

# *City of Brisbane*

## *Agenda Report*

**TO:** Honorable Mayor and City Council

**FROM:** Fred Smith via Clay Holstine, City Manager

**DATE:** Meeting of July 17, 2014

**SUBJECT:** Consider approval of Resolutions No. 2014-33, ratifying and approving an agreement for purchase of real property identified as Assessor's Parcel Number 007-570-130, and authorizing execution of closing documents on behalf of the City and approval of a supplemental appropriation in the amount of \$50,000.

**PURPOSE:** To approve the purchase of one parcel totaling approximately one acre for open space and habitat conservation in the Brisbane Acres.

**RECOMMENDATION:**

1. Approve resolutions No. 2014-33
2. Approve a supplemental appropriation from the General Fund in the amount of \$50,000

**BACKGROUND and DISCUSSION:**

The City has received preliminary approval of a matching grant from the staff of the California Coastal Conservancy's Bay Area Conservancy Program in the amount of \$40,000 to fund acquisition of one parcel of land from a willing seller in the Brisbane Acres. The total acreage of the proposed acquisition is approximately one acre.

The staff has negotiated a purchase agreement with the property owners, subject to ratification and approval by the City Council and contingent on final receipt of the grant funds and support of the purchase price by an appraisal. The proposed resolution will make the attached agreement effective and start the clock running on close of escrow. The Conservancy requires that the purchase price cannot exceed the fair market value as determined by an appraisal and the proposed agreement provides for an appraisal to be done at City expense. If the appraised value comes in lower than the agreed purchase, the


seller has the option to accept the lower price or withdraw from the agreement. The price listed in the agreement is the maximum price regardless of the appraised amount.

The proposed purchase adds to the City's holdings an additional acre of prime habitat at the eastern end of the main ridge of San Bruno Mtn. The parcel contains grasslands that are habitat for the endangered butterfly species on San Bruno Mountain.

#### **FISCAL IMPACT/FINANCING ISSUES**

The total purchase price for the one parcel is \$80,000 plus closing costs and appraisal fees of approximately \$10,000, for a total acquisition cost of approximately \$90,000. The California Coastal Conservancy staff has indicated that it will recommend to its board that it approve a grant of \$40,000, to pay half of the purchase price. The City share will be paid from the General Fund from which a supplemental appropriation of \$50,000 is being requested.

If the Council approves the proposed resolution and the appropriation, staff will open an escrow and deposit a \$5,000 earnest money deposit. The remainder of the City share will be deposited in escrow once the contingencies in the purchase agreement have been met.



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Clay Holstine, City Manager

#### **ATTACHMENTS:**

- Resolution No. 2014-33
- Map showing location of proposed acquisition
- Photo showing location of proposed acquisition

**RESOLUTION NO. 2014-33**

**A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF BRISBANE RATIFYING AND APPROVING THE AGREEMENT FOR PURCHASE OF REAL PROPERTY CONSISTING OF ONE UNDEVELOPED PARCEL OF LAND LOCATED IN THE UPPER HILLSIDE AREA OF THE CITY COMMONLY REFERRED TO AS BRISBANE ACRES AND IDENTIFIED AS ASSESSOR'S PARCEL NUMBER 007-570-130 AND AUTHORIZING EXECUTION OF CLOSING DOCUMENTS ON BEHALF OF THE CITY**

**WHEREAS**, a proposed purchase agreement between the City of Brisbane and Debra Fitting and the W. R. and Patty Buffington Trust ("Seller") has been presented to the City Council providing for the acquisition by the City of certain unimproved real property generally located within the upper hillside area of the City commonly referred to as Brisbane Acres and identified as Assessor's Parcel Number 007-570-130 ("the Property"), subject to various conditions having been satisfied; and

**WHEREAS**, the property to be acquired will be dedicated for habitat conservation and open space purposes; and

**WHEREAS**, the City Council has reviewed and considered the terms and conditions of the proposed purchase agreement, a true copy of which is attached hereto as Exhibit "A" and incorporated herein by reference (the "Purchase Agreement"), and has determined that it would be in the best interest of the City to proceed with the acquisition of the Property pursuant to the Purchase Agreement,

**NOW, THEREFORE, BE IT RESOLVED by the City Council of the City of Brisbane as follows:**

1. The Purchase Agreement attached hereto as Exhibit "A" is hereby ratified and approved in all respects.
2. The City Manager is hereby authorized and directed to execute, for and on behalf and in the name of the City of Brisbane, any and all escrow instructions, closing

statements, certificates of acceptance, acknowledgments, and other instruments and documents as may be necessary or appropriate in order to close escrow and complete the purchase of the Property by the City in accordance with the terms of the Purchase Agreement, including also any and all documents as may be necessary or appropriate for the application and receipt of grant funds from the California Coastal Conservancy's Bay Area Conservancy Program to finance the City's acquisition of the Property.

