

M. BIOLOGICAL RESOURCES

SETTING

The project site is in a developed urban area and is entirely occupied by the Fairmont Hotel complex. The site does not support or provide habitat for any rare or endangered wildlife or plant species. No known rare, threatened, or endangered species are known to exist on the project site or its vicinity. The project site contains ornamental plants and trees at the podium courtyard level and around the perimeter of the site. The existing podium courtyard level contains three palm trees, eight small potted trees/bushes, and four small trees/bushes. Approximately seven street trees are planted along the Powell Street frontage. Fourteen additional trees are planted along the sidewalk on the south side of the Fairmont Hotel complex on California Street. While the trees and bushes of the site provide some nesting habitat for birds, overall their habitat value for wildlife is small. Mostly common bird species associated with urban areas would use the trees as habitat.

REGULATORY SETTING

This section describes federal, state, and local regulations, permits, and policies pertaining to biological resources as they apply to the proposed project.

FEDERAL PLANS, POLICIES, REGULATIONS, AND LAWS

Federal Endangered Species Act

The U.S. Fish and Wildlife Service, in its jurisdiction over plants, wildlife, and resident fish, oversees the federal Endangered Species Act (ESA). The ESA prohibits the “take” of any wildlife species listed as threatened or endangered, including the destruction of habitat that could hinder species recovery.

Federal Migratory Bird Treaty Act

The Migratory Bird Treaty Act (MBTA) states that without a permit issued by the U.S. Department of the Interior, it is unlawful to pursue, hunt, take, capture, or kill any migratory bird. The act protects the majority of migratory bird species, and their active nests, eggs, and young.

STATE PLANS, POLICIES, REGULATIONS, AND LAWS

California Endangered Species Act

California implemented the California Endangered Species Act (CESA) in 1984. The state act prohibits the take of endangered and threatened species; however, habitat destruction is not included in the state’s definition of take. Section 2090 of the CESA requires state agencies to comply with regulations for

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protection and recovery of endangered species and to promote conservation of these species. The California Department of Fish and Game administers the act and authorizes take through Section 2081 agreements (except for designated “fully protected species”).

Regarding rare plant species, the CESA defers to the California Native Plant Protection Act of 1977, which prohibits importing into California, taking, and selling rare and endangered plants. State-listed plants are protected mainly in cases where state agencies are involved in projects subject to CEQA analysis. In this case, plants listed as rare under the California Native Plant Protection Act are not protected under the CESA but can be protected under CEQA.

California Fish and Game Code

Under Section 3503 of the California Fish and Game Code, it is unlawful to take, possess, or needlessly destroy the nest or eggs of any bird, except as otherwise provided by the code. Section 3503.3 of the California Fish and Game Code prohibits take, possession, or destruction of any birds in the orders Falconiformes (hawks) or Strigiformes (owls), or of their nests and eggs.

State CEQA Guidelines

Although threatened and endangered species are protected by specific federal and state statutes, Section 15380(b) of the *CEQA Guidelines* provides that a species not listed on the federal or state list of protected species may be considered rare or endangered if the species can be shown to meet certain specified criteria. This section was included in the *CEQA Guidelines* primarily to deal with situations in which a public agency is reviewing a project that may have a significant impact on, for example, a “candidate species” that has not yet been listed by either the U.S. Fish and Wildlife Service or the California Department of Fish and Game. Thus, CEQA provides an agency with the ability to protect a species from a project’s potential impacts until the respective government agencies have an opportunity to designate the species as protected, if warranted.

LOCAL PLANS, POLICIES, REGULATIONS, AND LAWS

City and County of San Francisco Urban Forestry Ordinance

Section 804 of Article 16, “Urban Forestry Ordinance,” in the San Francisco Public Works Code outlines the jurisdiction of the San Francisco Department of Public Works (DPW) over trees and landscaping. DPW has jurisdiction over planning, planting, protection, maintenance, and removal of trees or landscaping in the public right-of-way, as well as over certain trees on private property if they are deemed hazard, landmark, or significant trees. For projects involving the removal of trees under DPW jurisdiction,

the appropriate removal permit must be obtained concurrent with applications for building, demolition, or grading permits. Work must be completed within 6 months of an approved permit, unless an extension has been approved.¹ If DPW grants the tree removal permit, another tree must be planted in the place of the removed tree, or an in-lieu fee must be paid, unless DPW makes a written waiver. DPW also requires that notice be given to all interested San Francisco organizations and, to the extent practicable, the owners or property occupants on the block of the affected tree 30 days before removal; in addition, a notice must be posted on the affected tree. Written objections can be filed within those 30 days. If objections are filed, a hearing must be held before the tree can be removed.

