

May 10, 2006

To: Chairperson Burke and Members of the Berkeley Planning Commission

From: Neighbors on Urban Creeks

Subject: Creeks Ordinance

Referenced document: Creeks Task Force Recommendations

Approved April 17, 2006

Neighbors on Urban Creeks gratefully acknowledge the work that Creeks Task Force members have put into the difficult task of revising the Creeks Ordinance. After more than a year of work several statements reflecting our point of view to protect both our creeks and the rights of property owners have been incorporated into Task Force recommendations. For example, the recent action by the Task Force to eliminate reference to “potential daylighting opportunity sites.”

However, Neighbors on Urban Creeks wishes to advise the Commission of our remaining concerns:

1. Unclear Definition of a Creek and Absence of a Definition for Creek Culvert

- There is no definition of “intermittent,” “swale,” or “depression.” The definition states that “A depression that carries water only during or immediately following rainfall is not a creek,” yet a depression that carries water intermittently is covered by the ordinance. This is confusing and *unnecessarily complicates the enforcement of the Ordinance and clouds property owners understanding of their rights and responsibilities regarding the “creek.”* Also, Task Force recommendations call *only* for writing a definition of “Creek Culvert.” *When is a “creek culvert” not also a storm drain and vice versa?* Clear definitions are imperative if the revised ordinance is to be implemented in a fair and consistent manner and not become subject to multiple and shifting interpretations.

2. Rebuilding of Existing Structures

- The Statements of Agreement continue to indicate that “Rebuilding after any loss is permissible to the same configuration and footprint as the original structure.” A small footnote indicates that “Loss includes damage or demolition due to disaster, neglect, dry rot, and for any other reasons. The Zoning Ordinance defines demolition as the removal of 50% of the walls and 50% of the roof of a structure.” It is clear that *re-building a destroyed structure to the same height and size and on the same footprint as the original structure requires that the owner must undergo a public hearing to obtain a Use Permit during which anyone may protest the rebuilding of that structure.* It is highly probable that securing a Use Permit to rebuild near a creek *will* be vigorously opposed and thus greatly delayed or prevented. The Task Force has chosen not to comment on this issue, and their recommendations do not indicate the Use Permit requirement. This is not full disclosure of the requirements facing property owners.

- Neighbors on Urban Creeks supports rebuilding of existing structures that have been destroyed on their original footprint and to their original size and height *as a matter of right subject only to building codes*. We seek this for all existing structures, not just those affected by the Creeks Ordinance.
- With rebuilding rights potentially endangered or at least highly compromised in a very unclear manner, *how will financial institutions feel about financing or refinancing a property that may, in the end, not be feasibly rebuilt should it be damaged?*
- We request that the process to *grant the right to rebuild occur prior to approval of a Creeks Ordinance*. We are concerned that a revised Creeks Ordinance will be approved while in all likelihood the right to rebuild will languish for a significant period of time.

### 3. Regulation of Culverted Creeks

- Neighbors on Urban Creeks continues to support the *removal of culverts from the Creeks Ordinance*. Section 17 of the Municipal Code involves water management issues, storm drains, culverts and watercourses. Within this Section there should be one part that deals with open creeks, the Creeks Ordinance, and another separate part regarding culverts. Task Force recommendations that culverts should be in the Creeks Ordinance with the Public Works Department “authorized” to regulate them, while “City Staff” (undefined) will deal with infalls and outfalls of culverts to open creeks is unnecessarily confusing and unclear. We note that when the Task Force discussed the matter of culverts interfacing with open creeks, Public Works staff was specifically removed and “City Staff” substituted. Under this recommendation, owners of properties with culverts that interface with open creeks have no idea of *what will be allowed, who will decide, and how it will be decided*. Because damage occurring at the interfaces of culverts and open creeks may be caused by activities, structures and impermeable surfaces on multiple properties, a comprehensive water management plan is preferable to avoid prolonged and costly settlement of disputes.
- We request that you remove the statement “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.” Even though stated in broad terms, this adds nothing and sets up an expectation that may not be possible to meet. Property owners want decisions regarding building on or near culverts based on engineering, structural, and hydrologic considerations. No one wants to build too close to a creek or too near the opening of a culvert into a creek. It would be unsafe for the creek and the structure. Public Works staff should determine the margins of safety in these circumstances.

