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**MINUTES OF A MEETING
OF THE
FAYETTEVILLE CITY COUNCIL
JANUARY 16, 2001**

A meeting of the Fayetteville City Council was held on January 16, 2001 at 6:30 p.m. in Room 219 of the City Administration Building located at 113 West Mountain Street Fayetteville, Arkansas.

PRESENT: Mayor Dan Coody, Aldermen, Reynolds, Thiel, Young, Zurcher, Trumbo, Davis, Santos, and Jordan, City Attorney Jerry Rose, City Clerk Heather Woodruff, Staff, Press, and Audience.

CONSENT AGENDA

APPROVAL OF THE MINUTES: Approval of the minutes from the December 19, 2000 City Council Meeting. *(Removed at the request of the City Clerk)*

BID 00-79: A resolution awarding a contract to Harrison Davis Construction Co. of Fayetteville for their low bid of \$1,982,600.00 for the construction of the Fayetteville Senior Center. An approval of a budget adjustment in the amount of \$78,083.00 which is funded by the Council on Aging.

RESOLUTION 4-01 AS RECORDED IN THE OFFICE OF THE CITY CLERK.

LAND PURCHASE: A resolution approving an Offer and Acceptance contract between the City of Fayetteville and Rosie Dorsey, Rowie Howard, William Barker and Alice McClelland for the purchase of 18.88 acres of land off Huntsville Road in the amount of \$151,000.

RESOLUTION 5-01 AS RECORDED IN THE OFFICE OF THE CITY CLERK.

GRANT APPLICATION: A resolution authorizing the Mayor to apply for a federal grant to continue funding of the 4th Judicial District Drug Task Force.

RESOLUTION 6-01 AS RECORDED IN THE OFFICE OF THE CITY CLERK.

Alderman Zurcher moved to approve the consent agenda. Alderman Davis seconded the motion. Upon roll call the motion carried by a vote of 7-0-1. Thiel abstained.

Alderman Thiel explained she was abstaining from the Consent Agenda because her and her husband owned Thiel Construction Management which was working with Darrell Rantis on the Senior Center Project.

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OLD BUSINESS

RZ00-25.00: An ordinance approving rezoning request RZ00-25.00 as submitted by Dennis Caudle for property located at 1192 Rupple Road. The property is zoned R-O, Residential Office and contains approximately 0.52 acres. The request is to rezone to C-2, Thoroughfare Commercial. This ordinance was left on the first reading at the January 2, 2001.

Mr. Rose read the ordinance for the second time.

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

Mr. Rose read the ordinance for the third and final time.

Alderman Santos stated he thought the plan for that part of the town had changed and he felt that it did fit in with what was going in out there.

Alderman Jordan asked if the owner was planning to put up a fence.

Mr. Conklin stated the city had a Bill of Assurance for this rezoning. The Bill of Assurance did state that the Planning Commission would take a look at what type of screening is appropriate when the conditional use was applied for the storage facility. In regard to the distance from the street, it was 138 feet from Wedington to the new boundary line, which would be developed. It was approximately .88 acres.

Alderman Thiel stated her biggest concern was the curb cut which had been made and the fact that there was a driveway built back to this. The owner had stated he was not going to use that and had put up a temporary gate. She was concerned that people would be using the driveway in a few years. The fact that the garage doors faced out to the street also concerned her. She wished there was some assurance that they could have that the drive would never be used.

Mr. Conklin stated there had been a Bill of Assurance which had been entered into in 1990 that stated that access to the storage facility would be from Rupple Road and not Wedington. As with all Bills of Assurances, the staff had to monitor them and make sure that they were being enforced. In this instance, when it was discovered that the Highway Department built a curb cut and a drive back to the facility they brought it to the owners attention. The owner had blocked the drive. That Bill of Assurance was still in effect, if he violated the Bill of Assurance, then the City would take enforcement action to correct the situation.

