



Planning and Development Department

NOTICE OF PUBLIC HEARINGS ON AMENDMENTS TO THE CREEKS ORDINANCE AND ZONING ORDINANCE

The City is considering recommendations for amendment of the Creeks Ordinance (BMC Chapter 17.08 – Preservation and Restoration of the Natural Watercourses) and the Zoning Ordinance (BMC Chapter 23). Following a public hearing on May 30, 2006, the City Council directed staff to draft regulations to implement the Creeks Task Force policy recommendations. The City is mailing this notice to you because you are a property owner of a parcel of land identified by our mapping system as within approximately 30 feet of a regulated creek under the existing Creeks Ordinance.

The Creeks Ordinance is attached, with proposed changes to the existing Ordinance as recommended by the Creeks Task Force indicated in strike out and underlining. The Planning Commission and Public Works Commission will provide comments on the Draft Ordinance and modifications may be made prior to presentation to the City Council. Proposed revisions to two sections of the Zoning Ordinance regarding “rebuilding by right” and creeks are also attached.

The City Council requested that a public hearing be scheduled prior to adoption of the ordinances. The Planning Commission also requested that notice be provided to encourage participation at the meeting when they plan to make a recommendation on the Zoning Ordinance amendments and provide comments on the Creeks Ordinance amendments.

Planning Commission Public Hearing

Wednesday, October 11, 2006 at 7:00 p.m.

North Berkeley Senior Center
1901 Hearst Street, Berkeley

City Council Public Hearing

Tuesday, November 14, 2006 at 7:00 p.m.

Council Chambers
2134 Martin Luther King Junior Way, Berkeley

Additional Planning Commission meetings may be scheduled. Please contact Wendy Cosin, Deputy Planning Director at wcosin@ci.berkeley.ca.us or 510.981.7402 for more information. You can review and download background material online at: <http://www.ci.berkeley.ca.us/planning/landuse/creeks/>. The proposed changes are summarized below; please refer to the Draft Ordinance, attached, for further details.

Culverted Creeks: There is currently a 30-foot setback requirement for culverted creeks, within which a Variance is needed to build except in specific narrow circumstances. Under the draft Ordinance, the City would no longer regulate culverted creeks in the same manner as open creeks. Instead, the City Engineer would issue an administrative Creek Culvert Permit for development near a culverted creek based on the following standards:

- the construction or a setback will be adequate to protect the structural integrity of the culvert,
- the new constructions will ensure continued culvert access for repair and maintenance by property owners, and
- the new construction will ensure that creek flow will not be impeded or polluted.

If development is proposed within 25 feet of a culverted creek, property owners would be required to submit an investigation to the City to establish the exact location of the creek culvert. In general, if development is proposed within 15 feet of the centerline of the culverted creek, a report must be prepared by a structural engineer to demonstrate compliance with the standards outlined above.

Open Creeks: The proposed Ordinance outlines different regulations for different types of development within 30 feet of the centerline of an open creek as described below.

Vertical expansion of existing buildings located within 30 feet of the creek centerline (up or down within the existing building footprint) will require an administrative Creek Permit issued by the City Engineer, governed by standards that will protect against negative impacts on the creek.

In an area between 25 and 30 feet from the centerline of an open creek, additions that expand an existing building's footprint will require an Administrative Use Permit (AUP) issued by the Zoning Officer that includes criteria and findings designed to protect against adverse environmental effects to the creek.

Expansion of an existing building (other than vertically as described above) within the first 25 feet of the centerline of an open creek and development of a new building within 30 feet of the creek. Two options were prepared as was requested by the City Council.

- Option 1, recommended by the Creeks Task Force: Continue the current regulation, which requires the issuance of a Variance.
- Option 2: A Use Permit could be issued by the Zoning Adjustments Board with strict criteria and findings that alternatives have been considered and have been determined infeasible, and that the creek is protected against adverse environmental effects.

Decks and paving:

Zero – 10 feet of an open creek centerline:

- New decks require a Variance.
- Replaced decks require an Administrative Use Permit issued by the Zoning Officer that requires findings to protect the creek.
- Pervious paving is allowed for footpaths only.

Between 10 and 30 feet of an open creek centerline:

- New and replaced decks would require a Creek Permit issued by the City Engineer, governed by standards that will protect against negative impacts on the creek.
- Only pervious paving is allowed.

In any case when criteria or findings are required to document that development will not adversely affect a creek, a report will be required to be prepared by a licensed engineer or licensed geologist with

expertise in hydrology or slope stability that addresses the following issues: erosion, bank stability, storm water runoff, water quality, and riparian habitat.

Rebuilding After a Disaster:

The City Council requested that staff draft Zoning Ordinance amendments to allow property owners to replace or reconstruct structures damaged by events such as an earthquake, fire, or flood, as is provided in the existing Creeks Ordinance. The attached amendment allows a destroyed residential structure that does not include more than three units to be replaced with administrative approval of a Zoning Certificate provided that the replacement structure is substantially similar. This Ordinance would apply to all residential buildings with three or less units throughout the City, not just on lots near creeks. Structures that are not damaged or destroyed by such causes would be subject to additional regulations.

Environmental Review:

A draft Initial Study has been prepared that concludes that there is no substantial evidence that the Creeks Ordinance amendments would cause a significant effect on the environment; therefore, a Negative Declaration will be prepared and presented to the City Council for adoption. The final Initial Study and Negative Declaration will be available for public comment prior to October 13, 2006. The draft document is currently available on the City's web site.

Communication to the City Council

Written communication on this matter may be submitted electronically to the City Clerk, clerk@ci.berkeley.ca.us. Hard copies should be addressed to:

Berkeley City Clerk
Re: Creeks Ordinance Revisions
2180 Milvia St.
Berkeley, CA 94704

In order to be included in the hearing packet distributed in advance to the City Council, materials should be received no later than November 6, 2006. For inclusion in the Supplemental Packet distributed at the meeting, materials must be received by noon on November 14.



**P L A N N I N G
C O M M I S S I O N**

**N O T I C E O F P U B L I C
H E A R I N G**

Proposed Zoning Ordinance amendments to Berkeley Municipal Code (BMC) Chapter 23B.44, Variances, to allow issuance of a Use Permit rather than a Variance in certain situations, and BMC Subtitle 23C, General Provisions, to allow rebuilding of certain residential buildings by right after a disaster.

NOTICE OF PUBLIC HEARING
Wednesday October 11, 2006 @ 7:00 PM
North Berkeley Senior Center, 1901 Hearst Avenue

The Planning Commission of the City of Berkeley will hold a public hearing on the above matter on **Wednesday, October 11** at the North Berkeley Senior Center, 1901 Hearst Avenue (at Martin Luther King, Jr. Way), Berkeley (wheelchair accessible).

Following the public hearing, the Planning Commission may vote to recommend adoption, modification, or rejection of the proposed amendments. If the Planning Commission recommends adoption, the proposed amendments will be forwarded for action to the City Council.

PROJECT DESCRIPTION: Proposed amendments to BMC Title 23 (Zoning Ordinance) of the Berkeley Municipal Code to consider:

- Amendment of Section 23B.44.010, Variances, to allow a Use Permit to be approved rather than a Variance to modify zoning regulations regarding height, setbacks, lot coverage, or parking requirements if needed to meet the City's Creek Ordinance setback requirements.
- Addition of Section 23C.04.100, Rebuilding after involuntary destruction of structure or portion thereof, to allow reconstruction of nonconforming residential buildings with up to three dwelling units if destroyed by disaster.

LOCATION: Citywide

ENVIRONMENTAL REVIEW STATUS: 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. Any proposed discretionary project will require its own review pursuant to CEQA. No new uses are proposed to be established or eliminated.

BERKELEY PLANNING COMMISSION PUBLIC HEARING NOTICE

FURTHER INFORMATION: Questions about the project should be directed to the project planner, Wendy Cosin, AICP at (510) 981-7402 or wcotin@ci.berkeley.ca.us.

PUBLIC COMMENT

Comments may be made verbally at the public hearing and in writing before the hearing. Those wishing to speak at the hearing must submit a speaker card. Written comments concerning this project should be directed to:

Planning Commission
Jordan Harrison
Land Use Planning Division
2120 Milvia Street
Berkeley, CA 94704

Fax: (510) 981-7490
E-mail: JHarrison@ci.berkeley.ca.us

To assure distribution to Commission members prior to the meeting, **correspondence must be received by 12:00 noon, seven (7) days before the meeting.** 15 copies must be submitted of any correspondence with more than ten (10) pages or any item submitted less than seven days before the meeting.

COMMUNICATION ACCESS

To request a meeting agenda in large print, Braille, or on audiocassette, or to request a sign language interpreter for the meeting, call (510) 981-7480 (voice) or 981-6903 (TDD). Notice of at least five (5) business days will ensure availability. Agendas are also available on the Internet at: www.ci.berkeley.ca.us.



Item 9 - Supplemental

October 11, 2006

Planning and Development Department
Land Use Planning Division

Memorandum

To: Planning Commission
From: Erin Dando, AICP, Associate Planner
Date: October 11, 2006
Subject: **ZA 6:06: Amendments to the Zoning Ordinance (BMC Title 23) related to the Creeks Ordinance and rebuilding after involuntary destruction of structure; CEQA Exemption for Zoning Ordinance Amendments to BMC Sections 23B.44.010 and 23C.04.100**

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 increasing 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.



