

City of Brisbane

Agenda Report

TO: Honorable Mayor and City Council

FROM: Fred Smith via Clay Holstine, City Manager

DATE: Meeting of May 17, 2010

SUBJECT: Consider approval of Resolution No. 2010-22 ratifying and approving the agreement for purchase of real property identified as Assessor's Parcel Number 007-570-110 and authorizing execution of closing documents on behalf of the City and approval of a supplemental appropriation in the amount of \$80,000.

CITY COUNCIL GOALS:

- Goal #7. To develop plans and pursue opportunities to enhance Open Space.
- Goal #8. To develop plans and pursue opportunities to protect natural resources.
- Goal #16 To preserve the unique current character of Brisbane.

PURPOSE: To implement the Settlement Agreement discussed below and preserve additional habitat and open space in the Brisbane Acres.

RECOMMENDATION:

1. Approve resolution No. 2010-22
2. Approve a supplemental appropriation in the amount of \$80,000

BACKGROUND:

On March 10, 2008, San Bruno Mtn. Watch (SBMW) filed a suit, *San Bruno Mountain Watch v. Brookfield Northeast Ridge II, LLC et al.* Case No. CV 08-01366 SBA (EMC), in the Northern District of California alleging that, because of erosion from construction activities at their Landmark at the Ridge neighborhood, Brookfield had violated the Clean Water Act and their NPDES Construction Permit. While Brookfield denied the allegations in the lawsuit, the parties agreed to settle the litigation.

Brookfield agreed to additional revegetation at the site and to make a payment of \$80,000 to the City of Brisbane to be used within sixteen months for the acquisition of property in Brisbane Acres to be kept as open space. The choice of property to be acquired is entirely at the discretion of the City but, when the funds are expended, the City will have to send a

report to the Dept. of Justice describing how the funds were used. At its meeting of February 2, 2009, the City Council agreed to participate in the Settlement Agreement.

DISCUSSION:

After the funds were received from Brookfield, staff contacted, by mail, a number of property owners of parcels in the Brisbane Acres that lie within the area identified in the Open Space Plan as top priority for preservation. Two responses were received and staff was able to negotiate an agreement with the owner of APN 007-570-110, Brisbane Acres "lot" 40 to purchase the property for the amount of the settlement, \$80,000. This is comparable to prices paid by the City to purchase other parcels in the area.

The City Attorney prepared a purchase agreement, which was signed by the City Manager and sent to the seller. The agreement is contingent on ratification and approval by the City Council. The purchase offer was signed and accepted by the property owner returned to the City on May 11th. The proposed Resolution No. 2010-22, if approved by the City Council, will ratify the purchase agreement. Staff will then open escrow and the purchase should be completed within 30 days.

FISCAL IMPACT/FINANCING ISSUES

The purchase price is \$80,000. The Brookfield payment of \$80,000 has been received and deposited in the Open Space Fund. This amount will be appropriated from the Open Space Fund.

MEASURE OF SUCCESS:

Preservation of an additional one acre of open space and endangered species habitat in the Brisbane Acres implementing the goals of the Open Space Plan.



Department Head



City Manager

ATTACHMENTS:

Resolution No. 2010-22
Offer to Purchase Real Property

RESOLUTION NO. 2010-22

**A RESOLUTION OF THE CITY COUNCIL OF THE CITY
OF BRISBANE RATIFYING AND APPROVING THE
AGREEMENT FOR PURCHASE OF REAL PROPERTY
IDENTIFIED AS ASSESSOR'S PARCEL NUMBER 007-
570-110 AND AUTHORIZING EXECUTION OF CLOSING
DOCUMENTS ON BEHALF OF THE CITY**

WHEREAS, a proposed purchase agreement between the City of Brisbane and Debra Fitting ("Seller") has been presented to the City Council providing for the acquisition by the City of certain real property identified as Assessor's Parcel Number 007-570-110 ("the Property"), subject to various conditions having been satisfied; 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, 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.

* * * *

PASSED AND ADOPTED at a regular meeting of the City Council of the City of Brisbane held on the 17th day of May, 2010, by the following vote:

AYES:
NOES:
ABSENT:
ABSTAIN:

W. Clarke Conway, Mayor

ATTEST:

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 DEBRA FITTING ("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 (1) 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 007-570-110.

2. Purchase Price.

The total purchase price for the Property shall be the sum of Eighty Thousand Dollars (\$80,000.00), payable in full at close of escrow.

3. Escrow.

The parties shall establish an escrow with First American Title Insurance Company ("Escrow Agent"), at its office located at 135 Main St., San Francisco, California, or such other title company as may be agreed upon by the parties. 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.

4. 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 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 both parties shall thereupon be released and discharged from any further obligation or liability hereunder.

(d) At the Closing Date, legal 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.

5. **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 fifteen (15) days from the Effective Date 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 this purchase agreement at any time during this inspection period, in which event both parties shall thereupon be released and discharged from any further obligation or liability hereunder.

6. **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 Law;

- (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.

7. 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.

8. 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 both parties shall thereupon be released and discharged from any further obligation or liability hereunder.

9. 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.

10. 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 5 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 4(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.

11. Close of Escrow.

The sale escrow shall be closed within fifteen (15) days after City's approval of the legal title and physical condition of the Property in accordance with Sections 4 and 5 of this Agreement (the "Closing Date").

12. Prorations and Closing Costs.

(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.

(b) All closing costs and expenses related to this sale transaction shall be paid by Seller, including real property transfer taxes, if any, (however, it is anticipated that no such transfer taxes will be charged because City is a public agency), premium for the CLTA title insurance policy, and all escrow fees and other charges of Escrow Agent.

13. Possession.

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

14. 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.

15. **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

TO CITY City of Brisbane
Attn: Fred Smith
Brisbane City Hall
50 Park Place
Brisbane, CA 94005

16. **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.

17. **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.

18. **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.

(c) **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 heirs, executors, administrators, personal representatives, 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.

19. 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.

20 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 MAY 11, 2010, the offer shall be deemed to have been automatically withdrawn.

CITY:
THE CITY OF BRISBANE


Dated: MAY 5, 2003

By: 
Clay Holstine, City Manager

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:

Dated: May 11, 2010, 2010


DEBRA FITTING