

MINUTES OF A MEETING OF THE FAYETTEVILLE CITY COUNCIL

A regular meeting of the Fayetteville City Council was held at 6:30 p.m. on March 2, 1999 in Room 219 of the City Administration Building, 113 West Mountain, Fayetteville, Arkansas.

ITEMS CONSIDERED

ACTION TAKEN

Approval of the minutes	Approved	
Hwy. 265 Widening	Approved	Res. 33-99
Bid 99-27	Approved	Res. 34-99
Walker Park Parking Lot	Approved	Res. 35-99
Old Missouri and Zion Intersection	Approved	Res. 36-99
VA 98-12	Approved	Ord. 4142
RZ 99-1	Approved	Ord. 4143
RZ 99-2	Approved	Ord. 4144
CH2M Hill	Approved	Res. 37-99
Bakery Foods	Motion to file an injunction	
Cell Towers	Approved	Ord. 4145

PRESENT

Mayor Fred Hanna

Aldermen:

- Robert Reynolds
- Ron Austin
- Bob Davis
- Trent Trumbo
- Heather Daniel
- Kevin Santos
- Cyrus Young
- Kyle Russell

City Attorney

Jerry Rose

City Clerk

Heather Woodruff

Staff, Press, Audience

**MINUTES OF A MEETING
OF THE
FAYETTEVILLE CITY COUNCIL**

A meeting of the Fayetteville City Council was held on March 2, 1999 at 6:30 p.m. in the City Administration Building, Room 219, 113 W. Mountain Street, Fayetteville, Arkansas.

CONSENT AGENDA

APPROVAL OF THE MINUTES

Approval of the minutes from the February 16, 1999 meeting.

HWY. 265 WIDENING

A resolution approving an engineering contract with RJN Group, Inc. for Hwy. 265 widening (Hwy. 45 to Hwy. 16), including water and sewer relocations in the amount of \$588,853.00. Also approval of a project contingency in the amount of \$588,588.

RESOLUTION 33-99 AS RECORDED IN THE OFFICE OF THE CITY CLERK.

BID 99-27

A resolution awarding Bid 99-27 for ballfield fencing at Lake Fayetteville Softball Complex fields #2 and #3 and Babe Ruth Baseball fields #1 and #2 and approval of a budget adjustment.

RESOLUTION 34-99 AS RECORDED IN THE OFFICE OF THE CITY CLERK.

WALKER PARK PARKING LOT

A resolution approving a budget adjustment to reconstruct the southwest parking lot at Walker Park.

RESOLUTION 35-99 AS RECORDED IN THE OFFICE OF THE CITY CLERK

OLD MISSOURI AND ZION INTERSECTION

A resolution approving a contract with Tomlinson Asphalt Company for the Old Missouri Road and Zion Road intersection improvements in the amount of \$484,948.75 plus a contingency of 10% totaling \$533,450. And approval of a budget adjustment.

RESOLUTION 36-99 AS RECORDED IN THE OFFICE OF THE CITY CLERK

Alderman Daniel moved to approve the consent agenda. Alderman Davis seconded the motion. Upon roll call the motion carried unanimously.

OLD BUSINESS

No Old Business

NEW BUSINESS

VA 98-12

An ordinance approving utility easement vacation VA 98-12 as requested by Unitarian Universalist Fellowship for property located at 901 West Cleveland, Leverett's Third Addition Block 3 and a portion of Lot 5, 6, 7, and 8. The portion to be vacated is a 15-foot wide alley located south of lot 5 and 6 and north of lots 7 and 8.

Alderman Daniel stated she would be abstaining.

City Attorney Jerry Rose read the ordinance for the first time.

Alderman Santos moved to suspend the rules and go to the second reading. Alderman Russell seconded the motion. Upon roll call the motion carried by a vote of 7-0-1, Daniel abstaining.

City Attorney Rose read the ordinance for the second time.

Alderman Trumbo moved to suspend the rules and go to the third and final reading. Upon roll call the motion carried by a vote of 7-0-1. Daniel abstaining.

City Attorney Rose read the ordinance for the third and final time.

There was no public comment.

Mayor Hanna called for the vote. Upon roll call the ordinance carried by a vote of 7-0-1. Daniel abstaining.

ORDINANCE 4142 AS RECORDED IN THE OFFICE OF THE CITY CLERK.

RZ 99-1

Mayor Hanna introduced an ordinance approving rezoning request RZ 99-1 submitted by Thomas Hopper of Crafton, Tull, and Associates on behalf of Lindsey Management Company rezoning 22.3 acres of property located north of the Washington County Fairgrounds and east of Highway 71 bypass from A-1, Agricultural to R-2, Medium Density Residential.