Planning and Development Department

Land Use Planning Division

Staff Report

To: Planning Commission

From: Erin Dando, AICP
Associate Planner

Date: October 5, 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; and Recommendations on the Creeks Ordinance Revisions (BMC 17.08) and Draft Initial Study.**

Recommendation

Staff recommends the Planning Commission:

1. Open a public hearing, take public testimony and close a public hearing on ZA 6-06, amendments to the Zoning Ordinance related to the Creeks Ordinance and rebuilding after involuntary destruction of structure, and simultaneously take public comment on the proposed amendments to BMC Chapter 17.08 and the draft Initial Study;
2. Take action on the Zoning Ordinance amendments, ZA 6-06; and
3. Make comments on the revisions to the Creeks Ordinance.

Background

At its September 27 meeting, the Planning Commission discussed the ordinance amendments related to Berkeley Municipal Code (BMC) Section 17.08, Preservation and Restoration of Natural Watercourses (a.k.a. the Creeks Ordinance), and BMC Chapter 23, the Zoning Ordinance, related to changes to the Creeks Ordinance and rebuilding after involuntary destruction of a structure. (See September 27, 2006 Staff Report to the Planning Commission)

ZA 6-06: Zoning Amendments

The Planning Commission voted unanimously to incorporate additional language in the Zoning Ordinance draft amendments, as reflected in Attachment 1, which further directs the Planning Director to develop information and procedures for property owners that qualify for rebuilding by right for an advanced determination to rebuild.

Creeks Ordinance Amendments and Planning Commission Comments

At the meeting the Planning Commission began to make comments on the Creeks Ordinance revisions including:

- Section 17.08.020.M - question as to whether or not the BMC should reference CEQA, as this is not done in other sections of the BMC.
- Section 17.08.030 - there is no definition of a non-culverted creek.
- Section 17.08.045 - questions relating to what appears to be discretionary authority by the Public Works Engineer as to when additional information is required to build near culverted creeks. Staff noted the issuance of the "creek culvert permit" is a ministerial permit (an administrative decision), which is non-discretionary.
- Section 17.08.030.A.7 - recommendation that the City "shall" maintain a map of the creeks instead of "may".
- Section 17.08.045.C - the fifteen foot measure should clearly state it is measured horizontally at the surface, if that is the intent.

These comments and recommendations have not been incorporated into the text amendments for BMC Section 17.08. Individual Planning Commission members provided the above comments; however, staff needs direction as to whether they should be forwarded to the City Council along with any additional comments made on October 11. The attached amendments for the Creeks Ordinance (Attachment 2) incorporate recommendations by the Creeks Task Force on September 25, 2006, which were previously distributed to the Planning Commission with hand-written modifications.

Notification of Property Owners

The Planning Commission previously discussed concern with notification of residents affected by the existing Creeks Ordinance of the Commission's October 11 Public Hearing. In addition to earlier mail to neighborhood organizations, emails to the 200+ public distribution list of interested parties and press legal advertisements, staff has distributed the proposed ordinance language along with notification of the October 11th hearing and the City Council's public hearing scheduled for November 14, 2006 (Attachment 3) to all property owners identified as affected by the existing Creeks Ordinance.

Financial Estimate for Creek Studies

Commissioners requested information regarding the real costs to property owners for investigative work and structural reports as would be required under the proposed language for development near creek culverts and for environmental analysis for development near open creeks. The Public Works Department has provided the following estimate of these costs for creek studies:

- | | |
|---|-------------------|
| 1. Location and Depth Determination | \$2,000 - \$5,000 |
| 2. Structural Analysis of Culvert | \$2,500 - \$8,000 |
| 3. Environmental Analysis of impact
of development proximate to open creek | \$2,000 - \$6,000 |

Legal Response to Letter to the Creeks Task Force

The City Attorney has not issued a formal response to the issues raised by Mr. Graf, but some of his concerns were incorporated in the proposed ordinance, as distributed to the Commission on September 27. Staff agrees with Mr. Graf that CEQA applies to the Creeks Ordinance changes and is preparing a Negative Declaration. One of Mr. Graf's concerns was that the findings for

issuance of a Creek Permit and a Creek Culvert Permit require the exercise of discretion for purposes of CEQA and are, therefore, not ministerial. As has been previously discussed with the Commission, the applicant must provide the evidentiary basis for each of the findings, which allows the City Engineer to approve the permits. Administrative regulations will be adopted that provide further clarification about how these issues will be analyzed. Additional comments by Mr. Graf are in error or differ from the policy recommendations adopted by the Creeks Task Force.

Attachments:

1. Draft Zoning Ordinance Revisions, September 28, 2006
2. Draft Creeks Ordinance Revisions, October 2, 2006
3. Notification distributed to property owners affected by the existing Creeks Ordinance



Land Use Planning Division

Staff Report

To: Members of the Planning Commission
From: Wendy Cosin, AICP
Deputy Planning Director
Date: September 27, 2006
Subject: **Draft Creeks Ordinance and Zoning Ordinance Amendments**

Recommendation

- Provide comments on the Creeks Ordinance revisions and Initial Study
- Provide preliminary comments on the Zoning Ordinance revisions
- Set a public hearing for October 11, 2006 regarding proposed revisions to the Zoning Ordinance

Background

In January 2006, the Planning Commission (Commission) began reviewing the issues, scope of work, consultant findings and recommendations of the Creeks Task Force (CTF). The Commission took action on the CTF recommendations on May 10, 2006. In brief, it supported the CTF recommendations, but had the following concerns:

- In one or more places where the CTF would require a Variance, the Commission suggested that a Use Permit might be more appropriate.
- The findings for use permits, environmental analyses, and mitigations should not place an unreasonable burden on applicants requesting permits for minor additions.

On May 30, 2006, the City Council held a public hearing on the recommendations for changes to the Creeks Ordinance and took the following action:

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 Creeks Task Force (CTF) reviewed proposed amendments to the Creeks Ordinance at their September 11 and 18, 2006 meetings, and will discuss the amendments again on September 25, 2006. The version of the draft ordinance that is included with this report (dated September 22, 2006) is the same as what will be included for CTF review on September 25th. It shows most changes from the existing ordinance in strikeout or underlining, except that the entirely new sections are so noted and just show some of the changes that have been made during CTF review in strikeout and underlining. The existing ordinance is attached to assist with Commission review. This report briefly summarizes the key aspects of the proposed amendments.

The draft ordinance includes amendments to the Creeks Ordinance (Attachment No. 1) and the Zoning Ordinance (Attachment No. 2). As required by the Municipal Code, the Planning Commission needs to set a public hearing on the Zoning Ordinance amendments. Staff recommends that a hearing be set for October 11, 2006. No public hearing is needed at the Planning Commission level for the Creeks Ordinance amendments; the City Council requested that a public hearing be scheduled when the amendments return for its review in November.

Definition of Creek/Findings

A need to amend the definition of “creek” was identified to ensure that the definition is clear and to address a public concern as to whether rainwater runoff and the like might inadvertently get treated as a creek. In 2005, staff issued administrative procedures for processing permit applications where a creek may be present on the property (Attachment No. 3) to provide guidance on this point. The CTF discussed whether the details of this procedure should be included in the ordinance and the majority decided not to.

An important purpose of the definition is to clearly distinguish between creeks, whether open or culverted, and engineered structures developed for collection of storm or floodwaters (e.g. a storm drainpipes). The proposed definition includes most of the language from the existing ordinance and is reorganized.

A “creek” continues to include both open and culverted creeks in the definition, and new language is added to define each. Language was also added to identify the type of water source that contributes to a drainage area and the minimum size of a drainage area (one-third acre) that feeds a creek. Reference was added to the City’s administrative procedures.

Findings were amended based on recommendations from the City Attorney and CTF.

Regulation of Culverted Creeks

One of the most significant recommendations was to change the current prohibition on building within 30 feet of the centerline of a culverted creek without a Variance. This goal was achieved by creating a new type of permit – a Creek Culvert Permit – that could be approved administratively. The City Engineer determined that 15 feet is generally the critical distance when analysis is needed of the potential impacts of construction on a creek culvert. However,

City maps are not adequately detailed to be used for this purpose; therefore, a two-part process is proposed:

1. If development is proposed within 25 feet of a culverted creek, the applicant must provide information to establish the exact location of the centerline.
2. If development is proposed within 15 feet of the centerline of the culverted creek, additional information and an over-the-counter permit are required.

The revised ordinance:

- Requires a Creek Culvert Permit to be issued by the City Engineer for any development, except projects listed as “exempt”, proposed within 15 feet of the centerline of the culverted creek.
- A Creek Culvert Permit can be approved if the applicant submits a report prepared by a structural engineer that shows, to the satisfaction of the City Engineer, that the ordinance standards are met. The standards ensure that the construction or a setback will be adequate to protect the structural integrity of the culvert, ensure continued culvert access for repair and maintenance by property owners, and ensure that creek flow will not be impeded or polluted, including situations where a culverted creek transitions to an open creek.
- In response to a concern from the CTF that 15 feet may not be an adequate area, language was added to the draft ordinance to allow the City Engineer to require an engineering report if the depth and size of the culvert indicate that more information is needed regarding the proximity of development to the culvert.

The ordinance includes detailed submittal requirements to provide the City Engineer with the information needed to determine that the required standards can be met for a Creek Culvert Permit to be issued.

Open Creeks: Setback Regulations for Roofed Structures

The City Council approved the direction recommended by the CTF that the current prohibition on building a roofed structure within 30 feet of the centerline of an open creek without a Variance be handled differently for three types of construction. The revised ordinance addresses this as follows.

- Vertical expansion of existing buildings (up or down within the existing building footprint) that are located within the 30-foot setback will require an over-the-counter permit (Creek Permit) issued by the City Engineer, governed by standards will protect against negative impacts on the creek.
- Additions to existing development that expand the building’s footprint within an area between 25 and 30 feet from the centerline of an open creek will require an Administrative Use Permit (AUP) issued by the Zoning Officer that includes criteria and findings designed to protect against adverse environmental effects to the creek.
- Two options are provided for expansion of an existing structure (other than vertically as described above) within the first 25 feet of the centerline of an open creek and for development of a new structure within 30 feet of the creek.
 - Option 1: Continue the current requirement to obtain a Variance for such development as recommended by the CTF.

