

DATE ISSUED: December 5, 2001

REPORT NO. 01-274

ATTENTION: Council Committee on Natural Resources and Culture  
Agenda of December 12, 2001

SUBJECT: GRADING ACTIVITY ON SENSITIVE  
HABITAT  
AND CANYONS

REFERENCE: Christiansen / Samuels memorandum dated May 11,  
2001;  
NR&C meetings of May 16, 2001 and September 19, 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; and
- b) Establish an educational outreach program for contractors and property owners adjacent to canyons and sensitive habitat areas.

Manager's Recommendations - Direct the City Manager to proceed with Item a as proposed in Attachments 2 and 3 and implement procedural modifications; and implement Item b, the outreach program.

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 September 19, 2001. Changes were made to the report based on citizen input received before the publication date.

Fiscal Impact - While additional enforcement of grading violations has in some part been absorbed by modifying department operations, workload increases to enforce grading violations have displaced other 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, Deputy City Attorney, Development Services Biologist I, Associate Engineer) may be requested in FY 2003 if the continued increase in 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 with a range of policy options for the Committee to consider. On September 19, 2001, the following staff recommendations were accepted:

An increase in the maximum limit for Administrative Civil Penalties to \$250,000;

Secure the services of an Administrative Hearing Officer that has expertise in environmental and historical regulations;

Continue the use of Judicial Actions to enforce grading violations;

Routinely assess costs for field inspection and monitoring services and make these costs the responsibility of the violator:

Enforcement of the Land Development Code (Section 143.0112) prohibiting future development permit processing until conclusion of enforcement actions;

Increased enforcement measures against contractors, subcontractors, and equipment operators including: requirement that approved permits and plans be kept at the work site; and reporting of grading violations to the State Contractors Licensing Board;

Implementation of an "after hours" reporting system by the Neighborhood Code Compliance Department;

Creation of the Grading Violation Assessment Team (G-VAT) as the coordination vehicle for handling grading violations; and

Educational outreach program including: development of an informational brochure and video; addition of grading information on the City's web site; articles in community newspapers and the Union Tribune on grading and development in sensitive areas; and outreach to equipment rental companies and home improvement stores. In addition staff recommends distributing the brochure to engineering firms, to surrounding cities, and to agencies that routinely

perform grading activity in San Diego ( e.g., CalTrans, County Water Authority, etc.).

On September 19<sup>th</sup>, the Development Services and Neighborhood Code Compliance Departments were also directed to return to the Committee with a follow-up report considering:

- A. The proposed language changes to the Land Development Code as listed in Clairemont Mesa Planning Committee's September 18, 2001 letter (Attachment A and Supplement to Attachment C);
- B. Mandatory minimum penalties and non-discretionary fines for large scale grading violations, including delineated penalties that quantify extent and amount of damage;
- C. Analysis of collecting penalty fees at the completion of enforcement actions and potential future allocations for those fines collected;
- D. Pursue the proposed educational program by City staff with sufficient outreach to building contractors and to look at the potential for preconstruction conferences;
- E. Several alternatives for establishing an Open Space Division within Park and Recreation, Planning, or another department;
- F. Thorough analysis of the City operations and past practices of collecting fines regarding Environmentally Sensitive Lands;
- G. Delete the word "natural" in reference to the determination of the sensitive slope gradient;
- H. Address issues of strict liability and mandatory minimum, and also the mandatory requirement for the "Director" to consider all possible circumstances in reaching his/her decision as referenced in Joanne Pearson's September 19, 2001 letter; and
- I. Full cost recovery for investigations by City departments.

## DISCUSSION

- A. Proposed Language Changes to Land Development Code (Reference Clairemont Mesa Planning Committee's September 18, 2001 letter, Attachment A).

Staff has evaluated the Clairemont Mesa Planning Committee's suggested changes to the Land Development Code and has prepared individual responses to each suggestion in Attachment 1. In general, the issues addressed by the Planning Committee's comments are either already addressed by the current code or do not warrant amendments for the reasons noted. Of the suggested changes, staff supports the provision that the City Manager may require mitigation for land designated as open space and/or in a Multi-Habitat Planning Area (MHPA) as a result of illegal grading activities if sensitive resources are impacted. These changes to the Land Development Code could be added in the next update process anticipated within the next six months.

