City of Brisbane
Agenda Report

To: Mayor and Members of the City Council

From: Michael H. Roush, City Attorney

Council Meeting Date: September 7, 2017

Subject: Information Report Concerning Restricting the Uses of Properties Within Brisbane Acres that the City Owns

Recommendation

Consider this Information Report and determine whether any additional steps need to be taken at this time in order to restrict the uses of property within Brisbane Acres that the City owns.

BACKGROUND

Previously, Council requested advice as to whether the properties within Brisbane Acres that the City owns could be restricted such that the properties would remain undeveloped in perpetuity. The Open Space and Ecology Committee had made a similar request. Last year, this office provided a memo to the City Council and the Open Space Ecology Committee in response to the request and the Committee discussed the contents of that memo last year but did not make a recommendation. This Information Report sets forth several methods by which the uses of properties within Brisbane Acres that the City owns could be restricted. As discussed below, many of the properties that the City owns already have significant use restrictions.

There are approximately 110 parcels within the area called Brisbane Acres. Of those, the City currently owns 44 parcels, not counting the water tank sites. Of those parcels the City owns, 29 were acquired with federal or state funds and, in connection with those acquisitions, the funding agreements and/or deeds that conveyed the property to the City have restrictions against the use of the parcels for purposes other than for habitat preservation and open space. To remove those restrictions would involve the consent of the funding agencies which would be unlikely. Accordingly, for all intents and purposes these 29 City owned parcels are restricted to habitat preservation and open space in perpetuity.

As to the remaining City owned parcels, or parcels that the City may acquire in the future that do not involve funding agreements with federal or state agencies that restrict the parcels' use, there are several methods that could be employed that would restrict the use of the property for habitat or open space purposes. These methods are conservation easements, conveyances in fee to a public entity or a land trust, a declaration of restrictions and land use restrictions (e.g, zoning regulations).

DISCUSSION

A. Conservation Easements

A conservation easement is a recorded agreement between a property owner and certain qualified public or private entities to protect the character of land. Civil Code, sections 815-816. The intent of a conservation easement is to protect the natural, scenic, agricultural or historic character of the property subject to the easement by restricting the use of the property for the purpose for which the easement is granted. Often this type of easement is granted to a non-profit organization, such as a land trust. (A land trust is a private, non-profit organization that actively works to conserve land by undertaking or assisting in acquiring land or conservation easements.) If the City were to grant a conservation easement to such easement holder, the use of the property for any purpose other than those identified in the easement would be prohibited.

A drawback, however, for using conservation easements is that the easement holder has a fiduciary responsibility to ensure that the property is being used for purposes consistent with the easement's purposes, meaning that the easement holder must inspect and monitor the property routinely. In order to accomplish that, there is typically a cost to the grantor of the easement, such an endowment that generates sufficient funds to pay for the ongoing inspection and monitoring costs. Moreover, implicit in the City's decision to grant a conservation easement to a particular organization is that the organization has demonstrated stability and the personnel and other resources to maintain its oversight of the easement in the long term. Finding such an organization which would be willing to be the easement holder may prove to be problematic.

B. Conveyance of the Property in Fee to a Public Entity or Land Trust

Somewhat akin to a creating a conservation easement on the property, the City could convey its fee interest in the City owned parcels to another public entity or to a land trust and place restrictions on the use of the property in the conveyance documents. Such conveyance would likely remove the possibility that the property could be used for purposes other than the restricted ones. Similar to finding an organization that would be willing to undertake the responsibilities associated with holding a conservation easement, the issue with conveying properties in fee would be to find a public entity, for example the County of San Mateo, or other stable organization that would have an interest in accepting the properties. That is, along with ownership go responsibilities such as maintenance and another public entity or a land trust may not have the interest, without financial assistance from the City, in owning (and therefore maintaining) the property.

In addition, currently the City undertakes extensive efforts to maintain its properties to control non-native species and to reduce fire hazards. If the property were conveyed in fee, the City would lose direct control over these maintenance efforts.

C. Declaration of Restrictions

As a property owner, the City could record a Declaration of Restrictions, similar to CC&R's that an owner developing property records before individual lots are sold, in order to restrict the uses of the property. For example, a Declaration of Restrictions could be recorded that limits

the use of property within Brisbane Acres that the City owns to open space or habitat purposes. By recording such Declaration, the document would be of record concerning such restrictive uses. Of course, a future City Council would retain the discretion to terminate the Declaration, notwithstanding the political pressure not to do so. Accordingly, while a Declaration of Restrictions may for all practical purposes provide restrictions on the use of the property in perpetuity, it would not guarantee it.

