



To: Mayor Kou and Palo Alto City Council

January 22, 2023

Re: 575 Los Trancos Road Residential Project

Dear Mayor Kou and Council Members,

The Santa Clara Valley Audubon Society (SCVAS) and the Sierra Club Loma Prieta Chapter (SCLPC) are environmental organizations that work to protect natural resources and promote the enjoyment of nature. We provided comments on the draft IS/MND for the 575 Los Trancos Project, and we remain concerned after reading the responses to our comments. We maintain that a “fair argument” exists that the Project will significantly impact the environment. (*League for Protection of Oakland’s Historic Resources v. City of Oakland* (1997) 52 Cal. App.4th 896, 904.) A public agency must prepare an EIR whenever substantial evidence supports a fair argument that a proposed project “may have a significant effect on the environment.” (*Protect Niles v. City of Fremont* (2018) 25 Cal.App5th 1129, 1138-1139. This low threshold for the preparation of an EIR, and a “preference for resolving doubts in favor of environmental review” is met here. (*Mejia v. City of Los Angeles* (2005) 130 Cal.App.4th 322, 332.)

The city has discretion over the project and should require that the project be re-designed at a minimum of 55 feet from the top of the bank of Los Trancos creek (in line with the neighboring home) or a wider setback, ideally 150 feet. If this wider buffer/setback is not feasible, the city must prepare an EIR to fully analyze and mitigate the impacts and to consider alternatives to the proposed size of the project and its location on the parcel.

Palo Alto’s Comprehensive Plan Policy N3.3 and program N3.3.1 seek a range of setbacks from creeks, where a 150 foot setback is cited as appropriate for new development west of Foothill Expressway. The program notes that single-family residential development can be exempt from this larger setback but an ordinance that specifies setback width and conditions for a waiver of the setbacks has yet to be developed. A 20 foot setback from top-of-bank, however, seems very contradictory to the intent of the Comprehensive Plan to protect Palo Alto's waterways and riparian ecosystems.

The Palo Alto Comprehensive Plan Land Use definitions include the definition of **Streamside Open Space**. **This designation is intended to preserve and enhance corridors of riparian vegetation along streams.** Hiking, biking and riding trails may be developed in the streamside open space. The corridor

will generally vary in width up to 200 feet on either side of the center line of the creek. As we argue below, the proposed Project does not preserve or enhance the Los Trancos Creek Corridor. With a parcel larger than 5 acres, a project can be placed further from the creek that would be consistent with the intent of the Palo Alto Comprehensive Plan to protect the City's riparian corridors.

Palo Alto Zoning Code Section 18.40.140, Stream Corridor Protection, requires a 20 foot distance between the top of the creek bank and structures (as well as decks, swimming pools, spas, hot tubs and parking lots) or a 2:1 setback from the toe of the bank, whichever is greater.

To protect water quality and riparian habitat, including trees, the City of San Jose defines the riparian corridor at the top of the bank or the dripline of the riparian vegetation, whichever is greater. With the exception of downtown areas, this policy requires a setback of 35 feet to 100 feet from the Riparian Corridor (depending on the order of the creek).

The proposed development includes elements that are set 20 feet from the top of the bank. However, several Project elements are likely to require encroachment into this 20 foot setback for construction and future maintenance, and parts of the home is are located within/under the dripline of the riparian canopy (see discussion below). This is despite the statement in Appendix A Biological Resources Constraints Analysis pages 9-10:

“Project plans appear to avoid impacts to Los Trancos Creek, however the proposed project may result in indirect impacts to the creek and direct or indirect impacts to riparian habitat if project activities occur within the dripline of the riparian canopy. “

The parcel is a Local Responsibility Area (LRA) Fire Protection Zone, which is governed by Palo Alto Muni Code's Wildland-Urban Interface (WUI) regulations. (Some foothills parcels are State Responsibility Area (SRA), which have slightly different fire-protection rules.) Section 15.04.430 Muni Code requires that WUI parcels:

“Shall at all times maintain an effective defensible space by removing and clearing away flammable vegetation and combustible growth from areas within 30 feet of such buildings or structures.”

Mitigation BIO-3, Best Management Practices for Protection of Steelhead and Aquatic Habitat, requires (emphasis added):

- No vegetation removal, ground disturbance or construction shall occur within the creek or the 20 foot creek setback zone, which shall be demarcated with high visibility orange construction fencing to ensure avoidance of impacts to the aquatic habitat.

A 20 foot setback is an inadequate buffer to reduce or avoid impacts from runoff or erosion on the aquatic habitat and the critically endangered steelhead.

The parcel is 5.38 acres, with a width of more than 1300 feet, and the depth is up to 250 feet. The parcel should allow ample space for a development that provides an adequate buffer from the creek.

