



Office of the City Manager

ACTION CALENDAR  
May 30, 2006

To: Honorable Mayor and  
Members of the City Council

From: *PK* Phil Kamlarz, City Manager

Submitted by: Dan Marks, Director, Planning and Development

Subject: Recommendations from the Creeks Task Force and City Manager for Creeks  
Ordinance Revisions

RECOMMENDATION

Conduct a public hearing and, upon conclusion:

- 1) Support the Creeks Task Force (CTF) recommendations, including the details for future implementation as refined by the City Manager in response to Planning Commission concerns;
- 2) Provide direction regarding whether a Use Permit or Variance should be required on issues where the CTF and Planning Commission recommendations diverge; and
- 3) Direct that staff draft ordinance language to revise the Creeks Ordinance (BMC Chapter 17.08 – Preservation and Restoration of the Natural Watercourses), and that the ordinance language be reviewed by the CTF and Planning Commission prior to Council adoption.

SUMMARY

Per the City Council directive on November 9, 2004, a temporary Creeks Task Force (CTF) was established to review the Creeks Ordinance. The Council directed the Task Force to develop recommendations for ordinance revisions and review additional watershed and creek related issues. The Task Force completed its recommendations in April 2006. The CTF requests that its recommendations be approved and that the City Council provide direction to staff to draft ordinance language to implement its recommendations as written.

The Planning Commission provided comment and recommendations in May 2006; a separate report from the Planning Commission has been provided. This report conveys the Creeks Task Force recommendations, describes the Planning Commission concerns, provides additional detail from staff about implementation, and identifies the areas where

direction is needed from the City Council. Staff believes that most of the differences between the Planning Commission and CTF can be resolved as ordinance language is developed; however, specific direction is needed regarding whether a Use Permit or Variance should be required for development near open creeks in certain situations as described further in this report.

The stated goal of the Creeks Task Force is:

**To protect and restore natural creeks functions as achievable over time in an urban environment while recognizing the importance of property rights.**

The Creeks Task Force recommendations provide more flexibility and reduce restrictions on property owners compared to the existing ordinance. Attachment 1, CTF Recommendations, includes a table that compares the existing regulations with the proposed changes.

The CTF's most significant recommendations include:

- Regulating culverted creeks differently than open creeks. Specifically,
  - The current prohibition on building within 30 feet of the centerline of a culverted creek is to be removed.
  - Building over or near a culvert will only require an over-the-counter permit issued by staff, governed by standards to be developed that would protect building safety, provide culvert access and maintenance for property owners, and ensure that creek flow will not be impeded or polluted.
- Changing the permit requirements within the existing 30-foot setback along open creeks for development on vacant and developed lots. Specifically,
  - Development between 25 and 30 feet from the centerline of a creek would be permissible, subject to the securing of an Administrative Use Permit issued by the staff (but appealable to the ZAB and Council) after applying criteria, which will be developed. The criteria will be designed to protect against adverse environmental effects to the creek.
  - The current requirement to obtain a Variance for development within the first 25 feet of the centerline of a creek would continue. In legal effect, this means that new development within 25 feet of the centerline of an open creek would continue to be effectively prohibited.
  - There would be greater flexibility for building on developed lots along open creeks by allowing vertical expansions (up or down) of existing buildings in the 30-foot setback subject to the securing of a staff issued non-discretionary permit which will be subject to criteria to be developed to protect against negative impacts on the creek.<sup>1</sup> This permit would not be subject to further appeal.

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<sup>1</sup> The CTF recommended an "Environmental Analysis" be prepared by the applicant to demonstrate that there would not be an adverse impact on the creek. This is discussed in more detail later in this report.

- Strengthening the Creeks Ordinance and protection of creeks, riparian zones and water quality by applying new requirements along open creeks for unroofed structures such as decks, paving and bridges, which are not currently regulated under BMC 17.08.

The CTF recommendations were often made at a general policy level. The staff has suggested further details to flesh out these policy recommendations and to make it easier for the Council and public to appreciate the practical effect of the policy. These details are also designed to address the Planning Commission's concerns about the vagueness of the CTF recommendations. While the Planning Commission generally supports the CTF recommendations, it did express some concerns that the staff's suggested approach to implementation is designed to address.

