



CITY AUDITOR 345 6th Street, Suite 100, Bremerton, WA 98337-1873 & Phone (360) 473-5369

January 30, 2019

To Audit Committee Members:

Leslie Daug, Audit Committee Chair and Council Member
Deborah McDaniel, Audit Committee Vice-Chair and Citizen Member
Lori Wheat, Council Member
Darryl Riley, Citizen Member
Dennis Treger, CPA

Re: Elandan Gardens Review

Dear Audit Committee Members:

At your request and based on the information available to date, I am submitting my findings regarding the Elandan Gardens lease history review. The term of the current lease ends April 30, 2019, although the lease grants Lessee the option of extending the lease for up to four additional five-year terms upon delivering written notice to the City 60 days prior to the expiration of the term subject to the City and the Lessee mutually agreeing upon a new lease payment for each option. A new lease payment requires City Council ("Council") approval.

I was asked to summarize the lease history and contract terms, and provide a report intended to assist Council and the City of Bremerton ("City") Administration in their contract deliberations.

My work included the consideration and/or analysis of certain records including:

1. [Lease agreement dated August 16, 1991 between Daniel and Diane Robinson and the City for use of the subject property;](#)
2. [Elandan Gardens business license records;](#)
3. [Article III, Section 12 of the City of Bremerton Charter;](#)
4. [City Financial Policy, "Residential Rental Agreements and Commercial Leases";](#)
5. [FinancePLUS fixed asset listing;](#)
6. [Deed No. 85955 dated March 15, 1917 showing the City's purchase of the subject parcel from Garrison-Fisher Company;](#)
7. [September 10, 2008 schedule of Closed and Abandoned Landfill Sites in Kitsap County;](#)
8. [January 31, 2002 Sampling and Analysis Plan for Head of Bay Dump;](#)
9. [May 1950 Bremerton Sun news articles regarding dump closure;](#)
10. [1998 Anderson Creek Log Staging Property Chronology of Events, prepared by a former City Public Works Director, Gene Sampley;](#)
11. [Kitsap County property tax records;](#)
12. [City of Bremerton Zoning Map 4;](#)



13. [November 7, 2018 email from Allison Satter regarding further development of the property;](#)
14. [Lease amendment dated September 20, 1992 between the Robinsons and the City;](#)
15. [Lease agreement dated May 1, 2004 between the Robinsons and the City;](#)
16. [Draft Resolution No. 2923;](#)
17. [May 20, 2002 letter from Bremerton Kitsap County Health District to the City re: the Head of Bay Dump site's hazard ranking of 4;](#)
18. [July 22, 2004 Washington State Department of Ecology \("ECY"\) letter to Lynn Horton stating Head of Bay Dump's hazard ranking is adjusted to a 2;](#)
19. [ECY Confirmed & Suspected Contaminated Sites List dated October 22, 2018 showing Head of Bay Dump site's hazard ranking remains a 2;](#)
20. [October 14, 2002 Kitsap County Health District notification to the City for the need to post the property title with notification of the presence of a landfill;](#)
21. [November 18, 2004 Recorded Notice of Landfilling Activity;](#)
22. [October 11, 2018 email from Thomas Knuckey with an approximation of the cost to perform a remedial investigation/feasibility study of the property;](#)
23. [Model Toxics Control Act Regulation and Statute, revised 2013 \("MTCA"\);](#)
24. [Model Toxics Control Act Chapter RCW 70.105D.040 Standard of Liability;](#)
25. [August 20, 2014 Kitsap Public Health District Inspection Form for Head of Bay Dump;](#)
26. [Kitsap County Board of Health Solid Waste Regulations, Section 460 Construction and Notification Standards Near Landfills;](#)
27. [July 1, 2008 Kitsap County Health District letter to Nicole Ward;](#)
28. [Statement No. 49 of the Governmental Accounting Standards Board titled, Accounting and Financial Reporting for Pollution Remediation Obligations;](#) and
29. Miscellaneous research.

Additionally, I had discussions with the following individuals:

- Diane Robinson and Shanna Piliaris, governing persons of Elandan Gardens
- Jan Brower, Solid & Hazardous Waste Program Manager, Kitsap Public Health District
- Tom Knuckey, City Engineer
- Paul Gneiding, City Building Official
- Allison Satter, City Senior Planner
- Donna Musa, ECY Site Hazard Assessment Coordinator, NW Region Toxics Cleanup Program
- Louise Bardy, ECY Unit Supervisor, NW Region Toxics Cleanup Program

BACKGROUND

During a July 1991 City Council meeting, Daniel and Diane Robinson petitioned Public Works for lease of a City-owned parcel of land on the north (waterfront) side of Highway 16 between Port Orchard and Gorst for the purpose of operating a retail garden center. Ms. Robinson stated their plan was to develop the parcel into something similar and as pleasing to the eye as the Butchart Gardens. They planned to have a small gift shop and nursery with a limited selection of plants. Bill Duffy, then Utilities Director, stated the property was zoned forestry



at that time and that the City had problems with selling or leasing the land prior to the Robinson's interest.

