

DATE ISSUED: September 10, 2001

REPORT NO. 01-189

ATTENTION: Council Committee on Natural Resources and Culture  
Agenda of September 19, 2001

SUBJECT: GRADING ACTIVITY ON SENSITIVE HABITAT  
AND CANYONS

REFERENCE: Christiansen / Samuels memorandum dated May 11, 2001;  
NR&C meeting of May 16, 2001

### SUMMARY

Issues - Should the Committee direct the City Manager to:

- a) Proceed to City Council with a series of modifications to the Municipal Code and modifications to procedures relating to enforcement and reporting of grading violations;
- b) Establish an educational outreach program for contractors and property owners adjacent to canyons and sensitive habitat areas; and
- c) Establish a City Division to manage open space resources?

Manager's Recommendations - Direct the City Manager to proceed with Item a as proposed in Attachment 1 of this report and implement Item b, the outreach program and other procedural modifications as proposed in this report. Direct the City Manager to return Item c to the Committee within 90 days with an analysis of the benefits to establishing a City Division to manage open space resources.

Other Recommendations - Per the direction of the Committee, this report's recommendations in draft form were forwarded to all interested parties who attended the meeting of May 16. Changes were made to the report based on citizen input received before the publication date.

Fiscal Impact - Additional enforcement of grading violations can be absorbed by modifying department operations. Workload increases to enforce grading violations will displace lower priority cases. Based on the level of enforcement activity experienced following the adoption of these new regulations, additional staff (Neighborhood Code Compliance Land Development Investigator, Development Services Biologist I) may be requested in FY 2003 if the workload merits such a request.

### BACKGROUND

On May 16, 2001, representatives from the Development Services and Neighborhood Code Compliance Departments appeared before the Committee in response to an inquiry received from Council member Madaffer relating to City policies regarding unapproved grading in sensitive habitat areas and canyons. Following the staff response, public testimony and discussion by the Committee, staff was directed to return within 60 to 70 days with a range of policy options for the Committee to consider. The policy options were to include, but were not limited to:

- .....Increasing fines and penalties for violations occurring on environmentally sensitive lands;  
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- .....Extending enforcement measures to include contractors, subcontractors and equipment operators;  
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- .....Developing a system for reporting and enforcing grading violations during non-business hours;  
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- .....Developing improved coordination between the Neighborhood Code Compliance, Development Services and Engineering Departments;  
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- .....Establishing an educational outreach program to contractors, property owners and others to familiarize them with the constraints associated with environmentally sensitive lands;  
and  
.....
- .....Establishing a City Division responsible for managing open space resources.

Staff was also directed to supply the Committee with a comparison of regulations and procedures used by other jurisdictions, and a history of violations acted on by the City in the past 3 to 5 years to determine the effectiveness of code enforcement methods.

## DISCUSSION

### Fines, Penalties and Enforcement

A...Increase Civil Penalties Limit for Administrative Enforcement Actions - Currently, the San Diego Municipal Code (SDMC) places a maximum limit of \$100,000 per parcel for any related series of Municipal Code violations enforced pursuant to a Civil Penalties Notice and Order. Staff recommends increasing the maximum limit to \$250,000. This increase in penalties would serve to deter violators yet still remain consistent with our municipal powers as a charter City.

.....A Civil Penalty Notice and Order is heard by an independent Hearing Officer to determine if the penalty assessed by the City is appropriate and to determine if evidence of the violation exists. Currently, none of the Hearing Officers have specific expertise in environmental or historical issues. Staff will work to secure Hearing Officers with this type of expertise.

B...Use Judicial Actions to Enforce Grading Violations - Illegal grading cases will continue to be referred to the City Attorney's Office for prosecution. The City Attorney is authorized to enforce violations criminally or civilly by an injunction. Where violators refuse to comply with Stop Work Orders, the City Attorney may need to immediately file an injunction to

compel compliance. Judicial actions against businesses allege unfair business practices as well as municipal code violations and result in a court order compelling compliance. Stiff fines are often imposed. Past cases include fines ranging from \$70,000 to over \$100,000, as well as payment for investigative costs. The court order typically requires the business to take out advertisements or develop educational materials to inform other businesses how to avoid violating the law.