- B. Mandatory Minimum Penalties and Non-Discretionary Fines.

San Diego Municipal Code (SDMC) section 12.0805 (d) which authorizes the imposition of Administrative Civil Penalties for violations of the Municipal Code states:

“The City Manager has the authority to establish a penalty schedule for a Director to use as a guideline in determining the amount of civil penalties in appropriate cases. The Manager shall also establish procedures for the use of this schedule.”

Attachment 2 includes the proposed modifications to the factors utilized in the administrative civil penalties determination under Section 12.0805 (c) of the San Diego Municipal Code.

Attachment 3 represents a proposed penalty schedule drafted by City staff for grading violations. The proposed schedule takes into consideration the extent of the violations and the amount of damage incurred. The penalty schedule may be filed with the City Clerk and revised or updated as appropriate. These penalties would apply to both public and private projects.

On a quarterly basis, the Neighborhood Code Compliance Department will publish the amount of fines collected for enforcement actions on the department's web site. This information is currently not readily available but can be easily tabulated in the future.

- C. Collecting Penalty Fees at the Completion of Enforcement Actions.

Judicial and administrative civil penalties collected in code enforcement actions are required by the Municipal Code to be deposited in the “Civil Penalties Fund” pursuant to SDMC section 13.0402. This fund was established in 1993 “for the enhancement of the City's code enforcement efforts and to reimburse City Departments for investigative costs and costs associated with the hearing process that are not paid by the Responsible Person.”

- D. Proposed Educational Program with Sufficient Outreach to Building Contractors/  
Potential for Preconstruction Conferences.

In the September 19th report to the Natural Resources and Culture Committee, Development Services outlined a series of outreach efforts to ensure that both contractors and the general public would be made aware of new regulations pertaining to the disturbance of sensitive areas.

Development Services has also implemented pre-construction conferences with customers. During the last two years, over 50 have been conducted. These pre-construction conferences are required as part of the implementation of Mitigation, Monitoring and Reporting Programs (MMRP) applied to projects which have undergone discretionary review. The pre-construction conferences, scheduled prior to any grading, alert the developer and the contractor of sensitive resources on site. Participants in the pre-construction conference will define the contractor's responsibilities and the parameters of the work the contractor is to complete. This will help to ensure that these resources are properly protected and preserved during the grading and development of the site.

As part of implementation of a new, on-line, web-based project tracking system in Development Services, key information will be collected and maintained on the system for all permit applications, including grading permits. One of the new features of the system will provide a property owner, developer, or community member the ability by phone to interface with the new system to get information about any project. With this new system, anyone that has a project address, project number, applicant name, or project name will be able to obtain:

1. A list of the City review staff involved in the project.
2. The status of the overall project review process, including if a permit has been issued.
3. The status of any hearing, if the project requires one, along with when the hearing was noticed and what the hearing decision was.
4. The application expiration date and detailed information about each discipline review.

E..... Several Alternatives for Establishing an Open Space Division within Park and Recreation, Planning, or Other Department.

The Park and Recreation Department will address this issue in a separate report to be presented to the NR&C Committee.

F..... Thorough Analysis of City Operations and Past Practices of Fine Collection Regarding Environmental Lands.

Enforcement of illegal grading violations was not aggressively pursued in the past as a matter of routine. Past practices and operations included issuing Notices of Violation and obtaining voluntary compliance.

Judicial penalties are another type of penalty which are assessed for grading violations when the case is referred to the Code Enforcement Unit of the City Attorney's Office for prosecution. In civil actions, the prosecutor determines the amount of appropriate fine, based on the various causes of action pleaded in the complaint and applicable statutes. For example, where an "unfair business" cause of action is pleaded in a civil complaint, California Business and Professions Code Section 17206 lists a series of factors to be utilized in assessing an appropriate fine. These factors include: the nature and seriousness of the misconduct, the number of violations, the persistence of the misconduct, the length of time over which the misconduct occurred, the willfulness of the misconduct, and the defendant's assets, liabilities, and net worth. If the prosecutor files a criminal action, each violation is charged as a misdemeanor pursuant to SDMC Section 12.0201. Each conviction of a misdemeanor is punishable by a maximum \$1000 fine and/or six months in jail.

