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MINUTES OF A MEETING
OF THE
FAYETTEVILLE CITY COUNCIL
JUNE 6, 2000

A meeting of the Fayetteville City Council was held on June 6, 2000 at 6:30 p.m. in Room 219 of the City Administration Building located at 113 West Mountain Street, Fayetteville, Arkansas.

PRESENT: Mayor Fred Hanna; Aldermen Robert Reynolds, Ron Austin, Bob Davis, Trent Trumbo, Heather Daniel, Cyrus Young, Kevin Santos, and Kyle Russell; City Attorney Jerry Rose; City Clerk Heather Woodruff; Staff; Press; Audience.

CONSENT AGENDA

APPROVAL OF MINUTES
Approval of the minutes from the May 16, 2000 City Council Meeting.

GARLAND STREET IMPROVEMENTS: A resolution approving an engineering design contract in the amount of $28,253.37 with Hawkins-Weir Engineers, Inc. for the design of water and sanitary sewer relocations and system improvements on Garland Street from Maple Street to North Street in preparation for the State AHTD widening of Garland Street.

RESOLUTION 73-00 AS RECORDED IN THE OFFICE OF THE CITY CLERK.

COPS IN SCHOOLS FEDERAL GRANT: A resolution accepting a Cops in Schools Federal Grant in the amount of $470,095.00 and approval of a budget adjustment in the amount of $46,530.00.

RESOLUTION 74-00 AS RECORDED IN THE OFFICE OF THE CITY CLERK.

OLD MISSOURI ROAD IMPROVEMENTS: A resolution approving a contract for surveying services in the amount of $70,060.00 with Garver Engineers for the Old Missouri Road improvements; and approval of a budget adjustment in the amount of $70,060.00 to fund the surveying contract.

RESOLUTION 75-00 AS RECORDED IN THE OFFICE OF THE CITY CLERK.

BID 00-42: A resolution awarding Bid 00-42 to Central States Fire Apparatus LLC for the purchase of a new Fire Department pumping engine at a cost of $209,096.00.

RESOLUTION 76-00 AS RECORDED IN THE OFFICE OF THE CITY CLERK.

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AD 00-10.00: A resolution approving AD 00-10.00 as submitted by the City Planning Division to adopt the planning area boundary.

RESOLUTION 77-00 AS RECORDED IN THE OFFICE OF THE CITY CLERK.

Alderman Bob Davis moved to approve the Consent Agenda. Alderman Heather Daniel seconded the motion. Upon roll call the motion carried unanimously.

OLD BUSINESS

NEW BUSINESS

RZ 00-15.00
An ordinance approving rezoning request RZ 00-15.00 submitted by Bill Helmer on behalf of Clifford and Mary Clevenger and Mary Silvis for property located at 831 N. 54th Avenue. The property is zoned A-1, Agricultural and contains approximately 2.97 acres. The request is to rezone to R-1, Low Density Residential.

Mr. Rose read the ordinance.

Mayor Hanna asked the Council if they had any comments about this rezoning.

Alderman Daniel stated the Planning Commission had passed the rezoning unanimously. However, since this was in Ward 4, she would like to leave it on the first reading.

Mayor Hanna asked if there were any other comments. There were no further comments made.

THE ORDINANCE WAS LEFT ON THE FIRST READING.

AIRPORT STANDARDS
A resolution adopting the updated "Minimum Standards for Operations and Commercial Activities" for the Fayetteville Municipal Airport-Drake Field replacing the current document and its revisions.

Brenda Moss, Financial Coordinator for the airport, stated the Minimum Standards were basically a part of the regulations and rules that the Airport was operated under. The Standards had not been revised since 1981. They had basically taken out the terminology and language of airlines, and replaced them with more general aviation terminology. One major change was the removal of the word "aeronautical businesses," and replacing it with "commercial."

Alderman Russell asked if this had gone through the Airport Board?

Ms. Moss replied, "yes."

Mayor Hanna asked if anyone in the audience would like to address this resolution?

There was no public comment.

Alderman Ron Austin made a motion to adopt the resolution. Alderman Trent Trumbo seconded the motion. Upon roll call the motion carried unanimously.

RESOLUTION 78-00 AS RECORDED IN THE OFFICE OF THE CITY CLERK.

RFQ 00-4
Resolution approving a Letter of Engagement to Kutak Rock & Campbell for attorney services on the financing of the Wastewater Treatment Plant Facility.

Jerry Rose, City Attorney, stated the council should have a copy of the engagement letter before them. This was a standard bond counsel letter of engagement. However, attached to that, was an hourly wage or rate for work done on the possibility of funding this project through a sales tax.

Alderman Young stated any time bonding issues came up, he asked a standard question. His question was always just a simple one. He just wanted to make sure who they are working for. He had a letter there and it read, on page 3 of the City Engagement Letter, you will note that we have identified the City of Fayetteville as our client and have stated that in connection with all transactions covered by the Engagement Letter we are counsel only to the City. He just mentioned this to make this a part of the minutes. Everything was okay.

Alderman Trent Trumbo made a motion to approve the resolution. Alderman Bob Davis seconded the resolution. Upon roll call the motion carried unanimously.

RESOLUTION 79-00 AS RECORDED IN THE OFFICE OF THE CITY CLERK.

RFQ 98-10
Resolution approving a Letter of Engagement to Wright, Lindsey & Jennings for the financing of the New Library.

Jerry Rose, City Attorney, stated this was virtually the same thing as the last item. He explained the Council had already passed one contract with Wright, Lindsey & Jennings. It had been strictly a bond counsel contract. This one was an amendment to that and replaces that one. It again was a standard bond counsel agreement with the added hourly rate for work done on the sales tax issue if that was the council's choice.

Alderman Young stated he would ask his standard question when it came through before.

Alderman Russell asked if the approval of this letter committed the City to a certain funding source for the Library or if it just gave them those options with these attorneys?

Mr. Jerry Rose answered, that was correct.

Alderman Bob Davis moved to accept the resolution. Alderman Heather Daniel seconded the motion. Upon roll call the motion carried unanimously.

RESOLUTION 80-00 AS RECORDED IN THE OFFICE OF THE CITY CLERK.

FARMERS MARKET
An ordinance amending Section 114.03 of the Code of Fayetteville, Food; Milk, as proposed by the Board of Directors of Rural Mountain Producers Exchange, Inc. to allow vendors to use parking spaces on the east side of East Street and to allow the sale of other processed farm products.

Mayor Hanna stated this was for the Farmer's Market.

Mr. Rose read the ordinance.

Mark Cain, President of Fayetteville Farmers Market, stated he knew that some of them were there about three years ago when they had a local person who was a goat dairy farmer and wanted to sell locally processed cheese on the market. At that time, the City Ordinance and the R & P Regulations did not allow the sale of cheese. Since that time, they had done a lot of study as a market. All of their vendors had been brought into the process in terms of focus meetings over the last three years. Donna Dole came on the market with her cheese back in August of 1997. It has been a big success with the customers and has been a welcome addition to the Farmers Market. They were simply asking to increase the sale of other processed products there at the Market that are also grown by the vendor which for the time being included jellies, jams, vinegars. They proposed a processing committee, somewhat like their craft committee that will jury the products to make sure the vendors are indeed growing all of the ingredients in the products and that all of the health regulations have been conformed with. Back in 1997 they were given the use of the east side of East Street on Saturdays only. That was when they had their biggest influx of farmers coming into town to sale and what they were simply asking for now was that wording be placed into the ordinance that would allow the use of the parking spaces on the east side of East Street on Saturdays. Right now they used the west side of East Street as part of the Tuesday, Thursday and Saturday markets.

Alderman Trumbo stated he thought they were doing an outstanding job. It was a big draw for a

lot of people in town and out of town. It was great. He questioned how the politics worked on picking a spot. If they ran out of spots, were they going to allow more produce and vendors? How did that work?

Mark Cain replied they had a point system. They paid a 10% commission into their nonprofit organization that helped pay for their manager, sacks, advertising, and other things. Every market day a envelope was sent around and they wrote down what they had made and put 10% of that back into the envelope. From this they accumulated points based on the amount of sales that they did, and also the number of market days that they had attended the previous year, and the number of years that they had been at the market. It was a system that tried to acknowledge seniority and also, enthusiasm in terms of sales. New vendors could get on the market if they were successful. At the end of every year at their Fall Banquet Meeting they had a count of where all the points were added up, and people chose their spots for the next year. Now people coming on the market that were new, they may not get a permanent spot right away but they could show up on Tuesday or Thursday, generally Saturday spots were not open. They are placed in the empty spaces as they come in.

Alderman Trumbo commented that was great. He asked what the ball park figure was on sales a year that the Farmers Market made?

Mark Cain replied he believed last year they took in about $450,000.00.

Alderman Trumbo stated that's great and asked if that was that a record year?

Mark Cain replied, yes. Every year has been going up.

Alderman Daniel asked, Mark to explain the role of the health department in a little more detail?

Mark Cain stated in terms of processed products, all processed products, and at this time they were not including any bread items because generally people don't grow their own wheat, but people who have berry farms, or grape farms, or whatever, could easily produce jams and jellies to sale at the Market. Those all have to be produced in a certified kitchen. It can be at a restaurant or a home built one that was certified by the State Health Department, or any other certified kitchen available that can be rented. Also, they were requiring minimum product liability insurance. The Market already carried liability insurance for its vendors, but they wanted to insure that each vendor had their own liability insurance. Certain items like the dairy products or the frozen meats required USDA certification, so just in the same way right now they required plant vendors to be certified by the State Plant Board, those types of documents would be required to be on file with them before anyone could sale a processed product.

Alderman Davis asked Mark what limits the liability that he was requiring for those vendors to

carry?

Mark Cain stated he believed it was $500,000.00. He asked Donna Dole what she was carrying now? She replied, generally one million dollars coverage per case.

Alderman Davis stated per occurrence of two million aggregate. An aggregate would be, what two million, which would be the maximum per policy period?

Donna Dole said, she would have to go back and review her policy.

Alderman Davis said, okay, just out of curiosity. Are you having all the vendors name the Farmers Market as an additional insured?

Mark Cain replied that had been proposed. He believed probably the amount of liability insurance may vary with the type of product they were carrying. Some things carry higher risks, like dairy products. Jams, jellies, pickles generally in the high acid group require a process in the kitchen, but they were not nearly the same risk as the salsa or tomato sauces, and they were proposing right now to only add in the low risk items until they gained more experience with how they were going to introduce all of the vendors. Not all of the vendors would be in line actually to start producing any processed products. It would probably come fairly slow to the market as people get this under their belt. It would just be another addition to the type of income they could create from their farm products.

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

Mr. Rose read the ordinance.

Mayor Hanna asked if anyone in the audience would like to address this proposed ordinance change?

Alderman Kevin Santos made a motion to suspend the rules and go the third and final reading. Alderman Ron Austin seconded the motion. Upon roll call the motion carried unanimously.

Mr. Rose read the ordinance.

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

ORDINANCE 4248 AS RECORDED IN THE OFFICE OF THE CITY CLERK.

PARTIAL PERMIT
An ordinance repealing Section 156.04, Section 169.03 (B)(6), and Section 170.03 (A) of the Code of Fayetteville, Unified Development Ordinance, and amending those sections to prohibit non-final, partial and/or phased grading and/or storm water management, drainage and erosion control permits.

Alderman Daniel stated she hoped the Council didn't want to move on this tonight because there was some new information she found before her tonight and it was pretty complicated and very significant.

Alderman Austin stated this was referred to the Ordinance Review Committee. We had a very thorough discussion last Tuesday. We had input from various developers and individuals, and Alderman Davis made a recommendation that we accept it and present it at Council tonight.

Alderman Davis stated the recommendation was, and he received the feeling out of the task force, we really didn't vote on it, we would put together a task force and give it ample time to come up with a solution to this. Jim Beavers, City Engineer, indicated also, there was some new stuff coming out for the grading of 93 and the storm water of 96 which currently overlaps. There is some additional information coming out at the end of this year and he would like to incorporate all of these items into a new ordinance instead of the Council working on anything at this point in time.

