

City of Brisbane Agenda Report

TO: Honorable Mayor and City Council
FROM: Clay Holstine, City Manager
DATE: City Council Meeting of October 15, 2012
SUBJECT: UPC Payments

BACKGROUND

At the August 27, 2012 City Council meeting under Council Matters, Communications, the issue of status of billing and accounts receivable to Universal Paragon Corporation came up for discussion. The basis of the discussion was from a dialogue between Councilmember Conway and former Councilmember/Mayor Clara Johnson. Attachment A is a spreadsheet outlining the status of payments billed, received, and owed. Attachment B is the correspondence of the aforementioned.

Universal Paragon Corporation (UPC) owns the land commonly referred to as the Brisbane Baylands. There are three categories of billing:

1. **Baylands** – The City bills UPC for staff time per an agreement. The billing is done quarterly. Additionally, any work that is required, whether by city staff or consultant that is not EIR related is billed under this category. The quarterly billing for staff time is set at \$43,748. A late fee of a minimum 3% may be applied for late payments.
2. **EIR** – UPC has an active application for development before the City of Brisbane that is currently under EIR/CEQA review. The City has a contract with UPC whereby the City hired and manages an EIR consultant (ESA & Associates) to conduct the EIR and then bills UPC which is responsible for all payments.
3. **Truck Haul Fees** – While waiting for development and in preparation for development UPC has continued to operate a soils processing business on the old landfill (area east of Tunnel Ave). The City receives fees based on cubic foot of dirt brought on site. These fees are billed bi-monthly.

ANALYSIS

As of August 28th UPC has paid approximately 88.5% of the billing to date, this has dipped to 87.1% in September. This is a function of the September for Truck Haul Fees. The EIR category is a function of the City receiving billing from the consultant then billing UPC. There will always be some lag time in this category. We anticipate that once the Draft EIR is delivered (anticipated to be November) and they have billed us for work involved in preparing the document we will have a lull in billing. UPC will then be able to get this category caught up. The consultant will then have to gear up for the "Response to Comments" and billing will commence again.

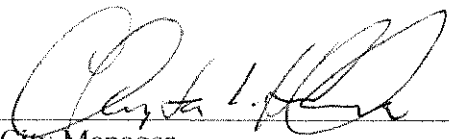
Attachment C is a spread sheet of demonstrating the effect of the 3 fold rate increase to UPC for truck haul fees that was implemented in 2004. As UPC began to gear up their soils processing business City staff saw an opportunity and rationale for significantly increasing the fee. The increased operation for UPC lowers their long term cost of importing soils on to the site. City staff argued at the time that the financial benefit should accrue to both parties.

The chart shows that by increasing the fee the City has received an additional \$1,162,551 dollars since 2004. Additionally, we estimate that we will receive another \$644,901 as they prepare the site for development.

CONCLUSION

City staff is diligently overseeing and managing the various activities that UPC has in Brisbane and monitoring accounts receivables. From time to time UPC has been slow to make payments and staff has continuously made contact and arranged for payment plans. UPC has continued to make payments and has not contested the fees the city has billed them for.

As we move forward it will be important to monitor and connect the status of receivables to moving on to the next phase of plan reviews. Staff is in consultation with UPC regarding the necessity of having the EIR billing caught up to the latest billing to the City by the time that hearings commence before the Planning Commission.



City Manager

ATTACHMENT A

As of August 28, 2012

	City Paid	Billed	Received	Owed	Unbilled
Baylands	2,184,888	2,134,888	2,057,685	127,203	50,000
EIR	2,206,937	2,081,774	1,703,024	503,914	125,163
Truck Haul	2,777,132	2,777,132	2,433,674	343,459	-
Total	7,168,958	6,993,794	6,194,383	974,575	175,163

As of September 30, 2012

	City Paid	Billed	Received	Owed	Unbilled
Baylands	2,218,291	2,134,888	2,057,685	77,203	83,403
EIR	2,206,937	2,081,774	1,703,024	378,750	125,163
Truck Haul	2,892,350	2,892,350	2,433,674	458,676	-
Total	7,317,578	7,109,012	6,194,383	914,629	208,566

City Bills Baylands and EIR on a quarterly basis. Next bill due to go out third week of October.

From: Clarke Conway
To: Clara Johnson
Subject: UPC processing fees
Date: July 10, 2012

Hi, Clara, sorry it took a while to get back to you but I took a week off from city stuff. As in my previous email to you, I am copying the rest of the council and CM in a spirit of communication with the disclaimer that I am not speaking for the whole council but rather an individual council member.

