



## **CITY COUNCIL AGENDA REPORT**

**Meeting Date:** October 17, 2024

**From:** John Swiecki, Community Development Director

**Subject:** Consideration of Non-SB 9 Issues Related to Open Space Protection, Street Standards and Roadway Ownerships, and Solar Shading in the Brisbane Acres (RBA) Zoning District

Prior to and during the September 5<sup>th</sup> public hearing on 2024-RZ-1, a number of issues unrelated to the draft ordinance and SB 9 implementation were raised. To minimize confusion and add clarity to the City Council's review process, these issues have been separated out for discussion in this staff report. Consideration of 2024-RZ-1 is the subject of a separate item on tonight's City Council agenda.

### **RECOMMENDATION**

Provide direction to staff as deemed appropriate by the City Council.

### **DISCUSSION**

Several RBA issues raised to date include:

#### **Mechanisms for protection of city owned open space lots in Brisbane Acres**

City Legal Counsel has provided a memorandum addressing mechanisms available for protection of public lands in the Brisbane Acres (see Attachment 1) and they are summarized below.

In 2019, City Council approved a Declaration of Restrictions that limits the use of the 47 properties that the City has acquired in the Brisbane Acres priority preservation area (PPA) for open space. The City Clerk's office is assembling the numerous deeds so that the legal descriptions of these parcels may be attached to the Declaration and then recorded with the County so that the Declaration is "of record". It is anticipated that this will occur by the end of the year. The Declaration of Restrictions is provided as Attachment 2 and a map of City owned properties is shown on Attachment 3. Once that Declaration is recorded it would take a unanimous vote of the City Council to subsequently release this restriction.

Other options for open space preservation include:

- a. Conveying a conservation easement on the properties to a land trust or other non-profit organization
- b. Conveying the properties in “fee” to a land trust or another public entity,
- c. Changing the General Plan land use designation and zoning of these properties to Open Space.

Note that the change of the General Plan designation and rezoning to Open Space was not recommended by Legal Counsel, due to potential exposure to claims of “taking” by the remaining private land owners within the PPA.

### **Limits of public vs. private streets in the Brisbane Acres**

A question was raised as to the limits of public streets versus private streets and who owns the private streets. Attachment 4 shows the approximate extents of public and private streets in the Brisbane Acres and vicinity, illustrating that most of those in the Brisbane Acres have remained in private ownership. This includes three owners in the Brisbane Acres as shown on the County’s GIS system, Tobie-Martin LLC, USA Guofu Inv. Inc. and Henry Yeung. Currently, the County GIS system does not show an owner for the road segment of Margaret Rd, immediately above Kings Rd. To determine the ownership of that segment, the City would need to engage a title company to conduct further research. Attachment 4 also shows undeveloped roadway lots often referred to as “paper streets”.

### **Street standards & safety for emergency ingress/egress**

BMC Section 17.01.060 requires that, "All infrastructure improvements necessary for providing service to the existing or proposed structure or use have been constructed or installed in accordance with applicable city standards as determined by the city engineer." Additionally, BMC Chapter 12.24 includes a prohibition against private streets and provides minimum street standards. The street standards apply to new development in the R-1 and R-BA districts whether the development is accomplished via SB 9 or not. Thus, any new development must be served by a public road. In the case of a private road being dedicated to the City, the length of the road necessary to connect to an existing public street would need to be brought to current City standards.

While some segments of Brisbane’s public streets in the upper areas of the R-1 district may not be improved to current standards, given their age, they are maintained by the City and provide adequate access and egress for emergency response. Also, as new development or major remodels of residences occur along these public streets, where they do not meet current

standards, the street segment along that property frontage is required to be brought up to current code. This would include a minimum 20-foot roadway width along those segments, thus providing easier passing points for vehicles.

On a related note, at the September 5 meeting the City Council inquired as to the cost of constructing a roadway. The City Engineer estimated the cost of rural road construction in the range of \$1M-\$3M per mile. The high degree of variability is based on site and roadway specific conditions such as roadway configuration, topography, soil conditions and grading which can drastically impact cost.

