



Planning and Development Department Land Use Planning Division

Staff Report

To: Planning Commission
From: Wendy Cosin, AICP
Deputy Planning Director
Date: October 19, 2006
Subject: **ZA 6-06: Amendments to the Zoning Ordinance related to the Creeks Ordinance (BMC Title 23) and rebuilding after involuntary destruction of structure**

Recommendation

Staff recommends the Planning Commission take action to recommend approval to the City Council of the Zoning Ordinance amendments, ZA 6-06, amending Berkeley Municipal Code Section (BMC) 23B.44.010 and creating BMC Section 23C.04.100, as written or as amended by the Planning Commission.

Amendments that are not opposed by staff and are discussed below include:

1. Eliminate “height of buildings” as one of the regulations that can be modified by Use Permit, rather than Variance as drafted in BMC Section 23E.44.010.
2. In proposed BMC Section 23C.04.100
 - a. Increase the number of residential structures that can be rebuilt by-right from three to four.
 - b. Add the following language to Subsection A1:
“An involuntary action includes an accidental occurrence due to the negligence of the property owner.”

Background

The Planning Commission discussed the proposed Zoning Ordinance amendments related to changes to the Creeks Ordinance and rebuilding after involuntary destruction of a structure on September 27th and at the October 11th public hearing. In brief, the following amendments have been proposed to the Zoning Ordinance:

- Revise 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 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.

- Add a new Section 23C.04.100, Rebuilding After Involuntary Destruction of Structures or Portion Thereof, which allows structures with up to three residential units that are destroyed by any involuntary cause including fire, earthquake or flood to be rebuilt subject to the issuance of a Zoning Certificate.

On October 11, 2006, the Planning Commission voted unanimously to incorporate the following additional language in the Zoning Ordinance draft amendment Section 23C.04.100.B regarding “Rebuilding”:

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.

Discussion

The Planning Commission raised the following questions and issues during the October 11th meeting.

Section 23B.44.010, Variances

1. How many variances applications are submitted annually?

Response:

Approximately one per year.

2. Allowing a Use Permit rather than a Variance to modify building height, yard setbacks, lot coverage, or parking space requirements might result in adverse impacts on neighbors and would undermine the zoning regulations.

Response: This is a policy decision for the Planning Commission to make. The purpose of this amendment is to balance the restrictions imposed by the Creeks Ordinance to maintain a creek setback by providing options for a property owner to build up or out in a way that wouldn't otherwise be allowed without approval of a Variance. As has been previously discussed, a Use Permit application would include a public hearing and “non-detriment” findings would need to be made, thus protecting neighboring properties. If the Planning Commission's key concern is the potential to modify height limits with a Use Permit, “height of buildings” could be removed from the proposed ordinance language. Staff does not have any concerns about removing this language.

Staff supports the concept of allowing the Use Permit process, especially for yard setback modifications, as an incentive for property owners to meet the Creeks Ordinance setback standards. The proposed Creeks Ordinance includes language that encourages alternatives to building within 30 feet of an open creek to be considered, including encroachments into yard setbacks (17.08.050 B1 & D3 and 17.08.058 1). Thus, the proposed zoning amendment directly supports this language. However, if the Planning Commission does not support this idea, it can be deleted from the recommendation to the City Council.

Section 23C.04.100, Rebuilding After Involuntary Destruction of Structures or Portion Thereof

3. Why shouldn't all structures be allowed to rebuild "by-right"?

Response: The direction from City Council did not clearly indicate whether the zoning amendment should apply to single-family dwellings (see reference to "rebuild their house" below) or to all residential structures (as may be implied by the reference to "habitable structure" below). Staff does not believe that it was the intention of the City Council to allow rebuilding of all structures following a disaster.

Excerpt from May 30, 2006 Memorandum to Council and Action Minutes
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.

It would be a major shift in the current policy to allow rebuilding of all structures after a disaster regardless of consistency with zoning regulations and without discretionary review after a disaster. The City's regulations regarding nonconforming buildings are an important tool for bringing projects into consistency with the Zoning Ordinance and General Plan. It is important for the City to maintain the option of discretion for larger residential and commercial projects due to the greater impact of their potential inconsistency with current regulations and/or the fabric and scale of neighborhood development.

If the Planning Commission supports consideration of allowing broader rebuilding by-right, staff recommends that this be added to the Commission and Department work program to allow additional research and more detailed policy analysis to be completed.

It should also be noted that is common for jurisdictions to adopt emergency regulations following a disaster as appropriate to the circumstances. The City adopted emergency regulations regarding rebuilding after the October 1991 fire.

4. If rebuilding “by-right” is limited to residential structures, should the number of units be four, rather than three, to reflect mortgage and insurance practices?

Response: Staff confirmed that the real estate community generally divides "owner-occupied" projects as 1 – 4 units, and anything larger is considered "commercial". These criteria are used by HUD, the FHA, Fannie Mae, and insurers. Staff does not have concerns about changing the allowable size for rebuilding by right from three to four residential units.

5. Why does the rebuilding by-right language refer to “involuntary” destruction?

Response: Direction from the City Council to amend the Zoning Ordinance to allow rebuilding by-right originated due to concern that the Creeks Ordinance allowed such rebuilding, but that there was not similar language in the Zoning Ordinance. The title of the existing section of the Creeks Ordinance is:

Section 17.08.055 Replacement of a structure or any portion thereof where destroyed due to disaster or similar occurrence.

The language within the section reads as follows: “A structure, or any portion thereof, has been destroyed by causes such as fire, earthquake or flood.”

