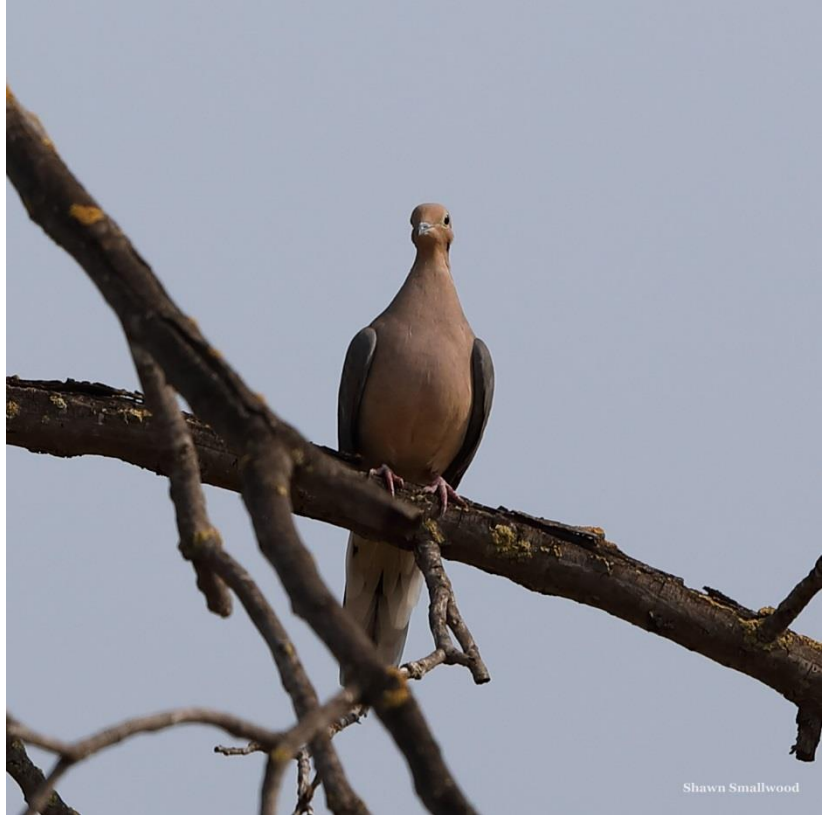
**Figure 8.** Fledgling western bluebird (left) watched by adult female (right) near the proposed project site on 25 August 2018.



**Figure 9.** Black phoebe (left) and black-chinned hummingbird (right) near the proposed project site on 25 August 2018.



**Figure 10.** One of many mourning doves on and nearby the proposed project site on 25 August 2018.



## **Replies to Second Set of Responses to Comments**

### Response E.1: Landscaped habitat

Respondents argue that “...*landscaped areas around the new facility would provide foraging habitat similar in value to the landscaped habitats currently on the site.*”

“Landscaped habitat” is not a term used in wildlife ecology or conservation biology; there is no scientific foundation for the term. Habitat is defined by a species’ use of the environment (Hall et al. 1997, Morrison et al. 1998), which means that “landscaped habitat” makes no sense. Most special-status species typically cannot use environments that are “landscaped” for the human aesthetic.

### Response E.2: Significance of impacts and mitigation

My brief site visit revealed that several special-status species do, indeed, occur in the project area. The project would reduce habitat of Cooper’s hawk, red-tailed hawk, both species of which I saw foraging on the project site. It would likely also reduce habitat of common yellowthroat, which I saw right next to the project site. Detection surveys would likely reveal additional special-status species, but preconstruction surveys would likely not. I stand by my earlier comments.

#### Responses E.2 to E.4 and E.6, E.10, E.13, E.14

I have nothing further to add to my earlier comments on the issues addressed in these responses.

#### Response E.5: Burrowing owl habitat

Respondents claim there is a paucity of ground squirrel burrows at the proposed project site, and thus no potential for burrowing owl presence. That is not what I saw. Ground squirrel burrows are visible in Figure 1. Figure 11 shows a cropped portion of Figure 1, in which I count at least 15 ground squirrel burrows. Other ground squirrel burrows I observed up close at the project's boundary (Figure 12). The burrows in both Figures 11 and 12 are located just outside the project's footprint, but would be fully exposed to lights, noise and frequent human activity. Whatever likelihood might exist for burrowing owls to use these burrows presently would evaporate with the construction of a building and landscaping right in front of, and facing directly into, this slope.

#### Response E.7: Lack of habitat for California tiger salamander

As I commented in my original letter, California tiger salamander was detected this year only 1,200 m from the proposed project site. I looked over the area where the tiger salamander was detected, and I examined the space between that site and the proposed project site for barriers to movement. No doubt the salamander's upland habitat has been severely fragmented by residential development, but pathways remain for tiger salamanders to travel between their breeding pond and the ground squirrel burrows on the proposed project site. Another concern is that with the detection of California tiger salamanders 1,200 m from the project site, there might be additional nearby sites where the species continues to breed.

#### Response E.9: Site is already developed

I looked over the current conditions at the site, and noted the nursery and homes. However, the structures at the site are small, the traffic volume is low, and there is little in the way of noise, lighting, and human activity. The proposed project would impose a larger structure with more traffic, noise and lighting.

#### Response E.11: The project would not impede wildlife movement

In my experience, volant wildlife fly over portions of landscapes that are less disturbed by human structures and activities. For example, the golden eagles that my colleagues and I have tracked using GPS transmitters fly in patterns that mostly thread the needle between areas intensively used by people, meandering their paths to avoid lands covered by residential, commercial and industrial uses. While at the proposed project site, I noticed multiple species flying over the project site, likely for the same reason I just gave – because it remains one of the last remaining patches of relatively low human use in the region. Over the site I observed turkey vultures, red-tailed hawks, a Cooper's hawk, a pair of northern shovelers, and mourning doves.



**Figure 11.** *At least 15 ground squirrel burrows are visible in this photo frame on the proposed project site on 25 August 2018, indicating the presence of a key component of burrowing owl habitat.*

Response E.12: The speed limit of 15 MPH will prevent traffic-caused wildlife mortality

Nobody that I saw on Hassler Parkway drove as slow as 15 MPH. In fact, I saw cars being driven quite fast.

**References Cited**

Hall, L. S., P. R. Krausman, and M. L. Morrison. 1997. "The Habitat Concept and a Plea for Standard Terminology." *Wildlife Society Bulletin* 25:173-82.

Morrison, M. L., B. G. Marcot, and R. W. Mannan. 1998. *Wildlife-Habitat Relationships: Concepts and Applications*. 2nd edition. University of Wisconsin Press Madison, WI.



**Figure 12.** *A ground squirrel burrow on the proposed project's border, observed on 25 August 2018. Such burrows are used as breeding and refuge habitat by burrowing owls.*



Thank you for the opportunity to reply,

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Shawn Smallwood, Ph.D.