



Creeks Task Force

Staff Report

To: Planning Commission
From: Erin Dando, AICP
Secretary to the Creeks Task Force
Date: April 26, 2006
Subject: **Final Recommendations from the Creeks Task Force**

Recommendation

That the Planning Commission continue to review the Creeks Task Force's (CTF) recommendations for revisions to the Creeks Ordinance, BMC 17.08, *Restoration and Preservation of Natural Watercourses*, other non-regulatory recommendations, and new recommendations and clarifications provided in this report. The Commission should provide the City Council its comments and recommendations on the work of the Creeks Task Force, finalizing its review at the Commission's May 10th meeting in order to meet predetermined deadlines established by the City Council.

Discussion

The final Creeks Task Force recommendations (Attachment 1) include additional clarifications developed by the CTF on April 17, 2006. The new recommendations are detailed below and include definitions for open creeks and creek culverts, further clarifications for the regulations of creek culverts and a new recommendation related to the notification of property owners of Creeks Ordinance revisions.

The Creeks Task Force adopted the attached "Creeks Task Force Background Paper" (Attachment 2), which has been updated from the previous version distributed to the Planning Commission on April 5th. The Task Force also adopted a new document titled the "Rationale for Berkeley Creeks Task Force Recommendations" on April 17th (Attachment 3). These documents provide a detailed history of the Creeks Ordinance, statements of the major issues and two major public opinions shared with the Task Force relating to the Ordinance, and an outline for the rationale for the CTF's recommendations. While they were authored by individual members, the CTF adopted both reports as official reports from the Task Force.

New Recommendations

Definitions

New to the recommendations previously submitted to the Planning Commission are definitions for open creeks and creek culverts which should be incorporated into the Creeks Ordinance. The open creek definition is based on the existing definition of a creek found in BMC 17.08. The Task Force has modified this definition (see the definition in track changes below). Most notably is the removal of creek culverts from the definition of an open creek. The removal of creek culverts is consistent with the to the CTF's intent to apply a 30-foot setback only to open creeks and not underground creek culverts. On April 5th the Planning Commission requested staff to provide the technical definition of a creek which was developed and is used by city staff to apply the existing creek definition for administrative purposes. The Planning and Public Works policy, which details this technical definition, is found in Attachment 4.

The CTF voting record is noted after the recommendations in the order of votes in favor, opposed, abstentions and members absent.

“Open creek” means an above ground 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, whether natural or engineered, swale, depression, or watercourse, whether or not culverted. A depression that carries water only during or immediately following rainfall is not a creek. 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 “open creek” will be synonymous with “natural watercourse” as used in the chapter. (11:1:1:2)

A “creek culvert” is an underground pipe or other engineered system capable of carrying water that connects two sections of open creek, or connects an open creek to another body of water. (9:3:1:2)

Creek Culverts

The Task Force further clarified the treatment of creek culverts and the intersections of creek culverts with open creeks with the recommendations below.

Underground creek culverts should be treated similarly to storm drains for the purposes of setbacks for safety, access and maintenance. A new definition of ‘creek culvert’ should be incorporated into the Creeks Ordinance, Berkeley Municipal Code 17.08. The Creeks Ordinance should also incorporate a section providing authorization of the Department of Public Works to administratively review and regulate development of structures (new structures and expansions to existing structures) near underground creek culverts, including roof structures, foundations, footings, and similar structures. (For information purposes only, this generally means that structure foundations must be set back from the edge of the culvert a distance equal to the depth of the culvert measured to the bottom of the culvert.) (10:3:1:1)

Special authority should be granted to City Staff in reviewing applications for development at the inlets and outfalls of underground creek culverts. Any setback

requirement and/or potential requirements for mitigations or improvements for the underground creek culverts should be based on engineering and safety criteria and the health of the creek, and shall consider the special requirements of this transition area. (9:0:5:1)

Recommendation on Public Noticing

The Creeks Task Force added a new recommendation for future notification of property owners related to revisions to the Creeks Ordinance and any subsequent proposed changes.

The City of Berkeley should notify all affected property owners, as identified by the City, of the approved changes to the Creeks Ordinance, as well as advanced notice of proposed changes. (14:0:0:1)

Advisement Documents for Staff Administration and Implementation

The requirement for an environmental analysis and potential mitigations are incorporated into some of the CTF regulatory recommendations under certain circumstances. The CTF recommends an environmental analysis be required in order to be sure proposed development does not create an adverse impact on a creek. The Task Force has requested that staff refer to a document (Attachment 5) from an individual member of the Creeks Task Force in the development of requirements for an environmental analysis, which is recommended to apply to the following projects:

- Vertical expansions of roofed structures within the 30-foot setback area (building permit)
- Horizontal expansions of roofed structures within the 30-foot setback area (AUP between 25 feet and 30 feet of the creek centerline)
- Construction of decks located within 10 – 30 feet of the creek centerline and replacement of decks within 0-30 feet of a creek centerline (building permit if more than 30 inches above grade; otherwise, no building permit required). An AUP is required for replacement between 0-10 feet of a creek centerline.

