



# Item #9A

April 13, 2005

Planning and Development Department  
Land Use Planning Division

## Staff Report

**To:** Planning Commission  
**From:** Erin Dando, AICP  
Secretary to the Creeks Task Force  
**Date:** April 13, 2005  
**Subject:** Creeks Task Force Work Plan, Budget and Schedule

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### Recommendation

That the Planning Commission:

- Review and approve the proposed work plan, budget and timeline for the Creeks Task Force and forward all to the City Council for consideration; or
- Review, modify and approve the proposed work plan, budget and timeline for the Creeks Task Force and forward all to the City Council for consideration.

### Background

#### 1. Establishment of Creeks Task Force

In 1989, the City first established BMC 17.08 - Preservation and Restoration of Natural Watercourses (Appendix A), or more commonly referred to as the Creeks Ordinance. Minor changes were made over the years and recent events have directed the Council's attention back to this Ordinance.

In early 2004 the City produced a map using Geographic Information Systems (GIS) to overlay various data in an effort to identify the regulated creeks in Berkeley. This information combined historic creek maps, US Geological Survey topographic information, and storm drain system data. This mapping effort was undertaken in order to identify properties affected by the Creeks Ordinance and to assist in the enforcement of the BMC provisions. Over the past few years, grass roots efforts evolved focusing Council attention to potential modifications of the existing Ordinance. In September 2004, the City notified approximately 2,500 properties, as determined by the new map, that were affected by the 15-year old Ordinance and informed them that the Council would hold a public hearing to help determine what direction to move forward with any revisions to the Ordinance.

At the September 28, 2004 Public Hearing, the Council amended the ordinance to include Section 17.08.055 which allows an existing structure to essentially be rebuilt after a disaster

without requiring a Variance finding by the Zoning Adjustments Board, as previously required. The building would still be subject to all applicable Zoning and Building Code requirements. In addition, the Council directed staff to return with a proposed work program for the review of the Creeks Ordinance and recommendations for further evaluating the issues raised at the Public Hearing. Staff prepared the requested report for the October 12, 2004 City Council meeting, attached as Appendix B, which outlined a program for revising the Ordinance and a more in depth review and assessment of the creeks in Berkeley.

The matter was continued until November 9, 2004, where the City Council established a temporary Creeks Task Force (CTF) to address specific issues related to the Creeks Ordinance. The 15-member Task Force was directed to refer all reports and recommendations first to the Planning Commission prior to being forward to the City Council, including the scope, work plan and budget due to the Planning Commission by April 1, 2005 and any recommended revisions to the Ordinance due to the Council in May 2006. In the event that the Task Force does not provide Ordinance revision recommendations by that time the current culvert protections in the Creeks Ordinance will be indefinitely suspended on May 1, 2006 until such time that a new ordinance is adopted.

Several reports and memorandums to the City Council were combined to make the actual motion and resolution approved by the City Council. The language from these documents and the final Council action is summarized in Appendix C.

## **2. Creeks Task Force Activity**

The Creeks Task Force first began meeting on February 7, 2005. The Mayor selected the Task Force Chair, Ms. Helen Burke, and most bodies had appointed their representatives in time for the first meeting. The CTF has met eight times over the past two months and participated in a Creeks Tour held in March. All of their meetings and the tour were held in accordance with the Brown Act and open to the public.

The Task Force worked diligently first focusing on developing a consensus of the major issues and categories related to the Creeks Ordinance. After developing and reviewing the list, the CTF crafted a draft work plan, synthesized by Task Force Member Jon Streeter, working from the individual drafts and comments of the other members.

The CTF opted to hold extended public comment periods on March 14<sup>th</sup> and 21<sup>st</sup> focused on the draft work plan instead of holding a public hearing at this stage in the process. The CTF determined the time constraints for producing their work products a limiting factor for noticing and holding a full public hearing. Public comments were heard at all meetings and in many cases were incorporated into the work of the Task Force. For the remainder of its meetings, the Task Force discussed the work plan and continued to refine the product along with a schedule and a proposed budget.

For more detailed information on the Task Force's meetings and activities, Planning Commissioners are encouraged to review all agendas, packet materials and minutes online at a special Creeks Task Force website through the Planning Department's website at: <http://www.ci.berkeley.ca.us/planning/landuse/Creeks/default.html>. This website was created in

an effort to make the work of the Task Force transparent to the public and to involve community input.

## **Discussion**

### **1. Work Plan**

Attached as Item 9B is the CTF work plan, budget and schedule developed and approved by unanimous vote on April 4<sup>th</sup> by the Creeks Task Force for the Planning Commission's consideration. The work plan identifies an initial scope of work based upon the Task Force's understanding of the issues at this point in time. During the process the Task Force will generally,

- take into account how the Creeks Ordinance affects property on or near water channels,
- ensure that the overall policy concerning creeks and culverts is appropriately fitted to the varying and different watershed conditions within the City,
- give careful consideration to health and safety issues and water-quality issues,
- promote flexible and fair enforcement of regulatory requirements, and
- facilitate identification and pursuit of all potentially available sources of funding for repair, maintenance, daylighting, and other costs of regulation.