Alderman Davis stated they could look at the curb cut as being a prudent business decision. The drive would help Mr. Caudle in future development. He did not look at it as a negative on the

owners part. He hoped that with the Bill of Assurance the owner was looking toward the future and that the curb cut would help with his development cost. Curb cuts were expensive.

Mr. Conklin stated that was the owners explanation, that when the Highway Department came in and widened Wedington Road they had asked him what his future plans were and if he would need a curb cut. The Bill of Assurance did not discuss having a curb cut on Wedington. It talked about a driveway to the storage facility, which had been blocked off at this time.

Alderman Reynolds stated that what bothered him was that the owner had agreed to enter from Ruppel, then there had been a gate put up facing Wedington. When this proposal first came through it was for all heated units. Those plans had been changed to include some without climate control. He was not going to support this request.

Alderman Zurcher asked if staff still supported their staff findings in their report.

Mr. Conklin stated the staff still agreed with their findings. This past fall he had brought forward an ordinance to allow additional commercial uses in C-1 zoning in order to provide neighborhood type retail services for the residential homes in that area and other C-1 areas. Typically they had argued that they needed C-2 in order to allow different types of uses. He tried to correct that this past fall. If this was shown as commercial on their Land Use Plan, the staff would be recommending C-1 and not C-2 zoning. C-2 zoning was required in order to have the storage use on this property. With regard to compatibility and their Land Use Plan, it did not meet their current Land Use Plan, which had been adopted December 19, 2000.

Alderman Zurcher asked if staff still supported their finding on traffic.

Mr. Conklin stated that they still supported that finding. With regard to potential and future traffic it was always difficult to determine at the rezoning time. There were many different uses in C-1 and C-2 that would be on this property. It was always difficult to make a finding that it will cause traffic congestion and danger.

Alderman Davis stated he assumed that Ruppel Road would have a stop light in the future.

Mr. Dennis Caudle, owner, stated when the highway was being constructed the State had told him that was the time to put in the driveway to serve that property. They were fixing to build on the lot adjacent to it and there would be no access to that property. As far as the gate being put in, it was put in at that time for the emergency entrance. They could read the minutes from 1990, the Fire Chief required fire hydrants. It was to be used as an emergency exit. It was not going to be used as an entrance or an exist. It was strictly for emergency use. The fence would be moved when the new building was constructed.

Alderman Young stated another concern was changing the use from climate controlled to just regular storage.

Mr. Caudle stated that was never changed. It was climate controlled in the middle and the outer was regular storage units. This design would help insulate the building and secure the intersection.

Alderman Young stated they had been under the impression that it was all climate controlled.

Mr. Caudle stated he thought that they had discussed it when they discussed the doors facing the highway. A true climate controlled building had no doors on the outside.

Mr. Conklin stated when they had worked on the Bill of Assurance with the applicant, that was when he discovered that this facility also included the mini-storage units on the north and south sides. As with all Bills of Assurance, the staff could not request or require the applicant to sign. It had to be voluntarily offered by the applicant. They had modified the Bill of Assurance and put in a "climate controlled facility and/or mini-storage units." That was what Mr. Caudle had agreed to and that was the Bill of Assurance being offered. He was concerned when he discovered that this also contained mini-storage because at Planning Commission they had discussed the type of assurance being offered. There were three or four places in the minutes where he had talked about the applicant offering them a climate controlled storage facility Bill of Assurance that the property would be used for this purpose. Now they were discussing mini-storage and climate controlled. He thought one of main arguments had been that he had existing mini-storage and that was a new use that was needed in Fayetteville and it was a climate controlled facility. It was one of the things the Planning Commission had considered when they recommended that the property be rezoned to C-2.

Alderman Zurcher stated he was inclined to decline this request. The City had a 2020 Plan and if they decided it was not a good plan for them, then they needed to go back and change it. Until that happened, he felt pretty good about sticking to that plan.

Alderman Davis asked what percentage of the facility was going to climate controlled.