In August 1991, the City began leasing the property to the Robinsons who continue to operate their nursery retail business, Elandan Gardens Limited, at this location. According to the Washington Department of Revenue records, William Robinson and Shanna Piliaris, the Robinsons' adult son and daughter, also operate businesses (Will Robinson Sculptor and Elandan Interiors) at this location.

The site has electricity, City water, and storage tanks that are currently used for sewage. City sewer is available by connecting to the sewer in front of the nearby Mattress Ranch property via a long low pressure sewer line.

LEASE APPROVAL POLICY

Article 3, Section 12 of the City Charter provides (in part) that Council can exercise its legislative power allowed under the Constitution of Washington state to approve leases. The City financial policy (signed by Mayor Horton rather than Council) for leasing commercial property provides that the Mayor has the authority to enter into lease agreements in an amount under \$10,000 per year and/or two years in length. The current lease for the Elandan Gardens property is \$4,800 annually for 15 years. Thus, the lease exceeds the financial policy threshold in terms of duration, making it subject to Council approval.¹

PROPERTY HISTORY

It appears from a fixed asset report in FinancePLUS² that the City acquired the subject parcel in December 1945; however, it appears from a deed that the City acquired the land in 1917 as part of the City's 1917 purchase of 600 acres of watershed land.³

According to the Kitsap County Health District ("KCHD"), this site was operated by the City as a mixed municipal waste landfill known as Head of Bay Dump from 1943 to 1950. The landfill accepted construction and demolition waste, industrial waste and mixed municipal waste. The landfill pushed out into the bay and waste was deposited and covered with dirt during operations. A log boom was used to control the spread of buoyant material. The dump received waste from the City of Bremerton, the Puget Sound Naval Shipyard ("PSNS"), and rural garbage collection services. Rodent poisoning was performed in 1949 and waste was burned at the dump to reduce volume.

Bremerton Sun news articles from May 1950 state the Superior Court ordered the City to cease dumping operations at the Head of Bay Dump. The City was charged with violating the county zoning code (the dump was located within 500 feet of a primary state highway) and being a nuisance (multiple resident complaints concerning odor and rats.) The City did not seek to defend itself and admitted to covering the garbage with nine inches of soil instead

¹ A legal review may be warranted to determine whether it is appropriate for Administration to enact policies that restrict Council's legislative power. Also, Legal could review whether it is appropriate to have the "and/or" clause in this policy.

² The City's accounting software.

³ Roger Lubovich, City Attorney, is reviewing the title report to confirm the boundaries of the City-owned property associated with this parcel.



of the State-required 24 inches, and admitted it was not covering the garbage on Saturdays until Monday to save overtime labor costs. The dump was subsequently moved to another location.

Following its use as a dump, it appears a portion of the property was leased to a tow boat company from the mid-1950s to the mid-1960s, and another portion of the property was leased for use in logging operations from circa 1950 to 1970. Other than the aforementioned uses, it appears the property remained vacant until the Robinsons began leasing it in 1991. When the Robinsons initially leased the property, it was raw land with no improvements and was largely overgrown with blackberry bushes.

Kitsap County Assessor records indicate the parcel size is 5.59 acres and City records show this waterfront property is zoned General Commercial. The land was last assessed in 2014 at \$497,520. For comparison purposes, the nearby Peninsula Subaru parcel is 4.95 acres and had a 2014 assessed land value of \$499,880 (with no material change in 2019). Because the assessed land value of a former landfill is almost identical to a non-contaminated parcel, it seems reasonable to assume the assessed value of the Elandan Gardens property does not reflect the undetermined decrease in value associated with its landfill issues.

