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Title: A resolution authorizing the acquisition of easements on property owned by the Bach Family Trust to be used for the Clear Spring Ranch Bank Stabilization Project and for access to the Owen and Hall Diversion Structure

Presenter:
Dan Higgins, Chief Water Services Officer
Jerry Forte, P.E., Chief Executive Officer, Colorado Springs Utilities

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Date	Ver.	Action By	Action	Result
9/26/2017	1	City Council	adopted	Pass

A resolution authorizing the acquisition of easements on property owned by the Bach Family Trust to be used for the Clear Spring Ranch Bank Stabilization Project and for access to the Owen and Hall Diversion Structure

Presenter:

Dan Higgins, Chief Water Services Officer
Jerry Forte, P.E., Chief Executive Officer, Colorado Springs Utilities

Summary:

Colorado Springs Utilities (“Utilities”) is seeking City Council approval of the attached Resolution authorizing the use of eminent domain to acquire four easements (the “Easements”) required across property located at 12620 Old Pueblo Road (the “Property”). Utilities is seeking easements only and not complete ownership of the underlying land. Despite repeated attempts by the City and Colorado Springs Utilities to negotiate an amicable acquisition of the Easements, the City and Utilities have been unable to negotiate an agreement for the purchase of the Easements. Staff will continue to make all reasonable efforts to reach a negotiated settlement for the purchase and sale of the Easements; however, obtaining the authority to proceed with a Possession and Use Agreement and eminent domain will allow Utilities to proceed with construction of a major Fountain Creek bank stabilization project and will ensure Utilities has the access it needs to perform maintenance work on the Owen and Hall Diversion Structure if agreement with the property owner cannot be reached.

Previous Council Action:

N/A

Background:

I. Bank Stabilization Project

Colorado Springs Utilities operates a solids handling (i.e., a sludge) pipeline that runs between Utilities' Las Vegas Water Resource Recovery Facility ("Las Vegas") and Utilities' Clear Spring Ranch Solids Handling Facility, generally following the alignment of Fountain Creek. Just north of the Clear Spring Ranch property, the sludge line runs within a narrow corridor located between the BNSF Railway tracks and Fountain Creek. The bank of Fountain Creek in this area is nearly 40-55 feet above the Creek and is eroding. In order to protect the sludge line from the failure that would occur through continued erosion of the Creek bank, Utilities proposes to construct a grouted boulder structure that would stabilize and armor the bank. The proposed stabilization project is expected to protect approximately 1,200 linear feet of the Creek's bank.

Work associated with this project must be performed during the low flow period for Fountain Creek to minimize the risk of damage during construction due to flooding. The low flow period typically occurs from October to March. Access to the project site would be from Utilities' property on the west side of Fountain Creek. Improvements must be installed on private property within drainage easements and within BNSF Railway right-of-way. Utilities has successfully obtained all of the necessary easements and permissions to perform this project except for one permanent easement and one temporary construction easement required from the owner of the Property.

II. Access to and Inspection and Maintenance of the Owen and Hall Diversion Structure

In addition to the two easements Utilities needs for the bank stabilization project, Utilities also requires two easements on the Property for access to Utilities' Owen and Hall Diversion Structure located on Utilities' Clear Spring Ranch property and for activities related to performance of periodic inspection, maintenance, and repair of the Diversion Structure. The Owen and Hall Diversion Structure supplies water for irrigation on Clear Spring Ranch, which then recharges the shallow aquifer used to supply process water for the Nixon and Front Range Power Plants. The Diversion Structure is currently scheduled for inspection later in 2017 and requires repairs as soon as the necessary easements may be obtained.

Access to the Diversion Structure with heavy equipment is typically made through Fountain Creek downstream of the Diversion Structure. Inspection and maintenance activities often involve construction of berms from stream sediment upstream and downstream of the Diversion Structure to divert flows from Fountain Creek and allow for work in dry conditions.

Utilities requires two permanent easements, one upstream and one downstream of the Diversion Structure, to ensure it has the ability to conduct these activities when required.

III. History of Negotiations

Utilities and RES began negotiations with the property owner in December 2015. On April 1, 2016, RES made an initial offer based on a RES value finding made in accordance with The City's Procedure Manual for the Acquisition and Disposition of Real Property Interests (the "RES Manual"). Following receipt of the initial offer, the property owner met with Utilities to discuss concerns with the contracts and easement documents and notified Utilities that she would be exercising her option to

obtain an appraisal. The property owner's appraiser valued the proposed easements and included damages for business loss. At the time of submitting her appraisal, the property owner also submitted a number of proposed revisions to the easement documents and contract. After reviewing the property owner's appraisal, Utilities' attorneys and RES determined that her appraisal contained compensation for damages based on speculative and likely unrecoverable lost business income.

In response to the property owner's appraisal, RES and Utilities obtained an appraisal and in December 2016, RES made a revised offer to the property owner based on the Utilities' appraisal. At the time of the revised offer, Utilities also provided a further revised contract and new easement documents which were modified to address additional concerns relating to future access to Fountain Creek raised by the owner. Based on the revised documents, the owner also obtained a second appraisal which also included damages based on the same speculative and inappropriate lost business income approach.

Pursuant to § 8.4 of the RES Manual, Utilities and RES contracted for a review of the appraisals and thereafter elected to obtain a third appraisal. RES and Utilities received the new appraisal on July 5, 2017 and sent a final offer based on the new appraisal on July 19, 2017. The property owner responded to this offer with additional questions and requested that Utilities provide additional consideration for fencing. After review of the response, Utilities made a last written offer including an administrative settlement on August 8, 2017. The property owner had until August 11, 2017, to accept or reject Utilities' last offer.

In accordance with the RES Manual, Utilities and RES must seek City Council approval prior to pursuing a Possession and Use Agreement or beginning the condemnation process. Utilities has attempted to negotiate acquisition of the easements with the property owner, but as of the date of this memo has been unsuccessful despite having made multiple offers and a number of revisions to the easements to address the property owner's concerns. Based on the history of the negotiations so far, Utilities has no option but to seek permission to pursue a Possession and Use Agreement and/or begin the condemnation process. If the property owner does accept CSU's last written offer, CSU will proceed with acquisition in accordance with the RES Manual.

Financial Implications:

The Easements will be acquired using Colorado Springs Utilities' funds. The owner of the Property will be afforded just compensation for the Easements, either through a negotiated settlement or a court proceeding.

Board/Commission Recommendation:

N/A

Stakeholder Process:

Staff has had multiple communications with the property owner and will continue to make all reasonable efforts to reach a negotiated settlement for the purchase and sale of the Easements.

Alternatives:

City Council may approve, modify, or deny approval of the attached Resolution.

Proposed Motion:

Move approval of the proposed Resolution authorizing the acquisition of easements on property owned by the Bach Family Trust to be used for the Clear Spring Ranch Bank Stabilization Project

and for access to the Owen and Hall Diversion Structure

N/A