Mr. Caudle replied it was approximately half climate controlled and half regular type storage, similar to the existing buildings. He added there was a need for this type of storage in the area. If there was a misunderstanding, that was exactly what it was, a misunderstanding. There was a strong need for the additional units. There would not be a unit available to rent, of any nature, during the summer season. West Side Storage was completely full during the summer months, from April to August. This building would contain eighty-four units. Forty of those would be climate controlled. The climate controlled would be inside the building surrounded by the regular units.

Mr. Conklin stated it was his understanding the building would look like a mini-storage building surrounding the perimeter of the building, then within the center of the building would be the climate controlled storage facility.

In response to questions from Alderman Thiel, Mr. Conklin stated there was 138 feet in front of the proposed storage facility, which was enough for a professional office building with parking. In regards to screening, Mr. Caudle did have some proposed screening for the site. Staff would also be making a recommendation to the Planning Commission. The Planning Commission would also debate the type of screening required for this facility.

Mr. Caudle stated the screening that he was most attracted to was the concrete pillars with regular privacy type fence between them.

Alderman Jordan stated he had thought it was all going to be climate controlled. He wondered how much of that swayed the Planning Commission.

Mr. Bob Estes, Planning Commissioner, stated he recalled that they had discussed that it was climate controlled. It was his recollection that the area had been rezoned some time ago for this purpose. He recalled that it was to be climate controlled. It was not a determining factor in his vote. What was, was the rezoning some years ago for this purpose.

Alderman Davis stated that in today's society there were many people who had to travel across town to store their extra possessions in a storage unit. It was not a high traffic use. If traffic were to drive by during the day, they would never see a lot of cars sitting there. As far as traffic problems, there really should not be a whole lot of congestion due to this. In time, they would see a stop light at Ruppel Road.

Alderman Zurcher stated there was probably more C-2 land in Fayetteville than what could be used in the next few years.

Mr. Conklin stated there was quiet a bit of land zoned C-2 that was undeveloped or could be redeveloped.

Mayor Coody asked shall the ordinance pass. Upon roll call the motion carried by a vote of 6-2-0. Zurcher and Reynolds voting nay.

ORDINANCE 4287 AS RECORDED IN THE OFFICE OF THE CITY CLERK.

NEW BUSINESS

FIRST NIGHT: A resolution approving a budget adjustment in the amount of \$15,000.

Alderman Trumbo stated this resolution was being brought forward by himself and Randy Zurcher.

Dr. David Williams was there to make a few comments about First Night and how it impacted various families.

Mr. Williams stated for the past thirty years he had been in the business of restoring mental health to communities and individuals. One reality for the past ten years was that they had a lot more individuals and communities suffering from mental disorders and community violence. Research was continuing to report it as a problem. People were continuing to feel less connected and less safe than they did ten years ago. He was interested in communities that connected more. It was his belief that the First Night event was one of those real ways that they did as the governing body that created ways for people to feel more connected, for them to feel safer. It was an opportunity for people to be united and lifted and inspired by the diversity of arts and celebration that both helped their diversity be more of a strength and their enjoyment more of their daily life or whether it was more of an opportunity for them to get out on the streets and say "hi" to their neighbors.

Ms. Joanne Comiskey stated she had the opportunity to work with the children at Washington Plaza on the giant puppet. It had been a group project. The puppet had been designed by the children. This project was a wonderful example of how the children had worked together. They became a community. What they would see at First Night was only one aspect of what they had done. They had come up with new ideas and expressed themselves. She had enjoyed working with the children.

Ms. Rebecca Weaver, Washington Plaza manager, stated this was the second year for the kids at their complex for them to work on a First Night Project. It was wonderful to see how the kids had grown from working on these projects. She stated she thought the kids received a sense of community involvement and being apart of their community. That was what they all wanted. This was the ounce of prevention that they all hoped for. It costs a lot less for the ounce of prevention than for the pound of cure.

Alderman Davis asked what the total cost was to put on First Night.

Alderman Trumbo stated their total budget was approximately \$115,000. They would be having it March 31 this year. He hoped they would be able to incorporate more with the University of Arkansas and bring in the University. They were hoping for fifteen to twenty thousand visitors this year.