FURTHER DEVELOPING THE PROPERTY

Ms. Satter provided the following information concerning further development of the property:

“Assuming the City could overcome significant development issues relating to (1) ingress/egress from State Highway 16, (2) associated with being a former landfill, (3) being surrounded by Endangered Species Habitat and (4) the shoreline regulations, this property may be further developed. The Department of Community Development has designated this property as General Commercial within the Comprehensive Plan and Zoning Code, and within the Bremerton Shoreline Master Program it is designated as Commercial (uplands) and Urban Conservancy (for the shoreline). The General Commercial zoning district intent is to provide locations for high intensity commercial uses serving the entire community and includes allowing uses such as Community Facility, School, Offices, Retail spaces (including big box stores), Hotel, Museum, Park, Residential uses, Hospital/clinic, and a Transportation Facility. The Shoreline designation allows similar uses to the General Commercial with additional requirements and procedures (such as a School or Transportation Facility is outrightly allowed in General Commercial, but the Shoreline Master Program requires a more intensive public process through a Shoreline Conditional Use Permit).”

1991 LEASE

The first lease with the Robinsons was signed in August 1991 by Daniel and Diane Robinson (Lessee), and Louis Mentor on behalf of the City (Lessor). The parties agreed to a 90-day feasibility period followed by a four-year initial term with options for two additional three-year terms. Rent was set at \$100 per month for ten months or until the intended use is open for business, then \$300 per month. The initial lease included an annual rent adjustment based on the percentage change in the Consumer Price Index (“CPI”).



In addition to rent, Lessee was also responsible for paying applicable taxes (including leasehold excise tax), assessments, insurance premiums, maintenance and other costs associated with improvements placed on the property. Lessee also agreed to pay all charges for heat, electricity, garbage, water, sewer, and all other public utilities or services charged against the property.

AMENDED LEASE AGREEMENT

In December 1992, the parties agreed to change the feasibility period-ending from November 1991 to December 31, 1992.

2004 LEASE

The second lease (which is the current lease) began May 1, 2004 with a 15-year term (ending April 30, 2019) and options to extend the lease for four additional five-year terms “upon delivering written notice to the City 60 days prior to the expiration of the term subject to the City and Lessee mutually agreeing upon a new lease payment for each option.”

If Lessee exercises its option to extend the lease, the Lessee shall have the right to terminate the lease upon giving the City one year prior written notice. If the City determines that the Property is once again needed for Utility or other City purposes, the City may terminate the lease upon giving Lessee one year prior written notice.

If during the initial 15-year term or any lease option term the City is required to perform remediation by any state or federal agency, the City may terminate the lease with one year written notice. If the City needs to obtain access to the Property during the notice period to perform remediation, Lessee will cooperate with the City to allow access that does not unreasonably interfere with Lessee’s use of the Property.

City has the option to terminate the lease upon 30 days written notice if cleanup of a hazardous substance from the site can be avoided by non-use of the Property, or if cleanup would interfere with Lessee’s use of the Property so as to incur additional cost to the City via other contract provisions.

During the initial 15-year term of the second lease, Lessee has been paying \$400 per month plus the leasehold excise tax for a total monthly payment of \$451.36. Lessee has also been responsible for paying utilities, taxes and assessments. A draft copy of Resolution No. 2923, declaring the property surplus to the City’s needs and approving the lease included a CPI rent adjustment; however, the CPI rent adjustment was eliminated in the final resolution and excluded from the 2004 lease.

CONTAMINATED SITES LIST

The Department of Ecology (“ECY”) is Washington’s environmental protection agency. ECY relies on health districts to assist with their mission, including performing site hazard assessments.

In May 2002, 11 years after the Robinsons began leasing the property from the City, the Bremerton-Kitsap County Health District completed a site hazard assessment of the Head of Bay Dump site as required under the Model Toxics Control Act Regulation and Statute



("MTCA").⁴ This site's hazard ranking, an estimation of the potential threat to human health and/or the environment relative to all other Washington state sites assessed at that time, was determined by ECY to be a 4, where a 1 represents the highest relative risk and 5 the lowest. Head of Bay Landfill was added to the ECY contaminated sites list at the end of August 2002.

The May 2002 site hazard assessment worksheet states, "Tidal activity is slowly eroding the landfill itself and there is exposed waste along the shoreline. Groundwater seeps stained with sulfur and iron exist along the beachfront of the fill area."

ECY hazard rankings are based on quintiles with 20 percent of all sites in each of the five categories. As the population of hazardous sites changes, rankings can change. Due to the hazardous sites population changes, Head of Bay is currently ranked a 2, a higher risk category than initially assessed.

After the site was added to the ECY's contaminated sites list, the City was required to post the property title with notification of the presence of a landfill. The purpose of the title notice is to inform subsequent property purchasers, renters, or surrounding property owners about the presence of a landfill on the property. On November 18, 2004, the City posted the notification on the property title. Additionally, presence of a landfill must be disclosed to all subsequent buyers for residential purposes per RCW 64.06.020.