- As was recommended by the Planning Commission, the City Council requested that a Use Permit be considered as an option for a Variance. Therefore, Option 2 was developed and is included in the draft ordinance to require a Use Permit issued by the Zoning Adjustments Board with strict criteria and findings that alternatives have been considered and have been determined infeasible, and that the creek is protected against adverse environmental effects.

Each is discussed in more detail below.

The Creek Permit described above for vertical additions would be a new administrative permit to be issued by the City Engineer. The ordinance requires a report to be prepared by a licensed engineer or licensed geologist with expertise in hydrology or slope stability, and that the report provide the information needed to determine that the required standards can be met for a Creek Permit to be issued. The required standards incorporate the “environmental analysis” originally proposed by the CTF. The Commission previously expressed concern that the environmental analysis that was recommended for ministerial permits would trigger CEQA because such an analysis would be discretionary. This issue has been resolved by requiring the report submitted with the application to provide the evidentiary basis for each of the required findings. In addition, the City Engineer may adopt administrative regulations that guide analysis of the criteria used to determine that the development will not adversely affect the creek.

For additions within the area 25 – 30 feet from the centerline of an open creek, the Planning Commission wanted to ensure that the circumstances when an AUP would be approved be clearly defined and that the findings not be too onerous. As drafted, the findings include the environmental analysis and are based on the premise that construction within the 25 - 30-foot area should only be approved if it would not adversely affect the creek.

Regarding expansion of an existing structure (other than vertically) within the first 25 feet of the centerline of an open creek and for development of a new structure within 30 feet of the creek, the Planning Commission believed that “a Use Permit may be more appropriate” than a Variance. On September 18, 2006, the CTF passed a motion supporting the Task Force’s original recommendation for a Variance. The motion passed 8 – 5.

A potential issue with the Use Permit option was raised in the attached letter from Michael W. Graf, Attorney, to Juliet Lamont and Phil Price, dated September 14, 2006 (Attachment 5). The letter argues that the proposal to allow development with a Use Permit rather than a Variance is a major weakening of the protections of the existing ordinance, which could result in potentially significant impacts on the environment and, thus, an Environmental Impact Report should be prepared. Staff does not agree with this analysis, but wanted to alert the Commission to this issue.

One problem with the existing Creeks Ordinance is that it references permit requirements from the Zoning Ordinance, but doesn’t explicitly tie the two together. The revised ordinance adds definitions of an Administrative Use Permit and Use Permit that specify that the permits will be issued in accordance with Zoning Ordinance procedures for such permits, but subject to only the findings contained in the Creeks Ordinance. Thus, the permit findings would be tailored to address creek-related issues and the standard “non-detriment” finding would not be required.

Open Creeks: Setback Regulations for Other Structures

The CTF recommended adding regulations for decks, paving, and bridges; the existing ordinance does not regulate these types of development. The revised ordinance:

- Restricts where new and replaced decks may be placed within 30 feet of an open creek. New decks are only allowed within 10 feet of the creek centerline with a Variance, although a damaged or destroyed deck within this area could be repaired, replaced, or rebuilt with an AUP issued by the Zoning Officer that requires findings to protect the creek. Between 10 and 30 feet, new or repaired decks would require a Creek Permit issued by the City Engineer, governed by standards will protect against negative impacts on the creek.
- Prohibit new impervious paving within 10 feet of an open creek, except for footpaths and bridges and require all new paving to be pervious within 30 feet of an open creek centerline, unless a Variance is approved.
- Establish a new standard for new and rebuilt bridges to ensure they meet clearance for a one in 100-year storm event to reduce chances of bridges becoming an obstruction during flooding events, unless a Variance is approved.

The Planning Commission and the City Council asked that a Use Permit alternative be provided in cases where the CTF recommendation called for a Variance. Although not currently drafted, language similar to “Alternative Two” for Section 17.08.050 could be adapted to the above situations where Variances are required.

Repair and Rebuilding of Existing Nonconforming Structures (Zoning Ordinance and Creeks Ordinance Amendments)

The CTF, Planning Commission, and City Council discussed the importance of allowing property owners replace or reconstruct structures damaged by events such as an earthquake, fire, or flood or similar occurrence, as is provided in the existing Creeks Ordinance (BMC 17.08.055). However, it was pointed out that the Creeks Ordinance does not supersede the existing Zoning Ordinance requirement for a Use Permit to replace nonconforming buildings. The rebuilding issue is addressed in three ways as described below.

1. A new provision to the Zoning Ordinance was drafted that would apply to all properties, whether proximate to a creek or not. Section 23C.04.100, Rebuilding After Involuntary Destruction of Structures or Portion Thereof, is included in the draft ordinance language (Attachment No. 2) and includes the following key elements¹:
 - A destroyed structure can be replaced with administrative approval of a Zoning Certificate.

¹ The CTF originally recommended that rebuilding of structures within the 30-foot setback area should be moved farther away from the creek centerline if feasible, that land use concessions should be considered in this regard, and that mitigations should be considered for rebuilding within the 30-foot threshold area. These recommendations were not included in the new section of the Zoning Ordinance or with the existing section of the Creeks Ordinance because they would be difficult to implement with a ministerial (administrative) process. Further, the Zoning Ordinance applies to all properties, not just those adjacent to a creek.

- This provision only applies to structures that are exclusively residential and that do not include more than three 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.

As indicated in the following action from the May 23, 2006 City Council meeting, the original direction was to refer Zoning Ordinance amendments to the Planning Commission to allow “a homeowner to rebuild their house” if destroyed by disaster. Language was changed to refer to a “habitable structure”.

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.

Staff recommends that the “by right” rebuilding provision only apply to residential uses and that it include properties with up to three 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 review larger projects as needed. 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. It should also be noted that is common for jurisdictions to adopt emergency regulations following a disaster as appropriate to the circumstances, and the City would always have that option.

To qualify for rebuilding with a Zoning Certificate, a structure will have to be 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. To make this determination, it is anticipated that staff will develop an administrative procedure for property owners to provide information to allow staff to document existing conditions in advance of potential damage 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 final². If a project is determined not to be “substantially similar”, the applicant would follow the standard requirements of the Zoning Ordinance and, if applicable, the Creeks Ordinance³.

2. Minor changes in language are proposed to Creeks Ordinance Section 17.08.055 to be more consistent with the new Zoning Ordinance language. This Creeks Ordinance section will continue to apply to replacement of all structures destroyed by disaster, as originally written, and the new Zoning Ordinance provisions will also apply.
3. In the Creeks Ordinance, a new Section 17.08.058, Replacement of Structure or Any Portion Thereof Where Destroyed for Reasons other than Involuntary Causes, was drafted and is included in the draft ordinance language. The recommended language establishes a process for properties that are damaged by more than 50% not as a result of an involuntary cause such as fire, earthquake or flood. In such case, a Use Permit would be required pursuant to both existing Zoning Ordinance standards and the Creeks Ordinance, with Creeks Ordinance findings required to address that alternatives have been considered, protection for the creek, and mitigations as appropriate.

New Issue: Combination of Rebuild with As-of-Right Additions: The City Council directed planning staff on September 19, 2006 to refer a concern brought forth by Councilmember Wozniak to the Planning Commission in its review of the Zoning Ordinance amendments related to rebuilding after involuntary destruction.

The concern raised by Councilmember Wozniak relates to the coupling of a by-right rebuild simultaneously with a by-right residential addition. At the September 19th meeting the Council approved the first reading of an Ordinance allowing by-right additions, subject to height limits, for 15% of the subject lot area up to 600 square feet.

Councilmember Wozniak expressed concern that an applicant could build a house up to 600 square feet larger than the original house after involuntary demolition without neighbor notification or discretionary review. As drafted, the amendment language states that any additional square footage, beyond what existed before the involuntary demolition, is subject to all otherwise applicable regulations governing such expansion or change⁴. If an applicant chooses to build an expansion as part of the by-right rebuild that exceeds 600 square feet or the height limit, an Administrative Use Permit would be required.

Staff recommends approval of the language as drafted. Staff believes the new provisions should affect all properties the same in that the regulations for additions should not change if a house is

² A more complex process that included consultation with abutters and confronters of the subject property was included in the ordinance drafted after the 1991 fire; however, given the potential for a larger area of destruction, the current ordinance was drafted to be simpler.

³ See “New Issue”, below.

⁴ The new ordinance will limit new square footage to 600 square feet, with a height limit of 14 feet for R-1, R-1A, R-2, R-2A, 16 feet for R-3 and R-4, and 18 feet for R-5. The new regulations will force any by-right addition to be 14 feet or less in height in the R-1 District and less than a maximum height of 20 feet in the Hillside Overlay District.

involuntarily demolished in whole or part. The property owner should still be entitled to the same zoning provisions. The new provisions recommended by the Planning Commission and adopted in a first reading by the Council provide greater protections to neighbors from the impact of large by-right additions. If the existing home were non-conforming due to setbacks or lot coverage, it could be rebuilt by right, per the drafted language; however, the new addition proposed as part of the by-right rebuild would be subject to all height restrictions, setbacks and lot coverage limitations.

Zoning Ordinance Amendment: Modification of Regulations

Several sections of the proposed amendments to the Creeks Ordinance require findings for approval of permits 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. The language included in Attachment No. 2 is 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 height of buildings, 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.

Allowing deviations from the Zoning Ordinance with a Use Permit rather than a Variance continues to provide a public hearing process and the standard Use Permit finding⁵ would ensure the proposed project would not adversely affect other properties.

