




Office of the City Manager

ACTION CALENDAR

November 14, 2006

To: Honorable Mayor and
Members of the City Council

From:  Phil Kamlarz, City Manager

Submitted by: Dan Marks, AICP, Director, Planning and Development

Subject: Amendments To The Zoning Ordinance

RECOMMENDATION

Conduct a public hearing and, upon conclusion adopt first reading of an ordinance adding Berkeley Municipal Code (BMC) Section 23C.04.100 regarding rebuilding after disaster, with the language of Section 23C.04.100A(1) as recommended by staff, and amending BMC Section 23B.44.010 regarding modifications to zoning regulations by Use Permit to comply with the Creeks Ordinance.

SUMMARY

This Council item differs from the proposed amendment to the Creeks Ordinance as follows. This proposed Zoning Ordinance amendment changes the language of the Variance section of the Zoning Ordinance to allow issuance of a Use Permit for construction within yard setbacks (as well as modification of other zoning standards) for the purpose of avoiding construction within the creek setback. The other Council item – the proposed Creeks Ordinance amendment - provides two options to allow construction within the creek setback – a Use Permit or a Variance. The two amendments are mutually exclusive.

1. Rebuilding As A Matter of Right Under the Zoning Ordinance After Disaster and Similar Occurrences [Creeks Ordinance already so provides]

After its May 30, 2006 public hearing on proposed amendments to the Creeks Ordinance, the Council requested that the staff bring back amendments to the Zoning Ordinance to allow rebuilding as a matter of right when an existing home has been destroyed after a disaster or similar occurrence. The Creeks Ordinance already provides that the creek setback restrictions do not apply in the case of such a disaster or similar occurrence. The proposed addition of BMC Section 23C.04.100, Rebuilding After Involuntary Destruction of Structures or Portion Thereof, would allow structures with up to four residential units that are destroyed by any involuntary cause including fire, earthquake or flood to be rebuilt subject to the issuance of an over-the-counter Zoning Certificate, which is not subject to a public hearing.

2. Greater Zoning Flexibility To Accommodate Creek Ordinance Restriction

As an unrelated matter, because property owners with creeks on or in close proximity to their property have more restricted development options, the staff also recommended and the Planning Commission agreed that such property owners be allowed to obtain a Use Permit to vary Zoning Ordinance requirements that would otherwise require a Variance. This report thus recommends an amendment to Section 23B.44.010, Variances, to allow a Use Permit, rather than a Variance, to be approved by the Zoning Adjustments Board to modify setbacks or other standard zoning requirements (excluding building height) on property located within 30 feet of an open creek when necessary to enable the property owner to comply with the open creek setback requirements of the Creeks Ordinance.

The Planning Commission recommended approval of these amendments. As is described further below and in the attached report from the Commission, staff and the Commission do not agree about the specific wording for BMC Section 23C.04.100.A(1), one of the findings needed for rebuilding “by-right” following a disaster. This is discussed in more detail below and in the Commission report.

The proposed changes to the Creeks Ordinance are the subject of a separate report on this agenda and are also subject to this public hearing.

FISCAL IMPACTS OF RECOMMENDATION

None

CURRENT SITUATION AND ITS EFFECTS

1. The provisions of the current Zoning Ordinance

During community meetings regarding amendment of the Creeks Ordinance, there was much discussion 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. The Creeks Ordinance already has a section that allows such rebuilding in disasters and similar occurrence notwithstanding the restrictions and setback requirements of the Creeks Ordinance.

The Zoning Ordinance distinguishes between the right to rebuild in an existing footprint with the right to rebuild at all. The Zoning Ordinance currently states a nonconforming structure damaged or destroyed to the extent of more than 50% of its appraised value is fully subject to the current zoning regulations. However, such a nonconforming structure can be rebuilt to the same size, extent and configuration as previously existed with a Use Permit.

The Creeks Ordinance (BMC 17.08.055) was amended in 2004 to allow structures adjacent to creeks to be replaced or reconstructed if damage was caused by events such as

an earthquake, fire, or flood or similar occurrence notwithstanding the setback and other restrictions of the Creeks Ordinance. However, the Creeks Ordinance does not address any otherwise applicable Zoning Ordinance requirements and requires a Use Permit for reconstruction of a nonconforming structure.