The objectives identified by the Task Force include:

- Protect the remaining open water channels and their associated riparian zones, and to regulate culverting.
- Promote the preservation, rehabilitation, and naturalization of existing and future open water channels and their associated riparian zones as part of the City's underlying natural landscape system.
- Establish a watershed-based policy framework for managing surface-water runoff from the Hills to the Bay.
- Establish a regulatory and administrative framework for what has already been developed and what can be developed along water channels, how further development can take place, and under what conditions that development can take place.

The Task Force has also identified seven major issues to be addressed over the next year in order to develop recommendations for any revisions to the Ordinance including:

1. Definitions,
2. Setbacks,
3. Regulated Structures,
4. Daylighting,
5. Maintenance and Repair,
6. Mapping and Ordinance Administration and Enforcement, and
7. Overall Watershed Policy.

### **2. Schedule**

The work plan includes five phases that outline a general course of action for which to undertake the review and analysis of the issues identified in the plan and return a recommended course of

action to the City Council by May 2006. Below is a table outlining the proposed Task Force timeline.

<b>Phase</b>	<b>Activity</b>	<b>Timeline</b>
Phase I	Data Gathering (finalize work plan, early consensus building)	May 2005
Phase II	Data Gathering, Policy Analysis and Development	June – September 2005
Phase III	Comprehensive Assessment and Preparation of Draft CTF Report	October – December 2005
Phase IV	Consensus Building, Comment Period, Final Report Preparation	January – April 2006
Phase V	Finalize & Present CTF Report to PC	April – May 2006

### 3. Budget

Attached to the work plan is a more detailed budget requesting \$100,000 in addition to a 0.5 Full Time Equivalent (FTE) staff from the Planning Department for the support of Task Force meetings, research, technical analysis, and report writing through May 2006. This work will be based upon the scope of work outlined in the work plan.

The 0.5 FTE of Planning Department staff has also been proposed by the Planning Department and Planning Commission in its recommendations to the Council for the Planning Department work program for FY 2006.

The CTF estimates the breakdown of the budget into the following topic areas and percentage of funds necessary for the technical assistance needed for its scope of work. More information including the Task Force hours, City Staff hours, and consultant hours are identified by topic area in the CTF budget, for a total appropriation of \$100,000.

<b>Topic Area</b>	<b>Estimated % of Budget</b>	<b>Estimated Cost</b>
Definitions	-	0
Setbacks	35%	\$ 35,000
Regulated Structures	35%	\$ 35,000
Daylighting	15%	\$ 15,000
Maintenance & Repair	10%	\$ 10,000
Mapping and Ordinance Administration and Enforcement	-	0
Watershed Policy	5%	\$ 5,000
Draft Report/Consensus Building	-	0
Final Report	-	0
<b>Total</b>	<b>100%</b>	<b>\$ 100,000</b>

## **Chapter 17.08 Preservation and Restoration of Natural Watercourses\***

### **Section 17.08.010 Purpose.**

The purpose of this chapter is to establish a policy on: (1) the issuance of permits for culverting open creeks; (2) the rehabilitation and restoration of natural waterways; and (3) the management of watersheds. (Ord. 5961-NS § 2, 1989)

### **Section 17.08.020 Findings.**

The City Council does find and declare that:

- A. Public health and safety requires creek and watershed management and planning in order to control flood and erosion damages. Maintenance of natural channels, including removal of debris and erosion control.
- B. A dependence on structural solutions for reduction of property damage such as creek channelization, culverting and channel riprapping, often has been found to result in the loss of property from unanticipated problems associated with their design. Channelization can result in changes in stream meander, bank erosion, channel filling and channel degradation, causing damages by the undercutting of bridges, homes and other structures or by the over-the-bank flows caused by channel filling. Culverts can result in upstream and downstream bank erosion problems and, because debris removal from them is difficult, they can back up flows and cause floods. Undersized culverts and culverts installed at the wrong slope can also cause flooding and serious bank erosion.
- C. The use of riprap or other debris to stabilize banks can result in the erosion of streambanks up and downstream of the riprap. Riprap and other debris may decrease channel capacity contributing to potential flood damages.
- D. Streams managed as close to a natural system as possible without interference from structures, maintain a geomorphic equilibrium or watercourse best suited for carrying stream flows, and carrying and depositing suspended bed loads.
- E. Natural streams provide the most environmental amenities to the community and riparian owners.
- F. Streams and their riparian environment should be held as an important public asset in an increasingly endangered environment that provides an unusual urban ecological habitat with recreational and aesthetic value.
- G. Culverting or channelization of existing open creeks should only occur if there is an extreme hazard to public health or safety and no other alternatives can prevent the hazard.
- H. It is in the interest of the City of Berkeley to encourage the removal of culverts and channels, prevent channel riprapping, and to restore natural watercourses whenever safely possible. (Ord. 5961-NS § 2, 1989)

### **Section 17.08.030 Definitions.**

The following definitions shall be applicable in the construction and application of this chapter.

