



Land Use Planning Division

## Staff Report

**To:** Members of the Planning Commission  
**From:** Wendy Cosin, AICP  
Deputy Planning Director  
**Date:** September 27, 2006  
**Subject:** **Draft Creeks Ordinance and Zoning Ordinance Amendments**

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### Recommendation

- Provide comments on the Creeks Ordinance revisions and Initial Study
- Provide preliminary comments on the Zoning Ordinance revisions
- Set a public hearing for October 11, 2006 regarding proposed revisions to the Zoning Ordinance

### Background

In January 2006, the Planning Commission (Commission) began reviewing the issues, scope of work, consultant findings and recommendations of the Creeks Task Force (CTF). The Commission took action on the CTF recommendations on May 10, 2006. In brief, it supported the CTF recommendations, but had the following concerns:

- In one or more places where the CTF would require a Variance, the Commission suggested that a Use Permit might be more appropriate.
- The findings for use permits, environmental analyses, and mitigations should not place an unreasonable burden on applicants requesting permits for minor additions.

On May 30, 2006, the City Council held a public hearing on the recommendations for changes to the Creeks Ordinance and took the following action:

Action: Moved, seconded, carried (Maio/Worthington; Noes–Olds, Wozniak) a motion to: direct staff to draft ordinance language based on the Creeks Task Force recommendations, including the requirements for a variance, and which clearly defines or classifies creeks, is sensitive to property owners and provides clear direction on how to comply with the creeks regulations, and amends the Zoning Ordinance to make it consistent with section 17.08.055 of the existing Creeks Ordinance, to allow rebuilding by right in the event of a disaster or similar occurrence; have this language reviewed by the Creeks Task Force and the Planning and Public Works Commissions; and schedule the draft ordinances for a public hearing before Council.

Moved, seconded, carried (Capitelli/Maio; Noes –Bates; Abstain–Worthington, Wozniak) a motion to direct staff to explore and develop and come back to Council with specific Use Permit findings that under the current Creeks Task Force proposals would require a variance.

The Creeks Task Force (CTF) reviewed proposed amendments to the Creeks Ordinance at their September 11 and 18, 2006 meetings, and will discuss the amendments again on September 25, 2006. The version of the draft ordinance that is included with this report (dated September 22, 2006) is the same as what will be included for CTF review on September 25<sup>th</sup>. It shows most changes from the existing ordinance in strikeout or underlining, except that the entirely new sections are so noted and just show some of the changes that have been made during CTF review in strikeout and underlining. The existing ordinance is attached to assist with Commission review. This report briefly summarizes the key aspects of the proposed amendments.

The draft ordinance includes amendments to the Creeks Ordinance (Attachment No. 1) and the Zoning Ordinance (Attachment No. 2). As required by the Municipal Code, the Planning Commission needs to set a public hearing on the Zoning Ordinance amendments. Staff recommends that a hearing be set for October 11, 2006. No public hearing is needed at the Planning Commission level for the Creeks Ordinance amendments; the City Council requested that a public hearing be scheduled when the amendments return for its review in November.

### Definition of Creek/Findings

A need to amend the definition of “creek” was identified to ensure that the definition is clear and to address a public concern as to whether rainwater runoff and the like might inadvertently get treated as a creek. In 2005, staff issued administrative procedures for processing permit applications where a creek may be present on the property (Attachment No. 3) to provide guidance on this point. The CTF discussed whether the details of this procedure should be included in the ordinance and the majority decided not to.

An important purpose of the definition is to clearly distinguish between creeks, whether open or culverted, and engineered structures developed for collection of storm or floodwaters (e.g. a storm drainpipes). The proposed definition includes most of the language from the existing ordinance and is reorganized.

A “creek” continues to include both open and culverted creeks in the definition, and new language is added to define each. Language was also added to identify the type of water source that contributes to a drainage area and the minimum size of a drainage area (one-third acre) that feeds a creek. Reference was added to the City’s administrative procedures.

Findings were amended based on recommendations from the City Attorney and CTF.