Alderman Santos stated they also had some good suggestions for additional changes to the ordinance like requiring a change to the overall plan, re-approval of the overall plan as the individual lot plans change, like they did at Steele Crossing. And another thing, maybe we just should not do partials for large scale developments with lots over a certain size. There are some different things we can look at. I think probably the only partials we do are for really big lots, large scales, so they would have pretty much the same effect.

Alderman Austin asked Alderman Santos if all of those suggestions were given to Jim Beavers, City Engineer, and his Staff, and if we do go with the idea of a study committee to incorporate into their recommendations?

Alderman Santos answered, that was correct.

Alderman Russell wanted to ask a couple of questions whether the Council does anything on this tonight or not? I am with Heather on certainly not moving this through tonight if we do anything with it at all because it is complicated. I would like Jerry Rose or Charlie Venable or Jim Beavers, if he is here, to with respect just use the grading ordinance as an example and outline for the benefit of the Council and for the benefit of the public the procedure that developers usually are required to follow under the ordinance, say for a large scale development, so we know

what we are considering messing with here in changing.

Charles Venable, Public Works Director, stated since Jim Beavers, City Engineer, was going to be the one responsible, he would be the best one to answer these questions.

Jim Beavers handed out copies of what the City's policy was, and he wanted to put down on paper the way they had reviewed the plans. As he stated earlier, we have about a two and a half page list here of how we review a grading plan that is submitted at this time. He asked Mr. Russell if he wanted him to go through the entire list?

Alderman Russell said, he didn't know if it was entirely necessary to go through the whole thing. His general question was the order of events underneath the City grading ordinance, specifically, he thought the storm water management ordinance tracts it fairly similarly. He was confused particularly as he thought you were supposed to submit a preliminary grading plan when you submit a plat for large scale approval.

Jim Beavers answered, yes, sir.

Alderman Russell stated he was kind of confused as to the process. It seemed to him the ordinance would require a final grading permit approval before the Planning Commission approves a large scale plat, and he does not when in that process work can begin on the land, except the ordinance reads, no work is supposed to begin until you have a grading permit, and he was assuming you all have interpreted that means a partial is sufficient for work to begin. He didn't know where the partial permit was issued, usually, with regard and in relation to the approval of the large scale plat. Which comes first, usually?

Jim Beavers stated the planning process is such that a preliminary grading plan and a preliminary drainage report are required with each large scale or subdivision that goes through the planning process. After the Planning Commission has approved the large scale or subdivision, then the developer's engineer is to prepare his construction plans which include the final grading plan and the final drainage calculations.

Alderman Russell asked if that was after large scale had been approved?

Jim Beavers replied after approval.

Alderman Russell stated that confuses him because just reading through these ordinances, it says no subdivision may be finalized nor large scale development plats approved before a final grading plan has been submitted to the City Engineer and approved. Which would indicate to him the procedure should be reverse of what Mr. Beavers was talking about in that the applicant should gain approval of a final grading plan from Mr. Beavers before they do large scale

development, plat approval in front of the Planning Commission. I am looking at 169.08 B.

Jim Beavers stated he would recommend that was one of several things when the Committee meets they need to look at because that is not our procedure, has never been our procedure and quite frankly, I think that part of the ordinance should be changed.

Alderman Russell replied, okay, the way we do it now is we do the plat submission along with the preliminary plan submission, then the large scale approval before the Planning Commission based on the preliminary plans and then you all look at the final plans and give out final permits after the large scale approval, right?

Jim Beavers answered, yes.

Alderman Santos suggested while the Council was waiting for this to go through three readings, could they go ahead and name a committee, or name what kind of representative they would like to see on this committee? Could the Council do that tonight?

Alderman Austin suggested the Mayor could appoint a committee or the Council could have a resolution to have a committee.

Mayor Hanna replied he would be glad to do it however the Ordinance Review Committee wants to do it.

Alderman Austin stated they wanted Alderman Young to be on the committee and Jim Beavers and his Staff to be on the committee, and some representatives from the construction industry, developer's industry and some citizens. That is really about all we talked about. We didn't name any names other than Cyrus and Jim Beavers.

Alderman Daniel suggested maybe each of the Councilmen could keep their ears open if they have some constituents who are interested in being on this committee, then we could start a list and look at it. What do you all think?

Mayor Hanna replied that sounded like a good idea. He would hesitate to form a committee before the Council found out who would actively serve on it. This committee is not something you need to appoint somebody to that will not show up.

Alderman Santos stated that if anyone was interested to give their Aldermen a call. Call your individual aldermen.

Mayor Hanna added call your alderman or call the Mayor's office, leave it with our secretary or ask for Mr. Venable.

Alderman Young stated if you want to serve he suggested that you do it in a hurry because that committee needs to meet next week.

Alderman Austin stated it would be an AD HOC committee. It will serve until we make a report and then it will go off.

Mayor Hanna stated there were several things you all evidently will need to discuss on this. He felt committees shouldn't be put together in a hurry, and he believes you should not do anything without going over the ordinance thoroughly so that what the committee decides upon will be sufficient.

Alderman Young stated one of the things that Jim Beavers was talking about was the new federal regulations that won't come in for six months to a year from now. The other thing he was talking about was combining the grading and the storm water management together basically into one ordinance, which is fine. I don't see where that would take that long to do that because the grading ordinance is already in place, unless you want to do some wholesale changes to it. He does not see doing that because they have changed it once or twice.

Charles Venable stated it took them about a year the last time they did it, remember? We had a committee then.

Alderman Young stated to just make sure that it siamese's in with the storm water management. He was still leery because even if they do that then he thought it had to be spelled out very plainly regarding whatever we do, and then when they change the tree ordinance, it needs to match what they do, that nothing happens until all these permits are in place.

Alderman Daniel asked Alderman Young if he was talking about a moratorium?

Alderman Young replied, no. He said regarding this thing he handed out, one of the whole purposes of the Tree Ordinance, and matching it with the grading plan, was so that trees would not get taken out that do not have to be. Now that was the main purpose of putting that provision in the Tree Preservation plan was to match it up with the grading plan.

Alderman Austin stated in visiting with Ms. Hesse, in the Tree and Landscape division, she wanted some time to go over it thoroughly. He did not believe they could rush that issue.

Alderman Russell stated Ms. Hesse told him six months.

Alderman Austin stated then it goes to the Ordinance Review Committee. All of these other committees will need some time so maybe the Council should just deal with the Agenda item tonight as a rush up deal and deal with the committee as a separate thing and not let the

committee preclude dealing with the Agenda item, if you would like to do that? He has submitted an ordinance. It is on the Agenda. It is on the first reading.

Alderman Russell stated they could either expedite it or leave it on the first reading or table it.

Mayor Hanna stated he felt they would not have to table it tonight if they weren't ready. After the next meeting he supposed it would have to be tabled.

Alderman Daniel stated she felt there was going to be greater attention paid to the City's ordinances considering the latest event, so she didn't think anything should be rushed through.

Alderman Russell stated he had a question about partial permits with regard to this memo that Jerry Rose prepared at Alderman Young's request. He has had some citizens raise this issue with him because they are afraid that granting partial permits gives undo leverage to developers and would possibly open the City up for legal liability if they then revoked the permits or refused to grant final permits later. The memo reads that the developer proceeds at his own risk. He takes that to mean that if the City granted a partial permit to a developer and their final permit application or a final plat or final plan does not meet the requirements of the ordinances, and the City, therefore refuses to issue a final permit, they can't come in and say they have all of this money invested, and you issued a partial permit, so they are entitled to a final permit. Is that correct?

Jerry Rose replied that was a good point. He and Jim Beavers had talked about that and from now on they want to be sure that is expressed fully in the partial permits that he is issuing. They are going to do that in the future giving them written notice that they are proceeding at their own risk. The fact is once large scale development approval/permission is given, it is not of matter of whether or not if the permits will be issued. It is a matter in what form they will be issued. In other words, the large scale development gives the permission for the permits to be issued. Now certainly they must follow all of the provisions of the City ordinances but there would rarely be a circumstance in which you would summarily deny a permit. It is not a yes or no answer. The answer is either yes or no unless you do this. Does that make sense? Have I stated that correctly, asking Tim Conklin, City Planner, and Jim Beavers, City Engineer?

Tim Conklin, City Planner, stated once a large scale development is approved, if their permit/applications are not meeting what is required, they tell them how to make it meet what is required, how to make it right.

Alderman Russell stated it was perfectly okay for the City to deny a permit if they are not doing what they are required to do under the ordinances, but it is not okay for the City, for no-good reason, to sit on a permit and not issue it.

Jerry Rose, stated again, the answer is not yes or no. The answer is either yes, you may have your permit or no, you may not have it unless you do this.

Alderman Young clarified in other words, they keep changing up their plans until it complies with the ordinance.

Jerry Rose, replied that was correct.

Alderman Austin asked if Engineering verifies that they actually do, right?

Alderman Russell stated somewhere in there he saw that if it is a major change to what the Planning Commission approved then they have to go before the Subdivision Committee of the Planning Commission to get the major change approved. If it is a minor change, you can approve it, right? That is after the Planning Commission has approved large scale development, which he is still confused about the order of the procedure. Under the current ordinance it would seem like a final grading plan needs to be submitted and approved by the City Engineer before large scale development plat approval. I may be wrong. I may be reading that wrong and that would counter to the procedure that you all have outlined. I guess we will talk about it in the committee.

Alderman Daniel asked if the City would no longer grant partial permits, are we boxing ourselves in, in any way? Does that give the City less flexibility?

Jim Beaver stated what he thought it would do is that it would naturally delay and slow down projects, but it would also put a burden on the Engineering Staff. They are now going to be pressed to get those out in a more timely fashion, if they could after the whole thing is in because they have already been delayed several weeks or month, and he was not sure where they would go with that. They would be talking about even further delays or be talking about less review, he just didn't know how they would handle that.

Alderman Austin asked if it could mean more staff?

Jim Beavers, answered, yes, sir.

Alderman Young asked what Mr. Beavers meant by delayed weeks or months?

Jim Beavers, stated if he understood the question, if they wait until they have all of the drainage calculations 100% correct before they issue a grading permit, as you are fully aware through your company, and we discussed this last Tuesday, it probably takes an average development, and Ron Petrie does most of these now. Again, I want to brag on Ron. He does an excellent job, a great job. I would say it has probably taken anywhere from two to four cycles of revisions before the

firm gets all of their drainage calculations to match the City's criteria manual and that could take anywhere from six weeks to three to four months. That would be an additional delay.

Alderman Young asked who was doing the delaying? The engineering company or the City of Fayetteville?

Jim Beavers, replied it was both if you take a time of the year like right now when they are really busy and have a back log of about 20-30 projects waiting to be reviewed and there is one individual who reviews projects. If drainage was submitted early in the year when they didn't have the back log, but we kick it back and it comes back in now, then there is going to be that lengthy time period before it gets reviewed for its second review. I am not saying if that is good or bad. I am just telling you that is how it is.

Alderman Young asked if they submitted something that complied with the ordinance right off, you could review it and approve it, right?

Jim Beavers, replied, yes, sir, we would love that. Most firms do a very good job but there are some minor things in our manual that generally they have to go back and check. We have to say the consultants in Northwest Arkansas are generally very, very good and do a very good job. I think the drainage designs going on today are far beyond what they were ten years ago. I think the firms are doing a very good job. I would like to say one thing that has not been mentioned when we talk about a phased or partial permit or grading permit issued in advance of checking the drainage calculations. I would like to make the point that they never approve any construction, any grading of any kind, without the Landscape Administrator first checking the trees. So if this whole issue is about the trees, I think it needs to be made clear that they do not allow, even if they are breaking out part of the project for the grading, we don't allow them to grade on that until they submit a full plan on that area and it is checked by Engineering and the Landscape Administrator.

Alderman Young stated if the storm water changes up the grading then that might change up what the tree preservation would be.

Jim Beavers, replied he would not say that couldn't happen but he did not believe that would happen very often.

