



## **CITY COUNCIL AGENDA REPORT**

**Meeting Date:** November 5, 2020, 2020

**From:** John Swiecki, Community Development Director

**Subject:** Proposed Ordinance No. 579 Amending Titles 15 and 17 of the Municipal Code to Comprehensively Update the City's Grading Ordinance

### **Community Goal/Result**

Safe Community - Residents and visitors will experience a sense of safety

### **Purpose**

To update the City's grading ordinance.

### **Recommendation**

That the City Council introduce Ordinance 579.

### **Background**

In 2012/2013 the City initiated a comprehensive update of the grading ordinance, partially in response to a lawsuit settlement regarding approval of the Ng condominium project on Bayshore Boulevard in 2007. Based on the settlement, specific provisions were recommended to be incorporated into the grading ordinance including (a) enhancing existing fines and penalties for violations of the grading ordinance; (b) prohibiting removal of existing vegetation having habitat value without providing mitigation; and (c) requiring habitat restoration of graded areas within the jurisdiction of the Habitat Conservation Plan (HCP) that would decrease the presence of exotic / non-native plant species, as well as prevent erosion. A number of other revisions were proposed to reflect best technical practices and provide procedural clarity.

The draft ordinance was recommended for approval by the Planning Commission and went through multiple hearings by the City Council in 2013. It was tabled in 2013 as City efforts were focused on other issues, such as Brisbane Soil Processing and the Baylands. In order to finalize the ordinance it was reviewed and recommended for approval by the City Council Infrastructure Subcommittee in July, 2020 and has been scheduled for tonight's City Council hearing.

### **Discussion**

While the draft ordinance is substantively the same as was last presented in 2013, there were a few revisions that were presented to the Infrastructure Subcommittee. These are described in detail in the attached subcommittee report.

The most notable relates to the Planning Commission's role in grading. The current ordinance requiring the Planning Commission to "approve a permit" is legally problematic as outlined in the memorandum from City Legal Counsel in the attached Infrastructure Subcommittee report. The solution proposed in 2013 was to make the Commission's review advisory to the City Engineer, limit the Commission's review to grading for projects with a related discretionary permit, and establish defined criteria to focus the

Commission's review. While the proposed revisions eliminate the overarching legal problem, procedural and perception issues remain.

For example it creates the unusual situation where a public-appointed body is advisory to city staff. Additionally, the review criteria are problematic for a variety of reasons, including lack of objective standards and inconsistency with other provisions of the Municipal Code. As such it is recommended that formal Planning Commission review of grading permit applications be eliminated from the grading ordinance. Note that if a project otherwise under the Commission's jurisdiction (design permit, use permit, etc) involves grading, the Commission retains the authority to consider grading in making a decision on the discretionary permit under their purview.

One proposed revision that was not discussed at the Infrastructure Subcommittee relates to the appeal process. Under the current ordinance all grading permits are appealable to the Planning Commission and subsequently to the City Council. The proposed 2013 ordinance revisions modified this cumbersome process by making permits appealable to the City Manager and subsequently to the City Council. The proposed revision still leaves the City Council in the untenable position of making decisions on technical (not public policy) matters that pursuant to state law are within the purview of licensed professionals. Given the technical nature of grading, it is recommended that the final decision on grading permit appeals rest with the City Manager. There are other precedents in the Municipal Code (Massage Permits, Tree Removal Permits) where this is the case.

Lastly, in recognition of the fact that grading permits are ministerial and the applicant will be the party affected by/aware of the City Engineer's decision, the ordinance clarifies the appeal procedures are applicable to the applicant.

The Planning Commission reviewed the draft ordinance at its meeting of September 10, 2020. In its correspondence (Attachment 3), the Commission expressed opposition to the proposed revisions concerning its role in the grading permit review process.

A summary of these concerns and staff's responses are provided below:

The Planning Commission's major objection to the proposed revisions stems from eliminating the Commission's role in oversight of grading permit applications. That oversight is embedded in a 2013 guideline that reserves to the Commission the right to consider alternative grading plans for certain grading permits and empowers the Commission to reject projects proposing "unnecessary amounts of excavation" when in the opinion of the Commission such grading is contrary to the General Plan.

The 2013 Guideline Conflicts with State Law.