2. Council Action – May 23 and May 30, 2006

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.

From: Mayor Bates, Councilmember Olds, Wozniak and Capitelli

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

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

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

On May 30, 2006 the City Council passed the following motion (language related to rebuilding is highlighted):

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

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

The City Council action did not clearly indicate whether the Council’s intent was to allow rebuilding “by-right” of only single-family dwellings or whether to include multiple-family dwellings. The issue originally arose due to the inconsistency between the Creeks Ordinance provision allowing reconstruction of single-family dwellings after a disaster and the Zoning Ordinance’s silence on this issue.

3. Recommended Amendments to the Zoning Ordinance

a. Replacement of Structures

Since the issue of rebuilding after a disaster is not a problem triggered by the presence of a creek and its regulation, the proposed new provision to the Zoning Ordinance applies to all properties. The proposed Section 23C.04.100, *Rebuilding After Involuntary Destruction of Structures or Portion Thereof*, includes the following key elements:

- A destroyed structure can be replaced with administrative approval of a Zoning Certificate.
- This provision only applies to structures that are exclusively residential and that do not include more than four units.
- The replacement structure must substantially similar including: use, dimensions, floor area, square footage, envelope, lot coverage, footprint, number of units, and window and exterior door size and location.

Staff originally recommended that the “by right” rebuilding provision only apply to residential uses of up to three units. The Planning Commission recommended, and staff concurs, that the regulations should apply to residential projects with up to four units. By benefiting both homeowners and people who own small projects, more housing units could be easily replaced while also providing the City with flexibility to require Use Permits for larger projects that would have greater impacts on surrounding neighborhoods. If additional expedited approaches to rebuilding are needed in any given disaster the Council can adopt regulations as it did in response to the 1991 fire.

Whether a proposed replacement structure qualifies for a Zoning Certificate, because it is substantially similar with respect to use, dimensions, floor area, square footage, envelope, lot coverage, footprint, number of units, and window and exterior door size and location, will be subject to an administrative procedure. It will likely require property owners to provide documentation of existing conditions in advance of a disaster or destruction. If, following a disaster, such documentation has not been established, the City would

research records to determine baseline project conditions and the determination of Zoning Officer would be final. If a project were determined not to be “substantially similar”, the applicant would follow the standard requirements of the Zoning Ordinance and, if applicable, the Creeks Ordinance to obtain a Use Permit.

b. Zoning Flexibility For Properties With Creeks

Several sections of the proposed amendments to the Creeks Ordinance require findings that alternatives to building within the creek setback area have been considered. For this to be effective, to provide flexibility, and in recognition that creek side property owners may have development rights limited by the existing setback regulations of the Creeks Ordinance, a revision to the BMC Section 23B.44.010, Variances, is proposed. The revised ordinance would allow a Use Permit, rather than a Variance, to be approved to modify setbacks or other standard zoning requirements on property located within 30 feet of an open creek when such a modification is needed for a property owner to comply with the Creeks Ordinance.

Section 23B.44.010 Variances

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

Concerns were expressed at the Planning Commission October 11th public hearing that the option for a Use Permit to be approved rather than a Variance would open the door to projects that would adversely affect neighboring properties. However, a Use Permit would continue to provide a public hearing process and the standard Use Permit non-detriment finding¹ would ensure the proposed project would not adversely affect other properties.

¹ The Board may approve an application for a Use Permit, either as submitted or as modified, only upon finding that the establishment, maintenance or operation of the use, or the construction of a building, structure or addition thereto, under the circumstances of the particular case existing at the time at which the application is granted, will not be detrimental to the health, safety, peace, morals, comfort or general welfare of persons residing or working in the area or neighborhood of such proposed use or be detrimental

4. Planning Commission Action

As required by BMC Section 23A.20.030, the Planning Commission held a public hearing on the proposed Zoning Ordinance amendments on October 11, 2006. On October 25, 2006, the Commission passed the following motion on a 9 - 0 vote.

M/S/C to recommend the Council adopt the staff proposed Zoning Ordinance amendments as modified by tonight's actions (Stoloff / Ferrazares). Ayes: Burke, Ferrazares, Gurley, Perry, Poschman, St. John, Stoloff, Tregub, Wengraf. Noes: None. Abstain: None. Absent: None.