### Regulation of Culverted Creeks

One of the most significant recommendations was to change the current prohibition on building within 30 feet of the centerline of a culverted creek without a Variance. This goal was achieved by creating a new type of permit – a Creek Culvert Permit – that could be approved administratively. The City Engineer determined that 15 feet is generally the critical distance when analysis is needed of the potential impacts of construction on a creek culvert. However,

City maps are not adequately detailed to be used for this purpose; therefore, a two-part process is proposed:

1. If development is proposed within 25 feet of a culverted creek, the applicant must provide information to establish the exact location of the centerline.
2. If development is proposed within 15 feet of the centerline of the culverted creek, additional information and an over-the-counter permit are required.

The revised ordinance:

- Requires a Creek Culvert Permit to be issued by the City Engineer for any development, except projects listed as “exempt”, proposed within 15 feet of the centerline of the culverted creek.
- A Creek Culvert Permit can be approved if the applicant submits a report prepared by a structural engineer that shows, to the satisfaction of the City Engineer, that the ordinance standards are met. The standards ensure that the construction or a setback will be adequate to protect the structural integrity of the culvert, ensure continued culvert access for repair and maintenance by property owners, and ensure that creek flow will not be impeded or polluted, including situations where a culverted creek transitions to an open creek.
- In response to a concern from the CTF that 15 feet may not be an adequate area, language was added to the draft ordinance to allow the City Engineer to require an engineering report if the depth and size of the culvert indicate that more information is needed regarding the proximity of development to the culvert.

The ordinance includes detailed submittal requirements to provide the City Engineer with the information needed to determine that the required standards can be met for a Creek Culvert Permit to be issued.

### Open Creeks: Setback Regulations for Roofed Structures

The City Council approved the direction recommended by the CTF that the current prohibition on building a roofed structure within 30 feet of the centerline of an open creek without a Variance be handled differently for three types of construction. The revised ordinance addresses this as follows.

- Vertical expansion of existing buildings (up or down within the existing building footprint) that are located within the 30-foot setback will require an over-the-counter permit (Creek Permit) issued by the City Engineer, governed by standards will protect against negative impacts on the creek.
- Additions to existing development that expand the building’s footprint within an area between 25 and 30 feet from the centerline of an open creek will require an Administrative Use Permit (AUP) issued by the Zoning Officer that includes criteria and findings designed to protect against adverse environmental effects to the creek.
- Two options are provided for expansion of an existing structure (other than vertically as described above) within the first 25 feet of the centerline of an open creek and for development of a new structure within 30 feet of the creek.
  - Option 1: Continue the current requirement to obtain a Variance for such development as recommended by the CTF.

- As was recommended by the Planning Commission, the City Council requested that a Use Permit be considered as an option for a Variance. Therefore, Option 2 was developed and is included in the draft ordinance to require a Use Permit issued by the Zoning Adjustments Board with strict criteria and findings that alternatives have been considered and have been determined infeasible, and that the creek is protected against adverse environmental effects.

Each is discussed in more detail below.

The Creek Permit described above for vertical additions would be a new administrative permit to be issued by the City Engineer. The ordinance requires a report to be prepared by a licensed engineer or licensed geologist with expertise in hydrology or slope stability, and that the report provide the information needed to determine that the required standards can be met for a Creek Permit to be issued. The required standards incorporate the “environmental analysis” originally proposed by the CTF. The Commission previously expressed concern that the environmental analysis that was recommended for ministerial permits would trigger CEQA because such an analysis would be discretionary. This issue has been resolved by requiring the report submitted with the application to provide the evidentiary basis for each of the required findings. In addition, the City Engineer may adopt administrative regulations that guide analysis of the criteria used to determine that the development will not adversely affect the creek.

For additions within the area 25 – 30 feet from the centerline of an open creek, the Planning Commission wanted to ensure that the circumstances when an AUP would be approved be clearly defined and that the findings not be too onerous. As drafted, the findings include the environmental analysis and are based on the premise that construction within the 25 - 30-foot area should only be approved if it would not adversely affect the creek.

Regarding expansion of an existing structure (other than vertically) within the first 25 feet of the centerline of an open creek and for development of a new structure within 30 feet of the creek, the Planning Commission believed that “a Use Permit may be more appropriate” than a Variance. On September 18, 2006, the CTF passed a motion supporting the Task Force’s original recommendation for a Variance. The motion passed 8 – 5.

