

City of Brisbane

Memo

To: Mayor & City Council
From: Clay Holstine, City Manager
Subject: Electronic Billboard on City property

Recommendation

Council review attached material and determine if it wishes to solicit Requests for Interest from companies in the billboard industry.

Background

The City has been approached in the past by private Billboard companies regarding City owned property at Sierra Point. The City had also been approached about placing a billboard on land that is within the City but owned by CalTrain.

During past council discussions some concern was raised on whether this use is allowed under our current general plan. **Attachment A** is a memo from the City Attorney's office which concludes that placing a billboard on City property would not, depending on where it is placed, be inconsistent with the General Plan. City staff was also asked to research potential financial value. In this case the City would have the potential of generating two sources of revenue, first by leasing the property and second by a negotiated fee for the economic value of the billboard. **Attachment B** is survey of San Mateo County cities. The intriguing comparison is San Carlos as it is tied to gross receipts that likely would be increasing over time. Currently, the City receives 8% of gross receipts from existing billboards in town.

The Economic Development Subcommittee has reviewed this item and seemed to like the style and illumination of the City of Millbrae sign on U.S. 101. Since the City would be issuing a proposal for a billboard on City property we are entirely in control of the billboard's dimensions, illumination, etc. It would also be possible to advertise city events (Mission Blue Concert Series, Farmers Market, etc) as one aspect of the negotiations.

If this is a project the Council wishes to explore further, staff recommends sending out a Request for Interest (RFI). We believe there are at least three companies operating in the Bay Area that may have an interest. By issuing an RFI the City is under no obligation to move forward with the project. But by doing so we may gain a better understanding of industry standards as well as the potential financial value. *See also Attachment C & D for maps of proposed location.*



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Memorandum

To: Clay Holstine, City Manager
John A. Swiecki, Community Development Director

From: Michael H. Roush, City Attorney
Teresa L. Stricker, Deputy City Attorney
Ivan Delventhal, Associate

Date: October 24, 2014

Re: Proposed Billboard on City Property

You have asked whether the placement of a billboard on a parcel of property owned by the City of Brisbane near U.S. Highway 101 would be consistent or inconsistent with the City's General Plan and Zoning Ordinance. As you requested, we have not examined the extent to which state and/or federal laws, rules and regulations might affect the placement of the billboard on property adjacent to a state highway. Our analysis follows.

I. General Plan

A city's general plan is the "constitution" for all future development. (*Leshar Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal.3d 531, 540.) For that reason, any decision by a city affecting land use or development must be consistent with its general plan. (*Friends of Lagoon Valley v. City of Vacaville* (2007) 154 Cal.App.4th 807, 815; *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 570.)

Consistent with these fundamental principles, Brisbane's General Plan expressly provides: "[The General Plan is] the foundation upon which all land use decisions are based. It is also an expression of community values." (General Plan, Ch. I.1.) We thus begin by examining those provisions of the General Plan that could apply to the billboard project.

The land use element of the General Plan, in a section entitled "Streets," sets forth City land use policies "address[ing] the desired physical character of both new and existing streets in Brisbane." (General Plan, Ch. V, p. 89, available at <http://www.ci.brisbane.ca.us/sites/default/files/brisbaneca/ChapterVLandUse.pdf>.) Policy 35, which appears in this "Streets" subsection, sets forth one such policy applicable to City streets:



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Design new streets to be attractive and comfortable for pedestrians and bicyclists, and to safely accommodate vehicular traffic. Street configuration, landscape and *signage* should all be considered as they contribute to community character.

(General Plan, Ch. V.5, p. 89) (emphasis added.)

To further Policy 35, the General Plan sets forth a variety of “programs” – which the Plan defines as “action[s], activit[ies], or strateg[ies] that are to be carried out in response to [an] adopted policy.” (General Plan, Ch. I.3, p. 22.) One of those programs, Program 35f, states: “Prohibit new commercial billboard sites and seek to remove those currently in place.” (General Plan, Ch. V.5, p. 89.)

While Program 35f could potentially be read as imposing a sweeping ban on new commercial billboard sites in the City, wherever located, we construe this prohibition as more narrow in scope. Program 35f appears in a section of the General Plan setting forth land use policies applicable to City streets alongside 10 other “programs,” the vast majority of which are plainly applicable to streets. For that reason, we conclude that Program 35f prohibits new billboards only to the extent the billboard would be placed on, near or visible from a city street.