Mayor Hanna asked if anyone had any other questions for Mr. Beavers?

Alderman Daniel asked if the Council was going to set a deadline when constituents can submit their names?

Mayor Hanna stated they would probably be well served to put the Friday deadline on the

applications for this committee. This is not something he feels needs to come back before the Council or Nominating Committee. We want people who want to be involved in it to be involved.

Alderman Young stated he would like somebody to set a time for next week.

Alderman Santos suggested at Agenda Session next week.

Alderman Young stated he was talking about when they were going to meet.

Mayor Hanna stated they could set a meeting date for later that week. If you don't get the applications in until Friday it would be hard to set a date for the meeting.

Alderman Reynolds asked did the Council know how many people they wanted on the committee?

Alderman Daniel suggested that each aldermen could come up with maybe one name. They did not want it to become too large.

Alderman Young said, something less than a hundred.

Alderman Daniel asked that by application did that mean just calling and submitting their name or do we need them to fill out a form?

Alderman Russell stated there were members of the public attending the meeting that would like to address the partial permit issue tonight while it is on the Agenda and we are talking about it.

Alderman Austin addressed the Mayor. We had a very thorough discussion at the Ordinance Review and he thought it would be good for us to be reminded that Kyle Russell brought it to our attention what our rules were at the last meeting about public input. One of the things that he remembered Kyle reading or Jerry Rose reading was that we avoid repeating items that were presented at committee meetings and other meetings.

Alderman Russell asked, repetitive comments?

Alderman Austin stated the reason he brought this up is that we are probably going to have this ordinance in some form to be considered and he just thought it would be more timely if most of the comments were addressed to the final recommendation. They don't want to limit the comments but just to advise people that probably this would be the most appropriate and would have the most impact.

Alderman Russell stated he believed if you say something now there would be no need to say it later and if you are going to say something later there is no need to say the same thing now.

Colene Gaston, 3270 Rom Orchard Road, I work in the City. I will try, Mr. Austin, to cover things I did not comment on at the committee meeting. There is one issue that has been raised tonight that Kyle has touched upon which concerns her that we are just going on from there because there is a provision she thinks is in effect now that is contrary to the way we are doing things. She put together a packet for the Council's assistance. She went to the trouble to do it for herself and she thought it might help all of you. As Heather knows, as of two weeks ago, she did not know what the UDO was. She went to get a copy of it and they were totally out of print. At the end of last week they came in and she got a copy. She found out the grading ordinance in the UDO has been amended. You have to take what is in your binder and cross reference it with the amendment. She attempted to do that for the Council and that is what is in the packet. The first thing in the packet was Cyrus's proposed ordinance. The next thing in the packet was Jerry Rose's memo talking about partial and phased permits. She thought it was interesting if you look and try to understand this process, one for Jerry's analysis, and attached to it are all of the so-called permits that have been issued for CMN to date, or as of the date this memo was written, since then three others have been issued. She attached those also. When they talk about permits she didn't think people realize what they are talking about is essentially a letter. The problem in understanding these permits sometimes was when you look at the letter they make reference to a plan but it is not specifically identified. You then go down to Engineering and you try to see what has been approved. It is very difficult. She knows Jim Beavers knows what has been approved but for anyone else coming in and trying to see what is approved and what is permitted, essentially is very difficult. Some of these permit approval letters don't even date the plans. They say the revised plans and drainage reports that were resubmitted for this project has been reviewed and approved subject to, which is a letter dated January 11, 2000. What those plans are in the boxes and boxes of files there, she thinks it is difficult to find out. It also, if you look at some of the approval letters, the new ones, you see that in fact verbal approvals have been issued and now they come back to get a written record of those verbal approvals. She thinks, to say the least, the system is very confusing and needs improvement and was glad to see there was going to be some ordinance review. She believes that process will result in a better procedure, and she said she was repeating herself, because one of her comments was we need to have a clear procedure. We need to know what pieces of the whole we are doling out along the way. We need to keep in mind the big picture. After those copies, there is the copy of the grading ordinance. She did her best to go through it for you and mark out the sections that have been repealed and referenced in the amendment where to go look. You can take the two together and find out what the existing law is. The last attachment is the storm water ordinance. Again, she wanted to call the Council's attention back to the amended graded ordinance. It is the same section that Kyle read. She also handed it out on a separate sheet just so you would see it. She thinks that it is very clear. It reads, "no subdivision may be finalized nor a large scale development plat approved before a final grading plan has been submitted to the City Engineer and approved." That is not

what we are doing here. We approved, or the Planning Commission approved on April 24th a large scale development for Steele Crossing. At that time there was no final grading plan submitted to the City Engineer and approved. There was not one approved until last Thursday and it is not even a final one. It is a partial one. She just wonders how we can keep doing business this way with the existing ordinance? She would like to know what the answer to that is.

Mayor Hanna asked if anyone in Planning had an answer to that one.

Colene Gaston said, she was new to these ordinances and she could be wrong. But it seems pretty clear to her in that provision we are not following the law as it is written. Thank you.

Mayor Hanna thanked Ms. Gaston.

Joanie Connors, 885 Fritz Drive, it is always a worrisome thing to the public when a committee is formed to study an issue because that means generally nothing is going to happen. This ordinance seems to be quite simple to her. It seems simply to be about the issue of allowing the public and the City government to have some time to study developments before they go through. It is to allow the law to take effect. The regulations we have in this City should have a chance to be studied in application to these developments. She thinks a vote on this issue would show who it is that you represent, us or the developers. Thank you.

Fran Alexander, 1946 N. Fox Hunter Road, gentlemen, I propose that you in order to study this and come to some conclusion about what to do next, declare a moratorium on any further grading or storm water development until you know what you are doing and all the rest of us know what you are doing. I want to site an example of something that is very, very serious to my family personally that has occurred, I think, because of the way things have been done. If you will recall the development on Mission that was eroding into Lake Lucille, a couple of years ago. That is right below my mother's home which has been sitting there for thirty years. In the last, and I want to point out the trees were virtually all removed from this heavily forested area, and I don't know in the process whether storm water drainage ordinances, grading ordinances and tree ordinances were all lined up, but I seriously doubt they were since we have seen the results lately the ordinances are not being lined up. The trees were removed, the streets were put in, the lots were put in, the utilities were put in and a few houses were put in, and Mayor Hanna had to stop the process of developing in order to stop the bleeding of the sediment into Lake Lucille. Remember? Because so much of that hill was washing into that lake and the people who lived around that on the other side of Mission were bitterly upset. Since that time Arlington Terrace has been repaved and the area at Kings Drive it intersects right below Arlington Drive was also repaved. Shortly after that was done subsidence took out about of one third of Kings Drive right there, right above that development. My mother's house is right above that intersection. She has had $2,500.00 of plumbing, where the plumbing disconnected from the house and now she faces

$30,000.00-$40,000.00 of foundation repair. I cannot prove that dirt that is now in Lake Lucille caused this to happen. But it didn't happen for 25-26-27 years. So you need to get these ducks in a row because you are costing a lot of us a lot of money. You know that I have been telling you, and telling you, and telling you. We are going on fourteen years that water runs downhill. Deal with it.

Mayor Hanna asked if there was anyone would like to speak to this grading plan? If not, we will close the public comment. I will ask you again to call your application in if you would like to serve on the committee. You could call my secretary, or Charlie Venable, or the City Clerk, and leave your name, address and telephone number. We will attempt to choose a committee that will be brought back before this Council at Agenda Session next Tuesday.

Alderman Russell asked if they were going to leave the ordinance on the first reading for now?

Alderman Young stated that is one answer to her question about stalling it. This ordinance will proceed on with each reading and get to a third and final reading and then we will have to do something. There is a time in which the Committee has to act in.

ORDINANCE WAS LEFT ON THE FIRST READING.

DAMAGE CLAIM
Consideration of a damage claim filed against the City by Richard Shewmaker.

Richard Shewmaker, 605 W. Dickson, stated I would rather be any place than here tonight. I have worked for a little more than two years with the City to try to resolve this damage on the building that I own at 603 W. Dickson. The basement is called 601, the main floor is called 603 and the top floor where we live is called 605. We have not had success in trying to settle the claim, so the only option we have since the statute of limitation ends the end of this month, is to come to the Council. It is not the only option. I guess there is no reason to come here and talk about it. I wanted to do that and see if we couldn't get some type of settlement from the City without getting involved in litigation. There are a lot of letters we are going to go through. If you will bear with me it won't take a whole lot of time but they are important to us in trying to present our side. The whole topic is rather simple. It is about a man and a machine. It is about a building. It is about character and truth. As I know you have been on the Council for some time even the youngest one here is familiar with tort liability. You are immune from tort liability. Tort being wrong doing, if you do something wrong, you are immune from that. If you do something wrong that is intentional you are not necessarily immune from that. This is a section of the statute that says you do have the right to come before you and you have the right to hear any claims and you have the right to settle those claims. We are going to talk about a machine that did the damage to our building. This old building before we got it was called the Polk Furniture Building. Before that it was called Stump Furniture and then before that it was a feed

store. We have some pictures that go way back in that time. It basically is a 70-year-old building built the way they built buildings 70 years ago which is not the way they do them now. Here is a picture of the machine that was down there. It is called a vibrating roller. It is a first class piece of machinery. It said it was made for highway and other large paving jobs. That was a really small paving job down there. It would have been great if we could have had something small down there. To give you an idea about the size of that machine, it weighs ten tons or it weighs twenty-two thousand pounds. I drive a Toyota Avalon which is a full size Toyota. This thing weighs seven times as much as that vehicle does. It is sixteen feet long. It is right at seven feet wide. From the bottom to the top of it, the roll bar is ten foot tall. The rollers on the front of it are called vibrating rollers. Those two rollers, one on the front and one on the back, are forty-eight inches tall. They are big and are used to do a big type of a job. It holds water and fuel. The water capacity of it is two hundred and fifty gallons. That is fifty-five gallon buckets of water. I want to now talk a little bit about the building. Mr. Shewmaker showed the Council and audience the building and the machine/to scale. This is that machine scaled next to our building. The shot is on Powerhouse Avenue. It is forty feet from the bottom. I think this is very critical. Here is the machine lying on the street. On the first floor there is a basement. This is not just a building that sits above the ground or flush with the ground. When he purchased the building, it had been vacant for a number of years and all three floors had been used for the sale of furniture for Polk Furniture. They were told the building behind it, at one time, had been used by Polk Furniture. That building and their building each have 12,000 square feet. The wall is forty feet tall. From the ground up to the first floor is stacked rock. There is not rebar in it. Back then they did not build with rebar. This is stacked rock with cement. Above this floor there are three layers of brick and plaster and stucco that was applied to the outside and inside walls. One of the critical things about this is the scale of it. We are talking about a machine that is up against a building where there is nothing on the other basement wall. If the bottom of this building is shaken, it will make the top shake, and will most likely shake at a greater vibration than the lower level did. When the damage occurred to the building, he was in the building when it happened. He was up in the resident level. He wants to talk about truth and character. On May 14 at his church service, their associate minister presented this sermon. He believed it applied to this project. He talked about the crisis of truth. The one absolute truth taught in school today is tolerance, not whether it is right or wrong. It is whether I tolerate you. If you lie to me, I am supposed to figure out a way to tolerate you. Frederick Nitsche had an interesting quote, "once the reality of absolute is denied all relationships are based on the exercise of power." Whom has the most power? I am going to tell you right now that I do not have the power. You, the Council, have the power. We individually create truth, or right or wrong, through personal taste, emotional preface and cultural choices. Absolute is something which is true for all people, for all places and for all times. The Council has read some these letters, most of them you have not read. If you will bear with me, we are going to go through some of it. These are his feelings and the feelings of his attorney, that the tort of damaging the building is one issue, and there is a possibility of the tort of fraud and the intentional tort of such. Webster defines fraud as deception, trickery, cheating and intentional perversion of truth to induce another to part with