It can be difficult to obtain financing to develop land that is on the ECY's contaminated sites list. However, the City can take steps to either clean up the property (arguably cost prohibitive) or find an alternative remedy, such as capping the site with soil or pavement, to bring the site to closure and have ECY issue a No Further Action opinion letter.

If the City is interested in preparing the site for development, the next major step would be to hire a consultant to perform a remedial investigation and feasibility study. A consultant from Parametrix expressed this process could take ten years and could cost about \$250,000 (\$25,000 per year average). Following the study would be the work and cost to implement the plan recommended in the study.

OTHER POTENTIALLY LIABLE PERSONS

MTCA provides that any past or present relationship with a contaminated site may result in liability. Under MTCA a potentially liable person can be a facility owner or operator (i.e. the City), and/or "anyone who arranged for disposal or treatment of hazardous substances at the site."

It is undetermined whether there are other potentially liable persons who could be required to share in the cost of cleanup. According to MTCA, in situations where there is more than one potentially liable person, each person is jointly and severally liable for cleanup at the site. According to MTCA, "That means each person can be held liable for the entire cost of cleanup." The process of identifying potentially liable persons and determining cost sharing allocations can be lengthy and expensive with an uncertain outcome.

RCW 70.105D.040 provides additional details concerning the standard of liability.

⁴ Known as the state's cleanup law, MTCA governs the cleanup and prevention of contaminated sites that can threaten people's health and the environment.



KCHD INSPECTIONS

In addition to the site hazard assessment, KCHD records show they performed at least 11 inspections of the site during a 21-year period from March 1993 to August 2014. Comments from the most recent inspection (August 2014) are shown below:

Full walk-around. East shore banks eroding - waste exposed (photos taken.) Multiple seeps – at least 2 iron, at least 2 w/ whitish growth. West side shore had yard debris. North tip pond empty – possible leak. Check on septic permit w/LB. Check building permit w/ City. Exposed waste on beach – glass, cable, tires, metal, ceramic shards.

FUNDING

Louise Bardy, an ECY unit supervisor of voluntary cleanup, stated ECY provides grants to local governments to help pay for a feasibility study and the cost of site cleanup. In general, such grants are available only for sites where the cleanup work is being done under an order or decree by ECY. Although funding is subject to availability, Ms. Bardy indicated ECY might consider this site a higher priority since it has already had an assessment and is waterfront. Grant funding requires a 50 percent match and is paid after the costs are incurred.

KCHD RECOMMENDATION

Ms. Brower of KCHD recommends that if the City has not already done so, it meet the requirements of the Kitsap County Board of Health Solid Waste Regulations, Section 460, Item 1(c) and (e), which read as follows:

§460 – CONSTRUCTION AND NOTIFICATION STANDARDS NEAR LANDFILLS

1. Construction Requirements.

- c. Construction within the Active Area of the Landfill. No person shall construct within the active area of a closed or abandoned landfill without first having submitted detailed engineering plans documenting how potential hazards will be controlled. Potential hazards include, but are not limited to, subsidence, methane, odor problems, hazards associated with subsurface utility installation, and leachate generation. A qualified, licensed Professional Engineer (PE) shall sign such plans. These plans must be submitted for review and approval to the jurisdictional building department and the Health District, or the Health District's designated representative.
- e. Methane Monitoring. All landfills where methane gas is generated shall provide for adequate venting, collecting, redirecting, or elimination of gases generated by solid waste. It shall be the responsibility of the landfill owner/operator to develop a sampling and testing program to monitor gas production and potential migration.

A July 1, 2008 letter from the KCHD to Nicole Ward, former City Senior Planner, indicates that in conjunction with a 2008 building permit application to build the newer storage/sculpting building, Elandan Gardens provided adequate documentation that



demonstrates levels of methane gas are below the lower explosive limits within 1,000 feet of the closed landfill. According to KCHD, this is based on findings reported in a June 18, 2008 Parametrix Technical Memoranda. Based on the information provided in the Technical Memoranda, KCHD did not require additional sampling and testing for the newer building as required in §460.1.e. Paul Gneiding, the City's Building Official, stated his review of the permit file indicates the building design is more than adequate for the site conditions in terms of subsidence.

The Kitsap County Board of Health Solid Waste Regulations concerning construction standards near landfills began in 1996, about a year after the Robinsons built their original building on site. Thus, it would seem construction of the original building would be exempt from the construction standards. However, in terms of risk, it may be prudent to confirm methane levels and other potential hazards associated with the original building are at safe levels. Mr. Gneiding believes there is low risk for subsidence given that no problems have been reported during the past 24 years that the building has been in existence, a period that includes a major earthquake⁵.

