

Local, State and Federal Land Use and Environmental Restrictions
Applicable to Residential Development of the Fairview Estates Property, APN
505-040-006, as proposed in July 2018 permit application

April 20, 2021
El Cerrito Trail Trekkers

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Most recent development proposal, dated July 2018 (application rejected as incomplete): 38 clustered homes on 15-acre parcel with 10-20% slopes and two tributaries to Baxter Creek, oak woodlands and other sensitive resources in an area subject to landslides, located immediately adjacent to the northernmost section of the Hillside Natural Area. Approximately 5.2 acres of the site would be preserved as open space; development of the remainder of the site would require mass excavation and grading. (Hereafter, the “proposed project.”)

I. Local and State Land Use Regulations.

A. City of El Cerrito General Plan (GP) Designation and Policies (Aug. 1999).
Available at: <https://www.el-cerrito.org/718/General-Plan>

1. The Fairview Estates Parcel: Designated “Very Low Density Residential” In the GP. See:

https://www.el-cerrito.org/DocumentCenter/View/1353/General_Plan_Land_Use_Map?bidId=

GP statements and policies relevant to the proposed project are listed below. It is black letter law that a project must be consistent with the local government’s adopted GP policies in order to be approved, and GP consistency also is required by the City’s Zoning Ordinance. (See, e.g., El Cerrito Muni. Code, Title 19 (Zoning), §§ 19.14.040(A)(3), 19.14.050(A), 19.41.030(D)(1).)

2. GP Policies Relevant to Riparian and Open Space Development.

The GP notes at the outset that “preservation and enhancement of natural features – trees, creeks, natural open space areas – ... will be a **high priority** for the City.” (GP p. 1-1.)

- a. GP Land Use and Community Development & Design element.

In the Land Use and Community Development elements, the GP discusses the importance of opening up buried creeks and maintaining existing creeks and preserving and restoring natural terrain, drainage and vegetation on or near development sites. (See GP. p. 4-20 (Policy LU6.1, Natural Features), p. 4-28, p. 4-35 (Policy LU CD3.5, Creek Preservation).) In addition, the GP encourages maintaining existing significant trees and tree groupings “where possible.” (GP p. 4-34 (Policy CD3.1, Tree Preservation).)

b. GP Open Space and Conservation element.

In the Open Space and Conservation element, the GP again discusses the importance of preserving riparian and oak woodland vegetation, native grasslands, wildlife corridors and other wildlife habitats. (GP p. 7-5, (Policy R1.1, Habitat Protection). This policy requires loss of these habitats to be “fully offset through creation of habitat of equal value.” (*Ibid.*) Project proponents also must compensate for any loss of rare and endangered species habitat. (GP p. 7-5 (Policy R1.2, Rare and Endangered Species).)

Project proponents also must maintain water quality levels established by the U.S. Environmental Protection Agency (EPA) and Regional Water Quality Control Board (Regional Water Board) under the federal Clean Water Act (CWA), and “achieve the highest possible level of water quality reasonable for an urban environment in City creeks.” (GP p. 7-6 (Policy R1.6, Runoff Water Quality).)

Most importantly, the GP requires **existing riparian vegetation to be preserved** to protect property owners and buyers from erosion and flooding, and provides that “[l]ands adjacent to riparian areas should be protected as public or private permanent open space through dedication or easements.” (GP p. 7-6 (Policy R.1.7, Creek Protection); *see also* GP p. 6-34 (“[r]equire permanent dedication of open space areas with high habitat, visual, recreational or archaeological values as a condition of development” and “[u]se visual or public-access easements and building setbacks to protect open space resources while allowing development on private parcels”).)

The GP further provides that “design and improvements along creeks (Cerrito Creek, Baxter Creek, etc.)” should be “accomplish[ed] ... in consultation and cooperation with creek restoration and design professionals.” (GP p. 7-6 (Policy R.1.8, Creek Improvements).)

“For development adjacent to creeks and major drainages,” the project proponent must “**provide adequate building setbacks from creek banks, provision of access easements for creek maintenance purposes and for public access to creekside amenities, and creek improvements such as bank stabilization. Also protect riparian vegetation outside the setback.**” (GP p. 7-7 (Policy R1.9, Development Near Creeks).)

c. GP Public Facilities and Services element.

The Public Facilities and Services element provides that: “[i]n meeting open space objectives to secure and preserve open space in perpetuity, the City will make maximum use of approaches that minimize ongoing City costs and liability exposure. **One approach will be to employ the development review process, wherever appropriate, to secure dedications, easements, and/or maintenance agreements.**” (GP p. 6-16 (Policy PR2.4, Open Space Strategy).)

“**Except where extraordinary circumstances indicate otherwise, ensure that development decisions protect existing open space areas.**” (GP p. 6-17 (Policy PR2.6, Existing Open Space Preservation).)

d. GP policies applied to proposed project.

