



AGENDA ITEM SUMMARY

City Council

STAFF

Jason Graham, Utilities
Tawnya Ernst, Real Estate Services
Ryan Malarky, Legal

SUBJECT

Second Reading of Ordinance No. 105, 2022, Authorizing the Conditional Conveyance of Certain City-Owned Property Rights to Chris Vandemoer and Geo. A. Henderson Co.

EXECUTIVE SUMMARY

This Ordinance, unanimously adopted on First Reading on October 4, 2022, authorizes the conditional conveyance of certain City-owned real property rights to Chris Vandemoer and Geo. A. Henderson, Co. (collectively "Vandemoer"). The proposed conveyance is part of a proposed settlement agreement between the City, Vandemoer, and The Nature Conservancy ("TNC") to obtain necessary property rights on the primary private access road for all three phases of the City's Halligan Water Supply Project ("Halligan Project"), in which the City intends to replace or modify a dam and enlarge Halligan Reservoir. Vandemoer owns certain real property adjacent to the reservoir that includes a private road that serves as the primary access point to the reservoir and the dam. The property is also encumbered by two conservation easements held by TNC. Since late 2018, City representatives have negotiated with Vandemoer to obtain property rights necessary for the Halligan Project. The parties are currently in eminent domain litigation for Phase 1 of the Project and have had productive conversations regarding a global settlement for all three phases of the Halligan Project.

The conveyance of the City-owned property would only occur if: (1) the parties enter into a settlement agreement; and (2) the City completes construction of the Halligan Project. This Ordinance does not seek approval of the settlement agreement itself. The decision whether to enter into the settlement agreement would be made by the City Manager following a recommendation by City staff, in consultation with outside legal counsel and the City Attorney's Office. This Ordinance is limited only to authorizing the conditional conveyance of City-owned property. The structure of the settlement agreement is explained more fully below.

STAFF RECOMMENDATION

Staff recommends adoption of the Ordinance on Second Reading.

BACKGROUND / DISCUSSION

Discussions and Negotiations

Vandemoer's property serves as the primary access point to Halligan Reservoir. An existing private road traverses Vandemoer's property and ends at the Halligan dam. City staff have been

communicating with Vandemoer for more than five years to share information, better understand Vandemoer's concerns, and to work towards addressing those concerns while also moving the Halligan Project forward. A map of the Reservoir area is included with this AIS for reference.

Pursuant to Council authorization in Ordinance No. 013, 2020, the City is engaged in eminent domain litigation with Vandemoer, TNC, and other parties to acquire access rights along the existing road for Phase 1 (Permitting and Design) of the project. City staff and Vandemoer have been negotiating a possible settlement of the litigation that would result in the City obtaining the property rights it needs from Vandemoer for all three phases of the Project, including construction and ongoing operation.

More recently, City staff have been communicating with TNC about the Project's impacts to TNC's conservation easements. The ongoing eminent domain litigation only concerns Phase 1 of the Project, which does not impact TNC's conservation easements. However, a settlement of property rights for Phase 2 would impact the conservation easements because that is when construction will begin, the road would be modified, and more substantial use of the road will occur. Phase 3 includes perpetual use of the road, which may also have impacts to the conservation easements. Accordingly, a proposed 3-phase settlement includes expanding the scope of the pending eminent domain case to include the property rights for Phases 2 and 3. Because the City's use in those later phases would impact the conservation easements, TNC's agreement to the settlement is appropriate. TNC has made certain requests regarding project means and methods with the intent towards mitigating impacts to wildlife and conservation interests. City staff and TNC are continuing discussions regarding the feasibility of those requests.

Proposed Agreement Benefits

While this Ordinance does not ask Council to approve the settlement agreement, an explanation of the proposed settlement framework may be helpful. City staff views the proposed settlement agreement as beneficial to the City because the proposed agreement would give the City the property rights it needs on this primary access to Halligan dam for all three phases of the Project and would eliminate the risk and expense of ongoing and future eminent domain litigation.