Ms. Tobi Kaufman, First Night, explained the story of April Fools Eve. There were dozens of youth groups involved in First Night. They had other outreach programs. This was their youth

outreach program. They also had Button Outreach. They distributed 15,000 buttons to low income families and at-risk youth. They also had multi-cultural outreach. They were of the highest quality. They could be very proud of the kinds of performers that were performing in their community. This was an area that they wished to expand. They also had Community Outreach. They worked to present an event to the community that was as high quality and low costs as possible. They wanted the event to be affordable and accessible. What they charged for the buttons did not even begin to cover the expenses. They wanted to subsidize them. In addition their Community Outreach meant they had approximately two hundred and fifty volunteers that worked on First Night. They encouraged families to come and volunteer as families.

Alderman Santos moved to approve the resolution. Alderman Jordan seconded the motion. Upon roll call the motion carried unanimously.

RESOLUTION 7-01 AS RECORDED IN THE OFFICE OF THE CITY CLERK.

FOI: Informational item on the Freedom of Information Act.

Mayor Coody stated he had requested an informational tutorial on the Freedom of Information laws so they could all do a better job knowing what the press should expect and what the public should expect.

Mr. Rose introduced Professor John Watkins, University of Arkansas. He has written *The Arkansas Freedom of Information Act, Third Edition*. Without question this book was the bible on the Freedom of Information Act in the State of Arkansas. It was the source that City Attorneys across this state went to when they had an FOI question.

Mr. John Watkins stated he had given talks on the Freedom of Information Act whenever anyone asked him to. He was willing to do more than just this session. He wanted to primarily answer questions on the Freedom of Information Act. He wanted to let them know that things were likely to get a bit more complicated after this session of the General Assembly. He and Jerry Rose had been appointed by the Governor to serve on the Electronic Records Study Commission. That commission had been charged with recommending to the General Assembly changes to the Freedom of Information Act to bring it into the electronic age. The current act had been passed in 1967 for a paper environment. They were in a totally different environment now and the act needed to catch up. This will be the most significant change in the law since its enactment. There was going to be a learning curve for everyone if the proposal was to become law. His experience had been with school districts and county bodies. Most of the questions involving FOI involved meetings. The act had two parts. One deals with records. One deals with meetings. It seemed that the meeting part raised most of the questions. In part it had not been interpreted very much by the Supreme Court. What they had to go on by way of guidance were

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opinions of the Attorney General. The Attorney General's opinions were not law. They were simply the opinions of the State's attorney on what the law was. Lots of issues involving meetings were unsettled, which meant there was not a black and white answer.

Alderman Thiel asked if it was legal for two aldermen to talk one-on-one about an issue.

Mr. Watkins replied that had not been directly answered under the act. There was a popular misconception about this. The FOI did not say a word about how many members of a governing body needed to be present before the act kicked in. He quoted from the act, "accept as otherwise specifically provided by law all meetings of the governing bodies of municipalities and various other entities shall be public meetings." What was a "governing body"? They, the Council, was for sure. There was nothing in the statute that defined how many members had to be present before there was a meeting for FOI purposes. The Supreme Court had ruled that they did not need a quorum present before the FOI applied. The court had not addressed the issue about less than a quorum, but less than two. The Attorney General had answered that question in an opinion in 1999. Mark Pryor had stated that he believed the inquiry would focus on not the number of attendees at the meeting, but instead on the extent to which the facts suggest the potential evasion of the Freedom of Information Act. Routine discussion of public business by two members of the governing body did not violate the FOI. In other words, it was possible for two members of the council to discuss official business as long as there was not an attempt to do so for the purpose of evading a public discussion. For instance, there was a Supreme Court case that involved an entity that had met on a certain issue and voted on it. There had been a motion to petition by one of the interested parties to reconsider. The executive secretary of the body called each member one at a time, and asked how they voted on the reconsideration. The Arkansas Supreme Court had said that was a violation of the FOI. That voting should have been done in public. Not by a series of phone conversations. Building on that opinion the Attorney General had reasoned that there was a potential for abuse involving successive meetings of two members, in person or on the phone. On the other hand, government would grind to a halt if every time a question arose they would have to call a public meeting. What the Attorney General had proposed was a case-by-case basis. There may be case where a discussion between two aldermen was just fine. As an example, as resident of Ward 4 he called an Alderman from Ward 1 because he knew him and asked for his help. Then the Alderman from Ward 1 called Ward 4 alderman to tell him of the citizens complain. This is an example of a conversation between two aldermen involving a matter of official city business. If the FOI were to apply to this conversation, they could not have city government. The Attorney General has recognized this. They could talk among themselves about City business, but they could not do so in a way where they would decide the issue before they got to the City Council chambers. Those decisions had to be made in public where the public could listen and see what they had to say about those issues. It was a very broad and fuzzy line.