C...Negligence Fine - After further review and consultation with the City Attorney, staff recommends additional modifications to the Civil Penalties ordinance rather than instituting a new fine. Staff believes this will still achieve the goals sought by this Committee. Therefore, in addition to the increased penalty limits described above, staff recommends that the following factors be added to SDMC Section 12.0805(c)(3) in order that the Enforcement Official can utilize these factors in the determination of the assessment of the penalty amount. See Attachment 1 for proposed ordinance amendments.

.....Recommended new factors:

Nature and seriousness of the violation.

Whether the offense impacted environmentally sensitive lands or historical resources.

Willfulness of the violators conduct.

Violators net worth, assets and liabilities.

D.Restoration and Remediation Fee - The current Municipal Code has provisions for the City to assess costs for field inspection and monitoring services at the sole cost of the responsible parties. A separate fee would therefore, be redundant. In the future, these costs could be assessed by the issuance of a Site Development Permit where the scope of work was limited to remediation only.

E.Prohibition of Future Development - With the adoption of the Land Development Code in January 2000, Section 143.0112 states in relevant part that “[if unlawful development occurs on property containing environmentally sensitive lands and an enforcement action has been commenced by the City pursuant to Section 143.0160, no development permit application may be processed until the enforcement action has been concluded.]” Based on the preceding language, the City already has the ability to prohibit future development on sites where violations have occurred until enforcement action, inclusive of repair and restoration as appropriate, is concluded. Currently, this provision of the Municipal Code is routinely applied to grading violators.

F.Contractors, Subcontractors, and Equipment Operators - In order to extend enforcement measures to include contractors, subcontractors, and equipment operators, staff recommends that the City institute the following:

Amending the Municipal Code (Chapter 12, Article 2, Division 1) to include provisions requiring that approved permits and plans be kept at the work site and made available to any City official upon request. Section 142.0145, Performance of Grading, could be

amended to add a separate subsection to state the following: “Compliance with the provisions of this division shall be evidenced by the availability, on site, of approved plans and a copy of a valid grading permit”.

Immediate reporting of contractors and equipment operators to the State Contractors Licensing Board when illegal grading is involved and requesting license suspension if the grading occurred in environmentally sensitive lands or historical resources, and license revocation if it is a repeat offender.

Failure to present and/or retain approved permits and plans on site and failure to comply with a Stop Work Order could result in Police intervention to have operators physically removed from the site.

G. After Hours Reporting - To report alleged grading violations during regular business hours, the Neighborhood Code Compliance Department (NCC) will be the primary and single point of contact. Calls coming in to other departments during business hours should be routed to NCC for processing. Investigations that include other City departments will be appropriately routed to them by NCC.

For after hours reporting, the Neighborhood Code Compliance Department will also be the primary contact. The public should call (619) 236-5500 (the NCC Complaint Intake Line) where they will be given instructions on how to report an alleged grading violation that is “in progress.” NCC will respond and initiate the investigation within 12 hours for alleged

violations that are reported after business hours, and within 4 hours for complaints reported during business hours.

H. Penalty Fees at Permit Issuance - The Development Services Department is responsible for collecting penalty fees at the time of permit issuance at the completion of enforcement actions taken by NCC for grading violations. These fees are double the amount charged for the same project where no violations of the Municipal Code have occurred. Coordination

between Development Services and NCC is assured through the exchange of information at monthly meetings which presently take place between the two departments. In the majority of cases, the issuance of grading permits follows the completion of a review of the project for compliance with Municipal Code requirements under a discretionary process. Development Services does, during the review process, coordinate with NCC to ensure that conditions requiring the payment of penalty fees are attached, as appropriate, to applicable discretionary permit requests.

