



Santa Clara Valley Water District

File No.: 17-0304

Agenda Date: 5/9/2017

Item No.: *5.3.

BOARD AGENDA MEMORANDUM

SUBJECT:

Approve the Purchase Agreement and Escrow Instructions for Real Estate File No. 5027-311 to Acquire Real Property (APNs 825-03-011 and 825-04-010) from Nature Quality, LP, a California limited partnership, for the Upper Llagas Creek Flood Protection Project, Project No. 26174051 and other potential benefits (Morgan Hill), (District 1). (PREVIOUSLY LISTED AS 3.6)

RECOMMENDATION:

- A. Approve the Purchase Agreement and Escrow Instructions for Real Estate File No. 5027-311 to Acquire Real Property (APNs 825-03-011 and 825-04-010) from Nature Quality, LP, a California limited partnership, for the Upper Llagas Creek Flood Protection Project, Project No. 26174051 and other potential benefits (Morgan Hill), (District 1);
- B. Authorize the Interim Chief Executive Officer to execute the Purchase Agreement and Escrow Instructions for Real Estate File No. 5027-311 (Assessor's Parcels 825-03-001 and 825-04-010); and
- C. Authorize the Interim Chief Executive Officer to execute the Certificate of Acceptance for Grant Deed 5027-311.

SUMMARY:

The Santa Clara Valley Water District (District) is undertaking the Upper Llagas Creek Flood Protection Project (Project) in partnership with the U.S. Army Corps of Engineers (Corps) and the City of Morgan Hill (City) to provide 1% flood protection to approximately 1,100 homes and 500 businesses along West Little Llagas Creek, East Little Llagas Creek, and Llagas Creek. The Project is approximately 13.9 miles long and encompasses the City, City of Gilroy, and various unincorporated areas of Santa Clara County, including San Martin (Attachment 1).

A portion of the proposed acquisition of a Grant Deed from Nature Quality (or "Seller"), Real Estate File No. 5027-311, is required for Phase 2 construction of the Project. District staff has worked with Nature Quality on a Purchase Agreement and Escrow Instructions to acquire Nature Quality's lands for \$6,313,439. Nature Quality has accepted and signed the Purchase Agreement and Escrow Instructions (Attachment 2; hereinafter "Agreement").

Key Provisions of Real Property Purchase Agreement and Escrow Instructions

AS-IS Sale: This purchase is a complete AS-IS acquisition. The Agreement is structured such that (1) the District has established the criteria which will constitute the AS-IS delivery condition of the property, (2) the District is afforded the opportunity to investigate the property, and (3) the Seller achieves finality with respect to its obligations to the District upon acceptance of the delivery condition of the property by the District.

Deposit: After the agreement is executed, the District will deposit one million dollars into escrow. The Seller must then provide the District with property documentation and the opportunity to investigate the property as to the matters outlined in Section 6 of the Agreement such as title, the condition, use, and suitability of the property, environmental reports, permits, and entitlements. If the District finds its evaluation of the property documents unsatisfactory and does not deliver the Acceptance Notice, this Agreement will automatically terminate and the Deposit shall be returned to the District. If the District finds its evaluation of the property documents satisfactory, the District will issue an Acceptance Notice as to the matters outlined in Section 6. Upon issuance of the Acceptance Notice, the deposit shall be released to the Seller and shall be nonrefundable to the District, unless the Seller defaults resulting in a failure of escrow to close.

Delivery Condition of the Property: An important buyer condition is that the Seller must deliver the property to the District in the Delivery Condition described in Exhibit E of the Agreement. Upon Seller's notice that a Delivery Condition has been satisfied, the District is afforded time to inspect the property and to review and approve the environmental, permit, and regulatory clearance documentation related to the Delivery Conditions.

If the District is satisfied that the Delivery Conditions have been fulfilled, then escrow may proceed to close. Upon the close of escrow then this transaction and Nature Quality's obligations to the District are complete. The District will have almost no basis to sue or make a claim against Nature Quality for any of the representations, warranties, and covenants set forth in the Agreement. District staff believes that the (1) visual/site inspection and (2) the time afforded to the District to review and approve the environmental documentation, regulatory permits and clearance reports will provide the District sufficient assurance that the Delivery Conditions have been met by the Seller.

If any condition in Section 7.1 Buyer's Conditions is not satisfied or waived by the Buyer, then escrow will not close. In the event of such failure, the Agreement and Escrow shall terminate and if, and only if, the cause of failure of the condition was the fault of Seller will the Deposit be returned to the District. However, if any condition in Section 7.2 Seller's Conditions is not satisfied or waived by the Seller, then escrow will not close, and if the failure of such condition is not caused by the Seller, then this Agreement and Escrow shall terminate, and the Seller shall retain the Deposit.

