

TRUST FOR WORKING LANDSCAPES

MEMORANDUM

TO: City of Bainbridge Island

FROM: Trust for Working Landscapes, aka “Friends of the Farms”

DATE: December 18, 2009

RE: Long-Term Lease Option for Management of City Agricultural Lands

I. Introduction:

The Trust for Working Landscapes (“TWL”) is currently operating as manager for City of Bainbridge Island farmland pursuant to a management contract entered May 6, 2009. The purpose of this memorandum is to fulfill the contract obligation requiring TWL to

Provide the City a report within 6 months, at no cost to the City, on the opportunities that may be presented by the potential conveyance of a 99-year lease for qualifying leasees, and the potential forms and amounts of consideration that might be available to the City in exchange for such a lease.

The concept of a 99-year lease has been introduced by TWL as an element of a long-range management plan for farmland owned by the City.

II. Public Farmland Management Background:

Bainbridge Island agriculture has a rich history that is evident in the community’s cultural and social values. The City’s Comprehensive Plan calls for the preservation and encouragement of agricultural activities. Key goals of the Comprehensive Plan include preserving and encouraging agricultural activities “as a means of providing locally grown food, enhancing the cultural and economic diversity of the community and preserving open space and view corridors.”

TRUST FOR WORKING LANDSCAPES

The City controls approximately 60 acres of public farmland. Since the purchase of these lands the City has engaged in an ongoing process to improve and manage these lands which serve as a strong foundation to the local agricultural industry.

A. American Farmland Trust Report 2005

In 2005, the Bainbridge Island City Council issued an RFP to create an *Assessment and Recommendations for Preservation and Management of City owned Agricultural Land*. The American Farmland Trust (AFT) responded to the RFP and produced a comprehensive report with recommendations for the City concerning management of its farmlands.

The AFT Report reviewed three management models for the City to consider a) Fee-simple acquisition with retained ownership, b) Fee-simple acquisition with subsequent sale subject to easement, and c) Easement acquisition.

The AFT Report concluded that the City of Bainbridge Island should retain fee-simple ownership of the six agricultural properties that it currently owns.

Understanding the AFT Report recommendations is crucial to understanding the course that has been followed to date by the City in the management of its lands. The primary findings relative to the long-range management of City agricultural lands are:

Some partnering organizations may be able to contribute staff or volunteer time and other cash-matching or in-kind services funded through private sources. But most programs still bear the brunt of financing program administration. Partnerships typically take the form of contractual agreements in which the program pays the partnering agency or organizations for specified services that support property management and/or program administration.

In the course of stakeholder interviews, one high-ranking city official said, “The City does not have the capacity to manage [these farms] hands on, and we should not build that capacity because it is already out there in the community.” Many farmland preservation programs enlist the help of other agencies and organizations for administrative and management tasks.

The City of Bainbridge Island should likewise explore partnering opportunities with qualified and competent agencies and organizations. Three organizations emerge as logical partners for the City: Bainbridge Island Metro Parks and Recreation District (“The District”), Bainbridge Island Land Trust (“BILT”), and Trust for Working Landscapes (“TWL”).

The City of Bainbridge Island should partner with the Bainbridge Island Metro Parks and Recreation District (The District) for the management of any property for which production agriculture is not a primary purpose. The City of Bainbridge Island should partner with the Bainbridge Island Land Trust (BILT) to hold and monitor agricultural conservation easements on the six properties.

TRUST FOR WORKING LANDSCAPES

The City of Bainbridge Island should partner with the Trust for Working Landscapes for the management of all properties for which production agriculture is a primary purpose.

The City of Bainbridge Island has made a commitment to the public to protect these agricultural lands, particularly those bought with Open Space bond money. Accordingly the City must make the commitment to ensure the proper management and administration of the properties over the long-term. While the City may be able to depend on other agencies and organizations for a portion of the staffing and operations expenses associated with property management and administration, it should be assumed that the City will always maintain some fiscal responsibility over the management of these lands.

If the City of Bainbridge Island plans to retain ownership and primary management responsibilities over the properties, the City should create at least one full-time City employee position dedicated to the administration and management of the properties.