- A. "Creek" means a watercourse which carries water from either a permanent or natural source, either intermittently or continuously; and which runs in a defined channel or continuous swale or depression, which later merges with a larger watercourse. The definition includes a channel, swale, depression, or watercourse, whether or not culverted. The definition excludes any part of an engineered system which was developed by a public agency for collection of storm or flood waters, provided however

that such part does not follow the original course of the creek. The City of Berkeley may maintain maps and other reliable records, reflecting such creeks for the guidance of the public. The word "creek" will be synonymous with "natural watercourse" as used in the chapter.

- B. "Culverting" means the placement or construction of a pipe or box shaped conduit in a creek bed for the purpose of conducting water.
- C. "Rehabilitation" means the improvement of a natural watercourse by the use of erosion control technology, revegetation, vegetation management and/or selective channel clearing with the objective to conserve and manage a natural waterway and riparian system.
- D. "Restoration" means the unearthing of a culverted stream or natural watercourse and the design of a new open channel to re-create the original stream channel and environment.
- E. "Reconstruction" means the partial re-creation of the original natural watercourse by allowing a portion of a culverted stream to flow to the surface and flow through a landscaped riparian environment.
- F. "Riprap" means cobbles, rock, concrete pieces or other non-vegetative debris used to protect streambanks against erosion. Riprapping, the placement of riprap on streambanks.
- G. "Cribwalls" means a rectangular framework of logs which is filled with soil and/or rocks and planted with cuttings.
- H. "Brush matting" means the use of dead or live cuttings from riparian vegetation stacked and secured against streambanks to check erosion and revegetate banks.
- I. "Fascines" (sometimes called, "wattles") means bundles of cuttings from riparian plants used to revegetate banks.
- J. "Plant cuttings" means sticks cut from riparian shrub and tree branches in their dormant state such as willows and alder, which are buried about halfway in the ground and take root.
- K. "Brush layering" means the use of live branches or cuttings which are inserted into the streambanks perpendicular to the slope so that the rooting occurs back into the slope.
- L. "Retention basins" means open spaces which hold overbank stream flows and can be used as parks and other open space uses in drier seasons.
- M. "Gabions" means wire baskets filled with rocks and soil and planted with seeds, cuttings and rooted plants. They can be used to rebuild streambanks. (Ord. 6716-NS § 1, 2002: Ord. 5961-NS § 2, 1989)

#### **Section 17.08.040 Obstructing or interfering with watercourses prohibited.**

It is unlawful for any person, organization, institution, corporation or the City of Berkeley to fill, or cause to be filled, to obliterate or cause to be obliterated, to obstruct or cause to be obstructed, to construct a building bridging a creek or cause such building to be constructed, or in any manner to interfere with or cause to be interfered with, any natural watercourse in Berkeley which carries off at any time of the year any storm water, or any surface waters, which have been precipitated by rains. This chapter does not apply to structures or conditions existing in creeks on or before the effective date of this chapter. (Ord. 5961-NS § 2, 1989)

#### **Section 17.08.050 Setbacks for new construction required.**

- A. Except as otherwise provided in subsection B, it is unlawful for any person, organization, institution, corporation or the City of Berkeley to construct any structure having a roof supported by columns or walls, including dwellings, garages, other accessory buildings and commercial buildings, within 30 feet of the center line of any creek.

Approval for such construction may be granted only by appeal to the Zoning Adjustments Board for a variance. The decision of the Zoning Adjustments Board may be appealed to the City Council pursuant to Chapter 23B.44 of the Berkeley Zoning Ordinance.

- B. A residential addition to an existing single-family home may be constructed through the issuance of a Conditional Use Permit pursuant to Chapter 23B.32 of the Berkeley Zoning Ordinance if the Zoning Adjustments Board or the City Council on appeal makes all of the following findings:

