



City of Sunnyvale

Notice and Agenda

Parks and Recreation Commission

Wednesday, April 22, 2015

7:30 PM

Council Chambers, City Hall, 456 W. Olive
Ave., Sunnyvale, CA 94086

Special Meeting - 7:30 PM

CALL TO ORDER

SALUTE TO THE FLAG

ROLL CALL

PUBLIC ANNOUNCEMENTS

Speakers are limited to 3 minutes for announcements of related board/commission events, programs, resignations, recognitions, acknowledgments.

CONSENT CALENDAR

[15-0367](#)

Draft Minutes of April 8, 2015 Parks and Recreation
Commission Meeting

Attachments: [Draft Minutes of April 8, 2015](#)

PUBLIC COMMENTS

This category is limited to 15 minutes, with a maximum of three minutes per speaker. If you wish to address the commission, please complete a speaker card and give it to the Recording Secretary or you may orally make a request to speak. If your subject is not on the agenda, you will be recognized at this time; but the Brown Act (Open Meeting Law) does not allow action by commission members. If you wish to speak to a subject listed on the agenda, you will be recognized at the time the item is being considered by the commission.

PUBLIC HEARINGS/GENERAL BUSINESS

[15-0308](#)

Acknowledge the Department of Public Works' Amendments to the Operational Standards for Acceptance of Land for Park Purposes

Recommendation: Alternative 3: Recommend that Council acknowledge the Department of Public Works Operational Standards for Acceptance of Land for Park Purposes, as presented in Attachment 3.

Attachments: [Current Parkland Dedication Standards](#)
[September 30, 2014 Study Session Presentation](#)
[Department of Public Works Standards for Acceptance of L](#)
[Analysis of Issues Associated with Dedication of a Superfu](#)

NON-AGENDA ITEMS & COMMENTS

-Commissioner Comments

-Staff Comments

ADJOURNMENT

Notice to the Public:

Any agenda related writings or documents distributed to members of this meeting body regarding any item on this agenda will be made available for public inspection in the originating department or can be accessed through the Office of the City Clerk located at 603 All America Way, Sunnyvale, CA. during normal business hours and at the meeting location on the evening of the board or commission meeting, pursuant to Government Code §54957.5.

Agenda information is available by contacting Anna Lewis at (408) 730-7336. Agendas and associated reports are also available on the City's web site at <http://sunnyvale.ca.gov> or at the Sunnyvale Public Library, 665 W. Olive Ave., Sunnyvale, 72 hours before the meeting.

Pursuant to the Americans with Disabilities Act, if you need special assistance in this meeting, please contact Anna Lewis at (408) 730-7336. Notification of 48 hours prior to the meeting will enable the City to make reasonable arrangements to ensure accessibility to this meeting. (29 CFR 35.106 ADA Title II)



City of Sunnyvale

Agenda Item

15-0367

Agenda Date: 4/22/2015

Draft Minutes of April 8, 2015 Parks and Recreation Commission Meeting



City of Sunnyvale

Meeting Minutes - Draft Parks and Recreation Commission

Wednesday, April 8, 2015

7:00 PM

Council Chambers, City Hall, 456 W. Olive
Ave., Sunnyvale, CA 94086

CALL TO ORDER

Chair Alexander called the meeting to order at 7:01 p.m. in the Council Chambers.

SALUTE TO THE FLAG

Chair Alexander led the salute to the flag.

ROLL CALL

Present: 5 - Chair Henry Alexander III
Vice Chair Craig Pasqua
Commissioner Ralph Kenton
Commissioner Robert Pochowski
Commissioner Andrea Schneck

Council Liaison Vice Mayor Martin-Milius (present)

PRESENTATION

[15-0407](#) American Youth Soccer Organization (AYSO)

Margaret Noe, President of Sunnyvale AYSO presented information about the local and national AYSO soccer leagues. She provided details about the league's history, philosophy, participants, and tournaments. Their current goal is to increase their presence in the City of Sunnyvale. She answered Commissioner's questions regarding safety, training, and how the Commission can assist the league.

[15-0408](#) Serra Little League

John Tracy, President of Serra Little League, presented information about the four Little Leagues serving Sunnyvale. He provided details about the Sunnyvale fields used by the league, the season of play, the Challenger program for developmentally challenged children and Little League's philosophy. He answered Commissioner's questions about the number of children participating in their programs, challenges, and how the Commission can assist the league.

PUBLIC ANNOUNCEMENTS

None.

CONSENT CALENDAR

- 1 A** [15-0358](#) Approval of the Draft Minutes of the Parks and Recreation Commission Meeting of March 11, 2015

Commissioner Pochowski moved and Commissioner Kenton seconded the motion to approve the draft minutes of the Parks and Recreation Commission Meeting of March 11, 2015. The motion carried by the following vote:

Yes: 5 - Chair Alexander III
 Vice Chair Pasqua
 Commissioner Kenton
 Commissioner Pochowski
 Commissioner Schneck

No: 0

PUBLIC COMMENTS

None.

PUBLIC HEARINGS/GENERAL BUSINESS

- 2** [15-0410](#) Capital Improvements Project Review

Parks Manager James Stark presented an overview and status update of the Park Division's capital improvement projects. He provided information about park projects at Baylands, Braly, Encinal, Fair Oaks, Fairwood, Lakewood, Las Palmas, Orchard Gardens, Orchard Heritage, Seven Seas, and Washington Parks as well as the Fremont High School Pool House.

- 3** [15-0411](#) Community Engagement

Superintendent of Community Services Daniel Wax provided Commissioners with possible opportunities for Community Engagement. Commissioners discussed the ideas of holding Parks and Recreation Commission Meetings at local parks, hearing presentations from recreation program providers, representing the commission at local events, and having more representation from local groups at the meetings. Superintendent of Golf and Parks Scott Morton provided information about user groups at local parks.

Commissioner Kenton moved to have staff bring an overview of the Recreation

Center programs to the meeting on June 10, 2015. The motion died for a lack of a second.

Commissioner Pochowski moved to have a presentation at each meeting, decided on by staff and the Chair, not to exceed 20 minutes long, and once a quarter to hold the Commission Meeting in a park and invite the community to attend. Commissioner Kenton seconded the motion. Commissioner Schneck requested a friendly amendment to include a volunteer day at the same park as the Commission's meeting, on a date either before or after the meeting. Commissioner Pochowski rejected the friendly amendment. The motion carried by the following vote:

Yes: 5 - Chair Alexander III
Vice Chair Pasqua
Commissioner Kenton
Commissioner Pochowski
Commissioner Schneck

No: 0

Commissioner Schneck moved to plan a volunteer day once a year at a park in which the Parks and Recreation Commission meeting was held. Commissioner Pochowski seconded the motion. Vice Chair Pasqua made a friendly amendment to increase the volunteer days to four times a year. Commissioner Schneck rejected his friendly amendment. Vice Chair Pasqua made a friendly amendment to increase the volunteer days to twice a year. Commissioner Schneck accepted his friendly amendment.

Superintendent Morton clarified the volunteer event would be coordinated by the Parks Division and Commissioners would participate side by side with the community.

The motion carried by the following vote:

Yes: 5 - Chair Alexander III
Vice Chair Pasqua
Commissioner Kenton
Commissioner Pochowski
Commissioner Schneck

No: 0

Chair Alexander moved and Vice Chair Pasqua seconded the motion to add a community engagement discussion item to the agenda every other meeting. Commissioner Pochowski requested a friendly amendment to add it once a quarter,

Chair Alexander rejected the friendly amendment.

Superintendent Wax clarified that the community engagement item, if approved, would be on the agenda every other meeting beginning June 10, 2015.

The motion carried by the following vote:

Yes: 5 - Chair Alexander III
Vice Chair Pasqua
Commissioner Kenton
Commissioner Pochowski
Commissioner Schneck

No: 0

NON-AGENDA ITEMS & COMMENTS

-Commissioner Comments

Commissioner Kenton represented the Parks and Recreation Commission at the Council meeting on March 24, 2015 regarding the Park Use Policies and Related User Fees Study Issue. He reported back that Mayor Griffith complimented the Commission for being active, viable, proposing study issues, and supporting the study issue process.