Confusion was expressed about the existing language because it wasn't clear whether it included both personal and large-scale disasters. The addition of the word “involuntary” was meant to make this more clear. As was discussed at the October 11th meeting, the following language could be added to ease concerns that have been expressed:

“An involuntary action includes an accidental occurrence due to the negligence of the property owner.”

6. Wording changes

Response: Planning Commission members suggested that the words “but not limited to” should be added to Section 23C.04.100 A 1 after the word “including” and before the word “fire”. Staff concurs with the intent, but does not believe the change is necessary. The subsection B, the Planning Commission suggested that the word “may” should be changed to “shall”. This has been discussed with the City Attorney, who does not agree that ordinance language should include administrative mandates that could undermine the law if an administrative task has not been completed.

Environmental Review

Staff concluded the proposed changes would be 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 amendments 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 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.

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.

Attachments:

1. Zoning Ordinance amendments as recommended by Planning Commission

1 ZONING ORDINANCE AMENDMENTS AS RECOMMENDED BY THE PLANNING
2 COMMISSION

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 height of buildings, the yard setbacks of
10 buildings, the percentage of lot coverage, or the parking space requirements when development is
11 proposed on property which is located within thirty feet of an open creek and where varying from
12 or modifying existing regulations is necessary to enable the property owner to comply with BMC
13 Chapter 17.08, 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 three 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**
38 **a description for owners of qualifying residential structures of such building information**
39 **required by the City to document existing characteristics of the building in case of future**
40 **damage or destruction.**

41



Planning and Development Department Land Use Planning Division

Staff Report

To: Planning Commission
From: Wendy Cosin, AICP
Deputy Planning Director
Date: October 19, 2006
Subject: **Proposed Amendments to the Creeks Ordinance (BMC Chapter 17.08)**

Recommendation

Staff recommends the Planning Commission provide comments to the City Council on the proposed amendments to the Creeks Ordinance (BMC Chapter 17.08 – Preservation and Restoration of the Natural Watercourses).

Background

The Planning Commission discussed revisions to the Creeks Ordinance as approved by the Creeks Task Force (CTF) on September 27 and October 11, 2006. Please refer to the ordinance with strikeout and underlining that was distributed with the October 11th report.

Discussion

The Planning Commission raised the following questions and issues during the October 11th meeting.

1. Costs will be onerous for property owners who are proposing development

Response: As was included in the October 11, 2006 staff report, the Public Works Department provided the following estimate of costs for creek studies:

- Culvert Location and Depth Determination \$2,000 - \$5,000
- Structural Analysis of Culvert \$2,500 - \$8,000
- Environmental analysis of impact
for development proximate to open creek \$2,000 - \$6,000

It should be noted that all of the reports would not be required for all projects. If the property owner knows that the creek culvert is within 15 feet of the mapped location of the culvert, the structural analysis would include the location and depth. The City does not have information about the location of most creek culverts on private property. To determine the location and depth, a consultant would either need to get access from the end of the culvert or would need to dig holes to locate the culvert. Also, it should be noted that the third bullet applies to development near open creeks, not creek culverts.

- 2. Regarding Section 17.08.045 D 1 (Page 5, lines 14 – 16), why does the report submitted to City Engineer for construction near a creek culvert have to show both existing culvert conditions and that the culvert won't be compromised by construction?**

Response: The existing condition of the culvert is needed to determine whether construction would compromise it structurally.

- 3. Regarding Section 17.08.058 (Page 11, line 6), why does the ordinance use 50% of appraised value as the threshold for rebuilding in 'non-disaster' situations, rather than demolition as defined in the Zoning Ordinance?**

Response: The ordinance language was designed to parallel Zoning Ordinance Section 23C.04.090, Destruction and Reconstruction of Nonconforming Buildings. If demolition were cited instead, it would need to reference the Zoning Ordinance definition of the term.

- 4. Regarding Section 17.08.058 (Page 11, lines 21 - 31), the ordinance should read, "The rebuilt structure would not", rather than "rebuilding the structure would not" to reflect that findings should address impacts from the new structure rather than the construction process.**

Response: Staff disagrees. The wording approved by the Creeks Task Force includes impacts from both the construction process and the new structure. Furthermore, some of the findings explicitly refer to the construction process.

- 5. Why is there no appeal process for action by the City Engineer on Culvert Permits or Creek Permits?**

Response: These are ministerial (administrative) permits and, therefore, there is no formal appeal process. As with any staff action, applicants can go to an employee's supervisor if they are not satisfied with the response received from the City Engineer.

- 6. Regarding Section 17.08.050D – Alternative Two (Page 7, line 40) the word "materially" should be added between the words "not" and "adversely" to the findings for a Use Permit if this option is selected for construction within 30 feet of an open creek.**

Response: Staff does not believe that the additional word is necessary because the findings need to address each of the subsequently listed conditions.

- 7. Use Permit vs. Variance - The major issue where a Planning Commission recommendation is needed is whether the Use Permit or Variance option should be selected for construction within 30 feet of an open creek (Section 17.08.050D, pages 7 & 8).**

Response: The CTF recommendation was for a Variance to be required. As requested by the City Council, the Use Permit option was developed with strict findings to protect the creek. Concerns were expressed at the Planning Commission meeting about Finding No. 3, requiring a determination that alternatives have been considered, including encroachments into yards, and have been determined not to be either physically or economically feasible. Staff believes that this is an extremely important finding to be required if the Use Permit option is selected. It supports the goal for development to be placed outside of the creek setback unless there are no

other alternatives, while not requiring the most difficult Variance finding regarding preservation of substantial property rights.