The proposed project appears to be inconsistent with several of the foregoing GP policies, inasmuch as it would destroy existing riparian and oak woodland habitat onsite and permanently bury and relocate a substantial portion of the northern tributary to Baxter Creek, and possibly would locate development too close to the southern tributary. The proposed project also includes grading within creek buffers of both onsite tributaries, and creation of a culvert and bulkhead, presumably in the northern tributary. (See Incomplete Application Letter from City of El Cerrito to Carl Campos, Aug. 17, 2018, p. 3 (hereafter “Incomplete Letter”).

3. GP Policies and Statements Relevant to City Acquisition of Property.

The GP encourages the City to acquire existing open space areas, *e.g.*:

“The City should review potential open space and establish priorities for acquisition by the City or by other agencies, or protection through other means. **High priority will be given to biologically sensitive and visually prominent lands that seem most at risk from development.** Conduct an inventory of unique natural areas, important wildlife habitats, and areas suitable for nature study, particularly near schools.” (GP p. 6-33.)

“**The City should identify funding sources for acquisition and ongoing maintenance for public open space lands.**” (*Ibid.*)

“**Encourage grants and donations of undeveloped property with high open-space values from private individuals or organizations. ... Encourage private, non-profit, and other public agencies to acquire and maintain undeveloped land for open space preservation.** These methods are preferred over the use of city funds for acquisition.” (GP p. 6-34.)

“Work with organizations such as the Urban Creeks Council, Trust for Public Lands, East Bay Regional Park District [EBRPD], Nature Conservancy, Coastal Conservancy, and other cities and counties to perform creek restoration and other tasks related to open space.” (*Ibid.*)

“**Prioritize parcels with high habitat, visual, archaeological or recreational values for purchase by the City if funds become available.**” (*Ibid.*)

“**El Cerrito should encourage the granting of scenic easements on landforms and key visual resources that could be subject to development.**” (GP p. 6-35.)

4. GP Policies Relevant to Hillside Development.

With regard to hillside development, the GP Resources and Hazards element requires development to be controlled “on ridges to protect the form of the ridges and, in particular, by restricting development on ridgelines. Natural contours and vegetation on ridgelines should be maintained. Locate and design structures and other public and private improvements so as to minimize cut and fill areas that will impact public views, safety and surrounding uses, and avoid building profiles (silhouettes) being located above the ridgeline when viewed from public streets and designated public access areas.” (GP p. 7-7 (Policy R.1.12, Ridgelines in East Richmond Heights Area).)

“Preserve prominent views of visual resources and the bay, and consider visual access and view corridors when reviewing development proposals. Require assessment of critical public views, ridgelines, scenic overlooks, Bay vista points, significant knolls, stands of trees, rock outcrops, and major visual features as part of the project review process to assure that projects protect natural resources through proper site planning, building design and landscaping, and that public access is provided if possible to vista points.” (GP pp. 7-7 to 7-8 (Policy R.13, View Protection and Vista Points.)

5. GP Policies Relevant to Development in Seismic and Landslide Hazard Areas.

GP Policies H1.2, H1.3, and H1.4 (GP Resources and Hazards element) require geotechnical review, soils and geological review, and other studies for development proposals in potentially hazardous areas, to assess the actual extent of landslide, erosion, sedimentation, settlement and seismic hazards. (GP pp. 7-16 to 7-17, p. 7-28.) All identified hazards must be mitigated, via an erosion control and revegetation plan, storm drain facilities, seismic safety of structures, fire safe buildings, fire retardant landscaping and other measures. (GP pp. 7-17 to 7-20.)

6. Other GP Policies and Statements Relevant to Restoration and Protection of City Creeks in General.

The GP notes that “[i]n 1995 the cities of El Cerrito, Albany, Berkeley and Richmond, the [EBRPD], and the University of California at Berkeley, endorsed a goals statement expressing mutual intentions to restore creeks to natural conditions ..., to assure adequate flow of freshwater for nourishment of creeks, and to promote public awareness of the value of healthy watersheds. (GP p. 4-60.)

The GP requires “coordination between the cities of El Cerrito, Albany, Berkeley, and Richmond, the [EBRPD], and the University of California at Berkeley to restore the watershed of the joint jurisdictions to a healthy condition.” close cooperation between these entities “to achieve the goals expressed in The Joint Watershed Goals Statement.” (GP p. 7-8 (Policy R.15, Joint Watershed Partnership).)