-Staff Comments

Superintendent Wax reminded the Commissioners of their Special Meeting on April 22, 2015 at 7:30 p.m. He announced the Friends of Sunnyvale Pottery is having a pottery sale on May 1-2. He inquired about the availability of the Commissioners to switch the May Commission meeting to May 20, 2015 as a joint meeting with the Arts Commission to discuss the budget. Commissioners Kenton, Schneck and chair Alexander confirmed their availability.

Superintendent Morton announced that the Stevens Creek Trail Feasibility Study will have community input meetings. The link is on the Public Works web page.

Superintendent Wax announced that the Arts Commission made a recommendation for the Murphy Park public art project. Council will review the three projects on April 21, 2015 and select an artist to provide the artwork.

INFORMATION ONLY REPORTS/ITEMS

[15-0413](#)

Report to Arts Commission: Review and Selection of the
Murphy Park Public Art Project

Staff has no recommendation.

ADJOURNMENT

Chair Alexander adjourned the meeting at 9:24 p.m.



City of Sunnyvale

Agenda Item

15-0308

Agenda Date: 4/22/2015

REPORT TO PARKS AND RECREATION COMMISSION

SUBJECT

Acknowledge the Department of Public Works' Amendments to the Operational Standards for Acceptance of Land for Park Purposes

BACKGROUND

On September 30, 2014, the City Council held a study session to discuss the Department of Public Works' current Parkland Dedication Standards (Attachment 1). As part of that discussion staff explained the purpose of the standards, provided a summary of the requirements, identified some of the key issues, and outlined possible next steps and options (Attachment 2). The current parkland dedication standards describe the requirements for a property to be "clean" and "clear". In general, it was concluded that the current standards are fine in respect to the "clear" requirements but the "clean" requirements are conservative and somewhat restrictive, and that they could be updated and refined to better meet park use requirements.

Staff is recommending that the City Council acknowledge the amendments that will be implemented by the Department of Public Works relative to Standards for Acceptance of Land for Park Purposes, as presented in Attachment 3.

The City Council is scheduled to consider this item on May 5, 2015.

EXISTING POLICY

General Plan, Chapter 3, Land use and Transportation - Open Space

Policy LT-8.14 - In applying the park dedication requirements for new development, place a priority on acquiring land over in-lieu payment, particularly when the development is in areas identified as underserved and/or when the land is of sufficient size or can be combined with other land dedication to form larger mini parks or neighborhood parks.

ENVIRONMENTAL REVIEW

The endorsement of the standards does not require environmental clearance because it is not a project within the meaning of CEQA. Any future park dedication will be required to complete environmental review prior to acceptance by the City.

DISCUSSION

The existing parkland acquisition standards provide that property must be "clean" and "clear" in order for the City to accept it for park use. They further provide that if there are any contaminants on a property, they must be below any applicable federal and State agency screening limits for non-restricted residential use. The proposed new standards, presented as Attachment 3, eliminate this hard and fast requirement, and are intended to allow the City greater flexibility in assessing the appropriateness of individual properties for park use. The new standards provide process direction

and establish the environmental requirements to determine if a property is acceptable, by further explaining the terms “uncontaminated” and “clear of encumbrances”.

Although staff made some formatting changes, added minor modifications, and provided additional clarifications to the “clear of encumbrances” requirement, no significant concerns were identified and the key concepts were maintained. As such, staff is focusing this report’s discussion on the “uncontaminated” requirements. The discussion focuses on the proposed changes related to environmental measurement requirements to better assess a property’s suitability for park use. The new standards are included as Attachment 3, and the following discussion provides a summary of the key modifications.

Definition of Significant Risk

As part of the proposed standards, an uncontaminated site is defined as a site where no user or occupant of the park will be exposed to any concentration of chemicals in soil, water, or air where such exposure would be expected to result in a lifetime incremental cancer risk greater than one-chance-in-one-million, or a threat of non-cancer health effects greater than a Hazard Index of 1 (“Significant Risk”). This is the standard used by various State and federal agencies to determine screening thresholds for contaminated substances. If there are hazardous materials or constituents of concern on the property, the amount or concentrations shall be below current environmental Screening Levels (SLs) published by the State of California or federal agencies. Although the previous standard *applied* the same definition, the new standards publish and include the specific definition to provide clearer direction to staff and developers.

Changes in Screening Levels Requirements

The current standards defined that no site would be accepted if it did not meet residential SLs. As part of this update, staff reviewed possible changes and is making the following modifications:

- For soil contamination, the SLs will be maintained at the residential level. This is appropriate for the following reasons:
 - 1) Soil remediation tends to be straightforward and cost effective. It normally just requires replacing the contaminated soil with clean soil, and it is the approach that was used on Seven Seas Park and other locations.
 - 2) At a park there is an expectation that the public will come in contact with soil as part of typical park activities. As such, it is important to maintain the most conservative SL, which is residential.
- For soil vapor contamination, the SL will be changed to the industrial/commercial requirement. This industrial/commercial SL is not as conservative as the residential SL, but still provides a conservative starting point for the City as they are based on indoor exposure over a typical workday.
- For groundwater contamination, the concentrations must meet the drinking water standard or the use of groundwater must be prohibited.

Human Health Risk Evaluation

If remediation to reduce contaminant concentrations to the SLs is not feasible as determined by the Director of Public Works, then a human health risk evaluation can be completed. The current standards do not allow for this step - If a site could not be remediated to residential SLs, the site was not acceptable. The proposed standards are appropriate for a number of reasons:

- Published SLs are not intended to be the final determinant on whether a site is not acceptable, as they are calculated using conservative assumptions that are not site specific. Published SLs allow the reviewer to determine that, if a site is below the SLs, additional environmental analysis will likely not be required.
 - As an example, the San Francisco Bay Regional Water Quality Control Board Users Guide: Derivation and Application of Environmental Screening Levels states that “the ESLs are intended to be conservative for use at the vast majority of sites” and “that the presence of chemical at concentrations above the ESLs does not necessarily indicate that a significant risk exists at the site. It does generally indicate that additional evaluation of environmental concerns is warranted.”
- If the new standard SLs are not met, then a human health risk evaluation can be completed that will take into account the actual site conditions and the proposed park uses.
- Using specific site conditions provides more detailed findings for a site. As an example, as part of the vapor assumptions, SLs assume sandy soil but a site could have different soil type such as clay. The published SL does not reflect this soil type, but the human health risk evaluation would.

Properties with Restrictions/Superfund Sites

As the City looks for various ways to expand its park inventory, the issue of whether the City should consider acquiring or accepting contaminated property that is the subject of regulatory oversight, such as Superfund sites, has been raised. There are a number of challenges and risks associated with acquiring this type of property; nevertheless there may be instances where such property could provide a safe and important park amenity for the community. A detailed memorandum discussing these risks and challenges, and possible way to mitigate them, is included as Attachment 4. Generally, in considering whether to accept dedication of a Superfund site or portion thereof, the City should evaluate the status of the cleanup at the site, the nature of the contamination, the condition of the title, and the financial viability of the party dedicating the site or any other parties responsible for cleanup of the site. The City should obtain and maintain bona fide prospective purchaser status, and allocate its liability to the party dedicating the site and/or another responsible party through an agreement that includes indemnity, defense and defined cleanup obligations. The City should also consider obtaining environmental insurance to cover certain liabilities, and whether it could obtain assurances from the United States EPA or other State agency responsible for oversight of the cleanup.

Because of the risks and challenges associated with acquisition of contaminated sites under regulatory oversight, the proposed standards provide that, as a general rule, the case file must be closed by the agency with "no restriction" on the site in order for the City to consider accepting the property. Case closure with mandatory covenants or deed restrictions, or with the need for ongoing monitoring, or remediation, would not be acceptable. Any exception to this standard must be directed and approved by City Council rather than staff.

FISCAL IMPACT

There is no fiscal impact associated with endorsement of the proposed standards.

PUBLIC CONTACT

Public contact was made through posting of the Parks and Recreation Commission agenda on the City's official-notice bulletin board, on the City's website, and the availability of the agenda and report in the Office of the City Clerk.

