



# CITY of BRISBANE

## Planning Commission Meeting Agenda

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Thursday, August 27, 2020 at 7:30 PM • Virtual Meeting

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**This virtual meeting is compliant with the Governor's Executive Order N-29-20 issued on March 17, 2020 allowing for deviation of teleconference rules required by the Brown Act. Consistent with the Order, this virtual meeting provides a safe environment for staff, Planning Commissioners, and the public while allowing for public participation. The public may address the Commission using exclusively remote public comment options which are detailed below.**

The Planning Commission Meeting will be an exclusively virtual meeting broadcast on Comcast Channel 27 and the City's YouTube channel at [www.youtube.com/Brisbaneca](http://www.youtube.com/Brisbaneca). The agenda materials may be viewed online at [www.brisbaneca.org/meetings](http://www.brisbaneca.org/meetings).

### **TO ADDRESS THE COMMISSION:**

Members of the public are encouraged to submit comments in writing in advance of the meeting to the project planner (see the posted public notice at <https://www.brisbaneca.org/cd/page/public-notice> for planner contact information, or for items that are not public hearings, refer to the staff report for planner contact information). Comments that can't be provided in advance of the meeting may be emailed or texted **prior to the start of the particular agenda item** to the below email and text line:

**Email:** [jswiecki@brisbaneca.org](mailto:jswiecki@brisbaneca.org)

**Text:** 415-713-9266

A call-in number is also available during the meeting for oral communications and public hearing items:

**Phone Number:** +1 (669) 900-9128

**Meeting ID:** 956 4561 7043 (After entering the meeting ID and pressing #, simply press # a second time to enter the meeting waiting room. No participant code is required. Please wait to call until the Chairperson and/or Staff announces that the phone line is open.)

### **SPECIAL ASSISTANCE**

If you need special assistance to participate in this meeting, please contact the Community Development Department at (415) 508-2120 in advance of the meeting. Notification in advance of the meeting will enable the City to make reasonable arrangements to ensure accessibility to this meeting.

**Commissioners: Gomez, Gooding, Mackin, Patel, and Sayasane**

**CALL TO ORDER**

## ROLL CALL

## ADOPTION OF AGENDA

## CONSENT CALENDAR

*Please Note: Items listed here as Consent Calendar Items are considered routine and will be acted upon collectively by one motion adopting the Planning Department's recommendation unless a member of the public, the Commission, or its staff asks to remove an item to discuss it. Prior to the motion, the Chairperson will ask if anyone wishes to remove an item from the Consent Calendar.*

- A. [Approval of draft Regular Meeting minutes of June 25, 2020](#)

## ORAL COMMUNICATIONS (Limited to a total of 15 minutes)

## WRITTEN COMMUNICATIONS

## NEW BUSINESS

- B. **PUBLIC HEARING: 213 Visitacion Avenue; Design Permit DP-2-20 and Use Permit UP-4-20;** NCRO-2 Neighborhood Commercial District- Downtown Brisbane; Design Permit and Use Permit for a new 6,477 sq ft, three-story mixed-use building with four dwelling units, a two-car private parking garage, and a 263 sq ft ground floor commercial storefront; Mark Topetcher, applicant; Arcus Housing LLC, owner.

*The applicant has requested that the public hearing be continued to a future date off-calendar. The public hearing would be re-noticed to the public.*

## ITEMS INITIATED BY STAFF

- C. [Grading Ordinance Update](#)

## ITEMS INITIATED BY THE COMMISSION

## ADJOURNMENT

- D. Adjournment to the meeting of September 10, 2020 at 7:30 p.m.

## APPEALS PROCESS

*Anyone may appeal the action of the Planning Commission to the City Council. Except where specified otherwise, appeals shall be filed with the City Clerk not later than 15 calendar days following the Planning Commission's decision. Exceptions to the 15 day filing period include the following: appeals shall be filed with the City Clerk within 6 calendar days of the Planning Commission's action for use permits and variances and 10 calendar days for tentative maps and advertising sign applications. An application form and fee is required to make a formal appeal. For additional information, please contact the City Clerk at 415-508-2110.*

## INTERNET & OTHER ACCESS

*Agendas and adopted minutes for meetings of the Planning Commission are posted on the Internet at: [www.brisbaneca.org/meetings](http://www.brisbaneca.org/meetings). Meetings are broadcast live on Comcast Channel 27 and by streaming video on the City's YouTube channel ([www.youtube.com/Brisbaneca](http://www.youtube.com/Brisbaneca)). Meeting video archives are available on the City's YouTube channel. Rebroadcasts on Channel 27 are during weeks following the meetings, on Fridays at 5 pm and Sundays at 1 pm. For a DVD copy, please contact the Community Development Department.*

## **NOTICE OF DISCLOSURE**

*Written information or comments that may include a person's name, address, email address, etc. submitted to the City, Planning Commission, and/or City staff are public records under the California Public Records Act, are subject to disclosure and may appear on the City's website.*

**File Attachments for Item:**

Approval of draft Regular Meeting minutes of June 25, 2020

DRAFT  
BRISBANE PLANNING COMMISSION  
Action Minutes of June 25, 2020  
Virtual Regular Meeting

CALL TO ORDER

Chairperson Sayasane called the meeting to order at 7:30 p.m.