some value or valuable thing belonging to him. The City is not immune from the tort of fraud. He worked numerous times, two official times, with the City plus a lot of different phone calls to ask the City to recognize they had damaged his building and to make the payment. Initially that payment request was for the entire amount. You will notice today there is a letter in your packet from last week, which is asking for 50% payment from the City with a resolution, hoping the insurance company will pay the other 50%. This is a letter that was written to the Council and it basically reads that in 1997 the City of Fayetteville laid a six-inch water line from Dickson Street to Powerhouse Seafood Restaurant. That street was named Gregg Street at that time, I believe, and later on it was renamed Powerhouse Avenue. After the water line project was completed, the City reconstructed the street which is now named Powerhouse. During the process of vibrating crushed rock on the street damage was done to our building at 601, 603 and 605 West Dickson. Improper use of the City's Ingersol Rand Vibrating Roller DD90 can result in the duplication in the effects of an earthquake. I have tried to get contractors, engineers and architects to come up here and say something. They are not going to do that. It is not to their benefit to do such and on the other hand, a lot of them do a lot of work with the City. That is different from having them on a witness stand testifying under oath. I have privately on several occasions tried to settle this issue with the City without success. I must go public now and the reason for doing that is June 30 is the end of statute of limitations. The City's denial of my claim continually mentions I have no evidence the City did the damage and I waited eight months to submit the claim. On May 12, 1993, the Fayetteville Historic District Commission honored our efforts in the preservation, a part of Fayetteville's historic past, and proclaimed the structure located at 603 West Dickson as an example of excellence in historic preservation. There have been some insinuations that the cracks have always been in the building. I find that very difficult. First of all they weren't always there and we would not have won such an award if they had been. We received the Acknowledgment for the Best Commercial Restoration of the year. Any cracks that existed had been repaired and the building painted. The evidence is that cracks caused by the earthquake machine have no paint in them today. I waited eight months to submit the claim. I am 57 years old. Our parents, all four of them, until a few years ago were living. Our parents' ages were in the 90's. Old age death is not immediate. It drags out and causes a lot of pain and disruption in the lives of their spouses and all other relatives around them. For a period of time of eleven months before the damage was done to our building and a period of time twelve months after the damage was done, we lost from death on separate occasions, my wife's mother, my mother's closest sister's husband, my mother's closest sister, my father and my wife's father. My mother will be 91 this summer and has not completely recovered from all of this. Those deaths don't occur like in a car wreck where all of a sudden it happens and it is over with. These deaths drug on and on. During this time we had also asked the City to enforce the noise ordinance and that was a real ruckus. They had threats on their lives and that thrown on top of everything else gave them a really full cup. The eight months delay to the damage claim is clearly understandable. The cracks with no paint in them speak for themselves. That building was rehabilitated by us. We have requested, through my aldermen, Mr. Young and Mr. Russell, which again is in our letter, that the City pass a resolution doing the following: Resolve that under that statute you saw,

make a payment to us in the amount of 50% of the damage claim plus a 5% consumer price index as determined by the University of Arkansas Center of Business and Economic Research, (that payment will be $290,000.00) and resolve that Hanover Insurance Companies be encouraged to make like payment on an equal amount. Since 1992 and until recently he was a real estate agent with Lindsey & Associates. As of May 29 or about a week before then, he was no longer associated with Lindsey. Nor does he have an active real estate license of any sort in the State of Arkansas. A legal problem with a major city could be significant harm for any real estate company. It makes no difference if it is Lindsey or whoever. I have visited with Jim. He is my friend and always will be. I also know he visited with the Mayor to try to see if we couldn't come to some resolution to this project. Attached are the letters to the City requesting the claims be honored, the letters from the City denying the claim and the City's letters denying the second claim. That second claim was verbal and not in writing. There was no letter in there for that. After they got the family things behind them, he contacted Kevin Crosson, who was the Public Works Director for the City of Fayetteville at that time. Kevin came down and looked at the building. I wish at that time I had a tape recorder because Kevin Crosson told me the City has had problems with the vibrating roller. Kevin asked if I had any estimates on the building? At that time Kevin and I were in Rotary together. At Rotary Kevin brought me an envelope with the original form in it to fill out regarding a claim request. If needed, he felt sure that Kevin's prints would be on that envelope. He asked him if he had any estimates and he said no. He told him he had to have three estimates and then get the packet back to him. That is what I did. He wrote a letter to Kevin dated July 1, 1998, which reads during the summer of 1997 the street next to our building at 603 West Dickson, known as Powerhouse Avenue, was paved by the City of Fayetteville Street Department while Street Superintendent Randy Allen was on vacation. While in our home the top floor of the building began to shake, not vibrate. He received a telephone call from Sound Warehouse wanting to know if the building was falling down. He was afraid. The glasses were banging against one another. He ran out of the building and discovered the City vibrator roller the size of a large truck was operating next to our building. He yelled and screamed at them to stop. Now remember, we are talking about a twenty thousand-pound piece of machinery that was sixteen feet long and at the top of the row bar ten foot tall. The plaster on the east side of the building next to the street was shattered from one end of the building to the other. The shaking also cracked the front, back and the west side of the building. The interior plaster of the building was also cracked. The building construction, which is three layers of brick with plaster on each side, shook the plaster from the brick requiring most of it to be removed and replaced. Serious damage was done to the building. We purchased our property on Dickson Street in October 1990, and began a renovation of it. He is confident that the City of Fayetteville will act responsibly and enable us to again restore this building during the summer while the traffic is slower. This was signed by him July 1, 1998. This is the form that Kevin left him. The City is probably still using the same thing. You describe the claims on it, but he attached his claims to it. He did a summary sheet. The names listed: Ace, Workman and Albert are plaster companies which are the biggest part of the job. Again, this was two years ago. The preparation of this building calls for sand blasting and if you have ever been around that you cannot live

inside a place that you are sand blasting. Sand goes everywhere. Since Sound Warehouse would be disrupted, he felt they should have something, some compensation. Their rent is $3,000.00 a month. Next was for wrapping the furniture, not moving it out, just sealing it up to where the sand would not get all in it; removing the awnings; two stairways that have to come out (cracks are behind them); and removal of the signs. Some of the aldermen have been there and have seen cracks inside and outside of the building. It is a logical assumption that there is a void in between where the three layers of brick are located. He showed a bonding agent that you squirt in there to try to pull a bond back to where the crack went through. Those amounts are not that far off. One was $553.00; one $562.00; and one $595.00. Again, we got primarily the plaster people to do it because why get a bid on the removal of the awnings. Stuff like that is just a waste of time. This is the bid sheet submitted by Ace Acoustics. Another is Workman Plaster who is out of Rogers, and Albert Plaster. After he submitted that, Kevin wanted to come down to the building with Charlie Venable, of which they did and walked through the building. Then they received a letter. It was addressed to him and dated July 31, 1998, and this is in your packet. In response to your claim dated July 1998, I have fully evaluated the facts available to me at this time and make a determination pertaining to the damage at your building located at 605 West Dickson. Your letter states that cracks in your plaster siding are the results of street work that took place on Powerhouse Avenue the two weeks of June 30 to July 7 of 1997. You brought the damage to my attention in April of 1998, roughly nine months after the construction took place. This delay and notification make it impossible for the City to say with certainly that the damage was done by the City Street work. We have reconstructed and resurfaced numerous miles of city streets and have received no claims of damage of this type which you have described. As you know, municipalities are granted total immunity from liability under State Statute except in the instances of an intentional neglect. Based on all of the above there is no evidence that the damage of being claimed is a result of any actions of the City, therefore, your claim must be denied. If you have any additional information for us to consider please feel free to contact me at your convenience. It was signed, Kevin Crosson. The reference up here to Mr. Venable when the City paved Powerhouse Avenue, I told Mr. Venable that not by this building, but by some buildings behind us which set back from the street maybe eight feet, that when everything was done he would pave that section up to those buildings. Charlie called me about doing that. I asked Charlie to come down to the area we were discussing and he did. I have some photos with me here. I can't pave that. There all kinds that are going to play legalities to get out of it by saying that is not my property, it is owned by the railroad, but when it rains hard they have a problem behind us where there is a bunch of trees. There are some problems with some of the property behind us. It causes flooding under heavy rains to occur on one building and he cannot lease it. I have a 2500 foot building that he could show anyone what happens when it rains. The water runs into it and all over the floor from the back. There are days that this 9,000 foot building on Dickson picks up water. On particular days on Dickson that is where the water stops. It hits on that wall because it has no place to go. It runs out from underneath of that building onto the street for several days at a time after the rain stops. If he had paved that section up there in the front that would be just another stopper to keep that water under the building. That is just not the

thing to do. This situation that he in is not a good situation. For him to stop that thing up and block that water up under that building it would possibly make the floors start buckling and the walls come down. At that time Charlie was not as powerful in the City as Kevin Crosson. He was the one I wanted to talk to. Right now Charlie is, but back then he wasn't. During the time of him getting his estimates, Workman, one of the contractors who submitted one of the plaster bids, asked him the question if this was the same building that the City of Fayetteville called him and asked him to give them a price on? I said I didn't know. He went and checked his records and said it was 603 or 601 West Dickson. I told him it was the same building. If they called you for a price, which was fine, but he was putting it together for you and you would be working with him. I am the owner of the building. After he was denied his claim, he called the president of the company, and asked him if he remembered that, and he said, yes. I told him what had happened and asked if there was any kind of statement he could make? All I want you to do is to tell the truth. Do you have any evidence to back up any statement that you do make? He sent him a letter and some logs out of his phone logs. It reads to whom it may concern on August 4, 1998. On April 2, 1998, Mr. Richard Shewmaker called our office to get an estimate to repair his building at 603 West Dickson Street in Fayetteville, Arkansas. On April 14, 1998, either Richard or Randy with Fayetteville Street Department called our office to get an estimate on the same building. On April 17, 1998, I gave Mr. Shewmaker an estimate to repair the outside of this building. On May 20, 1998, I gave Mr. Shewmaker an estimate to repair both the outside and the inside of the building. When I learned that the Fayetteville Street Department wanted an estimate on the same building, I called and said that we were dealing directly with the owner and that all estimates for repair would be submitted through the owner. He feels that it is highly unlikely that the City would ask for this information if they did not know that they had not damaged the building. Again, he wanted to ask the Council to look at this number, the 636-3398 in Rogers. When you call up there, you talk with his secretary who has a log book. This is the way they give information to people. I asked if he had such and if he could supply it as evidence. He provided this and you can see where he marked through the things that he was not interested in anybody knowing. I gather that most of that is phone numbers. This is where Richard Shewmaker of Lindsey & Associates wants Larry to call him, 521-6611. In conformation with his letter he has this statement: On April 14th Richard or Randy with the Street Department would like a price to put drivet on a wall. There is a phone number listed and if you call that number you will find it is the Street Department. That was in 1998. Sometime after that in April of 1999 I wrote this letter to Mayor Hanna. We had numerous conversations to try to get somewhere. Dear Mayor Hanna: This letter is intended to be a freedom of information request. For the period of April, March 1998 to December 1998, I request access to telephone records, incoming call message books, long distance telephone records, cellular telephone from the City Administrator in particular, and Kevin Crosson, Charlie Venable and Fred Hanna. The same information is needed from the City Attorney's office, the Street Department, in particular Randy Allen and Richard Cochrac. When the data is available, please let me know. Fred was able to get that information together and then called him. He came down to City Hall. This is just the first page of that bill. As the gentleman from Workman Plaster stated on April 14, he was called by the City of Fayetteville. This has

