ADDITIONAL RESPONSES TO PUBLIC COMMENTS

Below are additional responses to the comment letter submitted by Michael Lozeau, representing Lozeau Drury LLP, at the Planning Commission Hearing on July 25, 2018.

E. RESPONSE TO SHAWN SMALLWOOD – July 25, 2018 letter

Comment E.1: Preconstruction surveys avoid take. Multiple responses to my comments imply that project impacts can be avoided by performing preconstruction surveys, as if take is defined strictly as the killing of an animal. However, it is widely accepted in the field of wildlife ecology that habitat loss results in take regardless of whether animals are killed during construction or "saved" by preconstruction surveys. Habitat elsewhere is occupied already, leaving no place for project refugees to live. Displacement of animals is take. Worse, it is permanent take, meaning that all future generations of that species will have lost access to habitat that once occurred where the project was built. Preconstruction surveys might save a few individuals of a species from immediate death, but they cannot prevent the project from reducing the species' numerical capacity via habitat loss.

Response E.1: As stated in the Initial Study/Mitigated Negative Declaration (IS/MND), the development area of this project would only consist of three acres of already disturbed areas of the total 21 acre site. Within the three acres of proposed development, the Dove Hill Medical Care Facility Project would result in the disturbance of weedy non-native annual grasses and forbs (1.7 acres of potential foraging habitat) and improved land (1.3 acres of paved surfaces, including multiple structures). This area would be developed with landscaped areas and the medical care facility. Land use throughout the remainder of the project site (approximately 18 acres) 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. Because the analysis in the IS/MND and associated Biotic Assessment (Appendix B to the IS/MND) concluded that only certain species may be present on the approximately three-acre development site, preconstruction surveys, monitoring, and reporting mitigation measures are required as mitigation measures (MM Bio-1.1 to 3.3).

Furthermore, the City, through its partnership in the adoption of Santa Clara Valley Habitat Plan (VHP) in 2013, is a co-permittee for federal and state incidental take permits and applies the VHP conditions to projects that do not opt to obtain their own clearance from those wildlife agencies. This VHP was developed in association with the U.S. Fish and Wildlife Service (USFWS), and the California Department of Fish and Wildlife (CDFW), and in consultation with stakeholder groups and the general public. Permits issued by the USFWS and CDFW (jointly the Wildlife Agencies) would authorize incidental take of 18 plant and animal species included in the VHP. Rather than separately permitting and mitigating individual projects, the VHP evaluated natural-resource impacts and mitigation requirements comprehensively in a way that is more efficient and effective for at-risk species and their essential habitats. In addition, the City includes policies to adopt the VHP in the 2040

General Plan and the City approved the Final joint Environmental Impact Report/Environmental Impact Statement (EIR/EIS) on January 29, 2013 (Resolution No. 76546). Therefore, compliance with the VHP's conditions, which includes payment of fees, means that the ground disturbing activity is permitted under local regulations, state and federal law. This project is required to pay VHP fees and conform to applicable conditions that will contribute to the creation and maintenance of the VHP's conservation program, which will preserve and manage a minimum of 33,205 acres for the benefit of covered species, natural communities, biological diversity, and ecosystem function in Santa Clara Valley.

Comment E.2: Compensatory mitigation is intended to offset these longer-term impacts that preconstruction surveys cannot address. Most of the special-status species potentially affected by the project (27 of 30 species in Table 1 of my comment letter) are not covered by the VHP, meaning that the fee provides no compensatory mitigation for any of them because habitat is unique to each species (Hall et al. 1997, Morrison et al. 1998). In the case of burrowing owls, it is by now obvious that the VHP mitigation fees either have been insufficient or misdirected. Relying on preconstruction surveys rather than detection surveys results in blindness to impacts at both the analysis and mitigation stages. One cannot determine levels of take from preconstruction surveys, nor can one assess the adequacy of the mitigation fee from such surveys.

Response E.2: Per 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. 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 (i.e., federal or state listed or candidate for listing, California species of special concern, or state fully protected) 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).