A potential issue with the Use Permit option was raised in the attached letter from Michael W. Graf, Attorney, to Juliet Lamont and Phil Price, dated September 14, 2006 (Attachment 5). The letter argues that the proposal to allow development with a Use Permit rather than a Variance is a major weakening of the protections of the existing ordinance, which could result in potentially significant impacts on the environment and, thus, an Environmental Impact Report should be prepared. Staff does not agree with this analysis, but wanted to alert the Commission to this issue.

One problem with the existing Creeks Ordinance is that it references permit requirements from the Zoning Ordinance, but doesn’t explicitly tie the two together. The revised ordinance adds definitions of an Administrative Use Permit and Use Permit that specify that the permits will be issued in accordance with Zoning Ordinance procedures for such permits, but subject to only the findings contained in the Creeks Ordinance. Thus, the permit findings would be tailored to address creek-related issues and the standard “non-detriment” finding would not be required.

### Open Creeks: Setback Regulations for Other Structures

The CTF recommended adding regulations for decks, paving, and bridges; the existing ordinance does not regulate these types of development. The revised ordinance:

- Restricts where new and replaced decks may be placed within 30 feet of an open creek. New decks are only allowed within 10 feet of the creek centerline with a Variance, although a damaged or destroyed deck within this area could be repaired, replaced, or rebuilt with an AUP issued by the Zoning Officer that requires findings to protect the creek. Between 10 and 30 feet, new or repaired decks would require a Creek Permit issued by the City Engineer, governed by standards will protect against negative impacts on the creek.
- Prohibit new impervious paving within 10 feet of an open creek, except for footpaths and bridges and require all new paving to be pervious within 30 feet of an open creek centerline, unless a Variance is approved.
- Establish a new standard for new and rebuilt bridges to ensure they meet clearance for a one in 100-year storm event to reduce chances of bridges becoming an obstruction during flooding events, unless a Variance is approved.

The Planning Commission and the City Council asked that a Use Permit alternative be provided in cases where the CTF recommendation called for a Variance. Although not currently drafted, language similar to “Alternative Two” for Section 17.08.050 could be adapted to the above situations where Variances are required.

### Repair and Rebuilding of Existing Nonconforming Structures (Zoning Ordinance and Creeks Ordinance Amendments)

The CTF, Planning Commission, and City Council discussed the importance of allowing property owners replace or reconstruct structures damaged by events such as an earthquake, fire, or flood or similar occurrence, as is provided in the existing Creeks Ordinance (BMC 17.08.055). However, it was pointed out that the Creeks Ordinance does not supersede the existing Zoning Ordinance requirement for a Use Permit to replace nonconforming buildings. The rebuilding issue is addressed in three ways as described below.

1. A new provision to the Zoning Ordinance was drafted that would apply to all properties, whether proximate to a creek or not. Section 23C.04.100, Rebuilding After Involuntary Destruction of Structures or Portion Thereof, is included in the draft ordinance language (Attachment No. 2) and includes the following key elements<sup>1</sup>:
  - A destroyed structure can be replaced with administrative approval of a Zoning Certificate.

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<sup>1</sup> The CTF originally recommended that rebuilding of structures within the 30-foot setback area should be moved farther away from the creek centerline if feasible, that land use concessions should be considered in this regard, and that mitigations should be considered for rebuilding within the 30-foot threshold area. These recommendations were not included in the new section of the Zoning Ordinance or with the existing section of the Creeks Ordinance because they would be difficult to implement with a ministerial (administrative) process. Further, the Zoning Ordinance applies to all properties, not just those adjacent to a creek.

- This provision only applies to structures that are exclusively residential and that do not include more than three units.
- The replacement structure must substantially similar including: use, dimensions, floor area, square footage, envelope, lot coverage, footprint, number of units, and window and exterior door size and location.

As indicated in the following action from the May 23, 2006 City Council meeting, the original direction was to refer Zoning Ordinance amendments to the Planning Commission to allow “a homeowner to rebuild their house” if destroyed by disaster. Language was changed to refer to a “habitable structure”.