As we understand it, the billboard currently proposed has not been precisely sited or designed, so it is not clear at this time whether it will be on, near or visible from a City street. We do understand, however, that the intended view audience for the billboard would be motorists traveling on Highway 101. Based on that information, we believe that to the extent the proposed billboard would be on or near a City street, or plainly visible from a City street, a court would likely conclude that its installation is inconsistent with the City’s General Plan.

On the other hand, if the billboard would *not* be situated on or near a City street, and would *not* be visible (or perhaps be only incidentally visible) from a City street, a court would likely give deference to any determination by Council that the billboard’s installation does not violate Policy 35 or Program 35f of the General Plan despite the fact that the billboard is adjacent to and visible from a state highway. Indeed, courts give substantial deference to a public agency’s factual findings of consistency with its general plan unless “no reasonable person could have reached the same conclusion on the evidence before [the agency].” (*Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, 782.)



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In sum, in deciding whether the proposed billboard is consistent with Program 35f of the General Plan, location matters.¹

We have identified no other General Plan policy or program that would prevent the City from approving installation of the billboard proposed. The only other potentially inconsistent General Plan policies that we have identified are found in the Open Space element. We assume, however, that the parcel in question has not been devoted to an open space use or designated open space land and that, therefore, the General Plan's open space policies do not apply.

II. Zoning Ordinance

To the extent the proposed billboard is consistent with the General Plan, we conclude that the City's Zoning Ordinance does not prevent the City from approving installation of the billboard on City-owned property.

The Zoning Ordinance clearly provides that “[a]ll advertising signs shall be located on the same site as the use they identify or advertise” and prohibits “nonappurtenant advertising structures” (e.g. billboards advertising off-site goods and services) in all districts. (Brisbane Mun. Code, § 17.36.030.C; § 17.36.020.A.4; § 17.36.020.A.14, *available at* www.municode.com/library/ca/Brisbane/codes/code_of_ordinances.)

But by its very terms, the City's Zoning Ordinance does not regulate property owned by the City. In its “General Provisions,” the Zoning Ordinance expressly provides:

[The ordinance] shall apply to all property located within the city, *except property and property rights owned by the city*. With the above noted exception, this title [the Zoning Ordinance] applies to all such property to the maximum extent permitted by law, whether the same be owned by private persons, or by the state or any of its agencies or political subdivisions, or by the county, or by any district, including school districts, organized under the laws of the state, or by an public or private utility.

¹ As part of our analysis, we reviewed a letter from former City Attorney Harold S. Toppel to the City dated September 26, 2012, examining whether a proposal at that time for a billboard to be placed on a Caltrain right-of-way was consistent with the City's General Plan and Zoning Ordinance. In his letter, Mr. Toppel opined that the proposed billboard would not violate Policy 35 or Program 35f of the General Plan because the billboard would not be placed on a City street.



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(Brisbane Mun. Code § 17.01.040 (emphasis added).)

Likewise, the provisions of the Zoning Ordinance that regulate advertising signs in the City expressly apply to “all advertising signs located on *private property*, whether temporarily or permanently” and do not apply to “[a]ny signs owned by the city, wherever located” or to signs placed on private property by the owner or with the owner’s consent and that have been authorized to be so placed by resolution of the City Council. (Brisbane Mun. Code § 17.36.010.B (emphasis added).) And these provisions of the Zoning Ordinance exempting City-owned property are consistent with applicable case law holding that a city is generally not bound by its own zoning ordinance. (See Barclay and Gray, *Curtin’s California Land Use & Planning Law* (Solano Press, 34th ed. 2014) at pp. 68-69 *citing Sunny Slope Water Co. v. City of Pasadena* (1934) 1 Cal.2d 87, 98; *C.J. Kubach Co. v. McGuire* (1926) 199 Cal. 215, 217; *Bailey v. Los Angeles County* (1956) 46 Cal.2d 132, 140].)

Accordingly, we conclude that the Zoning Ordinance does not prevent the City from approving installation of a billboard that is consistent with the City’s General Plan on City-owned property. Rather, whether to approve such a billboard is a policy decision for the City Council. Of course, in making that determination, the Council may wish to consider that the Zoning Ordinance would prohibit a billboard of the type proposed here if located on private property absent a resolution by the Council expressly allowing it.

