



CITY COUNCIL AGENDA REPORT

Meeting Date: March 17, 2022

From: John Swiecki, Community Development Director

Subject: Application to State of California for an Equitable Community Revitalization Grant for Environmental Investigation on a Portion of the Baylands

Community Goal/Result

Safe Community - Residents and visitors will experience a sense of safety

Purpose

To obtain state grant funding to assist in the preparation of additional technical studies required as a precursor to remediation of the Operable Unit 2 (OU-2) portion of the Brisbane Baylands.

Recommendation

That the City Council: 1) Authorize the City Manager to submit an application to the State of California for an Equitable Community Revitalization Grant to secure funding for the development and review of technical studies in connection with the environmental remediation of the OU-2 portion of the Brisbane Baylands; and 2) Authorize the Mayor to sign a Reimbursement and Indemnification Agreement, in a form as approved by the City Attorney, concerning any Equitable Community Revitalization Grant the City would receive in connection with the environmental cleanup of the Baylands.

Background

In 2021, the Governor signed the Cleanup in Vulnerable Communities Initiative allocating \$500 million to expedite the clean up and beneficial use of contaminated properties. The Department of Toxic Substances Control's (DTSC) Equitable Community Revitalization Grant (ECRG) will provide more than \$200 million in grants to applicants through a competitive process. The grants are available to help local governments, even if the local government does not own the property that is contaminated.

Grants ranging from \$80,000 to \$7 million may be used, for example, to develop an environmental cleanup work plan approved by a regulatory agency as well as to implement site specific environmental cleanups. According to the Grant program's materials, communities throughout California that are burdened by lands that are contaminated and are expensive to cleanup and reuse for, among other uses, parklands, commercial enterprises and housing, will benefit by these grants by creating healthier and more economically viable communities. Under the grant program, private parties are not eligible to apply for funding, while local

municipalities are eligible, even if they do not own the property to be remediated. The deadline for filing a grant application is April 4, 2022.

BDI representatives have discussed with City staff whether the City would consider applying for one of these grants for the purpose of assisting in the development of an environmental clean up work plan and related technical studies for the OU-2 portion of the Baylands. As such, the City would be the applicant and, if the State were to approve the Grant, any funds allocated would be held and distributed by the City.

City staff brought this matter to the City Council Baylands Subcommittee (CMs Cunningham and O'Connell) for its input. The Subcommittee was conceptually supportive of the application but had four major concerns. First, it wanted the application to be relatively specific as to the scope, cost, and schedule of planning that would be undertaken if the grant were approved. Second, it wanted assurances that if the City were to receive such a grant, the City would not incur costs to administer the grant nor incur any liability for the cleanup efforts. Third, it wanted assurances that if the City submitted an application for this grant, it would not constitute any commitment on the City's part to take action concerning the Baylands and that the Council would retain its unfettered discretion to consider all matters relative to the Baylands. Fourth, it requested whether the City itself owned any property in the City that also warranted environmental cleanup such that the City might consider submitting a separate application for such work.

Discussion

As noted above, the grant being sought is for planning purposes, to fund various technical studies and workplans which are required prior to commencement of work to remediate the site. No physical remediation activities would be funded through this grant. In response to the subcommittee's concerns regarding scope, cost and timing, Attachment 2 to this report prepared by BDI outlines the various technical studies to be completed and cost estimates for each. The total grant request is for \$3M. While a detailed schedule for the preparation of each technical document has not been provided, the grant guidelines stipulate that work funded by the grant be completed within 2 years of grant award.

In response to the subcommittee's concerns about ensuring that the city does not incur any liability or financial responsibility associated with the grant, staff has drafted the attached Reimbursement and Indemnification Agreement which requires BDI to reimburse the City for any costs the City incurs in administering and overseeing the grant and would indemnify and defend the City for any potential exposure to liability arising out of the technical studies and workplans funded by the grant. Moreover, the Agreement reflects that the submission of the grant application and approval of the Agreement does not constitute the City's granting, or committing to grant, and form of land use entitlements for the Baylands; Council retains its full discretion in that regard.

Finally, City staff (Public Works Department) evaluated city owned properties that may be eligible for this grant program. Since the City has not completed a phase 1 environmental site assessment that indicates the need for cleanup, nor are any of the sites under regulatory oversight, the city properties do not meet the criteria specified in the grant application.