The table of species the commenter is referring to in this comment is Table 2 of the Exhibit B of the original public comment letter submitted from Lozeau Drury in April 2018. For the remainder of the species listed by the commenter, based on the biotic assessment (Appendix B to the IS/MND), the project is not expected to result in a significant impact and no compensatory mitigation is warranted under CEQA specifically. Even so, as part of the project, mitigation measures are included and shall be implemented that involves pre-construction surveys, monitoring, and follow-ups before and during constructions as enforcement mechanisms (MM BIO-1.1 to 3.3). These mitigation measures also extend to cover many of the potential impacts to 27 of the 30 species the commenter has specified in the above comment (Table 1 below), even if not covered in the VHP, as it is part of the Migratory Bird Treaty Act (MBTA). In addition, these species would also benefit considerably from the VHP's conservation program, which has been designed to accomplish the following:

- Create a Reserve System that will preserve a minimum of 33,205 acres for the benefit of covered species, natural communities, biological diversity, and ecosystem function.
- In addition to newly acquired land, incorporate 13,291 acres of existing open space into the Reserve System to enhance their long-term management. The total size of the Reserve System will be at least 46,496 ac and up to an estimated 46,920 acres.
- Protect 100 miles of streams.
- Preserve major local and regional connections between key habitat areas and between existing protected areas.
- Establish a framework for long-term management of the Reserve System and streams throughout the permit area to enhance populations of covered species and maintain biological diversity.
- Restore minimum of 70 acres and up to 428 acres of riparian woodland and wetlands to offset losses of these land cover types and contribute to species recovery.
- Create a minimum of 20 acres and up to 72 acres of ponds to offset losses and contribute to species recovery.

The project proponent's payment of VHP fees will contribute to the conservation of the species potentially occurring on the project site and is consistent with City's goals and regulations such as General Plan Action ER-1.8.

As previously stated in Response E.1, rather than separately permitting and mitigating individual projects, the VHP evaluated natural-resource impacts and requirements comprehensively in a way that is more efficient and effective for at-risk species and their essential habitats, such as the burrowing owls. For the burrowing owl, habitat surveys (i.e., mapping areas with burrows as well as burrows with sign of occupation by owls) are required only if the study area is located within VHP modeled occupied nesting habitat as mapped in Figure 5-11 of the VHP.[1]

Consistent with the VHP, 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. Based on the protocols established by the VHP, the reconnaissance surveys performed were sufficient to determine whether potentially suitable habitat for this species is present on the project site. . As these reconnaissance surveys found no potentially suitable burrowing owl habitat on the project site,, no further surveys are required. Please refer to Response E.5 for more information regarding burrowing owls surveys and habitats.

Comment E.3: Significance of Impacts. Even more misleading is the respondents' repeated claim that significance of take is defined by population-level impacts or the loss of some (unstated) portion of the species' range. If the standard of significance is based on clear biological thresholds, then it would be standard practice to perform surveys that are appropriate for quantifying distribution and abundance. Otherwise, how could the respondents determine whether project impacts would cause

[1] Santa Clara Valley Habitat Agency. 2012. Final Santa Clara Valley Habitat Plan, Chapter 6 – Conditions and Covered Activities and Application Process, Available at: https://scv-habitatagency.org/178/Santa-Clara-Valley-Habitat-Plan. Accessed August 7, 2018.

substantial population declines or cause regional populations to drop below self-sustaining levels? If the respondents' standard was correct, then each project's impact assessment would need to define the demographic organization of each species at issue within the project area so that it could be determined whether the project would affect a portion of a population, the whole of a population, or multiple populations (Smallwood 2001). Decision-makers would indeed be better informed if such a standard existed, but it does not exist under CEQA. Nor was it anywhere close to having been achieved by the surveys serving as foundation for conclusions in the ISMND. Respondents cannot claim anything about the project's potential impacts on populations of any of the special-status species at issue, because the respondents lack the data needed to understand anything about the social organization of any wildlife species occurring on the proposed project site.

Response E.3: H. T. Harvey & Associates ecologists who contributed to the biological resources report and IS/MND for this project have decades of South Bay experience with surveys, habitat assessments, and impact assessment concerning the special-status species potentially occurring on the project site and for some species. As stated in the IS/MND Section 4.4.1.2 and Appendix B to the IS/MND, in the case of the species considered to be potentially impacted by the Dove Hill project, information concerning the known distribution of threatened, endangered, or other special-status species and sensitive habitat that may occur in this area was reviewed, including the VHP. In addition, reconnaissance-level field surveys were conducted in September 12, 2008 and September 15, 2008. A follow up survey was conducted on February 9, 2009. Afterwards, a more focused reconnaissance-level site survey was completed for adult Bay Checkerspot butterflies in March 31, 2015. Based on the research found in the area and the reconnaissance site surveys, determinations regarding the potential number of individuals/pairs of certain species that may be impacted by the project, and relate that number to regional populations are made. These determinations are made based on the extent and quality of suitable habitat on the site, the sizes of those species' home ranges, and information on regional distribution and abundance available from the California Natural Diversity Database, Santa Clara County Breeding Bird Atlas[2], and a variety of other sources (including these ecologists' experience).