Alderman Young stated he would be abstaining from the vote.

City Attorney Rose read the ordinance for the first time.

Alderman Austin moved to suspend the rules and go to the second reading. Alderman

Santos seconded the motion. Upon roll call the motion carried by a vote of 7-0-1, Young abstaining.

City Attorney Rose read the ordinance for the second time.

Alderman Austin moved to suspend the rules and move to the third and final reading. Alderman Daniel seconded the motion. Upon roll call the motion carried by a vote of 7-0-1, Young abstaining.

City Attorney Rose read the ordinance for the third and final time.

There was no public comment.

Mayor Hanna called for the vote. Upon roll call the motion carried by a vote of 7-0-1, Young abstaining.

ORDINANCE 4143 AS RECORDED IN THE OFFICE OF THE CITY CLERK.

RZ 99-2

Mayor Hanna introduced an ordinance approving rezoning request RZ 99-2 submitted by Brett Henson rezoning property located on Locust Street at Archibald Yell Boulevard from R-2, Medium Density Residential to C-2, Thoroughfare Commercial.

City Attorney Rose read the ordinance for the first time.

Alderman Reynolds stated it was his understanding this was an addition to an existing building.

Alderman Santos asked if there would be a problem with getting the building out of the right-of-way.

Ms. Alett Little, Planning Director, replied they did not expect a problem with the lean to shed. However they needed to keep it because it was part of their storage.

Alderman Russell moved to suspend the rules and go to the second reading. Alderman Davis seconded the motion. Upon roll call the motion carried by a vote of 8-0-0.

City Attorney Rose read the ordinance for the second time.

Alderman Davis moved to suspend the rules and move to the third and final reading. Alderman Daniel seconded the motion. Upon roll call the motion carried unanimously.

City Attorney Rose read the ordinance for the third and final time.

There was no public comment.

Mayor Hanna called for the vote. Upon roll call the ordinance passed unanimously.

ORDINANCE 4144 AS RECORDED IN THE OFFICE OF THE CITY CLERK.

CH2M HILL

Mayor Hanna introduced a resolution approving a contract amendment number two, NPDES Permitting Assistance, with CH2M Hill in the amount of \$94,370.

Alderman Young had asked the item to be removed from the consent agenda to have some questions answered.

In response to questions from Alderman Young, Mr. Murray Fleming stated the calibration model had been approved which would need to be run during different seasons and different weather conditions.

Alderman Russell asked if the city needed to prepare a permit even though they were not sure there was even going to be a second plant.

Mr. Fleming replied they could get a permit but they could not plan the plant. He added they were trying to move on the two items together, getting the permit and proceeding on with plant plans.

There was no public comment.

Alderman Austin moved to approve the resolution. Alderman Davis seconded the motion. Upon roll call the motion carried unanimously.

RESOLUTION 37-99 AS RECORDED IN THE OFFICE OF THE CITY CLERK.

BAKERY FEEDS

Mayor Hanna open for discussion the legal alternative regarding Bakery Feeds.

City Attorney Rose explained the current situation with Bakery Feeds. The Planning Commission had considered whether or not to give them a conditional use, 2/8/99. That request had been denied. They were located in an I-1 use. The Planning Commission did not believe they were a center for recycling. He stated Bakery Feeds had appealed that decision to the

Circuit Court. He explained the court would become the Planning Commission and the application for a conditional use would start completely over. The case was currently in litigation.

He explained the alternative the city could take. There were two possible actions. One was an injunction relief, which would be for a simple cause of action. They were in an I-1 zone. The Planning Commission had determined they were not in the correct zoning. They thought they were a manufactory which needed to be in an I-2 zoning. The injunction would keep them from doing what they are currently doing in that zoning district. If the City were to bring an injunction against them, their possible defenses could be that they were in the correct zone, and they were what they said they were and were in the correct zone. They could state that they were grandfathered in. However, he did not believe it would be a good defense. The third option was estoppel, which meant that the city knew what they were doing and had done nothing for such a long period of time that it was too late to do anything about it now. He read the four elements of an estoppel. He thought this would be a good defense. In previous cases four months had been enough time for an estoppel to occur.

He stated if they believed they were not in accord with the city ordinances he urged them to give him the authority to enforce the city ordinances.

Alderman Russell questioned if Bakery Feeds had applied for a permit in the past.

Mr. Venable replied the only permit they had applied for was a permit for the footing of the smokestack.

Mr. Rose asked them to be very straightforward and not to cloud the issue. He asked if they were in a zone in which they were supposed to be in. He had been assured that if there was a possibility of a settlement they would be willing to consider it. He requested the council to give him the authority to consider a settlement before he filed suit against Bakery Feeds.