The City would acquire from Vandemoer property rights for all three phases as follows:

- Phase 1
 - The City would continue to have access along the existing road from Highway 287 under the existing temporary access agreement with Vandemoer.
- Phase 2
 - The City's Phase 2 property rights would begin when its Phase 1 rights end.
 - In exchange for compensation, the City would have a temporary construction easement generally along the existing road on Vandemoer's property.
 - The City would be able to widen and modify the road to meet the access needs of heavy equipment and materials.
 - When this temporary construction easement, the City's access rights would transition to its Phase 3 rights.
- Phase 3
 - The City would have permanent property rights it will need to operate and maintain the Reservoir, including, but not limited to, use of the improved road for access to the reservoir for all reservoir and dam operations, inspection, maintenance, repair. The City would also have the property rights it needs to raise the water level of the reservoir.

Consideration from the City

In exchange for Vandemoer conveying the property rights to the City, the City would pay a negotiated amount as a single payment for all property rights acquired, impaired or damaged. This amount is currently contemplated to be \$1,543,000 but is subject to change as negotiations continue. The intent is that the single payment will compensate both Vandemoer and TNC, which is customary in eminent domain cases. This amount would also cover all claims for costs and attorney fees either Vandemoer or TNC might be entitled to.

Consideration would also include the City conditionally conveying property rights to Vandemoer, which is the purpose of the proposed Ordinance. The City owns real property at the reservoir by way of a Halligan Reservoir agreement with the North Poudre Irrigation Company (“NPIC”), dated November 8, 1993, pursuant to which NPIC conveyed property to the City and retained the right to the return of that property in the event the City terminates the project. Accordingly, the City’s conveyance of property rights to Vandemoer would be conditioned upon the City completing construction of the Project and NPIC’s right to reacquire property irrevocably lapsing or being expressly released in writing by NPIC.

The City would conditionally convey fee title to Vandemoer of three parcels of City land adjacent to the reservoir, totaling approximately 23 acres, while retaining for the City an access easement to the reservoir for inspection and maintenance. The land to be conveyed to Vandemoer would include a permanent restrictive covenant that would prohibit commercial uses and building on the property. Cattle grazing would be allowed, but the City could fence out livestock to protect wetlands and vegetation under restoration.

The City would also conditionally grant Vandemoer an access easement (~7 acres) over City land that would fluctuate with the water level. The easement would only allow pedestrian access and cattle grazing, although the City could fence out livestock to protect wetlands and vegetation under restoration. No commercial uses or improvements would be allowed, such as buildings or roads.

The conveyance of any City property rights to Vandemoer would not take place until: (1) after the City entered into the proposed settlement agreement; (2) the City finished construction of the Project; and (3) the North Poudre Irrigation Company’s right to reacquire the City property rights is extinguished.

This means that if the City ultimately does not pursue the Halligan Project, the City would retain the property rights that are the subject of this Ordinance.

Consideration from Vandemoer

In exchange, Vandemoer would convey to the City:

- The City would continue to have its temporary access along the road for Phase 1 permitting and design.
- Three parcels of land in fee for the permanent inundation of reservoir water, totaling approximately 5 acres.
- A permanent inundation easement on his land for high water events and to allow the City access for inspection and maintenance, covering approximately 9 acres.
- A temporary construction easement for the construction in Phase 2 construction, which would become a permanent access easement at Phase 3 operations and maintenance.

Settlement with TNC

TNC has a conservation easement on a portion of Vandemoer's land that would be impacted by the City work on the Project. Staff are coordinating with TNC to incorporate mitigation measures into the Project and, to the extent necessary, subordinate the conservation easements on those portions of the Vandemoer

property that will be impacted by the improvement and use of the road for Phases 2 and 3.

CITY FINANCIAL IMPACTS

While negotiations are ongoing and settlement is not final, the estimated compensation to be paid by the City is \$1,543,000. City staff calculates that the exchange in real property interests between the City and Vandemoer, combined with the value of avoiding the risks and expense of protracted litigation, is equivalent to or exceeds the City receiving fair market value for the City property.

ATTACHMENTS

First Reading attachments not included.

1. Ordinance for Consideration
2. Exhibit A
3. Exhibit B