

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