For example, data regarding the social organization of white-tailed kites and loggerhead shrikes in the project vicinity are available. A study in northern California found that white-tailed kite territories were defended year-round with territory size ranging from 3.9 to 53.1 acres.[3] Loggerhead shrikes, which are highly territorial, have been found to establish breeding territories in California averaging 4.4 to 16.0 acres.[4] The proposed project would result in the disturbance of up to 3.0 acres of weedy non-native annual grasses and forbs and developed habitats that could potentially support nesting by the white-tailed kite and loggerhead shrike. Thus, based on known nesting territory size, it is reasonable to conclude that the project would impact a maximum of one pair of each species.

[2] Bousman, W. G. 2007. Breeding Bird Atlas of Santa Clara County, California. Santa Clara Valley Audubon Society.
[3] Dunk, J. R. and R. J. Cooper. 1994. Territory size regulation in Black-shouldered Kites. Auk no. 111:588-595.
[4] Yosef, R. 1996. Loggerhead Shrike (*Lanius ludovicianus*), version 2.0. In The Birds of North America (A. F. Poole and F. B. Gill, Editors). Cornell Lab of Ornithology, Ithaca, NY, USA.

The analysis of the potential impacts of the project on white-tailed kites and loggerhead shrikes also took into account the avoidance and minimization measures that the project would implement to avoid impacts on active nests of these species. 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. For these reasons and with implementation of mitigation measures, the project is not expected to result in the loss of any white-tailed kites or loggerhead shrikes

Comment E.4: Special-Status Species Designations Carry No Formal Legal Status. In an attached document to the City of San Jose's responses, H. T. Harvey & Associates argue that designations of Species of Special Concern are mere administrative designations and do not carry any formal legal status. However, under CEQA Guidelines section 15065, a project's effects on biological resources are deemed significant where the project would ... *"reduce the number or restrict the range of a rare or endangered plant or animal."* What do the CEQA Guidelines mean by rare? CEQA Guidelines section 15065 provide some guidance on this question, such as when a project would *"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 the California Department of Fish and Game or U.S. Fish and Wildlife Service."* Species of Special Concern are special status species, and are so designated in CDFW regulations. Fully Protected Species are also special-status species. The reasons for the designations are explained, often in great detail, in CDFW publications. A good example can be found in the accounts of bird species of special concern (Shuford and Gardeli 2008).

Response E.4: It is agreeable that an analysis of the project's potentially significant impacts should be conducted for species of special concern potentially occurring on the project site; such impacts were evaluated and completed in the project's IS/MND. The IS/MND has addressed all resource questions within the Appendix G checklist, which includes the potential for the project to, "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 the California Department of Fish and Game or U.S. Fish and Wildlife Service."

The previous comment from H. T. Harvey & Associates with regards to designation of species of special concern has no legal status is in response to the commenter's previous assertion (in a letter dated April 29, 2018) 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.", which is not true in the context of the determination of significant impacts for biological resources under CEQA. Refer to Attachment A – Bio Response Memo to the Responses to Comments and Text Changes document (RTC) posted on the City's website since Jul7 24, 2018: http://sanjoseca.gov/index.aspx?NID=6068.

Comment E.5: **Replies to Specific Responses. Response D17, part 1:** *"The Project site is not located within modeled occupied nesting habitat for the burrowing owl and therefore, mapping of burrows present on the site is not required under the VHP."* If mapping of burrows is not required, then no determination of the project's impacts on burrowing owls carries scientific validity. The VHP is not a free pass to rely on wishful speculation rather than established scientific protocol for determining a species presence/absence. The VHP gives neither H.T. Harvey & Associates nor City of San Jose license to imply that an adequate search turned up no sign of burrowing owls. Regardless of the coverage afforded by VHP, one cannot claim that cursory surveys are equivalent to CDFW's (2012) guidelines, nor can one claim that an absence determination carries the support of detection survey consistent with CDFW's (2012) guidelines. According to the CDFW's (2012) guidelines, nobody can determine burrowing owls absent from the proposed project site unless and until adequate detection surveys are performed.

Response E.5: As mentioned in Response E.1, the City has adopted the VHP and certified the EIR/EIS in 2013 which allows the County of Santa Clara (County), the Santa Clara Valley Water District, the Santa Clara Valley Transportation Authority (VTA) and the cities of Gilroy, Morgan Hill, and San José (collectively, the Local Partners or Permittees) to receive endangered-species permits for activities and projects they conduct and those under their jurisdiction.