been tracked from one end to the other. The City called for a bid on the building because they knew they had damaged the building. In my estimation when they discovered it was going to cost them some money they decided to say they did not damage the building. I talked to Kit Williams. I have talked to several attorneys about this thing. I believe he was on the Council at the time. I didn't go into all this detail. I was trying to keep this thing as private as I could. Kit told him he had a case one time where something like this was discovered and the accused person had been discovered. They had asked for a bid and that was the end of the case. He then submitted all of this information to his insurance company. The insurance company that insured the building at the time of the damage was not the insurance company that he had at this time. My agent who is dead now was with McCartney Fawcett. She was going to switch him to another company and I really never questioned any of that. I thought. I had insurance with Hanover at the time of the accident, when I was going to submit the claim, I didn't have any insurance with them. I was just insurance dumb because I have never had anything to happen to me like this before. This is not normal for me to deal with things like this. The agreement said you had two years to file a claim. They filed a claim. They sent in an engineering company Hague Engineering out of Texas. He was sure Hague was an engineering company that they used on a regular basis. They sent some people up here on two occasions. They met with the City and gathered at the City Shop and started up the machinery and did all kinds of tests. They looked at the building down there where they live. These are some pages out of a report. Mr. Randy Allen with the City of Fayetteville told us that three pieces of equipment had been used to pave Powerhouse Avenue along the east side of the Shewmaker building. Each of the pieces of equipment was operated with a seismographic recorder documenting earthborn vibrations and frequency of vibrations. As expected the most severe vibrations were produced by the Ingersol Rand Compactor, the one that is in this picture. As shown in the appendix chart the peak velocity was 2.2 inches per second. As shown in the chart only a few recorded points exceeded the threshold of cosmetic damage to plaster and stucco. They are admitting there the tests exceeded the threshold for cosmetic damage. I don't know if they are talking about a building like this or if they are talking about a building like this down here. Remember that 2.2 is the number they said was recorded. The threshold of vibration damage for light structures is between .5 and 2.0 which again, is another place that reads, yes, it did exceed the limit for cosmetic damages. The testing of the largest piece of vibrating equipment revealed that the vibrations exceeded very slightly the threshold for cosmetic damage to light commercial structures at a distance of two feet from the compactor. When the threshold is exceeded there is only a 5% probability that minor cosmetic damage might occur. There are about fifty-three pictures for anyone to come up here and look at. This one picture is in the middle of a field at the City Shop with a seismographic machine. These are two entirely different situations. If you found out who Hague did most of their work for, you would find it to be Hanover Insurance Company. After all of that, Mayor Hanna wrote me a letter dated September 30. I came to him maybe two months before that in 1999 and asked if they would not reconsider all of this stuff and make a significant payment, not the full payment like we asked for, which we thought would trigger the insurance. All we want you to do is tell the truth. That is the way I feel about it. I did

then and I do now. I think that if you look at some of those trials and the fact the City called for a bid, I think it lends itself to that. This is a letter the Mayor wrote me and what he is doing here is conveying a memorandum to him from Don Bunn and Charlie Venable. It reads: Dear Mr. Shewmaker and it is dated September 30, the reference claims for damages, 605 West Dickson. Several weeks ago you and I met to discuss your claim against the City for damages to your residence 605 West Dickson caused by the City's operation of the vibrating compactor near the building. Your claim sited multiple cracks on the exterior, all around the building, some cracks inside the building, and other damages. As a result of our meeting I agreed to have the Public Works Staff review your claim again to determine whether or not it is in our opinion a valid claim. As part of that claim review, Charlie Venable and Don Bunn met with you at your residence on Friday, August 27 and looked at the damage to your building both inside and outside. In addition they observed the vibrating compactor in the field to get an idea of how the compactor operated on the job. In a memorandum dated September 30, 1999, Mr. Venable and Mr. Bunn stated in their opinion that neither the operator nor the operation of the City's vibrating compactor nor any other aspect of the City's work around your building could have caused the damage. That is a very stiff statement. Not maybe. It could not have caused damage sited in his claim. Attached is the memorandum. It should be pointed out again the claim against the City was not filed until eight months later after the damage occurred and you presented no evidence of the condition of the building prior to the incident. In view of these facts and the opinions of Mr. Venable and Mr. Bunn, as stated in the report the City must confirm this denial. There is no paint in the cracks that are down there that was done by the vibrator. This is a letter that says the same thing, a memorandum to Mayor Hanna from Charles Venable and Don Bunn. I will read one statement and not the whole letter. It is our opinion that the City's operation of the compactor did not cause the damage that we saw at the building at 605 West Dickson Street. Our opinion is also based partly on Randy Allen's experience with the compactor in other situations. I asked to be present at this trial run and I was not allowed to be there, and as I recall the machine was broken down for some period of time. It took a little while, maybe a month or two, before the tests were run that were talked about in that letter. The City took the machine out to a site, put it up against a wall and did some vibrations, I assume, and from that they determined that it could not have caused this damage. I wrote a letter to Mayor Hanna and it was a freedom of information request dated October 8, 1999. I received your letter September 30, 1999, concerning damage to my building located at 605 West Dickson in Fayetteville, Arkansas. You attached a memorandum from Don Bunn and Charles Venable. The third paragraph of that memorandum described an on site evaluation of the use of the vibrating compactor. I requested these people visit the site and describe for recording where and how the tests were run. You reported back to me that they refused to do so. Therefore, I am requesting, in writing, the detailed description of the construction work on Markham Street. I need a legal description, a detailed description of what the machine was doing when hands were placed on the wall. In that letter it said that when the machine was working they placed their hands on the wall and did not feel like the vibration was that significant. I requested to make a model of the machine used the distance from the wall when tested, when vibration frequencies were used as well as an aptitude

setting. Also, I wanted the speed of the machine and the amount of the water in each tank. I received a letter shortly thereafter. The reference is from the Mayor. Reference is made to the freedom of information request dated October 8, 1999, and which you received October 12, 1999, regarding my letter of September 30, 1999. The location of the wall is about one block west of Razorback Road on the north side of Markham Street. The pavement is 6 inches of the base of the wall. The work consisted of leveling, resurfacing the street with asphalt, concrete, hot mix material. The machine being used to roll the asphalt was Ingersol Rand DD90. The other information requested, we have no record of it. He went out there and looked at the site. At Markham, and again this is to scale, there is the machine, a 20,000 lb machine, is up against the wall. It is four and one half feet tall. Behind that wall as opposed to not being anything, like it is over here, just a wall standing there with nothing behind it in the basement. There is a forty lineal foot of yard of dirt that goes before there is a house up there. This is an entirely different situation. Now if the machine had been put up here on this dirt and we could have seen it vibrate, that wall would have fallen down and the machine would have turned over, too. But that is not the comparison that was done. We own five feet out from the building. It was given to them back in 1992 by the City. The other day, May 11th he signed an easement for the City and the Street Department project to redo our sidewalks down there, there was no easement signed here. It may not mean anything to you but according to the attorneys it might have something to do with it, since it encroached upon private property, without an easement, condemnation without just compensation. That is a legal description of that piece of land. He was coming back from a football game and they were building that big parking deck, about six stories high, a massive concrete and steel structure. He called the gentleman that was the project manager of that project, and told him what his situation was, and asked him if he was ever told not to do things like this. He said years ago it was common knowledge that anyone operating a machine like this would never get up next to something like that. He said now with unemployment as low as it is, there are all kinds of folks that get on machines that should not be on machines, and they have had problems. They have had lawsuits and they lost. Now in the specifications you most always find the architect or the engineer making a comment. This is a sheet that he faxed him. Do not operate earth moving equipment within five feet of the walls of concrete structures for the purpose of depositing or compacting material. He had a book from the Arkansas Highway and Transportation Department with standard specifications for highway construction. When you go beyond that they are called special conditions and specifications. The highway department will tell you that these don't fit being up next to a building. This is one little part out of the 874 page highway book that gets into what is called embankment construction. An embankment according to Webster is a raised structure on earth. That is raised dirt. If embankment material can be deposited on one side only of those different things but walls, care should be taken that the area immediately adjacent to the structure is not compacted to the extent that it will cause overturn, or the wall to turn over. They didn't even have PSI concrete when his building was made. All of this was mortar put together in a wheelbarrow but yet this building has the right to stand. Do not operate earth moving equipment within five foot walls of concrete. This machine was built in accordance with the state of the art standards and recognizes safety rules, but nevertheless, it's

misuse can constitute a risk to life and limb, to the user or third parties, and may cause damage to the machine or to other material properties. The machine must be used in accordance with it's designated use as described in the operating manual. The machine must be only operated by safety conscience persons who are fully aware of the risk involved in operating the machine. Observe and instruct the user in all other general, applicable, legal and mandatory regulations relative to the incident, prevention and environment protection use of this machine. The edge is not stable. The edge of the street next to his old building is not stable. Always use and keep a distance from the edge of the building, pits and slopes. That is what this is. This is like a pit. It is just a hole. That basement is a hole in the ground and the machine was right up next to it. Use extreme caution and be very observant when operating in close quarters and congested areas which is what that is down there. Be observant to other workman, bystanders and other machines in the area. Be specifically careful if trenches, light poles, towers, buildings are within the affective range of the vibratory compactor. Improper operation could result in damage or injury. That is what has happened. People might say that your building is damaged but you will live and go on. He said he loved Fayetteville as much as everyone at the meeting. He wanted to show the Council how serious what he was talking to them about really was. He had in his hand a Property Owners Disclosure Statement. It was put out by the Arkansas Real Estate Commission. If you buy or sell something you fill this form out. It is intended to eliminate problems. It is intended for the owner of the property to not lie on the condition of his property when he has it for sale. This disclosure statement is part of the contract and under "other" on the contract his company had them include that the home inspection had to be to the 100% satisfaction of the buyer. He wanted to show the Council how serious the damage to this building comes into reality if you are talking about trying to sale it. Some of the questions from the disclosure statement are as follows: Has there been any damage to the property or any of the structures from fire, earthquake, landslides, floods, storms prior or during the ownership? Yes, there has been damage to the building since he has owned it. Are there any known defects in the structures or substructures or other improvements located on the property? Yes. Have you ever filed or made an insurance claim, warranty claim or other claim concerning the property? Yes. Have you ever received a settlement of a claim and not made the repairs? No. Are you aware of any events at the subject property of which if known to a potential buyer would adversely affect in a material manner the value or desirability of the property? Yes. Are there any other defects on the property known to you? This goes on for a few other pages. These are plain questions and when they are answered by me they are going to be answered honestly and no other way. This entire thing can be summarized by going over those five or six points again. We talk about, did the City damage his building or did the City not damage his building? It would have been a lot easier a long time ago if the City had just said, at the very beginning, we damaged your building and we are sorry. Maybe everything would have worked out differently with the insurance company. At least he would like to think it would have. But what really happened is that the City damaged the building and went through a series of things trying to say through some examples or working with other people that it is impossible to damage a seventy-year-old building with a basement like this with no steel in it. The City called for an estimate. The City

would not have called for an estimate on this building if they had not damaged this building. Do you remember all of that stuff, the letter from the plaster company, the records of his that he received a call on X date and phone records that show that call was made on X date from the City to him? It was a long distance phone call. You won't find the City calling Workman Plaster for anything. The City called for an estimate. The City participated with Hague Engineering in misrepresenting a test. If they had put a seismic machine on top of a wall that did not have anything on the other side that would have been a proper test. But just sitting it out there in the middle of the field and watching that company put that seismic machine down there, someone should have said that this is not a proper description of what happened down there. We were not inclined to that because we had already called for an estimate on the building. In the City's own trial No. 3 the machine was on the wrong side of the wall. That is very serious and very important. The City entered private property which we talked about just briefly of being an issue of condemnation without just compensation, maybe. The care required for the construction of the Town Center construction surpasses the care required, based on all of these examples that the City has used, of working next to my building. I am going to describe my building once again. My building from the wall of the basement floor is forty feet. There are three different levels in it. A basement where we had tenant space, Sound Warehouse, and where we live up here. On the other side of that wall down there, which was described in Highway Department's General Specifications that they give to contractors, you will get vibration. You are going to get that wiggly effect which will happen every time. You shake it a little on the bottom and the top starts doing more. These are not steel beams that go across but wooden beams that are not tied in. They just laid them on top of the block walls. This is an issue, which in his opinion, does not need to go to court. The issue of tort immunity on damaging the building is one thing. The issue of trying to cover it up, time after time after time. If there had been one time, someone could say that was an accident. I don't think we can say that on all of these different times. I don't think that was an accident. I think it was an intentional tort. The issue does not need to go to court and we have to call witnesses and you get people up there with Mc Clinton Anchor, Kink, Nabholz and Sweester, who won't come here in an environment like this but on a witness stand, I almost bet you that they will tell the truth. And if we call the people up who are designing the building for the football stadium and look at those specs, gentlemen I bet you a dollar to a donut, that these same requirements will be in here there. Again I am going to read to you what Webster says some of these things are that we have talked about. A tort is a wrongful act. A fraud is an intentional tort; a deception; a trickery, cheating; an intentional pervasion of truth to induce another to part with something valuable. This building is valuable to me. The money to fix it is valuable. The City never in any of this denied being next to the building. They say that you can be next to a seventy-year-old building that is stacked rock, with a basement, no steel in the walls and not damage the structure. But on the other hand, you don't want to get next to the Town Center which is a massive steel structure and poured concrete. You are not supposed to get next to it. Again as we have started out, this is a really simple issue in my opinion. It is about a man and a machine. It is about a building that is seventy years old that my wife and I own. It is about character and truth. When Jim Glenn retired as President of McIlroy Bank & Trust, and he

handed his keys over to Gary Head, this is the one thing that he said that was quoted in the newspaper, "the truth will serve you well." I will go back to another statement that my associate minister made and in connection with the truth that is absolute which is true for all people, for all places and for all times. I want to thank you for listening to this and if you have any questions I would be more than glad to answer them. I would be tickled to death if this City would strongly consider that resolution that I asked for you to do so and I wish that you would pass on it tonight, and then we can go forth.