If the City of Bainbridge Island plans to transfer management responsibilities to a third party, the City should designate at least one part-time (50% equivalent) city employee position dedicated to the coordination of third party partnerships and the oversight of any administration and management that remain in the City's purview.

In the short-term, the City of Bainbridge Island should finance administration and management expenses through general revenue allocations.

The City of Bainbridge Island should support the fundraising and capacity-building efforts of any organizations with whom it partners.

B. 90-Day Farmland Committee 2007

In June 2007 the Mayor of Bainbridge Island appointed a 90-Day Farmland Committee. The Mayor's 90-day Farmland Committee was charged with developing specific recommendations for managing the City's farm properties and for generally supporting the continuation of farming on Bainbridge Island. The committee's recommendations were based on the 2005 AFT Report.

The Committee's recommendations included the following:

That the City of Bainbridge Island contract with a management entity that would be required to carry out specific management tasks.

That the City of Bainbridge Island provide a consistent, stable environment in which leasehold farmers can feel secure in making capital investments on leased properties,

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establishing broad parameters for activities and outcomes of outside management entity in managing City-owned farmlands.

That the City provide seed funding on a declining basis for 3-5 years to allow the management entity to develop and implement establishment of the Island's comprehensive farm program.

III. Public Farmland Management Analysis:

A. Public Farmland Legal Infrastructure

TWL has engaged in extensive planning and discussions concerning the role of a Farmland Manager to support the City in long-range management of the farmlands it controls. To date TWL and the City have been managing the farmlands on an ad hoc piece meal basis that does not provide long-term management stability. Long-term management stability can be established by implementing a permanent legal infrastructure for farmland management.

Through careful consideration, considerable investment in consultants, and community dialogue, TWL has established the basis for an outline for a long-range management plan for the public farmlands. Some of the key elements of that plan include:

1. 99 Year Lease to the Farmland Manager Consultant. By providing a lease to the farmland manager, the City will remove itself from the need to provide daily and ongoing management of the City-owned farmland, and thereby significantly reduce its costs in fulfilling this public need. The 99 year term of the lease is recommended because this is an asset the City can immediately provide to the farmland manager to ensure the success of the long range management plan. A 99 year term is recognized in the banking industry as an asset that can be borrowed on for development projects such as farmer housing. In addition, entities such as foundations and others that provide grants recognize the inherent value of an organization retaining such an asset and have expressed interest in providing support for such an organization. Performance criteria and annual reporting mechanisms to the City would ensure accountability for the farmland manager.

2. Long Term Leases for Farmers Cultivating Public Farmlands. This should be viewed as the primary goal of the long term management plan. Long term leases for farmers will reduce the cost of management of public agricultural lands for the City and the farmland manager and will provide the surety necessary for farmers to invest long term in their businesses and in the land.

3. The lease described above would include farm management plans that would ensure compliance with City regulations and intended use for the public farmlands. In addition, individual business plans and farm plans submitted by farmers with the assistance of the farmland manager would be required to ensure viability.

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The management model proposed by TWL is based on the Farmland Manager serving as a coordinator and communicator between the City, which has a bureaucratic and businesslike culture, and farmers, whose culture is deeply rooted in the earth, cultivation cycle, and far more organic matters. This aspect of the Farmland Manager role requires the Farmland Manager to understand the policy and regulations of the City and at the same time the business realities and practicalities of farming faced by the farmers.

The role for the Farmland Manager goes well beyond coordinating between the City and the farmers. TWL believes that the role of Farmland Manager should be to serve as a quasi-public agency entrusted by the public with ensuring the productivity of the City farmlands as an industry and at the same time ensuring integration of this industry with the broader community.

B. TWL Legal Infrastructure Research

The current effort to identify a long-range management plan for public farmland has arisen largely due to the advocacy efforts of TWL. Members of the TWL board and TWL staff have dedicated many hours to discussions and planning for the public farmlands with the Office of the former Mayor, City Council, members of the public, and the farm community.