The VHP was developed in association with the USFWS, and the CDFW, and in consultation with stakeholder groups and the general public. Permits issued by the USFWS and CDFW would authorize incidental take of 18 plant and animal species included in the VHP. The VHP was also approved by the USFWS and the CDFW in 2013.

As part of the development of the VHP, existing land-use designations and open-space data were collected. In addition, quantitative assumptions of covered activity footprints and frequency of occurrence and effects on the covered plant and animal species were analyzed and calculated based on the physical and biological setting of the VHP study area. From there, conservation strategies were developed and areas of potential habitats were mapped.[5]

As discussed in detail in H. T. Harvey & Associates' response to comments letter dated May 22, 2018, the IS/MND, and associated Biotic Assessment of the IS/MND (Appendix B to the IS/MND), the burrowing owl is a covered species under the VHP, and the proposed project is a covered activity under the VHP. Based on the VHP, this site is not mapped as a potential occupied nesting habitat for burrowing owls and no further surveys are required under the requirements of VHP.

Even so, as part of this project, H.T. Harvey & Associates has conducted multiple reconnaissance-level site surveys and literature research to establish potential existing habitats for potential species to exist, burrowing owls included, in the full 21-acre project site. That assessment concluded that, given existing levels of disturbance and the paucity of

[5] Santa Clara Valley Habitat Agency. 2012. Final Santa Clara Valley Habitat Plan, Chapter 4 – Impact Assessment and Level of Take, Available at: https://scv-habitatagency.org/178/Santa-Clara-Valley-Habitat-Plan. Accessed August 7, 2018.

ground squirrel burrows within the development footprint, no burrowing owls or their habitat would be lost as a result of the project during the construction or operation of this project.

Comment E.6. Response D17, part 2: *" ... 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."* Given their decades of experience, then H.T. Harvey & Associates is aware that burrowing owls are nearly extirpated from the region. As of two years ago, breeding pairs in Santa Clara Valley numbered 37, and the situation is worse now. I was contacted twice this past breeding season by a biologist working on burrowing owls in Santa Clara Valley, and those contacts were not to report progress; quite the opposite. The VHP is obviously failing to conserve burrowing owls in Santa Clara Valley. And as I explained in my comments, distinguishing breeding habitat from foraging habitat falsely implies that burrowing owls can successfully breed without successfully foraging. Distinguishing habitat roles might be useful for narrowing an impact analysis to a smaller portion of the environment, but it does so by pretending that animals can breed in a state of starvation. Losing access to forage results directly in losing access to breeding opportunity.

Response E.6: This comment relates to the status and effectiveness of the VHP and does not directly address the project or the analysis in the IS/MND. The IS/MND assessed the impacts of the proposed project on burrowing owls based on the requirements of CEQA. As stated above, the USFWS and CDFW have reviewed and approved the assessment of impacts of VHP-covered projects on burrowing owls contained in the EIR/EIS prepared for the VHP. Further, the USFWS and CDFW have reviewed and approved the mitigation requirements for VHP-covered projects on burrowing owls. The proposed project will adhere to the requirements set forth in the VHP. It is not incumbent on the project proponent to determine the success/failure of the VHP's efforts to conserve burrowing owls.

Comment E.7: Response D18: *" ... 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."* Bats might be assumed present, but my comments addressed the ISMND's trivializing of the significance of project impacts and the inadequacy of proposed mitigation. Similar to the approach used for assessing project impacts to burrowing owls, the ISMND pigeonholed bat roosts to conveniently narrow portions of the environment (anthropogenic structures, in this case) and directed preconstruction surveys to that narrow environment. In my comments, I pointed out that appropriate survey methods would divulge which species of bats occur at the site and relative abundances.

Response E.7. As was stated above for burrowing owls, it is not incumbent on the project proponent, nor is it required by CEQA, to determine which species of bats occur at the site and their relative abundance. The IS/MND assumes bat species could be present and MM BIO-3.1 through 3.3 would be required to be implemented. The IS/MND concluded that the only locations on the site where bats could potentially roost are anthropogenic structures because no natural roost sites, such as large trees with cavities or caves, are present in or near the impact area. Because bats are assumed to be potentially present and impacts on bats are assumed to be potentially significant, mitigation measures are required and no additional

focused surveys are not warranted for the purpose of analysis of significant impacts under CEQA.

Comment E.8. Response D19: *"The IS/MND analyzed the impacts on white-tailed kites, loggerhead shrikes, California tiger salamander, California red-legged frog, and other species that occur or may occur on the project site."* Respondents failed to respond to my comments related to white-tailed kites, loggerhead shrikes, California tiger salamander, California red-legged frog and other species. And again, they focused on breeding habitat, as if breeding habitat is all that matters to any of these species. California tiger salamanders and California red-legged frogs require upland refugia, including those frogs and salamanders documented only short distances from the proposed project site. Without refugia for these species, and without foraging for the other species, there will be no breeding possible wherever it is they are breeding.