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W. Clarke Conway, Mayor

**PASSED AND ADOPTED** at a regular meeting of the City Council of the City of Brisbane held on the 17<sup>th</sup> day of July, 2014, by the following vote:

AYES:  
NOES:  
ABSENT:  
ABSTAIN:

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Sheri Marie Spediacci, City Clerk

## **OFFER TO PURCHASE REAL PROPERTY**

THE CITY OF BRISBANE, a municipal corporation ("City") hereby offers to purchase the real property hereinafter described from the owner thereof ("Seller"), on the terms and conditions set forth in this agreement (the "Agreement"):

### **1. Property.**

The real property (the "Property") that is the subject of this Agreement consists of one undeveloped parcel of land located in the upper hillside area of the City of Brisbane commonly referred to as Brisbane Acres, and identified as Assessor's Parcel Number 007-570-130.

### **2. Purchase Price.**

Subject to adjustment in accordance with Section 3 of this Agreement, the total purchase price for the Property shall be the sum of Eighty Thousand Dollars (\$80,000.00) of which Five Thousand Dollars (\$5,000.00) shall be deposited into escrow upon execution of this Agreement as a good faith deposit and the balance shall be paid in cash at close of escrow. Seller acknowledges that City has applied for a grant from the California Coastal Conservancy ("the Conservancy") in the amount of \$40,000, to be applied toward the purchase price for the Property. The balance of the purchase price will be paid by City out of its own funds. The parties expressly agree that the Seller's actual damages, in the event of default by the City would be difficult to determine and therefore the good faith deposit shall be Seller's liquidated damages and Seller's exclusive remedy in the event of default by the City.

### **3. Appraisal.**

Promptly after the Effective Date of this Agreement, City will obtain an appraisal of the Property, at its own expense, to be prepared by a qualified appraiser selected by City. In the event the market value of the Property, as determined by said appraisal, is less than \$80,000, City shall provide Seller with a copy of such appraisal and Seller shall have the option of either reducing the purchase price to the market value shown on the appraisal or terminating this Agreement, in which event the good faith deposit shall be refunded to City and both parties shall be released and discharged from any further obligation or liability hereunder. Seller shall give written notice to City of Seller's election hereunder within ten (10) days after Seller's receipt of the appraisal.

### **4. Escrow.**

The parties shall establish an escrow with First American Title Insurance Company or other title company selected by City ("Escrow Agent"). Each party shall execute

instructions to the Escrow Agent as are consistent with the terms and provisions of this Agreement at least five (5) days prior to the Closing Date. The parties acknowledge that separate escrow instructions will be submitted by the Conservancy relating to disbursement of its grant funds.

**5. Legal Title; Title Insurance.**

(a) Upon the Effective Date of this Agreement, City shall order a preliminary title report on the Property issued by First American Title Insurance Company (the "Title Report"), together with copies of all documents identified in Schedule B of the Title Report as evidencing or relating to the title exceptions described therein.

(b) Within fifteen (15) days after receipt of the Title Report and related documents, City shall notify Seller in writing of any objections to the matters disclosed by the Report or otherwise relating to the status of legal title to the Property. City shall also indicate those items described on the Report which City has approved as exceptions to legal title (the "Permitted Exceptions").

(c) If any objections to title are made by City, within thirty (30) days after receipt of City's notice of such objections, Seller shall, at Seller's own expense, either take such action as may be necessary to cure the title defect which is the subject of each objection, or confirm in writing to City that such item will be cured and eliminated as an exception to legal title at the Closing Date. In the event Seller is unable or unwilling to remove the unpermitted exception, City may elect to either (i) waive the objection and proceed with the closing, accepting legal title to the Property subject to such exception, or (ii) terminate this Agreement by written notice to Seller, in which event the deposit shall be refunded to City and both parties shall thereupon be released and discharged from any further obligation or liability hereunder.