Significant Trees

Significant trees are defined by City ordinance as trees in, or within 10 feet of, a public right-of-way that are greater than 20 feet tall, have a canopy greater than 15 feet in diameter, or have a trunk greater than 12 inches in diameter at 4.5 feet above grade.² Removal of significant trees requires the authorization of the DPW director or the director's designee, and is subject to the rules and procedures governing permits and disclosures as above.

Landmark Trees

In 2007, the San Francisco Board of Supervisors adopted legislation for designation and protection of landmark trees. Landmark trees can be anywhere within San Francisco, including private property. They are designated as such by the Board of Supervisors, based on criteria such as age, location, species, or visual quality. Once the tree has been designated, a notice indicating this designation is recorded for the property on which the tree is located. The City Zoning Administrator is required to identify landmark trees on proposed development or construction sites, and to notify the Urban Forestry Council and DPW. Special permits are required if the property is later proposed for development.³ The City Zoning Administrator or other City agency must impose measures to protect landmark trees on a construction site.

Authority over Site Development Plans

DPW has the authority to review and comment on site development plan applications received by the City's Central Permit Bureau that pertain to the planting, alteration, or removal of street trees, landmark trees, or significant trees. Unless permits have been obtained for removal, such trees must be protected

¹ San Francisco Public Works Code, Article 16, *Urban Forestry Ordinance*, Available at: <http://www.municode.com/Resources/gateway.asp?pid=14142&sid=5>, Section 806.

² Ibid, Section 810A.

³ Ibid, Section 810.

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during construction work that may occur within the dripline, or that might otherwise be adversely affected by excavation, construction, or street work.⁴ DPW may require a tree protection plan before approving the permit, if there are trees on the site that are to be preserved through construction.

San Francisco Planning Code, Section 143

Section 143 of the San Francisco Planning Code also includes requirements for street trees.⁵ The project site is in a Residential (R) district, which has the following requirements in the case of construction of a new building, relocation of a building, or additions of gross floor area equal to 20 percent or more of existing buildings:

- Street trees must be installed at a minimum of one 24-inch box tree for each 20 feet of property frontage along each street or alley; any remaining fraction greater than 10 feet requires an additional tree.
- The trees must be located within a setback area of the lot or within the public right-of-way.
- For trees installed in the public right-of-way, species and locations are subject to approval by DPW.

IMPACTS

SIGNIFICANCE THRESHOLDS

The thresholds for determining the significance of impacts in this analysis are consistent with the environmental checklist in Appendix G of the State *CEQA Guidelines*, which has been adopted and modified by the San Francisco Planning Department. For the purpose of this analysis, the following applicable thresholds were used to determine whether implementing the project would result in a significant impact on biological resources. The project would have a significant adverse biological resources impact if it would:

- M.a 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;
- M.b Have a substantial adverse effect on any riparian habitat or other sensitive natural community identified in local or regional plans, policies, regulations, or by the California Department of Fish and Game or U.S. Fish and Wildlife Service;

⁴ San Francisco Public Works Code, Article 16, *Urban Forestry Ordinance*, Available at: <http://www.municode.com/Resources/gateway.asp?pid=14142&sid=5>, Section 808.

⁵ San Francisco Planning Code, Article 1.2, Section 143, Street Trees, R, SPD, RSD, NC, C-3, DTR, MUG, MUO, MUR, UMU, SLR, SLI and SSO Districts, Available at: <http://www.municode.com/RESOURCES/gateway.asp?pid=14139&sid=5>.