Response E.8: As explained in H.T. Harvey's May 22, 2018 memo responding to the commenter's April 29, 2018 letter, the analysis did not focus solely on breeding habitat; rather, breeding habitat was emphasized because breeding habitat within dispersal distance of the site, as well as connectivity between such breeding habitat and the site, would be necessary for species such as the California tiger salamander and California red-legged frog to be present on the site in any capacity, either as breeders or nonbreeders.

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[6,7] and 1.3 miles for the California tiger salamander[8]), and there must be no barriers to dispersal between the breeding site and the project site. As stated in the Biotic Assessment to the IS/MND, no waterbodies providing suitable breeding habitat for either species are present on or immediately adjacent to the Project site.[9] 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.[10] 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, 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

[6] Bulger, J.B. and N.J. Scott, Jr. 2003. Terrestrial activity and conservation of adult California red-legged frogs Rana aurora draytonii in coastal forests and grasslands. Biological Conservation 110:85-95.
[7] [USFWS] U.S. Fish and Wildlife Service. 2010. Endangered and Threatened Wildlife and Plants; Revised Designation of Critical Habitat for California Red-legged Frog; Final Rule. Federal Register 75:12815-12959.
[8] Orloff, S. 2007. Migratory movements of California tiger salamanders in upland habitat-a five-year study. Pittsburg, California. Prepared for Bailey Estates, LCC by Ibis Environmental, Inc.
[9] H. T. Harvey & Associates. 2015. Biotic Assessment (2015 Update), Dove Hill Road Assisted Living Project, San Jose, California.
[10] California Natural Diversity Database. 2018. Rarefind 5 [Internet]. California Department of Fish and Wildlife [Version 5.2.14].

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 and completion of additional conditions prior to the issuance of grading permits, would reduce impacts on this species and its habitat, including foraging habitat, to a less-than-significant level.

Comment E.9. Response D20: *"The proposed project would occur on only 3 acres of the 21-acre site."* The 3-acre project would cause more than 3 acres of impacts to special-status species of wildlife. Lighting, noise, and human activity would push sensitive species further back from the existing boundary between the Anthropocene and wildlife habitat. Car and truck traffic to and from the project would extend to the origins and destinations of that traffic. Birds from beyond those 3 acres would collide with windows within the 3 acres, and if cats are kept on site, then they would extend their depredations on wildlife well beyond the 3 acres. Every project proponent would argue that their project is only a small portion of the remaining open space, but cumulatively their projects, however small individually, have pushed many wildlife species to the brink of extirpation/extinction.

Response E.9: The project site currently developed with two single-family houses and commercial landscaping businesses with associated plant nursery, sheds, and storage yards. The existing development area (3 acres of the full 21-acres) is already developed. The proposed project would not encroach further into the hillside. See Response E.3 and E.13 for a discussion overall habitat/boundary impacts, Response E.12 for traffic impacts, E.1, E.12, and E.13 for habitat and cumulative species loss. The project applicant confirms that pets will not be kept on-site at the proposed facility

Comment E.10: Response D21: "[California tiger] *Salamander and* [California red-legged] *frog breeding and upland habitat are not present on or immediately adjacent to the project site."* Respondents attempt to confuse the issue by conflating the conclusion of the impacts analysis. The ISMND did not conclude absence of these species from upland habitat. Quite the opposite, actually (page 47): *"The Habitat Plan maps the site as providing potential non-breeding habitat for the California tiger salamander and potential dispersal habitat for the California red-legged frog."* Without having performed any type of survey suitable for detecting California tiger salamanders or California redlegged frogs in upland refugia, respondents cannot claim to know whether the site supports refugia for these species. Certainly, California ground squirrel burrows are available as refugia, and certainly the Habitat Plan predicted the site potentially provides non-breeding habitat. Therefore, the reasonable determination is that the site potentially supports California tiger salamanders or California red-legged frogs.

Response E.10: See Response E.8 and Attachment A – Bio Response Memo to the July 2018 RTC memo.