1. All portions of the creek on the subject parcel are enclosed within a culvert, which is located below the surface of the land and there is no open creek within 30 feet of the proposed addition on any adjacent parcel.
2. The existing single-family home is bisected by a culverted creek such that at least 30 percent of its footprint is located on both sides of the culverted creek.
3. No portion of the proposed addition is located on land or improvements directly above the culverted creek.
4. There is no feasible alternative for development of the proposed addition on an area outside of the setback required by subsection A because of physical conditions on the site and/or the limitations imposed by otherwise applicable development standards.
5. The existing single-family home has two or fewer bedrooms and is smaller than the median size of single-family homes within a 500 foot radius, measured from the property boundary line of the existing single-family home.
6. The proposed addition shall not increase the size of the home to be larger than the median size of single-family homes within the 500 foot radius in subsection B.5.
7. A report by an independent structural engineer selected by the City and funded by the applicant has concluded that the culvert is sound and structurally adequate to support the existing and proposed improvements or will be made so as part of the proposed project.
8. The proposed addition will not adversely affect the creek.
9. The proposed addition will not be detrimental to the health, safety, peace, morals, comfort or general welfare of persons residing or working in the area or neighborhood of such proposed use, or be detrimental or injurious to property and improvements of the adjacent properties, the surrounding area or neighborhood or to the general welfare of the City. (Ord. 6740-NS § 1, 2003; Ord. 5961-NS § 2, 1989)

**Section 17.08.055 Replacement of a structure or any portion thereof where destroyed due to disaster or similar occurrence.**

Notwithstanding Section 17.08.050, a structure, or any portion thereof, may be replaced or reconstructed as long as all the following conditions exist:

- A. The structure, or any portion thereof, has been destroyed by causes such as fire, earthquake or flood.

- B. The proposed structure to replace or reconstruct the structure or portion thereof, is reasonably similar in use, dimensions, floor area, square footage, lot coverage and footprint to the destroyed structure and complies with all currently applicable building codes.
- C. If a culvert exists on the parcel and the proposed replacement will be within 30 feet of the centerline of such culvert, the applicant has submitted a report by a licensed structural engineer demonstrating to the satisfaction of the City that the proposed replacement structure will not negatively affect the culvert and that the replacement structure is designed with a foundation, such as pile supported, which does not exert any bearing load on the culvert. In making this determination, the report included information related to the proposed foundation design, the bearing strength of the soil, and the depth and size of the culvert. Alternatively, the applicant has submitted a report by a licensed structural engineer which has demonstrated to the City's satisfaction either that there is no feasible alternative to avoid imposing additional loading on the culvert, and the analysis provided has determined that the culvert has sufficient strength to resist such loading or the applicant proposes to reinforce the culvert as part of the project at the applicant's expense in a manner satisfactory to the City. (Ord. 6825-NS § 1, 2004)

**Section 17.08.060 Construction of walls, drains, bulkheads, etc.--Permit conditions required.**

The intent of this section is to prohibit culverting and riprapping, unless there is strong evidence that there is no other reasonable means to prevent the erosion of adjacent supports, foundations or other structures.

It is unlawful for any person, organization, institution, corporation or the City of Berkeley to construct or cause to be constructed, any wall, culvert, drain, bulkhead, or other structure in any natural watercourse or creek in the City of Berkeley, or to place riprap or any debris in the channel or on the banks, without first obtaining a permit therefor from the City Engineer. If a permit for construction is granted, the City Engineer shall require the applicant to submit plans and specifications for such a wall, bulkhead, culvert, drain, structure or bank protection work which shall specify the exact location and extent of the project. Any work that has been granted a permit, shall be carried out under the supervision of the City Engineer, or his/her designated representative.

Such a permit will not be granted if any one or more of the following alternatives, or any other is available to solve the problem.

- A. Excavating to restore a natural meander, stream geometry and channel roughness.
- B. Clearing debris cleanup.
- C. Flood proofing: e.g. minor redesign of buildings, relocation of porches or other minor structures, sheds, garages; raising of such structures; raising the grade of adjacent land.
- D. Removal of structures where feasible.
- E. Bank stabilization using vegetation or combination revegetation construction (soil bioengineering) that does not degrade the existing natural environment. This may include the use of vegetated and dirt filled gabions, vegetated wood cribwalls, live and dead brush matting, fascines, brush layering and cuttings, and other similar strategies based on employing plants as the long-term stabilizing materials.



- F. Vegetation management that can include selective clearing that retains a riparian canopy and root structure to preserve riparian habitat, control unwanted undergrowth, and stabilize banks.
- G. Set-back levee construction: flood wall construction on the flood plain.
- H. Changes in site design.

The request for any permit to culvert or perform any construction in a natural watercourse must conform to the requirements of the California Environmental Quality Act (C.E.Q.A.) and its current amendments and guidelines.