(d) At the Closing Date, marketable fee title to the Property shall be conveyed to City by Grant Deed, free and clear of any and all liens, claims, and encumbrances, except for real estate taxes that may be a lien but are not yet due and payable and the Permitted Exceptions. Seller shall furnish to City, a standard coverage CLTA owners policy of title insurance issued by Escrow Agent and effective as of the Closing Date, in the amount of the purchase price, insuring legal title to the Property vested in City, subject only to the Permitted Exceptions and any additional items that may have been approved by City in writing prior to close of escrow.

**6. Physical Condition of the Property.**

The Property will be acquired by the City in its "as is" condition and Seller shall have no obligation to make any alterations or improvements to the Property prior to closing. City shall have a period of thirty (30) days from the Effective Date of this Agreement to conduct any inspections, studies, or other investigations City deems appropriate to satisfy itself that the Property is suitable for City's intended use. The City may terminate the purchase agreement at any time during this inspection period, in which event the deposit shall be refunded to City and both parties shall thereupon be released and discharged from any further obligation or liability hereunder.

7. **Hazardous Substances.**

(a) As used in this Section and elsewhere in this Agreement:

(1) "Environmental Laws" means all federal, state, local, or municipal laws, rules, orders, regulations, statutes, ordinances, codes, decrees, or requirements of any governmental authority regulating, relating to, or imposing liability or standards of conduct concerning any Hazardous Substance (defined below), as may now or hereafter be in effect, including, but not limited to the Comprehensive Environmental Response, Compensation and Liability Act of 1980, the Resource Conservation and Recovery Act of 1976, the Clean Water Act, the Toxic Substances Control Act, the California Underground Storage of Hazardous Substances Act, the California Hazardous Waste Control Act, and the Porter-Cologne Water Quality Act

(2) "Hazardous Substances" means and includes, without limitation:

- (i) Those substances included within the definitions of "hazardous substance," "hazardous waste," "hazardous material," "toxic substance," "solid waste," "pollutant or contaminant" under any Environmental Laws;
- (ii) Those substances listed in the United States Department of Transportation Table (49 CFR 172.101), or by the Environmental Protection Agency, or any successor agency, as hazardous substances (40 CFR Part 302);
- (iii) Other substances, materials, and wastes that are or become regulated or classified as hazardous or toxic under federal, state, or local laws or regulations; and
- (iv) Any material, waste, or substance that is a petroleum or refined petroleum product, asbestos, polychlorinated biphenyl, designated as a hazardous substance pursuant to 33 USCS § 1321 or listed pursuant to 33 USCS § 1317, or is a flammable explosive or a radioactive material.

(b) Seller represents and warrants to City that as of the Effective Date of this Agreement and as of the Closing Date:

- (1) To the best of Seller's knowledge, the Property is free from Hazardous Substances and is not in violation of any Environmental Laws.
- (2) There are no buried or partially buried storage tanks located on the Property.

- (3) Seller has received no notice, warning, notice of violation, administrative complaint, judicial complaint, or other formal or informal notice alleging that conditions on the Property presently are in violation of any Environmental Law, or potentially violate any Environmental Law.
- (4) There are no continuing obligations to be performed by the owner of the Property under any remediation, monitoring, or other plan or governmental requirement relating to Hazardous Substances on the Property.
- (5) Seller has disclosed to City all information, records, and studies, if any, maintained by Seller in connection with the Property concerning Hazardous Substances.

#### 8. Seller Warranties.

Seller represents and warrants to City that as of the Effective Date of this Agreement and as of the Closing Date:

(a) Seller has no knowledge or notice of any condition on the Property which violates any health, safety, fire, environmental, building, or other code, ordinance, or regulation.

(b) To the best of Seller's knowledge, there are no encroachments on the Property from any adjacent properties, and the Property does not encroach upon any adjacent properties, easements, or streets.

(c) Seller has no knowledge of any pending or threatened litigation, administrative proceeding, or other legal or governmental action with respect to the Property.

(d) Seller is not a "foreign person" within the meaning of Section 1445(f)(3) of the Internal Revenue Code, and Seller shall furnish such affidavit as may be required at close of escrow to confirm such fact.

(e) This Agreement has been, and all documents to be delivered by Seller prior to or at the Closing Date shall be, duly authorized, executed, and delivered on behalf of Seller, and are or shall be legal and binding obligations of Seller, and shall be sufficient to convey marketable legal title to the Property to City. The execution of this Agreement does not violate any other contract or agreement to which Seller is a party or by which Seller may be bound.