8. Definition - Several concerns were raised with the definition of creek, including whether it is clear enough, issues regarding “general historic location”, and whether creek culverts should be included in the creek definition.

Response: Given that the CTF recommendation was based on over a year of work and that the definition follows the direction from the City Council, staff does not recommend that the Planning Commission propose a new definition. To review, as was presented at the last Planning Commission meeting, our goal was to minimize changes to the existing definition, rather than to re-write it in a new form. The following information was included in the May 30, 2006 City Council staff report:

Excerpt from May 30, 2006 City Council Report: 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”. 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.

There was discussion at the last Planning Commission meeting about whether the regulation of creek culverts should be taken out of the Creeks Ordinance. However, the CTF recommended and the Council concurred that regulation of culverted creeks be retained to ensure safety, access to the creek and the quality of water flowing through the creek culvert.

Environmental Review

A draft Initial Study was made available for public review in early September and was previously distributed to the Planning Commission. The document has been amended and a Negative Declaration has been prepared for the Creeks Ordinance amendments (the Zoning Ordinance amendments are exempt from CEQA). The documents are included in the Planning Commission packet as Information Item No. 12.

The public comment period on the Negative Declaration is October 12 – November 14, 2006. No Planning Commission action is needed. If the Planning Commission has comments on the Negative Declaration, they should be transmitted to the City Council with comments on the Creeks Ordinance.

1

PROPOSED AMENDMENTS TO CHAPTER 17.08

2

PRESERVATION AND RESTORATION OF NATURAL WATERCOURSES

3

Section 17.08.010 Purpose.

4

The purpose of this chapter is to ~~regulate~~ ~~establish a policy~~ on: (1) building over or near the issuance of permits for culverting open culverted creeks; (2) building near open creeks; (3) the rehabilitation and restoration of natural waterways; and (4 ~~3~~) the management of watersheds.

8

Section 17.08.020 Findings.

9

The City Council does find and declare that:

10

A. Public health and safety requires creek and watershed management and planning in order to control flood and erosion damages. ~~Maintenance of natural channels, including removal of debris and erosion control.~~

12

13

B. A dependence on structural solutions for reduction of property damage such as creek channelization, culverting and channel riprapping, often has been found to result in the loss of property from unanticipated problems associated with their design. Channelization can result in changes in stream meander, bank erosion, channel filling and channel degradation, causing damages by the undercutting of bridges, homes and other structures or by the over-the-bank flows caused by channel filling. Culverts can result in upstream and downstream bank erosion problems and, because debris removal from them is difficult, they can back up flows and cause floods. Undersized culverts and culverts installed at the wrong slope can also cause flooding and ~~serious~~ bank erosion.

22

C. The use of riprap or other debris to stabilize banks can result in the erosion of streambanks up and downstream of the riprap. Riprap and other debris may decrease channel capacity contributing to potential flooding. ~~damages.~~

25

D. Streams managed as close to a natural system as possible without interference from structures, maintain a geomorphic equilibrium or watercourse best suited for carrying stream flows, and carrying and depositing suspended bed loads.

28

E. Natural streams and their associated riparian habitat have great ecological value, and should be protected and restored because they provide ~~the most~~ environmental amenities to the community and riparian owners.

31

provide the most environmental amenities to the community and riparian owners.

32

~~—F.— Streams and their riparian environment should be held as an important public asset in an increasingly endangered environment that provides an unusual urban ecological habitat with recreational and aesthetic value. The desired condition of creeks within the City of Berkeley includes natural stream banks and a corridor of riparian vegetation.~~

36

G. Culverting or channelization of existing open creeks should ~~only not occur unless~~ if there is strong evidence that there is no other means to prevent the erosion of supports, foundations or other structures an extreme hazard to public health or safety and no other alternatives can prevent the hazard.

39

October 2, 2006

1 H. It is in the interest of the community City of Berkeley to encourage the removal of
2 culverts and channels, prevent unnecessary channel riprapping, and to restore natural
3 watercourses whenever safely possible.

4 I. It is in the interest of the City of Berkeley to develop incentive programs and stream
5 management resources designed to assist property owners in protecting creek corridors.

6 J. Construction over a culverted creek is discouraged but if performed must protect
7 building safety, access to the culvert and the environmental quality of the water flowing
8 through the culvert.

9 K. These regulations should protect and restore natural creeks functions in an urban
10 environment while respecting the interests of property owners.

11 L. In recognition of private property, daylighting of culverted creeks is entirely
12 voluntarily.

13 M. The California Environmental Quality Act applies to actions taken under this chapter.

14 **Section 17.08.030 Definitions.**

15 The following definitions shall be applicable in the construction and application of this
16 chapter.

17 A. "Creek" means a watercourse ~~which~~ (1) that carries water from either a
18 permanent or natural source, either intermittently or continuously, ; and which runs in a
19 defined channel, or continuous swale or depression, or in a culvert that was placed in the
20 general historic location thereof; and (2) the water either which later merges with a larger
21 watercourse or body of water, or is diverted into an engineered structure that does not
22 follow the general historic course of a creek . The definition includes a channel, swale,
23 depression, or watercourse, whether or not culverted. A "creek" does not include The
24 definition excludes any part of an engineered system structure which was developed by a
25 public agency for collection of storm or flood waters (e.g. a storm drainpipe) , provided
26 however that such part that does not follow the original general historic course of the a
27 creek. The City of Berkeley may maintain maps and other reliable records, reflecting
28 such creeks for the guidance of the public. The word "creek" will be synonymous with
29 "natural watercourse" as used in the chapter.