If the City Engineer recommends the granting of a permit for culverting or any other construction in any natural watercourse, the matter shall be referred to the Public Works Commission for review. If the City Engineer denies a permit, the applicant may appeal to the Public Works Commission for review and recommendation. In all cases the decision of the Public Works Commission will be final, unless the matter is appealed within 15 days to the City Council by the applicant, City staff or an interested party. (Ord. 5961-NS § 2, 1989)

**Section 17.08.070 Obstructions or structures declared nuisance when--Notice to remove--City to perform work when--Costs.**

Any structure, wall, bulkhead, culvert, drain, riprap or dam hereafter constructed, erected or maintained in violation of any of the provisions of Sections 17.08.040 and 17.08.050 hereof, any structure, wall, bulkhead, culvert, drain, riprap or dam heretofore erected or constructed in such manner or of such materials that the same does now or will hereafter obstruct the flow of any natural watercourse in the City, shall be and the same is declared to constitute a public nuisance, and the City Attorney of said City shall, upon order of the City Council, immediately commence action or proceedings for the abatement and removal and enjoinder thereof in the manner provided by law, and shall take such other steps and shall apply to such courts as may have jurisdiction to grant such relief as will abate and remove such building, obstruction, or structure, and restrain and enjoin any person, firm, or corporation from setting up, erecting, building, maintaining, or using any such building, obstruction or structure or using any property contrary to the provisions of this chapter. The remedies provided for herein shall be cumulative and not exclusive.

Any violation of this chapter shall be deemed an infraction punishable as set forth in Chapter 1.20 of the Berkeley Municipal Code. (Ord. 5961-NS § 2, 1989)

**Section 17.08.080 Failure to enforce chapter.**

Failure to enforce any part of this chapter, will not give rise to any civil or criminal liabilities. (Ord. 5961-NS § 2, 1989)

**Section 17.08.090 Fees.**

The City Council may establish by resolution the fees for administration of this chapter. (Ord. 6716-NS § 2, 2002)

\* For watercourse design requirements in subdivisions, see Ch. 21.24 of this code.



Office of the City Manager

ACTION CALENDAR  
October 12, 2004

To: Honorable Mayor and  
Members of the City Council

From: Phil Kamlarz, City Manager

Subject: Creeks Ordinance Modification Work Program

RECOMMENDATION

Provide direction to staff as to whether the Council would like further revisions to the creek ordinance considered as part of the Planning Division's work program for 2004-6 and provide direction as to approach and budget. Should the Council wish to undertake further work on this issue, Staff recommends a three-phase approach with the Planning Commission taking the lead in defining and implementing a public/stakeholder engagement process.

FISCAL IMPACTS

Should the Council adopt the three-phase approach recommended in this report, Phase 1 could be undertaken with the commitment of a quarter time staff person from Planning, and perhaps as much as an equivalent level of staff commitment from the Engineering Division and GIS staff. The impacts on the work program for the Planning Division are discussed in this report; the impacts on the other departments have not yet been ascertained. Phases 2 and 3 would require a commitment of an estimated \$500,000 - \$600,000 in consultant services over three to four years and a redirection of staff resources to accommodate this work. A funding source for consultant services has not been identified. Staff does not believe the choice of who leads the process (Planning Commission, task force or other alternative) would significantly affect the budget because staff assumes there will be an extensive public/stakeholder involvement process no matter who is in the lead, and the level of staff resources required to staff this process should therefore be similar.

CURRENT SITUATION AND ITS EFFECTS

The City's Creeks Ordinance was first adopted in 1989. It has subsequently been modified to clarify certain of its provisions but has not been substantially changed since it was first adopted. The ordinance prevents most development from occurring within 30 feet of the centerline of a creek. Creeks are broadly defined to include naturally occurring watercourses (whether seasonal or perennial) and those portions of a creek that have been placed in culverts (usually

underground) but remain in the location where they naturally occurred before being placed in the culvert.

Although the ordinance has existed for some time, concerns have been expressed by some Councilmembers and creek advocates that it did not effectively protect creeks and that modifications were needed. At the same time, the City's ability to map and notify affected property owners about the ordinance improved, and many people found out about the ordinance who did not realize they were regulated under it. In response to these factors, the Council decided to hold a public workshop on the Creeks Ordinance on March 16, 2004. At that workshop, the Council received a report from staff describing how the ordinance is currently being applied and also identifying some issues raised by the current ordinance. A new creeks map generated by the City's Geographic Information Systems staff was also presented that more accurately identified creeks and regulated areas, including a list of property owners potentially regulated under the ordinance. The Council also heard a presentation from creek advocates in regard to their concerns with the current ordinance.

The Council did not provide direction to staff on next steps on March 16, 2004 and brought the matter back for further discussion on July 13, 2004. At that time, the Council directed that staff schedule a public hearing for September 28, 2004 on the Creeks Ordinance and notify the 2300+ potentially affected property owners and other interested parties. At the public hearing on September 28, the Council adopted a first reading of a modification to the Creeks Ordinance to allow for rebuilding of a structure after a disaster without requiring a variance. A second reading of the ordinance was passed on October 5, and the ordinance is scheduled to go into effect 30 days later. The Council also directed that the City Manager propose a work program for making further revisions to the Creeks Ordinance to be considered as part of the Council's priority setting process on October 12.