From: Mayor Bates, Councilmember Olds, Wozniak and Capitelli

Recommendation: Direct the Planning Commission to review our home rebuilding policy (especially in the event of a major disaster) and examine changing it to allow a homeowner to rebuild their house in its existing location and in the same size with a "by right" permit unless serious engineering or ground stability complications exist.

Action: Moved, seconded (Worthington/Spring: Noes–Maio, Capitelli, Olds, Wozniak, Bates; Abstain–Moore) a substitute motion to approve recommendation.

Moved, seconded, carried (Capitelli/Maio; Noes–Worthington) a main motion to approve the recommendation as amended to direct the Planning Commission to review the City’s habitable structure rebuilding policy (especially in the event of a major disaster, but also including singular disasters) and change it to allow a building owner to rebuild their habitable structure in its existing location and in the same size with a “by right” permit notwithstanding any restrictions in the Berkeley Municipal Code or state law and to report back to Council on November 28, 2006.

Staff recommends that the “by right” rebuilding provision only apply to residential uses and that it include properties with up to three units. By benefiting both homeowners and people who own small projects, more housing units could be easily replaced while also providing the City with flexibility to review larger projects as needed. It is important for the City to maintain the option of discretion for larger residential and commercial projects due to the greater impact of their potential inconsistency with current regulations and/or the fabric and scale of neighborhood development. It should also be noted that is common for jurisdictions to adopt emergency regulations following a disaster as appropriate to the circumstances, and the City would always have that option.

To qualify for rebuilding with a Zoning Certificate, a structure will have to be substantially similar with respect to: use, dimensions, floor area, square footage, envelope, lot coverage, footprint, number of units, and window and exterior door size and location. To make this determination, it is anticipated that staff will develop an administrative procedure for property owners to provide information to allow staff to document existing conditions in advance of potential damage or destruction. If, following a disaster, such documentation has not been established, the City would research records to determine baseline project conditions and the

determination of Zoning Officer would be final<sup>2</sup>. If a project is determined not to be “substantially similar”, the applicant would follow the standard requirements of the Zoning Ordinance and, if applicable, the Creeks Ordinance<sup>3</sup>.

2. Minor changes in language are proposed to Creeks Ordinance Section 17.08.055 to be more consistent with the new Zoning Ordinance language. This Creeks Ordinance section will continue to apply to replacement of all structures destroyed by disaster, as originally written, and the new Zoning Ordinance provisions will also apply.
3. In the Creeks Ordinance, a new Section 17.08.058, Replacement of Structure or Any Portion Thereof Where Destroyed for Reasons other than Involuntary Causes, was drafted and is included in the draft ordinance language. The recommended language establishes a process for properties that are damaged by more than 50% not as a result of an involuntary cause such as fire, earthquake or flood. In such case, a Use Permit would be required pursuant to both existing Zoning Ordinance standards and the Creeks Ordinance, with Creeks Ordinance findings required to address that alternatives have been considered, protection for the creek, and mitigations as appropriate.

New Issue: Combination of Rebuild with As-of-Right Additions: The City Council directed planning staff on September 19, 2006 to refer a concern brought forth by Councilmember Wozniak to the Planning Commission in its review of the Zoning Ordinance amendments related to rebuilding after involuntary destruction.

The concern raised by Councilmember Wozniak relates to the coupling of a by-right rebuild simultaneously with a by-right residential addition. At the September 19th meeting the Council approved the first reading of an Ordinance allowing by-right additions, subject to height limits, for 15% of the subject lot area up to 600 square feet.

Councilmember Wozniak expressed concern that an applicant could build a house up to 600 square feet larger than the original house after involuntary demolition without neighbor notification or discretionary review. As drafted, the amendment language states that any additional square footage, beyond what existed before the involuntary demolition, is subject to all otherwise applicable regulations governing such expansion or change<sup>4</sup>. If an applicant chooses to build an expansion as part of the by-right rebuild that exceeds 600 square feet or the height limit, an Administrative Use Permit would be required.

Staff recommends approval of the language as drafted. Staff believes the new provisions should affect all properties the same in that the regulations for additions should not change if a house is

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<sup>2</sup> A more complex process that included consultation with abutters and confronters of the subject property was included in the ordinance drafted after the 1991 fire; however, given the potential for a larger area of destruction, the current ordinance was drafted to be simpler.

