

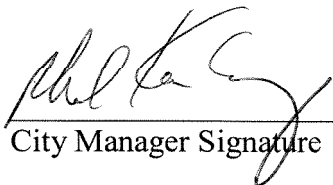
Office of the City Manager

## TO BE DELIVERED AGENDA MATERIAL

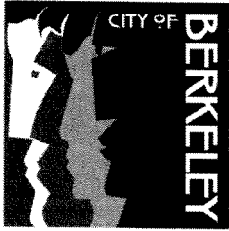
**Meeting Date:** October 12, 2004

**Item Number:** Worksession Item 1 and Council Agenda Item 9

**Item Description:** Creeks Ordinance Modification Work Program




City Manager Signature



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):

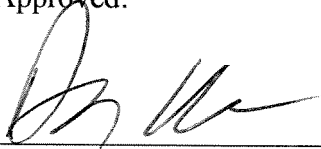
- West Berkeley Plan Update
- Waterfront Specific Plan Amendment

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

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Approved:



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Dan Marks  
Director of Planning and Development