- 30 1. A "permanent or natural source" includes a spring, artesian well, lake, estuary,
31 or a rainfall drainage area that covers at least one-third acre (14,520 square
32 feet).
- 33 2. The word "creek" is used synonymously with the phrase "natural
34 watercourse" in this chapter.
- 35 3. The portion of a creek that is visible above the ground is referred to
36 throughout this chapter as an "open creek."
- 37 4. The portion of a creek below ground and contained in an engineered structure
38 or culvert is referred to throughout this chapter as a "culverted creek."
- 39 5. A "swale" is a shallow trough-like depression that carries waters mainly
40 during rainfalls and snowmelts.
- 41 6. The City of Berkeley may maintain maps and other reliable records, reflecting
42 such creeks for the guidance of the public.

43 B. "Culverting" means the placement or construction of a pipe or box shaped conduit
44 in a creek bed ~~for the purpose of conducting~~ allowing water to be conducted.

October 2, 2006

1 C. "Rehabilitation" means the improvement of a natural watercourse by the use of
2 erosion control technology, revegetation, vegetation management and/or selective
3 channel clearing with the objective to conserve and manage a natural waterway and
4 riparian system.

5 D. "~~Restoration~~ Daylighting" means the unearthing of a culverted ~~stream~~ creek or
6 natural watercourse and the design of a new open channel to re-create the original stream
7 channel and environment.

8 ~~E. "Reconstruction" means the partial re-creation of the original natural watercourse~~
9 ~~by allowing a portion of a culverted stream to flow to the surface and flow through a~~
10 ~~landscaped riparian environment.~~

11 F. "Riprap" means cobbles, rock, concrete pieces or other non-vegetative debris used
12 to protect streambanks against erosion. "Riprapping" means the placement of riprap on
13 streambanks.

14 G. "Cribwalls" means a rectangular framework of logs which is filled with soil
15 and/or rocks and planted with cuttings.

16 H. "Brush matting" means the use of dead or live cuttings from riparian vegetation
17 stacked and secured against streambanks to check erosion and revegetate banks.

18 I. "Fascines" (sometimes called, "wattles") means bundles of cuttings from riparian
19 plants used to revegetate banks.

20 J. "Plant cuttings" means sticks cut from riparian shrub and tree branches in their
21 dormant state such as willows and alder, which are buried about halfway in the ground
22 and take root.

23 K. "Brush layering" means the use of live branches or cuttings which are inserted
24 into the streambanks perpendicular to the slope so that the rooting occurs back into the
25 slope.

26 L. "Retention basins" means open spaces which hold overbank stream flows and can
27 be used as parks and other open space uses in drier seasons.

28 M. "Gabions" means wire baskets filled with rocks and soil and planted with seeds,
29 cuttings and rooted plants. They can be used to rebuild streambanks.

30 N. "Administrative Use Permit" means a permit issued in accordance with the
31 procedures, including appeals, described in Chapter 23B.28 after making the findings
32 required by this Chapter.

33 O. "Use Permit" means a permit issued in accordance with the procedures, including
34 appeals, described in Chapter 23B.32 after making the findings required by this Chapter.

35 P. "Variance means a permit issued in accordance with the procedures, including
36 appeals, described in, and after making the findings required by, Chapter 23B.44.

37 Q. "Creek Permit" means a permit issued by the City Engineer in accordance with
38 the procedures described in this Chapter.

39 R. "Creek Culvert Permit" means a permit issued by the City Engineer in
40 accordance with the procedures described in this Chapter.

41
42 The City Manager may issue administrative guidelines and procedures to implement this
43 chapter, which may further explain these definitions.
44
45
46

1 **Section 17.08.040 Obstructing or interfering with watercourses prohibited.**

2 It is unlawful for any person, organization, institution, corporation or the City of
3 Berkeley to fill, or cause to be filled, to obliterate or cause to be obliterated, to obstruct or
4 cause to be obstructed, to construct a building bridging a creek or cause such building to
5 be constructed, or in any manner to interfere with or cause to be interfered with, any
6 natural watercourse in Berkeley which carries off at any time of the year any storm water,
7 or any surface waters, which have been precipitated by rains. This chapter does not apply
8 to the repair, replacement or construction of structures, or to conditions existing in creeks,
9 on or before, _____, 1989~~the effective date of this chapter.~~

10
11 **ALL NEW Section 17.08.045 Construction near Creek Culverts**

12
13 A. Except as provided in subsection B, any construction within 25 feet of the
14 centerline of a culverted creek, as the location of such creek is depicted on the
15 City of Berkeley map, that either expands the mass or footprint of an existing
16 building, or builds a new structure whether or not subject to the securing of a
17 building permit, shall comply with the requirements of this section. This
18 section authorizes administrative review and regulation of development of
19 structures near creek culverts for the purpose of determining appropriate
20 setbacks that promote safety and allow access for maintenance and repair.
21 Appropriate setbacks generally include those in which the structure foundations
22 are set back from the edge of the culvert a distance equal to the depth of the
23 culvert.