(f) Seller has provided the City with copies of all documents related to the property including all governmental permits and approvals obtained or held by Seller, all surveys of any kind (including boundary surveys, baseline reports, soil tests, engineering studies, etc) which are in Seller's possession or of which Seller has knowledge.



**9. Accuracy of Seller's Representations and Warranties.**

The continued accuracy in all respects of the representations and warranties made by Seller in this Agreement shall be a condition precedent to City's obligation to close the sale transaction. All such representations and warranties shall survive the Closing Date. In the event any such representation or warranty is found by City to be incorrect at the time made or as of the Closing Date, City may terminate this Agreement by written notice to Seller, in which event the deposit shall be refunded to City and both parties shall thereupon be released and discharged from any further obligation or liability hereunder.

**10. Mutual Indemnification.**

(a) Seller shall indemnify, defend, and hold City harmless from and against any and all losses, damages, liabilities, costs, or expenses, including attorney's fees, resulting from any inaccuracy in, or breach of, any representation or warranty of Seller contained in this Agreement. Seller further agrees to indemnify, defend, and hold City harmless from and against any and all third party claims, demands, causes of action, or liabilities pertaining to the ownership and use of the Property which accrue prior to the Closing Date.

(b) City agrees to indemnify, defend, and hold Seller harmless from and against any and all third party claims, demands, causes of action, or liabilities pertaining to the ownership and use of the Property which accrue from and after the Closing Date.

**11. Application and Receipt of Grant Funds**

City's obligation to purchase the Property pursuant to this Agreement is expressly conditioned upon the receipt by City of grant funds from the Conservancy in the amount of \$40,000 for the specific purpose of applying such funds toward the purchase price for the Property. In the event City's application for such funds is denied, or is approved for a lesser amount, City may, at its option, terminate this Agreement by written notice to Seller, in which event the deposit shall be refunded to City and both parties shall be released and discharged from any further obligation or liability hereunder.

**12. Access**

During the term of this Agreement, the City, its agents and employees, and contractors shall have the right to enter upon the Property, at reasonable times during ordinary business hours to make such inspections, survey and tests as may be necessary in the City's sole discretion. The City will use care and consideration in connection any of its inspections or tests and the Seller shall have the right to be present during any inspection of the Property by the City or its agents.

**13. Conditions to City's Performance.**

(a) City's obligation to close escrow is subject to all of the following conditions having been fully satisfied:

- (1) City shall have approved the Property, in accordance with Section 6 of this Agreement.
- (2) Escrow Agent is prepared to issue the policy of title insurance to City following close of escrow, in accordance with Section 5(d) of this Agreement.
- (3) Each of the representations and warranties made by Seller in this Agreement shall be true and correct as of the Closing Date.
- (4) Seller shall have delivered all documents and performed all of its obligations under this Agreement.
- (5) There shall have been no Material Change with respect to the Property. As used herein, the term "Material Change" means a change in the status of the use or physical condition of the Property as reasonably expected by City, that occurs subsequent to the Effective Date of this Agreement.

(b) All of the conditions set forth in Paragraph (a) above are for the benefit of City and any of such conditions may be waived in whole or in part by City giving written notice of such waiver to Seller prior to the Closing Date.

#### **14. Close of Escrow.**

(a) The sale escrow shall be closed within thirty (30) days after receipt by City of the grant funds from the Conservancy (the "Closing Date"); provided, however, that such Closing Date may be extended by mutual agreement of the parties.

(b) In the event the sale is not closed by the Closing Date, or in the event the grant funds from the Conservancy are not received by City within 270 days after the Effective Date of this Agreement, either party may terminate this Agreement by written notice to the other party and the Escrow Agent. Upon receipt of such notice, Escrow Agent shall return all funds and documents to the respective parties who deposited the same. The return of deposited funds and documents shall not release either Seller or City from their respective obligations to pay Escrow Agent's fees and costs for services rendered to the time of termination, nor shall such return constitute a waiver, release or discharge of any breach or default claimed to have been committed by either party in the performance of the obligations, agreements, or warranties set forth in this Agreement.

#### **15. Costs, Prorations and Adjustments.**

(a) Real estate taxes levied against the Property shall be prorated between the parties as of the Closing Date. Seller shall pay and discharge in full at closing the unpaid balance of any special assessments against the Property.