The GP further requires the City to coordinate with other interested federal and state agencies “in matters pertaining to open space and environmental resource protection.” (GP p. 7-8 (Policy R.1.14, Inter-Agency Cooperation in Environmental Resource Protection); *see also* GP p. 6-33 (City, County and EBRPD “should cooperate in studies of matters pertaining to open space and environmental resource protection”); GP p. 7-29 (“[t]he City should continue to coordinate with other cities, Contra Costa and Alameda counties, and other agencies to ensure that environmental objectives are achieved”).)

The GP directs the City to “[s]eek funding opportunities from State and federal agencies and from non-profit foundations for urban creek restoration efforts.” (GP p. 6-29 (Policy PS4.2, Creek Restoration).)

The GP also directs the City to establish a set of design objectives for Baxter Creek, similar to the objectives the City adopted in Resolution No. 96-103 for Cerrito Creek. (GP p. 7-7 (Policy R1.10, Cerrito Creek and Baxter Creek), GP pp. 7-26 to 7-27.) Objectives for Baxter Creek may include, as relevant here:

- a. Improve the natural channel characteristics.
- b. Maintain and improve the riparian habitat.
- c. Improve and maintain water quality in the creek channel...
- f. Establish a creek corridor through public ownership of a conservation easement or other interest in a portion of the property through which the creek flows.
- g. Establish setbacks for buildings and other improvements, through special regulations or a general Citywide creek protection ordinance.”

(GP pp. 7-27 to 7-28; *see also* GP p. 6-35 (“[t]he City should develop and implement a Riparian and Stream Restoration Program that identifies areas and stream segments that should be restored and provides policy guidance for such actions”); GP p. 7-31 (“[e]stablish priorities for riparian and stream restoration that include erosion control measures, stream clean-up, improved capacity and reliability of the City’s storm drain system, and revegetation plans”).) It is not clear whether the City ever adopted a set of design objectives for Baxter Creek or a Stream Restoration Program.

B. City of El Cerrito Zoning Ordinance Designation and Requirements (Municipal Code, Title 19, Zoning Code).

Available at: https://library.municode.com/ca/el_cerrito/codes/code_of_ordinances

1. Zoning Designation for Fairview Estates Parcel Is RS 10. El Cerrito Zoning Code, Title 19 of Municipal Code, Part II (Base District Regulations), Chap. 19.06 (Residential Districts), § 19.06.010.

Single family, 10,000 square foot minimum lot size. One of the specific purposes of this (and other) residential districts in the Zoning Code is to “[p]rotect sensitive environmental areas and features, including hillside areas, creeks, and biological resources; and protect against hazards related to earthquakes, unstable terrain, and wild fires.” (§ 19.06.010(D).)

“RS Single-family Residential. To promote and protect single-family neighborhoods at a base density of up to 10 dwelling units per net acre; and to minimize the out-of-scale appearance of large homes and development relative to their lot size and slope, and relative to adjacent homes in the neighborhood. **Certain areas of the RS district areas are intended to: protect sensitive hillside areas from extensive development; protect against hazards related to earthquakes, unstable terrain, and wild fires; protect sensitive environmental areas and features; and provide sites for larger, distinctive residences.** The RS District is split into four separate subsets guiding the minimum size of each lot and other development standards such as minimum lot depth and width and setbacks—RS-5 would be a minimum lot size of 5,000 square feet, RS-

7.5 = 7,500 square feet, **RS-10 = 10,000 square feet**, and RS-20 = 20,000 square feet.” (See § 19.06.010.)

The Zoning Code allows a maximum of one unit per 10,000 square foot lot, plus one accessory dwelling unit, with no density increases permitted unless the project complies with state and local affordable housing incentives. (§ 19.06.030, Table 19.06-B.)¹

However, the proposed project requires an amendment to the existing zoning district to include a “Planned Development” district overlay on the base district requirements, which may change minimum lot size and other requirements, as discussed in Part I.B.5 below.

(See Incomplete Letter, pp. 1-2.)

2. Zoning Ordinance Baseline Requirements.

The Zoning Code specifies the base minimum lot width, maximum lot coverage, maximum impervious surface coverage, front, side and rear yards, maximum building height, maximum density, building design and other development details. (See e.g., § 19.06.030, Tables 19.06-B, 19.06-C and 19.06-D.)

These base requirements may be modified via a Planned Development rezoning overlay, which the City states is required for the proposed project. (See Incomplete Letter, pp. 1-2; Part I.B.5 below; § 19.14.020(C).)

Zoning Code, Part IV (Regulations Applying in Some or All Districts), Chapter 19.25 (Landscaping and Buffer Yards) also sets forth detailed landscaping requirements for development projects, and requires, among other things, “[e]xisting healthy trees” to “be maintained whenever possible.” (§ 19.25.050(C).) The proposed project also likely will require design review pursuant to Zoning Code, Part V (Administration), Chap. 19.38 (Design Review).