The San Francisco Bay Regional Water Quality Control Board provides directions for effective riparian buffers:

“Estimates of effective buffer distances for sediment and nutrient filtration vary, but most of the scientific studies suggest distances between 50 and 100 feet for this purpose (Jones & Stokes 2002). Although any buffer distance from the top of bank is helpful for maintaining channel stability, a minimum 33-foot riparian buffer is required for contributing to a significant reduction in sediment levels (Corely et. al. 1999, Peterson et. al. 1992, as cited in Jones and Stokes 2002).” -- “Local Government Riparian Buffers in the San Francisco Bay Area”, San Francisco Bay Regional Water Quality Control Board, page 17,¹

The IS/MND acknowledges that direct disturbance and indirect impacts from runoff or erosion could impact water quality; therefore, the project has the potential to impact steelhead designated critical habitat and the impact is potentially significant. The IS/MND provides a meager 20 foot setback and no information on Los Trancos creek geo-morphological processes, ground water subflows on the project site and erosion processes on site. The project must prepare a full Environmental Impact Report to study, assess and disclose potential erosion and bank failure risks and provide adequate buffers and BMPs for protection of steelhead (*Oncorhynchus mykiss irideus*) and aquatic habitats.

There is an inherent conflict between Mitigation Measure BIO-3 and the required PAMC 15.04.200 Defensible Space.

The parcel is a Local Responsibility Area (LRA) Fire Protection Zone, which is governed by Palo Alto Municipal Code’s Wildland-Urban Interface (WUI) regulations. Section 15.04.430 requires that WUI parcels

“Shall at all times maintain an effective defensible space by removing and clearing away flammable vegetation and combustible growth from areas within 30 feet (9144 mm) of such buildings or structures.”

The Defensible Space requirements allows no flammable vegetation to be located within 30 feet of the structures.

The IS/MND proposes that vegetation that is green and healthy is not considered flammable, and therefore the riparian vegetation within 30 feet of the building footprint is expected to remain as-is with maintenance to remove any dead vegetation as needed.

However, as seasons change or vegetation dies, leaves and branches drop, dead annual grasses and tall weedy species dried in the summer will be removed by the homeowners to maintain defensible space. Maintaining a 30 foot defensible space is not plausible without, over time, significantly and unavoidably impacting the sensitive riparian habitat, impacting water quality and the species that depend on the riparian ecosystem.

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https://www.waterboards.ca.gov/sanfranciscobay/publications_forms/documents/bufferreport1204.pdf

Dead and decaying material is in fact directly or indirectly required habitat for many species, including the special status species that could be found on the project (including: Santa Cruz black salamander (*Aneides niger*), California giant salamander (*Dicamptodon ensatus*), California red-legged frog (*Rana draytonii*), western pond turtle (*Emys marmorata*), San Francisco garter snake (*Thamnophis sirtalis tetrataenia*), and the Dusky footed woodrat (*Neotoma fuscipes annectens*)). These species use dead and decaying materials to find or build shelter and find food. This is likely the reason why BIO-3 directs “No vegetation removal, ground disturbance or construction shall occur within the creek or the 20-foot creek setback zone.”^{2 3 4}

To ensure that Bio-3 and the Defensible Space requirements are consistent, a minimum buffer of 50 feet. should be required. This should allow vegetation to be removed in the 30 foot space, and allow the 20 foot riparian buffer to comply with Mitigation Measure BIO-3 and function as intended..

Mitigation BIO-3, Best Management Practices for Protection of Steelhead and Aquatic Habitat also directs (emphasis added):

- Best Management Practices (BMPs) **shall be developed** and implemented during all grading and construction activities to prevent erosion and sedimentation into the creek and to prevent the spill of contaminants in or around the creek.

The IS/MND defers development of BMPs to the future, hence the words “**Shall be developed**”. **CEQA does not allow deferred mitigations in a Mitigated Negative Declaration!** The reason for this is that in the absence of specific, site-specific information and criteria for the protection of the environmental resources that could be impacted, it is not possible to find that future mitigation measures will indeed reduce the impact to a less-than-significant level and in this case - prevent erosion and sedimentation to a level that protects Steelhead and Aquatic Habitat. So while deferred mitigation may be permissible if the mitigation measure is based on adequate studies and commits an agency to a realistic performance standard or criterion, this bar is not met in BIO-3.

The IS/MND includes some specific practices to be included in the future BMPs, including practices for preventing and addressing leaks and spills. Sediment and erosion control measures, however, are vague and provide no realistic performance standard or criterion criteria. The IS/MND provides no information on erosion, sedimentation and incision processes in Los Trancos Creek at the project site, and provides no evidence that the vague BMPs aimed to prevent erosion during construction suffice to provide adequate protection, or evidence that the 20 foot buffer suffices to protect the creek from bank failure due to the development of this project.

