

Overview of Development Constraints: Fairview Open Space Parcel

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El Cerrito Trail Trekkers

In an effort to assess the factors that would affect the ability to develop the 15-acre Fairview property in El Cerrito with a major residential subdivision, El Cerrito Trail Trekkers has compiled a detailed summary of the local, state and federal plans, ordinances, laws and regulations that would apply to any such proposal.

This property is the largest remaining privately-owned open space parcel in the City of El Cerrito. There are two creeks on the property, both of which are tributaries to Baxter Creek, and one of which with its series of steep cascades is the most beautiful in town. The site also contains significant oak woodland, grassland and other important wildlife habitat.

Although there is not currently any active development proposal for the Fairview property, the large home builder Toll Brothers is looking at the site for potential development.

The most recent development application dated July 2018 (which the City rejected as incomplete), proposed to: (1) construct 38 single-family homes; (2) bury most of the northern tributary to Baxter Creek; (3) preserve approximately a third of the site as open space; and (4) conduct extensive grading and removal or degradation of oak woodland and riparian habitat on the remainder of the site.

The Trekkers' report makes clear that the City's own policies, as set forth in its General Plan and Zoning Code, strongly discourage development on open space areas, particularly areas that include oak woodland and riparian habitat, and just as strongly encourage efforts to preserve such areas as publicly-owned open space if at all possible.

That is also the Trekkers' goal. This document summarizes the major points of the report, and emphasizes what Trekkers believes to be most pertinent as we ask members of the community to support its efforts to preserve the Fairview property.

We believe that public acquisition of the Fairview parcel is a realistic and feasible goal at this time, for several reasons: (1) there are numerous significant constraints to developing this property, as discussed further below; (2) we anticipate being able to obtain the assistance of the Trust for Public Land and other organizations and associations (assuming the property owner is a willing seller) in negotiating and executing the acquisition; (3) the City has previously accepted donations of other important additions to the Hillside Natural Area, which are currently owned and managed by the City; and (4) we believe the City would likely be willing to do so again, particularly given the many General Plan policies encouraging this.

As the Trekkers' report makes clear, development of the Fairview parcel faces a number of significant hurdles. The property is designated "very low density residential" in the City's General Plan, and is zoned "RS-10" (single family residential, 10,000 square foot minimum lot size per home) under the Zoning Code.

However, in addition to compliance with myriad applicable General Plan policies, the proposed project would require:

- City Council approval of a Zoning Map amendment to include a "Planned Development" overlay zone to allow for clustering of the homes on smaller lots on the northern portion of the site;
- Compliance with the City's Creek Protection Overlay District and Hazard Overlay District (for seismic and geologic hazard areas) requirements in the Zoning Code;

- City Planning Commission approval of a Conditional Use Permit (which approval can be appealed to the City Council);
- City Council approval of a Development Agreement;
- Compliance with local and state inclusionary zoning (affordable housing) requirements;
- Preparation of an environmental impact report (EIR) for the project under the California Environmental Quality Act (CEQA);
- Compliance with the state Subdivision Map Act and implementing City subdivision ordinance;
- Compliance with federal and state water quality laws, including compliance with the statewide General Permit for construction project stormwater discharges, and need to obtain federal and/or state permits for filling waters of the United States and/or waters of the State from the U.S. Army Corps of Engineers (Corps) and/or San Francisco Regional Water Quality Control Board (Regional Water Board);
- Surveys for federally- and state- listed endangered, threatened and candidate species and potential need for compliance with the federal and state Endangered Species Acts; and
- Likely requirement for a “streambed alteration agreement” with the California Department of Fish and Wildlife (CDFW) under state Fish and Game Code procedures applicable to projects that would significantly alter the bed, bank or channel of any stream.

The City’s General Plan requires preservation of creeks; riparian, woodland and grassland habitat; significant stands of trees; and ridgelines.