There is a key policy divergence between the CTF and the Planning Commission as to the type of permit to be required, for example, in order to build on vacant lots within the 30-foot setback from the centerline of an open creek. The CTF wished to retain the Variance requirement (which is the legal equivalent of a prohibition, except in very unusual circumstances) whereas the Planning Commission believed that a use permit might be more appropriate. The degree of discretion and flexibility in reviewing a Use Permit application depends on the standards for granting it. The Planning Commission did not further address this issue. **Direction is needed from the City Council on whether to continue with the Variance requirement as the CTF recommends.**

Rebuilding as a matter of right has been a major issue for the CTF and the Planning Commission. While the CTF did not recommend amendments to the Zoning or Creeks Ordinance to allow rebuilding as a matter of right, because Zoning Ordinance issues were not part of the charge of the CTF. The request to amend the Zoning Ordinance to allow such rebuilding as a matter of right after a disaster was separately referred by the Council to the Planning Commission at the May 23, 2006 Council meeting. Therefore, the Zoning Ordinance issue is only cross-referenced briefly in this report. The Council already amended the Creeks Ordinance to provide for such rebuilding as a matter of right within the 30-foot setback after a disaster or similar occurrence.

#### FISCAL IMPACTS OF RECOMMENDATION

The recommendations of the Creeks Task Force will require review for new projects not currently subject to review under the existing Creeks Ordinance. Permit fees currently cover approximately 75% of zoning staff review. Additional permits and fees will need to be developed for new types of projects subject to staff review.

#### CURRENT SITUATION AND ITS EFFECTS

##### **The provisions of the current ordinance.**

Under the current ordinance, the construction of any roofed structure within 30 feet of the centerline of a creek requires the securing of a Variance and is, thus, effectively

prohibited. The definition of a creek includes not only the portion that is above ground, but also that which runs through a creek culvert. Narrow exceptions to the Variance requirement exist for expansion of a single family home where the home sits on top of a culverted creek<sup>2</sup> and for replacement of structures destroyed by a man made or natural disaster or similar occurrence. The construction of structures without roofs or paving within the setback is not regulated.

### **The creation of the Creeks Task Force (CTF).**

In 2004, in response to public criticism of the ordinance, the City Council adopted Resolution No. 62,711A-N.S. establishing the temporary CTF. The resolution stated that recommendations on revisions to the Creeks Ordinance were to be transmitted to the City Council by May 2006. However, the Council was asked to extend this deadline on April 25, 2006 since the CTF had made significant progress towards developing its recommendations. The Council amended the CTF's enabling resolution per the staff's request extending the deadline to September 19, 2006. All recommendations of the CTF are first to be reviewed by the Planning Commission prior to their submission to the Council.

### **The CTF's Charge.**

The scope of work for the Task Force was described in the Council Resolution 62,711A as follows:

- Review and modification of the definition of a creek,
- Protection for creeks and the rights of property owners;
- Regulations for culverts,
- Setback standards,
- Protection for creeks and the rights of property owners,
- Rules and funding for identifying creeks on private property; and
- Criteria for daylighting creeks on public property.

## **BACKGROUND**

This report begins with an explanation of the CTF recommendations, and identifies where the Planning Commission or staff differs from the CTF or the staff has supplied further implementing details. The report then goes on to describes the process by which the CTF arrived at its recommendations.

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<sup>2</sup> The required findings for approval specifically reference the percent of the footprint of the house on each side of the culverted creek, the size of the home in comparison to surrounding homes, the number of bedrooms, and other extremely specific criteria.

## I. Regulatory Recommendations

This section of the report addresses the CTF's proposals for changes to the Creeks ordinance. Non-regulatory recommendations are located towards the end of the report.

### A. Definition of creek

As explained earlier in this report, the Council Resolution establishing the CTF provided that it was to consider "review and modification of the definition of a creek". This directive was prompted by public concern as to whether rainwater runoff and the like might inadvertently get treated as a creek. In 2005, staff issued a Planning and Public Works Procedure to provide guidance on this point. After reviewing this procedure and definitions from other jurisdictions and agencies, the Task Force found that the principles for defining a regulated "creek" were similar, that there was no obvious way to improve the existing definition, and that its work would be more productive by focusing on how development near a creek should be regulated (for example through the setback requirement) rather than by defining a creek. Thus, the Task Force did not recommend substantive changes to the Ordinance definitions.

However, in connection with its focus on exempting culverted creeks from the ordinance's setback requirement, the Task Force did, recommend some modifications to the definition of "creek"<sup>3</sup>. Since there are better approaches to accomplishing the CTF's policy recommendations concerning deleting the setback requirement for culverted creeks and there are unintended consequences with its proposed amendments to the definition, the staff recommends that the Council provide policy direction on the regulatory end to be achieved, namely whether and how culverted creeks should be regulated, and direct staff to draft the best regulatory means to achieve that end. The issue of culverted creeks is discussed next.