3. Creek Protection Overlay District Requirements.

The project parcel also lies within the Creek Protection Overlay District on the base zoning district (“Creek District”). This overlay district adds significant additional restrictions on development of the parcel. (See Incomplete Letter, pp. 3-4; Zoning Code, Part III (Special Dist. Regulations), Chap. 19.12 (Creek Protection Overlay District).) The purpose of the Creek District is “to control flood and erosion damages and to preserve natural watercourses as an important public asset that provides environmental, recreational and aesthetic value within the city.” (§ 19.12.010.)

In general, development in this district must be designed to achieve the following goals, among others: (a) preserve, enhance and restore “natural drainage ways as parts of the storm drainage system, minimizing any alterations or structures within the natural stream channel and

¹ Affordable housing incentives in state and local laws are beyond the scope of this summary. (See, e.g., Zoning Code, Part IV (Regulations Applying in Some or All Districts), Chap. 19.22 (Affordable Housing Bonus) and Chap. 19.23 (Incentives Program).) Note, however, that inclusionary dwelling units required by the Zoning Code (see Part I.B.7 below) count towards any requested density bonuses. (See § 19.30.040(D).)

streambed”; (b) preserve “riparian vegetation and protect wildlife habitat and wildlife corridors along natural drainage ways”; and (c) “protect lands adjacent to riparian areas as public or private permanent open space through dedication or easements”. (*Ibid.*)

Most importantly, the Creek District ordinance generally prohibits any fill, obliteration, obstruction, construction or interference in any creek² “to construct a building bridging a creek” or “in any manner interfere with ... any creek in El Cerrito which carries off at any time of the year any storm water, or any surface waters.” (§ 19.12.040(A).) The ordinance generally requires a 30-foot setback from the top of the creek bank or upper edge of riparian vegetation and a 35-foot setback from the centerline of the creek (as determined by the City Engineer). (§§ 19.12.050, Table 19.12-A, 19.12.060(A).) Generally speaking, no new roofed structures or new impervious surfaces are allowed within this setback area. (§ 19.12.060(A), (B).)

However, the City may grant an exception to the setback requirement for roofed structures (including dwellings, garages and other accessory buildings) via a conditional use permit (*see* Part I.C below) if all the following findings are made:

- “1. Alternative locations outside the setback area ... have been studied and found to be physically infeasible or more environmentally damaging.
2. Adverse environmental effects are mitigated to the maximum extent feasible and all feasible measures for creek protection are incorporated, including measures to protect riparian vegetation and prevent erosion, pursuant to the requirements of a creek protection and riparian habitat plan in subsection (E)(5) of this Section.
3. The exception is necessary to allow a principal permitted use of the property, and without an exception the size of the project would be limited to less than half of the lot coverage allowed under the Zoning Ordinance and/or the use and development of the property similar to that enjoyed by other similarly zoned properties in the vicinity would not be possible.
4. No structure is closer than 15 feet from the top of the creek bank.”

(§ 19.12.060(E).)

Project proponents wishing to rely on this exemption must submit a creek assessment, creek protection and riparian habitat plan, and construction management plan meeting specified

² The Creek District ordinance broadly defines “creeks” subject to the ordinance’s requirements to include even intermittent and ephemeral waterways or other channels, swales or depressions, whether identified or unidentified, “provided they are hydrologically connected to a waterway above and below the site or [are] connected to a spring, headwaters, lake or the San Francisco Bay.” (*See* § 19.12.030(A).) Creeks may be determined based on topography (e.g., channels, beds, banks, or “U” or “V” shaped features) or other indicator features, such as riparian and wetland habitat. (*Id.* and § 19.12.030(B).) This definition encompasses the two tributaries to Baxter Creek on the project site.

requirements. (§ 19.12.060(F), (H)(3).) If the City approves any development within the creek setback area, all measures specified in the creek and riparian habitat plan and any other mitigation measures identified in the California Environmental Quality Act (CEQA) review document (*see* Part I.D below) “shall become conditions of approval for the project.” (§ 19.12.060(H)(1).) In addition, the project proponent must obtain all required approvals from the California Department of Fish and Wildlife (CDFW), U.S. Army Corps of Engineers (Corps) and Regional Water Board “prior to or concurrently with the approval of any city permits.” (§ 19.12.060(H)(2); *see* Part II below for discussion of other federal and state permit requirements.)

In addition, “[c]ulverting and riprapping shall be prohibited unless there is strong evidence that there is no other reasonable means to prevent the erosion of adjacent supports, foundations, or property. A permit from the City Engineer and Zoning Administrator shall be required to construct or cause to be constructed, any wall, culvert, drain, bulkhead or other structure in any natural watercourse or creek in the city, or to place riprap or any debris in the channel or on the banks.” (§ 19.12.070(A).)