### **Solar Shading Protection**

Questions were raised at the September 5 City Council meeting regarding the protection of rooftop solar systems from shade cast from adjoining development. Brisbane does not have an ordinance protecting solar systems from shade from neighboring structures or trees. Developing such an ordinance would be challenging given Brisbane's topography and the need to balance the City's tree preservation objectives with solar access protection. Should the Council wish to allocate staff resources to this project, a referral to the Planning Commission would be recommended.

### **ATTACHMENTS**

1. City Legal Counsel's memorandum
2. 2019 Declaration of Restrictions
3. Map of City Owned Properties in the Brisbane Acres
4. Map of Private and Public Roadways

  
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John Swiecki, Community Development Director

  
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Jeremy Dennis, City Manager

## **LEGAL MEMORANDUM CONCERNING POTENTIAL ADDITIONAL PROTECTIONS OF CITY OWNED PROPERTIES IN THE BRISBANE ACRES**

From: Michael Roush, Legal Counsel

Date: October 3, 2024

### **City Owned Properties**

The City owns 47 properties within the Priority Preservation Area (PPA), in the Brisbane Acres. Most of these correspond to what is called the “Upper Acres” in the City’s 2001 Open Space Plan. Three of those parcels are designated as City water tank sites, with a water tank on one of them. The other 44 properties that have been acquired by the City in the PPA are for habitat preservation and open space purposes. An additional four sites were also acquired from within the R-1 Residential district immediately adjacent to the PPA, at the end of Paul Ave, also for open space purposes. The City also owns a fourth water tank site within the “Lower Acres” at the end of Glen Parkway, above Firth Park. A map showing this area and the properties owned by the City, including the Water Tank Properties, is attached.

### **Current Restrictions Imposed When Properties Were Acquired.**

Of the 47 properties within the PPA, 29 were acquired with federal or state funding. The deeds that conveyed these properties to the City restrict the use of those properties to habitat preservation and open space purposes. Those uses may not be changed without first obtaining the approval of the funding organization.

### **Declaration of Restrictions.**

In 2019, Council approved a Declaration of Restrictions that restricts the use of these properties to habitat preservation and open space. The declaration was prepared by staff in response to a Council question as to whether all of these properties, including, presumably, the 29 acquired with federal or state funding as well as any other similarly situated properties the City acquires could be restricted such that the properties would remain undeveloped in perpetuity and their use restricted to habitat preservation and open space purposes. This Declaration is to be recorded so that it is “of record”. The Declaration has not yet been recorded because it involves assembling nearly 50 deeds so that the legal descriptions may be attached to the Declaration. The City Clerk’s Office is in the process of assembling those deeds and it is expected the Declaration will be recorded by the end of the year. Although a future City Council would have the authority to amend or terminate the Declaration of Restrictions, the Declaration itself provides that such amendment or termination would need a unanimous vote of the City Council.

### **Other Means of Protection.**

Notwithstanding these current protections of City owned properties, questions have been raised whether there are other or additional means to prevent these properties from being used for other



than habitat preservation and open space. Three come to mind, with the first two being similar. These are:

- a conservation easement
- conveyance of the properties to a land trust or another public entity.
- change the General Plan land use designation and zoning of these properties to Open Space.

Conservation Easements: A conservation easement is a recorded agreement between a property owner and certain qualified public or private entities to protect the character of the land. Civil Code, sections 815-816. The intent of a conservation easement is to protect the natural, scenic, agricultural, or historic character of the property subject to the easement by restricting the use of the property for the purpose for which the easement is granted. Often this type of easement is granted to a non-profit organization such as a land trust. A land trust is a private, non-profit organization that actively works to conserve land by undertaking or assisting in acquiring land or conservation easements.

If the City were to grant a conservation easement on its properties to such an organization, the use of the properties for any purpose other than those identified in the easement would be prohibited.

