



Planning Commission

ACTION CALENDAR

May 30, 2006

To: Honorable Mayor and
Members of the City Council

From: Planning Commission

Submitted by: Helen Burke, Commission Chair, Planning Commission

Subject: Recommendation for Creeks Ordinance Revisions

RECOMMENDATION

That if the City Council accepts the Task Force recommendations, the revised ordinance reflect the Planning Commission concerns listed in this report.

FISCAL IMPACTS

Same as indicated in report from City Manager.

CURRENT SITUATION AND ITS EFFECTS

On May 10, 2006, the Planning Commission passed the following motions:

The Planning Commission commends the work and supports the recommendations of the Creeks Task Force although not all commissioners agree with all Creeks Task Force recommendations. The Planning Commission requests that if the City Council accepts the Task Force recommendations and the City Manager is requested to prepare specific revisions to the Creeks Ordinance, that the revised ordinance reflect the following:

1. The term "creek" be more carefully defined.
2. Findings required to obtain use permits for changes and additions to existing structures be clearly defined and less onerous.
3. Consider reducing the circumstances where environmental evaluations are required and their scope. The Planning Commission has concern about the scope of the mitigations.
4. In one or more places where a variance would be required by the Creeks Task Force, a Use Permit may be more appropriate.
5. Final language describing required environmental assessments avoid triggering required CEQA compliance.
6. 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.
7. Levels of environmental assessment that would place unreasonable burden on applicants requesting permits for minor additions to buildings and decks be identified and avoided.
8. Rebuilding as a matter of right, as long as the original footprint, elevation, location, and

envelope are honored.

(Pollack/Wengraf) Ayes: Samuels, Gurley, Wengraf, Stoloff, Pollack, DeStaebler. Noes: Sheen, Poschman. Abstain: Burke. Absent: None.

M/S/C to attach to the Planning Commission's recommendation the Neighbors on Urban Creeks position and the comments from individual Planning Commissioners as documents of interest. (Poschman/Samuels). Ayes: Samuels, Gurley, Wengraf, Stoloff, Pollack, DeStaebler, Sheen, Poschman, Burke. Noes: None. Abstain: None. Absent: None.

BACKGROUND

The Planning Commission received six reports on the work of the Creeks Task Force and discussed issues with revisions to the Creeks Ordinance on the following dates: April 13, 2005, January 11, January 25, February 8, April 8, and April 26, 2006. The Commission also participated in a joint public hearing with the Creeks Task Force on March 22, 2006.

CITY MANAGER

The Planning Commission comments are also reflected in the attached report from the City Manager.

CONTACT PERSON

Wendy Cosin, Deputy Planning Director, Planning and Development Department, 981-7402

Attachments:

- 1: Individual comments from Planning Commissioners on the CTF recommendations (cover memo dated May 10, 2006)
- 2: Memo from Neighbors on Urban Creeks to Planning Commission, dated May 10, 2006



Attachment 1

City Council
May 30, 2006

Planning and Development Department

Land Use Planning Division

Memorandum

To: Planning Commission
From: Carli Paine, Associate Planner
Date: May 10, 2006
Subject: Creeks Task Force Recommendations; Commissioner-submitted items for discussion

Please find attached the lists of issues and considerations submitted by Planning Commissioners to the Planning Commission Secretary for discussion.

From Harry Pollack

Resolution:

The Planning Commission resolves as follows:

- The Planning Commission thanks the CTF and the many citizens and the consultants who participated in the process. The Planning Commission recommends that the City Council carefully consider the CTF recommendations, with the understanding that the Planning Commission does not necessarily agree with each of the specific elements of the CTF recommendations.
- When the CTF recommendations use the word “creek”, it should in each case specify whether the intent is to refer to “open creeks”, “culverted creeks”, or both.
- Regarding Attachments 5 (Environmental Analysis) and 7 (Proposed Mitigations),
 - a. These are the opinion and suggestion of one member of the CTF and should not be afforded significant consideration; and
 - b. These are not to be considered as the CTF or Planning Commission recommendations as the basis of required findings for use permits or variances.
- Background to this item: When the CTF recommends that a Use Permit is required for a certain action, it does not always indicate the scope of the findings required to grant the use permit, and, e.g. whether the use permit should be relatively difficult or relatively easy to obtain. See, for example, items 9a, 9b and 10b on page 4 of the CTF recommendations. In other situations, the CTF does recommend specific findings. See, for example, #6 on page 3 of the CTF Recommendations includes the findings for an expansion of up to 5 feet into the 30-foot threshold area. As drafted, the findings set a very high standard and make such an expansion very difficult to obtain. Finally, the CTF recommends that a variance rather than a Use Permit should be required in certain circumstances. Is a variance appropriate in each situation recommended by the CTF? The Planning Commission should make a recommendation to Council regarding these matters. Potential recommendations include:
 - The Planning Commission recommends that the Council provide guidance on the complexity of findings required for each item requiring a Use Permit (such as ability to increase encroachment into the setback by 5 feet, etc.).
 - The Planning Commission recommends that the Council review each instance where a variance is proposed and provide guidance on whether a variance or a Use Permit should be required.
 - Alternatively, the Planning Commission could make these recommendations to the Council. For example, does the Planning Commission want a five foot expansion into the 30 foot setback to be difficult, easy or something in between? If we are not yet certain, we could recommend that the Council consider whether the CTF proposed findings should be accepted as-is or considered further (with staff assistance) by the Planning Commission and CTF if it remains active.