Alderman Austin asked Mr. Shewmaker if he could say a word to him. I want to thank you for giving me the grand tour of your beautiful place where you live up there. The tour included a lot more than just what you wanted to show me. You showed me the whole thing. You should be proud of it.

Richard Shewmaker said, they were proud of it.

Alderman Austin continued. It is obvious that you have done your job here. And it is obvious to me there is some damage to your building. What's not obvious to me is what the cause is and the only thing I know here is to speak the truth. It is not obvious to me. As I was leaving your place, I had to notice an eighteen-wheeler driving right in front of you on Dickson Street and appeared to be loaded. I am guessing 60,000 - 80,000 pounds. It was not vibrating like equipment but that extra weight would probably be equivalent to it. I don't know how many trucks go by your place and whether they could be a consideration or not. And the last question, the last thing I want to just ask is when the Staff called Rogers and asked for an estimate, could they have been verifying the truth of what you said your estimate was? This is just a question.

Richard Shewmaker responded he could pull back that page and let Alderman Austin read it.

Alderman Austin replied he was just asking, could they?

Richard Shewmaker stated it doesn't say that. That gentleman's letter does not say that.

Alderman Davis stated he thought a lot of him. He was just asking questions. First of all on the Hanover report that was done for Hanover, I should say, I guess you showed two or three pages of a 57-70 report. Before he would decide to do anything he would want to have the ability or opportunity to read all of those pages and see what the engineer actually said instead of just pulling out two or three pages of the report. Second of all, he has been in the insurance business in Fayetteville for thirteen years, a total of twenty overall, and from what he has seen it is nothing unusual with clients that he has had that may have a problem with the City, not liken to your situation, but in other situations. Toward the City you usually know what those costs of repairs would be if they feel like they are negligent. In this situation he does not think, and maybe he is wrong and maybe you all can correct him, I don't think there is anybody on Staff that would have

any idea what possible cost the stucco would be. And if that is the case, they would have to go to an outside source. He does not think that by the Staff asking for an outside source, instead of doing it internally on something they don't have any idea of what that would run, I don't know if that would actually obligate the City to show any type of negligence. I don't know. That is just an assumption. Number three: I would also want to see what the appraisal of the building was before the damage, not including the land cost because we are talking strictly about the building here and not the value of the land itself. Number four: You have done an excellent job of remodeling this building but the old Polk's building I do know before was in very bad repair. I don't know because I didn't see what you did to the building when you remodeled it. I don't know to what extent you went to actually fix the old problems with the building or if you basically just covered them up. And I feel like you probably took the extra steps, but I don't know that. So I have a lot of questions from those particular items.

Richard Shewmaker replied he does not know where we are going on this but the report is available. They saw the crux of the report. The damage couldn't be done. And then you saw a picture of the seismograph measuring the machine and it says in the report that it is picture number so and so. That is the whole crux of that report. These guys are pros in what they are doing.

Alderman Davis stated he knows and has read a lot of insurance reports and has seen why they decline clients and usually they are very forthright in telling you the problems. Usually it takes more than three pages out of a 57-page report to come to that conclusion and that is why he would want the City Staff or himself or anybody else up there to see all the pages involved.

Richard Shewmaker replied the Council was more than welcome to look at the report. You will find them to make every accusation in the sun. They are use to doing that. That is not his job.

Alderman Davis said, he understood.

Richard Shewmaker read the last paragraph from Mr. Wilson of Workman Plaster. Mr. Wilson said when he learned that the Fayetteville Street Department wanted an estimate on the same building he called and said that they were dealing directly with the owner and that all estimates for repair would be submitted through the owner. On their log book the lady didn't say they wanted to talk to somebody to see what was going on down there, it says Richard or Randy at the Street Department in Fayetteville would like a price of putting drivet on a wall. I don't think they would have called without feeling that had been done.

Alderman Daniel stated referring to one of Alderman Davis's questions, in your estimation as having been a real estate agent, how much has this building been devalued?

Richard Shewmaker stated let me just give you an idea. We are setting records down there every

day. What something was worth yesterday, you don't know what it is going to be worth tomorrow. That is the reason we went down there. We knew that this day was going to come. He had someone at his home after he had given up his real estate license, who was a licensed realtor asking if we would sale the top floor up there. The answer was no. The time will come but they were not ready yet. The size of each floor is 4250 feet. That is $833,000.00.

Alderman Davis replied he understood where Mr. Shewmaker was coming from but once again, on an appraisal he would want to see what it was at the time of the damage with the exclusion of the land cost.

Richard Shewmaker replied he did not know what it was worth at the time of the damage. He guessed somebody could do that.

Alderman Davis asked Mr. Shewmaker what was the value on his insurance policy?

Richard Shewmaker answered, a quarter.

Alderman Davis asked if $250,000.00 is the total property value?

Richard Shewmaker replied he insured his stuff to try to cover a mortgage and that is all he insures it for. After this damage occurred, his insurance was canceled.

Alderman Davis asked if Mr. Shewmaker's policy an ACV, an actual cash value policy?

Richard Shewmaker replied he was not an insurance wizard.

Alderman Davis stated he understood. There is replacement cost and there is ACV.

Richard Shewmaker replied he believed it was replacement. I don't know the answer to that.

Alderman Davis stated if it was grossly under insured, then you have a large coinsurance penalty if you ever had a total loss or a partial loss.

Richard Shewmaker replied he didn't know anything about that. He has had an attorney look at all of these things and he says he is more than willing to represent them.

Alderman Austin asked Mr. Shewmaker if he terminated his insurance or did the insurance company terminate him?

Richard Shewmaker answered that at one time when they went from one company to another, before they submitted the claim, we voluntarily did that. The agent just called him and told him

they were going to switch to this other company. He said fine. Now after they did that it was terminated. They do have insurance on it now. We may not tomorrow. Insurance to him is that it enables him to do is to keep a mortgage. He has talked to his lenders. He owes $625,000.00 and he has assurance from the one who owns 99% of that mortgage that the remainder of the property has escalated in value enough that he is not going to call the note.

Alderman Russell asked if the insurance company that terminated Mr. Shewmaker's coverage after the damage occurred was the same insurance company that is denying coverage?

Richard Shewmaker replied as he recalled. We are going back into something that does not concern him that much. He said he was legally within a time frame of dealing with this one according to their attorney. Although it took two years to submit a claim, the statute of limitation is five years in dealing with the contract.

Alderman Davis stated the carrier that had the claim would be the only one to spend the dollars to send someone out to look out it. Otherwise, they would just deny it if looking at the dates and possible occurrences.

Alderman Russell stated, in other words, the insurer that Mr. Shewmaker had his property insured with at the time of the damage would be the one that you would file the claim with.

Richard Shewmaker replied that would be Hanover. That is the one that is all dealt within here. I cannot even tell you the name of whom my insurance company is now.

Alderman Young stated it sounded like to him some of the aldermen wanted some additional information so he assumes everyone is wanting to table this or put it off for two weeks. Charlie, you may not want to respond right now. You may want to wait. Do you have any thoughts on what Mr. Shewmaker has presented here?

Charles Venable stated he thought he heard Mr. Shewmaker call him a liar, which he resents. I have known Richard a long time. I have looked at this twice. I have been through it twice. He does have some damage there but a lot of it is old. The large cracks have been there. He has some fine, hairline cracks on his plaster that, I mean, with that type of building it is going to do that with that plaster. I have looked at it. One thing that we did ask him for that he did not give us until tonight was something from the insurance company because he did send someone down or they did call first and I refused them until they wrote a letter asking to see what it was about and they did write a letter asking the City to let them look at the machine and to run it for them. They did that but he has not seen any of the results of that either. Of course there are a lot of things that he is talking about here that is different from paving and things of that nature, but he does not want to go into that right now.

Richard Shewmaker stated he wanted to say right now the common sense that he was talking about if there was not a crack and there was no paint in the crack, that was done afterwards. There are lintels, do you all know what lintels are? You have a basement window and there is an opening that you can crawl through, the lintel is the big, huge rock that is laid across that window. They have lintels that are broken. Those things do not just occur. They don't have any cracks or paint in those lintels.

Charles Venable stated he agreed they are broken but some of them have been broken for quite a while, Richard. The one on your front porch up there, for example, has been broken for quite a while.

Richard Shewmaker stated he thought they needed to go on a tour. He would be more than glad to host you all in his house on a tour.

Charles Venable stated he thought all of the Council needed to go through and look.

Alderman Davis stated he had another question for Mr. Shewmaker. The resolution that you wanted Kyle or Cyrus to present says that you feel some of this you can get back from the insurance carrier.

Richard Shewmaker stated they feel the City played a role in this. I am going to just say that and leave that alone. It is our hope we can take your admission and if it is an admission with a five-dollar bill after going through all of this, it doesn't mean the same thing as an admission with a substantial payment. That was his conversation with Fred at the second request. The substantial payment tells a story. It is possible the insurance company might even make the payment without me having to pay the attorney a third, you see.

Alderman Davis stated he understood that and there is a clause in Mr. Shewmaker's policy that talks about arbitration. In the event that you feel like in the policy has not treated you fairly, you do have a clause in all insurance policies that gives you that right.

Richard Shewmaker said, he guessed he was somewhere else on that.

Alderman Davis answered, okay.

Alderman Reynolds addressed the Mayor and said Randy's name was mentioned and he just noticed that Randy has entered the building. Randy, did you get up and come down here, and did you want to say something?

Randy Allen, Street Superintendent, stated he was just there available for any questions that the Council might have about this particular issue. I was at home and heard my name mentioned

several times about occurrences that took place during the paving process. If you have any questions, I will be happy to answer them.

Richard Shewmaker stated he wanted to mention that the discussion of two weeks was mentioned, let's please not wait that long. Our deadline is the 30th of this month to have something filed. That means, I would say, by the latest the 15th they are going to have to go on with the project. I will do anything I can do to accommodate anything that you all want as far as coming down there, as far as anything, I will do anything to accommodate you. If you all would like to meet there tomorrow at 4:30 p.m. as you do your tours, I will be there. I will get a copy of this report to whoever you want to. Let me tell you something, when you are at odds with people, you don't give them everything you have. That is the reason he did not give Mr. Venable a copy of that report. But you will find it will say things like you can look at a crack so long and psychology will take over and you will dream that there is something there that is not there. The real crux is, as I said before, it is the utilization of the machine and the test of the machine setting out there in the middle of a field. The mentioning of Mr. Venable's name and Mr. Randy Allen's name was in the text of these letters and I think you all know that, too. When we read these letters, we read the names that were in the letters.