ROLL CALL

Present: Commissioners, Gomez, Gooding, Mackin, Patel and Sayasane.  
Absent: None.  
Staff Present: Community Development Director Swiecki, Senior Planner Ayres, Associate Planner Robbins

ADOPTION OF AGENDA

Commissioner Patel moved adoption of the agenda. Commissioner Mackin seconded the motion and it was approved 5-0.

CONSENT CALENDAR

Commissioner Gooding moved adoption of the consent calendar (agenda item A). Commissioner Patel seconded the motion and it was approved 5-0.

ORAL COMMUNICATIONS

There were no oral communications.

WRITTEN COMMUNICATIONS

There were no written communications.

NEW BUSINESS

- B. PUBLIC HEARING: Grading Review EX-4-19; 338 Kings Road; R-1 Residential District;** Reconsideration of Grading Review application for approximately 357 cubic yards of soil cut and export to accommodate a new driveway and additions, including a two-car attached garage, for an existing single-family dwelling; Abraham Zavala, applicant; Huang John & Chen Joy Trust, owner.

Senior Planner Ayres gave the staff report. She answered questions regarding the elimination of the previously proposed on-street parking spaces, the proposed condition of approval to recommend the City Engineer require an arborist report regarding the project’s potential impact to tree roots versus requiring such a report, and use of the public right of way for accessing the subject property.

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Chairperson Sayasane opened the meeting to public comment.

Abraham Zavala, the applicant, and John Petroff, the project geologist engineer, addressed the Commission. Mr. Zavala described the project changes. Mr. Petroff explained the borings completed found bedrock fairly close to the surface, as reported in the geotechnical report.

Chairperson Sayasane asked Mr. Petroff if he was aware of complaints from neighboring properties regarding erosion.

Mr. Petroff stated he was not aware of such complaints and reiterated the findings of the test borings relative to low erosion potential.

Commissioner Gooding asked Mr. Petroff if he was aware of slides on Kings Road in other areas.

Mr. Petroff stated he was aware of “blow outs” of the hillside along Kings Road in Brisbane, but could not verify their exact location.

Commissioner Gooding asked Mr. Petroff whether slides were likely on the subject property from the proposed project.

Mr. Petroff stated based on his site observations and soil conditions, the soil conditions were very favorable for the proposed development and the proposed project would enhance the stability of the site and drainage of the site with the installation of retaining walls with integrated drainage. He did not observe any areas on the site that resembled a minor or major erosion or sliding.

Commissioner Gooding asked if there would be more or less water coming off the site with the proposed project.

Mr. Petroff stated he was not a hydrologist and could not address the volume of water runoff from the site, but reiterated that the project would enhance site drainage compared to existing conditions.

Commissioner Mackin asked how much water would be handled by the four inch perforated perimeter pipe and asked how he arrived at that recommendation. She asked how other drains on the property would tie into the four inch pipe.

Mr. Petroff said the solid pipe system would service any downspouts or area drains, and the perforated pipe would handle the subdrain water coming from below the ground surface. There would be two active drainages that could be combined in the same trench and route water around the house and discharge into the storm drain system at the street.

Commissioner Mackin asked how the drains were sized and what calculations were used.

Mr. Zavala said he prepared the calculations for the drain sizing based on the precipitation coming from the roof and retaining wall per California Building Code requirements. The existing drainage system for the existing system has to be improved as well because the current downspouts drain directly onto the ground near the foundation, so the project would improve existing drainage as well. A four inch perforated pipe is typical, but the City Engineer may require modifications.

Mr. Petroff said the key player in a sub drain isn't the pipe, but the trench itself in directing the water.

Commissioner Mackin said the geotechnical report found that the existing foundation was affected by existing settlement and portions of the existing foundation may need to be underpinned or replaced and asked if that will be addressed.

Mr. Zavala said that would be addressed in the building permit application.

Commissioner Mackin said the geotechnical report requires the geotechnical engineer to be on-site during construction.

Mr. Zavala said it is typical for the existing property foundation to be underpinned. In this case only one side is affected.