Comment E.11: **Response D22:** *"As discussed in the Biotic Assessment prepared for the project (Appendix B of the IS/MND) and analyzed in the IS/MND, the project site is not located in an area that is particularly important for wildlife movement."* Absence of evidence is not evidence of absence. Contrary to what respondents might have us believe, there has been no systematic scientific survey effort to identify areas of particular importance to wildlife movement. Consistent with the precautionary principle in risk assessment (National Research Council 1986, O'Brien 2000), and with the spirit and intent of CEQA, the burden of proof is on the project proponent to analyze impacts and mitigate potential interference that the proponent's project might have on wildlife movement. Merely pointing to an absence of evidence of wildlife movement in the area is no analysis at all. An EIR is needed to address this potential impact.

> **Response E.11:** As discussed in Attachment A – Bio Response Memo to the July 2018 RTC document, the site is disturbed and developed. It does not contain aquatic habitat. It is not identified as an established native resident or migratory wildlife corridor in the Coyote Valley Landscape Linkage report or VHP.[11] Furthermore, the posted RTC and associated Bio Response Memo to that RTC details reasons why this site is not important for regional wildlife movements (Response D22 and D24 of the RTC and pages 5-6 of the Bio Response Memo).

Comment E.12: **Response D23:** *" ... the vast majority of such species* [killed by project-generated traffic] *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."* That the vast majority of road-killed wildlife will be common species is irrelevant. In my comments I identified particular threatened, endangered, and otherwise rare or sensitive species that are likely to be run over and killed by project-generated traffic. Respondents failed to address potential impacts to special-status species. Respondents claim that the proposed project is not expected to cause substantial impacts to regional populations of common species, again ignoring my comments directed toward special-status species. However, as I commented on the ISMND, not one word was directed toward traffic-generated impacts on wildlife. There were no expectations of traffic impacts because there was no thought given to these impacts. Contrary to the dismissal of impacts by respondents, traffic impacts have taken devastating tolls on wildlife across North America. In Canada, 3,562 birds were estimated killed per 100 km of road per year (Bishop and Brogan 2013), and the US estimate of avian mortality on roads is 2,200 to 8,405 deaths per 100 km per year, or 89 million to 340 million total per year (Loss et al. 2014). Local impacts can be more intense than nationally.

Just across the Bay from the proposed project site, Mendelsohn et al. (2009) found 1,275 carcasses of 49 species of mammals, birds, amphibians and reptiles over 15 months of searches for traffic-caused wildlife fatalities along a 2.5 mile stretch of Vasco Road in Contra Costa County, California. Adjusting this number for the proportion of fatalities that were not found due to scavenger removal and searcher error, and the estimated fatality rate is 243,740 animals killed per 100 km of road per

[11] Open Space Authority. 2017. Coyote Valley Landscape Linkage, Available at: https://www.openspaceauthority.org/system/user_files/Documents/Coyote%20Valley%20Landscape%20Linkage%20Report_Final_lowres.pdf. Accessed August 7, 2018.

year, or 29 times that of Loss et al.'s (2014) upper bound estimate and 68 times the Canadian estimate. Furthermore, of the 49 species found as fatalities on Vasco Road, (16%) were special-status species. Some of the annual tolls, adjusted for the proportions not found, were estimated at 760 California red-legged frogs, 899 California tiger salamanders, 4 burrowing owls and 5 American badgers. These are not trivial numbers, but it can also be said that no single project contributes entirely to these death tolls. These tolls are the products of cumulative impacts from projects such as the proposed project. The impacts need to be addressed.

According to H.T. Harvey & Associates, in their supporting document attached to City of San Jose's responses to comments, *" ... 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."* H.T. Harvey & Associates provide no foundation for their conclusions, which appear to be purely speculative. Where is there evidence that a busy highway is more dangerous to wildlife than two-lane roads? If wildlife are more wary about crossing busy highways, then two-lane roads would be more dangerous. Nor does H.T. Harvey provide any evidence in support of their speculated claim that road traffic impacts would be "negligible." The evidence I have seen (and cited) indicates the opposite.

> **Response E-12:** Vehicle strikes are addressed in Attachment A – Bio Responses Memo to the July 2018 RTC memo. Comparisons of the Dove Hill project to projects along Vasco Road, from the perspective of wildlife use and potential for vehicular impacts, are inappropriate. Vasco Road is known to run through areas that support special-status species such as California red-legged frogs, California tiger salamanders, burrowing owls, and American badgers, whereas for reasons discussed in the IS/MND and July 2018 RTC memo, such species are not expected to be present on the Dove Hill Road site. Also, speed limits along Vasco Road are much higher than those on the Dove Hill Road site. Speeds within the project site are limited to 15 miles per hour and a three-way stop sign will be installed at the intersection of Dove Hill Rod and Hassler Parkway to control vehicle speeds. A total of 22 of the species in Table 2 within Exhibit B of the original comment letter from Lozeau Drury LLP provided by the commenter are avian species that would be able to fly out of the way of oncoming traffic at these slow speeds. There are no other projects that would utilize Dove Hill Road such that a significant cumulative impact would occur in the immediate project area.