Fiscal Impact

There would be no financial impact to the City in applying for this grant. If the grant were approved, BDI has agreed to reimburse the City for any costs in administering the grant.

Measure of Success


Award of a grant that would advance the Baylands remediation process.

Attachments

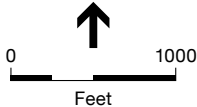
1. Site Map
2. Draft Work Scope
3. Draft Reimbursement and Indemnification Agreement



John Swiecki, Community Development Director



Clay Holstine, City Manager



Brownfield Grant- Proposed Scope of Work

The Baylands includes Operational Unit 2 (OU-2), which comprises approximately 130 acres of mostly former railroad property. The site is currently being cleaned-up and redeveloped under the jurisdiction of the California Development of Toxic Substances Control (DTSC) and San Francisco Regional Water Quality Control Board (Water Board). The Water Board is finalizing the Feasibility Study/Remedial Action Plan (FS/RAP) for OU-2.

The site scores 70-75 percent on CalEnviroScreen and has a pollution burden percentile of 91 percent. The City is not a “Responsible Party”, and the owner did not cause or contribute to the existing environmental condition. We are seeking funds to continue, and to increase, the direct participation in the development and review of site remedial documents and stakeholder engagement. This work will help implement the environmental design work established under the FS/RAPs and City required environmental obligations.

Specifically, the City initiative, Measure JJ, established the basic environmental cleanup parameters for the The Baylands, for example:

- Residential development shall be designed and remediated to accommodate ground-level residential uses and ground-level residential-supportive uses, e.g. a daycare, parks, schools, playgrounds, and medical facilities.
- Prior to the issuance of a grading permit to export soil or move soil from the existing landfill area for incorporation in a remediation or grading plan, the soil shall be tested in a manner approved by the City.
- Sufficient assurances for the satisfactory ongoing performance of site remediation and site development shall be provided as determined by the City.

The environmental requirements of Measure JJ were incorporated by DTSC and the Regional Board as Applicable and Relevant or Appropriate Requirements (ARARs) in each of the FS/RAPs. This grant funding will help ensure that the City requirements are fully incorporated with stakeholder engagement in the Remedial Design Implementation Plans (RDIPs) and other associated cleanup documents and pilot studies as listed here in the preliminary budget:

OU-2 Bunker C Mobility Study	\$250,000
OU-2 CVOC Treatability Study	\$550,000
OU-2 RDIP	\$750,000
City Environmental Consultant Review	\$200,000
OU-2 Regulatory Oversight Fees	\$250,000
OU-2 Soil Import Evaluation	\$750,000
OU-2 PCB Investigation & Removal Plan	\$150,000
OU-2 Hazardous Material Abatement Planning	<u>\$100,000</u>
Total Funding Request:	\$3,000,000

Schedule

DTSC plans to announce funding awards by August, 2022. If our team is awarded a grant, average time to negotiate a grant agreement is 120 days, therefore, grant funding could start January, 2023. All work under this new grant program must be completed within 24-months, so all work would need to be completed by January, 2025.

REIMBURSEMENT AND INDEMNIFICATION AGREEMENT

THIS REIMBURSEMENT AND INDEMNIFICATION AGREEMENT is made _____, 2022 between the City of Brisbane ("City") and _____ ("BDI") with respect to the following:

- A. The State of California has allocated funding for the clean up of contaminated sites through the Equitable Communities Revitalization Grant ("ECRG") Program.
- B. Public entities that do not own land that needs environmental clean up are eligible to apply for such grants.
- C. BDI owns land within the City of Brisbane, designated as Operational Unit 2 ("OU-2"), approximately 130 acres in size, that is being cleaned up and redeveloped under the jurisdiction of the California Department of Toxic Substance Control and the San Francisco Regional Water Quality Control Board ("Water Board").
- D. Concerning OU-2, the City is eligible to apply for an ECRG in order to obtain funding to assist in the review of the remedial documents that will implement the environmental design work established under the Feasibility Study/Remedial Action Plan that is being developed by the Water Board.
- E. It is in the interest of the City and the community for the City to apply for such ECRG to ensure the City's requirements concerning the clean up of OU-2 are fully incorporated in the Remedial Design Implementation Plan and other associated clean up documents.
- F. If the City is successful in obtaining such ECRG, the City may incur costs to administer the ECRG over and above the funding the ECRG provides for administration and City wants assurances that BDI will reimburse the City for any costs the City incurs in administering the ECRG over and above the funding the ECRG itself provides.
- G. The City also wants assurances that its submitting an application for the ECRG, its receipt of such ECRG, and its administering the ECRG do not in any way cause or contribute to the City's having any financial responsibility or liability concerning the environmental clean up of OU-2.
- H. The City also wants to make clear that its submitting an application for the ECRG, its receipt of such ECRG, and its administering the ECRG, does not in any way constitute the City's granting or the City's commitment to grant, any form of land use entitlements as to any portion of the Baylands
- I. BDI is willing to reimburse the City for its administrative costs and to provide assurances concerning the City's financial responsibilities or liability concerning the environmental clean up of OU-2.