Land Use Restrictions

Currently for purposes of the City's General Plan and zoning regulations, all properties within Brisbane Acres are designated for residential land use. The City could use its police powers to amend its land use regulations such that the land use designation of properties within Brisbane Acres, or portions thereof such as the properties within "Upper" Brisbane Acres, would be limited to open space; land uses not consistent with open space uses would not be permitted.

There are several difficulties with this approach, however. First, there could be potential issues with changing to open space the land use designation within a significant area of the Brisbane Acres because, currently, such designation would include both City owned and privately owned parcels. Owners of privately owned parcels whose use was restricted to open space could raise a "takings" claim if property owners were deprived of substantially all economic use of their properties. Second, if just individual parcels owned by the City were rezoned open space, that may well constitute impermissible spot zoning. Third, although it might be difficult politically, a future City Council could rezone the properties to a different land use designation that would allow development.

Summary as to Methods to Restrict City Owned Parcels in Brisbane Acres

Given these challenges and issues, if there were a public or private entity that the City believes would be able to perform the duties of a holder of a conservation easement for the long term and if the City were willing to provide funding for this purpose, granting a conservation easement appears to be the best choice in that the City would continue owning and maintaining its properties but the properties' use would be restricted to open space and habitat. If granting a conservation easement or conveying the properties in fee is not a viable option, then as between the Declaration of Restrictions and changing the land use designation of the parcels, the Declaration of Restrictions would have the same political risks (i.e., a future City Council could remove the restrictions) but would be the less likely to be challenged on grounds of a "taking" or spot zoning.

Acquisition of Additional Parcels for Open Space Purposes

The City Council's goal is to continue to acquire parcels in the Brisbane Acres area as they become available for sale so that those parcels may be maintained in perpetuity for open space and habitat. Fortunately, there has been funding available from the State or the federal government to assist in that effort. Another potential funding mechanism to acquire property for open space purposes would be through the creation of a District under the Recreation and Park District Law (Public Resources Code, section 5780 et seq.).

Under that law, the City could create an Open Space District, the purpose of which is to acquire and hold property for open space. Such District would be a separate governmental entity, similar to the Guadalupe Valley Municipal Improvement District. Although such District would be a separate entity, the City Council, rather than a separately elected board, could serve as the legislative body and City staff would support the District administratively and operationally.

Open Space Districts are formed under the Cortese-Knox-Hertzberg Act and therefore require LAFCO approval as well as, under certain circumstances, approval by a majority of the voters within the District to be formed. Proceedings to initiate such District are through a petition process (typically 25% of the registered voters within the proposed District) or by City Council resolution. Districts have the power to issue bonds to acquire open space parcels, with voter approval, with the debt service assessed against the parcels in the District. Districts also have the power of eminent domain to acquire property. Such acquired parcels would be held by the District and their uses restricted to open space. As to parcels currently owned by the City, the City could transfer those parcels to the District, at which time the property could not only be deed restricted but would also be subject to the restrictions imposed by the District itself. Under those circumstances, short of dissolving the District—which would take LAFCO approval--the uses of the property held by the District would remain for open space purposes.

The potential hurdles for creating an Open Space District are opposition to its creation by private property owners within the proposed District and the general reluctance of LAFCO's to create new districts unless there are compelling reasons to do so. Private property owners may object because not only might their properties be acquired by the District but also their properties (to the extent not acquired) could be assessed for the costs the District incurred in acquiring other properties, for example, the District's issuing bonds to generate funds for acquisition.

Notwithstanding these impediments, an Open Space District could be employed as an additional method to acquire and hold property in perpetuity as open space.

Conclusion and Next Steps

Because the Open Space and Ecology Committee made a similar inquiry as had the Council about the methods to restrict City owned properties within Brisbane Acres, this memo was shared with the Committee last year. The Committee took no formal action in response but did request the item be presented to the Council for discussion. Staff is looking for direction from Council whether it believes any additional steps need to be taken at this time concerning restricting the uses of properties within Brisbane Acres that the City owns.

Michael Roush
City Attorney

Clay Holstine
City Manager