24
25 B. The following structures shall be exempt from the requirements of this section:

- 26
27 1. Any fence, arbor, trellis, pergola, gazebo, play structure or other
28 similar unenclosed accessory structure.
29 2. Retaining walls less than three feet in height.
30 3. Flag and light poles.
31 4. Solar energy equipment.
32 5. Mechanical lifts.
33 6. Prefabricated or other moveable one-story detached accessory
34 buildings that are not permanently attached to a foundation.
35

36 C. Prior to undertaking construction subject to this section, in addition to the
37 information otherwise required to be submitted in connection with any other
38 applicable permit, the property owner shall submit the written results of an
39 investigation, including a map with topographic features and two foot contours
40 and the depth and size of the culvert, that demonstrates to the satisfaction of the
41 City Engineer the location of the culverted creek. Where such investigation
42 establishes to the satisfaction of the City that the centerline of the culverted
43 creek is located more than fifteen feet from the proposed construction, such
44 construction shall not be subject to any further regulation under this section and
45 the City shall so advise the property owner in writing unless the City Engineer

1 finds that the depth and size of the culvert requires further review under
2 paragraph D.

3
4
5 D. If the investigation submitted pursuant to subsection C demonstrates that the
6 proposed construction will occur within fifteen feet of the centerline of the
7 location of the culverted creek, or the City Engineer finds under subsection C
8 that further review is required under this subsection D, then the applicant shall
9 be required to obtain a creek culvert permit. The City Engineer shall only issue
10 a creek culvert permit if the applicant submits a report from a structural
11 engineer, contemporaneously, with the application for a building permit, which
12 establishes to the satisfaction of the City Engineer, each of the following:

- 13
14 1. The structural integrity of the culvert under existing conditions is
15 acceptable to the City Engineer and will not be compromised by the
16 proposed construction;
17 2. The proposed construction will not impede access for the responsible
18 party to repair and maintain the culvert;
19 3. The flow of the creek will not be impeded nor its water quality
20 impaired.

21
22 E. If the proposed construction is located within fifteen feet of the transition to an
23 open creek, then the construction must comply with each of the provisions of this
24 chapter that apply to construction adjacent to or within an open creek including
25 the provisions of section 17.08.050.

26
27 The report from the structural engineer shall include (1) a map depicting the distance
28 between the structure and the culvert with topographic features and two foot contours and
29 the depth and size of the culvert; (2) a description of any physical defects in the culvert
30 based upon a visual inspection by closed circuit television or other technology approved
31 by the City Engineer; (3) an analysis of the stability of the culvert based upon a structural
32 analysis; (4) the proposed design of the foundation and the bearing strength of the soil;
33 and (5) any other information deemed necessary by the City Engineer.

34
35 **Section 17.08.050 Setbacks for new construction required.**

36 A. Construction of, or addition to, any structure having a roof supported by columns or
37 walls, including dwellings, garages, other accessory buildings and commercial buildings,
38 within thirty feet of the centerline of an open creek shall comply with ~~to~~ this section.

39
40 B. A vertical expansion within its existing footprint of a structure that is located within
41 thirty feet of the centerline of an open creek may be constructed with the approval of a
42 creek permit by the City Engineer in accordance with this section. An applicant for a
43 creek permit shall submit a report completed by a licensed engineer or licensed geologist
44 with expertise in hydrology or slope stability concurrently with the application for a

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1 building permit demonstrating to the satisfaction of the City Engineer each of the
2 following:

- 3
- 4 1. The project will not create, exacerbate, or prevent the abatement of erosion and bank
5 de-stablization problems;
- 6
- 7 2. The project will not increase stormwater runoff into the creek;
- 8
- 9 3. The project's construction activities will not degrade water quality from increased
10 sedimentation and particulates from disturbed soils; pollution from motor oil; or from the
11 generally high level of toxics and trash around construction sites;
- 12
- 13 4. The project will not eliminate or degrade significant in-stream or riparian corridor
14 habitat; and
- 15
- 16 5. The project will not prevent establishing stable banks and/or headwall at a culvert
17 intake or outflow or otherwise impede or complicate access to a culvert for maintenance
18 or repair.

19

20 The City Engineer may adopt administrative regulations that guide analysis of each of
21 these issues and may establish a list of qualified consultants. If the expansion is
22 otherwise subject to an Administrative Use Permit or Use Permit under the Zoning
23 Ordinance, then the requirements of this sub-section shall be satisfied as part of the
24 consideration of the Administrative Use Permit or Use Permit.

25

26 C. Any expansion of an existing structure into or within the area twenty-five to thirty
27 feet from the centerline of an open creek may be constructed outside its existing footprint
28 with the approval of an administrative use permit. Each of the following findings must
29 be made by the Zoning Officer or, on appeal, the Board:

- 30
- 31 1. Alternatives to expansion within the setback area, such as reducing setbacks to move
32 the structure further away from the centerline of the creek, are either physically or
33 economically infeasible. Physical feasibility includes site constraints and the
34 relationship of the structure to adjacent structures. Economic feasibility includes
35 consideration of the relative cost of constructing the structure in its original location and
36 moving the structure to a new location.
- 37
- 38 2. The additional encroachment into the area within 25-30 feet from the centerline of the
39 creek is not substantial in relation to the width and depth of the property and the existing
40 structure on the property.
- 41
- 42 3. The expansion will not create, exacerbate, or prevent the abatement of, erosion and
43 bank de-stabilization problems.
- 44
- 45 4. The expansion will not increase storm water runoff into the creek.
- 46

1 5. The expansion's construction activities will not degrade water quality from increased
2 sedimentation and particulates from disturbed soils; pollution from motor oil; or from the
3 generally high level of toxics and trash around construction sites.

4
5 6. The expansion will not eliminate or degrade significant in-stream or riparian corridor
6 habitat.

