



CITY COUNCIL AGENDA REPORT

Meeting Date: 06/03/2021

From: Clay Holstine, City Manager

Subject: Agreement to Pay Staff and Consultants' Costs Concerning a Proposed Project to Redevelop the 144 Acre Quarry Property Adjacent to Brisbane

Recommendation

Approve the attached Agreement for Orchard Partners to pay Staff and Consultants' Costs concerning Orchard Partner's proposal to redevelop the 144 acre quarry property adjacent to Brisbane and authorize the execution of the Agreement.

Background

Orchard Partners, LLC ("Orchard") has informed the City it is in the process of acquiring the approximately 144-acre quarry property, currently in the unincorporated area of San Mateo County but immediately adjacent to the City (the "Project site"). The Project site is comprised of approximately 55 acres on which an active quarry has been in operation since approximately 1895, and approximately 89 acres of land that is undisturbed and/or previously mined and restored.

Orchard has also informed the City it is contemplating a proposal to redevelop the Project site consistent with the sphere of influence designations in the City's General Plan, generally as follows: (i) cease operation of the quarry and develop approximately 50-55 acres of the quarry floor portion of the Project site with industrial uses compatible with the Crocker Industrial Park; (ii) maintain the remaining approximately 89-94 acres as open space uses consistent with adjacent San Bruno Mountain open space/habitat conservation; and (iii) develop offsite infrastructure and improvements necessary to serve the new development (the "Project"). Orchard has informed the City the Project would advance the public goals of preserving and protecting quality habitat, and reclaiming and redeveloping a 125-year old quarry site.

To allow for development of the Project, Orchard intends to apply to the City for approval of land use entitlements, which will include a comprehensive environmental document and may include an amendment to the Brisbane General Plan, adoption of a Specific Plan covering the Project site, adoption of pre-zoning for the Project site to allow for annexation into the City, a tentative map, an operating program pursuant to the San Bruno Mountain Habitat Conservation Plan ("HCP"), and/or such other land use entitlements and permits as may be required, as well as annexation approval by the San Mateo County Local Agency Formation Commission, and certain resource agency permits (collectively, the "Project Approvals").

At a future City Council meeting, Orchard will be presenting an overview of the Project.

Due to the complexity of the Project, Orchard and City staff have discussed what fees should be imposed on Orchard in order for City staff to have the necessary resources to process the various applications for the proposed Project Approvals. Orchard has agreed to pay for outside consultant costs, such as the consultant who will prepare the environmental documentation—which is a standard practice—and has agreed to pay for all reasonable costs and expenses the City staff incurs in connection with processing the applications, which agreement is set forth in the attached Agreement to pay Staff and Consultants' Costs. The Agreement is discussed in greater detail below.

Discussion

Within the next few weeks, the City will select the consultant (and sub-consultants) who will prepare the environmental document for the Project. Following the execution of an agreement between the City and the consultant ("Consultant Agreement"), Orchard will deposit with the City 10% of the amount to be paid to the consultant, which funds will be deposited into a City reserve account ("Reserve Account"). Orchard will also deposit into that Reserve Account 20% of that 10% for "Staff Costs". For example, assuming the Consultant Agreement is for \$1 million, Orchard is agreeing to deposit \$100,000 into the Reserve Account for the consultant's costs and to deposit \$20,000 into the Reserve Account for "Staff Costs".

Concerning the overall "Staff Costs," such costs will be calculated based on 20% of the final amount of the Consultant Agreement. Again, by way of example, assuming the final amount of the Consultant Agreement is \$1.2 million, the Staff Costs that Orchard would pay would be 20% of that amount, or \$240,000. Staff and Orchard have agreed that pegging the Staff Costs as a percentage is a more efficient method than having each staff member "track" his or her time spent on the Project. It is the method the City has employed for other large projects, such as the Baylands and the Recology expansion and staff recommends Council concur in the use of that methodology here.

In addition, Orchard will pay not only for the environmental consultant and subconsultants who will prepare the environmental impact report and related documents but also for reasonable costs incurred by outside legal counsel retained by the City related to the Project, reasonable costs for outside planning services not provided by City staff, and other expenses, such as the cost of publication and mailing notices, necessarily incurred to process the Project. It was important to include costs for outside planning services because current City staff may not have the bandwidth to handle this Project and all the other projects that are on the horizon. Before, however, the City retains outside planning services, staff will discuss the issue with Orchard. Orchard may decide not to incur those costs, notwithstanding that it may mean that its Project may proceed more slowly.

The City will bill Orchard monthly for the consultants' costs and the Staff Costs. Because of the lag time, the City may draw on the funds that are in the Reserve Account to pay the consultants' costs and Staff Costs. As payments are received from Orchard, the Reserve Account will be backfilled. If, however, the Reserve Account drops below 50% of the original deposited amounts, and then is not replenished timely, under the Agreement the City may halt work on the Project until the funds have been received.