### B. Regulation of Culverted Creeks

#### 1. No 30 Foot Setback

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<sup>3</sup> The CTF recommendation is: "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.

The CTF's most significant recommended change to the Creeks Ordinance is to exempt development over or adjacent to a culverted creek from the existing 30-foot setback requirement. Any such development is currently subject to a Variance. While the CTF proposed to accomplish this end by changing the definition of a creek (see footnote 2) the substance of this recommendation (footnote 3) can be achieved in better ways. The language recommended by the CTF has unintended consequences and actually undermines other CTF recommendations. Thus, at this time, the Council should focus only on whether it agrees with the policy recommendation regarding culverts and not on specific Ordinance language in the definitions or otherwise.

2. Ministerial permits for building over a culvert (to ensure building and culvert safety, access for maintenance and creek flow.)

The specific recommendations are footnoted<sup>4</sup> and included in Attachment 1. While the CTF did not pursue the mechanics of its recommended case-by-case review any further, the **staff** envisions that the CTF recommendations will be implemented by an amendment to the Creeks Ordinance which will require the issuance of a ministerial over-the-counter permit subject to standards which address the structural integrity of the building and culvert, creek maintenance and access for the property owner, creek flow and intersection of a culverted creek with an open creek.

### C. Open Creeks- Setback Regulations

The CTF work focused on development of setback requirements from open creeks, not culverted creeks. Its recommendations are paraphrased, grouped by topic and numbered below<sup>5</sup>, with brief comment providing background, identifying Planning Commission issues, and indicating where City Council direction is needed. The CTF recommended changes refer only to proposed changes to the Creeks Ordinance and recognize that any

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<sup>4</sup> 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)

<sup>5</sup> The CTF voting record follows each statement in parenthesis in the order of votes in favor, opposed, abstentions, and members absent.

particular development may be subject to other requirements especially those imposed by the Zoning ordinance including those unrelated to whether there is a creek on the property.

*1. Existing Conforming and Legally Nonconforming Roofed Structures*

**a. Expansions up or down:**

The CTF recommended that modifications to legally non-conforming roofed structures within the 30-foot setback area should be permitted by right, if the expansion is within the existing footprint and is a vertical expansion (excavation or addition of new story). An environmental analysis of the impact on the creek should be required to show that there is no negative impact on the creek. (This is a case-by-case review for such projects.) (11:3:1:0) The Creeks Task Force believed that property owners who wish to expand or modify existing structures within 30 feet of an open creek should have greater flexibility than is currently allowed by the Creeks ordinance.

Under current law, depending upon the nature of the expansion or modification, the homeowner would have to get either a Use Permit in certain narrow circumstances, or a Variance (which is effectively impossible in the absence of extraordinary circumstances.) The CTF recommendation significantly simplifies this process by reducing it to a ministerial (non-discretionary) over-the-counter permit issued by the staff, as long as an environmental analysis showed no negative impact on the creek. **Staff** envisions that the details of the permit standards and environmental analysis are to be developed and embodied in the Creeks Ordinance amendment

**b. Expansions within the 30-foot setback:**

The CTF recommended that modifications to conforming or legally non-conforming structures that cause an expansion of up to 5 feet into the 30-foot setback area (i.e., no closer than 25 feet from the creek centerline) should be allowed with an Administrative Use Permit (AUP), which would include an environmental analysis. Such expansions would be allowed only if other options for expansion are not feasible, if the encroachment is relatively minor, if the proposed development would not create an adverse impact on the creek, the relative importance of the buffer based on the creek characteristics is considered, and mitigations commensurate with the impacts are included. Horizontal expansions from 0'-25' from the creek centerline should not be permitted, unless a Variance is obtained. (11:3:1:0)

The CTF recommendation to allow for a 5-foot encroachment into the 30-foot setback with an Administrative Use Permit (AUP) and environmental analysis provides new flexibility for property owners with existing structures in close proximity to open creeks. However, the findings for approval suggested by the CTF are proposed to discourage applications except in circumstances where there are no other feasible options for expansion.

The **Planning Commission** wanted to ensure that the circumstances when an AUP would be approved, described in the above CTF recommendation, be clearly defined. It was concerned that, as currently written, the necessary findings for approval may be too onerous.

The CTF recommends that any modification or expansion of existing roofed structures within 25 feet of the centerline of a creek continue to be subject to the requirements of current law (which requires a Use Permit in some narrow circumstances and a Variance in most circumstances.) The CTF recommendations reflect its position that it is vitally important to minimize development within the 30-foot setback. The CTF recommendations provide more flexibility than the existing ordinance by allowing a five-foot encroachment into the 30-foot setback for additions to existing structures and by allowing existing structures to be expanded vertically. The **Planning Commission** believed that “a Use Permit may be more appropriate” for the area within 25 feet of the centerline of a creek.