Alderman Russell stated he had a few comments. You know with any damage claim or lawsuit, it is the Council's job to be a good steward of the taxpayer's money and try to be fair to everybody as well. He is a little bit nervous any time there is this big a damage claim, and you know, I think that I should be. I commend you for coming forward with it and having the courage to come forward with it. You know the advantage in the City settling with you is that this is over right now and you do not have to go to court, none of our Staff members have to spend time in court and hopefully we could satisfy everybody. The disadvantage and from our prospective the advantage in settling with you for some amount is that the jury may order the City to pay more than what they were willing to settle for. The advantage in not settling is that the City may not have to pay anything depending upon the doctrines of tort immunity. As a steward of the taxpayer's money, your presentation has made me nervous. As a steward of the taxpayer's money, I don't necessarily want to see all this stuff go in front of a jury so I am interested in trying to broker some kind of settlement. It seems like the majority of the City Council would like to wait and get more information to do that, and I would be happy to have them wait and have you provide them with whatever information that you need. I would hate to see this go into court especially if there is a chance that a jury is going to find that the City is liable for more than what you even want us to settle for. I think the appropriate thing to do is to wait and try to work something out by the 15th. I think that is very reasonable on your part to want something done by that time rather than waiting two weeks because that gets close, and I am sure Jerry knows what goes into filing or defending a lawsuit and it would be nice for you and your attorney to know, at least, in a couple of weeks before your deadline as to whether something is going to be worked out or not.

Richard Shewmaker stated I want you to know that I tried everything I could do to keep from coming down here tonight but the only other option I had was to go stick my head in the sand and I am not made that way. I have worked and fought for this for my family, my wife and my children, and I am only doing what you all would have done. That is all I am doing.

Alderman Davis thanked Mr. Shewmaker

Alderman Russell asked the Council what they wanted to do regarding this situation.

Mayor Hanna stated that Richard had asked the Council to do something. I have not said anything about this because he had a very good presentation. There are some things in the presentation that I have questions about but Jerry Rose and I went up at Richard's invitation and looked at this in 1998. I asked Richard at that time what he thought the value of his building was before the damage occurred and what it was after. He did not answer me. I asked him if I brought an offer to City Council in the fifty to sixty thousand dollar range, if he would be interested in talking about that and he wasn't at the time. I think $580,000.00, of which the City is being asked to pay half, is a tremendous amount of damages and I seriously doubt that they were all caused by that. I am not saying that no damages were caused. I certainly wouldn't say that. Richard did things like using his fountain pen like that. There happens to be a floor and a roof and walls in there. They don't go like that. The walls are not just standing up by itself. I am not here to try to play judge and jury. I would suggest that the Council ask, and I will ask you, would you consider a lessor amount than this tonight?

Richard Shewmaker stated the only reason I am saying this is because I don't want to be here, but while I am here, I am going to try to defend my family as best I can. I believe that when after the first denial occurred, I called the Mayor on the phone and said this is rotten, and you said you wanted to come down there and look at it. I said I want you to come down there and look at it. You called me back and asked me if it was okay to bring Jerry. It was okay to bring anybody you wanted to. I believe the statement that was made was that you told me the building was not worth the amount of the damage. Fred, maybe in the time when you were down there things weren't worth that much but things are worth more now. It is an area where there is just so much room. Swifty never dreamed what he could probably get for his building. Five years ago you probably never dreamed it, could you? You have not hit the peak yet. It is unbelievable. It is great to be there. It is great to be in Fayetteville. I am tickled to death that I am down there. I am tickled to death that we have fought all of these battles for parking variances which we didn't do just for us, we did blanket parking variances for which we fought for a year to get it to where everybody could build down there. That is what makes it work, for all of us to build down there. The only dollar amount that I ever remember, and I considered it at that time being a friendly gesture from the Mayor, because that was his limit. Your limit is $20,000.00. You asked if I would settle for that and I said, no.

Mayor Hanna replied that was in the office at a later time. When we were down there talking, I think Jerry will.

Richard Shewmaker stated he didn't remember that. I am not saying that it didn't happen but I don't remember that.

Mayor Hanna stated actually at the time, I know that you were going through a hard time.

Richard Shewmaker stated the biggest part of our discussion was I had a hard time talking to you all because I got into the same thing again, but in more detail. If you all want to see death certificates and things like that, dates of entry to the psychiatric wards and things like that, they are available. When I was discussing that, and I think Jerry will remember that, I broke down and I really couldn't, and I still have difficulty talking about it.

Mayor Hanna stated he realized that but there are two questions. You have not answered any one of them. What do you think the value of your building was before that damage was done and what do you think it was after? Would you consider a lesser amount tonight if the Council talked around and offered you something less than $290,000.00?

Richard Shewmaker stated he did not know what the building was worth then. I am not lying to you. I don't know. I could tell you what things sold for. As far as what things sold for you mentioned something and that is the only way I know to do it. I want to get this thing over with. Alderman Davis stated he understood that. Being in my profession, we do not insure the land. Evidently you bought your policy not intending to insure the land and you are telling me at this point in time you have $250,000.00 worth of coverage, total. There is no way when I look at it from my stand point, with my experience in insurance, that I would want anybody to ever pay more than $250,000.00 because that is all you have insured it for yourself. If you are trying to split that between the carrier and the City, then you are looking at lowering your fee you are charging the City. Now, whether you can go back to your insurance carrier and get anything because it turns out the value is more than what you are claiming, then you have a problem once again with your coinsurance and you end up with zip.

Richard Shewmaker stated let me tell you something. I am a believer that whatever the dollar is there somewhere or another, I had insurance and I am a believer that if we didn't have all of these erroneous things occur, and if we just had someone to say, hey, I did it. I did it. I told the truth. I told an absolute truth. I think we would not be here today. I might have my building already fixed up.

Mayor Hanna stated he knew in his own mind the damage that was done to that building, if it was caused by the City's vibrator, was basically cosmetic. I am going to make a suggestion to the Council that we offer to change the amount and that resolution to $40,000.00 and ask him if

he will accept it. Now it is up to you the Council. I can't make the motion. I am sure you will want to ask the City Attorney what he will want to go along with it. That is my suggestion. There is your start right there.

Richard Shewmaker stated that was really close on what the City paid on some sewer backups, I think.

Alderman Trumbo stated he was not interested in making the settlement offer. I told Richard, and I appreciate him coming forward and sharing his views on this, but I think this is something that we, the Council, are not judge or jury. My degree is in finance, not engineering, and I obviously want to hear Randy Allen speak, and we have heard Mr. Venable, whom I have a lot of respect for his credibility and character, and I don't think the Council is at the point to where they are able to make an offer to the City Council on damage that I have no idea who caused it and what the vibrations are and what the engineering, scientific information would be needed to formulate that kind of decision.

Richard Shewmaker stated there was a lot more logic to it than wizardry. There really is.

Alderman Trumbo stated this is a case where you have a good argument. Mr. Venable and Mr. Allen have a good argument. This is something about why you go to court.

John Maguire, Administrative Services Director, addressed the Mayor. I would suggest to the Council that they ask Richard to consider mediation and protect both sides as much as possible. Just get an outside mediator to set down and work it out.

Alderman Santos asked, if that could be done before the deadline?

John Maguire stated Jerry Rose could tell you the attorneys could file a short form filing with a minimal cost to stay the time, if you run past June 30. The pleading could be amended in all the detail that you want.

Alderman Russell stated that negotiations can go on after Mr. Shewmaker's attorney goes ahead and files a complaint. Until that case goes to the jury, we can still settle.

John Maguire replied exactly. The filing would be minimal, in his opinion.

Mayor Hanna asked if Mr. Rose could handle setting up a mediation?

Jerry Rose replied if Mr. Shewmaker will agree to it. Sure.

Richard Shewmaker stated he would have to talk to John and see what he thinks.

John Maguire stated the State Law in these incidences recommend mediation of recent. It is a new statute.

Alderman Russell stated he wanted to make a couple more comments. Personally, I don't care of how much you have your property insured for because it is between you and your insurance company, as far as I am concerned.

Richard Shewmaker stated it was the same value he insured it for ten years ago.

Alderman Russell stated Mr. Shewmaker's purpose of insuring his property for you, the choice that you made, is so that you could keep your mortgage on the property. If you have insurance for X amount and I am not saying the City did, because I think this is a classic case where there is more than one way to look at the story. You have one story and the City Staff has another story, and that is what juries are for. I am not saying that he is opposed to any kind of settlement because as I said before, I would love to settle this. I am not going to limit settlement, my thinking in the settlement based upon what you have insured the property for. I am limiting it based upon my assessment of the case as a party. That is what we are, a party to the case. I know we are not a judge and a jury but parties and their attorneys, which Jerry is the Councils' evaluate things like this and we say, do we want this to go before a jury or not? Are we willing to not admit liability but to make a certain amount of payment to avoid having to have this go before a jury and risk more? If the City settles, you are gambling on the settlement that if we go forward to trial, you are gambling that you are not going to get anything, and the City is gambling that a jury is going to order us to pay more than a million dollars. That is why I am all for settling this for some amount in between that. As I indicated before I think some of the people on the Council, at least want some more information before settling on an amount and maybe a mediation. I think that might be appropriate but I am very open to settling the claim at some point before it goes before a jury because as I said I am nervous when I see all this stuff, and this is only one side of the story, but I have to admit as a steward of the taxpayer's money, yes, I am nervous when I see all of those documents that you presented. I am nervous to have them go before a jury.

Richard Shewmaker stated before he told Fred after the second denial that the only choice they had left was to go to court and to try to prove, not only in this instance, but in other instances the incompetence of the street work which I told him I was not interested in doing. If that is what we have to do we can do it. If I can get you all to come on a tour to my house today or tomorrow or some time, I promise you I won't take up another 15 minutes of your time. I think you go in the bus, don't you? I want to take you 4-5 blocks to show you something that equals that other construction incompetence that I am talking about. Again, I am not pointing any fingers at anybody. I feel I am backed up in a corner and I have to do what I am doing.

Alderman Davis stated he wants what is fair, is fair just like you do, okay?

Alderman Young asked Mr. Shewmaker if he could consult with his attorney tomorrow and start deciding whether or not you would submit to mediation or whatever?

Richard Shewmaker stated he talked to him yesterday and let me tell you what he getting ready to do. I am supposed to meet with one of his associates in the morning. He is going to Oklahoma City for a three-week trial. As far as he filing the suit, his associate would have to do that. It makes no difference to me.

Alderman Young stated it was basically Mr. Shewmaker's decision as to what to do. You can talk to him and make that decision. I would propose that the Council set a special meeting then before our Agenda Session next Tuesday, and if he wants to do that he can get with Jerry, and that would give him more time to get more information to decide what you all want to do.

Richard Shewmaker asked, what date would that be?

Alderman Daniel said, that would be before 4:30 p.m.

Alderman Russell said, the date would be one week from today.

Richard Shewmaker asked, if it was the 13th?

Alderman Russell answered Mr. Shewmaker, yes.

Alderman Austin asked if the meeting could be held after the Agenda Session? If you will agree to that I will second the motion.

Alderman Young said, however, the Council wanted to do it, before or after the session.

Richard Shewmaker asked, if the Council wanted to tour the property?

Alderman Young said, that would give these people enough time to get everything together.

Alderman Russell asked, if the Council wanted to pick a time to tour Mr. Shewmaker's property?

Richard Shewmaker asked, if the Council wanted to tour as a group?

Charles Venable said, that would be best in his opinion.

Alderman Davis stated he would like for Mr. Shewmaker, once again to do what John Maguire recommended. Talk and see if you can go through mediation on this.

Richard Shewmaker stated he was going to do that.

Alderman Davis stated he believed that was probably the best solution at this point. Yes, I would to go ahead and see the information that I requested.

Richard Shewmaker asked, if it was the engineering report?