In regards to the fees, the city did receive a payment from UPC on Friday, June 29, for the amount of \$186,642.92. The breakdown is as follows, \$60,496.25 for truck haul fees, \$48,764.24 for EIR and \$77,382.24 for the Baylands. This of course is not the full amount that is owed and to that note staff will be meeting with UPC on Monday and ratchet up the pressure that they need to get current. The EIR processing should slow down for a while until the EIR consultant starts doing the answers for the final draft as the draft is about ready. Your question was what can the city do in regards to UPC such as lien their property. There are three avenues of approach for the City should UPC choose not to get caught up:

1. Discussion such as what will happen next Monday to let them know that they absolutely need to get caught up or the following can and probably will happen.
2. The permit for processing the dirt is up for renewal with the planning commission and this is their main source of income, we can simply not process their permit and all operations will cease.
3. As part of the reimbursement agreement that was approved in October 2004, delineates resolutions of conflicts. This is more boiler plate legal language that as you well know is used in all of the City's contracts. As you may recall, the 2004 contract that staff negotiated with UPC, raised the dirt haul fees up to three times the amount of what was in place before this current contract, much to the squawking of UPC representatives at the time. The contract also required UPC to provide funding for the Principal Planner position of approximately \$160K per year and it was to be paid on a quarterly basis. In July 2006 the contract was amended with an addendum to recover the cost of specialized consultants that the City wanted to hire and these included:

Keyser Marston, to conduct and review financial issues of the proposed project.

Bingham McCutcheon Law Firm, to assist with the legal overview of the various state and regional agencies with permit authority on the land, including Regional Water Quality Board and Department of Toxic and Substance Control.

Camp, Dresser and McKee, Soil Engineering firm who conducted the peer review of the soil mitigation efforts of UPC and the regulatory agencies. Several workshops were held and a report was provided to the City.

James Wines, the architect who spoke and one of Bill Prince's "University of Brisbane" forums on green building principals and the other speakers who came to that series.

They also pay for ICF to do the CEQA training that citizens and the BBCAG recently attended. UPC also paid for the successful grant we received to evaluate solar possibilities on the Baylands.

In August of last year the agreement was amended so that UPC pays the City \$175K a year for processing their application and removed the reference to the Principal Planner and also added language that any bill later than 60 days accrues a 3% interest charge.

It will be to UPC's detriment if they don't catch up and I believe that they realize this and staff will convey a very strong message to get caught up or else. I'm an optimistic person and have full confidence in our staff that they will get this done.

In closing, I would still love to sit down and chat on any city issue that you wish to talk about and hope this further helps.

Best regards, Clarke

From: clara johnson [<mailto:clara-a-johnson@sbcglobal.net>]
Sent: Thursday, June 28, 2012 1:01 PM
To: Conway, Clarke
Subject: RE: concerns about questionable practices and UPC Project

Hello Clarke

I appreciate your long and detailed reply to my questions and comments. It is generous of you to write it.

When I used the figure \$600,000 that UPC owes us, I was using the number that included the unpaid truck fees from the work on the Baylands plus the project/EIR fees. They have established a history and habit of non-payment that the staff allowed to get ten times worse than it was several years ago.

What is the basis of your optimism that the fees will be paid? Can you put a lien against the property for these fees?

In the past there has been an indictment against Mr. Chen in Taiwan. There was reputed to be an indictment in Malaysia but that is gossip. Is it possible that the State Dept is not granting a visa because of a compromised legal status in another country? Maybe you should ask the State Dept why.

I see the motivation for your trip but I strongly believe that you should not meet him outside the United States. It gives the appearance of something unsavory. It also looks like the City is desperate and that is not a good place to negotiate from.

Recology wants to do something that requires an EIR. There is processing involved in the recycling and there will be some heating. There is a possibility of air emissions. We need to know if this will require a permit from the BAAQMD and what the air emissions will be. It seems that the City is ignoring this unpleasant possibility. I want to know the results of the EIR whether it is done on its own or with UPC before decisions are made that this is a good idea. This is the reason that I don't think that you should count on the money from the project. Your information shows me how much UPC does not favor the Recology variant.

I see that there are many complex issues involved and I believe there are many more yet to be dealt with.

Your generous response has not changed my mind on any of the issues though I am better informed on aspects of them. I will be pleased to talk to you sometime.