ALTERNATIVES

The City Council may:

1. Recommend that Council acknowledge the current Operational Standards for Acceptance of Land for Park Purposes, as presented in Attachment 1, and direct the City Manager to maintain the current administrative practice.
2. Direct the City Manager to develop a City Council Policy for the Department of Public Works' that establishes the Operational Standards for Acceptance of Land for Park Purposes and removes this administrative action from the City Manager.
3. Recommend that Council acknowledge the Department of Public Works Operational Standards for Acceptance of Land for Park Purposes, as presented in Attachment 3.

RECOMMENDATION

Alternative 3: Recommend that Council acknowledge the Department of Public Works Operational Standards for Acceptance of Land for Park Purposes, as presented in Attachment 3.

Prepared by: Manuel Pineda, Director of Public Works

Reviewed by: Lisa Rosenblum, Director of Library and Community Services

Reviewed by: Robert A. Walker, Assistant City Manager

Approved by: Deanna J. Santana, City Manager

ATTACHMENTS

1. Current Parkland Dedication Standards
2. September 30, 2014 Study Session Presentation
3. Department of Public Works Standards for Acceptance of Land for Park Purposes
4. Analysis of Issues Associated with Dedication of a Superfund Site for Park-Land



Park-land Dedication Standards

The following outlines the City's requirements for park-land dedication sites, if required as part of any land development project.

To maintain the health, welfare and safety of the general public, City would not accept the park-land until the following conditions are met:

1. The site shall be clean and clear of encumbrances. That is, the developer shall provide the City a written document certifying the park-land is clean and clear of encumbrances based upon the following criteria.
 - a. Property must be "Clean"
 - Both Phases I and II environmental reports would need to show that there are no hazardous material or constituents of concern on the property (qualitative).
 - As an alternative to the bullet item above, any hazardous materials or constituents of concern on the property are below current Environmental Screening Limits (ESL), or below Community Health Levels of Concern (quantitative).
 - "On-site Encapsulation" as a remedy is not acceptable by the City.
 - Averaging or blending samples is also not acceptable if there are "hot spots" above the ESLs or other standards.
 - Any open file case with any regulatory agency must be closed with "no restriction" on the site. Closure with covenants, or need for ongoing monitoring, or with any indication of hazardous materials or constituents of concern above ESL's is not acceptable.
 - b. Property must be "Clear"
 - Property should be free and clear of encumbrances of all kinds, including both physical and fiscal. Physically the land should have no buildings, structure, or utilities, above, at, or below ground. The exception would be well-documented utilities in appropriate easements, or other utilities or structures that meet the City's goals. In this case those physical encumbrances must also be clear of hazardous materials or constituents of concern, including the bedding and backfill material.

2. To satisfy item 1.a., the developer is responsible for the following items:

- a. Submit Phases I and II environmental reports showing that there are no hazardous material or constituents of concern on the property. As an alternative, prepare and pay for a specific environmental testing analysis (the "Analysis"). The minimum requirements of the Analysis shall include, but not necessarily limited to the following items:
 - The Analysis must be for the park-land dedication site as a separate parcel, not part of a larger development. Testing should be done on an established grid system with statistically appropriate grid sizes for the proposed park site area.
 - Identification of any types of contaminants and constituents of concern within the proposed park site, including qualitative and quantitative measurements. Discrete samples must be used. Blending or averaging is not acceptable. Hot spots (above ESLs) must be removed.
 - Proposal of remediation and/or clean-up measures so that all contaminants or constituents of concern can be demonstrated to be below any applicable federal and state regulatory agency's respective Environmental Screening Limits (ESL) for non-restricted residential use. Those regulatory agencies may include and are not limited to: (the Regional Water Quality Control Board, the Bay Area Air Quality District, the State Department of Toxic Substance Control and the San Francisco Bay Refuge, etc.
 - Estimated costs for those remediation and/or clean-ups measures identified in bullet item above.
- b. Submit the Analysis to the City for City's (or a third party selected by the City) peer review, paid for by developer.
- c. Take and pay for all necessary removal/remedial actions as recommended by the Analysis and to the City's satisfaction.
- d. Test the site, by the developer's environmental consultant, to confirm that the removal or remedial work actually resulted in the area having no contaminants above the ESLs, after any removal or remedial actions.
- e. Provide a report, prepared by the developer's environmental consultant, stating that the site has been tested in a standard and relevant manner and that it is now suitable for unrestricted residential use (the "Report").

3. To satisfy item 1.b., the developer is responsible for the following items:

- a. Remove all existing buildings, structure, or utilities, above, at, or below ground prior to the date of investigation in the Report.
- b. Prepare and record a grant deed (or other instrument) with notarization for transferring the property to the City. The instrument should clearly state how the City is acquiring interest either as a fee, right-of-way or parkland dedication. The instrument should also specify the due diligence that the City relied upon in accepting the property as clean and clear.
- c. Pay for all outstanding taxes and clear all outstanding liens as documented in the title report.
- d. Coordinate and pay for the title insurance and escrow fees.

4. Other conditions as listed below:

- a. There has been no activity on site since the time of the investigation in the Report that says that it is clean.
- b. Any changes to property, use of the property, storage of material or equipment on the property or other activities that could impact the property, occurring after the date of investigation in the Report, are grounds to require additional investigation.
- c. The site should be fenced to prevent access or illegal dumping commencing from the date of the Analysis, to the extent possible.
- d. The site should have signs prohibiting dumping or trespassing with a phone number for information that goes to the City commencing from the date of the Analysis.
- e. The developer is precluded from the determination of when and how the land will be developed as a park.
- f. Where the developer is required to or agrees to improve the park land, all park land work must be done to City standards, subject to City inspection, and must be maintained by and at the cost to the developer for six months following initial acceptance by the City.

Parkland Dedication Standards



***Council Study Session
September 30, 2014***

Background

- ***Parkland Dedication Standards established early 2012***
- ***Developed after the dedication and improvement of Swegles Park***
- ***Have clear direction and requirements***
- ***Some jurisdictions take dedication on a project by project basis***
 - ***San Jose, Santa Clara, Cupertino***

Purpose

- *To accept parkland as part of Development*
- *To maintain the health, welfare, and safety of the general public*
- *Manage risk*
- *Provide future flexibility*
- *Process – developer pays for all reports and testing*

Requirements

- *Environmental Phase I and II reports show that there are no materials of concern on the site*
- *Any materials of concerns are below current Environmental Screening Limits (ESL) or below Community Health Levels of Concern*
 - *ESLs provide screening levels for chemicals commonly found at sites with contaminated soil and groundwater.*
 - *ESL's are used for identification and evaluation of potential environmental concerns*
- *Property must be “Clean and Clear”*

Clean Requirements

- ***Identify all chemicals or materials of concern***
 - *Pesticides*
 - *Arsenic*
 - *Lead*
 - *Volatile Organic Compounds (VOC) in Soil*
 - *Soil vapor contamination*
- ***No blending or averaging - any “Hot Spots” must be removed***
- ***Site must be below ESL limits for non-restricted residential use***
- ***Complete any required mitigation and post testing***



Clear Requirements

- *Free of any physical encumbrances*
- *Remove all buildings, structures, or utilities above at or below ground*
- *Pay all taxes and clear all liens*
- *Prepare and record a grant deed*
- *Pay title insurance and escrow fees*