- M.c Have a substantial adverse effect on federally-protected wetlands, as defined by Section 404 of the Clean Water Act (including, but not limited to, marsh, vernal pool, coastal, etc.), through direct removal, filling, hydrological interruption, or other means;
- M.d Interfere substantially with the movement of any native resident or migratory fish or wildlife species, or with established native resident or migratory wildlife corridors, or impede the use of native wildlife nursery sites;
- M.e Conflict with any local policies or ordinances protecting biological resources, such as a tree preservation policy or ordinance; or
- M.f Conflict with the provisions of an adopted Habitat Conservation Plan, Natural Community Conservation Plan, or other approved local, regional, or state habitat conservation plan.

PROPOSED PROJECT

The proposed project would include approximately 9,800 square feet of privately-owned, publicly accessible open space in the form of the landscaped podium courtyard. Street-level replacement trees and sidewalk improvements are proposed along California and Powell Streets, in compliance with the City's Residential Design Guidelines Section 2.6. The ornamental plants and trees at the existing podium courtyard level and 13 of the 21 existing street-level trees along Powell and California Streets would be removed during demolition of the existing hotel tower and podium. As discussed above, existing street trees would be fully replaced. The proposed podium courtyard level would contain new landscaping including trees and other vegetation.

IMPACT EVALUATION

Impact BI-1 The proposed project would not have a substantial adverse effect on any species, riparian habitat, or other sensitive natural community identified in local or regional plans, policies, or regulations, or by the California Department of Fish and Game or U.S. Fish and Wildlife Service. (No Impact) [Criteria M.a and M.b]

The proposed project is in a fully developed urban area and does not support habitat for any rare or endangered wildlife or plant species. In addition, no riparian habitat or other sensitive natural communities exist on site. The proposed project would therefore have no impact on rare or endangered species, riparian habitat, or sensitive natural communities.

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Impact BI-2 The proposed project would not have a substantial adverse effect on federally protected wetlands as defined by Section 404 of the Clean Water Act (including, but not limited to, marsh, vernal pool, coastal, etc.) through direct removal, filling, hydrological interruption, or other means. (No Impact) [*Criterion M.c*]

The proposed project is a fully developed urban site and does not contain any wetlands or open waters of the United States or State of California. The proposed project would therefore have no impact on federally protected wetlands.

Impact BI-3 The proposed project would not interfere substantially with the movement of any native resident or migratory fish or wildlife species, or with established native resident or migratory wildlife corridors, or impede the use of native wildlife nursery sites. (Less than Significant with Mitigation) [*Criterion M.d*]

The project site is in a fully developed urban area and does not support or provide habitat for any rare or endangered wildlife species. No rare, threatened, or endangered species are known to exist on-site or in the project vicinity. The lack of natural nesting habitats in urban areas tends to result in resident and migratory birds nesting in ornamental or street trees. The project site contains 21 street trees on the periphery of the project site: seven along Powell Street and 14 along California Street. A total of 15 ornamental plants and trees are located at the podium courtyard level. Due to the urban environment and high level of human activities in the project area, only common bird species are likely to nest in the area. The proposed project could result in disturbances to nesting birds that may be located on trees at or near the project site, due to construction occurring during the bird nesting period (May through August). California Department of Fish and Game (CDFG) Code Section 3503 and the Migratory Bird Treaty Act of 1918 (MBTA) protects nesting birds, their nests, and eggs. Western gulls, for example, are a common species in the area, but one protected under the MBTA. Gulls typically nest on flat surfaces, such as roof-tops rather than in trees. Destruction or disturbance of a nest would be a violation of these regulations and considered a potentially significant impact. Due to the urban environment and high level of human activities in the project area, only common bird species are likely to nest in the project area.

Project-related demolition and construction activities could cause nest abandonment and death of young or loss of reproductive potential at active nests located near the building, and could be a potentially significant impact to birds. Specific conditions for the treatment of bird nests would be required as a condition of the tree removal permit under Public Works Code Article 16. Demolition/construction activities would occur during the early part of the breeding season (May through August). The project sponsor would therefore implement **Mitigation Measure M-BI-3** below by conducting pre-construction surveys for nesting birds prior to construction. **Mitigation Measure M-BI-3** is also proposed as part of

the project under the Construction Management Plan.⁶ Implementation of **Mitigation Measure M-BI-3** and adherence to the conditions under Public Works Code Article 16 would avoid significant impacts to any potential nesting birds. Therefore, this impact would be less than significant with mitigation.