7
8
9 Any expansion of an existing structure within thirty feet of the centerline of a creek
10 impacts the riparian corridor in that it reduces the size of the corridor, and may impact
11 habitat, flooding, runoff, and water quality. The Zoning Officer/Board shall require on-
12 site mitigation commensurate with the impact of an expansion on the riparian corridor
13 subject to this section.

14
15 **ALTERNATIVE ONE: VARIANCE – RECOMMENDED BY CREEKS TASK**
16 **FORCE**

17 A D. Except as otherwise provided in subsections B and C, it is unlawful for any
18 person, organization, institution, corporation or the City of Berkeley to construct any
19 structure having a roof supported by columns or walls, including dwellings, garages,
20 other accessory buildings and commercial buildings, within 30 feet of the center line of
21 any open creek.

22 Approval for such construction may be granted only by appeal to the Zoning
23 Adjustments Board for a variance. The decision of the Zoning Adjustments Board may be
24 appealed to the City Council pursuant to Chapter 23B.44 of the Berkeley Zoning
25 Ordinance.

26
27 **OR**

28
29 **ALTERNATIVE TWO: CONDITIONAL USE PERMIT – NOT**
30 **RECOMMENDED BY CREEKS TASK FORCE**

31 D. Except as otherwise provided in subsections B and C, it is unlawful for any person,
32 organization, institution, corporation or the City of Berkeley to construct or add to any
33 structure having a roof supported by columns or walls, including dwellings, garages,
34 other accessory buildings and commercial buildings, within 30 feet of the center line of
35 any open creek.

36 Approval for such construction may be granted only by appeal to the Zoning
37 Adjustments Board for a Use Permit. Approval of a Use Permit shall require the
38 following findings:

39
40 1. The construction will not adversely affect the creek by (a) exacerbating, creating, or
41 preventing the abatement of erosion and bank de-stabilization problems; (b) increasing
42 stormwater runoff into the creek; (c) degrading water quality from increased
43 sedimentation and particulates from disturbed soils; pollution from motor oil; or from the
44 generally high level of toxics and trash around construction sites; (d) eliminating or
45 degrading significant in-stream or riparian corridor habitat; or (e) preventing establishing

1 stable banks and/or headwall at a culvert intake or outflow or otherwise impeding or
2 complicating access to a culvert for maintenance or repair.

3
4 2. The construction will not be detrimental to the health, safety, peace, morals, comfort
5 or general welfare of persons residing or working in the area or neighborhood of such
6 proposed use, or be detrimental or injurious to property and improvements of the adjacent
7 properties, the surrounding area or neighborhood or to the general welfare of the City.

8
9 3. Alternatives to construction within the area thirty feet from the centerline of the creek
10 have been considered, including possible encroachments into yard setbacks to move the
11 structure farther away from the centerline of the creek and have been determined by the
12 Board either not to be physically or economically feasible. In determining physical
13 feasibility, the Board may consider site constraints; other development standards; and the
14 relationship of the structure to adjacent structures. In determining economic feasibility,
15 the Board may consider the relative cost of constructing the structure in its original
16 location and moving the structure to a new location.

17
18 ~~B.— A residential addition to an existing single family home may be constructed~~
19 ~~through the issuance of a Conditional Use Permit pursuant to Chapter 23B.32 of the~~
20 ~~Berkeley Zoning Ordinance if the Zoning Adjustments Board or the City Council on~~
21 ~~appeal makes all of the following findings:~~

22 ~~— 1.— All portions of the creek on the subject parcel are enclosed within a culvert, which~~
23 ~~is located below the surface of the land and there is no open creek within 30 feet of the~~
24 ~~proposed addition on any adjacent parcel.~~

25 ~~— 2.— The existing single family home is bisected by a culverted creek such that at least~~
26 ~~30 percent of its footprint is located on both sides of the culverted creek.~~

27 ~~— 3.— No portion of the proposed addition is located on land or improvements directly~~
28 ~~above the culverted creek.~~

29 ~~— 4.— There is no feasible alternative for development of the proposed addition on an~~
30 ~~area outside of the setback required by subsection A because of physical conditions on~~
31 ~~the site and/or the limitations imposed by otherwise applicable development standards.~~

32 ~~— 5.— The existing single family home has two or fewer bedrooms and is smaller than~~
33 ~~the median size of single family homes within a 500 foot radius, measured from the~~
34 ~~property boundary line of the existing single family home.~~

35 ~~— 6.— The proposed addition shall not increase the size of the home to be larger than the~~
36 ~~median size of single family homes within the 500 foot radius in subsection B.5.~~

37 ~~— 7.— A report by an independent structural engineer selected by the City and funded by~~
38 ~~the applicant has concluded that the culvert is sound and structurally adequate to support~~
39 ~~the existing and proposed improvements or will be made so as part of the proposed~~
40 ~~project.~~

41 ~~— 8.— The proposed addition will not adversely affect the creek.~~

42 ~~— 9.— The proposed addition will not be detrimental to the health, safety, peace, morals,~~
43 ~~comfort or general welfare of persons residing or working in the area or neighborhood of~~
44 ~~such proposed use, or be detrimental or injurious to property and improvements of the~~
45 ~~adjacent properties, the surrounding area or neighborhood or to the general welfare of the~~
46 ~~City. (Ord. 6740 NS § 1, 2003; Ord. 5961 NS § 2, 1989)~~

1 **ALL NEW Section 17.08.052 Regulation of construction, expansion, rebuilding, or**
2 **replacement of decks adjacent to open creeks**

3
4 A. Deck between ten and thirty feet of the centerline. it is unlawful for any person,
5 organization, institution, corporation, or the City of Berkeley to construct, add to,
6 rebuild, or replace a deck located in an area between ten feet and thirty feet of the
7 centerline of a creek without the approval of a Creek Permit from the City Engineer
8 accordance with this section. An applicant for a creek permit shall submit a report
9 completed by a licensed engineer or licensed geologist with expertise in hydrology or
10 slope stability demonstrating to the satisfaction of the City Engineer each of the
11 standards in paragraph D.