⁵ 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 or injurious to property and improvements of the adjacent properties, the surrounding area or neighborhood or to the general welfare of the City.

Environmental Review of Proposed Ordinance Amendments

A draft Initial Study, Attachment No. 4, analyzes the potential environmental impacts from the proposed amendments to the Creeks Ordinance. The conclusion of the Initial Study is that the ordinance revisions could not have a significant effect on the environment, and a Negative Declaration will be prepared. The City Council will need to act on the Negative Declaration prior to approval of the ordinance. Comments on the Initial Study, they can be addressed before the Negative Declaration is prepared. There will also be at least one month provided for formal, noticed public review and comment following completion of the Negative Declaration before Council action in November or December.

There are no potential adverse impacts that will result from the two proposed Zoning Ordinance amendments; therefore, these amendments are exempt from environmental review.

Schedule for Action

The City Council established November 28, 2006 as the deadline for returning the amendments to the Creeks Ordinance and, regarding rebuilding, to the Zoning Ordinance. November 28th has been selected as the date for a City Council public hearing on the ordinance amendments. Staff would like to incorporate all Commission changes to the draft ordinances into a final draft that will be mailed to all creek side property owners as soon as possible.

Attachments:

1. Draft ordinance language – Creeks Ordinance
2. Draft ordinance language – Zoning Ordinance
3. Public Works/Planning Department Procedure
4. Draft Initial Study, September 1, 2006
5. Letter from Michael W. Graf, Attorney, to Juliet Lamont and Phil Price, dated September 14, 2006
6. Chapter 17.08, Preservation and Restoration of Natural Watercourses

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PROPOSED AMENDMENTS TO CHAPTER 17.08

PRESERVATION AND RESTORATION OF NATURAL WATERCOURSES

Section 17.08.010 Purpose.

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.

Section 17.08.020 Findings.

The City Council does find and declare that:

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.~~

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.

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.~~

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.

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.

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

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.~~

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.

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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

1 PROPOSED ZONING ORDINANCE AMENDMENTS

2 **Section 23B.44.010 Variances**

3 The Board may grant Variances to vary or modify the strict application of any of the
4 regulations or provisions of this Ordinance with reference to the use of property, the
5 height of buildings, the yard setbacks of buildings, the percentage of lot coverage, the lot
6 area requirements, or the parking space requirements of this Ordinance; provided,
7 however, that a use permit, rather than a variance, may be approved to vary or modify the
8 strict application of any of the regulations or provisions of this Ordinance with reference
9 to the height of buildings, the yard setbacks of buildings, the percentage of lot coverage,
10 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
13 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
17 structure that is devoted exclusively to residential use and contains up to three
18 residential units and any structure which is accessory thereto, or any portion thereof,
19 may be replaced or reconstructed, subject to the issuance of a Zoning Certificate, if
20 the City finds that all of the following conditions exist:

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

35 B. The Planning Director may shall establish a process that allows an owner of a
36 qualifying residential structure to apply for an advance determination that the
37 proposed repair or replacement of a structure is substantially similar as required by
38 paragraph A(2) including the information required to document existing conditions.

C i t y o f B e r k e l e y

E N V I R O N M E N T A L I N I T I A L S T U D Y

1. **Project Title:** Revisions to the Creeks Ordinance (Berkeley Municipal Code 17.08 – Preservation and Restoration of Natural Watercourses) and to the Zoning Ordinance regarding rebuilding after involuntary destruction of a structure and regarding variances for properties located within 30 feet of an open creek.

2. **Lead Agency Name and Address:** City of Berkeley, 2120 Milvia Street, Berkeley, CA 94702

3. **Contact Person and Phone Number:** Wendy Cosin, AICP, Deputy Planning Director, 510.981.7402

4. **Project Location:** Citywide along open and culverted creeks

5. **Project Sponsor's Name and Address:** City of Berkeley

6. **General Plan Designation:** All

7. **Zoning:** All

8. **Description of project:**

The proposed project consists of revisions to the City's Creeks Ordinance, *Preservation and Restoration of Natural Watercourses* (BMC Chapter 17.08) and to the Zoning Ordinance. The revisions to the Creeks Ordinance are intended, among other goals, to modify the regulations for Berkeley creeks to balance protecting the creeks, habitat, adjacent riparian zones, and water quality with the rights of and flexibility for property owners living along creeks given Berkeley's urban environment. The Creeks Ordinance was first adopted in 1989. It contained certain key purposes including establishment of policies on:

- the issuance of permits for culverting open creeks;
- the rehabilitation and restoration of natural waterways; and
- the management of watersheds.

The existing Ordinance contains the following provisions:

- Prohibition of any obstruction that may interfere with any natural watercourse in Berkeley.
- Prohibition of any roofed structures, including vertical or horizontal expansions to existing structures, within 30 feet of a creek centerline, thus establishing a 30-foot setback from both open and culverted creeks.

- Prohibition of culverting or placing riprap (or other hardscape) in open creeks and the creation of a process for the review of such activities in the event there is no other reasonable means to prevent the erosion of adjacent supports, foundations or other structures.
- A narrow exclusion for the allowance of expansions of single-family homes within 30 feet of a culverted creek with the approval of a Use Permit, subject to meeting nine strict findings.
- The allowance for non-conforming structures to be rebuilt after disaster if reasonably similar in use, dimensions, floor area, square footage, lot coverage and footprint to the destroyed structure, complying with all currently applicable zoning and building regulations.

In response to concerns from local urban creeks advocates that the City’s ordinance was outdated, and from property owners along creeks that the ordinance was too restrictive of property rights, the City Council established a temporary Creeks Task Force (CTF) charged with reviewing the Ordinance and providing recommendations for potential revisions. The CTF completed its review providing recommendations for Ordinance revisions. The Council, having reviewed the recommendations of the CTF and the Planning Commission, has directed staff to develop revisions to the Creeks Ordinance, which this Initial Study analyzes.

State laws protect and regulate open bodies of water; however, only the City of Berkeley’s regulations dictate land use regulations along creeks within the City limits. This continues to be the case with the recommended revisions, which increase regulations in some cases, specifically in relation to decks, bridges and paved surfaces, and provide greater flexibility for expansion and modification to legally non-conforming structures. The City acts as the lead agency and the local jurisdiction for the California Environmental Quality Act process and the Joint Aquatic Resources Permit Application (JARPA) process. The JARPA process allows an applicant to submit one project application for the requirements of the following agencies which carry out their own separate review process of a project in and near creeks: the Regional Water Quality Control Board, the State Department of Fish and Game, the US Corps of Engineers and the San Francisco Bay Conservation and Development Commission (SFBCDC). The authority of these other agencies may or may not exceed the regulations of the City and thus they may supersede the Creeks Ordinance regulations with more stringent controls.

Project

In summary, the proposed ordinance modifications would modify the strict prohibition of building within 30 feet of a creek. It would modify the existing BMC Chapter 17.08 Preservation and Restoration of Natural Watercourses, also known as the Creeks Ordinance, as follows:

- Revise the definition of a “creek” to incorporate existing administrative policies on the physical characteristics that determine whether a watercourse is a creek. Both open creeks and culverted creeks continue to be included in the “creek” definition.
- Change the current prohibition on building within 30 feet of the centerline of a culverted creek without a Variance as follows:
 - Building over or near a culvert will only require an over-the-counter permit (Creek Culvert Permit) issued by the City Engineer, governed by standards that protect the structural integrity

of the culvert, ensure continued culvert access for repair and maintenance by property owners, ensure that creek flow will not be impeded or polluted, and address issues where culverted creeks intersect with open creeks if applicable.

- Change the current prohibition on building within 30 feet of the centerline of an open creek without a Variance as follows:
 - Vertical expansion of existing buildings (up or down within the existing building footprint) that are located within the 30-foot setback will require an over-the-counter permit (Creek Permit) issued by the City Engineer, governed by standards will protect against negative impacts on the creek.
 - Additions to existing development that expand the building’s footprint within an area between 25 and 30 feet from the centerline of an open creek will require an Administrative Use Permit issued by the Zoning Officer¹ that includes criteria and findings designed to protect against adverse environmental effects to the creek.
 - Two options are being considered for development within the first 25 feet of the centerline of an open creek. One option is to continue the current requirement to obtain a Variance for such development. The other option is to require a Use Permit² issued by the Zoning Adjustments Board with strict criteria and findings that alternatives have been considered and have been determined infeasible, and that the creek is protected against adverse environmental effects.
- Add regulations for decks, impervious paving, and bridges, which are not currently regulated in the Creeks Ordinance, as follows:
 - Restrict where new and replaced decks may be placed within 30 feet of an open creek. New decks are only allowed within 10 feet of the creek centerline with a Variance, although a damaged or destroyed deck within this area could be restored with an Administrative Use Permit issued by the Zoning Officer that requires findings to protect the creek. Between 10 and 30 feet, decks will require an over-the-counter permit issued by the City Engineer, governed by standards will protect against negative impacts on the creek.
 - Prohibit new impervious paving within 10 feet of an open creek, except for footpaths and bridges and require all new paving to be pervious within 30 feet of an open creek centerline.
 - Establish a new standard for new and rebuilt bridges to ensure they meet clearance for a one in 100-year storm event to reduce chances of bridges becoming an obstruction during flooding events.
- The following amendments are proposed to the Zoning Ordinance:

¹ In accordance with the Zoning Ordinance procedures for Administrative Use Permits, but subject to findings contained in the Creeks Ordinance.

² In accordance with the Zoning Ordinance procedures for Use Permits, but subject to findings contained in the Creeks Ordinance

- Revise Section 23B.44.010, Variances, to 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.
- 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.