Over the past several years TWL has retained staff to develop and promote the concept of a long-range public farmland management plan. During this development the concept of the ninety-nine year lease returned repeatedly as an attractive management tool. The 2006-2008 budgets for TWL reflected an investment of \$ 163,000 in this development process. In addition to ongoing work with the City, this development process has included meetings with local farmers, local banks, the Bainbridge Island Metropolitan Park and Recreation District, Sustainable Bainbridge/Sound Food, Global Source Education, Kitsap Conservation District, Bainbridge Island Chamber of Commerce and local business entities such as Town and Country Market. In addition, TWL board members have contributed significant amounts of time and effort to these same endeavors. While more work remains to be done a solid foundation has been laid for the community to decide how it will manage its public farms.

Over the last two years, TWL has developed draft farmer leases that would be utilized within the framework of the farmland management legal infrastructure once finalized. As noted above these farmer leases will be an essential element of public farmland legal infrastructure adopted including a ninety-nine year lease.

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C. Legal Authority for Ninety-Nine Year Lease¹

One question concerning the ninety-nine year lease concept is whether the City can provide the Farm Manager such a lease without that lease being considered a “gift.”

Article VIII, section 7 of the Washington State Constitution, reads as follows:

"No county, city, town or other municipal corporation, shall hereafter give any money, or property, or loan its money, or credit to or in aid of any individual, association, company or corporation, except for the necessary support of the poor and infirm, or become directly or indirectly the owner of any stock in or bonds of any association, company or corporation." (Emphasis supplied.)

The burden would be high on someone challenging the City’s decision to enter into a ninety-nine year lease with a Farm Manager. “A legislative enactment, including one by a municipal corporation, is presumed constitutional.” *City of Bellevue v. State*, 92 Wash.2d 717, 719-720, 600 P.2d 1268 (1979). A challenger to a legislative enactment has the burden of demonstrating the enactment's invalidity “beyond a reasonable doubt.” *Id.* (citations omitted). The court in *City of Bellevue* relied on article 8, section 7 of the State Constitution to determine that there must be a “gift” before the Constitutional prohibition would apply. *Id.*

“A gift is a voluntary transfer of property without consideration. *Andrews v. Andrews*, 116 Wash. 513, 521, 199 P. 981 (1921). There is no claim that the gift concept embodied in article 8, section 7 was meant to be interpreted in any manner different from the usual and ordinary meaning of gift. Therefore, inherent in that concept is the necessity of a donative intent. See *Oman v. Yates*, 70 Wash.2d 181, 185, 422 P.2d 489 (1967). We have so held in reference to article 8, section 7: (I)f intent to give a gift is lacking the elements of a gift are not present and article 8, section 7 does not apply.”

Id.

The Court in *Winkenwerder v. City of Yakima*, reviewed the constitutionality of a lease by the City to a private party, and similarly stated:

It is clear from the Ennis case and from many other decisions of this court that the only limitation on the power of cities of the first class is that their action cannot

¹ Please note that TWL is sensitive to the fact that the City has its own attorney. This analysis is provided for informational purposes only, and is not a substitute for an analysis from the City’s own legal department.

TRUST FOR WORKING LANDSCAPES

contravene any constitutional provision or any legislative enactment. See State ex rel. Billington v. Sinclair, 1947, 28 Wash.2d 575, 183 P.2d 813; State ex rel. Griffiths v. Superior Court, 1934, 177 Wash. 619, 33 P.2d 94; Walker v. City of Spokane, 1911, 62 Wash. 312, 113 P. 775. Cf. Washington Fruit & Produce Co. v. City of Yakima, 1940, 3 Wash.2d 152, 100 P.2d 8, 103 P.2d 1106, 128 A.L.R. 159; and Brennan v. City of Seattle, 1929, 151 Wash. 665, 276 P. 886, relative to the broad police powers of a city of the first class. The principles adhered to in the preceding cases clearly indicate that a city of the first class has as broad legislative powers as the state, except when restricted by enactments of the state legislature.

Winkenwerder v. City of Yakima, 52 Wash.2d 617, 622-624, 328 P.2d 873 (1958).

The Court found that “If the state could constitutionally exercise the powers which the city is here attempting to exercise, then the ordinance and agreement are valid, *unless* they contravene some provision of the city's charter.” Id. at 623.

