

4.3 Biological Resources

The project site is an existing Koll Center Newport surface parking area which contains landscaping, including trees, along the street frontages and within the site. Because trees can provide habitat for nesting and migrating birds, this section of the EIR describes the Project's potential effects on biological resources related to the removal of existing ornamental landscaping on the site. The analysis in this section is based in part on *The Koll Center Residences Arborist Report* prepared by BrightView Tree Care (BrightView, 2016a) and *The Koll Center Residences Conceptual Design, Existing Tree Inventory* prepared by BrightView Tree Care (BrightView, 2016b) which are included as Appendix C of this EIR.

4.3.1 REGULATORY SETTING

Federal

Migratory Bird Treaty Act (16 USC § 703 - 711)

Raptors (e.g., eagles, hawks, and owls) and their nests are protected under both federal and State regulations. With respect to federal regulations, the Migratory Bird Treaty Act (MBTA) of 1918, as amended in 1972, makes it unlawful, unless permitted by regulations, to “pursue; hunt; take; capture; kill; attempt to take, capture or kill; possess; offer for sale; sell; offer to purchase; purchase; deliver for shipment; ship; cause to be shipped; deliver for transportation; transport; cause to be transported; carry or cause to be carried by any means whatever; receive for shipment, transportation, or carriage; or export, at any time, or in any manner, any migratory bird for the protection of migratory birds or any part, nest, or egg of any such bird” (16 USC 703).

In 1972, the MBTA was amended to include protection for migratory birds of prey (e.g., raptors). Six families of raptors occurring in North America were included in the amendment: *Accipitridae* (kites, hawks, and eagles); *Cathartidae* (New World vultures); *Falconidae* (falcons and caracaras); *Pandionidae* (ospreys); *Strigidae* (typical owls); and *Tytonidae* (barn owls). The provisions of the 1972 amendment to the MBTA protect all species and subspecies of these families.

State of California

Nesting Bird Protection (California Fish and Game Code §§ 3503, 3503.5, and 3513)

Under Sections 3503 and 3503.5 of the California Fish and Game Code, activities that would result in the taking, possessing, or destroying of any birds-of-prey, taking or possessing of any migratory nongame bird as designated in the MBTA, or the taking, possessing, or needlessly destroying of the nest or eggs of any raptors or non-game birds protected by the MBTA, or the taking of any non-game bird pursuant to California Department of Fish and Game Code Section 3800 are prohibited. Section 3513 makes it unlawful to take or possess any migratory non-game bird as designated in the MBTA.

Section 3503.5 explicitly provides protection for all birds-of-prey, including their eggs and nests. It states that it is Section 3503.5 states it is “unlawful to take, possess, or destroy any birds of prey (in the order *Falconiformes* or *Strigiformes*) or to take, possess, or destroy the nest or eggs of any such bird except as otherwise provided by this Code or any regulation adopted pursuant thereto.” Construction-related disturbance during the breeding season could result in the incidental loss of fertile eggs or nestlings or

otherwise lead to nest abandonment. Disturbance that causes nest abandonment and/or loss of reproductive effort is considered “take” by the California Department of Fish and Wildlife (CDFW).

California Environmental Quality Act (14 California Code of Regulations § 15386; California Fish and Game Code § 1802)

The CDFW may play various roles during the CEQA process. As a trustee agency, the CDFW has jurisdiction over certain resources held in trust for the people of California. Trustee agencies are generally required to be notified of CEQA documents relevant to their jurisdiction, whether these agencies have actual permitting authority or approval power over aspects of the underlying project (14 California Code of Regulations [CCR] 15386). The CDFW, as a trustee agency, must be notified of CEQA documents regarding projects involving fish and wildlife of the State, as well as Rare and Endangered native plants, wildlife areas, and ecological reserves. Although as a trustee agency the CDFW cannot approve or disapprove a project, lead and responsible agencies are required to consult with the CDFW, as applicable to a project. The CDFW, as the trustee agency for fish and wildlife resources, shall provide the requisite biological expertise to review and comment upon environmental documents and shall make recommendations regarding those resources held in trust for the people of California (*California Fish and Game Code § 1802*).