12
13 The City Manager or designee may adopt administrative guidelines for analysis of each
14 of the standards described in paragraph D and may establish a list of qualified
15 consultants. If the deck construction is otherwise subject to an Administrative Use
16 Permit or Use Permit, then the requirements of this sub-section shall be satisfied as part
17 of the consideration of the Administrative Use Permit or Use Permit.

18
19 B. Replacement or Rebuilding of Deck within ten feet of the centerline. Except as
20 otherwise provided in Section 17.08.55, it is unlawful for any person, organization,
21 institution, corporation, or the City of Berkeley to rebuild or replace a damaged or
22 destroyed deck within ten feet of the centerline of a creek without the approval of an
23 Administrative Use Permit after making the findings in paragraph D.

24
25 C. New Deck within ten feet of the centerline –Except as otherwise provided in
26 paragraph A, it is unlawful for any person, organization, institution, corporation or the
27 City of Berkeley to construct a new deck or add to an existing deck located in an area
28 within ten feet of the centerline of a creek without the approval of a Variance.

29
30 D. Permit Standards - Neither a Creek Permit nor an Administrative Use Permit may be
31 issued pursuant to paragraphs A or B, respectively, without determining each of the
32 following:

- 33
34 1. The deck will not create, exacerbate, or prevent the abatement of, erosion and
35 bank de-stabilization problems.
36 2. The deck will not increase stormwater runoff into the creek.
37 3. The deck's construction activities will not degrade water quality from increased
38 sedimentation and particulates from disturbed soils; pollution from motor oil; or
39 from the generally high level of toxics and trash around construction sites.
40 4. The deck will not eliminate or degrade significant in-stream or riparian corridor.

41
42
43 The Zoning Officer/Board may impose conditions when necessary to make the findings
44 set forth herein for approval of the administrative use permit.

1 **ALL NEW Section 17.08.053 Paving adjacent to open creeks**

2
3 A. Impervious Paving – Prohibited. It is unlawful for any person, organization,
4 institution, corporation or the City of Berkeley to install, or replace after loss, impervious
5 paving on the area within thirty feet of the centerline of an open creek without the
6 approval of a variance.

7
8 B. Pervious Paving – 10 to 30 feet from centerline of open creek. Pervious paving is
9 permitted in an area between ten and thirty feet of the centerline of an open creek.

10
11 C. Pervious Paving – 0 to 10 feet from the centerline of open -creek. Pervious paving is
12 permitted in an area between zero and ten feet from the centerline of a creek for footpaths
13 only.

14
15 **ALL NEW Section 17.08.054 New or replacement of bridges**

16
17 In addition to any other requirements imposed by the City or other agencies, a bridge
18 over an open creek may only be is built or replaced, if the bridge provides a clear span
19 necessary to pass the water level raised by a one in 100 year storm event unless a
20 variance is approved. The bridge shall only be as wide as is necessary to accommodate
21 the proposed use of such bridge.

22 **Section 17.08.055 Replacement of a structure or any portion thereof where**
23 **destroyed due to disaster or similar occurrence.**

24 Notwithstanding any other provision of this chapter ~~Section 17.08.050~~, a structure, or
25 any portion thereof, may be replaced or reconstructed as long as all the following
26 conditions exist:

27 A. The structure, or any portion thereof, has been destroyed by any involuntary
28 causes such as including fire, earthquake or flood.

29 B. The proposed structure to replace or reconstruct the destroyed structure or portion
30 thereof, is ~~reasonably similar in~~ substantially the same with respect to its use, dimensions,
31 floor area, square footage, lot coverage and footprint ~~to~~ as the destroyed structure or
32 portion thereof and complies with all currently applicable building codes.

33 C. If a culvert exists on the parcel and the proposed replacement will be within ~~30~~ 15
34 feet of the centerline of such culvert, the applicant has submitted a report by a licensed
35 structural engineer demonstrating to the satisfaction of the City that the proposed
36 replacement structure will not negatively affect the culvert and that the replacement
37 structure is designed with a foundation, such as pile supported, which does not exert any
38 bearing load on the culvert. In making this determination, the report included
39 information related to the proposed foundation design, the bearing strength of the soil,
40 and the depth and size of the culvert. Alternatively, the applicant has submitted a report
41 by a licensed structural engineer which has demonstrated to the City's satisfaction either
42 that there is no feasible alternative to avoid imposing additional loading on the culvert,
43 and the analysis provided has determined that the culvert has sufficient strength to resist

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1 such loading or the applicant proposes to reinforce the culvert as part of the project at the
2 applicant's expense in a manner satisfactory to the City.

3 **ALL NEW 17.08.058 Replacement of structure or any portion thereof where**
4 **destroyed for reasons other than involuntary causes.**

5 If a lawful non-conforming roofed structure located within 30 feet of a centerline of an
6 open creek is to be replaced to the extent that more than 50% of its appraised value is to
7 be removed, and such replacement is not as a result of an involuntary cause such as fire,
8 earthquake, or flood, the Board may approve a Use Permit for the structure to be repaired,
9 or rebuilt within its previous footprint. In addition to the findings required to approve a
10 Use Permit, each of the following findings must be made:

11
12 1. Alternatives to rebuilding of structures within the 30-foot setback area have been
13 considered, including possible encroachments into yard setbacks to move the structure
14 farther away from the creek centerline, and have been determined by the Board either not
15 to be physically or economically feasible. In determining physical feasibility, the Board
16 may consider site constraints; and the relationship of the structure to adjacent structures.
17 In determining economic feasibility, the Board may consider the relative cost of
18 constructing the structure in its original location and moving the structure to a new
19 location.