The Court went on to state “**it is generally recognized that a sovereign may lease its property to private parties, so long as there is no interference with the public use.** See Najewitz v. City of Seattle, 1944, 21 Wash.2d 656, 152 P.2d 722; State ex rel. Northern Pacific Railway Co. v. Superior Court, 1925, 136 Wash. 87, 238 P. 985; Paine v. Port of Seattle, 1912, 70 Wash. 294, 126 P. 628, 127 P. 580; 64 C.J.S. Municipal Corporations § 1809, pp. 282, 283; 12 McQuillin, Municipal Corporations, 3d Ed., 665-667, § 35.33. And the Yakima City Charter specifically provides, in Art. I, § 1, that the city of Yakima [may lease property]” Id. at 879. Thus, the *Winkenwerder* Court stated that Washington law requires that a lease be constitutional and be an act that is in compliance with the City's charter.

In this case the City of Bainbridge Island is a non-charter code City. The City has the power to lease under state statute:

The legislative body of each code city shall have all powers possible for a city or town to have under the Constitution of this state, and not specifically denied to code cities by law. By way of illustration and not in limitation, such powers may be exercised in regard to the acquisition, sale, ownership, improvement, maintenance, protection, restoration, regulation, use, leasing, disposition, vacation, abandonment or beautification of public ways, real property of all kinds, waterways, structures, or any other improvement or use of real or personal property, in regard to all aspects of collective bargaining as provided for and subject to the

TRUST FOR WORKING LANDSCAPES

provisions of chapter 41.56 RCW, as now or hereafter amended, **and in the rendering of local social, cultural, recreational, educational, governmental, or corporate services**, including operating and supplying of utilities and municipal services commonly or conveniently rendered by cities or towns.

RCW 35A.11.020

Therefore, for the City to enter a ninety-nine year lease it must demonstrate that it has determined that it is receiving a benefit in exchange for entering the agreement. If the City has determined that it is receiving a benefit then the City is not intending that the lease be a mere gift, and it is exercising a power granted it under state statute.

The City should be diligent in determining the value of the asset it is including in the lease as part of its efforts to demonstrate that it is receiving adequate value. In an unreported case² (*Pierce County v. Washington Shellfish, Inc.* 126 Wash.App. 1020, Not Reported in P.3d, 2005 WL 536097 Wash.App. Div. 2,2005) the court reviewed a lease arrangement to determine if it resulted in an unconstitutional gift of public resources, in that case the harvesting of shellfish and, particularly, geoduck from the lease property.

The Division II Appeals Court applied the same test indicated in the cases above:

In determining whether a public expenditure is a gift under article 8, section 7, we focus on two factors: consideration and donative intent. *City of Tacoma v. Taxpayers of City*, 108 Wn.2d 679, 702, 743 P.2d 793 (1987). In order to show a violation of the constitutional prohibition against gifts, Pierce County must show that the lease amounts to ‘a transfer of property without consideration and with donative intent.’ *Gen. Tel. Co. v. City of Bothell*, 105 Wn.2d 579, 588, 716 P.2d 879 (1986).

Courts use the donative intent or grossly inadequate return element to determine how closely to scrutinize the sufficiency of the consideration. *Adams v. Univ. of Wash.*, 106 Wn.2d 312, 327, 722 P.2d 74 (1986). If there is no proof of donative intent or grossly inadequate return, the court does not inquire into the adequacy of consideration. *Adams*, 106 Wn.2d at 327.

Pierce County v. Washington Shellfish, Inc. 126 Wash.App. 1020, Not Reported in P.3d, 2005 WL 536097 Wash.App. Div. 2,2005.

² Unreported cases carry no weight with regard to judicial precedence. However, they may be used as useful indicators of how a court might analyze or address a specific issue.

TRUST FOR WORKING LANDSCAPES

The Court found that the contract did constitute a grossly inadequate return in part due to the County failure “to survey the property for natural resources before entering into the lease agreement.” Id.

Thus, due diligence requires the City to ascertain the value of the asset that it might transfer via a ninety-nine year lease, and the lease must provide a reasonable public benefit in return for what is being offered, but there is no out-right prohibition or restriction on the City entering such an agreement.