² “Found under rocks near streams, in talus, under damp logs, and other objects.”, Santa Cruz Black Salamander, Myers and Maslin, 1948, <https://californiaherps.com/salamanders/pages/a.niger.html>

³ “They also use grassy areas near water sources to regulate their body temperature, find cover, forage, mate and hibernate.” (Annual forbs and grasses are predominant in California and are dead in summer and fall.), San Francisco Garter Snake, US. Fish and Wildlife Service, <https://www.fws.gov/species/san-francisco-garter-snake-thamnophis-sirtalis-tetrataenia>

⁴ “These rodents are known for building stick houses that reach up to five feet in height and eight feet in diameter.”, Dusky-Footed Woodrat, The World Wildlife Federation, <https://www.nwf.org/Educational-Resources/Wildlife-Guide/Mammals/Dusky-Footed-Woodrat>

There is an inherent conflict between Mitigation Measure BIO-3 and the directions of the Geotechnical Report.

Page 4 of the Geotechnical Engineering Study states that the site contains “loose to very dense sand with variable percentages of clay and gravel”. The development’s large impervious area will deposit a large amount of runoff near the creek, which could cause the site’s loose soil to erode into the creek. The IS/MND has not studied or mitigated this potential harm to Los Trancos Creek. Moreover, additional work within the setback is mandated on Page 14 of the Geotechnical Engineering Study. The study recommends that the project “direct surface runoff away from site improvements at a minimum 5 percent grade for a minimum distance of 10 feet.” Again - this work is likely to involve additional grading within the Riparian area.

The project’s Geotechnical Engineering Study (Appendix C of the IS/MND) discusses the site preparation on page 8:

Due to the loose surficial soil, a program of over-excavation and backfilling is deemed necessary. The upper loose soil within the area of the proposed improvements should be (over-excavated to 2 1/2 feet bgs. The lateral extent of the over-excavation should extend at least 5 feet beyond the perimeter of the proposed residence.

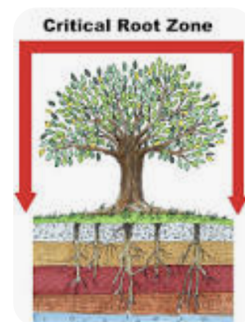
To be built as designed, the Project will excavate at least 15 feet from the top of the bank, with construction activity being performed even closer. This is inside the Riparian dripline, which means that they likely will be disturbing the roots of the Riparian canopy.

The Biotechnical Report did not consider subsurface flow and the impact of over-excavation and backfilling on subsurface flows has not been analyzed or mitigated. Riparian trees depend on subsurface flow, yet the IS/MND provides no discussion of the impacts to the riparian ecosystem.

Impact to riparian tree #30

The Project includes a building wall to be constructed at 11 feet from oak tree #30, under the canopy and well within the drip line of this riparian tree (see Figure 5 on draft IS/MND p.7). In Appendix B, Arborists Report Tree #30 is described as a Coast live Oak (*Quercus agrifolia*) and recommends that this tree should be pruned and cabled. The arborist report provides “A building wall is located at 11 feet from oak tree #30. Hand excavation under the Project Arborist supervision is recommended when working within 10 times the tree’s diameter. Encountered roots must be cleanly cut using a hand saw or loppers...”

The Stream Corridor Protection Code Section 18.40.140, (c) provides, All native riparian vegetation within 100 feet from the top of bank shall be retained unless its removal is approved by the director of planning and development services. To retain Tree #30, not only should excavation under the dripline be prohibited, but an adequate and intact root protection zone should be provided.



Based on scientific references⁵, the roots of a tree stretch beyond its drip line. To thrive, Live Oak trees require a buffer of their dripline + $\frac{1}{3}$ of the radius from the trunk of the tree to the dripline. For tree #30, this means 21.5 feet from the trunk of the tree. As proposed, the project is likely to cause the death of this riparian tree.

Deferred Mitigation

In *Save the Agoura Cornell Knoll v. City of Agoura Hills* (February 24, 2020) 2020 Cal. App. LEXIS 222, in a detailed decision, the Second District Court of Appeal affirmed the trial court's judgment and concluded that a proposed mixed-use development project in Los Angeles County presented potentially significant impacts requiring the preparation of an EIR, not an MND. The trial court found there was substantial evidence to support a fair argument that the Project may have significant environmental impacts on cultural resources, sensitive plant species, oak trees, and aesthetic resources and the proposed mitigation measures were inadequate to reduce impacts to a less than significant level⁶.