Comment E.13: Response D24: In responding to my comment that no cumulative impacts analysis was reported in the IS/ MND, respondents write *" ... the Project site is located at the very edge of open space along Coyote Ridge, is surrounded on three sides by rural suburban development and is not located within a designated migratory wildlife corridor."* My comment remains valid, as there has been no cumulative effects analysis of biological resource impacts resulting from the proposed project. Respondents claim that the project will not cause habitat fragmentation because it is located at the boundary of the Anthropocene rather than in the middle of wildlife habitat or some imagined wildlife movement corridor. However, the respondents are mischaracterizing habitat fragmentation, which is defined as the reduced numerical capacity of a species caused by the pattern of habitat loss or degradation (Smallwood 2015). Habitat loss need not occur in the middle of wildlife habitat, nor does it require interference with a movement corridor; it only has to result in a decrease in the

region's numerical capacity of a species. The concept of how wildlife movement corridors relates to habitat fragmentation is actually opposite of how it is portrayed by respondents. Corridors are human constructs intended to mitigate the effects of habitat fragmentation (Smallwood 2015).

Response E.13: The entire 21-acre project site is *already* disturbed due to the current developments on 3-acre portion and cattle grazing on the remaining 18 acres of open space. The Dove Hill Medical Care Facility Project would result in the disturbance of landscaped habitat, previously disturbed, ruderal, weedy, non-native annual grasses and forbs, and developed habitats. The project would continue to use the already developed footprint and would not encroach further into the undeveloped 18-acres. .

Comment E.14: Response D25: *"As discussed in the IS/MND, construction of the project could result in impacts to roosting bats and birds. However, the IS/MND provides mitigation measures that would be implemented to reduce the impacts to roosting bats and birds to less than Significant."* Here respondents acknowledge impacts to special-status species, but other responses downplay the impacts. Whereas respondents imply that multiple mitigation measures would reduce impacts to birds and bats, preconstruction surveys is the only measure directed toward 27 of the special-status species likely to be harmed by the project, and VHP fees would be the only other measure directed to the other 3 species. By definition, preconstruction surveys do not reduce impacts; they are intended only to minimize impacts through last-minute take-avoidance. In fact, the last-minute nature of these surveys is intended for salvaging only the readily detectable animals in immediate peril of destruction by heavy machinery. An impact reduction measure would be implemented after a project is developed, but not beforehand. Last-minute salvaging of at best a few animals qualifies as meager mitigation for project impacts on special-status species, 27 of which have no coverage under the VHP. My comment stands, that mitigation is grossly inadequate.

Response E.14: Fifteen of the "special-status" species listed by the commenter are not federally or state listed or candidates for listing, are not listed as California species of special concern, and are not state fully protected. 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 (i.e., federal or state listed or candidate for listing, California species of special concern, or state fully protected) 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) and provides mitigation measures to reduce potentially significant impacts to less than significant. For the remainder of the "special-status" species listed by the commenter, the project is not expected to result in a significant impact and no additional mitigation measures beyond those already specified in the IS/MND are warranted.

Nevertheless, mitigation measures that are incorporated as part of this project would provide further monitoring and preconstruction surveys to avian species. In addition to the mitigation measures included in the IS/MND, the project is required to comply with all applicable conditions of the VHP listed below:

- Condition 1- Avoid Direct Impacts on Legally Protected Plant and Wildlife Species. This condition applies to all projects covered under the VHP and helps to protect the following species for which environmental permits cannot be granted: Contra Costa goldfields, bald eagle, American peregrine falcon, southern bald eagle, white-tailed kite, California condor, and ring-tailed cat. It also requires compliance with MBTA and Bald and Golden Eagle Protection Act. The project will implement measures (i.e., preconstruction surveys for nesting birds and buffers around any active nests) to avoid take of active nests of birds protected under the MBTA, as required by Condition 1 of the VHP.

- Condition 3. Maintain Hydrologic Conditions and Protect Water Quality. Condition 3 applies to all projects and identifies a set of programmatic best management practices (BMPs), performance standards, and control measures to minimize increases of peak discharge of storm water and to reduce runoff of pollutants to protect water quality, including during project construction. These requirements include pre-construction, construction site, and post-construction actions. Pre-construction conditions are site design planning approaches that protect water quality by preventing and reducing the adverse impacts of stormwater pollutants and increases in peak runoff rate and volume. They include hydrologic source control measures that focus on the protection of natural resources. Construction site conditions include source and treatment control measure to prevent pollutants from leaving the construction site and minimizing site erosion and local stream sedimentation during construction. Post-construction conditions include measures for stormwater treatment and flow control.