- My opinion is that the above matters need further thought and work and that the Planning Commission should so advise the Council.

- It is the intention of the CTF and the Planning Commission that CEQA is not intended to be invoked by the proposed "Environmental Analysis". The revised ordinance should be drafted to ensure that applications for permits under the revised ordinance need not comply with CEQA.
- Section 17.08.060, Construction of walls, drains, bulkheads, etc., should be revised to allow greater flexibility (and easier findings to allow) construction of hard elements where open creeks and creek culverts meet.
- The Council should consider the issue of allowing existing structures (including both those near creeks and those not near creeks) damaged or destroyed to be rebuilt without a Use Permit.
- The Council **should/should not** begin the process of developing a watershed management plan. [Although such a plan is certainly needed, we should consider this recommendation in light of other planning priorities.]
- The Council should consider whether to allow overhangs of up to five feet into the 30-foot setback with some type of Use Permit.
- The Council should consider further the standard for bridges (CTF Recommendation #11) and consider whether exceptions should be allowed by variance or some type of Use Permit.

TO: Carli Paine, Secretary to the Planning Commission
FROM: Jordan DeStaebler, Associate Planner
RE: Draft Recommendations for Revision to the Creeks
Ordinance **My revisions are in red Helvetica font within parentheses.

1. Creeks are a community asset that should be protected and enhanced.
2. Creeks are part of an interconnected and integrated water management system and a holistic analysis is needed.
3. Culverted creeks should be regulated differently than open creeks. (However, it is acknowledged that they are often connected to and impact creeks.)
4. Culverts of all types should be removed from the Creek Ordinance. (4.5 The creek/culvert interface is often an area of special concern.)
5. No new culverts should be built.
6. Creek culverts should be treated as storm drains for the purposes of safety, access and maintenance.
7. Daylighting of culverted creeks on private property should be entirely voluntary.
8. (Substantial) Incentives for daylighting creek culverts and restoration of open creek channels should be established.
9. Daylighting of creeks on public property is a priority. The City should identify its own properties that have potential for daylighting. Land that is privately held, by either a private party or a non-publicly owned institution should not be part of the identification program.
10. Financial costs associated with creek restoration, repair and maintenance of creek culverts, repair and maintenance of storm drains and overall watershed management and other watershed related issues will require outside funding sources. Acquisition of outside funds should be a priority for the City. (I very much agree with #10.)
11. Property owners identified as being within 30 feet of the midline of a creek should have the right to rebuild after damage

- or loss, by right, with a Zoning Certificate, as long as the new structure is within the footprint and height and bulk of the original structure. Any changes to the original envelope would require an Administrative Use Permit or Use Permit depending on the extent of the changes. (11.5 If opportunity exists, property owners will be encouraged to rebuild on a voluntary basis on a smaller footprint and/or further from the creek with no reduction in square footage. As further incentive, the City will provide such property owners with an expedited Administrative Use Permit process.)
12. Any repairs to existing structures within the 30 ft. setback of an open creek , should be subject to standards set by the Building Department, as long as no square footage is being added .
 13. On vacant lots, structures should not be allowed to be developed within 30 feet from the centerline of an open creek.
 14. Unroofed structures, including decks should be allowed within 10 feet of an open creek.
 15. Best Management Practices guidelines should be followed when selecting paving (and deck) materials used close to creeks.
 16. If a bridge is needed for egress from a residence, rebuilding it by right is allowed subject to Building Code regulations.
 17. The new construction of fences, play structures and other similar structures should follow Best Management Practices guidelines for construction.
 18. Legally non-conforming structures, such as decks, bridges, and paving may be repaired and maintained without further review under the Creeks Ordinance.
 19. (A database of property owners abutting creeks and major culverts should be established so that the City is able to foster and maintain positive lines of communication with property owners in the areas of education and creek stewardship. Special effort should be made by the City to highlight the opportunities (funding, grants, Best Management Practices, plants, classes, etc.) available to homeowners to improve their property while also enhancing the watershed environment.)