Commissioner Mackin asked what caused the existing residence to be four inches out of level and foundation settlement.

Mr. Zavala said a house of this age commonly has an undersized foundation.

Mr. Petroff said foundation construction for older homes was to a different standard and less sophisticated than current foundation design. Current foundation designs avoid settlement. In their geotechnical report they found some fill along the front of the house and the foundation is less than a foot deep in that location. He said the report's recommendations for underpinning and shoring up the existing home during construction are all typical recommendations. The geotechnical engineer will be on-site during construction and will be able to consult with the contractor and project engineer throughout the entire project to ensure its safety.

Michelle Salmon, Brisbane resident, shared her concerns with impacts to street trees, including excavation near the roots. She also was concerned with fracturing the sandstone bedrock. She said it was not a stable land mass. She said the Council's recent budget included funding for the City's stormwater drainage system which costs would continue to escalate as long as stormwater runoff was filtered into the storm drain system. She said they should correct the existing foundation problem before they excavate. She said the project was a flip. She said a hydrologist should be consulted and answers should be locked down before issuing any approvals.

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Prem Lall, Brisbane resident, said he was very concerned with Mr. Zavala and Mr. Petroff's statements regarding observing site conditions during construction "on the fly." He said if they do things "on the fly" and flip the house, the subsequent owner and downslope properties would be impacted. He said the engineers didn't seem to know what they were doing. He asked where the four inch pipe came from and once it is clogged with dirt what will happen?

With no one else coming forward to address the Commission, Commissioner Mackin moved to close the public hearing. Commissioner Patel seconded the motion and it was approved 5-0.

Commissioner Mackin shared her concerns with the impacts to street trees and the stability of the existing foundation. She said it has not been demonstrated to her that the project will be safe for downslope and next door neighbors.

Director Swiecki stated that Ms. Salmon texted him to ask the Chair if she could address the Commission again.

The Chair agreed and welcomed Ms. Salmon to address the Commission.

Ms. Salmon asked the Commission to make sure anything they approve is locked tight. She said a nine inch clearance for the tree was not adequate.

Commissioner Gooding asked if they could require an arborist report to be prepared, and if the report finds the project will damage the trees, could that stop the project?

Director Swiecki stated the normal sequence would be to require an arborist report prior the building permit being issued that would evaluate impacts to the street trees. He noted the Municipal Code allows for street trees to be removed and replaced. The Municipal Code doesn't prohibit the project from proceeding if street tree removal is required. He stated the City Engineer is authorized to make decisions regarding street tree removal and replacement due to project construction, and staff would not speculate as to the City Engineer's decision in this case.

Director Swiecki advised the Commission that safety of a grading plan and safety of a construction project are subject to the purview of a licensed engineer. He cautioned the Commission about making assertions or conclusions regarding design safety and suitability unless they are professionally licensed to do so.

Commissioner Gooding stated he did not believe they had adequate advice from licensed professionals that the Commission needed to approve the project.

Chairperson Sayasane asked if they could require a hydrology report.

Director Swiecki stated the Commission could review a hydrology report or geotechnical report, but there was no basis in state law for the Commission to judge or dispute the conclusions of any such reports. He stated such reports would be for information only.



Commissioner Patel moved to deny the permit based on the finding that the application does not demonstrate it would preserve adjacent coast live oak street trees; potential conflicts with the trees root system due to excavation and trenching for underground drainage during construction, and the proximity of the trees to cars exiting the proposed garage are of concern; and removal and replacement of the trees would not be appropriate for this project due to the role they play in slope stabilization. Commissioner Gooding seconded the motion and the motion was approved 5-0.

Chairperson Sayasane read the appeals procedure.

#### ITEMS INITIATED BY STAFF

Director Swiecki stated the City Council continued the ADU draft ordinance the Commission approved in May to the fall and approved, on an emergency basis and with minor alterations, the STR ordinance.

#### ITEMS INITIATED BY THE COMMISSION

There were none.

#### ADJOURNMENT

Commissioner Gooding moved to adjourn to the regular meeting of Thursday, July 9, 2020. Commissioner Gomez seconded the motion and it was approved 5-0. The meeting adjourned at 9:15 p.m.

Attest:

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John A. Swiecki, Community Development Director

NOTE: A full video record of this meeting can be found on the City's YouTube channel at [www.youtube.com/BrisbaneCA](http://www.youtube.com/BrisbaneCA), on the City's website at [www.brisbaneca.org](http://www.brisbaneca.org), or on DVD (by request only) at City Hall.

**File Attachments for Item:**

C. Grading Ordinance Update



# 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 with 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**

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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.