



Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: Richard Doyle
Jennifer A. Maguire

SUBJECT: SEE BELOW

DATE: November 29, 2011

**SUBJECT: SETTLEMENT WITH UNION PACIFIC RAILROAD COMPANY /
PURCHASE OF A 9.04-ACRE PROPERTY THAT IS A PORTION OF A
FORMER SPUR TRACK COMMONLY KNOWN AS THE SAN JOSE
INDUSTRIAL SPUR; AND ADOPTION OF APPROPRIATION
ORDINANCE AND FUNDING SOURCES RESOLUTION AMENDMENTS
IN THE INTEGRATED WASTE MANAGEMENT FUND, SAN
JOSE/SANTA CLARA TREATMENT PLANT INCOME FUND, AND THE
SUBDIVISION PARK TRUST FUND**

RECOMMENDATION

- A. Approve a settlement and authorize the City Attorney to execute a Settlement Agreement to settle the case of Union Pacific Railroad Company v. City of San Jose. The settlement includes \$2,000,000 for the purchase of an approximately 9.04-acre parcel of real property, plus estimated closing costs of \$29,272, for a total amount of \$2,029,272.
- B. Adopt the following Appropriation Ordinance and Funding Sources Resolution amendments in the Integrated Waste Management Fund:
1. Increase the estimate for Earned Revenue by \$300,000;
 2. Establish an estimate for Transfers in the amount of \$52,784;
 3. Establish an appropriation to the Finance Department for UP Settlement Payment in the amount of \$964,272; and
 4. Decrease the Reserve for Operations and Maintenance by \$611,488.
- C. Adopt the following Appropriation Ordinance and Funding Sources Resolution amendments in the San Jose/Santa Clara Treatment Plant Income Fund:
1. Establish an estimate for Earned Revenue in the amount of \$79,382;
 2. Establish a Transfer to the Integrated Waste Management Fund in the amount of \$52,784; and

3. Increase the Ending Fund Balance by \$26,598.
- D. Adopt the following Appropriation Ordinance amendments in the Subdivision Park Trust Fund:
1. Establish an appropriation to the Finance Department for UP Settlement Payment in the amount of \$1,065,000;
 2. Decrease the Reserve: TRAIL: Coyote Creek (Story Road to Phelan Avenue) appropriation in the amount of \$600,000; and
 3. Decrease the TRAIL: Coyote Creek (Story Road to Phelan Avenue) Design appropriation in the amount of \$465,000.

OUTCOME

Settle lawsuit alleging damage to real property due to migration of hazardous materials from former City landfill onto adjacent real property owned by Union Pacific Railroad.

BACKGROUND

Union Pacific Railroad ("UP") owns an approximately 9.04-acre parcel of real property ("UP Property") that is a portion of a former spur track commonly known as the San Jose Industrial Spur. City of San Jose ("City") owns certain real property located directly adjacent to the UP Property (to the east and west) commonly known as the Story Road landfill ("City Property"). City operated a municipal landfill on the City Property from 1961 until its closure in approximately 1969.

In July of 2008, UP presented a claim to the City under the California Government Claims Act alleging that waste materials from the City Property, including construction debris, glass, plastic, oil residues and hazardous materials ("Landfill Waste") had migrated onto, encroached upon and contaminated the UP Property.

On January 15, 2010, UP brought an action against the City in the United States District Court, Northern District of California, San Jose Division, and subsequently filed a first amended complaint on March 12, 2010. UP alleged, among other things, that the Landfill Waste had migrated onto, encroached upon and contaminated the UP Property and sought damages and injunctive relief against the City ("Action"). The City and UP entered into a Tolling and Standstill Agreement, as the same has been amended from time to time, tolling UP's claims, and agreed to mediate the dispute.

On July 20, 2011, the City and UP attended a mediation in San Jose before Hon. Edward A. Panelli (Ret.) during which the City and UP reached a resolution of the

dispute whereby the City will purchase the UP Property and assume responsibility for its remediation, and indemnify UP, all subject to the terms and conditions of the proposed Settlement Agreement and proposed Agreement of Purchase and Sale.