The Agreement will end once final action has been taken on the Project. The Agreement will be suspended if Orchard requests it or, as described above, there is a funding issue.

Fiscal Impact

There is no negative financial impact to the City by entering into this Reimbursement Agreement. Indeed, to the contrary, the Agreement provides a vehicle so that City staff time is appropriately compensated for the time it spends processing this Project.

Attachment: Agreement (between the City of Brisbane and Orchard Partners for Orchard) To Pay Staff and Consultants' Costs



Clay Holstine, City Manager

**AGREEMENT TO PAY STAFF AND
CONSULTANT COSTS**

THIS AGREEMENT, dated _____, 2021, by and between the City of Brisbane, a municipal corporation (“City”), and Orchard Partners, LLC, a California limited liability company (“Orchard”), is made with reference to the following facts:

A. Orchard has informed the City it is in the process of acquiring the approximately 144-acre property located at 1 Quarry Road, in Brisbane, California (the “Project site”). The Project site is comprised of approximately 55 acres on which an active quarry has been in operation since approximately 1895, and approximately 89 acres of land that is undisturbed and/or previously mined and restored.

B. Orchard has also informed the City it is contemplating a proposal to redevelop the Project site consistent with the sphere of influence designations in the City’s General Plan, generally as follows: (i) cease operation of the quarry and develop approximately 50-55 acres of the quarry floor portion of the Project site with industrial uses compatible with the Crocker Industrial Park; (ii) maintain the remaining approximately 89-94 acres as open space uses consistent with adjacent San Bruno Mountain open space/habitat conservation; and (iii) develop offsite infrastructure and improvements necessary to serve the new development (the “Project”). Orchard has informed the City the Project would advance the public goals of preserving and protecting quality habitat, and reclaiming and redeveloping a 125-year old quarry site.

C. To allow for development of the Project, Orchard intends to apply to City for approval of land use entitlements, which will include a comprehensive environmental document and may include an amendment to the Brisbane General Plan, adoption of a Specific Plan covering the Project site, adoption of pre-zoning for the Project site to allow for annexation into the City, a tentative map, an operating program pursuant to the San Bruno Mountain Habitat Conservation Plan (“HCP”), and/or such other land use entitlements and permits as may be required, as well as annexation approval by the San Mateo County Local Agency Formation Commission, and certain resource agency permits (collectively, the “Project Approvals”).

D. City is willing to undertake processing the applications for the Project Approvals so long as Orchard pays all reasonable costs and expenses City will incur in connection therewith, including the cost of City staff time and the cost for consultants. To ensure that funds are readily available for payment of such costs, Orchard has agreed to fund a Project Reserve Account maintained by City, as hereinafter set forth.

NOW, THEREFORE, the parties agree as follows:

1. **Project Reserve Account.** Within ten (10) business days of the execution of this Agreement, Orchard shall deposit with City the sum of Thirty Thousand Dollars (\$30,000), to be held by City as a Project Reserve Account and disbursed in accordance with the terms of this Agreement. Within ten (10) business days of the execution of an agreement between the City and

the environmental consultant (which may include work to be provided by sub-consultants) to prepare the environmental impact report and related documents for the Project (“Consultant Agreement”), which Consultant Agreement may be amended from time to time, Orchard shall deposit in the Project Reserve Account ten percent (10%) of the full amount of the Consultant Agreement (“Consultant Deposit”) and twenty percent (20%) of the Consultant Deposit for “Staff Costs” as defined in Section 2 of this Reimbursement Agreement (“Staff Costs Deposit”). City shall keep separate records of the Project Reserve Account showing all deposits made by Orchard and all disbursements from the account made by City, and such records shall be available to Orchard for inspection at any time during City’s regular business hours. Beginning within ninety (90) days of the initial deposit, the City shall send to Orchard a statement of the Project Reserve Account’s deposits and disbursements quarterly. Although separate accounting records of the Project Reserve Account shall be maintained, City shall not be required to segregate the Project Reserve Account into a separate fund and no interest shall be payable to Orchard thereon.

2. **Staff Costs.** For the services provided by City staff to process the Project Approvals, Orchard shall pay to the City a fee to represent a reasonable estimate of time incurred by staff employed by City (“Staff Costs”). The fee for Staff Costs shall be in a total amount equal to twenty percent (20%) of the Consultant Agreement as that Agreement is amended from time to time.

3. **Consultants’ and Other Costs.** For the cost of other services related to the City’s processing the Project, Orchard shall pay to the City (a) the actual costs incurred by all environmental consultants (including the primary consultant and any subconsultants retained by the primary consultant) who will prepare the environmental impact report and related documents, (b) the actual and reasonable costs incurred by outside legal counsel retained by the City for services related to the Project, (c) the actual and reasonable costs incurred by consultants or other outside services retained by the City for planning services related to the Project, and (d) other out of pocket expenses reasonably and necessarily incurred by City in connection with the Project including, but not limited to, the cost of publication and mailing of notices of hearings, and the cost of surveys, plans, drawings and documents (the “Actual Costs”). City shall pay the Actual Costs to the appropriate parties from the Project Reserve Account. Before the City retains consultants or other outside services for planning services related to the Project, City shall meet and confer with Orchard concerning the City’s retention thereof, including the proposed scope, duration, and cost of such services.