Regional and Local

Regional Habitat Conservation Plan

The project site is within the plan area of the Orange County Central-Coastal Natural Communities Conservation Plan (NCCP). This regional habitat conservation plan covers much of central Orange County. The NCCP is managed by the Nature Reserve of Orange County, and the City is a participating jurisdiction in the NCCP. However, the project site is not in a reserve designated under the NCCP, and there are no survey requirements for the site pursuant to the NCCP.

City of Newport Beach Municipal Code

The following provision from the City’s Municipal Code requires parkway trees be provided by new developments.

Title 13 (Streets, Sidewalks and Public Property), Chapter 13.09 (Parkway Trees)

Where a new building is constructed on vacant land, or the original floor area of an existing main building would increase by more than 50 percent of its original size, an applicant is responsible for planting trees in the parkway abutting the building site. Parkway trees must be at least a 36-inch box of type, variety, and/or species selected by the City in accordance with the City Street Tree Designation List. If the City determines that because of the location, terrain or condition of the property that required tree planting is impractical at the abutting parkway, the City would plant the 36-inch box tree at a location designated by the City.

4.3.2 ENVIRONMENTAL SETTING

The project site is in the Koll Center Newport and is currently developed with surface parking lots and common landscape areas for the existing office buildings. There are no native vegetation communities within or immediately adjacent to the site. The existing landscaping throughout the project site consists

of non-native ornamental vegetation, which provides very limited habitat for wildlife. While a few species of birds may use the ornamental plantings for nesting and/or roosting, the immediately surrounding area does not provide suitable habitat for foraging, nesting/breeding, movement, or refuge for common or sensitive wildlife species. However, the site does contain several large ornamental trees and shrub vegetation that have the potential to support nesting migratory birds. *Table 4.3-1* identifies tree species in the City right-of-way and on the project site, as well as the number of trees that would be removed within the City right-of-way and trees on private property. No drainages traverse the site and no potential jurisdictional waters or wetlands areas are present on or immediately adjacent to the site.

Table 4.3-1. Trees Summary				
Common Name	Scientific Name	Existing Trees	Trees to be Removed	Trees to Remain
City Trees				
California sycamore	<i>Plantanus racemose</i>	7	7	0
Red ironbark	<i>Eucalyptus sideroxylon</i>	2	0	2
Private Trees				
Camphora tree	<i>Cinnamomum camphora</i>	39	31	8
Spotted gum	<i>Corymbia maculate</i>	33	28	5
Carrot wood	<i>Cupaniopsis anacardioides</i>	5	0	5
Red ironbark	<i>Eucalyptus sideroxylon</i>	32	15	17
Benjamin tree	<i>Ficus benjamina</i>	20	20	0
Rustyleaf	<i>Ficus rubiginosa</i>	13	13	0
Jacaranda	<i>Jacaranda mimosifolia</i>	2	2	0
Crape myrtle	<i>Lagerstroemia indica</i>	5	0	5
Sweet gum	<i>Liquidambar styraciflua</i>	77	62	15
Brisbane box	<i>Lophostemon confertus</i>	4	0	4
Southern magnolia	<i>Magnolia grandiflora</i>	6	6	0
California sycamore	<i>Plantanus racemose</i>	101	84	17
Aleppo pine	<i>Pinus halepensis</i>	50	24	26
Fern pine	<i>Podocarpus gracilior</i>	2	2	0
Ornamental pear	<i>Pyrus calleryana</i>	4	0	4
Tipu tree	<i>Tipuana tipu</i>	45	38	7
Chinese elm	<i>Ulmus parvifolia</i>	12	12	0
Total		459	339	120
Source: BrightView Design Group, 2016b.				

4.3.3 THRESHOLDS OF SIGNIFICANCE

The following significance criteria are from the City of Newport Beach Environmental Checklist. The Project would result in a significant impact related to biological resources if it would:

Threshold 4.3-1 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 CDWG or USFWS.

Threshold 4.3-2 Interfere substantially with the movement of any native or migratory fish or wildlife species; inhibit established native resident or migratory fish or wildlife corridors; or impede the use of native wildlife nursery sites.

Threshold 4.3-3 Conflict with any local policies or ordinances protecting biological resources, such as a tree preservation policy or ordinance.