## BACKGROUND

The City's Creeks Ordinance was adopted in 1989. Minor clarifying amendments were adopted in 2002, and later amendments in 2003 relaxed the requirements for making modest changes to single family homes. Except for this change the ordinance has not been substantially changed since its adoption. It is the City's policy to protect and restore its creeks and to encourage uncovering and "daylighting" creeks that have already been placed in culverts. To implement this policy, the ordinance prevents new development of a structure with a roof from occurring within 30 feet of the centerline of a creek.

After the public hearing on September 28, 2004, the Council approved first reading of an ordinance amendment to address concerns expressed by property owners about reconstruction after a disaster. While this modification addressed one key concern expressed by property owners, several other issues were noted as concerns, among which the following seemed to be most critical:

- The ordinance's definition of culverts as creeks so long as they were located in the location of the historic creek. Such culverts are currently regulated in a similar manner to open creeks. Many people questioned the feasibility of daylighting culverted creeks and whether culverts should be regulated in the same manner as open creeks.
- The lack of scientific underpinning for the 30-foot setback requirement and the need to establish more objective and complete standards for protecting creeks. Although the current ordinance was pioneering and has been somewhat effective in preventing additional harm to creeks, there was general agreement that a 30-foot setback requirement was outdated and arbitrary. Creek advocates noted that most cities with creek protection policies do not, as a rule, use arbitrary setbacks, but rely on an assessment of the specific character of the creek.
- The definition of a creek. Staff currently applies a four-part test for determining whether a swale or channel is also a creek. Several people commented on the current definition of what constitutes a creek, as described in the City's Draft Administrative Regulation. That current definition relates to whether water is flowing in the channel after a prolonged rainfall. Although many if not most creeks in the Bay Area are intermittent and do not carry water year-round, the issue of what constituted a "permanent source" of water and how much flow is necessary and for how long for a channel to be considered a creek was a subject of much discussion.
- The cost to property owners of determining how they are affected by the ordinance, and the costs to the City of reconsidering the creeks ordinance, including a comprehensive assessment of creeks and culverts.

An issue that also arose in the hearing is the condition of culverts on private property. As staff has indicated in the past, the City believes these are the responsibility of private property owners and that issue is not proposed to be addressed further in the work program discussed below.

### WORK PROGRAM

Staff indicated in its report for the September 28, 2004 hearing that a comprehensive assessment of creeks and full revision of the current ordinance would cost "several hundred thousand dollars." Moreover, the process involved in modifying the creeks ordinance would also absorb considerable staff time with impacts on other work program items. Staff indicated it would return on October 12 with a recommended approach for addressing this issue at a time of highly constrained budgetary resources.

Staff recommends that the creeks ordinance be addressed in three phases. Phase 1 would be an initial modification to the ordinance to address some of the immediate issues identified in the public hearing and narrow the scope of future assessments. Phase 2 would be a thorough assessment of key creeks and establishment of more comprehensive policies on creek protection and restoration for those creeks. Phase 3 would be an assessment of the feasibility of daylighting

certain culverted creeks on public property, including an identification of opportunity sites and a feasibility assessment for daylighting a few of those opportunity sites. Staff recommends this three-phase approach in order to address early in the process some of the key concerns raised regarding the current ordinance and at the same time narrow the scope of future assessment in order to keep the costs down. As noted above, moving forward with a full assessment of the City's open and culverted creeks would be costly. Each phase is described in more detail below, including budget and staffing implications. A discussion of the impact of undertaking the creeks' work on the Planning Division's work program also follows.

#### Phase 1: Initial Creeks Ordinance Modification.

This would be a relatively short, focused effort with limited public engagement. Public involvement would occur primarily through public hearings, either before the Planning Commission or Council. In this first phase, Staff proposes to respond to some of the key issues identified at the September 28, 2004 hearing by proposing additional modifications to the ordinance, as follows:

- No longer define culverts located in the historic location of creeks as "creeks" under the ordinance. Staff would recommend that the City maintain some requirements for engineering analysis prior to building near culverts (similar to those recently included in the "after-disaster" section), but the 30-foot setback provisions would be removed through such an amendment.
- Remove the 30-foot setback requirement from the ordinance and instead require that anyone wishing to construct within 30 feet of the centerline of an open creek first establish that such construction will not have a negative impact on the creek, considering all of its values. Staff would recommend broadening the definition of what would be regulated to include decks, new driveways, grading and other types of construction that might affect a creek.
- Reconsider the definition of a creek. Staff plans to reconsider how it defines a creek by examining other ordinances and other criteria for establishing what constitutes a creek in a California coastal environment

Cost/Time Frame: Staff believes this first phase would involve a quarter-time Planner as well as significant assistance from Engineering Division staff and the City Attorney's office. This should be a focused three to six month effort. Staff does not recommend a consultant for this phase.