He explained the other option of filing a law suit was under public nuisance. The standard was very high. He read the definitions of a nuisance. Generally, a lawful business cannot be considered a nuisance nor does it become a nuisance because of the depreciation of property values. He read several definitions of nuisance.

He recommended that by using the injunction they would be putting everything that was an issue would be an issue. He did not recommend proceeding with a nuisance. There was no estoppel on a nuisance. They could always come back later. It was also his understanding there would be some private action. He did not recommend the council give him the authority to file a nuisance suit.

Alderman Trumbo stated that this issue belonged in a court of law.

Alderman Trumbo moved that the city attorney file an injunction lawsuit and proceed with the city attorney recommendation. In addition, give him time to seek a settlement.

Alderman Austin seconded the motion.

Alderman Reynolds thought Bakery Feeds was going to have to work with the people in the south part of town because they had not been a good neighbor in the past.

In response to questions from aldermen, Mr. Rose stated any settlement he negotiated would come back to city council for approval.

Alderman Trumbo thought the city needed to proceed with the injunction. He did not believe they needed to have public comments because it would be going to court.

Mayor Hanna though any comments at this time might prejudice Mr. Rose's work.

Alderman Young stated Bakery Feeds had taken the position that the Planning Commission had denied their conditional use permit, however it was his understanding the Planning Commission had found they were not in the proper zoning district and were not able to proceed. He questioned how the city could prevent this from happening in the future.

Mayor Hanna called for the vote. Upon roll call the motion carried unanimously.

NO RESOLUTION OR ORDINANCE WILL STAND BY MOTION.

CELL TOWERS

Mayor Hanna introduced an ordinance staying applications for cell tower placement pending the development of a new cell tower ordinance.

Mr. Rose read the ordinance for the first time.

Ms. Little noted several important points on a handout. Local authority may not regulate cell towers based on environmental impact as long as they comply with federal standards. Cities may deny requests based on aesthetics, preserving the character of neighbors or areas, or because multiple towers were not necessary. Cities may not rely on public opposition to deny a request for a cell tower. She thought the article gave a balanced view. She asked the council to be very specific on their direction on writing the new ordinance.

Alderman Davis stated it was not his intention to ban cellular towers, but he had received over

135 calls last week that did not want to have the cell tower in the proposed location. He noted there were several other towers being proposed. He was wanting to put a freeze on all current and future applications for cell towers. He thought the city could hold all current applications until a new ordinance could be written.

Mr. Rose replied the applicant had the right to rely on the laws that were in affect when they applied. The majority of courts in the United States had ruled that the applicant had the right to rely on the laws in effect the day they applied. He stated the city had always allowed all the applicants in the pipe line to complete the process.

In response to questions from Alderman Davis, Ms. Little stated the Planning Commission had requested the applicant look at any other sites that they could locate. Southwestern Bell had discovered it would take three locations to get the same coverage this location would give them.

Alderman Davis suggested that in the moratorium or freeze of the ordinance include in what zones they want towers located, height limitations, co-location of towers, if towers become obsolete who is responsible for taking the tower down. He iterated that we need to protect the skyline from an overabundance of towers.

Alderman Trumbo questioned who would pay to have a tower removed.

Mr. Craig Hull stated there was a removal of improvement clause in the leases which required the owner or lessor to remove the tower .

Alderman Santos asked why they did not locate on the existing water tower, rather than building a separate tower.

Mr. Hull explained they were cooperating with the city. There were several other towers on the tank.

Alderman Santos asked how the towers would interfere with the operation of the tanks.

Mr. Venable replied maintenance of the tank was the main concern.

Mr. Rose suggested staff to work with the aldermen in the development of the new ordinance. He noted there was considerable flexibility in the current ordinance which required a conditional use which would have to go before the Planning Commission. He added he could not recommend they freeze the current applicants in the process.

Alderman Davis expressed concern about more applicants coming in for cell towers before the

new ordinance was in place.

Mr. Rose stated he was comfortable with the idea that the city was not going to accept or process applications for cell towers for six months pending the development of a new ordinance.

Alderman Davis asked if they could regulate cell towers in the growth area.

Ms. Little stated the city had some control over the growth area on development. The city's subdivision regulations applied. Zoning did not. Conditional uses were a function of the zoning. She explained the staff had a list of information the applicant would have to provide them. She read the list the applicant must submit to the Planning Commission.

In response to questions from Alderman Trumbo, Mr. Rose stated the Planning Commission could place restrictions on the conditional use. He stated the Planning Commission could deny a conditional use if they had good reasons.

Alderman Trumbo questioned how the cell tower on Hwy. 45 was built without complying with all those conditions.

Ms. Little replied the cell tower was not inside city limits.