M-BI-3: Pre-construction Surveys for Nesting Birds

The project sponsor shall implement the following protective measures to ensure implementation of the Migratory Bird Treaty Act and compliance with State regulations during construction. To the extent feasible, the project sponsor and/or the construction contractor(s) shall trim/remove all vegetation/tree limbs necessary for project construction between September 1 to January 31. Should construction activities or vegetation removal commence between February 1 to August 31, pre-construction surveys for nesting birds shall be conducted for any affected tree(s) located within the public right of way by a qualified biologist to ensure that no active nests would be disturbed during project implementation. A pre-construction survey shall be conducted no more than 14 days prior to the initiation of demolition/construction activities. During this survey, the qualified person shall inspect the street trees located within the public right of way and areas immediately adjacent to the project site for nests.

If an active nest is found close enough to the construction area to be disturbed by these activities, the qualified biologist, in consultation with the California Department of Fish and Game, shall determine the extent of a construction-free buffer zone to be established around the nest until the young have fledged.

Impact BI-4 The proposed project would not conflict with any local policies or ordinances protecting biological resources, such as a tree preservation policy or ordinance. (Less than Significant) [Criterion M.e]

The San Francisco Board of Supervisors adopted legislation that amended the City's Urban Forestry Ordinance (Public Works Code Article 16, Sections 801 et seq.), to require a permit from the Department of Public Works (DPW) to remove any protected trees. Protected trees include landmark trees, significant trees, or street trees located on private or public property anywhere within the territorial limits of the City and County of San Francisco. A landmark tree has the highest level of protection and must meet certain criteria for age, size, shape, species, location, historical association, visual quality, or other contribution to the city's character, and has been found worthy of Landmark status after public hearings at both the Urban Forestry Council and the Board of Supervisors. A significant tree is either on property under the

⁶ Conversion Management Associates, 2010, *Fairmont Hotel Revitalization and Residential Tower Project Construction Management Plan*. March. This document is available for review at the Planning Department, 1650 Mission Street, Suite 400, as part of Case No. 2008.0081E.

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jurisdiction of DPW, or on privately owned land within ten feet of the public right-of-way, which satisfies certain criteria. Removal of a landmark, significant, or a street tree requires a permit from DPW.

There are no landmark or significant trees on the project site. The 15 ornamental plants and trees at the podium courtyard level and 13 of the 21 street trees along Powell and California Streets would be removed during the demolition and construction phases of the project. Street trees are protected under Article 16 of the Public Works Code which requires that a permit be obtained prior to removal. The project sponsor would apply for a tree removal permit and comply with any requirements set by the City. The proposed project would plant replacement street trees along Powell and California Streets after the construction of the project is complete. In addition, new landscaping of equal or greater than 15 ornamental plants and trees would be placed in the proposed podium courtyard level.⁷ The proposed project would not conflict with San Francisco's local tree preservation ordinance; therefore, this impact would be less than significant.

Impact BI-5 The proposed project would not conflict with the provisions of an adopted Habitat Conservation Plan, Natural Community Conservation Plan, or other approved local, regional, or state habitat conservation plan. (No Impact) [Criterion M.f]

The proposed project does not fall within any local, regional, or state habitat conservation plan. No impacts would occur.

CUMULATIVE IMPACTS

Removal of street trees with nesting birds would be regulated by Article 16 of the Public Works Code, which would require relocation or replacement trees at some other location through a permit issued by DPW. The project proposes tree replanting, and therefore would not contribute to cumulative tree losses, should they occur. Thus, cumulative effects related to street tree removal would be less than significant. Subsequently, cumulative development in the project site vicinity combined with the proposed project would not adversely affect biological resources. Thus, the proposed project would not have cumulatively considerable impacts on biological resources in the project area.

MITIGATION AND IMPROVEMENT MEASURES

Implementation of Mitigation Measure M-BI-3 would reduce potential biological resources impacts to less-than-significant levels.

⁷ Isaacson, Glenn, 2010. Conversion Management Associates, Personal Communication with AECOM on February 25, 2010.