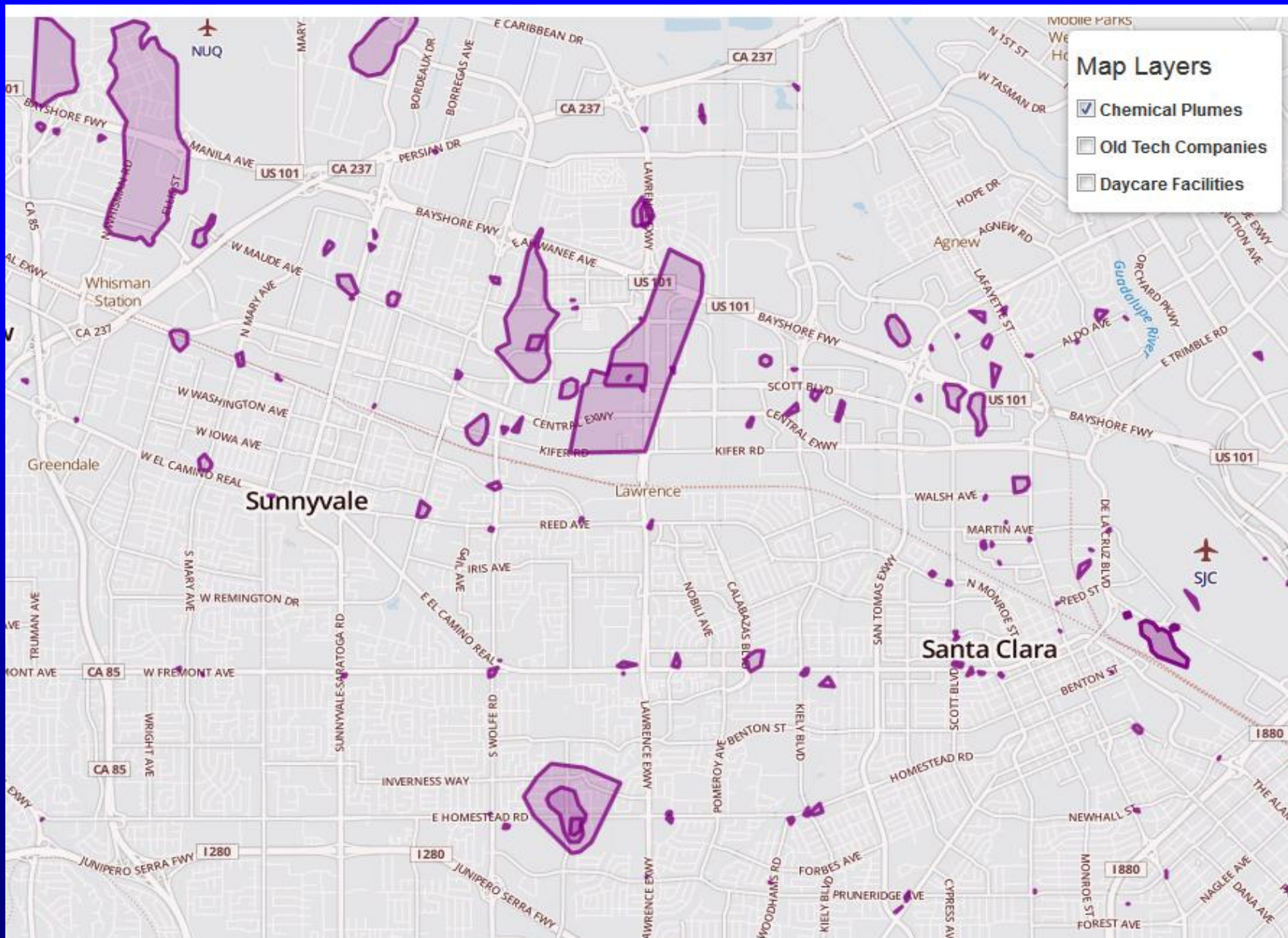


Key Items

- **MOST** soil contamination can be mitigated by removing and replacing
- **MOST** soil vapor contamination is caused by groundwater contamination
- Soil vapor mitigation is expensive and long-term
- Limited areas in Sunnyvale are of significant concern



Plumes



Current Parks

■ Seven Seas

- *Arsenic identified*
- *Remove and replaced soil between .5-2.5 feet*

■ Orchard Gardens Park Expansion

- *Below ESL levels*



Possible Next Steps/Options

- ***Science and analysis changes***
- ***Maintain current standard***
- ***Possible modifications***
 - ***Modify the residential ESL thresholds***
 - ***Differentiate between Soil and Soil Vapor***
 - ***Project by project basis***
- ***Modify from standards to guidelines***
- ***Staff to review alternatives – come back to Council***
- ***Any proposed modifications would still meet the Purpose***

Purpose

- *To accept parkland as part of Development*
- *To maintain the health, welfare, and safety of the general public*
- *Manage risk*
- *Provide future flexibility*
- *Process – developer pays for all reports and testing*

Parkland Dedication Standards



***Council Study Session
September 30, 2014***



Department of Public Works Standards for Acceptance of Land for Park Purposes

The following standards apply when the City of Sunnyvale is considering acquiring land for park purposes, whether through dedication by a developer or land purchase.

To maintain the health, welfare and safety of the general public, the City will not accept property for park purposes unless it is “Uncontaminated” and “Clear of Encumbrances.” In addition, when property is being conveyed to the City for park purposes, certain other requirements must be met as well.

“Uncontaminated” is defined as demonstrating to the satisfaction of the City, as determined by the Director of Public Works, that no user or occupant of the park will be exposed to any concentration of chemicals in soil, water, or air where such exposure would be expected to result in a lifetime incremental cancer risk greater than one-chance-in-one-million or a threat of non-cancer health effects greater than a Hazard Index of 1 (“Significant Risk”). This is the standard used by the various State and federal agencies to determine screening thresholds for contaminated substances.

“Clear of Encumbrances” means property that is free and clear of both legal and physical encumbrances.

Uncontaminated Property Requirements

1. For the City to accept property, the following is required:
 - A. Both Phase I and Phase II environmental reports conclude there are no hazardous materials or constituents of concern on the property; OR
 - B. If there are hazardous materials or constituents of concern on the property the amount or concentrations shall be below current environmental Screening Levels (SLs) published by the State of California or federal agencies. For soil contamination the concentrations must be below Residential SLs. For vapor contamination, the concentrations must be below Industrial/Commercial SLs. For groundwater contamination the concentrations must meet the drinking water standard or the use of groundwater must be prohibited. If multiple constituents of concern are present, even at concentrations below SLs, the cumulative risk must not be Significant.
 - C. If concentrations or amounts at the site exceed the relevant SLs, then they must be remediated to a non-significant level. If remediation is not feasible, as determined by the Director of Public Works, a site-specific human health risk evaluation for the proposed uses within the park shall be completed by the City’s consultant to assess whether exposure to the

property would result in a Significant Risk, and whether feasible mitigation measures would reduce the risk. If, as determined by the Director of Public Works based upon his or her review of the consultant studies, exposure to the property would not pose a Significant Risk to users, or any risk can be reduced to insignificant through specified mitigation measures, then the City may accept the property.

- D. For property that contains contaminants and that is the subject of an open file or case with any regulatory agency, the file must be closed by the agency with "no restriction" on the site in order for the City to consider accepting the property. As a rule case closure with mandatory covenants or deed restrictions, or with the need for ongoing monitoring, or remediation, is not acceptable to the City, even if the property could meet B or C above. Any exception to this standard must be directed and approved by City Council.

2. The person or entity proposing to dedicate the property is responsible for paying for and submitting the following items:

- A. Submit Phase I environmental report showing that there are no hazardous materials or constituents of concern on the property. Prepare a Phase II environmental report (Analysis) as directed by the Director of Public Works. The Analysis proposal will be reviewed and approved by the Director of Public Works prior to on-site testing occurring. The minimum requirements of the Analysis shall include, but are not necessarily limited to the following items:
- Analysis of the park-land dedication site as a separate parcel, not part of a larger development. Testing should be done on an established grid system with statistically appropriate grid sizes for the proposed park site area. Sampling should also focus on any recognized environmental conditions or environmental issues related to historical property uses.
 - Identification of any types of contaminants and constituents of concern within the proposed park site, including qualitative and quantitative measurements. Discrete samples must be used. Blending or averaging is not acceptable. Hot spots (above SLs) must be removed.
 - Proposed remediation and/or clean-up measures so that all contaminants or constituents of concern can be demonstrated to be below any applicable federal and State of California regulatory or advisory agency's respective environmental SLs.
 - Estimated costs for those remediation and/or clean-ups measures identified in bullet item above.
 - Submittal of the Analysis to the City for City's (or a third party selected by the City) peer review, paid for by developer.
 - Completion of all necessary removal/remedial actions as recommended by the Analysis and to the satisfaction of Director of Public Works.
 - Testing of the site, by the developer's environmental consultant, to

confirm that the removal or remedial work actually resulted in the area having no contaminants above the SLs or site-specific Significant Risk levels, after any removal or remedial actions.