<sup>3</sup> See “New Issue”, below.

<sup>4</sup> The new ordinance will limit new square footage to 600 square feet, with a height limit of 14 feet for R-1, R-1A, R-2, R-2A, 16 feet for R-3 and R-4, and 18 feet for R-5. The new regulations will force any by-right addition to be 14 feet or less in height in the R-1 District and less than a maximum height of 20 feet in the Hillside Overlay District.

involuntarily demolished in whole or part. The property owner should still be entitled to the same zoning provisions. The new provisions recommended by the Planning Commission and adopted in a first reading by the Council provide greater protections to neighbors from the impact of large by-right additions. If the existing home were non-conforming due to setbacks or lot coverage, it could be rebuilt by right, per the drafted language; however, the new addition proposed as part of the by-right rebuild would be subject to all height restrictions, setbacks and lot coverage limitations.

### Zoning Ordinance Amendment: Modification of Regulations

Several sections of the proposed amendments to the Creeks Ordinance require findings for approval of permits that alternatives to building within the creek setback area have been considered. For this to be effective, to provide flexibility, and in recognition that creek side property owners may have development rights limited by the existing setback regulations of the Creeks Ordinance, a revision to the BMC Section 23B.44.010, Variances, is proposed. The revised ordinance would allow a Use Permit, rather than a Variance, to be approved to modify setbacks or other standard zoning requirements on property located within 30 feet of an open creek when such a modification is needed for a property owner to comply with the Creeks Ordinance. The language included in Attachment No. 2 is as follows:

#### Section 23B.44.010 Variances

The Board may grant Variances to vary or modify the strict application of any of the regulations or provisions of this Ordinance with reference to the use of property, the height of buildings, the yard setbacks of buildings, the percentage of lot coverage, the lot area requirements, or the parking space requirements of this Ordinance; provided, however, that a use permit, rather than a variance, may be approved to vary or modify the strict application of any of the regulations or provisions of this Ordinance with reference to the height of buildings, the yard setbacks of buildings, the percentage of lot coverage, or the parking space requirements when development is proposed on property which is located within thirty feet of an open creek and where varying from or modifying existing regulations is necessary to enable the property owner to comply with BMC Chapter 17.08, Preservation and Restoration of Natural Watercourses.

Allowing deviations from the Zoning Ordinance with a Use Permit rather than a Variance continues to provide a public hearing process and the standard Use Permit finding<sup>5</sup> would ensure the proposed project would not adversely affect other properties.

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<sup>5</sup> The Board may approve an application for a Use Permit, either as submitted or as modified, only upon finding that the establishment, maintenance or operation of the use, or the construction of a building, structure or addition thereto, under the circumstances of the particular case existing at the time at which the application is granted, 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.



### Environmental Review of Proposed Ordinance Amendments

A draft Initial Study, Attachment No. 4, analyzes the potential environmental impacts from the proposed amendments to the Creeks Ordinance. The conclusion of the Initial Study is that the ordinance revisions could not have a significant effect on the environment, and a Negative Declaration will be prepared. The City Council will need to act on the Negative Declaration prior to approval of the ordinance. Comments on the Initial Study, they can be addressed before the Negative Declaration is prepared. There will also be at least one month provided for formal, noticed public review and comment following completion of the Negative Declaration before Council action in November or December.

There are no potential adverse impacts that will result from the two proposed Zoning Ordinance amendments; therefore, these amendments are exempt from environmental review.

### Schedule for Action

The City Council established November 28, 2006 as the deadline for returning the amendments to the Creeks Ordinance and, regarding rebuilding, to the Zoning Ordinance. November 28<sup>th</sup> has been selected as the date for a City Council public hearing on the ordinance amendments. Staff would like to incorporate all Commission changes to the draft ordinances into a final draft that will be mailed to all creek side property owners as soon as possible.

#### Attachments:

1. Draft ordinance language – Creeks Ordinance
2. Draft ordinance language – Zoning Ordinance
3. Public Works/Planning Department Procedure
4. Draft Initial Study, September 1, 2006
5. Letter from Michael W. Graf, Attorney, to Juliet Lamont and Phil Price, dated September 14, 2006
6. Chapter 17.08, Preservation and Restoration of Natural Watercourses