MEMORANDUM

TO: Public Works Committee

FROM: Carla Cushman, Assistant City Attorney

SUBJECT: Settlement agreement with BPRushmore LLC re: subdivision improvements for IGT subdivision

DATE: April 28, 2020

I write to explain the settlement agreement before you today and to urge Council to approve the settlement agreement.

If the Council approves the settlement agreement, BPRushmore would pay the City $258,795.77 and dismiss its lawsuit against the City. The City would promptly contract for design of a water line the length of Fox Road and Berglund Road and of a sewer line to be installed partway down Fox Road and would utilize BPRushmore’s payment to budget for installation of the improvements in a timely manner to support future development in the area.

History

In 2007, BPRushmore platted one lot in IGT Subdivision for the new campus for National American University. As part of the plat, BPRushmore provided a surety for subdivision improvements triggered by the plat in the amount of $266,413.73. Those subdivision improvements included water and sewer the length of Fox Road and down Berglund Road, as well as the improvement of Berglund Road to City street standards. With one exception, BPRushmore has generally maintained its letter of credit for $266,413.73 since 2007. The City currently holds a letter of credit in that amount, although the estimated cost to build the required improvements today is $494,636.63.
On July 15, 2019, BPRushmore came to the Council asking it to grant exceptions to the required improvements. It asked to be allowed to build only water the entire length of Fox Road and Berglund Road and to provide sewer a portion of Fox Road. The new sewer would service the property on the north side of Fox Road, which had been reviewed by the Council as part of the Samuelson apartment development. After hearing from BPRushmore and neighbors on Berglund Road, the Council denied that request, requiring BPRushmore to build sewer the entire length of Berglund Road as well as improve Berglund to City street standards.

**Settlement Agreement**

BPRushmore filed a lawsuit seeking a writ of certiorari for Council’s July 15, 2019 decision. In conjunction with the lawsuit, BPRushmore’s attorney and I have worked together to draft the settlement agreement that is before you today. The settlement agreement would allow the City to pursue design and construction of the most immediate improvements at BPRushmore’s cost (agreed by the parties to be $258,795.77) in order to facilitate future development in the area. These immediate improvements would include a water line and a sewer line constructed in an easement on the property north of Fox Road. The water line will extend down Fox Road and south on Berglund Road, and the sewer line would extend partway down Fox Road to provide service to the northern property. Any future improvements required for future extension of the sewer line or for the construction of Berglund Road would either be completed by developers as a result of future development, or would become the City’s responsibility to build when needed.

I encourage you to approve the settlement agreement, which would give the best path forward for these improvements to be built to support future development. If we wait for BPRushmore to construct any improvements, the City and the neighbors will likely be waiting for years. The developers have not built the improvements in the last 13 years, which is why City staff forced the developer’s hand in 2018 and 2019 to move forward with the construction. Now, BPRushmore would not begin any design work until the lawsuit is over – months away given the court’s priority on criminal (not civil) cases during the COVID-19 pandemic. The current letter of credit expires nine months after the lawsuit concludes or October 1, 2021, whichever comes first. That means that if, after the lawsuit concludes, BPRushmore fails to complete the improvements, the City could not collect on the letter of credit until its expiration date, in 2021 or 2022 at the earliest. While the letter of credit would get the City a few more thousand dollars than the settlement amount, the cost of the project would likely increase by greater than that amount ($7600) if the project is delayed.

City design and construction of the improvements at BPRushmore’s cost is the best way to ensure that the utilities needed for future development are built. The

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1 The Council’s approval of the Samuelson apartment project was appealed to circuit court, and the court affirmed the Council’s decision to allow the project as proposed. The property is currently available for development and is for sale by the owners, who have granted the City an easement for the utilities at the request of BPRushmore, in accordance with the settlement agreement.
settlement will enable the City to schedule these improvements for design and construction as part of Public Works’ CIP plan to move them forward to completion.

Settling the litigation also removes the uncertainty of the court’s ruling on Council’s July 2019 decision, permits staff to focus on constructing the improvements instead of spending time on the lawsuit, and gives finality and a definite plan for the City and the neighbors to rely on. Everyone agrees that the water line and a partial sewer line adjacent to Fox Road are essential for future development in the area to occur, yet it has been at a standstill for 13 years. The best way to get these improvements built is to approve the settlement agreement, so that BPRushmore can pay the City $258,795.77 and the City can use that money to design and build the improvements.

If you have any questions please email me at carla.cushman@rcgov.org or give me a call at 394-4140.