Similar to the request above, the CTF has recognized two additional documents (Attachment 6 and Attachment 7) submitted by individual members requesting staff to take them under advisement in the development of potential mitigations, which may be required under the following circumstances:

- as a condition of an Administrative Use Permit for the expansion of an existing building within the 30-foot setback; and
- when rebuilding existing non-conforming roofed structures within the 30-setback.

While neither of these documents was adopted by the Task Force, the CTF generally agreed that they should serve as examples for staff to utilize.

Creeks Task Force Extended Work Program

The recommendations developed by the Task Force do not include ordinance amendments; rather, the recommendations along with those from the Planning Commission will be presented to the City Council for further direction on the development of ordinance language.

Recognizing the effort, time and commitment of the Creeks Task Force members, the CTF is interested in reviewing the ordinance language once prepared by staff and prior to its adoption by the City Council. The CTF has additional tasks from its approved work plan, unrelated to

ordinance revisions, which it believes should be addressed prior to the disbanding of the Task Force. For these reasons the Task Force recommends that it continue in operation through September following a tentative schedule (Attachment 8) to meet its objectives. This will allow the CTF to continue to utilize its consultant team in order to develop a Best Management Practices Guide and incentives and criteria for daylighting, which can be forwarded to the Council for approval and/or implementation. The original work plan assumed all work would be accomplished by May 2006; however, the original City Council Resolution did not provide a date for the disbanding of the temporary Task Force. The Task Force generally indicated that it had no interest in continuing after September and staff will be asking Council to take a formal action disbanding the Task Force on a date certain in September.

Additionally, the CTF has agreed that the City should use the consultant team and redirect some of the funding to cover the necessary fees for reporting and analysis required under the California Environmental Quality Act (CEQA) as pertains to any proposed ordinance revisions. While this task is not in the original scope of services, City Staff intends to work with the consultant to amend the scope as necessary. By using the funds in the CTF budget, this avoids the need to request additional funding from the City Council to accomplish this required task.

As time and funding permits, the CTF may proceed with additional tasks during the next few months, not going beyond September. The CTF may complete some, but not likely all, of its work as detailed in the original work plan, approved by both the Planning Commission and City Council in 2005.

Questions from the Planning Commission

Commissioners have raised a number of questions during and after the April 5th Commission meeting. The following responds to some of those questions.

- How many properties are affected by the Ordinance? How many are affected by open creeks versus creek culverts?

There are currently 1833 properties identified by the City as “affected” by the existing Creeks Ordinance. Since the original mapping in 2004, properties have been removed from the list after further investigation at the site. Staff estimates that about 1/3 are affected by creek culverts and the remaining are affected by open creeks.

Questions Raised by Individual Planning Commission Members

Commissioner David Stoloff:

- I would like to include a discussion of whether there should be a permitting process whereby a property owner could get a permit for building within the 30 foot limit subject to performance conditions and design review.

This option was considered and rejected by the Creeks Task Force in favor of a strict limit on further encroachment. In the view of the majority of the CTF, a 25-foot no build zone is needed to protect the long term health of a creek and promote the objective of balancing the needs of the creeks while recognizing the rights of property owners in an urban environment

Commissioner Susan Wengraf:

- Definition of a creek
The Creeks Task Force has provided a recommended definition of a creek.

- Definition of a culvert
The Creeks Task Force has provided a recommended definition of a creek.

- How are storm drains regulated by PW? What are the implications of regulating culverts in the same manner as storm drains?
The Public Works Department establishes setbacks for development near storm drains for the purposes of maintenance, access and repair. If regulated as storm drains, review and approval of buildings near underground creek culverts not otherwise subject to discretion would be an administrative matter, not subject to public review or appeal.

- Does all new construction require a Use Permit? Even if it was destroyed by fire? earthquake? etc? What policy did the City follow after the firestorm?
A Use Permit is required for all dwelling units. If a dwelling unit was built prior to this requirement, it is considered non-conforming due to the sole fact that it does not have the required permit. In order to rebuild a dwelling unit, a Use Permit is required. The vast majority of residential buildings in the City were built prior to the requirement for a Use Permit and are therefore non-conforming and would require a Use Permit (public hearing) to be rebuilt, even if destroyed by fire or other cause. Many buildings in Berkeley do not conform to existing zoning standards and are therefore “non-conforming” not only because they lack a Use Permit, but also because they do not meet current development standards. Such buildings may be rebuilt with a Use Permit if they are destroyed or demolished. Most buildings encroaching into the creek setback would be non-conforming by virtue of lacking a Use Permit and also due to the lack of creek setback.

- The finance department has records of all properties in Berkeley including footprint and square footage. Can these records be used to establish footprint and envelope of all properties identified as being within 30 ft of a creek, so that if they ever have to be rebuilt, we would have a record of what was there?
The information available is not necessarily accurate and does not necessarily include enough information to allow for rebuilding an “in-kind” building. As staff has indicated, the issue of as-of-right rebuilding was not referred to the CTF or to the Planning Commission by the Council. The question raises issues about how as-of-right implementation might work, which would require additional staff research. If the Planning Commission would like to take up this issue as a separate matter, it should indicate this in its recommendations to Council.