Palo Alto's 575 Los Trancos IS/MND suffers similar inadequacies as did the City of Agoura Hills MND. The City made no effort to study potential erosion, and instead deferred mitigations (the development Best Management Practices for Protection of Steelhead and Aquatic Habitat) to the future.

With no studies of the geomorphology and erosion processes of Los Trancos Creek and how these may be exacerbated due to impacts of this project, no studies of the the project site hydrology (especially subsurface flow) and how the over-excavation and backfilling that are required due to the site's upper loose soil could impact the flora and fauna of the riparian ecosystem, and no criteria for development of BMPs or for ongoing monitoring, the 575 Los Trancos Road IS/MND fails to comply with CEQA. The mitigations provided are simply insufficient to avoid or reduce impacts to the creek, riparian ecosystem, trees and wildlife. Mitigation measure BIO 3 failed to explain how the future BMP would mitigate potentially significant effects on Biological Resources and protect of Steelhead and Aquatic Habitat

Furthermore, the IS/MND failed to analyze whether a viable buffer from the creek can be provided on this 5.38 acre parcel, or to specify performance criteria evaluating the feasibility of avoidance as an alternative to excavation within the dripline of riparian trees, and lighting and activities in close proximity to the creek. There is no indication that it is impractical or infeasible for the City to articulate specific performance criteria for evaluating and monitoring the efficacy of the BMPs.

Lighting

Night time lighting disrupts normal animal behaviors, circadian rhythms, and threatens the health of organisms. Section 18.40.140 of the Palo Alto Municipal code requires,

“Nighttime lighting shall be directed away from the riparian corridor of a stream”.

⁵ On the Maximum Extent of Tree Roots. E.L. Stone and P.J Kalisz, *Forest Ecology and Management*, 46 59-102, 1991, and *Understanding Trees*, p. 44, 202, Robert Kourik Metamorphic press, 2015 ISBN 978-0-9615848-6-3

⁶ *Save the Agoura Cornell Knoll v. City of Agoura Hills* (2020) 46 Cal.App.5th 665

In addition, in the City's Guidelines Within Streamside Review Area ("Streamside review area" means all properties abutting a stream or located within 50 feet from the top of a stream bank, except those properties separated from the stream by a public street."), the guidelines include,

"(a) The distance between nighttime lighting and the riparian corridor of a stream should be maximized"

The project proposes accommodations of lighting concerns on street traffic and side neighbors but the proposed mitigations of shining lights downward with such a minimal setback from a creek that hosts special status species are inadequate to prevent disruption to steelhead⁷ and other aquatic, terrestrial and avian species that depend on the riparian corridor.

The staff report includes three mitigations: (1) Automatic blackout shades (2) Automatic vacancy sensors and (3) Motion sensors for exterior lighting. There are no guarantees that these mitigations will continue to be maintained or used. It is almost guaranteed that the light will interfere with wildlife living or moving in or along the creek buffer, as these may actually trigger motion sensitive lighting.

A more effective mitigation would be to simply move the house further away from the Riparian corridor. In addition, require all outdoor lighting to be dimmable and in the yellowish range (2700 Kelvin or less) to reduce light pollution and the attraction of migratory birds and insects.

Bird Safe Design

The entire project is located less than 300 feet from the lush riparian corridor of Los Trancos Creek, a place where birds should be safe from collision with glass. Yet the buildings seem to include transparent, see-through glass elements that are known to be extremely hazardous to birds in flight.



DARK ANODIZED ALUM WDWs & DOORS



CLR GLASS GUARDRAILS, DECKING W/ NATURAL WD APPEARANCE

Homes in similar locations in Cupertino are required to provide bird safety glazing treatment on 90% of their facades. Palo Alto should do the same in Open Space zoning locations. For this project, the City should require:

⁷ Artificial light at night has an impact on fish behavior, altering their patterns of feeding, migrating, and predator avoidance.

<https://www.usgs.gov/centers/western-fisheries-research-center/news/shedding-some-light-issue-investigating-hw>

- Elimination of transparent, see-through and other hazardous architectural elements.
- Effective bird-safe glazing treatment to 90% of all glass surfaces. Please require glazing that achieves an American Bird Conservancy Threat Factor rating of no more than 15. A product database that offers rated glazing solutions is available online⁸.
- Prohibit UV glazing treatments, angled glass and overhangs from being considered bird-safety glazing treatments, as these have been proven ineffective, especially in proximity to habitat areas..

We appreciate your attention to our concerns,

Sincerely,

Shani Kleinhaus, Ph.D. Environmental Advocate
Santa Clara VALley Audubon Society

Mike Ferreira, Executive Committee Member
Sierra Club Loma Prieta Chapter

⁸ <https://sfplanning.org/standards-bird-safe-buildings?page=2506>