#### After-the-Fact Permit Issuance

Past practice by the Development Services and Neighborhood Code Compliance Departments allowed persons who were working without a permit to obtain an after-the-fact permit as part of the compliance process. Criminal penalties were only applied in certain cases where public safety concerns or egregious violations were involved. The recent focus on grading violations has resulted in a change in this practice. Currently there is a mechanism in place which informs Development Services staff that permits may not be processed until the code enforcement action is completed.

#### Coordination Between Departments

There are a number of staff resources currently dedicated to handling issues regarding grading, environmental lands, and historical resources. To better coordinate staff activities in the event grading in environmentally sensitive lands has occurred, staff recommends that the Neighborhood Code Compliance Department convene a “Grading Violation Assessment Team (G-VAT).” The purpose of the G-VAT is to assess the damage, discuss the nature and seriousness of the violation, discuss appropriate enforcement actions, discuss potential corrective measures, and assign a case lead so as to have one point of contact for the public for each case. Future inquiries from the public regarding a specific case should then be referred to this case lead.

The team should include at a minimum one representative from the following:

Neighborhood Code Compliance Department;

Development Services Department (Permitting / Biologist);

Engineering and Capital Projects Department (Field Engineering / Inspection); and

Office of the City Attorney.

Multiple representatives from the same department may be appropriate. Also outside agencies (i.e., Caltrans, State Department of Fish and Game, the Regional Water Quality Control Board, the U.S. Army Corps of Engineers, the Coastal Commission, etc.) and other City departments (i.e., Planning, Transportation, Park and Recreation, Environmental Services, Metropolitan Waste Water etc.) may be called in on an ad hoc basis depending on the situation. In the event a new Open Space Division is created, it is anticipated that a representative from that division would be added as a standing member of the team.

The Development Services Department additionally has three staff assigned to Mitigation

Monitoring Coordination. This group's responsibility is to ensure that environmental mitigation measures which are conditions of discretionary projects approved by the City are implemented in the field as the project is developed, including pre-construction coordination with the Engineering Field Division and consultation with NCC on violations. Development Services also has an emergency environmental response team. This four member team responds to requests from the Water Department, MWWD and other City Departments who, due to emergencies, must make immediate repairs to City infrastructure and facilities in environmentally sensitive areas. These staff ensure that impacts to sensitive areas are minimized and that appropriate steps are taken to restore disturbed areas as quickly as possible.

#### Educational Outreach

The following proposals will be implemented within the next nine months to acquaint developers, contractors, homeowners and other interested parties of City regulations regarding sensitive lands:

- Development of a brochure (see Attachment 2 for draft) which will be available to contractors and to property owners informing them of potential development limitations their property may have because of its proximity to sensitive resources. The Fire Department will be requested to distribute this brochure as part of their distribution of material on brush management. This brochure will also be direct mailed to contractors and builders, and provided to environmental groups such as the Sierra Club, Friends of Canyons as well as professional organizations such as the Board of Realtors, BIA and geological, archeological and historic professionals. In addition, staff will research the feasibility of including brochure information in City water/sewer bills.

- Development of a video which will inform the general public of City regulations pertaining to environmentally sensitive areas. When completed, this video will be aired on the City Access Channel. It will cover content similar to the brochure and include examples of what environmentally sensitive lands look like, how to obtain additional information about environmentally sensitive lands, why these lands are important to the citizens of San Diego, and finally, what the potential penalties are for disturbing lands illegally.

- Information relating to development in sensitive areas will be added to the City's Web site on the Development Services, NCC and Engineering Department pages.

- Request the printing of articles in community newspapers and the Union Tribune on grading and development in sensitive areas.

- Outreach to equipment rental companies and home improvement stores requesting that they display brochures, developed by the City, which contain sensitive lands development limitations.