No such permit will be granted if there is another “alternative available to solve the problem,” including but not limited to bank stabilization, vegetation management, a setback levee, or changes in site design. (§ 19.12.070(C).) Again, the project proponent must obtain all required federal and state permits and complete all CEQA review “prior to, or concurrently with the approval of a permit by the City Engineer.” (§ 19.12.070(D).)

Finally, “[n]o grading, alteration of the natural contours of the land, cutting or alteration, or removal of creek bank vegetation, within the creek or creek setback area shall be permitted except in” specified circumstances. (§ 19.12.080.)

4. Hazard Overlay Requirements.

A significant portion of the site also lies within a High Landslide Risk Area on the City’s Special Study Map, which also places these portions of the site within a designated Hazard Overlay District: Seismic and Geologic Hazard Area. (*See* Zoning Code, Part III, Chap. 19.13 (Hazard Overlay District).) Proposed new construction in these areas require a soils report prepared by a registered Civil Engineer and a geologic report by a certified Engineering Geologist. (§§ 19.13.030, 19.13.040, 19.13.050.)

5. Planned Development District Requirements.

According to the Incomplete Letter, the proposed project requires compliance with the City’s Planned Development District overlay ordinance. (*See* Incomplete Letter, pp. 1-2; Zoning Code, Part III, Chap. 19.14 (Planned Development District).)

“The specific purpose of the PD Planned Development district is to provide for detailed review of development that warrants special review and deviations from the existing development standards. This district is also intended to provide opportunities for creative development approaches and standards that will achieve superior community design, environmental preservation and public benefit, in comparison to subdivision and development under district regulations.” (§ 19.14.010.)

A PD District requires Planning Commission and City Council approval of a rezoning to add a special PD District to the base zoning requirements (*see* Part I.B.2 above), and a conditional use permit for the proposed development project (*see* Part I.C below). (§§ 19.14.020(A), 19.14.030.) In approving the project, the City may authorize deviation “from the minimum lot area, yard requirements, building heights, other physical development standards, and land use and density requirements” of the base zoning district. (§ 19.14.020(C).)

An application for a PD District rezone must contain a variety of additional information, including a proposed open space and landscaping plan; locations of existing trees, drainages and watercourses; site plan; engineering plans; and other information. (§ 19.14.030(F).) In order to approve a PD District rezoning and conditional use permit, the City must find, among other things, that the proposed PD District and development “conform[s] in all significant respects with the General Plan,” and is “demonstratively superior to the development that could occur under the standards applicable to the underlying base district.” (§ 19.14.040.)

6. Development Agreement Requirements.

In addition, all Planned Developments require City approval of a Development Agreement. (*See* Incomplete Letter, p. 2; Zoning Code, Part III, § 19.14.020(D).) Procedures for negotiation and approval of development agreements are outlined in the Zoning Code, Part V, Chapter 19.41 (Development Agreements).

Development agreements must be: (a) consistent with the GP, (b) “compatible with the uses authorized in” the Zoning Ordinance district in which the property is located, (c) “non-detrimental to the public health, safety and welfare of the Community,” (d) be reviewed under CEQA (*see* Part I.D below), and also (e) must “provide substantial public benefits.” (§ 19.41.030(D).)

A Development Agreement must include provisions for reservation or dedication of land for public purposes on site, or payment of in-lieu fees for offsite dedication and comply with other mitigation measures imposed on the development by the City. (§ 19.41.040(A), (B), (D).) Development Agreements also must comply with the related requirements of state law, Government Code sections 65864 *et seq.*

7. Inclusionary Housing Ordinance Requirements.

The Incomplete Letter states that the proposed project is required to meet the City’s inclusionary housing requirements. (*See* Incomplete Letter, p. 2; Zoning Code, Part IV, Chap. 19.30 (Inclusionary Zoning).)

These requirements apply to, among other projects, “[a]ll for-sale residential development that consist of nine or more units” and “[a]ll residential development and contiguous property that is under common ownership or control.” (§ 19.30.030(B).) Twelve percent of the total dwelling units for sale must “be made available for purchase at an affordable housing cost to moderate income households.” (§ 19.30.040(A)(2), (B)(1).) *See* Chapter 19.30 for more information.

C. Project Approval Procedures.

Ordinarily, if otherwise in compliance with the GP and Zoning Code, single family dwellings require no conditional use permit or variance and are a specifically permitted use, although such uses “may be subject to zoning clearance review.” (§ 19.06.020, Table 19.06-A; *see* Zoning Code, Part V, Chap. 19.33 (Zoning Clearance Review).) If the houses are more than one story, preliminary design plans must be submitted to the City pursuant to Zoning Code, Part V, Chap. 19.32 (Common Procedures). (§ 19.32.050(F).)