- B. If the requirements for part A cannot be met and remediation is not feasible, Developer provides funding for the City's consultant to complete a human health risk evaluation. For the property to be acceptable the study would need to conclude that the concentrations of all constituents of concern will not individually or cumulatively result in a Significant Risk to park-land occupants, users, or workers.

Clear of Encumbrances Requirements

1. Property shall be free and clear of encumbrances of all kinds, including both physical facilities and legal or fiscal constraints, such as liens, deed restrictions, etc. Physically, the land should have no buildings, structure, or utilities, above, at, or below ground. The exception would be well-documented utilities in appropriate easements, or other utilities or structures that meet the City's goals. If any structures, utilities, or other facilities will stay in place than those physical encumbrances must also be clear of hazardous materials or constituents of concern, including the bedding and backfill material.
2. The person or entity proposing to dedicate the property is responsible for the following items:
 - a. Remove all existing buildings, structure, or utilities, above, at, or below ground except for those expressly authorized by the City to remain.
 - b. Provide a title report.
 - c. Prepare and record a grant deed (or other instrument) with notarization for transferring the property to the City.
 - d. Pay for all outstanding taxes and clear all outstanding liens as documented in the title report.
 - e. Coordinate and pay for the title insurance and escrow fees.

Other Requirements

1. Any changes to property, use of the property, storage of material or equipment on the property or other activities that could impact the property, occurring after completion of all environmental reports and analysis, are grounds to require additional investigation.
2. The site should be fenced to prevent access or illegal dumping.
3. The site should have signs prohibiting dumping or trespassing with a phone number for information that goes to the City.
4. Where the developer is required to or agrees to improve the park land, all park land work must be done to City standards, subject to City inspection, and must be maintained by and at the cost to the developer for six months following initial acceptance by the City. The developer is precluded from the determination of when and how the land will be developed as a park.

MEMORANDUM

To: JOAN BORGER, CITY ATTORNEY, CITY OF SUNNYVALE
From: LEILA BRUDERER
Date: MARCH 20, 2015
Re: **ANALYSIS OF THE ISSUES ASSOCIATED WITH THE DEDICATION
OF A SUPERFUND SITE AS PARK- LAND**
cc: MELISSA THORME

I. BRIEF SUMMARY

The City of Sunnyvale ("City") is considering whether to modify its Park-land Dedication Standards to be less restrictive, and whether the City should ever consider accepting dedication of a Superfund or other contaminated site or portion of such a site for park-land. Although there are circumstances and complications that must be addressed, a Superfund site or portion thereof could be suitable for use as park-land by the City. However, before accepting dedication of a Superfund site or portion thereof for park-land, and before designing the park to be located on the site, the City should evaluate the status of the cleanup at the site, the nature of the contamination, the condition of the title, and the financial viability of the party dedicating the site or any other parties responsible for cleanup of the site. In addition, to avoid or limit the liability the City will have as owner of a Superfund site, the City should obtain and maintain bona fide prospective purchaser status, and allocate its liability to the party dedicating the site and/or another responsible party through an agreement that includes indemnity, defense and defined cleanup obligations. The City may also want to consider whether to acquire or require others to acquire environmental insurance to cover certain liabilities, and to obtain certain assurances from the United States Environmental Protection Agency ("EPA") or another state agency responsible for oversight of the cleanup.

II. GENERAL BACKGROUND

The City has Park-land Dedication Standards, which specify the level of contamination that the City will accept for land being dedicated as a park. These standards state that either the land be free of any hazardous material or constituents of concern, as demonstrated by a Phase I and Phase II environmental report or any hazardous materials, or the constituents of concern found on the land must be below current Environmental Screening Limits or below Community Health Levels of Concern. We understand there are a number of contaminated properties located within the City, including some Superfund sites. In addition, we understand the difficulties that the City

has in finding park sites that meet the City's current Park-land Dedication Standards. The City is considering whether to modify its Park-land Dedication Standards to be less restrictive. To aid in that consideration, this memorandum explains what it means for a property to be considered a Superfund site, reviews the issues the City should consider before accepting dedication of a Superfund site, analyzes the risks and benefits associated with the dedication of a Superfund site, and outlines potential ways to mitigate those risks.

III. BACKGROUND ON SUPERFUND SITES

A Superfund site is defined as any land in the United States that has been contaminated by hazardous waste and identified by the EPA as a candidate for cleanup because the site poses a risk to human health or the environment or both. Superfund sites are listed on the National Priorities List ("NPL") because EPA considers them the nation's worst hazardous waste sites. EPA, or a State agency acting on behalf of EPA, is responsible for actively engaging in or overseeing the cleanup of Superfund sites. Superfund sites vary widely in size and location, and in the type and severity of contamination. For example, a Superfund site can have soil contamination, groundwater contamination or both. Further, a Superfund site may have widespread contamination with a less toxic contaminant or have a small area contaminated with an extremely toxic contaminant (e.g., a "hot spot").

IV. CONSIDERATIONS FOR DEDICATION OF A CONTAMINATED SITE

The City should consider a number of issues when evaluating each Superfund site for dedication as park-land, as many of these issues will bear on whether the particular site is appropriate for dedication as park-land and/or impact the design of the park to be placed on the dedicated Superfund site. These issues fall into three subject areas: 1) status of the cleanup, 2) nature of the contamination, and 3) title health and financial viability of the responsible party/current site owner.

As discussed in more detail below, the issues the City should evaluate regarding the status of the cleanup of the site include the type of cleanup, how long the cleanup has been ongoing, whether there are any current limits on the use of the site and whether there is the possibility of future limits. Issues the City should evaluate regarding the nature of the contamination include the amount of contamination, the type of contamination, the type of media that is contaminated, and the location of the contamination. Finally, the City should evaluate issues related to the title of the property and the financial viability of the prior owner/responsible party. We would recommend that the City engage a qualified environmental consultant to help evaluate the issues related to the status of the cleanup and nature of the contamination to determine whether a particular Superfund site is a good or bad choice for dedication as park-land.

A. Status of Cleanup

One of the first issues that the City should evaluate is the status of the cleanup of a particular Superfund site. Some Superfund sites have been undergoing cleanup for decades, while others are still in the investigation or remedy development phase. Generally, where a Superfund site has been undergoing cleanup for several years to decades, greater information is generally available from both the site owner and EPA regarding the effectiveness of the remedy selected, whether any areas of the site have achieved cleanup levels, and whether any institutional controls have been or will be imposed on the site. All of this information is important for the City to have to enable it to determine whether the Superfund site is a good site for dedication as park-land, and, if so, to determine an appropriate design for the park in light of any contamination, treatment facilities, or institutional controls.

1. Effectiveness of the Remedy Selected

It is advisable that the City determine the effectiveness of the particular remedy selected, if that information is available, because that information will give the City insight into how much longer the site will undergo cleanup, and how long any associated treatment equipment will remain at the site. For example, a site may be undergoing treatment for groundwater contamination through a pump and treat remedy. If the groundwater treatment has been under way for some time, the City should be able to evaluate whether remedy is effectively treating the groundwater and reducing contaminant concentrations. And, it is also likely that the responsible party or regulatory agency will have a projection regarding when cleanup levels will be achieved at the site, and how much longer the groundwater wells and associated treatment equipment will remain onsite. The City can use this information to either site the park in a portion of the site that does not have remediation facilities (i.e., groundwater wells), or incorporate the facilities into the park design in a way that does not interfere with the treatment equipment, and ensures neither will be disturbed by park activities. If the City designs a park around wells and treatment equipment, this information will also help the City to plan for a future date when the wells and treatment equipment could be removed, and to designate the responsibility for the removal and any potential disruption associated with that removal.