While Use Permit criteria can be very narrowly drafted, a Use Permit allows more flexibility than a Variance. The impact of changing to a Use Permit requirement will depend on the findings required to obtain the permit. Broad discretion will make the outcome unpredictable and staff and hearing intensive. Narrow and more predictable standards such as requiring specified technical reports would make the outcome more predictable, but will entail staff and consultant costs in conducting individualized review of applications and supporting the hearing process, since more applicants are likely to seek Use Permits rather than Variances. The Use Permit approach will require more staff work and the additional costs may not be fully recoverable through the imposition of fees. **The Council should provide direction on this issue.**

2. *Setbacks from Open Creeks: New Roofed Structures*

The CTF recommends that on either vacant or developed lots, the existing provisions of the Creeks Ordinance apply, namely that a Variance will be required for any **new roofed structure** within 30 feet of the centerline of an open creek(11:3:1:0). Although the CTF recommended adding flexibility to the regulations for existing structures, it supported maintenance of the current strict Variance requirement for new structures because property owners can generally design around a creek when they build on an empty lot. If the lot and creek on it truly precludes any reasonable development the owner may be able to establish the requirements for a Variance.

The Planning Commission has suggested that the Council consider whether a Use Permit may be better in this instance as well.

3. *Setbacks from Open Creeks: Unroofed Structures, including Decks, Paving, and Bridges*

a. **New Decks:** (12:0:3:0)

- i) Decks may not be built within zero to 10 feet of the creek centerline, unless a Variance is obtained.
- ii) Decks may be built within 10 feet to 30 feet of a creek centerline with an environmental analysis of the impact on the creek. (Ministerial Review)

**b. Replacement of Existing Decks After Loss<sup>6</sup>: (12:0:3:0)**

- i) After loss, decks may only be rebuilt within zero to 10 feet of a creek centerline with the approval of an Administrative Use Permit, including an environmental analysis of the impact on the creek.
- ii) After loss, decks may be rebuilt within 10 feet to 30 feet of a creek centerline with an environmental analysis of the impact on the creek. (Ministerial Review)

Decks are currently unregulated by the Creeks Ordinance and the recommendations above would increase the scrutiny for such projects. The Task Force is particularly interested in protecting a 10-foot area from the open creek centerline. In order to protect this 10-foot area, the CTF recommends that no new decks be built within this distance. A Variance would be required for new decks. The **Planning Commission** indicated that “a Use Permit may be more appropriate”, and suggested that this be further considered. The CTF proposed that an AUP be required to replace existing decks within this 10-foot area.

Only administrative review would be needed for new or existing decks further than 10 feet from the creek centerline. This review would normally take place in conjunction with a building permit application. A new administrative permit process may need to be developed to implement this regulation.

**c. New Paved Areas: (12:0:3:0)**

- i) No impervious paving is permitted within 30 feet of a creek centerline, unless a Variance is obtained.
- ii) Only paving for footpaths and bridges is allowed within 10 feet of a creek centerline. Pervious paving is permitted within 10 – 30 feet of a creek centerline. Construction of paving should follow Best Management Practices guidelines.

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<sup>6</sup> With regard to existing unroofed structures, the CTF agreed that the threshold for imposing the new setback requirements should be when 50% or more of the structure or paving must be replaced. This is similar to the existing definition of demolition for roofed structures, which considers 50% removal of the roof and 50% removal of the walls a demolition.

**d. Replacement of Paved Surfaces After Loss: (12:0:3:0)**

- i) No impervious paving is permitted within 30 feet of a creek centerline, unless a Variance is obtained. Replacement with impervious material is not allowed.
- ii) Only paving for footpaths and bridges is allowed within 10 feet of a creek centerline. Pervious paving is permitted within 10 – 30 feet of a creek centerline. Construction of paving should follow Best Management Practices guidelines.

The existing Creeks Ordinance does not regulate paved surfaces. The Task Force understands the impacts that paved surfaces create on the creek environment including higher runoff volume and velocity, the loss of potential groundwater recharge and opportunity for pollution mitigation by vegetation in a paved environment. The CTF recommends that no paving be allowed within 10 feet of an open creek centerline except for footpaths and bridges, unless a Variance is approved. It also recommends that all new paving be pervious, to allow water to permeate into the ground, reducing water runoff.