There are no potential adverse impacts that will result from the Zoning Ordinance amendments; therefore, this Initial Study only analyzes the Creeks Ordinance amendments.

9. Surrounding Land Uses and Setting: The City of Berkeley is a largely built-out city of approximately 110,000 people with structures dating from the late 19th century. Most of the City was built-out in the earlier part of the 20th century, and most new development that occurs in the City is “redevelopment” of previously developed property. The University of California is the dominant institution in Berkeley but is not subject to the City’s land use authority and therefore the Creeks Ordinance and subsequent creeks regulations do not apply to University property, although open creeks, such as Strawberry Creek, are found on University property.

All of Berkeley’s original natural creeks in the developed portions of the City (generally west of the East Bay Hills ridgeline) have been either significantly modified or have been filled and/or placed in culverts. There are virtually no remaining unmodified natural creeks in the areas subject to the existing or proposed ordinance. Under the existing ordinance, a creek was very broadly defined to include waterways – whether open or culverted – that remain in their historic location. The regulations of the existing ordinance do not distinguish between culverted and open creeks.

As part of reviewing the ordinance, the City undertook an analysis of the existing open creek environment. A March 14, 2006 memo from Balance Hydrologics³ (the lead consultant) summarized the findings of the analysis. The consultants found that two-thirds of the primary roofed structures on the sites sampled did not conform to a 30-foot setback requirement. It further found that over three-quarters of the sites sampled had decks and patios within 30 feet, and 96 percent had impervious surfaces within 30 feet of a creek. The analysis concluded:

Biological values appear to be relatively poor in the majority of reaches we sampled. Moreover, many of these reaches are severely impacted by existing development such that re-establishment of any significant biological or habitat value will be very difficult. Exceptions

³ Balance Hydrologics, Inc., “Summary of Data and Conclusions: Possible Revision of the City of Berkeley Creeks Setback Ordinance” memo to Wendy Cosin of March 14, 2006

include lower Cordornices and Strawberry Creek where there are opportunities for significant restoration.

10. Other public agencies whose approval is required:

The City of Berkeley acts as the lead agency and the local jurisdiction for the California Environmental Quality Act process. The ordinance modifications being considered in this Initial Study relate to land use regulations near creeks. Other agencies regulate development in and immediately adjacent to creeks. In particular, the California Department of Fish and Game has responsibility for permits for structures within the banks of a creek or over creeks. The Army Corps of Engineers sometimes claims jurisdiction involving fill within a wetlands/waterway. The Regional Water Quality Control Board reviews permits that may have an impact on water quality. The proposed ordinance modifications do not supersede the authority of these agencies to regulate development within their areas of identified jurisdiction nor does the ordinance relieve property owners of responsibility to obtain appropriate permits from those agencies, should they be required. The City's regulations are an additional level of regulation in addition to any regulations and requirements of these other agencies.

INITIAL STUDY CHECKLIST

ENVIRONMENTAL FACTORS POTENTIALLY AFFECTED:

The environmental factors checked below would be potentially affected by this project, involving at least one impact that is a "Potentially Significant Impact" as indicated by the checklist on the following pages.

- | | | |
|--|---|---|
| <input type="checkbox"/> Aesthetics | <input type="checkbox"/> Agriculture Resources | <input type="checkbox"/> Air Quality |
| <input checked="" type="checkbox"/> Biological Resources | <input type="checkbox"/> Cultural Resources | <input type="checkbox"/> Geology /Soils |
| <input type="checkbox"/> Hazards & Hazardous Materials | <input checked="" type="checkbox"/> Hydrology / Water Quality | <input checked="" type="checkbox"/> Land Use / Planning |
| <input type="checkbox"/> Mineral Resources | <input type="checkbox"/> Noise | <input type="checkbox"/> Population / Housing |
| <input type="checkbox"/> Public Services | <input type="checkbox"/> Recreation | <input type="checkbox"/> Transportation/Traffic |
| <input type="checkbox"/> Utilities / Service Systems | <input type="checkbox"/> Mandatory Findings of Significance | |

DETERMINATION

On the basis of this initial evaluation:

I find that the proposed project COULD NOT have a significant effect on the environment, and a NEGATIVE DECLARATION will be prepared.	<input checked="" type="checkbox"/>
I find that although the proposed project could have a significant effect on the environment, there will not be a significant effect in this case because revisions in the project have been made by or agreed to by the project proponent. A MITIGATED NEGATIVE DECLARATION will be prepared.	<input type="checkbox"/>
I find that the proposed project MAY have a significant effect on the environment, and an ENVIRONMENTAL IMPACT REPORT is required.	<input type="checkbox"/>
I find that the proposed project MAY have a “potentially significant impact” or “potentially significant unless mitigated” impact on the environment, but at least one effect 1) has been adequately analyzed in an earlier document pursuant to applicable legal standards, and 2) has been addressed by mitigation measures based on the earlier analysis as described on attached sheets. An ENVIRONMENTAL IMPACT REPORT is required, but it must analyze only the effects that remain to be addressed.	<input type="checkbox"/>

I find that although the proposed project could have a significant effect on the environment, because all potentially significant effects (a) have been analyzed adequately in an earlier EIR or NEGATIVE DECLARATION pursuant to applicable standards, and (b) have been avoided or mitigated pursuant to that earlier EIR or NEGATIVE DECLARATION, including revisions or mitigation measures that are imposed upon the proposed project, nothing further is required.



Planning Director

Date

Initial Study prepared by: Wendy Cosin, Deputy Planning Director
City of Berkeley
2120 Milvia Street
Berkeley CA 94704

CheckList

I. AESTHETICS -- Would the project⁴:

- a) Have a substantial adverse effect on a scenic vista? [] [] [] [x]

Not applicable. The proposed project is a modification of the City's regulations related to land uses adjacent to creeks. Although it may affect the development of structures along creeks, it will not in itself create development. The impact of the revised regulations on development will not affect scenic vistas.

- b) Substantially damage scenic resources, including, but not limited to, trees, rock outcroppings, and historic buildings within a state scenic highway? [] [] [] [x]

Not applicable. There are no State Scenic Highways within the City of Berkeley. Therefore the project will have no effect. [Ref. 1]

- c) Substantially degrade the existing visual character or quality of the site and its surroundings? [] [] [] [x]

The proposed project is a modification of the City's regulations related to land uses adjacent to creeks. Although it may affect the development of structures along creeks, it will not in itself create development. The revised regulations maintain a required setback from open creeks and therefore development would not degrade existing visual character or quality of the sites surrounding creeks.

- d) Create a new source of substantial light or glare which would adversely affect day or nighttime views in the area? [] [] [] [x]

Not applicable. The proposed project is a modification of the City's regulations related to land uses adjacent creeks. Although it may affect the development of structures along creeks, it will not in itself create development. The impact of the revised regulations on development will not affect light or glare in any way.

II. AGRICULTURE RESOURCES: In determining whether impacts to agricultural resources are significant environmental effects, lead agencies may refer to the California Agricultural Land Evaluation and Site Assessment Model (1997) prepared by the California Dept. of Conservation as an optional model to use in assessing impacts on agriculture and farmland. Would the project:

- a) Convert Prime Farmland, Unique Farmland, or Farmland of Statewide Importance (Farmland), as shown on the maps prepared pursuant to the Farmland Mapping and Monitoring Program of the California Resources Agency, to non-agricultural use? [] [] [] [x]

- b) Conflict with existing zoning for agricultural use, or a Williamson Act contract? [] [] [] [x]

⁴The headers of column check boxes are defined as follows: PSI : Potentially Significant Impact, <SWM : Less Than Significant With Mitigation, LS : Less Than Significant Impact, ⊘ : No Impact

- c) Involves other changes in the existing environment which, due to their location or nature, could result in conversion of Farmland, to non-agricultural use?

Responses II a-c: Not applicable, according to the *Adopted General Plan* (2001-2002) there are no significant agricultural resources in Berkeley. None are shown in that document’s Existing Land Use Map and the Land Use Diagram. Further, the *Land Management Element* states that “Agriculture in Berkeley is limited to personal and community gardens.” (Ref 1)

III. AIR QUALITY -- Where available, the significance criteria established by the applicable air quality management or air pollution control district may be relied upon to make the following determinations. Would the project:

- a) Conflict with or obstruct implementation of the applicable air quality plan?
- b) Violate any air quality standard or contribute substantially to an existing or projected air quality violation?
- c) Result in a cumulatively considerable net increase of any criteria pollutant for which the project region is non- attainment under an applicable federal or state ambient air quality standard (including releasing emissions which exceed quantitative thresholds for ozone precursors)?
- d) Expose sensitive receptors to substantial pollutant concentrations?
- e) Create objectionable odors affecting a substantial number of people?

Responses III a-e: Not applicable. The proposed project is a modification of the City’s regulations related to land uses adjacent creeks. Although it may affect the development of structures along creeks, it will not in itself create development. The impact of the revised regulations on development will not affect air quality in the City.

IV. BIOLOGICAL RESOURCES -- Would the project:

- a) Have a substantial adverse effect, either directly or through habitat modifications, on any species identified as a candidate, sensitive, or special status species in local or regional plans, policies, or regulations, or by the California Department of Fish and Game or U.S. Fish and Wildlife Service?