A separate report is provided with the details of the Planning Commission action. The one area of disagreement between staff and the Commission is addressed below.

The Commission expressed concerns with the use of the word "involuntary" in both the Zoning Ordinance and in the Creeks Ordinance, which had been approved by the Creeks Task Force. The Planning Commission was concerned that if a fire was caused by the negligent act of a homeowner, for example, falling asleep smoking a cigarette, the cause of the fire would be considered "voluntary" and not entitle the homeowner to rebuild as a matter of right. The staff assured them that the ordinance is not intended to disallow rebuilding in such cases. Nonetheless, the Planning Commission passed the following motion by a 7 – 1 – 1 (abstain) vote.

M/S/C to strike "involuntary" and add "but not limited to" after "including" and add "except the intentional act or omission of the property owner" after "flood" to 23C.04.100.A(1) and make the same changes to the language in BMC 17.08.055, line 27 page 10 (Attachment 2, Item 9 of October 11, 2006) (Perry /St. John). Ayes: Ferrazares, Gurley, Perry, St. John, Stoloff, Tregub, Wengraf. Noes: Burke. Abstain: Poschman. Absent: None.

The above motion would amend the wording of 23C.04.100.A(1) as shown in strike-out/underlining below.

A. Notwithstanding Sections 23C.04.030, 23C.04.050, and 23C.04.090, any structure that is devoted exclusively to residential use and contains up to four residential units and any structure which is accessory thereto, or any portion thereof, may be replaced or reconstructed, subject to the issuance of a Zoning Certificate, if the City finds that all of the following conditions exist:

or injurious to property and improvements of the adjacent properties, the surrounding area or neighborhood or to the general welfare of the City.

1. The structure, or any portion thereof, has been destroyed by any ~~involuntary~~ cause including but not limited to fire, earthquake or flood except the intentional act of omission of the property owner.

The City Attorney has advised that the Planning Commission's proposed amendment would exacerbate the problem identified by the Commission, not cure it because the intentional act of smoking could be said to have led to the fire. She advises that the Planning Commission's concern is better addressed by making it clear that accidental destruction caused by the negligent acts or omissions of the owner are included in the type of cause entitling the owner to rebuild as a matter of right. The following language responds to the issues that were raised by the Planning Commission and could be substituted in Section 23C.04.100.A(1), as well as in the corresponding section of the Creeks Ordinance, Section 17.08.055 A if requested by the Council.

1. The structure, or any portion thereof, has been destroyed by any involuntary accidental cause including fire, earthquake or flood, whether or not such accidental destruction resulted from the negligence of the owner.

5. Environmental Review

Staff concluded the proposed changes are exempt from the California Environmental Quality Act pursuant to Guidelines Section 15061(b)(3) because it can be seen with certainty that the proposed amendments would not have a significant effect on the environment. The proposed modification to the City's Zoning Ordinance will not in and of itself create development or create any adverse environmental impacts. Any proposed discretionary project would require its own review pursuant to CEQA. No new uses are proposed to be established or eliminated.

The proposed new section of the Zoning Ordinance allowing rebuilding of structures after disaster would not create any adverse environmental impacts because existing structures would be replaced within their previously existing footprint with no substantial changes. Furthermore, the ordinance requires replacement or repair to comply with applicable building codes and any other regulations adopted to address safety issues after a declared disaster.

The proposed changes to the Variance section of the Zoning Ordinance apply only to creek properties and simply allow a different type of permit (Use Permit) for requested encroachments into yards or other modification of the strict application of other zoning requirements for the purpose of achieving creek setbacks. Environmental review and findings of "non-detriment" would need to be made for individual projects as part of the Use Permit process.

BACKGROUND

Provided above

RATIONALE FOR RECOMMENDATION

Provided above

ALTERNATIVE ACTIONS CONSIDERED

Alternatives were considered when staff requested direction from the City Council in May 2006. The proposed ordinance implements the direction provided by the Council.