The **Planning Commission** recommendation indicated that “in one or more places where a Variance would be required by the CTF, a Use Permit may be more appropriate”, and suggested that this be further considered.

**e. New Bridge:**

The CTF recommends that new bridges should only be constructed with a clear span necessary to pass a one in 100 year storm event and of the minimum width necessary for the proposed use. (12:0:3:0)

**f. Replacement of Bridges After Loss:**

The CTF recommended that rebuilt bridges should have a clear span necessary to clear water after a one in 100 year storm event and be of the minimum width necessary for the proposed use. (12:0:3:0) Thus in effect the Task Force recommended that rebuilt bridges meet the industry standard for new bridges in order to reduce the chances for bridges to become obstructions during flooding events. Otherwise a Variance would be required for a rebuilt bridge. As indicated above, the **Planning Commission** suggested that a Use Permit be considered rather than a Variance.

**g. Fences, play structures and other similar construction:**

The CTF recommended that fences, play structures and other similar construction should not be regulated under the Creeks Ordinance; however, Best Management Practices should be utilized for construction. (12:0:3:0).

In addition the CTF's consultant team is tasked to develop a Best Management Practices and stream care guide to assist creekside residents and the City of Berkeley with voluntary guidelines for appropriate development, construction and landscaping practices along open creeks.

### *3. Repair/rebuilding of existing structures*

#### a. Unroofed Structures

The CTF recommends that any legally non-conforming unroofed structure and paving may be repaired and maintained without further review under the Creeks Ordinance. (12:0:3:0.) in recognition of property owners' need to repair and maintain structures in which they have already invested even if the structures do not adhere to the new requirements under a revised ordinance. This is consistent with the approach the City takes in other regulatory contexts.

#### b. Roofed structures

The CTF addressed the issue of repair or rebuilding of damaged or destroyed roofed structures located within 30 feet of a centerline of an open creek by the following recommendations:

- Existing legally non-conforming structures may be repaired, renovated, and maintained subject to all other Zoning regulations, including the requirement for a Use Permit if more than 50% of the structure (dwelling unit) is replaced. (11:3:1:0)
- Rebuilding of structures within the 30-foot setback area should be encouraged through land use concessions to be moved farther away from the creek centerline.
- Mitigations should be considered for rebuilding within the 30-foot threshold area.

The existing Creeks Ordinance (BMC 17.08.055) states that structures adjacent to creeks can be replaced or reconstructed if damage was caused by events such as an earthquake, fire, or flood or similar occurrence as long as the rebuilt structure or portion thereof meets the requirements of 17.08.055. However, this regulation does not supersede the Zoning Ordinance requirement for a Use Permit to replace nonconforming buildings (BMC 23C.04.090) or dwelling units (BMC 23C.08.010 and individual Zoning District requirements in Chapters 23D and 23E),

There has been much discussion by some CTF members and the public regarding the ability of property owners to rebuild homes by right **under the Zoning Ordinance** after a no-fault demolition, without having to secure a Use Permit, as is generally required by

the Zoning Ordinance<sup>7</sup>. Review of the Zoning Ordinance was not part of the CTF's charge under the City Council resolution. The majority of CTF members believed that this issue is outside its scope of work and inappropriate for it to make recommendations on, since this requirement is a zoning regulation that applies to all dwelling units in the City, not just those along creeks. The CTF did not support including a provision in the Creeks Ordinance to exempt creeks properties from this citywide requirement.

While discussing the Creeks Ordinance recommendations on May 10, 2006 the **Planning Commission** indicated support for moving ahead with ordinance revisions to ensure that rebuilding would be allowed as a matter of right. On May 23, 2006, the City Council referred the issue of the necessary Zoning Ordinance approval to rebuild a single-family home destroyed after a disaster to the Planning Commission.

#### D. Environmental Analysis

Many of the CTF recommendations are premised on an environmental analysis to ensure that proposed development does not create an adverse impact on an open creek. The CTF anticipated that for the type of projects listed below, a professional, such as a landscape architect, hydrologist, biologist, or environmental engineer, would prepare a report that would provide documentation that the project would not create any adverse impacts on the creek. If the project did not meet this requirement, it would not be approved.