C. Public Benefit from Ninety Nine Year Lease

Benefits to the City and Community for adopting the 99-year lease concept include:

1. Fulfillment of City of Bainbridge Island Comprehensive Plan Goals.

The City's Comprehensive Plan guides the growth and establishes the long-range vision for the Island, identifying important characteristics that the community desires to retain, promote or foster. The Comprehensive Plan incorporates goals and policies that guide the community toward that vision, including the Five Overriding Principles of the Plan

The Comprehensive Plan Vision Statement indicates that for Island planning: “Outside of Winslow and the service centers, Bainbridge Island should preserve its pastoral heritage, which is rooted in its open spaces, winding roads, and **small-scale agricultural establishments.**”

The Vision Statement also says “Foremost, Bainbridge Island should preserve the diversity of one of its most precious resources--its people. The Island should remain a place where the business people, artists, **farmers** and long-time residents can all find a place to live.”

The City Comprehensive Plan Environmental Element Agricultural Section Goals 1 through 4 and supporting Policies, and Economic Element Goal 1 and Policies E 1.3 through E 1.5 state a desire to preserve and protect island agricultural land and to retain and enhance farming as part of a diverse local economy.³

It is the duty of the City to ensure that the Comprehensive Plan is fulfilled. To the degree that a legal infrastructure including a ninety-nine year lease for the largest farmlands on Bainbridge Island promotes the goals of the Comprehensive Plan by preserving these lands the City is fulfilling its responsibility.

2. Reduced Management Cost to the City

As indicated above, the AFT Report stated:

³ See Exhibit 1 for applicable excerpts of the Comprehensive Plan.

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If the City of Bainbridge Island plans to retain ownership and primary management responsibilities over the properties, the City should create at least one full-time City employee position dedicated to the administration and management of the properties.

If the City of Bainbridge Island plans to transfer management responsibilities to a third party, the City should designate at least one part-time (50% equivalent) city employee position dedicated to the coordination of third party partnerships and the oversight of any administration and management that remain in the City's purview.

The ninety-nine year lease is a tool that can be used to transfer management responsibility of public farmlands to a Farm Manager. By transferring management of the public farmlands to a Farm Manager the City reduces its management responsibilities, and as a result staff costs for farmland management. The value of reducing the need for a full-time City employee position to a part time position is significant. In addition, TWL's work in the community has produced ideas that might allow the City to remove itself completely from management of these properties, and limit its involvement to receiving annual reports. Important

3. Support for Farm Manager and Long-Range Management of Public Farmlands.

The ninety-nine year lease is an asset. By granting a ninety-nine year lease to a Farm Manager the City would provide the Farm Manager a valuable asset that could be used to enhance the work of the Farm Manager in improving and managing the public farmlands.

During TWL's field research local banks (American Marine and Viking) indicated that it is possible to borrow on a ninety-nine year lease for farm housing and other infrastructure projects. Assuming that the completed farm housing or infrastructure projects could pay back this initial financing (e.g. through rents and/or other funding sources), then the ninety-nine year lease allows this development to occur without City financing.

In addition, grant agencies look to control of property before they fund activities associated with farmlands. A ninety-nine year lease will show significant property control, and will assure grantors of long-term sustainability of farming operations.

3. Benefit to Island Business

The City's public farmlands are the largest farmland operations on the Island. They part of a network of operating farms that are located all over the Island. This network is an

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Island industry, not merely a historical remnant, but one which continues to thrive and return a financial and cultural value to the Island environment. This benefit is not limited to the modest incomes of farmers and farm workers. Island farms also add significant value to community real estate, both for properties near farmlands and for the community as a whole as individuals are drawn to the community due the presence of this our continued agricultural work.

The ninety-nine year lease is part of a legal frame-work that ensures the continued long-term viability of these extremely significant farmlands, and of the benefits enjoyed by the community due to the continuance of local farmland operations.

4. Additional Benefits Realized by the Community Due to Fully Functional Public Farmlands:

Increasing the amount of locally grown food and processed food products.

Preserve the island's farming heritage.

Conservation and protection of sensitive natural resources.

Preservation of landscape for cultural, historical and aesthetic values.

Creation and access to public education and recreation opportunities that connect the community with farming and local food production.

Enhancing the cultural diversity of the community.