Limitation on Claims: To limit Seller's liability, the Seller has required that some limitations be placed on the District's ability to recover for claims for breach of any representation or warranty of Seller (see Section 8.7). Seller's covenants, representations, and warranties shall be effective upon execution of this Agreement and shall survive 12 months after close of escrow (the "Survival Date"); thereafter they will have no force or effect. No claim for breach of any representation or warranty of Seller shall be actionable or payable (a) if the breach in question results from or is based on a

condition, state of facts or other matter which was actually known to the District prior to the close of escrow, (b) unless the valid claims for all such breaches collectively aggregate more than \$50,000 in which event the amount of such claims up to a maximum amount of \$150,000 shall be actionable, and (c) unless written notice containing a description of the specific nature of such breach shall have been given by District to Seller prior to the Survival Date and an action shall have been commenced by District against Seller within 60 calendar days thereafter. The only exception that the Seller would carve out from these limits were those claims caused by Seller's intentional misrepresentations.

To protect the Seller from further liability, the Seller required the District to agree to that this is an AS-IS sale, and that District shall accept the property "AS-IS, WHERE IS," with all faults and defects (latent and apparent). This means that the District will not rely upon any warranties, representations, or information of any kind received from the Seller with respect to the property. The District agrees it will rely solely on its own independent investigations and verification of the accuracy of such information and the property. There are important restrictions to the District's remedies such as the waiver of any and all rights to file or record any lis pendens or any other lien or encumbrance against the Property, or to seek specific performance or other equitable relief, or recover any damages from Seller (see Section 11.2). The District further agrees to release the Seller from any claims it may now have or hereafter acquire against the Seller arising from or relation to the condition of the property (including the presence in the soil, air, surface and subsurface waters of hazardous or toxic materials), valuation, salability or utility of the property. Lastly, the District specifically waives the provision of California Civil Code Section 1542 that is a release of unknown future claims. The Seller would not have agreed to sell this the property to District for the purchase price without the disclaimers and other promises set forth in this Agreement.

With regard to the Delivery Conditions described in Exhibit E, the Seller has allowed the District to complete a Phase 1 and a Phase 2 Hazardous Substance Liability Assessment (HSLA) investigation of the entire property, including a separate asbestos containing material and separate lead paint sampling and testing. Groundwater samples were collected at each of the existing four on-site monitoring wells where the results were satisfactory. Soil sampling showed elevated concentrations of arsenic, cobalt, nickel and total chromium concentrations. However, the HSLA report stated that these elevated concentrations are within the concentration ranges typically associated with background conditions for soils in the southern San Francisco Bay Area, with only total chromium concentrations exceeding the available background data/values slightly. The Phase 2 HSLA conclusion stated,

"In summary, based on the data obtained during the limited investigation conducted and summarized in this report, it is Weiss's professional opinion that the conditions at the property did not present a high risk of environmental impact at the time of the investigation."

The asbestos and lead paint testing results found some areas exceeding authorized limits. The Seller has agreed to remediate and abate the identified areas to acceptable limits and provide certified clearance reports from a licensed abatement Contractor in accordance with the Delivery Condition described in Exhibit E of the Agreement.

Potential Benefits of the Total Purchase of the Nature Quality Property

After extensive discussions and consideration by many District staff, the total purchase of the Nature Quality property could provide potential benefits such as:

1. Additional land for a staging area and equipment storage during construction.
2. The Project will be re-designed within the Nature Quality site to reduce the Project's environmental impacts to existing riparian vegetation by widening the channel to the north and converting the existing four large wash water ponds to earthen terraces with native plantings. Without the full property acquisition, the Project would have to remove existing native vegetation along both banks due to the industrial facility improvements' proximity to the existing Llagas Creek channel.
3. Closure and removal of this industrial facility, which has the potential to contaminate surface and groundwater resources adjacent to Llagas Creek, would satisfy the objectives of the Safe Clean Water (SCW) Program Project B2 - Interagency Urban Runoff Program, which are described as follows:

"This project [B2] supports the District's continued participation in the Santa Clara Valley Urban Runoff Pollution Prevention Program (SCVURPPP) and South County programs that help the District reduce storm water pollution and meet regulatory requirements to reduce contaminants in surface water.

The District also participates in the regulatory development process related to storm water by providing review, analysis and commentary on various basin plan amendments, Total Maximum Daily Loads (TMDLs) and water bodies listed as impaired or threatened under the federal Clean Water Act. The SCW Project B2 also allows the District to maintain regional public education and outreach activities to help prevent urban runoff pollution at the source."

4. A potential for secured and centralized South County Maintenance Yard & Sandbag Distribution Center.
5. A potential treatment/purification center site/recycled water facility.
6. Possible facility expansion opportunity for a South County Office site. One option is establishing a District presence for accepting in-person groundwater well payments from South County well owners.
7. Possible site to facilitate growing large orders of native plants required for the revegetation of flood protection projects. Growing conditions could be controlled and regulated by District staff to decrease the likelihood of plant pathogens.

In the future, as the District considers potential uses of this property as described above, the District will complete environmental analysis and review as required by the California Environmental Quality

Act.