## Managing City Open Space Resources

During budget hearings, Council directed that a new Division or Department be created that would manage all City owned open space. Council's desire was to create an entity that would manage our open space for protection and enhancement purposes. A staff report regarding the possibility of creating this new division will be submitted to the Natural Resources & Culture Committee by the Park and Recreation Department Director for consideration at a future time.

Staff recommends that grading violations on privately-owned open space and environmentally sensitive lands continue to be enforced by the Neighborhood Code Compliance Department, per the recommendations outlined in this report.

## Enforcement Action History

The Neighborhood Code Compliance Department (NCC) opened 107 cases for alleged grading violations in the period from January, 1996 to May, 2001. Of the 107 cases, a majority (72) have been closed. As a random sampling, NCC reviewed 56 of the 72 cases that were closed. The closed cases fall into three main categories.

The largest category involved project sites that were either under permit or that required no permit due to the amount of grading taking place. Thirty-four cases were closed in this category. The second category were cases where either minimal grading occurred to increase useable yard area or retaining walls were constructed without encroachment into sensitive lands. Seven cases were closed in this category.

The third category involved fill dirt being brought onto a vacant lot in preparation for development. Ten cases involved the issuance of a Stop Work Order or Notice of Violation. Permits were later obtained and the violations were closed on eight cases. Of the two remaining cases, the fill material was removed from the site voluntarily; in the other, the fill was removed after the case was elevated to a Civil Penalty Notice and Order. Five of the cases were not under NCC's jurisdiction. These cases were under the jurisdiction of the City of La Mesa and the State of California.

There are currently 51 open cases involving alleged grading violations. Four of these cases have been submitted to the City Attorney's Office for formal enforcement actions. The other 47 cases are in various stages of enforcement action by NCC. The open cases highlighted in the Web page compiled by Carrie Schneider provide a representative sample of cases handled by the City of San Diego (see Attachment 3). The vast majority of violation cases are processed in a timely fashion where permits are obtained and there is minimal impact to the subject property as well as to surrounding neighbors and the environment. There are a number of cases however, that for a variety of reasons, cannot be resolved quickly and negatively impact residents and the environment until they can be brought into compliance.

## Additional Information

Prior to the May 16 Committee meeting, Development Services received a list of 12 sites where concerned citizen's groups believed unpermitted grading and disturbance of environmentally sensitive lands had occurred. Attachment 3 of this report supplies those sites to the Committee and provides a City response relating to whether violations have occurred on these properties. Attachment 4 contains a summary of what enforcement and penalty mechanisms other cities and counties in California use when illegal grading occurs in their jurisdiction.

## CONCLUSION

In analyzing NCC's past handling of cases and in working with the Development Services Department to prepare responses to the Web site, several general themes emerged. The enforcement remedies used in some cases did not provide for the most efficient and expeditious resolution of the grading violation. Additionally, the enforcement remedies did not always provide a disincentive to violate the Municipal Code from the onset. There has been some problems with coordination and in some cases conflicting information and direction to the property owner from the numerous departments that can and do become involved in land development issues. This report provides recommendations which should minimize these problems by providing a team specifically to deal with complaints and violations. Increased penalties and modified procedures should help to better protect environmentally sensitive lands in San Diego.

## ALTERNATIVES

1. Do not modify the San Diego Municipal Code.
2. Adopt selected items from the Manager's list of recommendations.

Respectfully submitted,

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Tina Christiansen, A.I.A.  
Development Services Director

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Marcia K. Samuels  
Neighborhood Code Compliance Director

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.....Approved: George I. Loveland  
..... Senior Deputy City Manager

TPC/MKS/RWD

Attachments:

1. Modifications to Code; Determination of Civil Penalties
2. Draft Brochure (Note: This version only includes current penalties, and will be revised based upon Council's decisions on any Ordinance changes.)
3. Staff Response to Purported Grading Violations
4. Comparison of Regulations