ANALYSIS

The proposed Settlement Agreement provides that the City will purchase the UP Property from UP for \$2,000,000. The City and UP will each pay fifty percent (50%) of any escrow fees and expenses and will pay their respective attorneys' fees. City's portion of the closing costs is an amount estimated at \$29,272, which includes a termination fee of \$9,772 to terminate a billboard located on the UP Property.

The City, at its sole cost and expense, will perform all work that may be necessary for the investigation, assessment, monitoring, removal and remediation of any waste, hazardous materials, pollutants, contaminants, building materials or other materials on, about or emanating from the UP Property. The City will perform any and all monitoring, post-closure maintenance, and other investigation or remediation that may be required. Although some funding for remediation of the currently owned City landfill sites is budgeted annually in the General Fund, no funds are available for this particular site. The method of remediation is often influenced by the eventual future land use. Considering the site is currently planned for future trail purposes, a likely remedial alternative would be capping the impacted material in-place that could be implemented at the time of trail development. Therefore, future funding to redevelop the site will need to include funding for the necessary environmental mitigation. The City plans to pursue grant funding opportunities, if available, to supplement any required remediation work. Since the adjacent City-owned landfill is already being remediated and monitored, additional costs for the ongoing monitoring of the subject site are not expected to be significant.

In consideration of the City's purchase of the UP Property and the performance of City obligations in the Settlement Agreement and the Agreement for Purchase and Sale, UP will forever release, discharge and covenant not to sue City, and its subsidiaries, parents, officials, employees, attorneys and agents, of and from any and every claim arising directly or indirectly out of or related in any way to the allegations, transactions or subject matter of the Action, to the UP Property, or to any hazardous materials thereon.

The settlement is reasonable in light of the inherent risks and costs of litigation. This settlement is made as a compromise of a disputed claim, and the City is not admitting that it is legally liable for any amounts claimed.

PUBLIC OUTREACH/INTEREST

This memorandum, settlement agreement, and purchase and sale agreement have been posted on the City's website for the December 13, 2011 City Council agenda.

COORDINATION

This memorandum was coordinated with the Office of Economic Development, the Finance Department, the Parks, Recreation and Neighborhood Services Department and the Environmental Services Department.

COST SUMMARY/IMPLICATIONS

Funding available for the purchase of the land will come from multiple sources, including the Integrated Waste Management Fund, San José/Santa Clara Treatment Plant Income Fund, and Subdivision Park Trust Fund. A brief description of the various sources of funding for this project is provided below:

Integrated Waste Management Fund

Approximately \$964,000 of the total cost of \$2,029,272 will come from the Integrated Waste Management Fund. Of this amount, \$611,488 is to be funded from unrestricted late fees. A reconciliation of prior year expenditures and 2010-2011 late fee revenues has shown that the Reserve for Operations and Maintenance contains sufficient late fees to fund this portion of the settlement. Additionally, \$300,000 is available in 2011-2012 from ineligible Construction Demolition Diversion Deposits (CDDD) revenues. CDDD is an incentive program to encourage the recovery of debris from construction and demolition projects. The City collects a deposit that is fully refundable with proper documentation that the debris has been recycled. Deposits which are not redeemed per the requirements of the Municipal Code are determined ineligible and are available for unrestricted purposes in the Integrated Waste Management Fund. Lastly, approximately \$52,800 will be available in this fund due to a transfer of revenue received in the San José/Santa Clara Treatment Plant Income Fund as described below.

San José/Santa Clara Treatment Plant Income Fund

Approximately \$79,400 in unrestricted revenue is recommended to be recognized in the San Jose/Santa Clara Treatment Plant Income Fund associated with the purchase and sale of an electric pole easement on Water Pollution Control Plant buffer lands with Los Esteros Critical Energy Facility. The City's portion of that revenue is approximately \$52,800, which is recommended to be transferred to the Integrated Waste Management Fund. The remaining portion of the revenue of approximately \$26,600 will be distributed

back to the tributary agencies through an annual reconciliation process between the City and the tributary agencies.