However, because the Fairview Estates parcel is also within the Creek Protection Overlay District and the proposed project would, among other things, destroy an existing creek and also would require a Planned Development approval, a Conditional Use Permit is required for this development. (Incomplete Letter, p. 1; *see* §§ 19.12.040(C), 19.12.050, Table 19.12-A; 19.14.030(B).)

Conditional Use Permit procedures are set forth in the Zoning Code, Part V, Chapters 19.32 (Common Procedures) and 19.34 (Use Permits). “The process for review of Use Permit applications is designed to evaluate possible adverse impacts and to minimize them where possible through the imposition of specific conditions or requirements. Approval of a Use Permit requires careful review of the location, design, configuration, and special impacts of a proposed use to determine, against standards and criteria, the desirability of permitting its establishment on a particular site.” (§ 19.34.010.) “All Conditional Use Permit applications shall require a public hearing before the Planning Commission.” (§ 19.34.030(E); *see also* §§ 19.12.050, 19.14.030(B), (C).)

In addition, as mentioned, the project as proposed would require a rezoning of the site to a Planned Development district. (*See* §§ 19.14.020(A), 19.14.030(A).) Procedures for approval of a rezoning are set forth in Chapter 19.40 (Amendments to Zoning Map and Text) and require both Planning Commission and City Council approval. (§ 19.14.030(C).)

Finally, as also mentioned, a Planned Development approval requires a Development Agreement, which likewise must be reviewed and approved by both the Planning Commission and City Council. (§§ 19.14.030(C), 19.41.030.)

D. California Environmental Quality Act (CEQA), Public Resources Code § 21000 *et seq.*

CEQA environmental review requirements applies to any discretionary project approved by a local or state government agency that is not otherwise statutorily or categorically exempt from CEQA and that may have a significant environmental effect. CEQA requires the lead permitting agency (in this case, the City of El Cerrito), to conduct an initial study and determine whether there is substantial evidence supporting a fair argument that the project may have a significant effect on one or more environmental resources or issues. (Pub. Res. Code §§ 21080(c), (d).)

If so, then the City must prepare a detailed environmental impact report (EIR) on the proposed project and circulate it for public and other agency review for a minimum of 30 days. (*Id.*, §§ 21080(d), 21091(a), 21151.) The EIR must examine significant project effects and feasible project alternatives to avoid or reduce these effects, and include feasible mitigation measures for each significant effect identified. (*Id.*, §§ 21002, 21002.1.)

In its Incomplete Letter, the City stated that an EIR likely would be required for the proposed project.³ (Incomplete Letter, p. 1.) City CEQA review procedures are set forth in the Zoning Code, Part V, Chap. 19.42 (Environmental Review).

E. Subdivision Map Act (SMA), Government Code § 66410 *et seq.*

This statute controls the design and requirements for subdivision and development of parcels for residential purposes. Requires the subdivider to comply with various conditions pertaining to parkland dedication, school fees, streets and bicycle paths, local transit facilities, etc. The requirements of the SMA are implemented by the local government permitting agency (here, the City of El Cerrito) via local ordinance. (*See* El Cerrito Muni. Code, Title 18, Divisions of Land.)

The proposed project would require City approval of a tentative subdivision map under the SMA and local implementing ordinances. (Incomplete Letter, p. 1.) A detailed discussion of these requirements is beyond the scope of this summary.

II. Other Applicable or Potentially Applicable Federal and State Environmental Laws.

A. Federal and State Water Quality Laws.

1. Compliance with Statewide General Permit for Construction Project Stormwater Discharges, State Porter Cologne Water Quality Control Act and Federal Clean Water Act (CWA).

“Dischargers whose projects disturb one or more acres of soil or whose projects disturb less than one acre but are part of a larger common plan of development that in total disturbs one or more acres, are required to obtain coverage under the General Permit for Discharges of Storm Water Associated with Construction Activity Construction General Permit Order 2009-0009-DWQ. Construction activity subject to this permit includes clearing, grading and disturbances to the ground such as stockpiling, or excavation, but does not include regular maintenance activities performed to restore the original line, grade, or capacity of the facility.” (*See* https://www.waterboards.ca.gov/water_issues/programs/stormwater/construction.html.)

³ There are a number of CEQA exemptions provisions that apply to “infill” housing projects. It appears preliminarily that this site would not qualify for any such CEQA exemptions due to the presence of significant habitat and riparian areas, landslide and wildfire risk, exceedance of maximum acreage limitations, and/or failure to meet certain affordable housing criteria and density requirements, among other reasons.

The discharger must provide notice of intent to comply with this general permit to Regional Water Board (here, San Francisco Region 2) and comply with the best management practices and other mitigation measures specified in the permit for sediment and erosion control during project construction.