The following are examples of cases which have been prosecuted by the City Attorney's Office:

.....**1. *People v. Warmington Homes*** - The City Attorney's Office filed a civil complaint in 1993 against a developer who had illegally dumped fill material and illegally graded on a site containing vernal pools. As part of an agreed settlement, the developer paid \$60,994 which represented the costs incurred by the City to restore and monitor the vernal pools. (The City selected a contractor to implement a five-year restoration plan which required removal of the fill, remediation work to repair the environmental damage, and restoration of the site to its original condition.) The defendant also paid \$15,000 to the City of San Diego for restitution and the monies were deposited in the City's Vernal Pool Mitigation Fund. In addition the defendant was required to pay \$11,063 to reimburse the City for investigation costs incurred.

.....**2. *People v. Meraux*** - The City Attorney's Office filed a civil complaint in 1996 against a private property owner who illegally graded and filled property he owned. The owner was not aware that the property contained vernal pools and the pools were damaged by the grading. A civil settlement was reached which allowed compensation for the destruction of the vernal pools by off-site mitigation. The real estate company who sold the defendant the property purchased environmental credits in the amount of \$45,000 on behalf of the defendant. The defendant also reimbursed the City for investigative costs in the amount of \$1,525.

This year a number of cases were referred to the City Attorney's Office for prosecution. As these cases are in litigation, it is not appropriate to discuss the details of each case.

G.....Delete the Word "Natural" in Reference to the Determination of Sensitive Slope Gradient.

The deletion of the word "natural" in the definition of steep hillsides would have significant impacts to property owners proposing new development and redevelopment projects in the City of San Diego. The proposal would significantly increase the number of discretionary actions being processed without any assurance that additional sensitive resources would be protected. This proposal would also increase the cost of processing projects for the applicant and increase the processing time for many projects.

This modification to the definition of steep hillsides would also be a major policy shift in City regulations by restricting development in previously graded areas of the City. The City of San Diego has never had process restrictions or regulations aimed at protecting manufactured slopes. In addition, City policy documents, from Land Use Plans to the C-720 coastal maps, only regulate natural slopes.

The development of manufactured slopes is regulated should natural biological resources be present on these slopes, or should such slopes be proposed to be modified requiring a ministerial or discretionary grading permit. Biological resources would still be regulated under the City's Environmentally Sensitive Lands regulations and where manufactured slopes are coincident with natural slopes. In those circumstances, the restrictions on development of sensitive resources would limit the ability for new development to impact the slopes.

Staff, therefore, does not recommend changing the language as proposed.

.....H. Address Strict Liability and Mandatory Minimum, and Mandatory Requirement for the "Director" to Consider All Possible Circumstances in Reaching Decision (Reference Joanne Pearson Letter, September 19, 2001).

Illegal grading violations constitute strict liability offenses pursuant to the Municipal Code. Section 121.031 of the Land Development Code states that "Violations of the Land Development Code shall be treated as strict liability offenses regardless of intent." Code enforcement violations throughout the Municipal Code are similarly treated. This means that a property owner may be held liable for violations occurring on his or her property irrespective of intent, participation, or knowledge. Holding a property owner or violator strictly liable is consistent with caselaw. In *Leslie Salt Co. v. San Francisco Bay Conservation Comm.*, 153 Cal.App. 3d 605, 622 (1984), the court found the property owner responsible for violations of state environmental protection statutes even though some person, without the owner's permission or knowledge, dumped illegal materials on his property. California cases subsequent to this decision have similarly held property owners responsible for violations of ordinances protecting the public's health, safety and welfare (Reference *People v. Bachrach*, 114 Cal App 3d Supp 8,12 (1980)).

I..... Full Cost Recovery for Investigations by City Departments.

The Municipal Code presently authorizes City departments to recover investigative costs. For example, SDMC Section 13.0103 authorizes the assessment of reinspection fees for services after the third inspection of a property after the issuance of a Notice of Violation. The reinspection fee schedule is on file in the City Clerk's Office pursuant to SDMC Section 13.0104. If an administrative civil penalty action is pursued for an illegal grading violation, SDMC Section 12.0806 authorizes that administrative costs incurred may also be assessed, e.g., costs for the scheduling and processing of a civil penalties hearing. If a judicial civil action is pursued by the City Attorney's Office, the civil complaint seeks costs incurred by City employees who have worked on the case. If a criminal action would be pursued by the City Attorney's Office, investigative costs may be recovered via a plea bargain agreement.