From Jim Samuels

Carli,

Thanks for the reminder. These are some comments/thoughts on the CTF Recommendations:

1. Setbacks: Although there is general agreement on the 30' setback, it should be noted that some cities that were studied define setbacks on a case by case basis taking into account depth and width of channel, steepness and composition of banks, etc. Although this method obviously puts a bigger burden on staff, it would seem to have considerable merit.
2. Culverts: Many large downtown Berkeley multistory buildings (eg. all three YMCA buildings dating back to 1910) are built on top of creek culverts; this is foremost an engineering question best left to Public Works. None of the nine communities studied include culverts in their creek ordinances. Further, as daylighting of existing creek culverts on private property is to be strictly voluntary, the purpose and value of identifying "opportunity sites" for daylighting culverts on private property would be questionable.
3. Vacant lots with creeks: One could view that requiring a variance to the Creek Ordinance in order to build on these lots effectively takes away an owner's ability to use his land. Consideration might be given to reducing the requirements for building on these lots to a use permit level.
4. Rebuilding after a 50% loss: A Use Permit is required in these cases. To satisfy the requirements of a Use Permit, an owner will be faced with zoning restrictions (yard setbacks, etc.) as well as Creek Ordinance restrictions (30' to creek centerline, etc.). The Use Permit process for rebuilding homes in these cases may prove to be a formidable task.
5. Rebuilding decks in the setback zone: Although not formerly in the Creek Ordinance, new proposed requirements for rebuilding existing decks from zero to 10' from the centerline of a creek include obtaining an Administrative Use Permit and providing an Environmental Analysis of potential impacts. As defined in Attachment 5 to the CTF Recommendations, such an analysis would place a considerable financial burden on a homeowner to hire the environmental consultants required to provide this.
6. Vertical Expansions of existing nonconforming structures and expansions 5' into the 30' setback: New proposed requirements include an AUP for the latter and an Environmental Analysis for both. Further, Mitigations are to be considered for these constructions. As defined in Attachment 7 to the CTF Recommendations, Mitigations would impose a considerable financial burden on a homeowner.

From Gene Poschman

Suggested list for the Planning Commission to comment on in its report to the City Council on the Creeks Task Force Report

I: Rebuilding after disaster

Rebuilding after disaster ought to be by-right and not subject to the ZAB use permit process if there is evidence based on plans, photos, and other confirming evidence of the configuration of the previously existing structure, including footprint, heights and the envelope, that the proposed structure is the same. This does not apply to the interior of the structure. Updates in building code aspects would be required.

The present wording of the CTF report would require the project to go before ZAB for a use permit or for use permits and while Statement 11 states that “rebuilding after any loss is permissible to the same configuration and footprint as the original structure” this is not-by-right rebuilding but clearly subject (under No. 7 “Regulating Existing Roofed Structures along Open Creeks”) to “all other Zoning regulations, including the requirement for a Use permit if more than 50% of the structure (dwelling unit) is replaced.” Use permits can take months to make it on to the ZAB agenda. Use permits are subject to appeal to the Council. Further there is the very unclear stipulation in 7.b. That Mitigations should be considered for rebuilding within the 30-foot structure.” What kinds of mitigations? Considered by whom? Clearly, the point is that this issue is either unclear or should be changed.

II. The definition of “open creek”

The centerpiece of any creek ordinance ought to be a fully satisfactory definition of open creek. The definition of “open creek” given on page 2 of the “Final Recommendations” is inadequate and ambiguous.

- 1—“permanent or natural” The permanent must be “unnatural.” What is meant by a permanent unnatural source?
- 2—“either intermittently or continuously” How intermittently? For a week? A month?
- 3—“continuous swale or depression” Swale is defined in the June 29, 2005 document signed by Cardinaux and Marks as “sloping 10 percent and running continuously for more than 328 feet” but depression is not defined. It should either be defined or have stated that it means the same things as swale.
- 4—“a channel” In the first sentence it is a “defined channel” but here it is simply a channel”
- 5—“swale” Above it was a continuous swale—here is only “swale.” Is there a difference?
- 6—“A depression that carries water only during or immediately following rainfall is not a creek.” Again how does a depression differ from a swale or a continuous depression. What is meant by “immediately”? Is this the meaning of “intermittently in sentence one?”
- 7—“The City of Berkeley may maintain maps”

There are two rather different approaches to defining “open creeks”, one is by definition, and the other is by maps. They are not mutually exclusive but obviously the key issue is how is the Berkeley property owner to definitively know the situation of his property? If not on the

map, there is still the very real possibility of the property being defined as on a creek by someone by definition. By whom? And with what review?

III.-- “Creek Culverts”

The location of the “creek culvert” ordinance section whether in the “Creek Ordinance” or separately may be symbolic but there are many homes affected by culverts and the meaning of being on or close to a culvert and the policy of simply handing all the issues whatever they may be to the Department of Public Works is hardly reassuring without careful review of the issues.

Further, on setbacks from culverts, the parenthetical note that “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” should simply be removed. It has been described to the Planning Commission as only a “rule of thumb” which seems not to be followed.

IV-- The Adminstrating of the Ordinance

The administration of the Creeks/Culvert ordinance is probably the most important aspect of the successful functioning of Creeks/Culvert policy in Berkeley. The City’s notification of affected property owners of approved changes and proposed further changes is an important step. Other than this aspect, the Report of the CTF really does not deal with major concerns of the citizens such as having, for any reason, an inspection to verify placement or removal on the affected list, fees for such an inspection, if any and several other aspects. The inter-departmental joint agreement between Public Works and Planning of June 29, 2005 seems to cover only one issue, how to treat an application for new construction and its relationship to a “creek identification fee.”

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.*