(c) Seller shall pay the real property transfer taxes and documentary transfer taxes, if any, levied on the conveyance of the Property to City. However, it is anticipated that no such transfer taxes will be charged because City is a public agency.

(d) The premium for the CLTA title insurance policy and all charges of Escrow Agent and other customary closing expenses shall be divided equally between the parties.

16. **Possession.**

Possession of the Property shall be delivered to City on the Closing Date.

17. **Broker.**

Seller and City each represent and warrant to the other that no real estate broker has been involved in this transaction and no brokerage commission is payable to any party.

18. **Notices.**

Any notices required or permitted to be given under this Agreement shall be in writing and shall be either personally delivered to the other party or sent by certified mail, return receipt requested, addressed to the other party as follows:

TO SELLER:

Debra Fitting  
232 Klamath St.  
Brisbane, CA 94005

W. R. and Patty Buffington Trust  
PO Box 1284,  
Cobb, CA 95426

TO CITY:

City of Brisbane  
Attn: City Manager  
Brisbane City Hall  
50 Park Place  
Brisbane, CA 94005

19. **Attorneys Fees.**

In the event legal action shall become necessary in order to enforce or interpret this Agreement, the prevailing party shall be entitled to recover all costs and expenses that may be incurred in connection therewith, including reasonable attorneys fees.

20. **Further Assurances.**

Whenever requested by the other party or by Escrow Agent, each party shall execute, acknowledge, and deliver such further conveyances, assignments, confirmations, approvals, consents, and other instruments and documents as may be necessary to

consummate the sale transaction in accordance with the terms and conditions of this Agreement and to otherwise carry out the intent and purpose of this Agreement.

## 21. **Miscellaneous Provisions.**

(a) **Waivers.** A waiver of any breach, covenant, or provision of this Agreement shall not be deemed a waiver of any other breach, covenant or provision, and no waiver shall be valid unless in writing and executed by the waiving party. An extension of time for performance of any obligation or act shall not be deemed an extension of time for performance of any other obligation or act.

(b) **Entire Agreement.** This Agreement constitutes the entire agreement between the parties and supersedes and cancels all prior agreements or understandings, whether written or verbal. This Agreement can only be amended by a written amendment hereto duly executed on behalf of both parties, with City's execution having been duly authorized by Resolution of the Brisbane City Council.

(c) **Non-Merger.** All of the terms, provisions, representations, warranties, and covenants of the parties under this Agreement shall survive the close of escrow and shall not be merged in the Grant Deed or other documents.

(d) **Counterparts.** This Agreement may be executed in one or more counterparts, each of which shall be deemed an original and all, taken together, shall constitute one and the same document.

(e) **Time of Essence.** Time is of the essence in this Agreement.

(f) **Successors and Assigns.** This Agreement shall be binding upon and shall inure to the benefit of the respective successors and assigns of the parties.

(g) **Governing Law.** This Agreement shall be governed and construed in accordance with the laws of the State of California.

## 22. **Effective Date of Agreement.**

Seller acknowledges that this Offer must be ratified and approved by the City Council of the City of Brisbane, and until such ratification and approval is granted, this Offer is not legally binding upon City. If Seller indicates by signing this document that the terms and conditions of the offer set forth herein are acceptable, this Agreement shall become effective upon the adoption by the Brisbane City Council of a Resolution ratifying and approving this Agreement and declaring the same to be a binding contractual obligation of the City of Brisbane. The date of adoption of such Council Resolution shall be deemed to be the Effective Date of this Agreement.

## 23 **Offer and Acceptance.**

This Agreement constitutes an offer to purchase the Property on the terms and conditions contained herein, subject to ratification and approval by the City Council of the

City of Brisbane. If Seller fails to execute this Agreement and return it to City by the close of business on 6/16, 2014, the offer shall be deemed to have been automatically withdrawn.

**CITY:**  
THE CITY OF BRISBANE

Dated: 5/29/14, 2014

By: *Clay Holstine*  
Clay Holstine, City Manager

**ACCEPTANCE**

The undersigned Seller hereby accepts the foregoing offer and acknowledges that this Agreement is not legally binding upon City until the offer has been ratified and approved by Resolution of the City Council of the City of Brisbane.