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Alderman Zurcher stated he knew First Night needed money, he called Alderman Trumbo on the phone and asked if they could do something together to get First Night more money. Was the law broken on that phone call?

Mr. Watkins stated that was a matter that was going to come before the Council for a decision. He assumed in the conversation that he did not call other aldermen asking for their support. As long as he did not engage in those types of subsequent conversations he was okay. He was talking about an item of official business. What the Attorney General calls routine general discussion of public business. Even though it was going to be acted on by the Council, he had not pre-ordained anything. That was what the act was suppose to prevent. They were not to make these decisions in private, then go through a charade in public where they reconfirmed what they had already decided behind closed doors.

Alderman Young stated he was pointing out some of the problems. Where was the line? The examples they were giving were simple things like a street or First Night. What about something like CMN Business Park and trees, which were major political issues in Fayetteville. Did that change anything?

Mr. Watkins replied the Attorney General has stated that as long as there is not evidence of an intent to evade the FOI, then they were probably okay. Even if it was a complex and controversial issue. He did not think the nature of the issue determined the question, rather it was the attempt or the appearance of trying to evade the public meeting requirement.

Alderman Young stated that put a heavy burden on the public because it would be impossible to prove that was not happening.

Mr. Watkins replied that was true, but it also put the burden on the public official to make sure that the substance of the conversation they may have had with another alderman was made public at the meeting. The public then has access to that same point. On the other hand if he were to call another alderman and no one ever reveals the discussion then they had a potential problem, because the idea was that as much public discussion as possible on issues were to be decided in the public arena.

Mr. Rose stated his advice to them was a little more pragmatic. He knew a couple of pragmatic facts. They had one of the most active media anywhere in Arkansas. They had a number of newspapers and video outlets as well. What they did was under intense scrutiny. They also had a very informed public who also takes advantage of the Freedom of Information Act, unlike many cities in Arkansas. We had civilians, not just the professional media, that looked at them. Coupled with that, he knew the questions were simply tough to deal with and they were on an individual basis. He knew full well that as long as they were talking about sex and football they were fine. His advice was a little more pragmatic than John's. In an overabundance of caution.

If they were asking him in this over litigious society that they lived in, how they could avoid the problem, it was not by avoiding their fellow alderman, but by simply avoiding talking about city business. He was not sure that was the law, but he did know that his advice would keep them out of trouble.

Mr. Watkins added that would be exactly the same advice he would give them. If they were his client, he would give the same advice. Don't do it. If they were going take action, error on the side of caution. Caution would be to avoid those one-on-one discussions on matters that were likely to come before the Council for final decision. On the other hand that just because they did it, did not mean they had violated the law. Sometimes he believed the press interpreted the FOI the way they wished it was instead of the way it is. They sometimes go a little overboard in saying that when any two of them got together in a room, there was a violation of the FOI. That was not true. Even if there were two of them in a room and they discussed a matter of public concern, that was not a violation of public concern, but to avoid any controversy, don't do it.