Sincerely

Clara

--- On Tue, 6/26/12, Conway, Clarke <cconway@ci.brisbane.ca.us> wrote:

From: Conway, Clarke <cconway@ci.brisbane.ca.us>

Subject: RE: concerns about questionable practices and UPC Project
To: "Clara Johnson" <clara-a-johnson@sbcglobal.net>, "Council Members" <CouncilMembers@ci.brisbane.ca.us>
Cc: "Holstine, Clay" <clayh@ci.brisbane.ca.us>
Date: Tuesday, June 26, 2012, 9:27 PM

Hi Clara, I would like to respond to your email of last night with the disclaimer that I am only writing on behalf of myself and not the whole council. I am also copying the council and city manager so that they can view what my response is. I am not sending this to BrisNet but if you wish to do so, you may.

On your first inquiry of being in the arrears with UPC I don't disagree that we shouldn't be this far in the arrears but staff is working with UPC staff and I am confident that they will get it resolved and therefore caught up. The following is a breakdown of what we have been doing with them since about 2005 when they first put in their submittal of their proposed project:

For the Baylands we have billed \$1,918,974 and they have paid, \$1,728,418 and owe the city \$190,556. The billing is staff time that has been utilized processing their proposed project.

For the EIR we have billed \$1,655,377, and they have paid, \$1,357,930 and owe the city \$297,446. Now if you recall we are still updating the General Plan and this is being charged to UPC and would have cost the city in the \$1,000,000 range and this includes the Recology project also. UPC will be paying the whole bill on this. Between these two items this is a total of \$488,002 that UPC owes the city and this is current information. Again, while I don't disagree with you, I do disagree that we are undermining the integrity of the application processing and again, I am confident that staff will get this current with UPC and keep it current.

In regards to your second concern of the "\$1,000,000 that might be received if a UPC project with the Recology variant is approved." This is not a factual statement and let me clarify this: The voters passed a business license fee of up to \$3,000,000 on companies doing business of 100,000 tons or more of recyclables per year (Recology). While this project has not been approved in any variant, the city council can STILL enact the fee on Recology regardless of whether they expand or not. The expansion is being studied as part of the EIR. Now, what is happening is our staff is talking to Recology and the City and County of San Francisco to negotiate in the fee of approximately \$2.1 million for next year but would fall into this year's fiscal budget, discussion is a better method than just flopping the fee on them. They have initially agreed to 50% of this which is where the \$1,050,000 projection in the budget came from and these discussions are ongoing. The council will have an ordinance come before us in the July timeframe that will be doing the whole \$2.1 million for a period of 4 years. Now, the expansion of Recology's project is where the 20 or 25 acres of UPC property comes into play. If Recology is not able to retain this property we cannot even process their proposed project because it is reliant on the acquiring the 20 to 25 acres. If they are unable to do so, then Recology and SF will have to look for an alternative site more likely in SF. So really in essence, with the loss of VWR, Recology could potentially replace the sales tax loss plus some. For the budget currently passed we counted there will be no sales from VWR in Brisbane, this was a conservative estimate. VWR will not begin to relocate to Visalia until fall of this year so that means at least 3 months if not 6 months of sales tax that was not put into the budget, so we are talking about .5 to 1 million in sales tax. If we get the whole 2.1 million from Recology, (which I believe we can) then with just these 2 items we can be \$1 million in the black on our just passed budget.

In regards to your third concern of considering a council sub-committee and CM to Vancouver BC, I strongly disagree with you, and I will explain why: A couple of years ago (2010) while I was mayor, I and staff met with Recology staff and UPC staff and the chairman of UPC who is Den Hu. I explained to UPC the importance of Recology's potential expansion to Brisbane in that it aligned with our "Green" values and sustainable business model and the potential on going funds that the city would receive for our economic survival. Mr. Hu indicated that if this is what Brisbane

wants then it should happen. In 2 years since this meeting nothing has happened other than we received a rather terse letter saying how the Recology project will negatively impact UPC's project. Recently, I initiated a meeting with UPC and let Jonathan S. and Willie B. know that the citizens of Brisbane have no confidence in UPC and don't believe that UPC cares about what happens in or to Brisbane and our citizens and that the land sale to Recology needs to go through so that we can have a measure of economic stability. I then indicated, along with Cliff, that UPC has an absentee land owner and how are they, meaning Jonathan and Willie going to relay this message too him. (The message was sent strongly) Willie B. responded with, "why don't you tell him yourself" and he was refering to Y.H. Chen, the former chairman, because he will be in Vancouver BC for other business along with the current chairman Hu. At this current time, Chen is not allowed in the U.S. and this is a State Department issue (Federal Gov.). I believe this meeting needs to take place along with the CEO of Recology and tell Chen directly of the importance of the potential Recology project happening and therefore the property aquisition from UPC.