Subdivision Park Trust Fund

Funding of \$1,065,000 is recommended to be allocated in this memorandum from the Subdivision Park Trust Fund. This funding is currently allocated (or reserved) for the development of the Coyote Creek Trail from Story Road to Phelan Avenue. As part of this memorandum, the funding will be re-allocated to the Settlement Agreement with Union Pacific Railroad. This funding was collected within the required nexus of the UP Property. While this funding is being diverted from an existing trail project (Coyote Creek Trail), the UP Property being purchased as part of this transaction will eventually become part of an another trail project – the Five Wounds Trail. The Five Wounds Trail will eventually connect residents of the Spartan-Keyes area all the way to the future Berryessa BART station. While both the Coyote Creek and Five Wounds trails are priorities, expenditure of these funds for acquisition of the Five Wounds Trail is recommended as it allows land-banking for future trail development, as opposed to Coyote Creek trail which does not require acquisition.

1. AMOUNT RECOMMENDED: **\$2,029,272**

Settlement Agreement	\$2,000,000
Closing-related Costs	\$29,272
Total Cost	\$2,029,272

2. SOURCE OF FUNDING:

- 375 – Subdivision Park Trust Fund
- 423 – Integrated Waste Management Fund
- 514 – San Jose/Santa Clara Treatment Plant
Income Fund

3. OPERATING COST: This memorandum provides funding for a settlement agreement with the Union Pacific Railroad. This action will not have an operating or maintenance impact on the General Fund. However, funding for remediation of the site as part of the future trail development will need to be identified at that time.

BUDGET REFERENCE

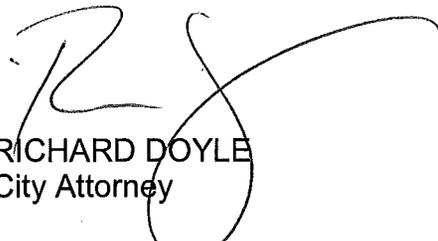
Fund #	Appn #	Appn. Name	Total Appn	Funding toward Settlement*	2011-2012 Adopted Operating Budget Page	Last Budget Action (Date, Ord. No.)
423	0762	Environmental Services (Reserve for Operations and Maintenance)	\$3,820,642	\$611,488	XI-50	10/25/2011 Ord.No. 28987
375	8299	Reserve: TRAIL: Coyote Creek (Story Road to Phelan Avenue)	\$600,000	\$600,000	V-241	6/21/2011 Ord. No. 28928
375	7302	TRAIL: Coyote Creek (Story Road to Phelan Avenue) Design	\$465,000	\$465,000	V-242	6/21/2011 Ord. No. 28928

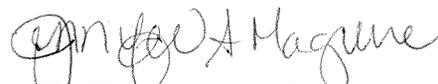
* In addition to the funding above, new appropriations are recommended as part of this memorandum to provide for the settlement amount of \$964,272 in the Integrated Waste Management Fund and the following amounts are recommended to be recognized:

- \$300,000 of CDDD revenue in the Integrated Waste Management Fund.
- \$52,784 of revenue in the San José/Santa Clara Treatment Plant Income Fund will be recognized and transferred to the Integrated Waste Management Fund.

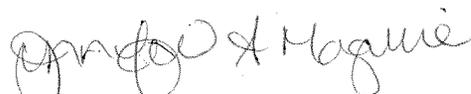
CEQA

CEQA: Not a Project; File No. PP10-066h, Settlement Agreements.


 RICHARD DOYLE
 City Attorney


 JENNIFER A. MAGUIRE
 Budget Director

I hereby certify that there will be available for appropriation in the Fiscal Year 2011-2012 monies in excess of those heretofore appropriated therefrom, said excess being at least \$300,000 in the Integrated Waste Management Fund and \$79,382 in the San José/Santa Clara Treatment Plant Income Fund.


 JENNIFER A. MAGUIRE
 Budget Director

For questions please contact Richard Doyle, City Attorney at (408) 535-1900.