20
21 2. Rebuilding the structure would not create, exacerbate, or prevent the abatement of,
22 erosion and bank de-stabilization problems;

23
24 3. Rebuilding the structure would not increase stormwater runoff into the creek;

25
26 4. Rebuilding the structure will not degrade water quality from increased sedimentation
27 and particulates from disturbed soils; pollution from motor oil; or from the generally high
28 level of toxics and trash around construction sites;

29
30 5. Rebuilding the structure would not eliminate or degrade significant in-stream or
31 riparian corridor.

32 **Section 17.08.060 Construction of walls, drains, bulkheads, etc.--Permit conditions**
33 **required.**

34 The intent of this section is to prohibit culverting and riprapping, unless there is strong
35 evidence that there is no other reasonable means to prevent the erosion of adjacent
36 supports, foundations or other structures.

37 It is unlawful for any person, organization, institution, corporation or the City of
38 Berkeley to construct or cause to be constructed, any wall, culvert, drain, bulkhead, or
39 other structure in any natural watercourse or creek in the City of Berkeley, or to place
40 riprap or any debris in the channel or on the banks, without first obtaining a permit
41 therefor from the City Engineer. If a permit for construction is granted, the City Engineer
42 shall require the applicant to submit plans and specifications for such a wall, bulkhead,

1 culvert, drain, structure or bank protection work which shall specify the exact location
2 and extent of the project. Any work that has been granted a permit, shall be carried out
3 under the supervision of the City Engineer, or his/her designated representative.

4 Such a permit will not be granted if any one or more of the following alternatives, or
5 any other is available to solve the problem.

6 A. Excavating to restore a natural meander, stream geometry and channel roughness.

7 B. Clearing debris cleanup.

8 C. Flood proofing: e.g. minor redesign of buildings, relocation of porches or other
9 minor structures, sheds, garages; raising of such structures; raising the grade of adjacent
10 land.

11 D. Removal of structures where feasible.

12 E. Bank stabilization using vegetation or combination revegetation construction (soil
13 bioengineering) that does not degrade the existing natural environment. This may include
14 the use of vegetated and dirt filled gabions, vegetated wood cribwalls, live and dead
15 brush matting, fascines, brush layering and cuttings, and other similar strategies based on
16 employing plants as the long-term stabilizing materials.

17 F. Vegetation management that can include selective clearing that retains a riparian
18 canopy and root structure to preserve riparian habitat, control unwanted undergrowth, and
19 stabilize banks.

20 G. Set-back levee construction: flood wall construction on the flood plain.

21 H. Changes in site design.

22 The request for any permit to culvert or perform any construction in a natural
23 watercourse must conform to the requirements of the California Environmental Quality
24 Act (C.E.Q.A.) and its current amendments and guidelines.

25 If the City Engineer recommends the granting of a permit for culverting or any other
26 construction in any natural watercourse, the matter shall be referred to the Public Works
27 Commission for review. If the City Engineer denies a permit, the applicant may appeal to
28 the Public Works Commission for review and recommendation. In all cases the decision
29 of the Public Works Commission will be final, unless the matter is appealed within 15
30 days to the City Council by the applicant, City staff or an interested party. (Ord. 5961-NS
31 § 2, 1989)

32 **Section 17.08.070 Obstructions or structures declared nuisance when--Notice to**
33 **remove--City to perform work when--Costs.**

34 Any structure, wall, bulkhead, culvert, drain, riprap or dam hereafter constructed,
35 erected or maintained in violation of any of the provisions of Sections 17.08.040 and
36 17.08.050 hereof, any structure, wall, bulkhead, culvert, drain, riprap or dam heretofore
37 erected or constructed in such manner or of such materials that the same does now or will
38 hereafter obstruct the flow of any natural watercourse in the City, shall be and the same is
39 declared to constitute a public nuisance, and the City Attorney of said City shall, upon
40 order of the City Council, immediately commence action or proceedings for the
41 abatement and removal and enjoinder thereof in the manner provided by law, and shall
42 take such other steps and shall apply to such courts as may have jurisdiction to grant such
43 relief as will abate and remove such building, obstruction, or structure, and restrain and
44 enjoin any person, firm, or corporation from setting up, erecting, building, maintaining,

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1 or using any such building, obstruction or structure or using any property contrary to the
2 provisions of this chapter. The remedies provided for herein shall be cumulative and not
3 exclusive.

4 Any violation of this chapter shall be deemed an infraction punishable as set forth in
5 Chapter 1.20 of the Berkeley Municipal Code. (Ord. 5961-NS § 2, 1989)

6 **Section 17.08.080 Failure to enforce chapter.**

7 Failure to enforce any part of this chapter, will not give rise to any civil or criminal
8 liabilities. (Ord. 5961-NS § 2, 1989)

9 **Section 17.08.090 Fees.**

10 The City Council may establish by resolution the fees for administration of this
11 chapter.

12

13 **ALL NEW Section 17.08.100**

14

15 Any violation of this Chapter may be charged, in the discretion of the enforcing officer or
16 City Attorney, as a misdemeanor or an infraction.

17

18