The City’s General Plan Draft Environmental Impact Report (pages 231-232) indicates that there are no candidate, sensitive or special status species of plant or animal that have been identified as inhabiting or potentially inhabiting Berkeley’s riparian habitat areas in the urbanized portion of the City (to the degree species have been identified, they are in the wildland areas on the eastern edges of the City). More recent

studies⁵ have looked at Steelhead migration. An assessment of Codornices Creek conducted by Kier Associates between fall 2001 and summer 2003 determined that there are steelhead in Codornices Creek, and steelhead did spawn and produce young-of-the-year fish in each of the two study years. Other observations of steelhead have been reported (between the railroad tracks and San Pablo Avenue) during surveys conducted by Rana Resources in 2001 as part of the Lower Cordonices Creek Improvement Plan. Although the California red-legged frog can generally be found in riparian habitats with deep pools and dense riparian or emergent vegetation, there have not been reports of this threatened species in Berkeley. Finally, an Environmental Impact Report (EIR) was prepared for the University Village and Albany Northwest Berkeley Properties Master Plan project concluded that suitable habitat exists in lower Codornices Creek for the western pond turtle; however, none have been sighted.

As noted in the “Setting” section, much of Berkeley’s creek environments are highly disturbed and have relatively poor water quality. The proposed ordinance provides minor modifications to existing regulations in regard to development near these urban creeks, but would not lead to any significant changes in existing habitat conditions. The existing 30-foot setback from the centerline of an open creek would generally be maintained under the new regulations. Any new roofed structures approved within this area would need to meet criteria designed to protect against adverse environmental effects to the creek. The ordinance may improve habitat conditions by reducing the amount of impervious surfaces near creeks, and limiting encroachment near creeks of structures such as decks, thereby generally increasing habitat area. However, these changes are comparatively minor and, given the generally poor habitat conditions already extant along Berkeley’s creeks, species habitat will not be significantly modified by the proposed ordinance.

- b) Have a substantial adverse effect on any riparian habitat or other sensitive natural community identified in local or regional plans, policies, regulations or by the California Department of Fish and Game or US Fish and Wildlife Service?

As described in the “setting” section of the DEIR for the General Plan, the habitat near all of Berkeley’s remaining open creeks has been significantly modified, including intrusion by mostly non-native vegetation, grading and terracing of banks, existing structures including homes, accessory structures, decks, patios, parking and paving, and other modifications to habitat. As described in the City’s evaluation of existing conditions, existing riparian habitat values are poor. The ordinance would significantly modify regulations regarding development near enclosed culverted creeks by substituting an administrative process for the existing Variance requirement. However, enclosed culverted creeks generally do not have associated riparian areas and, therefore, no impact is anticipated.

⁵ City of Albany. “Cordonices Creek Improvements Plan Draft Initial Study and Proposed Mitigated negative Declaration”, March 4, 2004; University of California, Berkeley, “Subsequent Focused EIR for the University Villally and Albany/Northwest Berkeley Properties Master Plan Amendments”, January 30, 2004; City of Albany, “Albany Cleveland/Eastshore Redevelopment Plan Target Store Preliminary Environmental Assessment”, 2003

The proposed modifications may improve existing riparian habitat by adding new provisions that would prohibit some types of structures and impervious surfaces in close proximity to open creeks, where no such regulations currently exist. For properties adjacent to open creeks, the ordinance would allow additions to existing non-conforming homes within an existing footprint. While such additions may have minor construction impacts, there would be no further encroachment into the habitat area, and the ordinance includes criteria designed to protect against adverse environmental effects to the creek, including potential impacts from construction. The impacts of allowing additions on existing footprints impacts would therefore be very minor and temporary.

Finally, the ordinance would allow existing non-conforming roofed structures to encroach five additional feet into the 30-foot setback on open creeks by Administrative Use Permit under very limited circumstances. The ordinance also includes an option for development to be allowed within the 30-foot setback with a Use Permit, rather than Variance as is currently required. In both cases, the ordinance explicitly requires findings to ensure that the project would not adversely affect the creek or riparian area and also stipulates that conditions can be imposed to mitigate impacts. Given the low value and highly disturbed nature of the existing habitat, and the highly limited circumstances where such encroachments would be allowed, the impacts of such additions should be very minor and would be addressed by the standards included in the ordinance. With new regulations related to impervious surfaces and decks that currently are not regulated in any manner, the revised ordinance taken as a whole will provide greater protection to the riparian habitat adjacent to creeks.

- c) Have a substantial adverse effect on federally protected wetlands as defined by Section 404 of the Clean Water Act (including, but not limited to, marsh, vernal pool, coastal, etc.) through direct removal, filling, hydrological interruption, or other means?

The regulations prohibit certain types of development, not previously regulated, in close proximity to creeks to reduce potential impacts on creeks and water quality. The revised ordinance continues to regulate development within a 30-foot setback. It does not explicitly allow any type of development that might lead to fill in a wetland, nor does it supercede existing regulations by other agencies related to fill in wetlands areas. There may be some very rare, unforeseen circumstance where the proposed revised ordinance would allow replacement of existing fill for an existing encroaching building footprint (to support new construction over that footprint), but this would be a highly speculative circumstance, would still be regulated under applicable State and federal requirements and would in any case not be a significant new impact because it would not expand an existing footprint.

- d) Interfere substantially with the movement of any native resident or migratory fish or wildlife species or with established native resident or migratory wildlife corridors, or impede the use of native wildlife nursery sites?

See IV a, above, for detail on migratory fish and wildlife. In general, as described in the “setting” section of the General Plan DEIR, the habitat near all of Berkeley’s remaining open creeks has been significantly modified, including intrusion by mostly non-native vegetation, grading and terracing of banks, existing structures including homes, accessory structures, decks, patios, parking and paving, and other modifications



to habitat. As described in the evaluation of existing conditions prepared for the City by Balance Hydrologics, existing habitat values are poor.

The proposed ordinance modifications would potentially improve existing habitat by adding new provisions that would prohibit some types of structures and impervious surfaces in close proximity to an open creek, where no such regulations currently exist. The ordinance would significantly modify setback requirements from enclosed culverted creeks; however, enclosed culverted creeks do not have associated riparian areas and potential development would not interfere with any movement within the culvert. The ordinance does not modify the existing prohibition of further culverting of creeks that could interfere with migratory habitat of aquatic species.

As described in more detail in IV b and c, above, with new regulations related to impervious surfaces and decks which currently are not regulated in any manner, the revised ordinance taken as a whole will provide greater protection to the existing habitat adjacent to creeks and improve water quality related to any aquatic species.

- e) Conflict with any local policies or ordinances protecting biological resources, such as a tree preservation policy or ordinance?

The General Plan encourages enhancement and improvement of creek habitat. As described under IV b-d, the proposed ordinance will have a net beneficial impact on habitat and water quality, consistent with the General Plan and other City policies.

- f) Conflict with the provisions of an adopted Habitat Conservation Plan, Natural Community Conservation Plan, or other approved local, regional, or state habitat conservation plan?

Not Applicable. There are no adopted habitat conservation plans or natural community conservation plans in Berkeley or in adjacent communities that could be affected.

V. CULTURAL RESOURCES -- Would the project:

- a) Cause a substantial adverse change in the significance of a historical resource as defined in 15064.5?
- b) Cause a substantial adverse change in the significance of an archaeological resource pursuant to 15064.5?
- c) Directly or indirectly destroy a unique paleontological resource or site or unique geologic feature?
- d) Disturb any human remains, including those interred outside of formal cemeteries?

Responses V a-d: Not applicable. The proposed project is a modification of the City’s regulations related to land uses adjacent to creeks. Although it may affect the development of structures along creeks, it will not in itself increase create development. The impact of the revised regulations on development will not affect cultural resources in the City.

VI. GEOLOGY AND SOILS -- Would the project:

- | | | | | | |
|------|---|--------------------------|--------------------------|--------------------------|-------------------------------------|
| a) | Expose people or structures to potential substantial adverse effects, including the risk of loss, injury, or death involving: | | | | |
| i) | Rupture of a known earthquake fault, as delineated on the most recent Alquist-Priolo Earthquake Fault Zoning Map issued by the State Geologist for the area or based on other substantial evidence of a known fault? Refer to Division of Mines and Geology Special Publication 42. | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input checked="" type="checkbox"/> |
| ii) | Strong seismic ground shaking? | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input checked="" type="checkbox"/> |
| iii) | Seismic-related ground failure, including liquefaction? | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input checked="" type="checkbox"/> |
| iv) | Landslides? | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input checked="" type="checkbox"/> |
| b) | Result in substantial soil erosion or the loss of topsoil? | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input checked="" type="checkbox"/> |
| c) | Be located on a geologic unit or soil that is unstable, or that would become unstable as a result of the project, and potentially result in on- or off-site landslide, lateral spreading, subsidence, liquefaction or collapse? | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input checked="" type="checkbox"/> |
| d) | Be located on expansive soil, as defined in Table 18- 1-B of the Uniform Building Code (1994), creating substantial risks to life or property? | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input checked="" type="checkbox"/> |
| e) | Have soils incapable of adequately supporting the use of septic tanks or alternative waste water disposal systems where sewers are not available for the disposal of waste water? | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input checked="" type="checkbox"/> |

Responses VI a-e: Not Applicable. The proposed project is modification of the City’s regulations related to land uses adjacent creeks. Although it may affect the development of structures along creeks, it will not in itself create development. The impact of the revised regulations on development will not affect geologic conditions in the City or expose residents to new impacts. The proposed change to the process for building near or over a creek culvert specifically requires an analysis of bearing strength of the soil and the structural integrity of the culvert. Newly required findings for approval of additions and decks require analysis to ensure that development would not create, exacerbate, or prevent the abatement of, erosion and bank de-stabilization problems.