J.....Permit Processing for Geotechnical Exploration. (*This item was not part of the Committee's September 19, 2001 discussion; however, it is presented here due to relevancy to the overall grading issue.*)

On November 26, 2001 during a meeting between City staff and concerned citizens, an issue was raised by the geotechnical consulting and building industries that the "permit to get a permit" process was burdensome both in added cost and time. They also expressed concern that the submittal requirements for a Site Development Permit were not fully understood by the geotechnical consulting industry. Furthermore, it was felt that revisions to the Land Development Code to establish a "geotechnical exploration permit" are needed.

The Land Development Code currently requires a Site Development Permit for geotechnical exploration on properties that contain historical resources or environmentally sensitive lands. Geotechnical exploration is most often aimed at determining development feasibility and the most appropriate areas of a site for development from a geotechnical perspective. Currently, the Land Development Code requires many proposed developments to obtain a Site Development Permit (Process Three, Process Four, or Process Five approval) to get sufficient geotechnical information prior to making a development proposal submittal as another discretionary action. This adds an approximate 4-6 month permit process in addition to the permit process required to secure a development approval.

In light of this, staff is considering Land Development Code amendments that would allow geotechnical exploration on properties with sensitive resources through a Process One or Two approval provided that strict conditions are met. The requirements of the CEQA process would also be evaluated. Conditions would include seasonal restrictions, monitoring by specialists such as a biologist or archaeologist, and implementation of a restoration and monitoring plan immediately following completion of site work to restore disturbed areas to previous conditions. In the coming months, staff will be developing a proposal of new regulations that will be evaluated through the Land Development Code Update review process.

Until this issue is evaluated and resolved through the code update process, Development Services committed to: 1) involving the geotechnical industry and the environmental community as stakeholders in the code update process; 2) creating a submittal checklist/procedures bulletin for the geotechnical exploration permit processing; and 3) providing a training meeting specific to the geotechnical and building industries on the current code requirements as would be detailed in



the bulletin.

### SUMMARY OF RECOMMENDATIONS

In addition to the previous accepted recommendations from the September 19, 2001 NR&C Committee meeting as outlined in the Background section of this report, staff recommends:

- .....Revising Land Development Code Section 121.0312 (c) allowing the City Manager to consider mitigation for land designated as open space and/or in a Multi-Habitat Planning Area (MHPA) as a result of illegal grading activities if sensitive resources are impacted (reference Attachment 1).
- .....Modifying the factors utilized in the Administrative Civil Penalties determination under Section 12.0805 (c) of the San Diego Municipal Code (reference Attachment 2).
- .....Adopting the proposed Administrative Civil Penalty Criteria and Schedule for Violations Regarding Environmentally Sensitive Lands, Historical Resources and Paleontological Resources to the San Diego Municipal Code (reference Attachment 3).
- .....Quarterly posting of the fines collected from enforcement actions on the Neighborhood Code Compliance Department web page.
- .....Continuing pre-construction conferences.
- .....Implementing a new, on-line, web-based project tracking system.
- .....Retaining “natural” in the definition of steep hillsides.
- .....Implementing public input and outreach measures regarding geotechnical exploration.

## CONCLUSION

In analyzing the Neighborhood Code Compliance Department's past handling of cases and in working with the Development Services Department, 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 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 also 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

Marcia K. Samuels  
Neighborhood Code Compliance Director

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Approved: George I. Loveland  
Senior Deputy City Manager

TPC/MKS/JWT

### Attachments:

- 1....Responses to Attachment A of Clairemont Mesa Planning Committee Letter Dated 18 September 2001
- 2....Determination of Civil Penalties
- 3....Proposed Civil Penalty Fee Criteria and Schedule

**City Staff Responses to Clairemont Mesa Planning Committee's (CMPC)  
Recommended Revisions to Land Development Code for Purpose of Protecting Canyons,  
Hillsides, Open Space and Other Environmentally Sensitive Lands  
(Reference Discussion Item A)**

CMPC Suggested Revision:

**113.0103 Definitions**

*Steep hillsides* means all lands that have a slope with a natural gradient of 25 percent (4 feet of horizontal distance for every 1 foot of vertical distance) or greater and a minimum elevation differential of 50 feet, or a natural gradient of 200 percent (1 foot of horizontal distance for every 2 feet of vertical distance) or greater and a minimum elevation differential of 10 feet.