1. Vertical expansion of existing roofed structures within 30 feet of an open creek centerline (Ministerial)
2. Expansion of existing roofed structures 25 – 30 feet from an open creek centerline (AUP)
3. Construction of new decks within 10 - 30 feet of an open creek centerline (Ministerial)
4. After loss, replacement of existing decks within 10 - 30 feet of an open creek centerline (Ministerial)
5. After loss, replacement of existing decks within 10 feet of an open creek centerline (AUP)

The CTF intent was for the City to develop guidelines or standards to be addressed in a technical report submitted with an application, such as whether the project would create

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<sup>7</sup> It is important to distinguish between the right to rebuild in an existing footprint with the right to rebuild at all. The Zoning Ordinance currently states that with a Use Permit, a nonconforming structure can be rebuilt to the same size, extent and configuration as previously existed. A Use Permit would also be required if one was not issued for the original construction. This is not a new zoning regulation; it has been a City requirement for many years and is a common zoning regulation in other cities.

Taking of property rarely becomes an issue because the variance findings are designed to protect against an inadvertent taking of property without just compensation. The Use Permit process gives the City the ability to regulate the size, location, and other details of a proposed house. Therefore, the issue is what the process should be for rebuilding, not whether rebuilding should or would be approved.

bank destabilization, increased erosion or runoff, or degradation of significant riparian habitat. The technical report would then provide information to staff to document that the project meets the requirement to not adversely affect a creek. The **staff** will be taking these CTF concerns into account when drafting the criteria for the permits to which the analysis applies.

Some of the **Planning Commission's concerns** about whether the analysis might be unduly burdensome or trigger CEQA review can be alleviated when developing the permit process and criteria. Thus **staff** does not see any need for additional direction from the Council at this time on this issue.

### E. Mitigations

The CTF recommendations state that mitigations should be considered when structures are proposed in the setback area adjacent to open creeks as follows:

- When expanding existing structures up to five feet within the setback area (AUP); and
- When replacing a structure destroyed more than 50% (Use Permit).

In these cases, the potential impact of the project and the need for mitigations would be analyzed under the discretionary review process. Planning Department staff (for an AUP) or the Zoning Adjustments Board (for a Use Permit) would decide whether mitigations would be required and what they would be on a case-by-case basis. The CTF did not suggest mitigations be applied by staff outside of the discretionary review process. The **Planning Commission** expressed concern about the potential scope of mitigations. Staff believes that these issues can be addressed on a case-by-case basis during discretionary review. Thus Council need not address this issue further.<sup>8</sup>

This report next describes the process by which the CTF arrived at its recommendations.

## II. The CTF Process

The CTF met continuously for 14 months learning from scientific experts, other jurisdictions, property owners and creek advocates. It held 36 meetings over the last year

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<sup>8</sup> The details for environmental analysis and potential mitigations were not developed by the CTF. However, the CTF requested staff to take certain documents under advisement for the administration and implementation of its recommendations. The Task Force has requested that staff refer to a document (Attachment 4) from an individual member of the Creeks Task Force in the development of requirements for an environmental analysis. Similarly, the CTF has recognized two additional documents (Attachment 5 and Attachment 6) submitted by individual members and requested staff to take them under advisement in the development of potential mitigations for rebuilding homes near open creeks. 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 as local standards are developed.

alone, one jointly with the Planning Commission. The background materials for these meetings were posted along with CTF's agendas to enhance public input. Over 200 members of the public attended each meeting with 60 and 49 speakers at the hearings, respectively. The Task Force finalized its recommendations addressing the regulations of creeks on April 17, 2006 (Attachment 1, which includes a table comparing the CTF recommendations to the existing Creeks Ordinance.) Additionally, the CTF adopted two reports:

- "Creeks Task Force Background Paper" (Attachment 2) which provides history about the Creeks Ordinance, examples of creek regulations in other communities, information about the competing policy values weighed by the CTF, and a list of the creeks located in Berkeley, including the length of open creeks and culverted creeks both on public and private property; and
- "Berkeley Creeks Task Force Rationale for Recommendations" (Attachment 3), which provides excerpts from presentations made by expert panelists to the CTF and important information on the scientific basis for the recommendations.

Before it began its full scale evaluation of the policy issues, the CTF reviewed research which had been undertaken by the City's retained consultant. It is described next.

### **III. Preliminary Research Re Existing Creek Conditions in Berkeley - Consultant Findings**

Balance Hydrologics' field sampling program was the most significant work task requested by the CTF. The Task Force did not begin to develop recommendations until the consultants completed the field sampling, the purpose of which was to provide more information about existing conditions of creekside properties throughout the City. The key findings of this work are detailed below. The March 14, 2006 letter report from Balance Hydrologics (Attachment 8) provides more information on the field assessments and the consultants' conclusions.