VII. HAZARDS AND HAZARDOUS MATERIALS -- Would the project:

- | | | | | | |
|----|---|--------------------------|--------------------------|--------------------------|-------------------------------------|
| a) | Create a significant hazard to the public or the environment through the routine transport, use, or disposal of hazardous materials? | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input checked="" type="checkbox"/> |
| b) | Create a significant hazard to the public or the environment through reasonably foreseeable upset and accident conditions involving the release of hazardous materials into the environment? | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input checked="" type="checkbox"/> |
| c) | Emit hazardous emissions or handle hazardous or acutely hazardous materials, substances, or waste within one-quarter mile of an existing or proposed school? | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input checked="" type="checkbox"/> |
| d) | Be located on a site which is included on a list of hazardous materials sites compiled pursuant to Government Code Section 65962.5 and, as a result, would it create a significant hazard to the public or the environment? | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input checked="" type="checkbox"/> |
| e) | For a project located within an airport land use plan or, where such a plan has not been adopted, within two miles of a public airport or public use airport, would the project result in a safety hazard for people residing or working in the project area? | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input checked="" type="checkbox"/> |
| f) | For a project within the vicinity of a private airstrip, would the project result in a safety hazard for people residing or working in the project area? | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input checked="" type="checkbox"/> |
| g) | Impair implementation of or physically interfere with an adopted emergency response plan or emergency evacuation plan? | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input checked="" type="checkbox"/> |
| h) | Expose people or structures to a significant risk of loss, injury or death involving wildland fires, including where wildlands are adjacent to urbanized areas or where residences are intermixed with wildlands? | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input checked="" type="checkbox"/> |

Responses VII a-h: Not Applicable. The proposed project is a modification of the City’s regulations related to land uses adjacent to creeks. Although it may affect the development of structures along creeks, it will not in itself create development. The impact of the revised regulations on development will not affect hazards or hazardous materials in the City.

VIII. HYDROLOGY AND WATER QUALITY -- Would the project:

- | | | | | | |
|----|--|--------------------------|--------------------------|-------------------------------------|--------------------------|
| a) | Violate any water quality standards or waste discharge requirements? | <input type="checkbox"/> | <input type="checkbox"/> | <input checked="" type="checkbox"/> | <input type="checkbox"/> |
|----|--|--------------------------|--------------------------|-------------------------------------|--------------------------|

The proposed ordinance modifications regulate development near creeks. As noted earlier, new provisions would allow modification of existing non-conforming structures (within the existing footprint) that are located within 30 feet of a creek, and would allow new encroachments to within 25 feet of a creek for an existing non-conforming building. Construction of buildings in these locations could lead to temporary construction impacts, including erosion into creeks and disturbance of soils with contaminants that could enter into the creek during construction activity, if appropriate construction mitigations are not instituted. However, the proposed ordinance requires a finding that construction activities will not degrade water quality from increased sedimentation and particulates from disturbed soils; pollution from motor oil; or

from the generally high level of toxics and trash around construction sites, as well as other findings that protect water quality. Accordingly, there should be no violation of water quality standards or waste discharge requirements.

- b) Substantially deplete groundwater supplies or interfere substantially with groundwater recharge such that there would be a net deficit in aquifer volume or a lowering of the local groundwater table level (e.g., the production rate of pre-existing nearby wells would drop to a level which would not support existing land uses or planned uses for which permits have been granted)?

The City of Berkeley does not rely on existing groundwater supplies. The proposed ordinance would regulate development near existing creeks, but as described in Sections IV b-d, there should be a net decrease in impervious surfaces near creeks as a result of new regulations prohibiting new impervious surfaces; thereby very slightly increasing opportunities for recharge.

- c) Substantially alter the existing drainage pattern of the site or area, including through the alteration of the course of a stream or river, in a manner which would result in substantial erosion or siltation on- or off-site?

The Ordinance revisions do not change existing requirements regulating alterations of creeks, including the existing prohibition of culverting open creeks. The Ordinance revisions strengthen regulations prohibiting impermeable surfaces within 30 feet of an open creek centerline in order to further reduce potential increases in surface water and sheet flows that could lead to erosion.

- d) Substantially alter the existing drainage pattern of the site or area, including through the alteration of the course of a stream or river, or substantially increase the rate or amount of surface runoff in a manner which would result in flooding on- or off-site?

As noted under V c and IV b-d, the ordinance allows for minor modifications to structures near creeks in an already highly disturbed creek environment. These minor modifications would not “substantially alter existing drainage patterns”. Moreover, the revised ordinance would lead to a net reduction in impervious surfaces and restoration of habitat that should lead to a very small net benefit in regard to slowing run-off and reducing the potential for flooding on and off-site. Required findings for approval of a creek permit or administrative use permit include: “the project will not increase stormwater runoff into the creek”.

- e) Create or contribute runoff water which would exceed the capacity of existing or planned stormwater drainage systems or provide substantial additional sources of polluted runoff?

The ordinance relates to modifications of land use regulations near creeks. While it would permit very small increases in roofed area under very limited circumstances near creeks, it would also decrease impervious surfaces near creeks. Overall, the ordinance should lead to a net benefit relative to reducing the amount and speed of drainage, and reduce sources of polluted runoff. Required findings for approval of a creek permit or administrative use permit include: “the project will not increase stormwater runoff into the

creek”. As noted above, the ordinance also includes a requirement for findings to ensure that construction impacts will not adversely affect water quality.

- f) Otherwise substantially degrade water quality?

The ordinance relates to modifications of land use regulations near creeks. By potentially decreasing impervious surfaces, the ordinance may lead to a net benefit relative to reducing the amount and speed of drainage, and reduce sources of polluted runoff. The proposed ordinance requires a finding that construction activities will not degrade water quality from increased sedimentation and particulates from disturbed soils; pollution from motor oil; or from the generally high level of toxics and trash around construction sites, as well as other findings that protect water quality.

- g) Place housing within a 100-year flood hazard area as mapped on a federal Flood Hazard Boundary or Flood Insurance Rate Map or other flood hazard delineation map?

The proposed ordinance does not change any requirements regarding construction within the 100-year flood hazard area. Any new development that would be proposed within the flood hazard area would be subject to environmental review and mitigations as necessary.

- h) Place within a 100-year flood hazard area structures which would impede or redirect flood flows?

The proposed ordinance does not change any requirements regarding construction within the 100-year flood hazard area. Any new development that would be proposed within the flood hazard area would be subject to environmental review and mitigations as necessary.

- i) Expose people or structures to a significant risk of loss, injury or death involving flooding, including flooding as a result of the failure of a levee or dam?

Any new development that would be proposed within the flood hazard area would be subject to environmental review and mitigations as necessary. There are no levee’s or dams in Berkeley that would be affected by the ordinance change.

- j) Inundation by seiche, tsunami, or mudflow?

The proposed project is a modification of the City’s regulations related to land uses adjacent to creeks. Although it may affect the development of structures along creeks, it will not in itself create development. The impact of the revised regulations on development will not lead directly to development that may be affected by a tsunami or seiche. While mudflows may occur along creeks (especially during seismic events), there is no history of mudflows in Berkeley and in any case the proposed ordinance change would have very minor impacts on the potential for properties to be affected by any possible mudflows. Therefore, assessing the impacts of the ordinance would be highly speculative at best.

IX. LAND USE AND PLANNING - Would the project:

- a) Physically divide an established community?

Responses IX a: Not Applicable. The proposed project is modification of the City’s regulations related to land uses adjacent to creeks. Although it may affect the proximity of structures along creeks on developed lots, nothing in the ordinance would lead to development that may physically divide an established community.

- b) Conflict with any applicable land use plan, policy, or regulation of an agency with jurisdiction over the project (including, but not limited to the general plan, specific plan, local coastal program, or zoning ordinance) adopted for the purpose of avoiding or mitigating an environmental effect?

The City’s General Plan includes one specific policy and several actions related to the protection and restoration of creeks:

Policy EM-27 states:

Whenever feasible, daylight creeks by removing culverts, underground pipes, and obstructions to fish and animal migrations.

There are no proposed changes to the existing Creek Ordinance regarding daylighting. The existing ordinance states: “It is in the interest of the City of Berkeley to encourage the removal of culverts and channels, prevent channel riprapping, and to restore natural watercourses whenever safely possible”.

There are several specific actions under this policy, some related to daylighting, and others related to improving and sustaining the creek environment. In regard to daylighting, two actions are relevant:

C. Encourage daylighting of creeks on public lands as well as along creeks that are substantially open and accessible to the public.

Neither the existing nor the proposed ordinance address this issue.

D. Restrict development on or adjacent to existing open creeks. When creeks are culverted, restrict construction over creeks and encourage design solutions that respect or emphasize the existence of creek under the site.

The proposed ordinance modifications continue to restrict development on or adjacent to existing open creeks. It would permit existing buildings to be modified within an existing footprint, but only minor further encroachments under limited circumstances. The proposed ordinance requires information to be provided to the City Engineer prior to authorizing any work within 25 feet of a culverted creek. Engineering studies are required to ensure safety and access to the culverted creek for maintenance, as well as to ensure that the flow of the creek will not be impeded nor its water quality impaired. In addition, if the

culverted creek transitions to an open creek within fifteen feet of the proposed construction, the engineering studies have to document that the creek will not be adversely affected.

Several other actions in the General Plan relate to open creeks, including:

- A. *Seek funding sources to acquire and preserve land within creek corridors for restoration or daylighting.*

The revised ordinance does not specifically address this action.

- B. *Establish, where appropriate or feasible, pedestrian and bicycle paths along creek-side greenways to connect neighborhoods and commercial areas.*

The revised ordinance does not specifically address this action.

- E. *Ensure that creek daylighting proposals include appropriate landscaping, allowing for adequate access, and carefully consider the urban context, the impact on existing recreational spaces, and the economic impact on the property and nearby properties.*

The revised ordinance does not specifically address this action.