A drawback is that there is typically a cost to the grantor of the easement (here, the City). The organization that holds the easement has a fiduciary responsibility to ensure that the property is being used for purposes consistent with the easement's purpose. This means, at a minimum, the organization must inspect and monitor the property routinely and in order to carry out that responsibility in perpetuity, there is typically a cost. That cost is often paid up front in the form of an endowment that generates sufficient funds to pay for the ongoing cost to inspect, monitor, and, if necessary, to undertake remedial work on the property to ensure its continued use as habitat preservation and open space. The cost will depend on the number of parcels and/or the size of the area in question, as well as the level of service expected of the organization.

Moreover, implicit in the decision to choose a particular organization as the easement holder, the City would need to be confident that the organization has demonstrated stability and has personnel and other resources to maintain its oversight of the easement in the long term.

Conveyance of the Properties in Fee to a Land Trust or a Public Entity: Somewhat akin to creating a conservation easement on the properties, the City could convey its properties to a land trust or a public entity and place restrictions on the use of the properties in the conveyance documents. This is similar to the restrictions the State and the federal government placed in the deeds to the City when State or federal money was used to purchase certain properties.

Such restrictions would likely remove the possibility that the properties could be used for any other purposes. Similar to finding an organization to undertake its fiduciary responsibilities associated with holding a conservation easement, the City would want a stable organization with sufficient resources and personnel to inspect and maintain the properties in perpetuity. As with an organization holding the conservation easement, an

organization holding the properties in fee would likely require an endowment to ensure funds would be available to carry out its fiduciary duties.

Although transferring the properties, with restrictions, to another public entity, such as San Mateo County, is also a possibility, that assumes such entity would have an interest in accepting such properties and, if it did, whether it too would require an endowment for the long-term maintenance of the properties.

Finally, currently the City undertakes efforts to maintain these properties to control non-native species and to reduce fire hazards. If the properties were conveyed in fee to a third party, the City would certainly expect the same degree of effort to control non-native species and to reduce fire hazards, but the City would lose direct control over those efforts.

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

If that were to occur, and since such land use designation would apply not only to City owned parcels but also to privately owned parcels, it is likely that the owners of private property would claim that such designation deprived them of substantially all economic use of their properties and therefore the designation constituted a "taking" of their properties for which the City must pay compensation, thereby exposing the City to millions of dollars in claims. Accordingly, because of the unknown cost to the City, which could be significant, changing the land use designation to open space is not a recommended course of action.

RESOLUTION NO. 2019-22

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF BRISBANE AUTHORIZING THE  
EXECUTION AND RECORDING OF A DECLARATION OF RESTRICTIONS CONCERNING  
PROPERTIES THE CITY OF BRISBANE OWNS IN THE UPPER AREA OF BRISBANE ACRES

WHEREAS, the City is the owner of properties located in the City of Brisbane, in an area commonly known as the Upper Area of Brisbane Acres ("the Properties").

WHEREAS, the City acquired some of the Properties with federal or state funds and, in connection with those acquisitions, the funding agreements and/or deeds that conveyed the Properties to the City have restrictions as to the use of the Properties such that the Properties may not be used for purposes other than habitat preservation and open space.


WHEREAS, as to the other Properties that the City owns or other properties within Brisbane Acres that the City may acquire in the future for habitat preservation or open space purposes, City intends that such Properties, like the other Properties acquired with federal or state funds, be restricted such that the Properties may be used only for habitat preservation or open space purposes.

NOW THEREFORE, the City Council of the City of Brisbane resolves as follows:

Section 1. The City Council approves the attached Declaration of Restrictions as to the Properties, authorizes the Mayor to sign it and directs the City Clerk to record this document in the Official Records of San Mateo County.

Section 2. In the future, should the City acquire other properties in the Upper Area of Brisbane Acres for habitat preservation or open space purposes, the Mayor is authorized to sign and the City Clerk is directed to record the appropriate and necessary documents, as may be approved as to form by the City Attorney, such that the Declaration of Restrictions shall apply equally to such properties.