#### Phase 2: Comprehensive Creeks Assessment and Policy Development

This second phase would involve consultants and a more extensive stakeholder engagement process. Staff recommends that, initially, such an assessment focuses on some of the key creeks in the City, and then be expanded over time to include other creeks as fiscal and staff resources allow. Staff recommends that the Planning Commission determine the public engagement process. Alternatively, the Council may wish to establish a separate time-limited task force, or a special joint committee of several commissions. The initial phase would include the following:

- An evaluation of key creeks, including their biology, hydrology and geo-morphology.
- Establishing policies related to the studied creeks in regard to appropriate setbacks for development and for the types of structures and other development that should be regulated.
- Establishing a “best-practices” policy manual for development near creeks.

Cost/Timeframe: Staff expects that this second phase would require a quarter time to half-time Planner as well as a significant contribution of staff time from the Engineering Division of the Public Works Department and GIS staff of the Information Technology Department. The cost of the technical assessment would depend on the number of creeks to be assessed, but staff estimates that the analysis and assistance in development of policy would cost somewhere in the neighborhood of \$250,000 - \$350,000 over 12 to 18 months. Once policy is developed, it would be applied to other creeks as either the consultant or property owners complete assessments of those creeks. Staff expects that the technical assessment would require six to nine months. Policy development would require another six to nine months. The CEQA and adoption process could potentially add another six months to the schedule, leading to an overall program schedule of 18 to 24 months.

### Phase 3: Daylighting Culverted Creeks

Staff recommends that the feasibility of daylighting culverted creeks on public property be assessed as a third phase of this project. The culvert assessment could include a survey of opportunity sites on public property for daylighting followed by a more detailed feasibility assessment of each of those sites identified as the most significant opportunities. Should an opportunity arise at anytime to daylight a culvert on public property, the Council could direct that such an assessment be done immediately and would not need to wait for completion of a city-wide study. Daylighting culverts is already established City policy in the General Plan.

Cost/Time Frame: This phase would begin when the other two phases are completed. Staff expects that the cost for this phase would depend on the number of sites identified for detailed feasibility assessments, but that a reasonable expectation for identifying opportunity sites and conducting a small number of more detailed feasibility assessments would be in the neighborhood of \$250,000.

### Impact on Planning Division Work Program

As adopted by Council, the Planning Division work program for the next 18 months includes all of the following items, with Mayor’s Task Force items identified with an “MTF” below. Staff has divided the work program into two sections: those that are ongoing and that staff recommends proceed to completion without delay; other items that will likely be delayed if the Council chooses to pursue the Creeks Ordinance work previously outlined without increasing staff. Phases 2 and 3 of the Creeks Ordinance modification process also have fiscal implications

as no budget is currently identified for the \$250,000 - \$350,000 of consultant effort that staff estimates would be required for Phase 2, or the \$250,000 estimated for Phase 3.

No delay recommended

- Southside Plan EIR and Adoption; expected completion: Fall, 2005
- Landmarks Preservation Ordinance Revision (also MTF item): expected completion, Spring, 2005.
- Process Applications for Amendments to Zoning Ordinance and General Plan (there are currently three applications underway): expected completion, Spring, 2005
- General Plan Review and Implementation (annual evaluation); expected completion: Winter, 2004-5, including Housing Element update (required by State).
- Downtown Hotel/Conference Center Planning: unknown completion date or commitment level
- Zoning Ordinance Revisions/Clean-up (also on MTF): ongoing
- Improvements to public notification: underway (MTF)
- Defining staff's role: underway (MTF)
- Preparation of a comprehensive historic data base: partially done with no further work programmed (MTF)
- Implement University Avenue Strategic Plan: first phase related to height and bulk completed in draft: expected completion, Fall, 2004 (MTF)
- Commercial Parking Requirements modification: work begun, expected completion, Spring, 2005 (MTF)
- Review and response to the UC and LBNL Long Range Development Plans

Delay Expected if Creeks Work undertaken:

- Exceptions to commercial district quotas and establishment of quotas on Euclid.
- Several Phase 2 Mayor's Task Force items which we had anticipated undertaking in 2005 may be delayed, including: further improvements to notices; update of CEQA procedures; modifications to the Zoning Ordinance in regard to small scale projects and as-of-right envelopes for single family additions; and establishment of improved criteria for establishing multi-family/mixed use residential density.

- San Pablo Avenue Design Guidelines (MTF)

There are at least two other potentially high priority projects on the horizon that would be affected by undertaking the Creek's work (or vice versa):

- West Berkeley Plan Update
- Waterfront Specific Plan Amendment

Should these last two projects become priorities, it is highly unlikely current staffing levels would be able to accommodate them in the next year should the creeks process proceed as suggested.