Mr. Mark Stogla, Southwestern Bell Wireless, presented information regarding cell towers. They were trying to work with Planning to make the cell tower as unobtrusive as possible. He stated it would be devastating to them if their application were included in the moratorium. The issue of co-location was something they were still trying to work out. He asked that the moratorium not apply to existing structures. He thought the conditional use process was more restrictive than most ordinances. He introduced his associates Kit Turner, Bobby Farrell.

Mr. Stewart, Southwestern Bell, stated he had met with Ms. Little about shorter towers, co-location and stealth construction. He added in that area there was a lot of problems. They were proposing to replicate what they had done in other cities by designing a tower to look like a church steeple. He stressed the fact it was a church steeple with cell tower equipment. He had looked at other sites, but to replicate the coverage this site would provide would take three locations. He stressed the fact the tower would be a church steeple. He did not believe property values would decrease. They had an affidavit from a local appraiser who could ascertain that there would be no property devaluation. American Cancer Society was not concerned about health affects of towers. The proposed towers would be digital. He thought they were giving the city what it was requesting.

Mayor Hanna stated he received a call from a citizen expressing concern about the affects of a

cell phone on pace makers.

Mr. Stewart explained the person should not carry their phone in the front pocket.

Mr. Lloyd Bowen, an area resident, stated he was concerned about the affects of the tower on his pacemaker and the value of his property. He expressed frustration that he had not be notified of the proposed tower being located in his neighborhood. His pacemaker company had told him not to get a cell phone within one and a half feet of his pacemaker. He questioned the amount of frequency that would be coming off the tower.

Mayor Hanna clarified, Mr. Bowen's concerns were that the health factor of the location of the cell tower would decrease the value of his property.

Mr. Bowen stated the church had a day care and he questioned the affects the cell tower would have on the children. He explained his health conditions and the cautions expressed by his pacemaker's company. He stated the tower would be intruding on his neighborhood. He stated he did not believe half of what the Southwestern Bell was telling them.

Alderman Davis read an article which noted the increase in childhood leukemia from cell towers.

Mr. Stewart replied most of the studies he had read had to do with overhead power lines.

Alderman Davis presented another article on mice with use of cell towers.

Alderman Young stated this was a technical instrument affecting another technical instrument. The cell tower was affecting his pacemaker.

Alderman Davis quoted another article reporting the affects of cell towers on other medical equipment.

Alderman Austin stated some hospitals had requested him not to use his cell phone in a hospital. He questioned how close the frequency would be from the cell phone to the medical equipment. He noted that the item before them was not their request, but a future ordinance.

Alderman Austin stated he was more concerned about the frequency than the wattage. He asked if anyone could answer the question.

Dr. Reynolds, an area physician, felt Southwestern Bell needed to construct three separate towers rather than one. The people who lived next to the tower would be affected by all the waves. The neighbors did not know they were going to be proposing a tower. The neighbors needed the time

to organize.

Mr. Jim Smith, Altell, stated they tried to use existing structures and to work with cities. They wanted to be proactive. He suggested building an industry panel before they adopted a moratorium. He stressed this would affect their growth and emergency services. He asked them to consider a 90 day moratorium and to allow them to help in writing the ordinance.

Mr. Steve Ward, an area resident, stated the city had not heard from the citizens who used these facilities. He thought this would hold up the development. He noted it was also a safety issue. Most of the 911 calls were from cellular phones.

Alderman Russell noted everyone wanted the benefits of the cellular services. They were not wanting to ban cellular services. He did not believe it would take six months to come up with a new ordinance.

Alderman Young stated they could repeal the moratorium if they completed the ordinance before six months.

Mr. Rose read the amendment to the ordinance which included an emergency clause.

In response to the public, Mr. Rose stated the applicant had the right to rely on the current laws when they submitted their application. He noted the item would be going in front of the Planning Commission.

Alderman Young moved to accept the amendment to the ordinance. Alderman Davis seconded the motion. Upon roll call the motion carried unanimously.

Alderman Davis moved to suspend the rules and move to the second reading. Alderman Young seconded the motion. Upon roll call the motion carried unanimously

Mr. Rose read the ordinance for the second time.

Alderman Russell moved to go to the third and final reading without suspending the rules. Upon roll call the motion carried unanimously.

Mr. Rose read the ordinance in its entirety.

Mayor Hanna called for the vote. Upon roll call the motion carried unanimously.

Mr. Rose stated there needed to be a separate vote for the emergency clause.

Mayor Hanna called for the vote. Upon roll call the emergency clause carried unanimously.

ORDINANCE 4145 AS RECORDED IN THE OFFICE OF THE CITY CLERK.

Meeting adjourned at 8:45 p.m.