For example, the General Plan requires existing riparian vegetation to be preserved to protect property owners and buyers from erosion and flooding, and provides that “lands adjacent to riparian areas should be protected as public or private permanent open space through dedication or easements.”

The General Plan also states that it is City policy to, “except where extraordinary circumstances indicate otherwise, ensure that development decisions protect existing open space areas.” The General Plan provides that, if loss of habitat cannot be avoided, such loss must be “fully offset through creation of habitat of equal value.”

The General Plan further discourages development on ridgelines, requires natural ridge contours and vegetation to be maintained, and requires cut and fill slopes to be minimized. Also, prominent public views and other visual features of the site must be maintained through the development review process.

But the General Plan does more than include policies to protect against depredations to habitat, open space, and ridgelines. It positively calls for protecting open space and particularly riparian areas through dedications, easements or purchase. Among many statements to that effect in the plan is this: “The City should identify funding sources for acquisition and ongoing maintenance for public open space lands.” Also, the City must “Prioritize parcels with high habitat, visual, archaeological or recreational values for purchase by the City if funds become available.”

In addition, the General Plan makes clear that developments which affect creeks are more than simply a local matter, but are regional in scope, and requires the City to coordinate with other local, state and federal agencies on “matters pertaining to open space and environmental resource protection,” including creek and watershed restoration efforts.

Further, the development plan would violate density and setback rules, and would contravene violate General Plan and Zoning Code policies and requirements designed to preserve hillsides and sensitive environmental areas, and to protect against hazards related to earthquakes and geologically unstable terrain.

Both the General Plan and Zoning Code require existing healthy trees and tree groupings and riparian areas to be preserved, which the proposed development plan would not do.

The Zoning Code's Creek District overlay rules, with certain limited exceptions, generally require a 30-foot no development setback from creeks, do not allow filling, culverting or rip-rapping of creeks, and call for preserving "riparian vegetation and protect wildlife habitat and wildlife corridors along natural drainage ways."

Developments alongside creeks require not just City approval, but prior or concurrent approval by two state agencies and one federal agency: the CDFW, the Regional Water Board, and the Corps.

Developments in the Hazard Overlay Zone further require preparation of soils report by a registered Civil Engineer and a geologic report by a certified Engineering Geologist.

Both the Planning Commission and City Council would have to approve a Planned Unit Development zoning overlay as well as a Development Agreement for the development to proceed. However, such approval requires the City to find that the development is "consistent with the General Plan" and "provide substantial public benefits."The development as proposed is not consistent with the General Plan, as outlined above. And rather than providing public benefits, the development would destroy what the City identifies as a major public benefit – preservation of significant riparian areas and open space.

In addition, a development of nine or more units requires that 12 percent of the homes be affordable, which was not part of the development plan.

The City also has indicated that an EIR under CEQA would be required for development of the project. The developer also will be required to prepare a subdivision map and obtain City approval for the proposed land subdivision under the state Subdivision Map Act and City subdivision ordinance, as well as a Conditional Use Permit.

Approval also will be needed from the Regional Water Board, CDFW, and most likely the Corps because of the project's impact on creeks. Two of these agencies have raised serious questions about whether they would approve the project as proposed. In 2016, the Corps stated that the request for filling the creek did not meet the requirement that it be the "least environmentally damaging, practicable alternative," and the Regional Water Board also expressed strong concerns about the effects of the project on the creeks.

CDFW also implements the state streambed protection statute, which is designed to prevent significant alteration of creeks and to protect them from other damage, and will likely require the developer to enter into a state streambed alteration agreement to avoid and mitigate any damage to these creeks.

Finally, if any endangered or threatened species are found on the project site, the developer would need to obtain authorization from the U.S. Fish and Wildlife Service under the federal Endangered Species Act and from CDFW under the California Endangered Species Act.

In 2016, the Corps noted the potential for the federally-threatened and state-endangered Santa Cruz tarplant to occur the project site. If the developer proceeds and is required to complete an EIR, the presence of other endangered species may be revealed.