- F. *Work in cooperation with adjoining jurisdictions to jointly undertake creeks as part of urban open space, and to create creek-side transportation corridors for pedestrians and bicycles, as described in the 1995 JOINT Watershed Goals Statement.*

The revised ordinance does not specifically address this action.

- G. *Regulate new development within 30 feet of an exposed streambed as required by the Creeks Ordinance and minimize impacts on water quality and ensure proper handling of stormwater runoff by requiring a careful review of any public or private development or improvement project proposed in water sensitive areas.*

The revised Creeks Ordinance would continue to maintain a 30 foot setback from the centerline of an exposed streambed, except in very limited circumstances where some flexibility would be permitted when studies document that neither the creek nor stormwater runoff would be adversely affected by proposed development. In particular, required findings for approval of a creek permit or administrative use permit address stormwater runoff and water quality, including impacts from construction activities. In addition, the proposed modifications to the ordinance related to reducing impervious surfaces should lead to a slight reduction in stormwater pollutants entering the creek and, therefore, and improvement in water quality.

- H. *Consider amending the Creek Ordinance to restrict parking and driveways on top of culverts and within 30 feet of creeks.*

The proposed amendments do not address parking and driveways on top of culverts. The amendments do require surfaces near creeks to be of pervious materials to improve creek health.

- I. *Consider replacing culverts under streets with open bridging when feasible.*

While the Creeks Task Force has encouraged the City to review where it may be feasible to “daylight” creeks on public property (presumably including culverts that could be replaced by bridges), the ordinance revisions themselves do not explicitly address this action.

A second policy in the General Plan could be inferred to relate to creeks and their associated habitat areas, in addition to other natural areas within the City:

Policy EM-28 states:

Restore and protect valuable, significant, or unique natural habitat areas.

The proposed changes to the ordinance would continue to protect creek areas and would enhance protections to their habitat areas by requiring studies to document that construction will not adversely affect creeks or habitat, restricting impervious surfaces near creeks and requiring mitigation when development is occurring near creeks.

- c) Conflict with any applicable habitat conservation plan or natural community conservation plan?

Not Applicable. There are no adopted habitat conservation plans or natural community conservation plans in Berkeley or in adjacent communities that could be affected.

X. MINERAL RESOURCES -- Would the project:

- a) Result in the loss of availability of a known mineral resource that would be of value to the region and the residents of the state?
- b) Result in the loss of availability of a locally-important mineral resource recovery site delineated on a local general plan, specific plan or other land use plan?

Responses X a-b: Not Applicable. The proposed project is modification of the City’s regulations related to land uses adjacent creeks. There will not be any impact on mineral resources.

XI. NOISE -- Would the project result in:

- a) Exposure of persons to or generation of noise levels in excess of standards established in the local general plan or noise ordinance, or applicable standards of other agencies?
- b) Exposure of persons to or generation of excessive groundborne vibration or groundborne noise levels?
- c) A substantial permanent increase in ambient noise levels in the project vicinity above levels existing without the project?
- d) A substantial temporary or periodic increase in ambient noise levels in the project vicinity above levels existing without the project?

Responses XI a-d: Not Applicable. The proposed project is modification of the City’s regulations related to land uses adjacent creeks. There will not be any impact on noise levels in the City.

- | | | | | | |
|----|--|--------------------------|--------------------------|--------------------------|-------------------------------------|
| e) | For a project located within an airport land use plan or, where such a plan has not been adopted, within two miles of a public airport or public use airport, would the project expose people residing or working in the project area to excessive noise levels? | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input checked="" type="checkbox"/> |
| f) | For a project within the vicinity of a private airstrip, would the project expose people residing or working in the project area to excessive noise levels? | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input checked="" type="checkbox"/> |

Responses XI e-f: Not Applicable. There are no nearby airports or private air strips. The closest airport is Oakland International, which is approximately 7.5 miles from Berkeley (1).

XII. POPULATION AND HOUSING -- Would the project:

- | | | | | | |
|----|--|--------------------------|--------------------------|--------------------------|-------------------------------------|
| a) | Induce substantial population growth in an area, either directly (for example, by proposing new homes and businesses) or indirectly (for example, through extension of roads or other infrastructure)? | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input checked="" type="checkbox"/> |
| b) | Displace substantial numbers of existing housing, necessitating the construction of replacement housing elsewhere? | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input checked="" type="checkbox"/> |
| c) | Displace substantial numbers of people, necessitating the construction of replacement housing elsewhere? | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input checked="" type="checkbox"/> |

Responses XII a-c: Not Applicable. The proposed project is modification of the City’s regulations related to land uses adjacent creeks. Although it may affect the development of structures along creeks, it will not in itself increase the level of development in the City of Berkeley or lead directly to development that may increase the level of population or housing in the City.

XIII. PUBLIC SERVICES

Would the project result in substantial adverse physical impacts associated with the provision of new or physically altered governmental facilities, need for new or physically altered governmental facilities, the construction of which could cause significant environmental impacts, in order to maintain acceptable service ratios, response times or other performance objectives for any of the public services:

- | | | | | |
|--------------------------|--------------------------|--------------------------|--------------------------|-------------------------------------|
| Fire protection? | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input checked="" type="checkbox"/> |
| Police protection? | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input checked="" type="checkbox"/> |
| Schools? | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input checked="" type="checkbox"/> |
| Parks? | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input checked="" type="checkbox"/> |
| Other public facilities? | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input checked="" type="checkbox"/> |

Responses XIII: Not Applicable. The proposed project is modification of the City’s regulations related to land uses adjacent creeks. Although it may affect the development of structures along creeks, it will not in

itself increase the level of development in the City of Berkeley or lead directly to development that may affect public services in the City.

XIV. RECREATION

- a) Would the project increase the use of existing neighborhood and regional parks or other recreational facilities such that substantial physical deterioration of the facility would occur or be accelerated?
- b) Does the project include recreational facilities or require the construction or expansion of recreational facilities which might have an adverse physical effect on the environment?

Responses XIV a-b: Not Applicable. The proposed project is modification of the City’s regulations related to land uses adjacent creeks. Although it may affect the development of structures along creeks, it will not in itself increase the level of development in the City of Berkeley or lead directly to development that may affect recreational resources in the City.

XV. TRANSPORTATION/TRAFFIC -- Would the project:

- a) Cause an increase in traffic which is substantial in relation to the existing traffic load and capacity of the street system (i.e., result in a substantial increase in either the number of vehicle trips, the volume to capacity ratio on roads, or congestion at intersections)?
- b) Exceed, either individually or cumulatively, a level of service standard established by the county congestion management agency for designated roads or highways?
- c) Result in a change in air traffic patterns, including either an increase in traffic levels or a change in location that results in substantial safety risks?
- d) Substantially increase hazards due to a design feature (e.g., sharp curves or dangerous intersections) or incompatible uses (e.g., farm equipment)?
- e) Result in inadequate emergency access?
- f) Result in inadequate parking capacity?
- g) Conflict with adopted policies, plans, or programs supporting alternative transportation (e.g., bus turnouts, bicycle racks)?

Responses XV a-g: Not Applicable. The proposed project is modification of the City’s regulations related to land uses adjacent creeks. Although it may affect the development of structures along creeks, it will not in itself increase the level of development in the City of Berkeley or lead directly to development that may affect transportation or parking in the City.

XVI. UTILITIES AND SERVICE SYSTEMS -- Would the project:

a)	Exceed wastewater treatment requirements of the applicable Regional Water Quality Control Board?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
b)	Require or result in the construction of new water or wastewater treatment facilities or expansion of existing facilities, the construction of which could cause significant environmental effects?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
c)	Require or result in the construction of new storm water drainage facilities or expansion of existing facilities, the construction of which could cause significant environmental effects?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
d)	Have sufficient water supplies available to serve the project from existing entitlements and resources, or are new or expanded entitlements needed?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
e)	Result in a determination by the wastewater treatment provider which serves or may serve the project that it has adequate capacity to serve the project's projected demand in addition to the provider's existing commitments?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
f)	Be served by a landfill with sufficient permitted capacity to accommodate the project's solid waste disposal needs?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
g)	Comply with federal, state, and local statutes and regulations related to solid waste?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>

Responses XVI a-g: Not Applicable. The proposed project is modification of the City's regulations related to land uses adjacent creeks. Although it may affect the development of structures along creeks, it will not in itself increase the level of development in the City of Berkeley or lead directly to development that may affect utilities and service systems in the City. Reducing paving could likely lead to less storm water runoff inundating the City's storm water drainage facilities.

XVII. MANDATORY FINDINGS OF SIGNIFICANCE

- | | | | | | |
|----|---|--------------------------|--------------------------|--------------------------|-------------------------------------|
| a) | Does the project have the potential to degrade the quality of the environment, substantially reduce the habitat of a fish or wildlife species, cause a fish or wildlife population to drop below self-sustaining levels, threaten to eliminate a plant or animal community, reduce the number or restrict the range of a rare or endangered plant or animal or eliminate important examples of the major periods of California history or prehistory? | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input checked="" type="checkbox"/> |
| b) | Does the project have impacts that are individually limited, but cumulatively considerable? (Cumulatively considerable) means that the incremental effects of a project are considerable when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects)? | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input checked="" type="checkbox"/> |
| c) | Does the project have environmental effects which will cause substantial adverse effects on human beings, either directly or indirectly? | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input checked="" type="checkbox"/> |

The proposed project does not trigger any of the mandatory findings of significance. The project modifies City regulations related to land uses adjacent creeks. Although it may affect the development of structures along creeks, it will not in itself create development.

18. SOURCE REFERENCES

1. General Plan, City of Berkeley, Adopted 2001-2002
2. California Division of Aeronautics "California Airport Data"
3. Balance Hydrologics, "Creeks Task Force Background Report," April 17, 2006