- Condition 15 – Western Burrowing Owl. Condition 15 requires the implementation of measures to avoid and minimize direct impacts on burrowing owls, including pre-construction surveys, establishment of 250-ft non-disturbance buffers around active nests during the breeding season (February 1 through August 31), establishment of 250-ft non-disturbance buffers around occupied burrows during the nonbreeding season, and construction monitoring. Pre-construction surveys for burrowing owls are required by the VHP in areas mapped as breeding habitat, which include the project site.

Conclusion: The IS/MND concluded that the project would result in potential impacts to biological resources and identified project-specific mitigation measures, City standard conditions and conditions of approval that will reduce those impacts to a less than significant level. Because mitigation measures would reduce the impacts to less than significant levels, no further mitigation measures or an environmental impact report is required.

Table 1. Potential Species near the Proposed Site (As Stated by Dr. Shawn Smallwood in Lozeau Drury LLP Original Public Comments (dated April 30, 2018).

Species	Scientific name	Status	Covered by HCP?	Location	Covered Under
California tiger salamander	*Ambystoma californiense*	FT, CT	Yes	iNaturalist posting nearby	VHP
Pallid bat	*Antrozous pallidus*	SSC	No	Unknown, but likely	Mitigation Measure BIO-3.1
Western red bat	*Lasiurus blossevillii*	SSC	No	Unknown, but likely	
Fringed myotis	*Myotis thysanodes*	WBWG	No	Unknown, but likely	
Long-eared myotis	*Myotis evotis*	WBWG	No	Unknown, but likely	
Small-footed myotis	*Myotis cililabrum*	WBWG	No	Unknown, but likely	
San Francisco dusky-footed woodrat	*Neotoma fuscipes annectens*	SSC	No	Unknown, but likely	No species or nests were found during focused surveys at the site
California gull	*Larus californicus*	TWL	No	eBird postings nearby	Mitigation Measure BIO-2.1, consistent with the MBTA, would avoid impacts to the species and active nests
Golden eagle	*Aquila chrysaetos*	BGEPA, BCC, CFP	No	eBird postings nearby	
Red-tailed hawk	*Buteo jamaicensis*	CDFW 3503.5	No	eBird postings nearby	
Ferruginous hawk	*Buteo regalis*	CDFW 3503.5, TWL	No	on site; eBird postings nearby	
Red-shouldered hawk	*Buteo lineatus*	CDFW 3503.5	No	eBird postings nearby	
Sharp-shinned hawk	*Accipiter striatus*	CDFW 3503.5, TWL	No	eBird postings nearby	
Cooper's hawk	*Accipiter cooperi*	CDFW 3503.5, TWL	No	eBird postings nearby	
Northern harrier	*Circus cyaneus*	SSC3	No	eBird postings nearby	
White-tailed kite	*Elanus leucurus*	CFP, TWL	No	eBird postings nearby	
American kestrel	*Falco sparverius*	CDFW 3503.5	No	on site; eBird postings nearby	
Merlin	*Falco columbarius*	CDFW 3503.5, TWL	No	eBird postings nearby	
Prairie falcon	*Falco mexicanus*	CDFW 3503.5, TWL	No	eBird postings nearby	

Peregrine falcon	*Falco peregrinus*	CE, CFP	No	eBird postings nearby	
Burrowing owl	*Athene cunicularia*	FCC, SSC2	Yes	Occurrences in region	VHP
Great-horned owl	*Bubo virginianus*	CDFW 3503.5	No	eBird postings nearby	Mitigation Measure BIO-2.1, consistent with the MBTA, would avoid impacts to the species and active nests
Barn owl	*Tyto alba*	CDFW 3503.5,	No	eBird postings nearby	
Olive-sided flycatcher	*Contopus cooperi*	SSC2	No	eBird postings nearby	
Oak titmouse	*Baeolophus inornatus*	BCC	No	eBird postings nearby	
Loggerhead shrike	*Lanius ludovicianus*	FSC, SSC2	No	eBird postings nearby	
Yellow warbler	*Setophaga petechia*	SSC2	No	eBird postings nearby	
Common yellowthroat	*Geothlypis trichas sinuosa*	SSC3	No	eBird postings nearby	
Savannah sparrow	*Passerculus sandwichensis*	SSC3	No	eBird postings nearby	
Tricolored blackbird	*Agelaius tricolor*	SSC1	Yes	eBird postings nearby	VHP