2. Federal Clean Water Act Permit for Filling Waters of the United States, CWA section 404, 33 U.S.C. § 1344.

In March 2016, the U.S. Army Corps of Engineers (Corps) issued a Public Notice for the proposed project, determining that the project site contained jurisdictional waters of the United States (*e.g.*, the two tributaries to Baxter Creek). (*See* Corps, Public Notice, Fairview Estates Residential Development Project, # 2007-00828S, Mar. 4, 2016.) The project proposed to permanently bury over 375 linear feet, and temporarily bury about 85 linear feet, of the northernmost tributary, and construct two stormwater detention basins, which would require a Corps permit for dredging and filling waters of the United States under section 404 of the CWA.

In 2019, the Corps and EPA narrowed the definition of waters of the United States in regulations implementing the CWA. (85 Fed. Reg. 22250 (April 21, 2020), amending 40 C.F.R. § 328.3.) It is not clear whether the Corps would continue to take the position that the site contains jurisdictional waters of the United States in light of this revised definition, given that the tributaries are intermittent streams. However, because these tributaries flow into Baxter Creek, which ultimately flows into the Bay, it is likely that they remain jurisdictional even applying the current, more narrow definition of waters of the United States under the revised federal regulations.

If these streams remain jurisdictional, then the Corps would have to issue a CWA section 404 permit for the proposed filling of the northern tributary to Baxter Creek, and conduct an alternatives analysis, cumulative and other impact analysis and public interest determination under section 404(b)(1) of the CWA and its implementing regulations. The public interest determination considers a wide variety of factors, such as fish and wildlife values, water quality and water supply, flood hazards, and economics.

In order to issue the permit, the Corps would have to make a finding that the proposed filling is the “least environmentally damaging, practicable alternative,” and include specified mitigation measures to avoid, minimize and mitigate/compensate for the fill. (40 C.F.R. §§ 230.10(a), (d), 230.12(a)(3).) In its March 2016 Public Notice, the Corps noted that because the project was not water-dependent, there was a rebuttable presumption that there was a less damaging practicable alternative to the filling of the tributary to Baxter Creek.

3. State Certification of Federal Permit, CWA Section 401, 33 U.S.C. §§ 1341(a), (d).

If a section 404 permit is required for the proposed project, the Regional Water Board also would have to issue a certification of the federal permit under section 401 of the CWA. This section permits a state to review a federal permit for compliance with state water quality laws and

standards, and add conditions to the federal permit to ensure compliance with these state requirements.

In its April 2016 comments on the Corps' March 2016 Public Notice, the Regional Water Board noted that the "the impacts associated with the proposed Project are significant." (*See* email from Kathryn Hart, Regional Water Board Water Resource Control Engineer, to Janelle Leeson, Corps Permit Manager, April 4, 2016.) Further, contrary to the Public Notice, the Regional Water Board did not consider the removal of the temporary filling of 85 linear feet of Baxter Creek and subsequent "restoration" of this portion of the creek to be a mitigation measure, but rather stated that this filling was itself a significant impact requiring mitigation. Moreover, the Public Notice did not adequately describe the impacts of either the permanent and temporary fill, or the required efforts to avoid or minimize these impacts to the maximum extent practicable.

The Regional Water Board indicated its intent to require "rigorous and detailed evaluation of" an alternative "that does not involve fill of streams and any wetland features on the site" and reduction of the proposed number of lots on the site. If impacts to the northern tributary cannot be avoided, the Regional Water Board would require creation of new streams channel or daylighting of buried streams at a minimum 1:1 ratio. If daylighting opportunities are not available, then stream restoration can be considered, with the mitigation ratio dependent upon the location and type of work proposed (but likely greater than a 1:1 ratio).

4. State Discharge/Fill Permit (Waste Discharge Requirements) under State Porter Cologne Water Quality Control Act, Water Code §§ 13040, 13260.

If the tributaries are no longer considered jurisdictional under the federal CWA, the project proponent still would be required to obtain a state discharge permit for adversely affecting "waters of the State." These are defined more broadly under the state Porter Cologne Act than the definition of waters of the United States under the CWA. In April 2019 and April 2020, the State Water Resources Control Board adopted procedures and implementation guidance, respectively, for the Regional Water Boards to issue state discharge permits (referred to as "waste discharge requirements") for projects that adversely affect wetlands, ephemeral and intermittent streams, and other waters of the state, including projects that propose to discharge fill material into such waters. (*See* State Water Board, *State Wetland Definition and Procedures for Discharges of Dredged or Fill Material to Waters of the State*, April 2019 (Procedures), and State Water Board, *Implementation Guidance for the State Wetland Definition and Procedures for Discharges of Dredged or Fill Material to Waters of the State*, April 2020 (Implementation Guidance).)