Regrettably, the referenced guidelines conflict with State Law, the Professional Engineers Act (Business and Professions Code, Sections 6700 and following). That law was enacted in order to safeguard life, health, property and the public welfare and requires any person who practices professional engineering to be qualified and licensed by the State. B & P Code, section 6730. A professional engineer refers to a person engaged in the professional practice of rendering service or creative work requiring education, training and experience in the engineering services and the application of special knowledge of the mathematical, physical and engineering sciences in such professional work as investigation, evaluation, or design of public or private projects. B & P Code, section 6701. Such engineering embraces grading specifically and therefore requires only licensed engineers to submit, and other licensed engineers to

evaluate, designs, plans and specifications and engineering reports for grading projects. B & P Code, section 6731. Without putting too fine a point on it, any person who engages in professional engineering without the required license to do so violates the law. B & P Code, section 6787 (a).

There is no conflict between the Commission's review of grading in the context of its review of certain land use entitlement applications and eliminating its review of all grading permit applications.

The Commission also sees a conflict between the State law set forth above and other State law provisions that permits the Commission the authority to consider grading in context of its review of certain land use entitlement applications, such as a conditional use permit or a subdivision map.

There is a substantial body of procedural as well as substantive law that provides guidance to Planning Commissions when it is acting in a quasi-judicial capacity. Quasi-judicial actions are those that involve application of preexisting laws or standards to a specific project, such as the Commission's consideration of a conditional use permit or a subdivision map. In those cases, certain procedural and due process requirements, such as notice and an opportunity to be heard--apply. Decision makers must be neutral and unbiased. Importantly, when these types of matters are before the Commission, it must make written findings to support its decision; the record must contain substantial evidence to support the findings, and the findings must in turn support the decision and be sufficiently detailed so as to bridge the analytical gap between the evidence and the final decision. Typically, such entitlements will be granted if the general welfare standards are not implicated, for example, the proposed use would not create noise, dust, odors, or other undesirable effects.

It is, therefore, in this much broader context that the Commission may properly consider proposed grading as part of its overall review of a particular project, including imposing conditions to mitigate any adverse impacts. Such review, however, does not entail the Commission's technical review of the grading permit application, which review currently is set forth in the guideline discussed above and comes into play as to any grading that exceeds 50 cubic yards. Accordingly, there is no conflict between the Commission's role when it is looking at the grading when it is acting in a quasi-judicial capacity and the State law provisions that prohibit the Commission from serving as a reviewer of the City's professional engineer's judgment.

City law grants decision making authority to remove City trees to the City Engineer.

As to trees in the public right of way, the Commission contends its general land use authority grants it the authority to review the City Engineer's determination as to whether a street tree must be removed. The ordinance, however, that the City Council has adopted makes clear that whether such trees should be removed is solely in the determination of the City Engineer, based on concerns of public safety. Section 12.12.030, Brisbane Municipal Code. The Commission's position as to why it should be involved in that decision is contrary to the ordinance.

Appeals to the Planning Commission concerning grading permit applications is also contrary to State law.

Finally, the Commission contends that appeals concerning the City Engineer's decision on grading permit applications should be heard by the Planning Commission/City Council. That contention, however, likewise places the Commission and Council in the same role as acting as professional engineers that, for the reasons set forth above, neither is authorized to do. Moreover, outside the land use context, the

Municipal Code routinely has appeals directed to the City Manager. See, for example, Section 8.10.160, BMC (revocation of massage establishment registration); Section 12.12.060, BMC (denial of tree removal permit on private property). This is fundamentally no different.

Staff recognizes the valuable role that the Planning Commission plays for the community and the City in evaluating land use projects. Removing the Commission's review of grading permit applications does not diminish that role and indeed the Commission will continue to have purview concerning grading when it is context of an overall land use entitlement application. For the reasons expressed above, staff continues to recommend the revisions to the grading ordinance concerning the Commission's role in reviewing grading permit applications.

**Fiscal Impact**

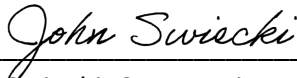
None

**Measure of Success**

Adoption of an updated grading ordinance

**Attachments**

1. Draft Ordinance 579
2. Infrastructure Subcommittee Report 7/29/20



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John Swiecki, Community Development Director



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Clay Holstine, City Manager