

Aldermen

Ward 1 Position 1 – Adella Gray
Ward 1 Position 2 – Brenda Thiel
Ward 2 Position 1 – Kyle B. Cook
Ward 2 Position 2 – Nancy Allen
Ward 3 Position 1 – Robert K. Rhoads
Ward 3 Position 2 – Robert Ferrell
Ward 4 Position 1 – Shirley Lucas
Ward 4 Position 2 – Lioneld Jordan



Mayor Dan Coody
City Attorney Kit Williams
City Clerk Sondra Smith

**City of Fayetteville Arkansas
Special City Council Meeting Minutes
January 8, 2008**

A special meeting of the Fayetteville City Council was held on January 8, 2008 at 4:30 PM in Room 326 of the City Administration Building located at 113 West Mountain Street, Fayetteville, Arkansas.

Vice Mayor Jordan called the meeting to order.

PRESENT: Alderman Gray, Thiel, Cook, Allen, Ferrell, Lucas, Jordan, City Attorney Kit Williams, City Clerk Sondra Smith, Staff, Press, and Audience

ABSENT: Mayor Coody and Alderman Rhoads

Pledge of Allegiance

New Business:

Commonwealth-Ghosen Theatre Corporation Settlement Agreement: A resolution to approve a settlement agreement with Commonwealth-Ghosen Theatre Corporation to purchase a construction easement and a permanent sewer main easement for the West Side Sewer Improvement Project for a total monetary consideration of \$100,000.00 plus other considerations.

City Attorney Kit Williams: I want to thank all of you for coming to this special meeting. I think it is very important. This condemnation case is scheduled for a two day trial beginning next Tuesday. We were in the midst of trial preparation. Normally Assistant City Attorney David Whitaker has the responsibility for handling easement condemnation cases. He has been able to resolve them. There was only one other one that had to go into litigation for a while and you approved that settlement several months ago.

In this particular case the City had to obtain an order of possession for the necessary easements for the Highway 112 Drive In property in July, 2006 in order not to delay the construction of the longest and largest sewer main for the west side project. We have been negotiating with the owner and the owner's attorney as early as 2005 but could never come to any agreement. As the initial trial date approached for this condemnation case last fall the land owners appraiser finally finished his in depth and lengthy appraisal of what he estimated would be the proper value of both the construction and permanent sewer easement. His \$825,600 valuation was many times the \$36,550 valuation estimated by the City's appraiser. With such a large discrepancy, the hundreds of thousands dollars at stake, and the probability of a jury trial, David asked that I assist and I agreed to do that. I issued written interrogatories, request for documents, and other discovery. I conducted lengthy depositions of the land owner's representative and their appraiser. We agreed to some minor changes to the sewer easement language. The land owners appraiser reconsidered and substantially lowered by almost half a million dollars their earlier demand. His valuation then came down to \$335,600. This is still many times more than what our appraiser was. It is difficult to predict how a jury will determine the actual value when they hear two real estate appraisers give very different valuations.

In a condemnation jury trial about a year ago involving Springdale a Washington County jury awarded almost what the land owner had requested and more than four times what Springdale's appraisers had valued a particular taking. That was about four tenths of an acre for a road and it cost Springdale \$100,000, much more than the less than \$24,000 that they had valued it at.

In our case the permanent sewer easement aligning across Highway 112 has to stay away from Clabber Creek in order not to endanger the habitat of the Arkansas Darter.

The permanent sewer easement is almost a full acre. There was also about six tenths of an acre which was the temporary construction easement which we have been using for a little over a year and a half now. We are not quite finished there, the pipe is in but not everything is done. The pipe is in the ground, the land has been reclaimed, the grass is growing and it looks real nice out there.

I felt it would be wise to make one final attempt to settle this case now that the land owner has reduced his demand by half a million dollars. I spoke with David Jurgens and the Mayor about this and then gave the land owner's attorney the top figure that I could recommend to you. It was less than one eighth of the land owner's original demand and less than 30% of their latest demand, but I felt it was a reasonable compromise figure. Fortunately the land owner has agreed, with some small additional items, involving a couple of sewer and water taps, access to Highway 112, extending the tops of the manholes that are there up to two feet, things like that. With that we have a settlement proposal acceptable to them which I can also recommend to you.