#### *A. Open Creek Rapid Assessment*

To identify what properties to sample, the City notified 1,191 creek-side property owners requesting access to their property for the consultants to perform a rapid assessment of the conditions at the site. Of the 450 property owners who responded, 371 granted access to their property, although only 320 of the responses were for properties along open channel reaches. Due to timing and funding constraints, Balance Hydrologics performed rapid assessments at 78 parcels located on open creeks. The sampled sites were located in each of the City's watersheds from the flatlands and up into the hills.

1. Of the sampled parcels, 66% do not conform with the existing 30-foot setback requirement. In other words, there was a "primary roofed structure" located less than 30 feet from the creek centerline on more than half of the parcels sampled. The consultant team estimates at least 50% of non-sampled parcels that occur

opposite the channel from the sampled parcels would also not conform to the current creek setback requirements.

2. Patios, Decks and Impervious Surfaces (which are not regulated under the current Ordinance, but are recommended for new regulations by the CTF):
  - 84% of catalogued patios are less than 30 feet from the creek centerline (n = 31)
  - 76% of catalogued decks less than 30 feet from the creek centerline (n = 37)
  - 96% of catalogued impervious surfaces less than 30 feet from the creek centerline (n = 25)
3. Of the sampled sites 64% had rip rap (or other bank hardening material) composing the banks (49 out of 76)
4. Of the sampled sites 35% of streamside and “culvertside” residents have between 40%-100% of their total lot areas covered by a setback buffer of 30 feet.

CTF and the consultant recognized that this was not a statistically valid sample; however, the field visits provided the consultant with valuable information that informed their conclusions and the CTF recommendations. In particular, while scientific studies suggest that more than 30 feet is advisable for a creek setback, a larger setback would not be feasible in Berkeley given the existing development pattern. Furthermore, the consultant did not find substantial variation in existing parcel or setback conditions among creeks or portions of creeks and, therefore, they did not recommend varied standards for different creeks or portions of creeks.

#### *B. Creek Culvert Mapping Results*

Creek culverts were analyzed by reviewing the City’s maps and aerial photographs. For primary roofed structures:

- 466 primary roofed structures were counted to occur within 30 feet of culvert alignments in the City of Berkeley; and
- 134 were counted to occur on top of mapped culvert alignments.

Based upon its research and preliminary discussions the CTF agreed on certain principles to guide development of its policy recommendations.

### **IV. CTF Developed Preliminary Statements of Agreement**

The Task Force developed a set of 13 Statements of Agreement (Attachment 1), which were created to develop consensus as much as possible prior to discussion of the regulatory recommendations. In summary, the Statements of Agreement establish the CTF’s perspective that:

- Creek culverts should be regulated differently than open creeks;
- Any daylighting of creek culverts on private property should always be voluntary;

- Property owners should be able to repair, maintain and replace the structures they currently have regardless of proximity of the creek; and
- 30-feet is a generally accepted setback area where care and consideration should be given to protect the creek from the impacts of development.

Working from the original policy basis of the existing ordinance, the Statements of Agreement, and the broad goal, “to protect and restore natural creeks functions as achievable over time in an urban environment while recognizing the importance of property rights,” the Task Force developed numerous regulatory and non-regulatory recommendations, as previously described.

## **V. The Planning Commission Process and Recommendations**

In January 2006, the Planning Commission began reviewing the issues, scope of work, consultant findings and recommendations of the CTF. The Planning Commission took action on the CTF recommendations on May 10, 2006; their comments and recommendations are attached in a separate report and are also referenced herein.

In brief, the Planning Commission’s key concerns with the CTF recommendations are:

- In one or more places where the Creeks Task Force would require a Variance, the Planning 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.

The CTF recommendations reflect their position that it is vitally important to minimize development within the 30-foot setback. Their recommendations provide more flexibility than the existing ordinance by allowing a five-foot encroachment into the 30-foot setback for additions to existing structures and by allowing existing structures to be expanded vertically.

Staff believes that most of the Planning Commission concerns can be addressed when ordinance language is drafted; however, staff needs direction from the City Council on the issue of whether a Variance (as recommended by the CTF) or a Use Permit (as suggested by the Planning Commission) should be required for the following situations:

- On a vacant or developed lot, development of a new building within 30 feet of an open creek centerline
- On a developed lot, expansion of an existing building within 25 feet of an open creek centerline
- New impervious surface within 30 feet of an open creek centerline (new or replacement)
- Development of new decks within 10 feet of an open creek centerline
- Development of bridges not designed for a 100-year storm event

The Planning Commission also requested that the following issue be addressed when the Creeks Ordinance is revised:

Include language that recognizes that the Department of Public Works requires flexibility when reviewing proposed walls, drains, bulkheads, riprap, etc. in order to protect private property as well as stream quality.