Section 3. This Resolution shall take effect immediately upon its adoption.



Madison Davis  
Mayor

I, the undersigned, hereby certify that the foregoing Resolution No. 2019-22 was duly and regularly passed and adopted by the Brisbane City Council at a regular meeting held on June 6, 2019 by the following vote:

AYES: Councilmembers Cunningham, Lentz, O'Connell and Mayor Davis

NOES: None

ABSENT: Councilmember Conway



Ingrid Padilla  
City Clerk

RECORDING FOR THE BENEFIT OF,  
REQUESTED BY  
AND RETURN TO:

CITY OF BRISBANE/CITY CLERK  
50 PARK PLACE  
BRISBANE, CA 94005

EXEMPT FROM FEE PURSUANT TO  
GOVERNMENT CODE SECTION 6103/27383

### **DECLARATION OF RESTRICTIONS**

This Declaration is made by the City of Brisbane, a municipal corporation, 50 Park Place, Brisbane, CA, 94005, ("City") concerning properties that the City owns within an area of the City commonly known as the Upper Area of Brisbane Acres.

#### **Recitals**

A. City is the owner of properties located in the City of Brisbane, County of San Mateo, State of California, more particularly described in Exhibit "A", attached hereto and incorporated herein by reference ("the Properties").

B. City acquired some of the Properties with federal or state funds and, in connection with those acquisitions, the funding agreements and/or deeds that conveyed the Properties to the City have restrictions as to the use of the Properties such that the Properties may not be used for purposes other than habitat preservation and open space.

C. As to the other Properties that the City owns or other properties within Brisbane Acres that the City may acquire in the future, City intends that such Properties, like the other Properties acquired with federal or state funds, be restricted such that the Properties may be used only for habitat preservation or open space.

D. To better carry out that intent, the City Council on June 6, 2019 adopted Resolution 2019-22 approving this Declaration of Restrictions as to the Properties, authorizing the Mayor to sign it and directing the City Clerk to record this document in the Official Records of San Mateo County.

NOW, THEREFORE, in consideration of the recitals and for purposes of restricting the use of the Properties in perpetuity solely for habitat preservation and open space purposes, the City declares as follows:

1. The Properties are restricted in perpetuity solely for habitat preservation and open space purposes.

2. Should other property within the Upper Area of Brisbane Acres be acquired by the City for habitat preservation or open space purposes, the City shall ensure that this Declaration of Restrictions applies equally to such property.

2. This Declaration shall be recorded in the office of the County of San Mateo Recorder.

3. This Declaration is binding on the successors and assigns of the City.

4. This Declaration shall be construed and enforced pursuant to the laws of the State of California. Should any legal action be brought to enforce any provision herein, the prevailing party in such action shall be entitled to attorneys' fees and court costs as may be fixed by the court.

5. This Declaration shall not be revoked or amended in any way without the unanimous vote of the City Council of the City of Brisbane.

IN WITNESS WHEREOF, this Declaration is executed by the City as of the \_\_\_\_ day of \_\_\_\_\_, 2019, at Brisbane, California.

"CITY"

APPROVED AS TO FORM:

