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May 24, 2021

Memorandum

To: Plan Commission
From: Brian Running
Re: Proposal to Eliminate Connection of River Valley Road to STH 59

A referral has been made by Alderman McElderry in response to requests from constituents in his district to block the planned connection of River Valley Road to the STH 59 bypass. Doing so is no longer possible at this time, and if attempted could expose the City to legal liability.

The connection of River Valley Road to STH 59 is part of a development called Fox River Village being done by Waukesha Parkway, LLC at the intersection of STH 59 and CTH X. The development is within TID 28 and will receive TIF financing.

The Plan Commission approved the developer's site plan, which included the River Valley Road connection, on December 9, 2020, and it was subsequently approved by the Common Council on December 15, 2020. The architectural plans and revised landscaping plan were approved by the Plan Commission on January 27, 2021. A TIF development agreement, which included the requirement of the construction of the River Valley Road connection per the approved site plan, was approved by the Common Council by an 11-3 vote on February 18, 2021. That development agreement was then executed by Waukesha Parkway LLC and the City on March 9, 2021. Finally, a Public Works development agreement, which also includes the requirement of constructing the River Valley Road connection per the approved site plan, was approved by the Common Council by unanimous consent on April 8, 2021 and was executed by Waukesha Parkway LLC and the City on April 14, 2021.

The two executed development agreements are valid, binding, and enforceable contracts. They cannot be undone without the consent of all parties. If the City were to try to cancel the contracts unilaterally and revoke the requirement for the River Valley Road connection, the City would be in breach of contract, and would be liable to the developer for resulting damages. The developer has already spent a considerable amount of money on the development in reliance on the City's approval of their plans and the execution of the two contracts, and that out-of-pocket expense would probably be the minimum amount of damages. Expectation damages would probably be much greater. There is no governmental immunity from damages for breach of contract, and there is also no cap on damages for breach of contract.

It is not procedurally possible for the Council to rescind the contract at this point. The Common Council can rescind its prior actions, unless doing so would interfere with a party's vested

interest. In the case of a contract, a Common Council can rescind its approval of a contract unless the contract has begun to be performed, a party has spent money in reliance on the contract, or a party has otherwise gained a vested interest in the contract. If the other party has gained a vested interest in the contract, then a motion to rescind the approval of the contract is out of order. Construction of the River Valley Road connection has already begun, with roadbed grading and drainage improvements already installed. The developer has a vested interest in the development agreement contracts.

In addition, the developer has expressly made it clear that its development is predicated on the existence of a traffic light at its connection with STH 59. Without a signalized intersection, the development loses significant value and the developer would not develop the land. The state Department of Transportation has approved a signalized intersection at the development's connection to STH 59, but on the express condition that River Valley Road be connected to STH 59 at the development's access point, in line with the existing access drive to St. John Neumann Catholic Church and the City's Fire Station 3. This was expressly stated in a letter from the DOT to the City Engineer dated February 2, 2021.

If River Valley Road is not connected to STH 59, no traffic signals can be installed, and the developer's plans are significantly adversely affected. The developer therefore has a vested interest in the development agreements, and it is no longer possible for the City to remove the River Valley Road connection from the development plans by rescission of the development agreements. For the same reason, the developer will not voluntarily consent to removing the River Valley Road connection from the development plans.

In conclusion, to avoid adverse legal consequences for the City, it is categorically advised that the proposal to block the connection of River Valley Road to STH 59 be denied. It is simply too late at this point.