Moreover, where a site is fully investigated and the remedy has been selected that involves leaving some contamination in place without treatment, this information will also enable the City to determine whether such contamination makes the site unsuitable for a park or will impact the park design. For example, if a Superfund site has soil contamination that will be left in place, the City will need to consider whether the park can be designed in a way that prevents exposure to and avoids disrupting the areas of contamination. If the park design will involve paved areas, like tennis or basketball courts or a skateboard park, those facilities could be sited over the soil contamination so that it is fully covered and contained. Alternatively, the City could require the current site owner to place a layer of clean soil and sod or mulch over the soil contamination that prevents the public from being exposed to the contamination. As discussed in greater detail

below, such considerations could impact the City's potential liability, and what steps the City takes to mitigate that liability.

2. Areas Where Cleanup Goals Have Been Achieved

It is also important for the City to know whether any areas of the Superfund site have already achieved cleanup levels. A number of benefits are derived from having this information. First, an area that has achieved required cleanup levels may be eligible for deletion from the NPL by EPA if it receives a petition requesting the removal. Before deletion, EPA must make a determination that no further cleanup work is required, the state must concur, and the necessary institutional controls must be in place. If the site owner is successful in having the portion of the Superfund site removed from the NPL, the property dedicated to the City will no longer be considered a Superfund site. This makes it more likely that the City's use of the property as park-land will not be disturbed in the future by required additional cleanup. Another benefit of knowing whether a portion of the site has achieved cleanup levels is that the City could use that information to create a park design that takes advantage of the cleaner areas by using them as a soccer field or other open area, and site park equipment and associated paving on other areas of the site that have not achieved cleanup levels.

3. Institutional Controls

An additional consideration that the City should evaluate is what institutional controls are or will be imposed on a Superfund site so that the City can determine whether these controls will interfere with use of the site as park-land, and if any limits exist on the type of park equipment/facilities that can be developed on the site. Institutional controls are legal and administrative tools used to maintain protection of human health and the environment at contaminated sites. Institutional controls are often used when cleanup work is ongoing or when some amount of contamination remains on-site as part of a cleanup remedy. These controls can take the form of property use restrictions or informational devices, such as deed notices or public advisories that alert and educate people about a site. Institutional controls are designed to keep people from using a site in a way that is not safe and/or from doing things that could damage the cleanup equipment. For example, an institutional control on a Superfund site may restrict the site for industrial use, which would mean the site is not suitable for use by the City as park-land. On the other hand, an institutional control restricting the drilling of wells on a particular Superfund site would likely have no impact on whether that site could be dedicated to the City as park-land. And, as discussed in greater detail below, for the City to maintain certain liability protections at a Superfund site, its use of the site must not impede the integrity or effectiveness of institutional controls, and must comply with all land use restrictions.

B. Nature of Contamination

Another issue the City should understand and evaluate about a Superfund site before accepting the land for dedication as a park is the nature of the contamination at the site. This includes

information about the type of contamination, the type of media that is contaminated, and the location of the contamination. Having information about each of these issues will enable the City to determine whether the site is suitable for use as park-land, and, if so, design a park compatible with the contamination.

1. Type of Contamination

The City should fully evaluate the type of contamination at a particular Superfund site because different contaminants pose different exposure risks. For example, if the soil and groundwater at a site were contaminated with chlorinated volatile organic compounds (“VOCs”), primarily trichloroethylene (“TCE”) and its biodegradation products, the EPA would likely require soil excavation, groundwater extraction and treatment, groundwater monitoring, and placement of a restrictive covenant prohibiting the installation of onsite wells until the completion of the groundwater remediation. VOCs - as their name indicates - are volatile, meaning the substance can volatilize and become airborne, creating a potential vapor intrusion risk for any structures located on the site. When soil excavation at a site is complete, but VOCs are present and groundwater remediation is ongoing, institutional controls may be placed on the site restricting its use (no residential, schools, daycares), and preventing use of the groundwater or excavation of any soils. So, if the City was considering accepting park-land property contaminated with VOCs, part of that consideration would need to include whether the park design would include any buildings, such as restroom facilities or public meeting spaces. If the park design included buildings, the City would need to require the current site owner/responsible party to evaluate the potential risk of vapor intrusion into those structures. If some risk existed for vapor intrusion, the City likely would want to consider whether to require the current site owner to install vapor mitigation barriers (equipment that prevents vapor intrusion) or design its buildings to avoid vapor intrusion (well ventilated or on a raised platform). As another example, if the Superfund site at issue has soil contaminated with lead, it may not be a suitable location to be dedicated as park-land unless the lead contaminated soil is removed or completely covered. This would particularly be the case if the lead were at the surface as lead poisoning would pose a real risk to children that would use the park, and potentially ingest the contaminated soil. But, if the park design involved many paved areas, like basketball or tennis courts, it is possible that these areas of the park could be sited over the lead contaminated soil, avoiding any risk of direct public exposure to the lead. Alternatively, the City could require the current site owner/responsible party to remove or cover the lead-contaminated soil with a thick layer of clean fill to avoid exposure issues.

2. Type of Contaminated Media And Location

Another important consideration for the City is the type of contaminated media present and the location of that contamination at a particular Superfund site. As previously stated, Superfund sites can have soil contamination, groundwater contamination, or both, and these areas of soil and groundwater contamination can be at different depths. Each type of contamination and location poses different issues that the City must consider to determine whether the site is

suitable for dedication as park-land. For example, soil contamination at the surface (versus at a significant depth) will likely pose more problems for use of the site as park-land because, unless the surface soil contamination is removed or covered, a definite risk of exposure exists to individuals using the park. In addition, if the Superfund site has been undergoing cleanup for some time, and soil contamination remains, it is likely that the oversight agency and responsible party have agreed to leave the soil contamination in place with certain institutional controls or land use restrictions in effect. In this circumstance, and assuming the site is otherwise suitable for dedication as park-land, the City will likely need to design the park to avoid potentially exposing the public to the soil contamination by choosing a park design that covers all of the soil contamination. If, however, the soil contamination is at depth, and not near the surface, the area of contamination may have little to no impact on the park design.

Groundwater contamination likely poses fewer risks of exposure than soil contamination unless the groundwater is relatively shallow or will be needed for use at the park. If either is true, then the City would need to determine whether the current site owner/responsible party is treating or will treat the groundwater to levels that are safe for park use (e.g. irrigation). If the groundwater is contaminated by VOCs, the depth of the groundwater contamination is relevant because the depth can impact the likelihood of vapor intrusion risks from the groundwater contamination. Generally, groundwater at a greater depth will have fewer risks of vapor intrusion than shallower groundwater. In addition, with groundwater contamination, treatment or monitoring wells may be located onsite and the City will need to protect these wells from interference or destruction in its park design or will need to site the park in an area that does not have any wells. If the park is located in an area with groundwater wells, the City will need to grant the responsible party access to the wells to conduct sampling as necessary, which also could impact the design of the park.

C. Title Health and Financial Viability of Responsible Party

1. Title Health

Another issue the City should review prior to accepting a Superfund site for dedication as park-land is the condition of the title for the site. EPA and state agencies can place environmental liens on contaminated properties to recover cleanup costs that the government has incurred at the site. EPA uses two types of environmental liens where the federal government has funded an environmental investigation and cleanup. The first is a Superfund lien, which entitles EPA to recover cleanup costs that the government has incurred. The second is a windfall lien, which is designed to prevent an entity from realizing an unfair windfall from the purchase of a property that has been cleaned up using taxpayer dollars. The City should be wary of both types of liens as these liens could expose the City to financial liability to the lienholder (EPA or a state agency). If a lien exists on any Superfund site proposed for dedication to the City as park-land, the City should approach EPA or a state agency to determine whether it will agree to release or waive the liens. If EPA or the state agency will not agree to release or waive the liens, the City

should approach the current site owner and/or other responsible party regarding satisfying the liens before accepting dedication of the site as park-land.

2. Financial Viability of Responsible Party

A key issue the City should investigate before accepting a Superfund site for dedication as park-land is the financial viability of the entity responsible for cleanup of the site, particularly when the site will have long-term cleanup obligations or the cleanup has not yet begun. The financial viability of the entity responsible for cleanup of the site is important because, as discussed in more detail below, if that party becomes insolvent, the City and other responsible parties could be on the hook for the costs to clean up the site. In addition, if the current owner that is dedicating the site to the City is not the party responsible for cleanup of the site, the City should investigate both the financial viability of the responsible party and the current owner. As discussed below, if the City uses certain contractual mechanisms to shift risk to the current owner, it will be important that the current owner is financially viable so that it can continue to shoulder the risks, and not expose the City to liability.