CITY OF BRISBANE



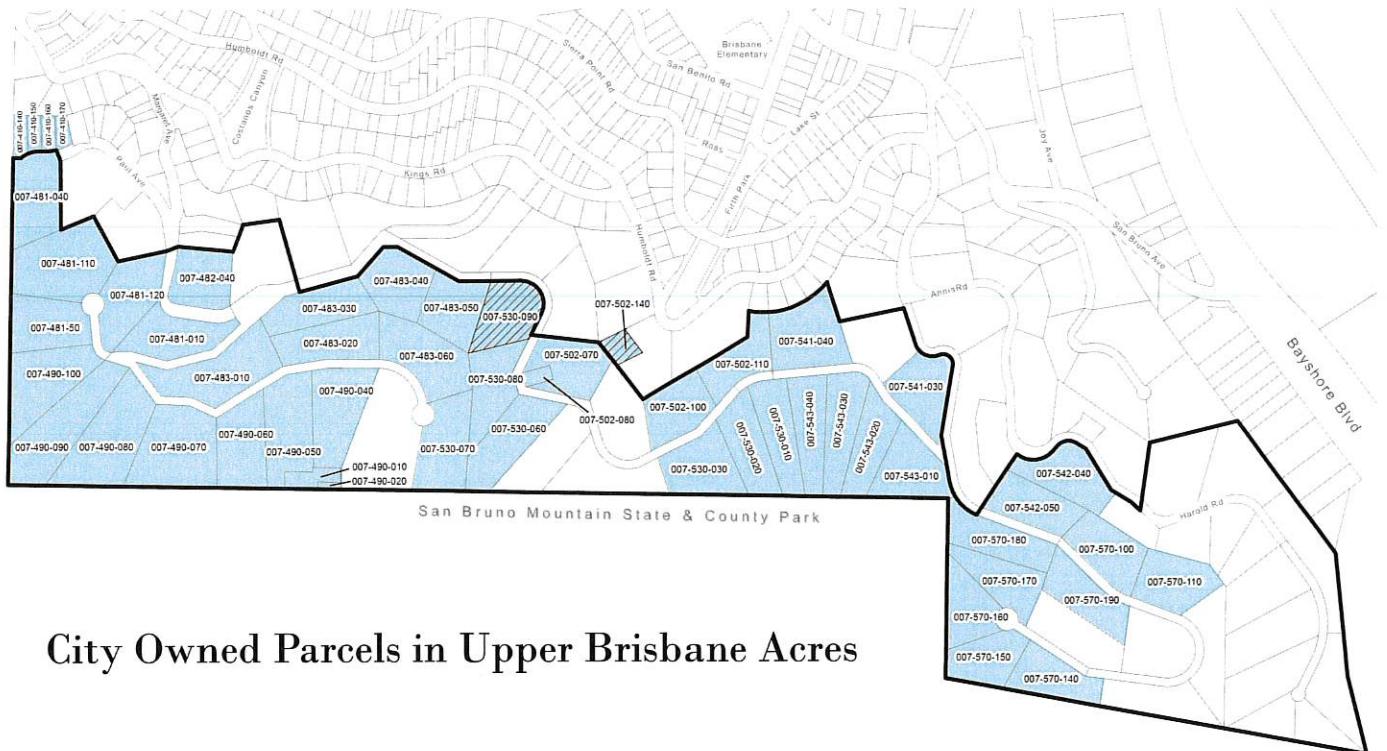
\_\_\_\_\_  
Thomas McMorrow  
City Attorney

  
\_\_\_\_\_  
Madison Davis  
Mayor

Attest:

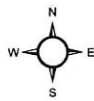
  
\_\_\_\_\_  
Ingrid Padilla  
City Clerk

# EXHIBIT A



## City Owned Parcels in Upper Brisbane Acres

-  Priority Preservation Area per 2001 Open Space Plan
-  City Owned Property
-  Water Tank Property
-  Parcel Lines