As addressed in Section 1.4, *Summary of Effects With No Impact*, the City has determined that the Project would not have a significant impact on the following threshold for the reasons stated below, and that no further analysis was required:

- Have a substantial adverse effect on any riparian habitat or other special-status natural community identified in local or regional plans, policies, regulations, or by the CDFG or USFWS.
- 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.
- Conflict with the provisions of an adopted Habitat Conservation Plan, Natural Community Conservation Plan, or other approved local, regional, or state habitat conservation plan. The project site does not contain riparian habitat (USFW, 2017) or any water resources (e.g., streams, creeks, channels, vernal pools). Therefore, no impacts to riparian habitat would result from Project implementation. Additionally, the site does not contain waters, including wetland waters, that are subject to federal jurisdiction under Section 404 of the Clean Water Act. Therefore, no impact would occur.

As previously noted, the project site is within the plan area of the Central-Coastal NCCP. However, the site is not in a reserve designated under the NCCP, and there are no survey requirements for the site pursuant to the NCCP (County of Orange, 1996). The City of Newport Beach General Plan Natural Resources Element designates 28 Environmental Study Areas (ESAs). An ESA may support species and habitats that are sensitive and rare within the region or may function as a migration corridor for wildlife. The project site is not located within a designated ESA (Newport Beach, 2009). The nearest ESA is San Diego Creek, which is located approximately 0.80 mile south/southwest of the site. The San Joaquin Marsh is located approximately 0.15 mile east southeast of the site in the City of Irvine. Because of the lack of habitat resources on the project site, no impact would occur.

4.3.4 ENVIRONMENTAL IMPACTS

Threshold 4.3-1: **Would the Project 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 Wildlife or U.S. Fish and Wildlife Service?**

A substantial adverse effect to special-status plant species would occur if a project would: (1) reduce the population size or reduce the area of occupied habitat of a rare, threatened, or endangered species; or (2) reduce the population size or reduce the area of occupied habitat of a locally uncommon species. A substantial adverse effect on a special-status wildlife species would occur if a project would: (1) reduce the known distribution of a species; (2) reduce the local or regional population of a species; (3) increase predation of a species, leading to population reduction; (4) reduce habitat availability sufficiently to affect potential reproduction; or (5) reduce habitat availability sufficiently to constrain the distribution of a species and not allow for natural changes in distributional patterns over time.

The project site is existing surface parking with ornamental landscape areas; there are no native habitat areas on the site nor is the site adjacent to native habitat areas. The site is surrounded on all sides by developed parcels. Project implementation would require the demolition of the surface parking areas including the existing ornamental landscaping in the parking area, and would include the removal of approximately 339 ornamental trees (Table 4.3-1). The Proposed Project includes site landscaping including groundcover, shrubs, vines, succulents, grasses, and trees. The existing parking area does not provide habitat for any known special-status species or listed plants. No significant impact would occur.

While there is no suitable habitat for any special-status wildlife species on the project site, some of the existing trees could provide nesting habitat for native birds. Nesting birds are protected under the federal Migratory Bird Treaty Act (16 USC § 703 et seq.) and the California Fish and Game Code (§ 3503 et. seq.). Federal regulations prohibit any person to “pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale, sell, offer to barter, barter, offer to purchase, [or] purchase” any migratory bird, including parts of birds, as well as eggs and nests. The California Fish and Game Code Sections 3503, 3503.5 and 3512 also prohibit the take of birds and active nests. Mitigation Measure (MM) 4.3-1 requires a preconstruction survey for nesting birds with procedures should nesting birds be discovered. Implementation of MM 4.3-1 would reduce potential impacts to nesting birds to a less than significant level.

Impact Summary: *Less Than Significant With Mitigation.* The Proposed Project would potentially have direct impacts on nesting birds. This impact would be mitigated to a level considered less than significant with implementation of MM 4.3-1.