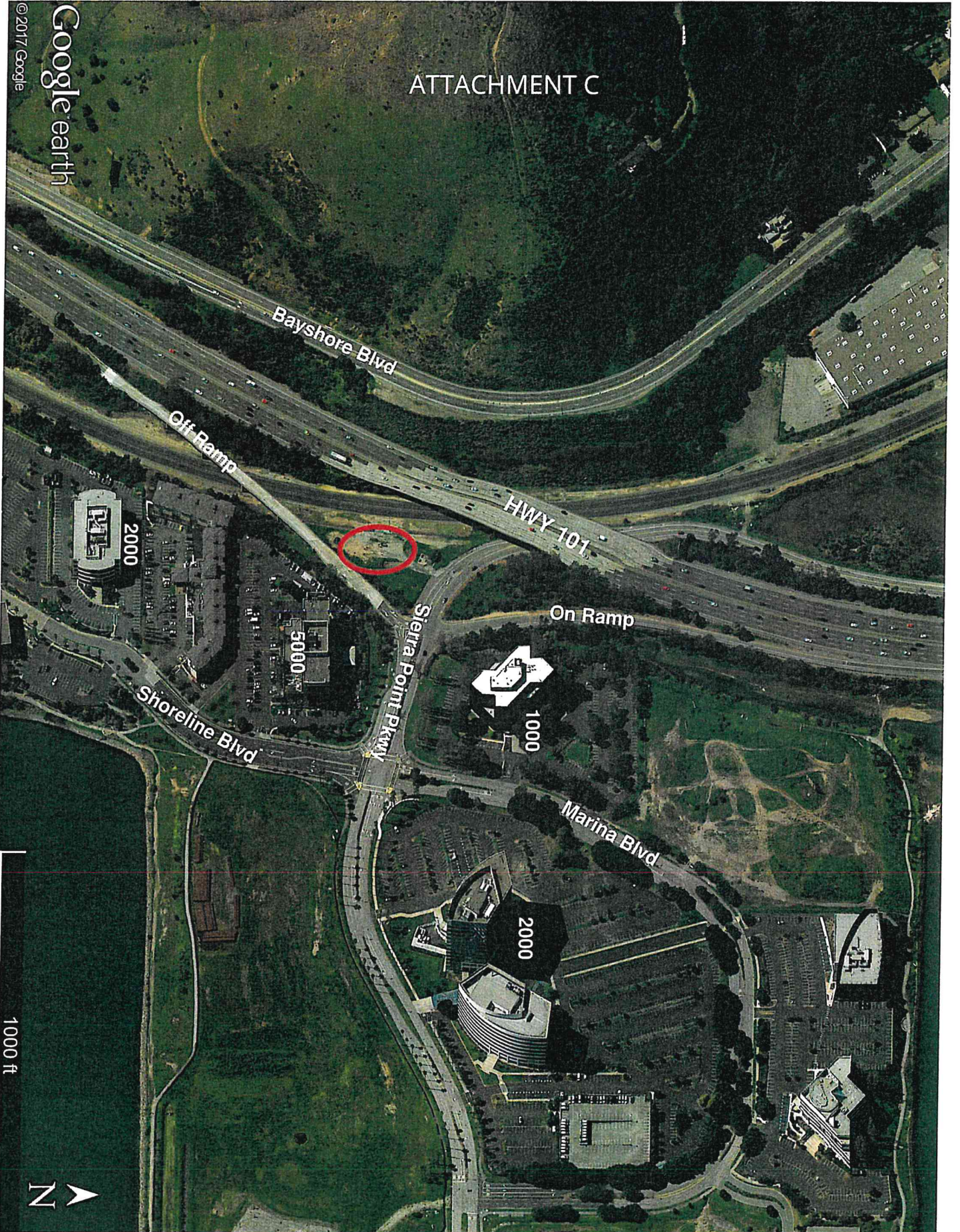
Please do not hesitate to contact us with any questions or concerns.

Revenues Other Cities receive from Electronic Billboards located in their City

Location	Private/Public Property	One-time Money	On-going Revenue
South San Francisco	Private	\$ 275,000	\$ 160,000
Millbrae	Public	\$ -	\$200,000 esclating to \$275,000 over the 20 year life of the agreement
San Carlos	Public	\$ 100,000	30% of Gross Revenues, Minimm \$200,000 a year which increases with inflation
East Palo Alto	Public	\$ -	\$ 15,000
Daly City	Private	\$ -	\$ -

ATTACHMENT C

Google earth
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1000 ft



Attachment D