Alderman Young stated in the past, it had been the City Attorney's opinion, that because the Mayor had a vote on the governing body, that the Mayor was in the same boat as the Alderman.

Mr. Watkins stated there were a couple of Attorney General's opinions, one dealing with a city with a City Manager form of government, which the mayor's role was different than it was in the Mayor/Council form, but in both situations the Attorney General has taken the position that the Mayor was a member of the Council for FOI purposes. There was not an opinion directly on that question regarding a city of the first class that had the Mayor/Council form. There was a city of the second class Mayor/Council opinion. The statute did not differ enough on that point to have a different outcome. The Attorney General has opined that the Mayor is a member of the Council for FOI purposes.

Mayor Coody asked in the hypothetical where say Swifty called the Mayor rather than another alderman, was that more or less?

Mr. Watkins answered, it was not a violation if he called Mr. Jordan to report that there was an upset citizen in his ward and wanted his street fixed yesterday, that was a matter of official business. What was important to a lot of citizens was basic City services. It was at the heart of City business, so if he called or talked to Mr. Jordan and raised that issue, it was not a violation of FOI, then there would not be a violation if he called the Mayor and raised the issue with him. There was not an attempt to hide anything from the public. When the matter came before the appropriate City committee or Council, you knew where he was going to be. There was nothing hidden in that situation. It did not matter if it was a Councilman to Councilman or Mayor to Councilman, as long as there were two of them, there was the potential for an FOI violation. But just because they talked about City business, does not mean you have automatically violated the FOI. That was the point the Attorney General was trying to make.

Alderman Trumbo asked if the meeting that precipitated this tonight, which he found very enlighten, when they had three board members from the Youth Center, which received money from the City of Fayetteville, with the Mayor and Alderman was that subject to FOI.

Mr. Watkins asked, was what subject to FOI?

Alderman Trumbo replied the meeting where there were three members of a board, which receive money from the City of Fayetteville, the Mayor and an Alderman.

Mr. Watkins replied that was a complicated question, because it involved potentially a meeting that was public, even though there were no Aldermen there. The Board of Directors of certain non-profit organizations that were supported in whole or part by public funds, were also subject to the FOI law.

Alderman Zurcher asked for clarification in that meeting. As he understood it the Boys and Girls Club had not been notifying the press and had not been under the FOI as far as they were concerned, up to that point. He did not think that up to that point that they had been notifying the press of their meetings.

Mr. Watkins stated if a body was clearly subject to the FOI, it only needed to give notice of their meetings to people who have asked for it. If no one asked for notice, they did not have to give notice. The Supreme Court so held in the 1970's and reconfirmed that in 1999. If no one asked for notice of a meeting, they did not have to give notice. They might not have given notice, because no one asked for notice.

Mr. Rose added, remember that they had asked for notice as far as City meetings and they had a standing request. The City Clerk had the list for City meetings.

Alderman Reynolds stated in that meeting the Mayor and Bob Davis were already there and Trent was going to attend that meeting, so he called the press.

Mr. Watkins stated this was why this was a complex situation, it is possible that the Board of Directors of the Boys and Girls Club would have to meet in public anyway. No matter who was there. That was a factual question. It was determined, not just on the basis on whether the Boys and Girls Club received public funds, that was one requirement, but there was another requirement according to the Arkansas Supreme Court that there be an intertwining between the City and the non-profit. Was there a close relationship, so in effect the public business was being carried on by this private nonprofit corporation. It was not just the receipt of public money, by itself. What they wanted to avoid was public business being shunted off into private organizations in the theory that they could avoid public scrutiny by having private groups do the work that the City would normally do. For example the many lawsuits involving the Incinerator