CONTACT PERSON

Dan Marks, Director of Planning and Development, 981-7401

Approved:

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Dan Marks  
Director of Planning and Development





Creeks Task Force

## Item #9A, Appendix C

Planning Commission

April 13, 2005

## Item #6

February 7, 2005

### Staff Report

**To:** Creeks Task Force Members  
**From:** Erin Dando, AICP  
Associate Planner  
**Date:** February 7, 2005  
**Subject:** **Task Force Enabling Legislation and Direction from City Council**

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#### Background

On September 28, 2004 the City Council held a Public Hearing on the Creeks Ordinance, BMC 17.08. At the conclusion of the Public Hearing, the Council directed staff to return with a proposed work program for the review of the Creeks Ordinance and recommendations for further evaluating the issues raised at the Public Hearing. Staff prepared the requested report for the October 12, 2004 City Council meeting. The matter was continued until November 9, 2004, where the Council took action based upon the reports from several members of the Council.

#### Discussion

Task Force members previously received the summary from the November 9, 2004 Council meeting and the related documents that the Council reviewed in establishing the Task Force. The text below represents the combination of the reports, which the City Council approved as the proposal for review of the creeks ordinance. The information below represents the recommendations as written by Mayor Bates and Councilmembers Maio and Hawley in the report dated October 18, 2004, the addendum dated November 9, 2004 and further items, which the Council approved to amend the reports.

1. **October 18, 2004 Report from Mayor Bates and Council Members Hawley and Maio (directly quoted from report)**
  - 1.1 **Membership.** The Task Force will include representative appointment by each Member of the City Council and one member appointed by the Planning Commission, Public Works Commission, Community Environmental Advisory Commission, and the Parks and Recreation Commission. Total membership will include 13 people. Appointments will be made in December, following the seating of new Council Members. **(Superseded by Item 3.4 below.)**

- 1.2 **Structure.** The Task Force will be staffed by the Planning Department, with assistance from other city departments as needed.
  - a. All Task Force reports, recommendations, and ordinance changes will be submitted to the Planning Commission for their comments prior to coming to the City Council for its consideration, to enable public input into the task force recommendations, and to make a recommendation to Council.
- 1.3 **Scope.** The Task Force will be directed to recommend a scope, work plan, and budget to be submitted to the Planning Commission by April 1, 2005. The Planning Commission review and recommendations must reach the Council in time for the Council's fiscal year 2006 budget process. The Council will then provide the Task Force with instructions based on those recommendations, available budget, and their priorities.
- 1.4 **Timeline.** While the exact work plan still must be determined, the Council will set a deadline of May 2006 for revisions to the Creeks Ordinance. A specific deliverable date will ensure that the process does not extend indefinitely. The Task Force will be required to work efficiently and make progress on achieving its goals.
  - a. As part of setting this deadline, direct the City Manager to return to the Council with an ordinance that will implement this proposal with the provision that if the Task Force recommendations are still not forthcoming by the deliverable date, the current culvert protections in the Creeks Ordinance will be indefinitely suspended on May 1, 2006 until such time that a new ordinance is adopted by the Council.
2. **November 9, 2004 Report from Councilmembers Hawley and Maio (directly quoted from report)**
  - 2.1 In addition to the 13 persons to be appointed by the Mayor and four Commissions, add an additional two persons to be appointed by the Mayor to ensure the temporary Task Force is balanced in its representation of stakeholders, **(not adopted, superceded by Item 3.4 below)**
  - 2.2 Specify that the Mayor will name the Chair of the Task Force from the appointed membership,
  - 2.3 Describe a scope of work allowing flexibility to enable the Task Force to add additional items as recommended by staff and to refer questions to appropriate Commissions for their investigation,
  - 2.4 Exclude from discussion by the Task Force the issue of responsibility for repairing culverts on private property, as that is currently under litigations, and

2.5 Specify that the Task Force meetings be publicly noticed, provide time for public comment, and be held in a location accessible to the public.

2.6 The scope of work is to include the following:

- Review and modify the definition of “creeks” in the City’s Ordinance.
- Recommend methods to protect creeks and the rights of property owners.
- In recognition of the lack of scientific underpinning for the 30-foot setback requirement, establish more objective standards or a method to establish setbacks for new construction or additions near creeks.
- Determine whether and how culverts should be regulated in a manner different from that of open creeks, and whether and how creeks of significant length should be regulated in a manner different from that of short and possibly intermittent flows of water.
- Determine the costs and possible sources of funding for identifying culverted creeks on private property.
- Provide suggestions for best practices for development near creeks.
- Suggest criteria and possible funding sources for daylighting creeks on public property.

### **3. Additional Action to Amend the Reports**

The main motion to approve the October 18<sup>th</sup> and November 9<sup>th</sup> reports was further amended to include (as quoted by the City Clerk):

1. All meetings will be held in accordance with Brown Act requirements for noticing and accessibility;
2. There shall be at least one public hearing;
3. Water quality issues will be considered; and
4. The portion of the recommendation that originally provided for the Mayor to make an additional two appointments be removed and instead the Neighbors on Urban Creeks will select one representative and groups in support of creeks will select one representative to sit on the Task Force.