4. **Payment of Consultants’, Staff and Other Costs.** On a monthly basis, beginning thirty (30) days after the execution of the Consultant Agreement, City shall invoice Orchard (a) for the cost of services related to the processing of the Project, as set forth in Section 3 (the “Monthly Invoiced Amount”) and (b) an additional twenty percent (20%) of the Monthly Invoiced Amount to cover Staff Costs. Orchard shall pay the invoice within thirty (30) days of its receipt of the invoice.

5. **Use and Reinstatement of the Project Reserve Account.** If necessary and pending City’s receipt of payment from Orchard as set forth in Section 4, City may use the Project Reserve Account to pay Consultant and other costs as set forth in Section 3 and to pay Staff Costs

as set forth in Section 2. If at any time (a) a disbursement to consultants from the Project Reserve Account would result in the balance being less than fifty percent (50%) of the Consultant Deposit or, in the sole discretion of the City, inadequate to cover foreseeable Actual Costs to be incurred by the City within the following thirty (30)-day period, plus a reasonable margin as deemed appropriate by the City based on the anticipated nature of the expenses, or (b) a disbursement for Staff Costs from the Project Reserve Account would result in the balance being less than fifty percent (50%) of the Staff Costs Deposit, City shall provide written notice of such fact to Orchard and Orchard, within fifteen (15) days after receipt of such notice, shall deposit with the City such additional amount as may be necessary to restore the balance of the Consultant Deposit and/or the Staff Costs Deposit to an amount indicated by the City in the notice. If Orchard should fail or refuse to deposit the additional funds, City and its consultants shall be entitled to suspend all further review and work on the Project.

6. **Suspension of Review.** Orchard may suspend any further review by City of the Project by providing written notice to the City. Orchard shall pay City any of the costs incurred by the City pursuant to Sections 2 and 3 of this Agreement prior to City's receipt of Orchard's notice to suspend further review.

7. **Termination of Agreement.** Upon completion of all processing of Orchard's applications for Project Approvals as evidenced by final action having been taken by the City, or by Orchard's written withdrawal of such applications and/or suspension of review pursuant to Section 5 herein, this Agreement shall terminate and any balance remaining in the Project Reserve Account after payment in full of all costs and expenses owed to City under the terms of this Agreement shall be refunded to Orchard within sixty (60) days.

8. **Notices.** Any notice or demand required or permitted to be given hereunder shall be in writing and shall be either personally delivered or sent by certified mail, return receipt requested, to the address of the other party as follows:

To City: City of Brisbane
Attn: Director of Community Development
50 Park Place
Brisbane, CA 94005

To Orchard: Orchard Partners, LLC
Attn: Tyler Higgins
3697 Mt. Diablo Blvd.
Suite 200
Lafayette, CA 94549

With a copy to: Megan Jennings
Coblentz Patch Duffy & Bass LLP
One Montgomery Street, Suite 3000
San Francisco, CA 94104

9. **Limitation on Effect of Agreement.** The execution of this Agreement by City shall not constitute the granting by City, or the commitment to grant, any form of land use entitlement, permit or approval, or any agreement or commitment by City to take any action with respect to the Project or any other acts or activities relating to the subsequent independent exercise of discretion by the City. Any such subsequent action shall be considered by the City Council, in its sole and unfettered discretion, following the conduct of all legally required procedures, including, without limitation, all environmental review processes as may be required by the California Environmental Quality Act.

10. **Miscellaneous Provisions.**

(a) **Costs of Suit.** In the event legal action between the parties shall become necessary in order to enforce or interpret this Agreement, or any provision contained herein, the prevailing party shall be entitled to recover all costs and expenses as may be incurred in connection therewith, including reasonable attorney's fees.

(b) **Entire Agreement.** This Agreement constitutes the entire agreement between the parties and supersedes and cancels any prior agreements or understandings, whether written or oral.

(c) **Choice of Law; Jurisdiction; Venue.** This Agreement shall be governed by and interpreted in accordance with the laws of the State of California. Jurisdiction and venue of litigation arising from this Agreement shall be in the County of San Mateo, State of California.

(d) **Amendments.** This Agreement can only be modified by a written amendment hereto executed by both parties.

(e) **Counterparts.** This agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

[Signatures on following page]

IN WITNESS WHEREOF, the parties have executed this Agreement as of the day and year first above written.

CITY OF BRISBANE,
a municipal corporation

ORCHARD PARTNERS, LLC,
a California limited liability company


Karen Cunningham, Mayor

Tyler Higgins, President

Attest:

Ingrid Padilla, City Clerk

Approved as to form:



Michael H. Roush
Legal Counsel