While it appears some of the potential hazards of constructing near an abandoned landfill are not an issue or are controlled, it is unclear whether all of the potential hazards identified in §460 have been ruled out as an issue or are controlled. An environmental consultant⁶ estimated the cost to perform methane testing, if necessary, would range from \$3,000 to \$7,000, including a report.

OTHER CHALLENGES

In addition to landfill issues noted above, some other obstacles that could be encountered in more fully developing the property include:

1. Ingress/egress: Accessing this property from eastbound Highway 16 requires traveling beyond the property and making a U-turn, then crossing two lanes of 60 mile per hour traffic in approximately 800 feet to get to the driveway. Depending on the volume of traffic, more than one attempt may be needed. If not improved, the awkward access to this property may discourage developers.
2. Adjacent to Endangered Species Habitat: Sinclair Inlet is home to Steelhead, an endangered species, which could lead to additional development challenges.
3. Before any significant construction could be planned, a geotechnical engineer would need to evaluate the soil to determine what kind of foundation could stand on the former landfill. Soils associated with landfills are less stable than unimpaired sites.

FINANCIAL REPORTING

Statement No. 49 of the Governmental Accounting Standards Board titled, *Accounting and Financial Reporting for Pollution Remediation Obligations*, addresses accounting and financial reporting standards for pollution (including contamination) remediation obligations,

⁵ The February 28, 2001 Nisqually earthquake had a magnitude of 6.8.

⁶ Jessica Bernardini of Cornerstone Environmental Group, LLC.



which are obligations to address the current or potential detrimental effects of *existing* pollution by participating in pollution remediation activities such as site assessments and cleanups.

According to GASB No. 49,

“Once any one of five specified obligating events occurs, a government is required to estimate the components of expected pollution remediation outlays and determine whether outlays for those components should be accrued as a liability or, if appropriate, capitalized when goods and services are acquired. Obligating events include the following:

- The government is compelled to take pollution remediation action because of an imminent endangerment.
- The government violates a pollution prevention–related permit or license.
- The government is named, or evidence indicates that it will be named, by a regulator as a responsible party or potentially responsible party (PRP) for remediation, or as a government responsible for sharing costs.
- The government is named, or evidence indicates that it will be named, in a lawsuit to compel participation in pollution remediation.
- The government commences or legally obligates itself to commence pollution remediation.”

GASB 49 paragraphs 25 and 26 address disclosures as follows:

- ¶25. For recognized pollution remediation liabilities and recoveries of pollution remediation outlays, governments should disclose the following:
 - a. The nature and source of pollution remediation obligations (for example, federal, state, or local laws or regulations)
 - b. The amount of the estimated liability (if not apparent from the financial statements), the methods and assumptions used for the estimate, and the potential for changes due to, for example, price increases or reductions, technology, or applicable laws or regulations
 - c. Estimated recoveries reducing the liability
- ¶26. For pollution remediation liabilities, or portions thereof, that are not yet recognized because they are not reasonably estimable, governments should disclose a general description of the nature of the pollution remediation activities.”

Based on my current understanding of the former Head of Bay dump site, it appears none of the obligating events have occurred and the City, therefore, is not required to estimate the components of expected pollution remediation outlays or determine whether outlays for those components should be accrued as a liability. It also appears the City does not need to disclose (in a note to the financial statements) a general description of the nature of potential pollution remediation activities because none of the obligating events have occurred.



Messrs. Pitts and Riley stated they agree there are no financial reporting requirements at this time.

SUMMARY

The issues associated with this waterfront property limit its market potential; therefore, the City receives a lower return on this property. At some point, the City may wish to consider cleaning up the property, if necessary, and preparing it for sale or development. If the City wishes to grant a lease extension, it may want to first ensure the potential hazards of construction near an abandoned landfill (Kitsap County Board of Health Solid Waste Regulations, Section 460) are controlled. It is my understanding that Chal Martin, Public Works Director, is beginning the process to have a consultant assess the condition of the property.

If the City chooses to grant a lease extension, it may want to consider adding an annual rent adjustment provision. A common rent adjustment factor is the annual change in the Consumer Price Index.

Please contact me if you have questions or need additional information.

Sincerely,

Jennifer L. Sims CPA/CFF, CFE
City Auditor

cc: Mayor Wheeler
City Council
Chal Martin, Public Works Director
Roger Lubovich, City Attorney
DeWayne Pitts, Finance Director
Mike Riley, Assistant Finance Director