### 4. Locating and Repairing Culverts on Private Property

- Current City policy is that locating and repairing culverts on private property is the sole financial responsibility of the property owner. The Task Force did not discuss the question of locating a culvert on private property and it dismissed the subject of repairing by stating that the Council requested that they not discuss that issue. *These costs must be discussed* for four reasons: 1) the costs are substantial, particularly the cost of culvert repairs, and will result in abandoned, deteriorated properties without City financial assistance to affected property owners; 2) culverted creeks are an integral part of the City's storm drain system, benefiting all property owners not just the property on which the culvert is located; 3) the City has not been forthcoming in acknowledging the culverts it has constructed on private property (e.g. WPA project culverts) and 4) it is fundamental that if the City wishes to regulate culverts, they should be responsible for determining their location. *We request that you, at the very least, ask the Council to review its current policy on the location and repair of culverts on private property.*

#### 5. Expansion of Existing Buildings

- Many communities and counties classify creeks by size and regulate them accordingly. The Task Force did not do this. Instead, setbacks and other regulations are subject to a one-size-fits-all approach that does not take into account width or depth of the creek, slopes on the banks of the creek, amount of water in the creek and other factors which describe critical differences between creeks. Neighbors on Urban Creeks believe that *if differences in creeks are not considered through such mechanisms as classifying creeks by size, a better approach would be to regulate them on a case by case basis.*

#### 6. Undefined Mitigations, Incentives, and Environmental Analysis

- These measures are not defined and it is unclear to owners what will be required and what the possible costs will be. Examples: 1) expansions of existing structures into the 30-foot setback on one side of an open creek will involve mitigations commensurate with the impacts; 2) mitigations should be considered for rebuilding within the 30-foot threshold area; and 3) rebuilding structures within the 30-foot threshold area should be encouraged by giving incentives to move the structure further from the creek. With no definitions, indication of the level of requirements, estimate of costs, or description of the processes which will be used, *how can owners be assured that the processes involving these mechanisms will be cooperative and not confiscatory in nature?*
- Neighbors on Urban Creeks has consistently opposed waiving zoning review as an incentive to move rebuilt existing structures away from an open creek. Movement of existing rebuilt structures could result in such problems as intruding on a neighbor's view corridor. *We support rebuilding on the existing footprint as a matter of right, but want zoning review if the structure is rebuilt on a different footprint or higher or larger*

*than the original structure. We support waiving zoning fees as the appropriate incentive in these instances.*

7. Development on Vacant Creekside Properties

- Neighbors on Urban Creeks supports a setback from the centerline of an open creek on vacant property. The Task Force recommends a setback of 30-feet on either side of the creek measured from the centerline. We understand from Planning staff that approximately 100 vacant properties, mostly residential, are affected by this recommendation and that it is “easier” to obtain a variance to develop vacant property because of the need to allow owners use of their property and avoid the “takings” issue. Since it is necessary to approve some level of development, *we suggest that the recommendation for a Variance in these instances be changed to that of a Use Permit.* This would allow consideration of all of the factors that would be relevant to the owner, the creek, and the neighbors while still recognizing that some level of development would occur.

8. Absence of a Comprehensive Watershed Management Plan

- A watershed management plan, in which creeks and culverts are a part, is necessary to address the real life problems of water management in Berkeley. The Creeks Ordinance addresses land use issues around open creeks. Berkeley homes and business suffer from flooding from a storm drain system that is crumbling, lacking in capacity, and completely absent in some areas. The water table in the City is rising and may affect mapped deep landslide areas. *Neighbors on Urban Creeks support the immediate development of a comprehensive water management system.*