CONTACT PERSON

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

Attachments

1: Proposed Ordinance Changes (Sections 23B.44.010 and 23C.04.100)

1 ZONING ORDINANCE AMENDMENTS AS RECOMMENDED BY
2 THE CITY MANAGER

3 **Section 23B.44.010 Variances**

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

14 **23C.04.100 Rebuilding after Involuntary Destruction of Structure or**
15 **Portion Thereof (New Section)**

16 A. Notwithstanding Sections 23C.04.030, 23C.04.050, and 23C.04.090, any structure that
17 is devoted exclusively to residential use and contains up to four residential units and any
18 structure which is accessory thereto, or any portion thereof, may be replaced or
19 reconstructed, subject to the issuance of a Zoning Certificate, if the City finds that all of the
20 following conditions exist:

- 21 1. The structure, or any portion thereof, has been destroyed by any involuntary cause
22 including fire, earthquake or flood.
23 2. The replacement structure or portion thereof is substantially similar in use, dimensions,
24 floor area, square footage, envelope, lot coverage, footprint, and number of units to the
25 destroyed structure or portion thereof that it is designed to replace.
26 3. The replacement or repair complies with all currently applicable building codes and any
27 other regulations, adopted to protect against serious safety problems at the site such as
28 engineering conditions, soil stability and the like, for example an ordinance or
29 emergency regulation adopted by the Council or the Director of Emergency Services
30 after a declared disaster.
31 4. Where a structure to be replaced or rebuilt does not conform to subsection (2) above
32 and is to be expanded or changed, such structure shall be subject to all otherwise
33 applicable regulations governing such expansion or change.

34 B. The Planning Director shall establish a process that allows an owner of a qualifying
35 residential structure to apply for an advance determination that the proposed repair or
36 replacement of a structure is substantially similar as required by paragraph A(2) including the
37 information required to document existing conditions. The Planning Director shall also develop a
38 description for owners of qualifying residential structures of such building information required
39 by the City to document existing characteristics of the building in case of future damage or
40 destruction.

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ORDINANCE NO. -N.S.

AMENDING BERKELEY MUNICIPAL CODE (BMC) SECTION 23B.44.010 AND ADDING
BMC SECTION 23C.04.100

BE IT ORDAINED by the Council of the City of Berkeley as follows:

Section 1. That Berkeley Municipal Code 23B.44.010 is amended to read as follows:

Section 23B.44.010 Variances

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

Section 2. That Berkeley Municipal Code 23C.04.100 is added to read as follows:

23C.04.100 Rebuilding after Involuntary Destruction of Structure or Portion Thereof

- A. Notwithstanding Sections 23C.04.030, 23C.04.050, and 23C.04.090, any structure that is devoted exclusively to residential use and contains up to four residential units and any structure which is accessory thereto, or any portion thereof, may be replaced or reconstructed, subject to the issuance of a Zoning Certificate, if the City finds that all of the following conditions exist:
1. The structure, or any portion thereof, has been destroyed by any involuntary cause including fire, earthquake or flood.
 2. The replacement structure or portion thereof is substantially similar in use, dimensions, floor area, square footage, envelope, lot coverage, footprint, and number of units to the destroyed structure or portion thereof that it is designed to replace.
 3. The replacement or repair complies with all currently applicable building codes and any other regulations, adopted to protect against serious safety problems at the site such as engineering conditions, soil stability and the like, for example an ordinance or emergency regulation adopted by the Council or the Director of Emergency Services after a declared disaster.
 4. Where a structure to be replaced or rebuilt does not conform to subsection (2) above and is to be expanded or changed, such structure shall be subject to all otherwise applicable regulations governing such expansion or change.

- B. The Planning Director shall establish a process that allows an owner of a qualifying residential structure to apply for an advance determination that the proposed repair or replacement of a structure is substantially similar as required by paragraph A(2) including the information required to document existing conditions. The Planning Director shall also develop a description for owners of qualifying residential structures of such building information required by the City to document existing characteristics of the building in case of future damage or destruction.

Section 3. Copies of this Ordinance shall be posted for two days prior to adoption in the display case located near the walkway in front of Old City Hall, 2134 Martin Luther King Jr. Way. Within 15 days of adoption, copies of this Ordinance shall be filed at each branch of the Berkeley Public Library and the title shall be published in a newspaper of general circulation.