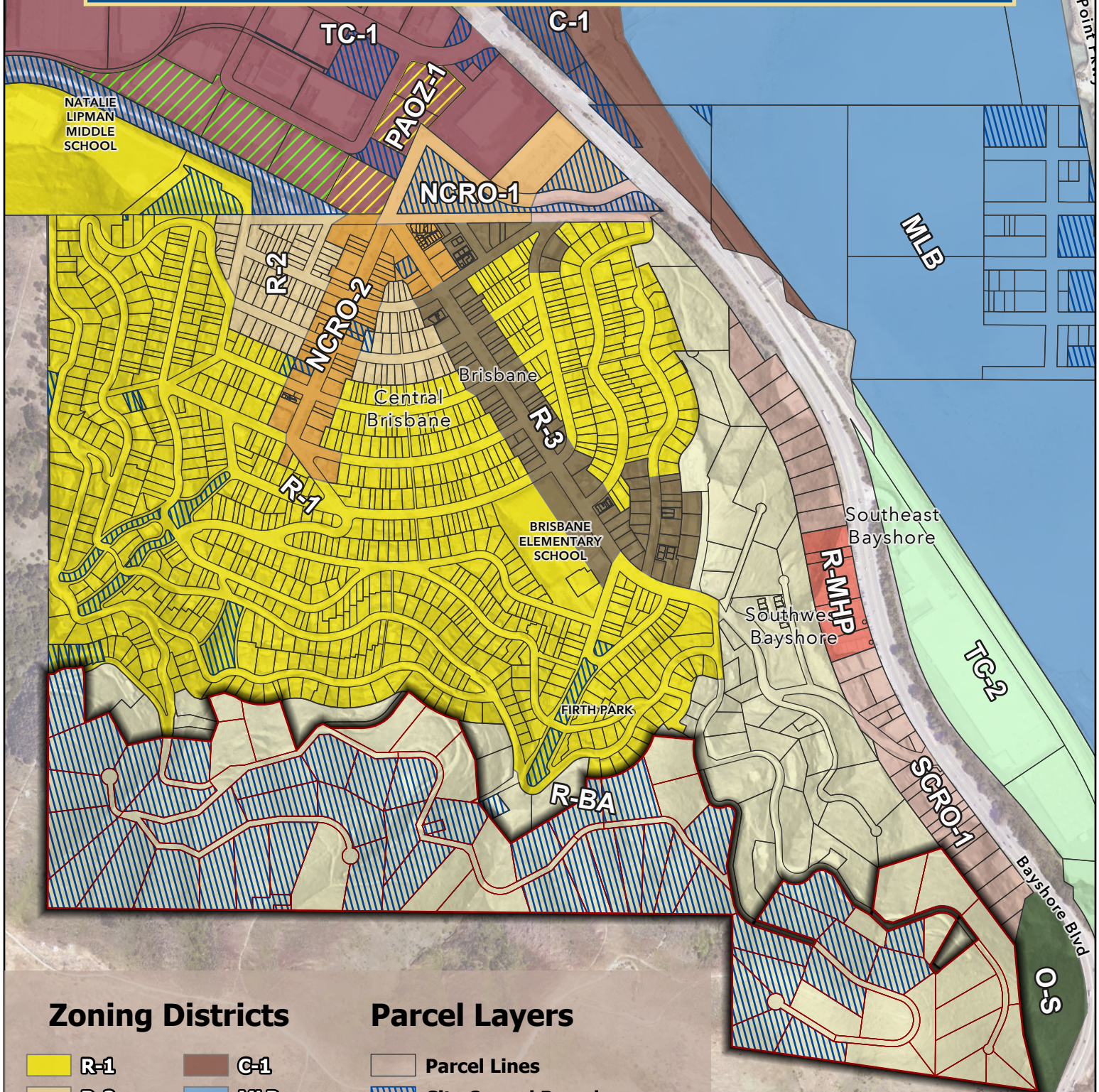


0 200 400 800 1,200 Feet





# Brisbane's Priority Preservation Area with Zoning



## Zoning Districts

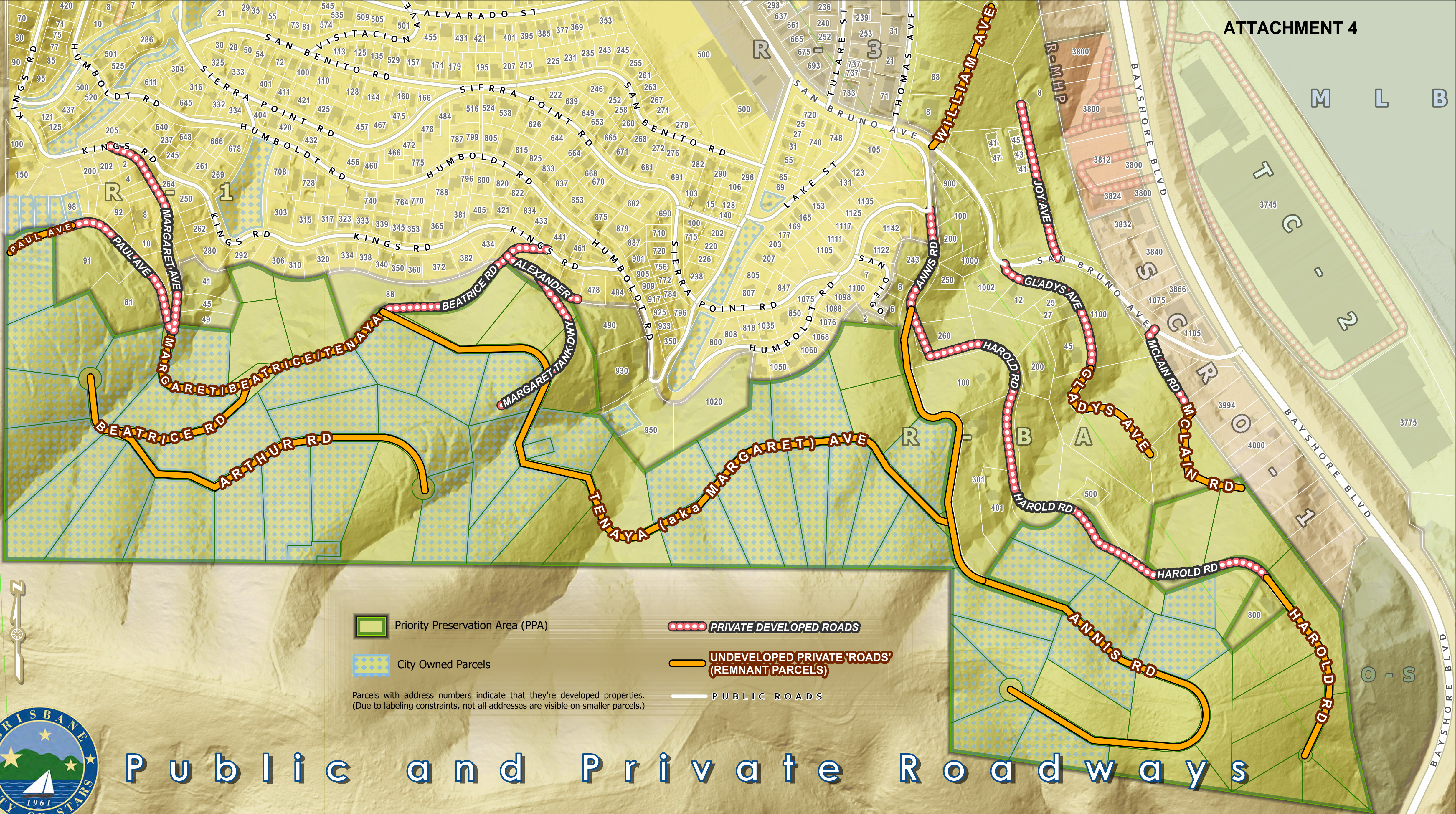
R-1	C-1
R-2	MLB
R-3	NCRO-1
R-BA	NCRO-2
R-MHP	O-S
SCRO-1	PAOZ-1
TC-1	PAOZ-2
TC-2	

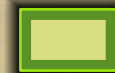
## Parcel Layers


Parcel Lines
City Owned Parcels
Priority Preservation Area








 Priority Preservation Area (PPA)

 City Owned Parcels

Parcels with address numbers indicate that they're developed properties.  
(Due to labeling constraints, not all addresses are visible on smaller parcels.)

 PRIVATE DEVELOPED ROADS

 UNDEVELOPED PRIVATE 'ROADS' (REMNANT PARCELS)

 PUBLIC ROADS



10/07/2024

# Public and Private Roadways