V. RISKS AND BENEFITS OF DEDICATION OF A CONTAMINATED SITE

A. Risks

1. CERCLA Liability

A significant risk to the City of the dedication of a Superfund site to the City for use as park-land is the risk of liability under the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"). CERCLA, a law commonly known as Superfund, authorizes EPA, and by extension state agencies, to respond to releases, or threatened releases, of hazardous substances that may endanger public health, welfare, or the environment. CERCLA enables EPA or a state agency to force parties responsible for environmental contamination to clean up the site or to reimburse the Superfund for response and remediation costs incurred. CERCLA also enables one responsible party to sue another to recover costs incurred in cleaning up a site.

The four elements of CERCLA liability are: (1) the site in question is a facility, (2) a release or threatened release of a hazardous substance at the facility, (3) the release or threatened release has caused a party to incur necessary costs of response, and (4) a party falls within one of the four categories of liability under CERCLA. (42 U.S.C. §9607(a).) CERCLA liability is strict, which means that if the four elements are satisfied, a party has liability for the costs of cleaning up a site regardless of their involvement in the subject contamination or lack thereof. In addition, CERCLA liability is joint and several, meaning that a liable party may be held responsible by EPA or a state agency for the entire cleanup even if their contribution to the contamination was small or nonexistent. However, CERCLA does allow multiple responsible parties to go to court to seek an equitable allocation of the costs of a cleanup.

A Superfund site will satisfy the first three elements of CERCLA liability. So, whether the City will have CERCLA liability if it accepts dedication of a Superfund site as park-land depends upon whether the City falls within one or more of the four categories of responsible parties. The four categories of responsible parties under CERCLA are the owner and/or operator of a facility at the time of disposal of hazardous substances, the current owner and/or operator of the facility, a person who generated or arranged for the disposal or treatment of hazardous substances at the facility, and a transporter of hazardous substances to the facility if the transporter selected the disposal or treatment site. Through acquisition and development of a Superfund site as park-land, the City could fall within one or more of the categories of responsible parties under CERCLA. First, once the Superfund site is dedicated to the City, the City would become the current owner of the site, making it liable as a current owner under CERCLA. And, if the City is responsible for operating and maintaining the park, the City could also be liable as the current operator of the site. As stated above, CERCLA liability is strict, so the City will have CERCLA liability for the site even though it never contributed to the contamination at the site.¹ Moreover, the City could also have liability as a transporter under CERCLA if development of the park involves the movement of contaminated soils from one area of the site to another. As a liable party under CERCLA, the City could be responsible to pay for the costs of cleanup of the Superfund site whether incurred by EPA or another entity. However, there are ways the City can avoid or limit liability under CERCLA, which are discussed in detail in Section VI below.

2. Liability Under California Law

California's counterpart to CERCLA is the Carpenter-Presley-Tanner Hazardous Substances Account Act ("HSAA"). (Cal. Health & Safety Code §§25300-25395.45.) The HSAA follows in the footsteps of CERCLA, adopting CERCLA's definition of responsible party, so the same four categories of parties liable under CERCLA are also liable under the HSAA. As a result, the City, as owner of the portion of a Superfund site that is dedicated as park-land would also have liability under the HSAA.

Moreover, at Superfund sites, California state agencies may share duties with EPA in administering a cleanup. This means that liability may exist under other California environmental statutes. For example, when groundwater contamination is involved, a California EPA Regional Water Quality Control Board may be the lead agency for environmental investigation and remediation for much of the cleanup. The California State Water Resources Control Board and its associated Regional Boards have statutory authority under the Porter-Cologne Water Quality Control Act to order cleanup of a site, and recover cleanup costs from parties responsible for contamination. (Cal. Water Code §§13000 et seq.) Note that it is less

¹ Note that if there are other viable solvent responsible parties who did contribute to the contamination at the site, those parties will typically be allocated a larger share of the costs of cleanup than a party like the City, who did not cause or contribute to the contamination. This would be the case as long as the City's ownership and operation of the park-land does not exacerbate the contamination or interfere with its cleanup.

likely at a Superfund site that a state agency would pursue the City as current owner for cleanup costs, but this largely depends upon whether the other responsible parties are solvent, and able to pay for the cleanup.

3. Other Potential Liability

Superfund sites (and other contaminated sites) are often subject to potential suits by third parties alleging personal injury (toxic tort) and property damage. The City could certainly be exposed to such suits as owner of a Superfund site. This is particularly the case where the City will use the site as a park by the City because there may be potential for the public to be exposed to contamination at the site. These claims would require that the plaintiff prove that the owner of the contaminated property acted, or failed to act, in a negligent manner with respect to hazardous substances on the property, and that act or omission caused the plaintiff's harm or property damage. Because the City will have ownership of the property, the City could be responsible if it negligently exposes the public to the contamination, or if it fails to take reasonable precautions to prevent the migration of the contamination onto other property.

To evaluate the risk of third party suits, the City should review the protectiveness statement issued by the EPA, if available, to determine what uses of the property are consistent with public health, and the potential for the contamination to migrate. In addition, the City should engage a qualified environmental consultant to identify any potential areas of risk based upon the nature of the contamination and status of the cleanup. There are contractual options available to limit the City's liability for third party claims, which are discussed in detail below. In addition to these contractual options, the City can take other affirmative steps to further mitigate the risk of exposure or migration. For example, the City may want to post signs that warn the public of the risk of exposure, as is done with warning signs under Proposition 65.

B. Benefits

One main benefit to accepting dedication of a Superfund site as park-land is that the City will be increasing the land available for park-land, and, therefore the number of parks. In addition, by converting a Superfund site to a park, the City will be returning the land to productive reuse for its citizens – turning Brownfields into green fields.

VI. POTENTIAL WAYS TO MITIGATE THE RISKS OF DEDICATION OF A SUPERFUND SITE

A. Ways to Mitigate CERCLA Liability

1. Bona Fide Prospective Purchaser

CERCLA provides a defense to liability for a bona fide prospective purchaser (BFPP). Under the BFPP defense, an owner cannot be held liable for pre-existing releases of hazardous substances

on a property, provided certain conditions are met. A key advantage of the BFPP protection is that it is self-implementing, and does not require EPA to make determinations about the party's qualifications for BFPP status.

To achieve BFPP status, a new purchaser must have "no affiliation" with a liable party, and the new purchase must not only achieve BFPP status, but must also maintain that status for as long as potential liability exists. Potential liability may exist for as long as contamination remains on the property and/or the statute of limitations on cost recovery actions remains in effect. As a result, to take advantage of the BFPP protections, the City must not only undertake certain actions before acquiring the property, but must recognize that the City will also have continuing obligations.

The criteria for obtaining BFPP status, which must be satisfied prior to acquiring the Superfund site or property within the site, includes showing that all disposal of hazardous substances occurred before acquisition, and making "all appropriate inquiries" about the property prior to acquisition. Making "all appropriate inquiries" about the property before acquisition can involve the following:

- an in-depth site inquiry by an environmental professional,
- interviews with past/present owners,
- review of historical sources of information about a site,
- a search for recorded cleanup liens,
- review of federal, state and local records,
- visual inspection of the site, considering any specialized knowledge the City may have about the site,
- a review of the relationship of the purchase price to the value of the property,
- a review of commonly known/reasonably ascertainable information, and
- a review of the obviousness of the presence of contamination.

If the City can demonstrate that all disposal occurred before the City acquired the site, and conducts all appropriate inquiries, the City can establish BFPP status.

To maintain its status as a BFPP, the City must satisfy certain ongoing obligations after site acquisition, including:

- complying with land use restrictions,
- not impeding the effectiveness or integrity of institutional controls,
- exercising appropriate care with respect to hazardous substances found at the site by taking reasonable steps to prevent releases,
- providing cooperation, assistance and access to EPA,
- complying with information requests and administrative subpoenas, and

- providing legally required notices with respect to discovery or release of any hazardous substances.