I think you should approve this settlement because you avoid any chance that the jury could side with the land owner and force us to pay up to \$335,000. Their attorney has asked for attorney's fees. We don't believe they are entitled to attorney's fees but there is a recent Supreme Court case that has broadened attorney's fees in these sorts of cases, involving water, not sewer and that is why we think he is not entitled to them. There is some chance that the court could rule against us. He claims in his letter to me that the attorney's fees might be as much as \$100,000. I

don't know, the case has been going on a long time but that seems high to me. Attorney's fees always seem high to me. You avoid any chance of that. You avoid the continuing out of pocket expenses, litigation expenses and any appellate cost that would be there if in fact we went to trial. We certainly would not agree to pay any attorney's fees and so that would eventually end up at the Supreme Court level if that issue was being pushed. All of this can be achieved for a net additional payment of \$63,450. I think it is a fair settlement. I have been a lawyer for over 30 years now, I have had many jury trials and I have also settled many cases especially during my 14 years as a private attorney. My experience both as your City Attorney and in private practice tells me that this is a fair settlement both for the land owner, our citizens and our rate payers. It is less than an eighth from where they started and less than 30% of what they are demanding now. I appreciate you coming and thinking about this. I know this is a big decision but this is as quick as we could get to it after they lowered their other demand to make it where any settlement was at all possible.

Alderman Ferrell: In light of the fact of where they started from and where we are right now with them, couple that with the fact of the unknown if it gets litigated. That all goes into the time table which we desperately are striving to stay on to finish this WSIP program so I would move that we approve the resolution.

Alderman Cook: I am not going to vote against this but I have some issues with some of the terms that are in here. One of them is allowing them an additional two or three lane curb cut at some future date. We are sort of circumventing Planning at some future date.

City Attorney Kit Williams: They have requested two entrances onto Highway 112 for this bottom 15 acre parcel. We could not agree to that because that would be in violation of the access management plans and ordinances that you are considering and certainly against what I think Planning would like. I don't think it is unreasonable at all to give this 15 acre site an access to Highway 112. I think they would be entitled to that under our ordinances. That is why I was willing to do that. They did ask for two and I said I could not ask you to go against the kind of ordinances that you are going to pass. So they agreed and allowed it to be just one so that is why it is just one.

Alderman Cook: What would you think the monetary value of two sewer and two water tap fees would be?

David Jurgens, Water and Wastewater Director: For a domestic tap or for taps for a single structure the price would be roughly \$425. It is outside the highway right of way and on the same side of the road. Monetary value as we charge right now for tapping fees would be less than \$1,000 for those two sewer taps and the water taps are about the same.

Alderman Cook: If I read this right at some future point once they develop and they find a final finished grade the City is going to be responsible for raising the manhole to that level.

David Jurgens: Yes and I had some reservations with that and that was a lot less than they originally asked for. We put a height limit of two feet and you can raise a man hole two feet without taking the entire upper section off, if it is more than two feet you have to take the entire

subsection off and that is pretty major work. With the two feet there is a riser we can bring in and bring it up to grade that way; it is not that difficult to do. It is probably less than \$250 per manhole and I think there are five manholes on the property. So I was comfortable with that two foot adjustment for flood plain issues. I think we put a time constraint on that as well.

City Attorney Kit Williams: Ten year time which is reasonable. I think if they are going to develop they very well might develop in ten years. We talked about that we might have to do some fill there, that is why they were asking for that. I appreciate David's work on this. I kept him involved all the way through. This is his pipe so I wanted to make sure we were doing everything right and not offering something that would be detrimental to the City in the future. He gave me good advice about keeping it down to no more than two feet and we are not allowing a tap on our main giant pipe going through there because we don't do that. I want to thank David for his help on this in making sure that these terms would be fair.

Alderman Cook: Don't misunderstand me; I think staff has best intentions. I wanted to make sure everyone understands up front what we are voting on.

Tim Conklin, Planning and Development Management Director: Does the water and sewer impact fees still apply?

City Attorney Kit Williams: This is a sewer connection tap fee.

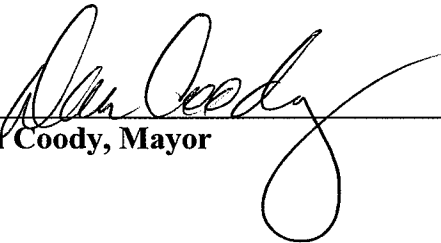
Tim Conklin: Okay.

City Attorney Kit Williams: That's what they asked for so that is what we gave them.

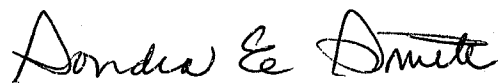
Alderman Ferrell moved to approve the resolution. Alderman Lucas seconded the motion. Upon roll call the resolution passed 7-0. Alderman Rhoads was absent.

Resolution 08-08 as Recorded in the office of the City Clerk.

Adjournment: 4:45 PM



Dan Coody, Mayor



Sondra E. Smith, City Clerk/Treasurer