Water Code section 13260(a) requires a project proponent to file a report of waste discharge and obtain authorization from the Regional Water Board when the proposed activity will result in the discharge of waste that "could affect the quality of the waters of the state," unless the Regional Water Board has adopted a waiver of waste discharge requirements. "Waste" means "any and all other waste substances ... associated with human habitation, or of human or animal origin, or from any producing, manufacturing, or processing operation." (Water Code § 13050(d).)

“Waste” includes fill material placed in waters of the State. (State Water Board Procedures and Implementation Guidance.)

The same impact analysis and mitigation requirements the Regional Water Board proposed in connection with the state 401 certification process for the Corps CWA section 404 permit also would apply to a Regional Water Board discharge/fill permit issued solely under state law.

B. National Environmental Policy Act (NEPA), 42 U.S.C. § 4332 *et seq.*

If a CWA section 404 permit is required, the Corps also must comply with NEPA prior to issuing the permit, which requires the Corps to conduct an environmental assessment (EA) of the proposed fill permit, and possibly prepare a full environmental impact statement (EIS). In its March 2016 Public Notice, the Corps made a preliminary determination that, while the proposed filling of the tributary to Baxter Creek did not qualify for a categorical exclusion from NEPA, it likely would only require preparation of an EA and not an EIS.

C. Federal and State Endangered Species Laws

1. Federal Endangered Species Act (FESA), 16 U.S.C. § 1531 *et seq.*

FESA would apply if the development project may affect any fish, wildlife or plant species listed as endangered or threatened under FESA or may affect any officially designated critical habitat on the site. The Corps’ March 2016 Public Notice identifies the Santa Cruz tarplant as a federally-listed threatened species that *potentially* could be affected by the proposed project, and does not identify any designated critical habitat on the site. It is unclear whether this is accurate. A comprehensive protocol-based survey would be required prior to project development to verify the presence or absence of any listed species and critical habitat on site (both federally- and state-listed).

If a CWA section 404 permit is required for the project and the issuance of this permit may affect any federally-endangered or threatened fish, wildlife or plant species or their designated critical habitat, the Corps must engage in inter-agency consultation with the U.S Fish and Wildlife Service (FWS) under FESA. (16 U.S.C. § 1536(a)(2).) The FWS must issue an opinion outlining whether the proposed filling is likely to adversely affect the listed species or habitat, and if so, to what extent. If the extent is major, the FWS must issue a formal biological opinion outlining project alternatives and mitigation measures the permittee must take to avoid and minimize these effects. (16 U.S.C. §§ 1536(b)(3), (b)(4).)

If no section 404 permit is required and the project may “take” (e.g., kill, harass or harm) any federally-listed fish or wildlife species, or remove, dig up or destroy any federally-listed plant species, then the project proponent would be required to obtain an “incidental take permit” from the FWS. (16 U.S.C. §§ 1532(19), 1538(a)(1)(B), (a)(2)(B), 1539(a)(1)(B), (a)(2).)

2. California Endangered Species Act (CESA), Fish & G. Code, § 2050 *et seq.*

CESA applies if the project would result in the “take” (generally, killing or destroying) of any fish, wildlife or plant species listed as threatened or endangered or any species that is a candidate for listing under CESA. (Fish & G. Code, §§ 2080, 2085.) It is not clear whether any state-listed species is or may be present on the project site.

Preliminarily, it appears that Santa Cruz tarplant may be present on the project site, which is dually-listed as threatened under FESA and endangered under CESA. As mentioned, a comprehensive protocol-based survey would be required prior to project development to verify the presence or absence of any federally- or state- listed species on site.

If a state-listed species is present and would be adversely affected by the proposed project, then the project proponent must obtain an “incidental take permit” from CDFW. (Fish & G. Code, § 2081(b).) Alternatively, if the project requires a CWA section 404 permit and consultation with the FWS under FESA, and all species affected are dually-listed under both FESA and CESA, the project proponent can rely on the FESA compliance procedures and obtain a “consistency determination” from the CDFW for CESA compliance purposes. (Fish & G. Code, § 2080.1.)

D. State Streambed Protection Law, Fish & G. Code, § 1600 *et seq.*

“California Fish and Game Code section 1602 requires any person, state or local governmental agency, or public utility to notify CDFW prior to beginning any activity that may do one or more of the following: (1) divert or obstruct the natural flow of any river, stream, or lake; (2) change the bed, channel, or bank of any river, stream, or lake; (3) use material from any river, stream, or lake; or (4) deposit or dispose of material into any river, stream, or lake.”

“Please note that ‘any river, stream, or lake’ includes those that are dry for periods of time as well as those that flow year-round. If you are not certain a particular activity requires notification, CDFW recommends you notify. CDFW requires a Lake and Streambed Alteration (LSA) Agreement when a project activity may substantially adversely affect fish and wildlife resources.” (See <https://wildlife.ca.gov/Conservation/Environmental-Review/LSA>.)