matter, the City retained some outside lawyers from Chicago and DC to advise them on complex issues regarding the disengagement from that project. The Arkansas Supreme Court ruled that the records of the law firm that the City had retained were opened to the public under the FOI, because the law firms were in affect the functional equivalent of the City Attorney. The ideal was that theoretically, the City Attorney could have provided the advice. If he had produced memoranda for the City, those records that supported him in his files, would have been subject to the FOI. They could not change that result, by hiring an outside law firm. The idea was that they could be evading the openness requirement by doing business through a private entity rather than his own staff. The reason why the FOI extended to the private organizations was to stop the notion that City's or other entities doing their business through a private organization, thereby, evading the openness requirements of the FOI. He did not know enough of the facts to offer any kind of opinion on the status of the Boys and Girls Club, but it was possible that they would be considered an entity subject to the FOI by themselves. They at least met one requirement, they received public funds in support of their activities. It may have well been subject to the FOI just because of the status of the Boys and Girls Club as a recipient of public funds. The other question was, let us assume that was not the case, and the Board of the Boys and Girls Club was not required to meet in public; does that change because the Mayor and a couple of Aldermen attend a meeting with the Board of Directors of the Boys and Girls Club. The answer was, no, it doesn't mean that it was a meeting of this governing body. It was a meeting of the Board of the Boys and Girls Club where other people were in attendance, including members of this body. In other words, the question is Who's meeting is it? The fact that they may attend a meeting with another group did not mean that it was their meeting for FOI purposes. On the other hand, if while they were there at someone else's meeting and they discussed matters that were likely to come before the Council, then they ran the risk of stepping over the board and fuzzy line. In this situation he would not advise doing that. He urged that while they were at some other meeting, not to discuss matters which could come before Council. It would be the safest thing to do. Their mere presence at someone else's meeting did not convert it into their meeting.

Alderman Young stated one of the things he had been thinking about. Sometimes a committee that was not subject to the FOI would be discussing a topic which would come before the Council, and an Alderman showed up and did not participate in the discussion, but just listened. Sometimes they were invited to neighborhood meetings to listen to their concerns.

Mr. Watkins stated he did not have a problem with that. If a neighborhood association invited them to attend a meeting, and they just listened, even if three of them showed up, it was still not their meeting. If they did not talk to each other, there was not FOI violation. When he was on the Planning Commission he discouraged that. He would ask the citizen to say it to the whole Planning Commission, so they could all hear it. If they wanted to write them a letter, he would read it at the Planning Commission Meeting. So that way everyone in the decision making body would have the some benefit of that information. But if he just listened to someone on the phone it was not a violation of the FOI.

Alderman Trumbo stated that by the sound of it, Mr. Stockland did not have to resign in order to go to the meeting in order to keep from complying from the FOI. He was on the Parks Board with another individual. He had been told that he could not go. If there were two members of the Parks Board, they would have to give notice of a public meeting.

Mr. Watkins stated that was playing it safe. He did not think it was a violation of the act. Would he have advised the meeting to take place without giving FOI notice? No, he probably would not have. But after the fact, did he conclude that it was a violation? No.

Alderman Santos asked if a meeting were called and the press was there and the meeting was adjourned and they were milling around talking and he wanted to ask the Mayor something about the City Attorney selection, and the press were there, but they were not listening to them, could they discuss things like that? When the press had been notified that they were meeting, were they free to discuss anything at that meeting?

Mr. Watkins stated there was an interesting question about whether they had actually started a new meeting or not at that point. Technically, what they may have is where one meeting had ended, now they have another meeting. Technically, if that was true, then notice would have to be given, two hours.

Alderman Thiel stated, but actually, Kevin, that meeting, she was kind of a part of too, they were asking questions about tonight's meeting. Procedural questions.

Mr. Watkins stated that was the kind of routine business that the Attorney General had envisioned as not being subject to FOI. That was going to be common when they had new members of the governing body. That was the kind of thing that was going to raise to the level of an FOI violation.

Alderman Trumbo stated if in the future there was a meeting going on and he or she were interested in listening, can he or she walk into the room and just listen?

Mr. Watkins replied it depended on who's meeting it was.

Alderman Trumbo replied, say it was the Mayor's meeting and he was talking to some people and a constituent called and asked them to go and listen. Could they go listen?

Mr. