



MEMORANDUM

DATE: 27 August 2020

TO: Planning Commission

FROM: John Swiecki *JS*
Community Development Director

SUBJECT: Grading Ordinance Update

A comprehensive grading ordinance was initiated by the City some time ago. The matter was put on hold several years ago by the City Council. Earlier this month the City Council Infrastructure Subcommittee revisited the draft ordinance and recommended it be forwarded to the City Council for consideration. The full subcommittee agenda and report can be found here: <https://mccmeetings.blob.core.usgovcloudapi.net/brisbaneca-pubu/MEET-Packet-7cf7ad26c19d49a7a0a91c9999707f8a.pdf> Staff has attached excerpts from the larger packet for reference.

Several revisions to the draft ordinance were recommended as outlined in the attached materials. Notably the revised ordinance clarifies and modifies the Planning Commission's role in grading permit review. Specifically for any project that otherwise requires Planning Commission review (Design Permit, Use Permit, Variance etc.) the Commission will have the opportunity to review grading as part of the overall project. No unique findings for grading are required, rather the Commission may consider grading in making the findings for the requested permit. Commission review of grading will not be required in cases where the project is otherwise not subject to Planning Commission review.

This is being presented as an informational item only to the Commission.

Attachment
Excerpts from 7/29 Infrastructure Subcommittee Report



MEMORANDUM

DATE: 29 July 2020

TO: Infrastructure Subcommittee

FROM: Clay Holstine, City Manager

SUBJECT: **Grading Ordinance Update**

BACKGROUND

In 2012-2013 the City undertook 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 reviews 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.

Staff believes it is now timely to complete the process and adopt a revised ordinance. While staff remains supportive of the draft ordinance from 2013, there are several recommended revisions which are discussed below. Most of these are based on changes to procedures and regulations that have taken effect since 2013, or a second look at the statutory authority for the Planning Commission to review grading plans. Attached for reference are the ordinance last presented to the City Council in 2013 and a clean copy of the draft ordinance now proposed for adoption.

DISCUSSION

Planning Commission Review

The current ordinance requiring the Planning Commission to approve a permit is legally questionable for reasons outlined in the attached memo from City Legal Counsel. Experience also has shown practical difficulties as well as frequent confusion among the public and Planning Commissioners in understanding the scope of the Commission's review authority when grading permits are subject to Planning Commission review. The draft 2013 ordinance changed the procedure to limit the Planning Commission's role to making a recommendation to the City Engineer and establishing defined criteria to focus its review. While the proposed revisions eliminate the overarching legal problem, procedural and perception issues remain. Additionally,

as pointed out in the attached memo from legal counsel, the proposed review criteria are problematic for a variety of reasons, such as the lack of objective criteria. As such staff recommends that Planning Commission review of grading permit applications be eliminated from the grading ordinance. Note that if a project 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 overall project.

HCP Compliance

The draft 2013 ordinance specifies that Site Activity Review be obtained from the HCP Plan Operator prior to vegetation clearing within the HCP. In practice, the Plan Operator may authorize vegetative removal through various means, not limited to a Site Activity Review. It is recommended that Section 15.01.100 be revised to require Plan Operator approval without specifying the means by which such approval may be obtained.

On a related note the 2013 version of the ordinance included a series of prescriptive requirements for revegetation plans intended to minimize impacts on habitat values. While well-intended, there are some practical difficulties with the language as proposed. It is likely that most areas with habitat value will lie within the HCP area which means that approval from the Plan Operator will be required. The prescriptive requirements set forth in the ordinance may not have any relationship to the requirements imposed by the Plan Operator. It is unclear what legal or technical basis the City would have to impose requirements that differ from what is required under the HCP. For example, while the draft ordinance specifies that on-site mitigation is preferred, the Plan Operator does not generally support the creation of isolated habitat islands that lack connectivity; the Plan Operator prefers the enhancement and creation of meaningful habitat that is contiguous to existing resources. It is therefore recommended that the prescriptive revegetation requirements be deleted.

Enforcement

The City Council's policy direction has been that the fines for illegal grading provide a substantial financial incentive to encourage compliance, as opposed to representing a nominal penalty that constitutes the cost of doing business. City legal counsel is reviewing the penalty provisions set forth in the draft ordinance and will report back if revisions are recommended.

Attachments

City Legal Counsel Memo
2013 Redlined Ordinance
2020 Proposed Draft Ordinance

MEMORANDUM

Date: July 23, 2020
To: Members of the City Council Infrastructure Committee
From: Michael Roush, Legal Counsel
Subject: **Amendments to the Grading Ordinance Concerning the Planning Commission's Review of Grading Permit Applications**

Under the City's Grading Ordinance, the Planning Commission is to review and must approve certain grading permit applications. Staff is recommending that this provision of the Grading Ordinance be deleted because it conflicts with State law concerning who is authorized to review these types of applications. In addition, various revisions to the Grading Ordinance have been under discussion for several years now, including imbedding into the Ordinance the review criteria that the Planning Commission has (by policy) been applying and therefore in the future would apply when called upon to review a grading permit. Staff is recommending that these criteria not be included because the standards are vague, conflict with recent State legislation that require objective design standards relative to the City's review of residential projects, and/or are dealt with more comprehensively in other parts of the Municipal Code

The relevant section of the Grading Ordinance provides as follows:

"Where a grading permit is required by the provisions of this Chapter, it shall be obtained from the city engineer, except that grading permit approval by the planning commission shall be required in the event:

A. More than two hundred fifty (250) cubic yards of material is to be moved or planned to be moved in any single grading or excavation operation or if more than fifty (50) cubic yards of materials is to be exported from any single parcel of land."

Conflict with State Law

California law, (Business and Professions Code, sections 6700 – 6799; "Professional Engineers Act"), enacted in order to safeguard life, health, property and public welfare, ensures and requires any person practicing engineering to be qualified and licensed to practice engineering. A professional engineer includes a wide category of engineers including civil, electrical and mechanical. Only a professional engineer may, under law, evaluate public or private utilities and structures, as well as engineering submittals concerning grading permit applications.

Under the Brisbane Municipal Code, certain submittals are to be included with a grading permit application and those submittals must be prepared by a professional engineer licensed by the State. Those submittals include: a grading plan; soils engineering report (including hydrology reports), engineering geology reports (also including hydrology reports) and interim and final erosion control plans, including the calculation of pre- and post-development runoff. Section 15.01.090, BMC.

As set forth above, the Municipal Code also requires a grading permit from the planning commission under certain circumstances. The Code creates a very real situation where the Commission is called upon to evaluate or make decisions on the submittals prepared by a professional engineer. By requiring the Commission to make that type of evaluation and decision, it compels the Commission to engage in an activity that the Business and Professions Code expressly makes unlawful. Bus. & Prof. Code, sections 6785-6787 (a). The Code should not require the Commission to act in an unlawful manner and therefore this section of the Grading Ordinance must be deleted.

Grading permit submittals will continue to be thoroughly and carefully reviewed by the City Engineer to ensure that any significant amount of grading will be in compliance with sound engineering principles. That review, however, will properly be performed by someone who has the requisite training, skill, and license to do so.

Lack of Standards in the Proposed Amendments to the Grading Ordinance

The proposed amendments set forth certain review criteria that the Planning Commission is to apply when it reviews grading permit applications. Those standards are currently being applied by a policy that the Commission adopted some years ago. Those criteria, however, are vague and lack objective standards and therefore run contrary to the objective design standards that state law now requires when local agencies review residential development projects. For example, one criterion is that the grading must “fit comfortably” into the natural topography. Clearly, this is a highly subjective determination that would apply only in hillside residential areas and would certainly lead to claims that decisions were arbitrary and capricious.

Similarly, another design review criterion that the amendment would imbed in the Ordinance is the Planning Commission’s design review of retaining wall appearances and visual impacts. Leaving aside that no objective design standards are set forth for how the Commission is to make such determination, requiring the Commission to make that determination on a stand alone basis when the actual construction project is not before it is counter intuitive and, again, leads inexorably to decisions that are arbitrary and capricious.

Conflicting Authority

The proposed amendments also provide that in the Commission’s review of a grading permit application, it will consider retention and/or removal of trees on private property and street trees. Those matters, however, have been thoroughly vetted by the City Council in its earlier, comprehensive adoption of a separate ordinance concerning the preservation of trees in the community. Adding another layer of review is unnecessary, redundant and could lead to conflicting results. Moreover, the Commission has no authority over trees in the public right of way and therefore could create an unrealistic expectation of the Commission’s authority to retain (or remove) a street tree.

Retention of Planning Commission Authority

It should be noted that the proposed revisions address grading permits for projects that are otherwise not subject to Planning Commission review. For projects otherwise subject to Planning Commission review (design permits, use permits, variances, etc) that involve grading, the Commission retains the ability to consider grading in the context of the broader approval and required findings. This reflects a holistic and logical review process, as opposed to piecemeal review of grading on a stand alone basis.

Conclusion

Involving the Planning Commission in the review process of grading permit applications conflicts with State law and to eliminate that conflict, the section of the Grading Ordinance that provides for the Commission's review of such applications should be deleted. In addition, the proposed review criteria fail to meet the objective standards now required for review of residential development projects and/or are more comprehensively addressed elsewhere in the Code.

If the Committee has any questions or concerns on these matters before the Committee's meeting, please let me know.