This recommendation could be addressed with an amendment to BMC Section 17.08.060, which prohibits culverting and riprapping. The City Engineer agrees that flexibility is needed. This was not discussed by the CTF. Revised language will be provided for CTF review in June and will be returned to the City Council with the other Creeks Ordinance amendments.

## **VI. CTF Non-Regulatory Recommendations**

The CTF also made non-regulatory recommendations, as summarized below. The specific language of the recommendations is included in Attachment 1.

- Fund a Watershed Coordinator position to provide general assistance and apply for grants for creek restoration and watershed management issues
- Develop a watershed management and action plan to adequately address watershed issues.
- Develop a Best Management Practices guide and incentives package to assist property owners and the City with creek-friendly development and activities, and to help restore the health of Berkeley's watersheds.
- The City should develop a program to understand where underground creek culverts have negative impacts upstream and downstream.
- Develop a process to encourage daylighting on private property including a set of minimum criteria and incentives.
- Notify all affected property owners of the approved changes to the Creeks Ordinance, as well as advanced notice of proposed changes.

The City Council resolution and the approved CTF work plan call for additional tasks to be completed. Staff will provide a separate report to the Council in the future on the status of these tasks and, at the same time, will provide options for the Council regarding when the CTF should be disbanded.

## **VII. Minority Report**

At the March 22<sup>nd</sup> Joint Public Hearing with the Planning Commission, five members of the CTF presented a "Minority Report" (Attachment 7). The report details several recommendations which are contrary to those recommendations of the majority including:

- Expansions of existing buildings into the 30-foot setback should be determined on a case-by-case basis (thus no standard setback), until such time as the City staff

can develop flexible standards which consider the varying depth and water flow of creeks in Berkeley, the sizes and layouts of lots adjoining the creeks, or the proximity, character and bulk of the proposed expansions.

- Property owners should be allowed to rebuild and repair a structure, without further zoning review. The Zoning Ordinance should be amended to remove the provision to require a Use Permit to rebuild a dwelling unit after demolition for all existing buildings if it is to the same height, bulk, and footprint as the original structure.
- Creek culvert regulations should be removed from the Creeks Ordinance.
- When either the location or the repair of a creek culvert or storm drain on private property is required the expense of locating the culvert and of carrying out the repair should be borne by the City.

#### RATIONALE FOR RECOMMENDATION

The CTF has responded to the Council's direction in developing recommendations for revisions to the Creeks Ordinance as well as other creek and watershed issues. A thorough review of the rationale behind the different recommendations is outlined in a report titled, "Rationale for Berkeley Creeks Task Force Recommendations," adopted on April 17<sup>th</sup> (Attachment 3).

#### ALTERNATIVE ACTIONS CONSIDERED

The Creeks Task Force considered a variety of options for regulation of development adjacent to open creeks, including a "case-by-case" approach and a "zonal" approach where standards would vary depending on the creek or the section of creek. The Task Force rejected these alternatives due to infeasibility and uncertainty of implementation.

In brief, staff identified the following concerns with the "case-by-case" approach: less certainty for property owners than is provided with a numerical setback; cost to property owners since each application would require analysis including reports on hydrology, geomorphology, engineering and others, all borne by the property owner; impact on staff and/or ZAB to address the volume of applications; and the potential for inconsistency in implementation of creek protection.

The "zonal" approach, with zones defined by differences in the geomorphic features of the area or creek (or based on other criteria), would be expensive to develop because a vast amount of additional data on Berkeley's creeks would be needed. Such an approach may not result in better protection of the creeks than other approaches that utilize a standard setback. The City's consultant, Balance Hydrologics, reported that there are so many variations in creek conditions that a zonal approach did not appear feasible.

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Attachments:

- 1: Recommendations from the CTF (April 17, 2006), including Table 1
- 2: Creeks Task Force Background Paper
- 3: Berkeley Creeks Task Force Rationale for Recommendations
- 4: Basic Elements of a "Creeks Environmental Analysis"
- 5: Mitigation, comments by CTF Member Phil Price
- 6: Mitigation, comments by CTF Member Josh Bradt
- 7: Minority Report of the Creeks Task Force, March 20, 2006.
- 8: Summary and Data Conclusions from Balance Hydrologics, March 14, 2006.
- 9: Proposed Schedule
- 10: Administrative Policy for Defining "Creek"
- 11: Public Hearing Notice
- 12: Existing Creeks Ordinance
- 13: Public Works Commission comments on the CTF Recommendations