Alderman Davis replied yes, the engineering report and the value you have on your insurance policy. I understand what Kyle just told me, but looking at it from real life values I know what people are willing to pay for things and if your evaluation on your insurance is substantially less than what you feel like it is worth, that is a different situation. Usually your banker, Kyle, will also see to it that you have a percentage of the value on the insurance.

Alderman Reynolds stated the Council needed to talk with the Staff. We need to get the advice first from the City Attorney also.

Jerry Rose stated let me give you a little bit of advice or what I think it is. One, I'll tell you the obvious, that obviously this is a very difficult proceedings to hold court in. It is hard to do. I am not sure what my role is or Mr. Venable's role or Randy's role in it is and it is awkward. It is very hard and very difficult for us to do it. Obviously a court of law or a mediator, as John Maguire suggests, is a better form probably for it than this. It is hard to do and I sympathize with your dilemma in doing it. Before you turn that down, could you leave that up for just a second, Richard? Let me be sure that I understand. I read your letter there and you remodeled back in 1993 and your building was painted and remodeled and stuccoed or dry treated at that time, is that correct? That is not correct?

Richard Shewmaker answered, no. In 1993 was when that award was given to us.

Jerry Rose replied exactly. When did you do it then prior to that? In 1990, 1991?

Richard Shewmaker stated they moved into it in 1990.

Jerry Rose asked if that was the time it was last painted and dry treated and stuff like that? Here is my problem. Let me try to articulate my thoughts. First of all Richard is exactly right about his understanding of the law. You have tort immunity. That means that you are not liable in a court of law for torts of negligence. I don't know of any tort that I have heard described tonight that was not the tort of negligence. I have heard Mr. Shewmaker quote fraud and misrepresentation. I don't know how any fraud or misrepresentation harmed his building even if he is correct in that assumption. Certainly there was no fraud or (mis) anything at the time that this occurred. Legally, I guess I have some confidence in your tort immunity defense. Let's go beyond that because I think I hear you don't want to do that, you want to go further than that and

you want to be right in what you do regardless of what the law provides. Let me tell you what I had to look at and what the Mayor had to look at and what Mr. Venable had to look at because Mr. Shewmaker was asking us to advocate to you the expenditure, at that time, of a half of a million dollars, approximately $500,000.00 bucks. That is a lot of money. It was more money than the Mayor or myself or Mr. Venable or anybody else could recommend to you to do based upon our word. We figured you all needed some facts of your own to determine that and that is pretty much one reason why you are here tonight. One other thing, there is no engineering report of which I am aware of which supports Mr. Shewmaker's conclusion that the wall was damaged or his building was damaged as a result of this machine. There is no member of City Staff that I have talked to from Randy Allen to Kevin Crosson to Charlie Venable who believes and Charlie Venable is an engineer, that his wall was damaged by that piece of machinery. The only piece of evidence that I had at all to determine any of this is Mr. Shewmaker's contention that was so. I don't know of any other. Having said that, that led me again to the conclusion that based upon the facts again, it was too much of a decision for the Mayor to make, or I to make, or Charlie Venable to make, or Randy to make to advocate this kind of thing happening without your listening to what you just listened to. I don't know how to respond to all of this. We can indeed if you wish have a hearing and I can ask Randy, I suppose questions. I would be interested, Randy, do you recall calling these folks that Mr. Shewmaker believes that show some liability on our part?

Alderman Daniel asked Randy to come to the microphone.

Jerry Rose stated I think that would be good because Mr. Shewmaker believes that is very important and let's determine why you called and what you were doing when you called.

Jerry Rose stated he would like him to look at that. Have you seen this, Randy? Did you see this on TV? There is a little note here that says that Richard or Randy at the Street Department in Fayetteville would like a price to put on dry crete on a wall. Do you recall that?

Randy Allen, Street Superintendent, stated that was correct. I was instructed to make that call by Kevin Crosson. He had no experience in the construction trade. We had received no estimate from Mr. Shewmaker as to the cost of damages that he was claiming on his building. He was just, at that point, saying there's damages, there's damages. The walls were almost falling down and things of that nature.

Jerry Rose asked was that in any way an admission of liability?

Randy Allen answered, absolutely not. That was a fact-finding mission to find out exactly what the drivet would cost to be reapplied to the exterior of that type of building.
Jerry Rose asked Randy if he believed that machine caused that damage? You have been out there and have looked at the damage, haven't you?

Randy Allen answered, yes, I have. I have been out there two or three different times.

Jerry Rose asked Randy if he believed that machine caused it?

Randy Allen answered, no, I do not.

Jerry Rose asked Randy to tell the Council just why briefly. I don't like doing this but can you tell the Council just briefly why you believe that?

Randy Allen answered, because of all of the applications that I have seen this vibrator roller in, next to, and around. I just have not seen this type of damage occur. We are talking about a type of material on the exterior of a building that is very rigid and brittle. If you place it on a structure that has any movement, you will see cracking in it. I use to live in a stucco house, when I was a youngster. It had cracks in it. That's just typically the nature of the beast. From my estimation and what I ascertained in looking at the damages, to me there were probably more damages occurred by passing of the AM Railroad Train within a 100 feet of Mr. Shewmaker's building than there was from the vibratory roller for the short period of time that we were there paving Powerhouse Avenue.

Jerry Rose stated that's plenty. That is all I am trying to tell you is all the members of the City Staff that I talked to articulated to me what I thought were reasonable reasons why they believe this damage was not caused by that. The paint Mr. Shewmaker placed so much emphasis on and whether or not the paint is inside of it or after it, I am not sure what the meaning of that is, but logic tells me that if the crack was there at the time when the building was painted in 1993, the crack would have paint in it. Does that make sense? However, if the crack occurred sometime after 1993, then perhaps it would not have paint in it. Well, about all that tells you is those cracks in that building probably occurred after 1993 and the roller was in 1997. I don't know how to evaluate that. In addition to that Mr. Shewmaker has some extraordinarily good reasons why he didn't report this for eight months after it occurred. Extraordinarily good reasons. Reasons that all of us can sympathize with and I think have great compassion for but it doesn't take away the simple fact that it was eight months before it was reported. We have no way of knowing what happened during those eight months. None. I don't know what to do with that. Now obviously we can start a large argument here tonight and I know that Mr. Shewmaker disagrees completely with what I just told you. I am sure that he has probably a very good presentation to give you. You all need to decide whether or not you want to do that, or do you want to do that at a special meeting, or what do you want to do with it? I am just trying to tell you that this is not a new problem. It is one that Charlie Venable has looked at since 1998. It has been going on for two years. We have not been rude or ignored Mr. Shewmaker. We have been out there. We have looked. We have run tests. The Mayor has met with him. I have met with him. The Mayor has met with him on more than one occasion. Mr. Venable has met with him. City Staff has met with him. I don't want you to think in any way that we have blown off Mr.

Shewmaker or ignored him in any way, shape, form or fashion. It is simply that the evidence we had didn't lead us to the same conclusions that Mr. Shewmaker drew. The final decision is yours if you want to make it.

Alderman Austin stated that what they had there was good evidence to take John Maguire's suggestion and I think we ought to give Mr. Shewmaker a couple of days to give us some feed back. I would like to move that when we do meet it will be with the idea of receiving the new information we asked for and considering mediation as a solution because I am confident the facts will be presented the same way they were presented tonight. I trust a mediator is somebody who does it professionally. I think that is the right way to do it. I feel real comfortable with that as an alderman.

Alderman Young asked, if the meeting would be after the Agenda Session?

Alderman Daniel said, yes, and she just recently toured and looked at the buildings so she did not want to go on the tour. She was sure that Richard would be glad to go around with any of you between now and Tuesday if you want to look up close at this.

Richard Shewmaker stated he felt like he needed to make one more comment in response. If anyone would like to come to that building when the train goes by, I want you down there. You can run some eighteen wheelers up and down the front. I want you down there. You can't hear or feel a thing. Those vehicles don't do a thing. I would not tell you that if I didn't know it. I have lived there for ten years. The train had nothing to do with the damage of this building. We might as well talk about the airplanes that land at High Fill. That is all I have to say about that.

Alderman Young asked Jerry Rose, if this goes to mediation, is the first thing that each side files an initial thing with the court and then request to go to mediation or does it go directly to mediation?

Jerry Rose stated he was not sure how you get there from here but all it takes cooperation and desire on Mr. Shewmaker's part to have it go to mediation. If that is what we are trying to do we can figure out or his attorney can figure out a way to get there. I think Mr. Maguire's idea of having his attorney go ahead and file a lawsuit which would total the time and make the statute of limitations run is probably the thing to do since we are almost out of time. It sounds like it would be the way to go. If we had more time, we would not have that difficulty. We are going to have to enter into some kind of mediation agreement as to the form of the mediation. Who is going to do it and agree to that, and whether or not if it will be binding in any rights of appeal that may be available to him? That can be done. Again all of it requires Mr. Shewmaker's cooperation and at any time he withdraws it, we don't have that anymore.

Alderman Young asked if Richard decides to go that route of initially filing and then going to

mediation, then if he files that before next Tuesday, we wouldn't have to meet in a special session next Tuesday?

Alderman Austin stated he thought they should go ahead and decide whether they were going to have a mediator even though he may file a lawsuit.

John Maguire asked Jerry Rose if it could be only a two-page deal, and then you can amend the heck out of it and put eighty pages on it later?

Jerry Rose stated you can, but that's me giving Mr. Shewmaker legal advice and he has a capable attorney that can give him that on his own. He can figure that out. I'm sure this is not Mr. Everett's first rodeo.

Richard Shewmaker stated as he understood it we are talking about him finding out about mediation and getting a copy of the engineering report and insurance policy.

Alderman Davis stated, if it turns out that he decides to go through mediation and you are willing to accept that and go ahead and file the suit, then there really is no reason to supply us with any additional information.

Richard Shewmaker replied, okay. Do you all want me to figure that out in a day or two?

Alderman Young told Mr. Shewmaker he could go ahead and get the Council the information though.

Alderman Russell stated that what his concerns were about this was the Council had heard Mr. Shewmaker's version of the story and he was not a juror in the case, but if he were, he believed that Mr. Shewmaker was a credible person and he seemed like a very trustworthy person to him. The Council had also heard the City Staff's version of the story of which he was not saying that was not a credible version, but they had only heard from one person that was there, he thought, at the time that this machine was operating, and that was Mr. Shewmaker, which was a pretty significant fact. The only way the Council could really know what happened was for all of them to go up to the third floor of Mr. Shewmaker's building and bring the DD 90 out there and fire it up. He did not believe anybody wanted to do that.

Richard Shewmaker answered Alderman Russell. Tell you what I will do. If you all will put up a sufficient bond, I'll let you start it over again. I will.

Alderman Austin stated he didn't know if he wanted to go for that but he thought it would might be a good idea for Mr. Shewmaker to get that seismic equipment up there and measure some of the vibrations from the trains.

Richard Shewmaker answered, there isn't any, Ron. That is what I am saying.

Alderman Austin stated he just thought that would be good evidence, if there were not any.

Mayor Hanna asked, what year was that building painted, Richard, on the outside?

Richard Shewmaker asked, pardon me?

Mayor Hanna asked again, what year was that building painted on the outside, the exterior?

Richard Shewmaker answered, I would have to look. I would say 1990. That was when we bought the building. We worked on it for years. I am going to say 1991 or early 1992.

Mayor Hanna asked Mr. Shewmaker if he painted the exterior after he bought it?

Richard Shewmaker answered, after we remodeled the inside we fixed the outside and painted it.

Alderman Russell stated, we have been saying there is more than one version to the story and that is what juries are for but we can avoid sending it to a jury if we so choose. Mediation might help us do that. I hope we can reach some sort of solution.

Alderman Young asked, if the Council was in agreement to having a special meeting after the Agenda Session or do they need to take a vote?

Alderman Russell stated we can schedule it and then call it off if we need to later.

Mayor Hanna thanked Mr. Shewmaker.

Alderman Young reiterated to Mr. Shewmaker that the meeting was at 4:30 p.m. next Tuesday.

Mayor Hanna asked if anyone had any announcements?

Meeting adjourned.