Staff Response:

See response to Discussion Item G in report. Staff does not recommend changing the language as proposed.

CMPC Suggested Revision:

**121.0204 Authority to Report Violations**

The City Manager or designated Code Enforcement Official ~~may~~ shall report violations of the Land Development Code to the State Contractors License Board or other appropriate state licensing or regulatory agency.

Staff Response:

The City intentionally uses the word “may” to allow discretion in reporting violations because it is not always appropriate. For instance, if the development is being completed by the owner (owner/builder who is a contractor), state law prohibits the City from reporting violations to the State Contractors License Board. Staff, therefore, does not recommend changing the language as proposed.

CMPC Suggested Revision:

**121.0312 Restoration and Mitigation as a Remedy**

- (a). In addition to other enforcement remedies provided for in Municipal Code Chapter 1, the City Manager ~~may~~ shall order the reasonable restoration of a structure, premises, and any adjacent and affected site to its lawful condition or ~~may~~ shall require reasonable mitigation. These requirements ~~may~~ shall be attached as conditions to applicable permits or enforcement actions and orders as appropriate.
- (b). Any restoration or mitigation imposed by the City Manager or Building Official shall be at the sole cost of the responsible person.
- (c). Mitigation may be appropriate where the City Manager determines that restoration of the premises or adjacent site to its pre-existing condition is not feasible or that irreparable damage has been done to the premises, an environmentally sensitive land, ~~or~~ a historical structure, or any area designated as open space in an adopted community plan.
- (d). Mitigation may include the purchase or exchange of like-kind real property or structures of a similar or greater quality and value.
- (e). The City Manager or Building Official may require a combination of restoration and mitigation of the structure or premises if warranted by the circumstances.
- (f)..The City Manager or Building Official may promulgate additional administrative guidelines and regulations to implement and clarify the authority to require restoration and mitigation.

Staff Response:

- (a). Changing the language as proposed would dictate that the City Manager's only remedy to a violation is mitigation or restoration. In some situations, a combination may be the best remedy. In addition, some violations require issuance of building permits or some other ministerial action and conditions, by law, may not be imposed on a ministerial action. Staff, therefore, believes that the language should not be changed.
- (c). Staff supports the change. See Discussion Item A in report.

CMPC Suggested Revision:

**126.0502 When a Site Development Permit Is Required**

(e) A Site Development Permit decided in accordance with Process Five is required for the following types of development.

.....(1) In the Airport Approach Overlay Zone, *development* proposals that receive an FAA determination of hazard and that are not exempt, as described in Section 132.0202.

.....(2) In the Airport Environs Overlay Zone, *development* for which a City Council override is requested, as described in Section 132.0302.

.....(3) In the Clairemont Mesa Height Limit Overlay Zone, *development* for which an exception to the height limit is requested, as described in Section 132.1306.

.....(4) In any area designated as open space in an adopted community plan, any *grading or development*.

**142.0103 When a Permit Is Required for Grading**

(a). A Grading Permit is required for any grading work specified in Section 129.0602.

(b). A Site Development Permit is required for any grading that results in the creation of a slope with a gradient steeper than 25 percent (4 horizontal feet to 1 vertical foot) and a height of 25 feet or more in accordance with Chapter 12, Article 6, Division 5 (Site Development Permits).

(c). A Site Development Permit is required for any grading, (including clearing or grubbing) within any area designated as open space in an adopted community plan.

Staff Response:

(4). Many areas of the City are designated as open space in community plans yet have zoning that would allow development consistent with regulations of the code. If significant resources such as slopes or biology are present, then the Site Development Permit would already be required. If no resources are present, other than base zone development regulations, the code does not have any regulations related to the fact that the community

plan designates the property as open space. Furthermore, if a community feels that an area designated as open space in a community plan should have development restrictions, then a rezoning request should be initiated to zone the property OR-1-1. This zone was created to implement community open space and limits encroachment on properties with that zoning designation. Staff, therefore, does not support making the suggested change.