NOW, THEREFORE, the parties agree as follows:

1. **Administrative Cost Reserve Account.** Within 10 business days of City's receipt of any ECRG concerning the environmental clean up of OU-2, BDI shall deposit with City the sum of Twenty Five Thousand Dollars (\$25,000), to be held by City as an Administrative Cost Reserve Account ("Reserve Account") and disbursed in accordance with the terms of this Agreement. City shall keep separate records of the Reserve Account showing all deposits made by BDI and all disbursements from the account made by City, and such records shall be available to BDI for inspection at any time during City's regular business hours. Beginning within 90 days of the initial deposit, the City shall send to BDI a statement of the Reserve Account's deposits and disbursements quarterly. Although separate accounting records of the Reserve Account shall

be maintained, City shall not be required to segregate the Reserve Account into a separate fund and no interest shall be payable to BDI thereon.

2. **Use of the Reserve Account.** Reference is made to the terms and conditions of the ECRG that the State of California has provided to the City, a copy of which is attached hereto as Exhibit A. To the extent permissible under the ECRG, City shall use the ECRG to pay for any administrative costs the City incurs in administering the ECRG. To the extent, City incurs administrative costs to administer the ECRG in excess of what is provided in the ECRG, BDI shall reimburse the City for such costs out of the Reserve Account.

3. **Reinstatement of Reserve Account.** If at any time a disbursement from the Reserve Account would result in the balance being less than 50% of the Reserve Account, City shall provide written notice of such fact to BDI and BDI, within 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 Reserve Account to an amount indicated by the City in the notice. If BDI should fail or refuse to deposit the additional funds, City shall be entitled to suspend all further review and work related to the ECRG.

4. **Termination of Reserve Account.** Upon completion of work related to the ECRG and the payment in full of all reimbursable amounts as provided in Section 2, City shall within 60 days return to BDI any balance remaining in the Reserve Account.

5. **Indemnification.** BDI shall indemnify, defend and hold harmless City, its officers, employees, and agents from any and all claims, demands, liabilities and judgments for, or by reason of, any damage, loss, personal injury, death, responsibility for the environmental clean up of OU-2, or any clean up costs of OU-2, caused by or arising out of BDI's use of the ECRG in its environmental clean up efforts concerning OU-2, or caused by or arising out of the City's administration of the ECRG.

6. **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:
 50 Park Place
 Brisbane, CA 94005

To BDI:

7. **Limitation on Effect of City's Submitting an Application for an ECRG and Executing this Agreement.** The City's submitting an application to the State of California for an

ECRG, the City's receipt of such ECRG, the City's administration of such ECRG, and/or the City's execution of this Agreement shall not in any way constitute the City's granting, or the City's commitment to grant, any form of land use entitlement, permit or approval, or any City agreement or commitment to take any action with respect to OU-2 or any other portion of the Baylands, or any other acts or activities relating to City's subsequent independent exercise of discretion. 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.

8. 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.

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

CITY OF BRISBANE,
a municipal corporation

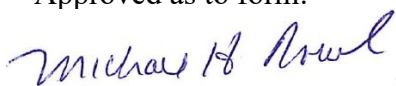
BDI

Coleen Mackin, Mayor

Attest:

Ingrid Padilla, City Clerk

Approved as to form:

A handwritten signature in blue ink that reads "Michael H. Roush". The signature is written in a cursive style with a large initial "M".

Michael H. Roush
Legal Counsel