This is would NOT be a negotiation of any kind, it will be meeting with UPC's highest ranking officials and delivering a strong message of which I consider this a follow-up to the 2010 meeting. If they chose not to act, then we have to consider what our next steps would be.

Again, I initiated this with UPC and I consider this leadership. I have been very straight forward to UPC and to our citizens regarding the Baylands and to the City Council regarding meeting with them. If the long term expansion of Recology doesn't happen and they leave, then it will mean 20% of our General Fund Budget.

Clara, in ending, you and I have worked together many years and have a strong mutual respect for each other. This is a lot of information and I would like to invite you to sit down with me and go over the details of this information and any other issues that you would like to discuss, as I find the face to face talking is much more effective than email or other written medias.

Best regards, Clarke

From: clara johnson [clara-a-johnson@sbcglobal.net]
Sent: Monday, June 25, 2012 9:45 PM
To: Council Members
Cc: brisbane listserve
Subject: concerns about questionable practices and UPC Project

Dear Mayor and City Council

I watched a portion of your June 18, 2012 meeting. I am concerned about the handling of some aspects of UPC's project processing. I was surprised to hear that you have allowed the city fund that holds UPC money to be used for EIR processing to become \$600,000 in arrears. This fund was required by the City Council to have at least \$50,000 minimum in it. I remember when you had allowed UPC to become \$60,000 in arrears and I objected to that practice then. The City of Brisbane is, in effect, financing the UPC project that you will later decide whether to approve or not. I strongly object to what you are doing. I believe that you are granting a special privilege to UPC that is not available to others. You are undermining the integrity of the processing of their application. Did the City Council ever approve the actions taken by the staff with regard to this loan that you have made? Did you say that you wanted this done or approve the payment schedule agreement that was negotiated? This money should be paid immediately along with another \$50,000 that would take the fund to the originally agreed upon minimum balance. What public interest reason is there for this questionable practice? Why did you allow it?

My second concern has to do with your discussion of the \$1,000,000 that might be received if a

UPC project with the Recology variant is approved. A council member talked about the absolute importance of getting this money and said that if it was to happen it would mean 20% of the City's budget. It is you who will approve or deny this project (with the consent of the people) but you talk like it is up to someone else and you wrote this budget to include that million dollars despite the fact that you don't know what the traffic or air quality impacts or other impacts of the Recology variant will be. I believe your deficit in this budget is really \$1,969,000 because you shouldn't include money from a project that you don't know the impacts of and which has not been approved.

My third concern is that you are considering sending a City Council Sub-Committee and the City Manager to Vancouver British Columbia Canada to meet with the managing owner of UPC. It is never a good idea for City Officials of a small town to meet with a developer in another country. Why don't you meet him in Brisbane or San Francisco or SFO? If there is a legal impediment to his entry into the United States then ask yourself about the appropriateness of meeting this individual outside the U.S. and what the D.A. or the California Attorney General and your constituents will think about this action. Did you consult the City Attorney about this? You might also think about how he owes our City \$600,000 because you let it happen.

I am sending this letter to Brisnt because these troubling issues should be aired in public. I hope others will tell you how they feel about your actions. I appreciate your attention.

Sincerely

Clara A. Johnson

Fees shown below are truck haul impact only; value of grading permit review and grading permit inspection fees are not included.

Truck Haul Impact Fee effective July 30, 2003 (per cubic yard)	\$0.06
Truck Haul Impact Fee effective August 23, 2004 (per cubic yard)	\$0.18

Total Import/Export Ryan/BSP 2005-2011 (full years)	2,759,016
Total Import/Export Brisbane Recycling 2005-2011 (full years)	6,928,917
TOTAL	9,687,933
Value Truck Haul fees at 2003 rate:	\$581,275.98
Value Truck Haul fees at 2004 rate:	\$1,743,827.94
INCREASE	\$1,162,551.96

Current excess (both sites) to be moved later:	5,374,178
Value future Truck Haul fees (excess only) at 2003 rate:	\$322,450.68
Value future Truck Haul fees (excess only) at 2004 rate:	\$967,352.04
INCREASE	\$644,901.36