CMPC Suggested Revision:

**142.0150 Unauthorized Grading**

It is unlawful to do, cause to be done, or maintain any work covered under this Division without first obtaining a grading permit

The provisions of this Section shall apply to all persons who do, cause to be done, or maintain any work covered by this Division without benefit of a permit including:

- (a). Property owners or lessees;
- (b). Contractors who perform the work;
- (c). Drivers who transport fill material to the site or the excavated material from the site.

Compliance with the provisions of this Division shall be evidenced by the availability on the site of approved plans and a copy of a valid grading permit.

**(Note: Proposed 142.0150 is verbatim 62.0403 that was rescinded when the Land Development Code was adopted by Ordinance Number O-18451 on December 9, 1997)**

Staff Response:

These proposed additions are already sufficiently covered under the “Enforcement” Section of the LDC. Section 121.0302 (b) already states that it is illegal for “any person” (which includes all of those listed in the Committee’s letter) to grade, excavate, clear, fill, grub, build an embankment, construct slopes, or disturb sensitive natural or biological resources on any lot or premises. Staff, therefore, does not support the suggested revisions regarding enforcement. Staff does, however, support the requirement to make approved plans available on-site along with a copy of a valid grading or other construction permit.

CMPC Suggested Revision:

**142.0151 Site Restoration**

Restoration of grading work undertaken without a permit is required and shall occur prior to any further development on the site. Restoration requires:

- (a). Submittal to and acceptance by the Permit Issuing Authority of a restoration plan which may include necessary monitoring by the City or a City designated party, both at the cost of the violator.
- (b). Obtaining a grading permit and receiving inspection approval from the Permit Issuing Authority; and
- (c). Compliance with any other reasonable requirements of the Permit Issuing Authority including those set forth in Section ~~62.0104(h)~~ of this Code.

**(Note: Proposed 142.0151 is verbatim 62.0405 that was rescinded when the Land Development Code was adopted by Ordinance Number O-18451 on December 9, 1997)**

Staff Response:

Staff believes that this information is sufficiently covered in Chapter 12, Article 9, Division 6 entitled Grading Permit Procedures and requires no changes to the code. Staff, therefore, does not recommend changing the language as proposed.

CMPC Suggested Revision:

**142.0152 Compliance with CEQA**

No grading permit shall be issued without the final environmental document which addresses the proposed grading or a written statement from the Environmental Analysis Section certifying that the project is exempt from environmental review requirements in accordance with the California Environmental Quality Act.

**(Note: Proposed 142.0152 is similar to 62.0410(h) that was rescinded when the Land Development Code was adopted by Ordinance Number O-18451 on December 9, 1997)**

Staff Response:

Grading permits may be ministerial actions. Not all grading permits are discretionary actions. Under the California Environmental Quality Act (CEQA), ministerial actions are exempt from the requirement for CEQA review (Public Resources Code Section 21080 (b)(1)). Projects that required prior discretionary actions (including public projects) as a result of proposed impacts to sensitive biological resources, steep hillsides or historical resources (neighborhood development permits or site development permits) would have been subject to environmental review and, therefore, grading permits issued consistent with those previous actions and environmental documents are not subject to further review beyond a determination of compliance with approved permit conditions. Staff, therefore, does not recommend changing the language as proposed.



**12.0805 Determination of Civil Penalties**

(a). In determining the date when civil penalties started to accrue, a Director may consider the date when the Department first discovered the violations as evidenced by the issuance of a Notice of Violation or any other written correspondence.

(b). The assessment of civil penalties shall end when all action required by the Notice and Order has been completed.

(c). In determining the amount of the civil penalty to be assessed on a daily rate, a Director may consider some or all of the following factors:

(1) The duration of the violation.

(2) The frequency or recurrence of the violation.

(3) The *nature and* seriousness of the violation.

(4) The history of the violation.

(5) *Whether the offense impacted environmentally sensitive lands or historical resources.*

(6) *The willfulness of defendant's misconduct.*

(7) *Defendant's assets, liabilities and net worth.*

(8) The Responsible Person's conduct after issuance of the Notice and Order.

(9) The good faith effort by the Responsible Person to comply.

(10) The economic impact of the penalty on the Responsible Person.

(11) The impact of the violation upon the community.

(12) Any other factors that justice may require.