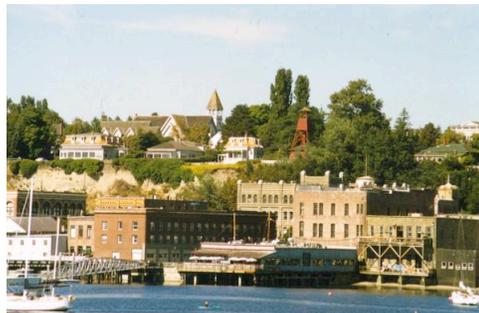
Enhancing the economic diversity of the community.

Preservation of open space and view corridors.

D. Examples: Ninety-Nine Year Municipal Leases

1. Port Townsend and Jefferson County Historical Society <http://www.jchsmuseum.org/jchshistory.html>

In 1971, the Bell Tower was in need of repair. To complete this repair the Jefferson County Historical Society raised more than \$9,500 to pay for the restoration effort. In gratitude, the community gave the Jefferson County Historical Society a 99-year lease in part of the old City Hall for a museum and archive. Port Townsend's special historical landscape and efforts at preservation and restoration began to receive outside recognition.



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2. Cle Elum and State Park

http://www.washingtonstatehorsepark.org/wroot3/latest_news.html

The Cle Elum City Council endorsed a proposal from the Authority Board to accept ownership of the land being donated by Suncadia in exchange for a long-term (99+ years) leaseback to the Authority at a nominal annual rate. This arrangement offers several major benefits: it will allow the Horse Park to avoid paying property tax on the land, and further underscores the close relationship and between the Authority and the City as the Horse Park develops into a major driver of economic growth for the surrounding area.

3. Issaquah and State Salmon Hatchery

Located at 125 W Sunset Way, the Issaquah Salmon Hatchery has more than 300,000 visitors each year. The best time to visit is September and October, when the salmon return to the hatchery up Issaquah Creek and when the Friends of the Issaquah Salmon Hatchery (F.I.S.H.) offers public tours.

From their website:

"This site was once part of "City Park", which was connected to downtown Issaquah with a wooden bridge over Issaquah Creek. During the 1920's, the park was well used with a bandstand and speaking platform for large holiday celebrations; and there was much picnicking along the creek.

The hatchery was constructed as a Works Project Administration project during 1936-1937. Plans included: Hatchery Building (increased in size during late design phase from 90 feet long to 176 feet!), hatching troughs, deep tray troughs, hatchery baskets, egg trays, overseer's residence, feed house, garage, rearing ponds, water system, and racks and traps.

In the early 1990's, the State Department of Fish and Wildlife announced plans to close the hatchery due to budget constrains. But the City of Issaquah, Friends of the Issaquah Salmon Hatchery (F.I.S.H.), the Muckleshoot Tribe, and King County all urged the state to keep the hatchery open. With a new focus on education, watershed stewardship, and bolstering native and threatened salmon such as the Lake Washington steelhead, the hatchery was significantly renovated and expanded in 1997 and 1998 with a new viewing pond, viewing shelter, four raceways, plumbing, stormwater systems, and a fish ladder. As of 1999, more significant improvements are still in the works!

The lands on which the hatchery sit are owned by the City of Issaquah which is leasing them to the State of Washington on a 99 year lease."

<http://www.issaquahhis...>

<http://www.issaquahfis.../>

<http://wdfw.wa.gov/wil...>

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IV. Conclusion

The City has taken the lead in preserving local farmland operations by purchasing 60 acres of farmland that includes some of the most productive farms on the Island. To fulfill the purposes that this farmland was purchased for, the City must provide a legal infrastructure that will guarantee that these public farmlands are maintained and operational into an indefinite future.

A ninety-nine year lease to a Farm Manager will provide the foundation necessary for a long term management legal infrastructure for the City's public farmlands. It will serve as the linch pin in a process to transfer management responsibilities for which the City is ill suited, to an entity that will be responsible to the City and to the greater community. The ninety-year lease will reduce management costs to the City, and increase opportunities for the public farmlands to be managed in a manner that meets the community vision to preserve and enhance our agricultural heritage.

The City should give serious consideration to the ninety-nine year lease as a farmland management option.