Exercising appropriate care with respect to the hazardous substances found at a site could mean the City must stop continuing releases, prevent threatened future releases, and prevent exposure to earlier releases. This obligation will require the City to carefully plan its park design to ensure the design will not result in a release or threatened release, to be vigilant regarding any changes in conditions at the site, and to notify the responsible party as soon as possible if any indication of a release arises. The City could lose its status as a BFPP, and become liable for cleanup costs by interfering with the existing cleanup, exacerbating existing contamination, or causing a new release of contamination.

B. Ways to Mitigate All Potential Liability

1. Responsible Party Agreement to Indemnify And Defend

An indemnification clause can be a mechanism to transfer environmental liabilities from the City to the prior owner and/or responsible party. In accepting dedication of a Superfund site as park-land, the City should obtain an agreement from the entity dedicating the site that it will indemnify and defend the City against any claims for costs associated with any environmental liabilities arising from contamination on the site and any cleanup of the site. Such an indemnification agreement would mitigate any CERCLA or state law environmental liability the City may acquire by becoming a current owner/operator of the site. Through the indemnity, that liability would be shifted to the previous site owner. In the event the City was sued under CERCLA or state law for costs associated with cleanup of the site, the City could cross-claim against the indemnitor (either the entity that dedicated the property as park-land or another responsible party) for the full costs sought by the plaintiff, and for the City's defense costs in the action. The indemnity should also extend to potential claims against the City relating to or arising from the contamination on the Superfund site, like third party tort claims, to protect the City from these types of third party suits. It is unlikely, however, that a current owner/responsible party will agree to indemnify the City for the City's own negligence, so the City could still face third party tort suits if the City designs a park in a way that results in harm to the public from exposure to the contamination.

2. Agreement Defining The Responsible Party's Obligations

Another option that the City could use to mitigate the risk of accepting dedication of a Superfund site as park-land is to enter into an agreement with the current site owner or responsible party that clearly defines that entity's obligations to perform and pay for the environmental cleanup at the site, and defines the standards for completing the cleanup. The obligations and standards can be taken from documents the EPA or state agency have developed to define the responsible

party's obligations and site cleanup goals, or can be more stringent than what EPA or a state agency are requiring. This type of agreement clarifies which entity has responsibility for the cleanup, and defines when the cleanup is complete, which could prevent future disputes between the City and the prior owner/responsible party over these issues.

This agreement will also need to address access issues for the responsible party, and ensure that appropriate access is provided to allow for the cleanup and any associated monitoring. The City may also want to consider whether to make the current owner/responsible party pay for the preparation of the site for use as a park and/or for the actual park development and installation of any park equipment. By requiring the current owner/responsible party to pay for preparing and developing the park and installing any equipment, the City can shift any liability arising out of those activities to the current owner/responsible party, ensure those activities do not disturb the current cleanup, and avoid responsibility for the costs of disposal of any contaminated soil that may need to be excavated.

3. Environmental Insurance

Coverage under an environmental insurance policy is another way the City could mitigate the risks associated with owning a Superfund site, such as liability for cleanup costs or third-party claims. The City could purchase its own environmental insurance coverage, or require that other parties, such as a developer, responsible party, or consultant name the City as an additional insured. However, environmental insurance is typically written on a "claims made" basis meaning that the insurance only covers events while the policy is in force. Because environmental policy terms can vary over time and by carrier, and the costs of certain policies can vary widely, we could recommend that the City consult an insurance provider if it is considering acquiring insurance. We would also recommend that if the City is considering whether to require the current owner/responsible party to add it to a policy as an additional insured, that the City engage an attorney to review the policy to understand what protections the City may gain by being an additional insured, and what limitations may exist on the policy. The following are some types of environmental policies that the City may consider purchasing:

- Pollution Legal Liability (PLL) or Site Pollution Liability. These policies typically cover third-party claims for cleanup, bodily injury and property damages as well as defense costs. This type of policy may be useful to the City to mitigate the risk of third-party tort and property claims in the event the City causes or contributes to a release at the site. PLL policies typically cover property owners and others named to the policy, such as developers. However, these policies do not typically cover pre-existing conditions known to require remediation, so they likely would not cover the City for liability associated with the existing contamination at a Superfund site.
- Combined PLL and Cleanup Cost Cap Policy (CCC) policies. This type of policy is a combination of a PLL policy and a CCC policy (see further discussion below) and is

designed to cover properties with known environmental problems in which there is planned remediation and redevelopment.

- Property Transfer/ Property Owner's Policy. This is a form of PLL coverage marketed towards the parties involved in a property transaction. Property transfer liability insurance covers the seller and buyer of a property for third-party bodily injury (BI) and property damage (PD) claims and cleanup costs arising out of the property, but only for contamination that had not yet been detected as of the policy's inception date. This type of policy would therefore only provide the City with coverage for contamination at the site discovered after acquisition.

The City may consider requiring that the current owner or responsible party dedicating the land to maintain a CCC policy to cover an unanticipated increase in costs of a known cleanup. The policyholder pays an agreed-upon amount for cleanup costs of identified contamination and the insurance company pays any additional costs up to an agreed upon amount. There is a very limited insurance market for this type of coverage and, typically, policies limit coverage to three identified triggers only: 1) discovery of unidentified pollution, 2) additional amounts of pollution, or 3) a change in regulatory requirements. Examples of typical policyholders include property owners, developers, municipalities, and contractors. These policies can often be very expensive, and a careful review of the terms is important to ensure that the insurance will cover the cleanup costs expected.

Last, the City should require that any environmental consultant or contractor responsible for developing the site as a park maintain Errors and Omissions (“E&O”) insurance. This professional liability insurance on the consultants’ work will provide coverage for errors made by a consultant in developing the site as a park.

Insurance products may serve as a tool to manage environmental liability risks, but many factors affect their utility including the types of coverage available, the dollar limits on claims, the policy time limits, site assessment requirements, and the cost of available products.

C. Other Tools to Limit Risk

1. Superfund Comfort / Status Letter

The City may consider whether to obtain a Superfund Comfort/Status letter from EPA. Comfort/Status letters would provide the City with the information the EPA has about a particular property and the EPA’s intentions with respect to the property as of the date of the letter. The EPA is careful to clarify that Comfort/Status letters are not a release of liability, but may provide helpful guidance in evaluating a particular Superfund site’s cleanup status and the potential for future liability.

For example, the City could seek a Comfort/Status letter from EPA where EPA addresses what “reasonable steps” the City could take to meet its BFPP continuing obligations with respect to hazardous substances found at the property. When issuing this type of letter, the EPA would make an assessment of the actions proposed by the City, and, based on site-specific factors and environmental concerns, determine any potential incompatibilities between the proposed site activities and EPA’s response actions. The EPA will also suggest appropriate steps for the City to take with respect to the planned or completed response action. Because the letter only provides information with respect to reasonable steps based on the available information and the nature and extent of contamination known to the EPA at the time the letter is issued, the City should not interpret the letter to imply that no additional “reasonable steps” are necessary to maintain BFPP status.

2. Ready for Reuse Determinations

When all or a portion of a Superfund site is deemed to be protective for specified uses, the EPA has the discretion to issue a Ready for Reuse (“RfR”) Determination. RfR Determinations are intended to facilitate reuse by providing a plain statement that a site identified as ready for reuse will remain protective as long as all required response conditions and use limitations continue to be met. The City could request that the current owner/responsible party request a RfR determination from EPA for the site or portion of the site that will be dedicated as park-land. This would provide confirmation from EPA of whether a particular site is suitable for use as park-land and/or compatible with the planned design of the park.

**CHECKLIST OF CONSIDERATIONS FOR
DEDICATION OF A CONTAMINATED SITE**

1. **Status of the Cleanup**
 - a. Effectiveness of the remedy selected
 - b. Any areas of the site that have achieved cleanup levels
 - c. Institutional controls
2. **Nature of the Contamination**
 - a. Type of contamination
 - b. Type of media that is contaminated
 - c. The location of the contamination
3. **Title Health & Financial Viability**
 - a. Any EPA liens on the property
 - b. Financial viability of the current owner/responsible party to pay for cleanup