(d). The City Manager has the authority to establish a penalty schedule for a Director to use as a guideline in determining the amount of civil penalties in appropriate cases. The Manager shall also establish procedures for the use of this penalty schedule.

**NOTE: Italics represents proposed modifications to the current Municipal Code.**

## Proposed Civil Penalty Criteria and Schedule for Violations Regarding Environmentally Sensitive Lands, Historical Resources and Paleontological Resources

### PROPOSED FINE SCHEDULE:

#### I. SENSITIVE BIOLOGICAL RESOURCES

RESOURCES IMPACTED/DESTROYED	MINIMUM CIVIL FINE
<u>Wetlands</u>	
Vernal Pool	\$20,000
Coastal Wetlands (salt marsh, salt panne)	\$20,000
Riparian Habitats (oak riparian forest, riparian forest, riparian woodland, riparian scrub)	\$15,000
Freshwater Marsh	\$15,000
Disturbed Wetland (excluding vernal pool)	\$10,000
Marine Habitats/Eelgrass Beds	\$5,000
<u>Uplands</u>	
Tier I - Rare Uplands (Maritime Succulent Scrub, Maritime Chaparral, Native Grassland, Oak Woodlands, etc.)	\$20,000
Tier II - Uncommon Uplands (Coastal Sage Scrub (CSS), CSS/Chaparral, etc.)	\$15,000
Tier IIIA and IIIB – Common Uplands (Mixed Chaparral, Chamise Chaparral, Non-native Annual Grassland, etc.)	\$10,000
<u>Endangered Species</u>	
Impacts to individual endangered species not covered by the MSCP Subarea Plan	\$20,000*

\* This fine would be considered and imposed only following consultation with the U.S. Fish & Wildlife Service and the California Department of Fish & Game.

**II. OTHER ENVIRONMENTALLY SENSITIVE LANDS (Steep Hillides, Coastal Beaches, Sensitive Coastal Bluffs, and 100-Year Floodplains)**

Disturbance of Environmentally Sensitive Lands lacking sensitive biological resources and without a permit \$5,000

Disturbance of Environmentally Sensitive Lands lacking sensitive biological resources that exceeds permitted encroachment \$5,000

**III. HISTORICAL AND PALEONTOLOGICAL RESOURCES**

Disturbance of archaeological or paleontological resources without a permit \$5,000

**NOTE: These fines are assessed pursuant to San Diego Municipal Code Section 12.0805, and may vary depending on the twelve factors listed in Section 12.0805 (c) which the Director may consider in assessing a daily fine.**

**PENALTY CRITERIA:**

Once the minimum civil fine for impacts to environmentally sensitive lands, historical resources, and paleontological resources is determined from the civil fine schedule listed above, the total fine or penalty for individual Illegal Grading Violations would be assessed using the following minimum criteria (maximum penalty not to exceed \$250,000):

1. Size of the impacted area (acreage/square footage);
2. Extent of direct and indirect impacts on-site;
3. Extent of direct and indirect impacts off-site;
4. Type of habitat affected;
5. Quantity of habitat affected;
6. Quality of habitat affected (connectivity to wildlife corridors, etc.);
7. Presence of federal or state listed species or narrow endemics;
8. Extent of encroachment into a Multi-Habitat Planning Area (MHPA);
9. Presence and significance of cultural resources (historic and prehistoric);
10. Presence of paleontological resources;
11. Geological stability of the impacted area;
12. Soil contamination;
13. Existing and surrounding land use;
14. Visibility – landform alteration.

This assessment shall include a discussion of the development potential/eligibility of the site, feasibility and extent of on- or off-site mitigation; restoration; or remediation measures.

**ADMINISTRATIVE FINES:**

Appropriate fines are levied along with immediate implementation of erosion control measures (if applicable) and a restoration and monitoring plan. The minimum fine for the Administrative Civil Penalty ranges between \$2,500 and \$25,000 per day per violation. The maximum penalty would not exceed \$250,000. In addition, the violator would automatically be subject to the costs associated with enforcement action, the cost of restoration, mitigation and monitoring as well as for preparing any and all reports and plans (e.g., biological resources report, historical resources report, revegetation plan, grading plan, erosion control plan) required to be submitted in conjunction with correcting the violation and restoring the site to previous conditions, if applicable. The applicant can only submit for development permits after the enforcement action has been complete.