

EL DORADO COUNTY GRAND JURY, 2013-2014

EL DORADO COUNTY FAILS TO ENFORCE ITS GRADING, EROSION AND SEDIMENT CONTROL ORDINANCE

Case Number GJ-13/14-18

Reason for Report

The Grand Jury received a number of complaints involving improper grading of private property. Three specific complaints were investigated and addressed in three separate reports. One involves grading of a rural property, another involves grading of a suburban property and the third is grading by a commercial property owner. In each instance, persons other than the property owner suffered damage as a result of the county's failure to ensure compliance with its Grading Ordinance. The investigations of those cases caused the Grand Jury to question if there was a pattern and practice of failing to comply with the County Grading Ordinance.

The Grand Jury found that it did.

Background

The Ordinance

The El Dorado County Grading, Erosion, and Sediment Control Ordinance (hereinafter "the Ordinance")

...for the purpose of regulating grading within the unincorporated area of El Dorado County to safeguard life, limb, health, property and public welfare; to avoid pollution of watercourses; and to ensure that the intended use of a graded site is consistent with the El Dorado County General Plan, any Specific Plans adopted thereto, the adopted Storm Water Management Plan, California Fire Safe Standards and applicable El Dorado County ordinances including the Zoning Ordinance and the California Building Code. (Section 15.14.110)

"This ordinance *shall* be implemented and enforced *by the County...*" (emphasis added)

A grading permit is required for all grading activities in the unincorporated area of El Dorado County unless a specific exemption applies. (Sections 15.14.130 and 15.14.140). An exemption did not apply to any of the specific instances investigated by the Grand Jury.

The Ordinance requires permit applications to include specific informational items. (Section 15.14.200)

Fees collected when a permit is issued are used to fund enforcement of the Ordinance. Violation fees of twice the regular permit fees are required whenever grading is done in

violation of the Ordinance or without an approved permit. The language of the Ordinance is **not** discretionary; It **mandates** that this violation fee be charged. (Section 15.14.230 E)
It prohibits grading activities that cause or have the potential to result in itemized hazards including a threat to neighboring property or degradation of water quality. (Section 15.14.290)
The county is authorized to enter private property and conduct work necessary to abate and repair hazards from unlawfully created conditions. The County may conduct such work either using its own employees or through a licensed contractor. The County is required to bill the property owner for costs incurred and is authorized to recover those costs through a lien on the property and other legal means. (Section 15.14.410)

Enforcement of the Ordinance

Review of the permit application and subsequent inspection of the grading site only happens after permit fees are paid. Otherwise, no action is taken. When work is initiated without a valid permit a stop work order may be issued. If work is completed prior to issuance of a stop work order or if work continues without a valid permit, there is no inspection of the work done. Thus, someone who wants to perform work not authorized by county ordinances could well decide to not seek a permit in order to get away with that unauthorized work.

County employees interviewed were aware of the legal authority to charge violation fees but not that those fees were mandatory rather than discretionary. Further, violation fees were rarely charged and suggested that it would discourage the public from seeking a permit and encourage performing work without proper permits.

County employees were unaware of the County's authority to conduct necessary remedial work at the property owner's expense and knew of no instance when this action was taken.

Why is the Grading Ordinance Not Enforced?

Grading in violation of the Grading Ordinance resulted in substantial harm to property owners adjacent to or affected by improper grading in each of the cases investigated by the Grand Jury. The Grading Ordinance gives the Department of Transportation significant authority to correct improper grading. This authority could be a very effective tool for protecting other affected property owners if it were used, but it is not Why not?

Both County staff and officials reported that they perceived it to be the *will of the Board of Supervisors* that the Ordinance not be enforced. They stated that El Dorado is a *property rights county*; the will of the Board of Supervisors is that property owners not be burdened by strict compliance with requirements perceived to be onerous for some property owners. Several witnesses reported they believed the Ordinance imposed excessive burdens on property owners maintaining rural access roads

The public appears to understand that the Ordinance is not enforced. Neither of the contractors who performed illegal grading in Report No. 13-15 or 13-16 felt required to obtain a permit for the grading they performed. In Report No. 13-16 the Contractor appears to have understood that if he failed to pay the fee for a grading permit no action would be taken to enforce the terms of the permit.

The Ordinance is quite specific "...to safeguard life, limb, health, property and public welfare; to avoid pollution of watercourses..." The Grading Ordinance of the County of El Dorado is Chapter 15.14 of the County Code; it is the law of El Dorado County. Failure to enforce the Ordinance is failure to enforce the law; that failure benefits property owners who act unlawfully while denying the law's specific protections to others. It leads to a perception of corruption on the part of County officials and general disrespect for County government.