Project Background

The Llagas Creek Flood Protection Project was originally administered by the United States Natural Resources Conservation Service (NRCS), formerly known as the Soil Conservation Service (SCS). In 1999, the Corps was authorized by Congress to take over from NRCS and construct the remaining portion of the Project. However, due to lack of federal funding, the Corps' progress on the Project stalled. To get the Project back on schedule, the Corps approved the District's request to take over the Project's lead to administer the planning (preparation of the environmental documents) and design phases.

On September 22, 2009, the Board approved a cost-sharing agreement with the City of Morgan Hill (City) to prepare the environmental document and the design plans and specifications for the Project. This Board action set the course for the District to take on Project tasks normally performed by the Corps so as to advance the Project work. The City agreed to reimburse the District up to \$3 million of the total anticipated cost of these work efforts. On April 7, 2014, the District received final payment in full from the City of Morgan Hill.

An Environmental Impact Statement/Environmental Impact Report (EIS/EIR) was prepared in 1982 that analyzed the original Llagas Creek Flood Watershed Project developed by the United States Department of Agriculture's SCS in the late 1960s. Since the approval of the 1982 EIS/EIR, numerous changes have occurred within the Project limits, including increased urbanization and riparian habitat, changes in runoff conditions, the federal listing of steelhead, and state/federal listings of California Tiger Salamander as threatened species, have resulted in refinements to the original Project design.

Project elements include:

1. Widening (generally by constructing against one bank) and deepening the channel in all reaches;
2. Construction of a geomorphically stable channel form that includes a sinuous low-flow channel, with geomorphic benches at bankfull elevation where the channel is widened;
3. Permanent maintenance access roads along the top of both banks;
4. Aquatic habitat enhancements;
5. Grade control structures;
6. Modifications to culverts and bridges;
7. Construction of a tunnel beneath Nob Hill through downtown City of Morgan Hill to bypass high flows from a portion of existing West Little Llagas Creek through the City's downtown that can remain natural (as-is), thus preserving the existing vegetation and habitat;
8. New 1.25-mile-long diversion channel (Reach 7a).

Certification of the Final EIR and Adoption of the Findings and MMRP

The Draft EIR was completed, a Notice of Completion was filed with the California Office of Planning

and Research (OPR), and the Draft EIR was released for public review on January 6, 2014. A public meeting to receive comments on the Project was held on January 15, 2014, within the 45-day public review period. Resource agencies requested additional time for review and comment, which District staff granted. Ten letters with comments were received from the public and agencies in addition to oral comments received at the public meeting. Formal responses to each comment were incorporated into the Final EIR.

On June 10, 2014, the District's Board certified the Final EIR and approved the recommended Tunnel Alternative as the Project.

Certification of the Final EIS

U.S. Army Corps of Engineers (USACE) San Francisco Regulatory Division released the Project's Draft Environmental Impact Statement (EIS) for Public Review and 45-day comment period on December 31, 2015. The Public Review comment period ended on February 16, 2016. The USACE Regulatory addressed the comments in their Final EIS, with Corps Regulatory certification of the EIS anticipated in approximately May 2017.

The Project has been divided into two phases for construction as identified in Attachment 1. Phase 1 [Reaches 4, 5 (a portion), 7A, and Lake Silveira] construction is approximately 4.2 miles in length. Phase 2 [Reaches 5 (a portion), 6, 7B, 8, and 14] is approximately 9.7 miles in length. Phase 1 construction cost estimate is \$35 million and Phase 2 construction cost estimate is \$80 million (2017 values).

Next Steps

Phase 1 construction (Reach 4, Reach 7a diversion, and the on-site mitigation - Lake Silveira) is currently estimated to be advertised for construction in Fall 2017, subject to receipt of the Resource Agency permits. Phase 2 construction (all remaining reaches) will require approximately an additional 100 parcels to be acquired. Approximately 80 of these parcels have been acquired to date with the remaining parcels to be acquired by July 2018.

FINANCIAL IMPACT:

There is sufficient Project funding in the FY17 budget for the acquisition of this parcel. However, other SCVWD funds from Safe Clean Water (SCW) Project B2 - Interagency Urban Runoff Program may be partially utilized to purchase said property or credited to the Project, as determined by the Interim Chief Executive Officer.

The Project's property acquisition costs, including appraisal costs and fees, are eligible for 100% reimbursement by the Department of Water Resources (DWR) State Subventions Program. In the case of this property acquisition, only the portion of this purchase needed for the Project will qualify for DWR State Subventions (estimated between \$500,000 and \$1 million).

CEQA:

On June 10, 2014, the Board certified the Environmental Impact Report for the Upper Llagas Creek Project, Resolution no. 14-67. The Notice of Determination is attached (Attachment 3).

ATTACHMENTS:

Attachment 1: Project Map

Attachment 2: Purchase Agreement and Escrow Instructions

Attachment 3: Notice of Determination

UNCLASSIFIED MANAGER:

Katherine Oven, 408-630-3126