**SELLER:**  
DEBBIE ANN FITTING

Dated: May 29, 2014

*Debbie Ann Fitting*

**SELLER:**  
W. R. & PATTY BUFFINGTON TRUST

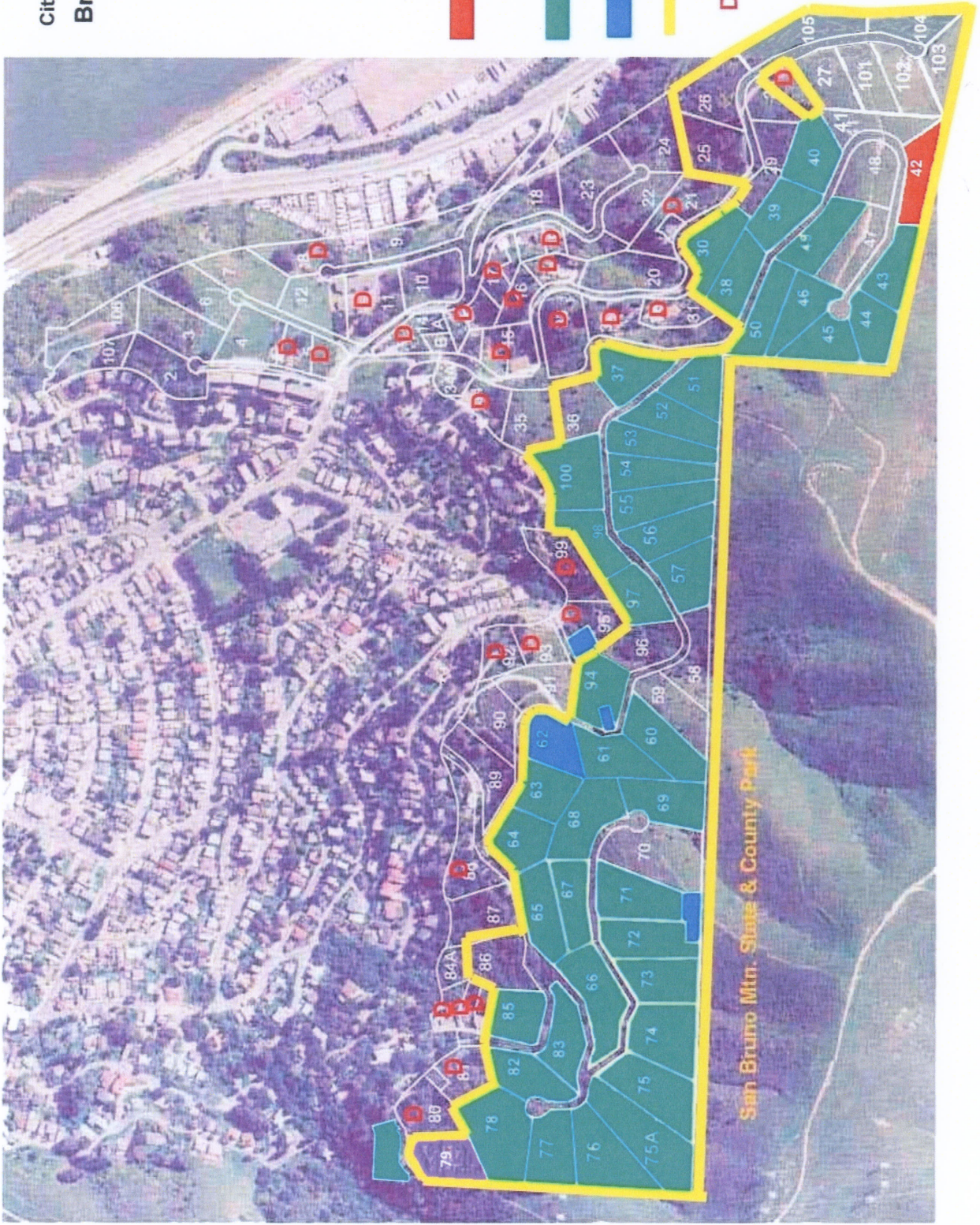
Dated: June 2, 2014

*W.R. Buffington Trust*  
*W.R. Buffington*

Dated: June 2, 2014

*Patty Buffington*  
*Patty Buffington Trust*

**City of Brisbane  
Brisbane Acres**



- Proposed Acquisition
  - City Owned Open Space Parcels
  - Water Dept. Parcels
  - Priority Preservation Area
  - Developed parcel
- ↑  
NORTH

**San Bruno Mtn. State & County Park**

Parcel numbers visible on the map include: 107, 106, 2, 3, 4, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105.



lot 42