Actions

- The Grand Jury reviewed the El Dorado County Grading, Erosion and Sediment Control Ordinance.
- The Grand Jury interviewed private parties who complained to having been adversely affected by the County's failure to enforce the Ordinance.
- The Grand Jury interviewed County employees responsible for implementing and enforcing the Ordinance.

Findings

1. When grading work is done in El Dorado County and no permit is obtained and no permit fee paid, and the county is made aware of the work being done before the work is complete, the county will issue a stop work order.

Response: The respondent agrees with the finding, except that a stop work order is not always issued. In some cases a letter is issued stating the need for a permit. In other cases the County can issue a citation, send a Notice to Correct, and/or record a Notice of Violation. The County Code Enforcement regulations are contained in Section 9.02 of the County Code.

2. When work improperly continues after issuance of a stop work order or if work is completed before a stop work order is issued, no enforcement action is taken.

Response: The respondent disagrees with the finding. Enforcement can be engaged through a range of options other than the stop work order, depending on circumstances, such as public health and safety. Section 9.02.05 of the County Code

allows options for code enforcement: “Nothing in this chapter shall be interpreted to preclude an enforcement authority from informally encouraging citizens to comply with the El Dorado County Code or other applicable laws. Informal oral or written requests to encourage compliance are encouraged, as are attempts to informally negotiate or mediate issues relating to compliance.”

3. Only payment of a permit fee triggers inspection of grading work performed.

Response: The respondent disagrees with the finding. Payment of permit fees triggers permit review, issuance, inspection, and finaling. Complaints generated by the public on potential unpermitted grading also can trigger an inspection.

4. Grading work performed where no permit fee is paid is not inspected.

Response: The respondent disagrees partially with the finding. Complaints generated by the public will trigger an inspection.

5. El Dorado County does not enforce its Grading, Erosion and Sediment Control Ordinance.

Response: The respondent disagrees with the finding because the Grand Jury report findings were based on “three specific complaints” dating from 2011. Development Services issued 45 stand-alone grading permits in 2011, 45 in 2012, 86 in 2013, and 49 in the first six months of 2014. Additional grading reviews and inspections have occurred and are combined with other permits such as a commercial building or single family residence. The Department of Transportation (now the Transportation Division) also issues grading permits. The Grading Ordinance is enforced on every permit applicable.

6. The County’s failure to enforce its Grading, Erosion and Sediment Control Ordinance encourages illegal grading to the detriment of other property owners and residents.

Response: The respondent disagrees with the finding because it is not substantiated by the report or findings. There is significant number of grading permits issued by the County every year. There is no evidence the County does not enforce the Grading Ordinance. There is no evidence that there is a causal relationship to unpermitted grading. There is no evidence of detrimental impacts to property owners or residents. The County Code Enforcement procedures (outlined in Section 9.02 of the County Code) include a response to all complaints of unpermitted grading and building activity. Enforcement of identified unpermitted activity is prioritized based on health and safety issues and other considerations. The Department Director has prosecutorial discretion to determine the appropriate response to Ordinance Code violations based on factors

such as fairness, staffing levels, history of violations, public health and safety, and the seriousness of the violation.

Recommendations

1. The Board of Supervisors should review the Grading, Erosion and Sediment Control Ordinance and determine whether the Ordinance imposes overly burdensome requirements for rural access roads.

Response: The recommendation will not be implemented because it is not warranted. The Grand Jury findings do not support changing the Grading Ordinance to be “less onerous and more permissive permitting process for simple maintenance of rural roads” because the Grading Ordinance already exempts maintenance (Section 15.14.140.J.)

2. If the Board of Supervisors determines the requirements for grading of rural access roads are overly burdensome, it should amend the Ordinance to define appropriate requirements for the grading of those roads.

Response: The recommendation will not be implemented because it is not warranted. The Grand Jury findings do not support changing the Grading Ordinance to be “less onerous and more permissive permitting process for simple maintenance of rural roads” because the Grading Ordinance already exempts maintenance (Section 15.14.140.J.)

3. Whether or not the Ordinance is amended, the Grading, Erosion and Sediment Control Ordinance should be enforced.

Response: The recommendation has been implemented. Respondent notes that the Director has prosecutorial discretion to determine the appropriate response to Ordinance Code violations based on factors such as fairness, staffing levels, history of violations, public health and safety, and the seriousness of the violation.