Threshold 4.3-2: **Would the Project 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?**

As noted above, the project site is developed and located within an urban environment. The site is not located within a known movement or travel corridor for native resident species. Project implementation

would require the demolition of the surface parking area including the removal of approximately 339 ornamental trees in the parking and common landscape areas. Native migratory birds and their nests are protected under the provisions of the *Migratory Bird Treaty Act* and *California Department of Fish and Game Code*. The loss of any active nests of a native bird during construction would be considered a significant impact. MM 4.3-1 requires a preconstruction survey for nesting birds with procedures should nesting birds be discovered. Implementation of MM 4.3-1 would reduce potential impacts to nesting birds to a less than significant level.

Impact Summary: *Less Than Significant With Mitigation.* The Project would potentially have direct impacts on nesting birds. This impact would be mitigated to a level considered less than significant with implementation of MM 4.3-1.

Threshold 4.3-3: Would the Project conflict with any local policies or ordinances protecting biological resources, such as a tree preservation policy or ordinance?

The City does not have a tree preservation ordinance applicable to trees on private property. Chapter 13.09 (Parkway Trees) of the City's Municipal Code requires new developments to plant trees in the parkway abutting the building site. The trees are to be at least 36-inch-box trees of the type, variety and/or species determined by the City in accordance with the City Street Tree Designation List. The Project would be required to comply with Standard Condition (SC) 4.3-1 which requires compliance with Municipal Code 13.09.

Impact Summary: *Less Than Significant Impact.* The Proposed Project would comply with SC 4.3-1.

4.3.5 CUMULATIVE IMPACTS

Past, present and reasonably foreseeable future projects are required to implement measures, as set forth in their respective CEQA documents, consistent with federal, State, and local regulations to avoid adverse effects to existing biological resources or to mitigate for significant impacts to these resources. The types of measures required for projects impacting protected habitat, species, and regulated resources can include avoidance, project design features, regulatory approvals, best management practices, and mitigation measures. With mitigation, the Proposed Project would not cause a significant impact to biological resources. As discussed in Section 4.3.3 above, the project site does not contain riparian habitat or any other water resources. Additionally, the site does not contain waters, including wetland waters, that are subject to federal jurisdiction under Section 404 of the Clean Water Act. The site is not located within a designated ESA, which may support species and habitats that are sensitive and rare within the region or may function as a migration corridor for wildlife. The Project would not contribute to a cumulative effect on biological resources including sensitive species, protected habitat, or wetland resources. Therefore, the Project would not contribute to a cumulatively considerable impact. Without mitigation measures, cumulative impacts could be significant to biological resources. With implementation of SC 4.3-1, which requires new developments to plant trees in the parkway abutting the buildings site (Chapter 13.09 of the City's Municipal Code) and MM 4.3-1, which requires a preconstruction survey for nesting birds with procedures should nesting birds be discovered, impacts would be less than significant. While there is no suitable habitat for any special-status wildlife species on the project site, some of the existing trees could provide nesting habitat for native birds.

4.3.6 MITIGATION PROGRAM

Project Design Features

No project design features have been identified by the Applicant.

Standard Conditions

SC 4.3-1 The Applicant shall be responsible for planting trees in the parkway abutting the building site in accordance with City rules, regulations and policies in compliance with the City of Newport Beach Municipal Code Chapter 13.09 (Parkway Trees). The parkway trees shall be at least a 36-inch box of the type, variety and/or species determined by the City in accordance with the City Street Tree Designation List. If the City determines that because of the location, terrain, or condition of the property that required tree planting is impractical at the abutting parkway, the Applicant shall plant the 36-inch box tree at a location designated by the City.

Mitigation Measures

MM 4.3-1 A preconstruction survey for nesting birds shall be conducted by a qualified biologist if clearing and grubbing work is conducted within the bird nesting season (typically February 15 to September 15). If an active nest is discovered, disturbance within an established buffer shall be prohibited until nesting is complete; the buffer distance shall be determined by the biologist in consultation with applicable resource agencies and in consideration of species sensitivity and existing nest site conditions. Limits of avoidance shall be demarcated with flagging or fencing. The biologist shall record the results of the recommended protective measures described above and shall submit a memo summarizing any nest avoidance measures to the City to document compliance with applicable State and federal laws pertaining to the protection of native birds.

4.3.7 LEVEL OF SIGNIFICANCE AFTER MITIGATION

With implementation of the Mitigation Program set forth in this section, potential impacts would be reduced to a level considered less than significant.

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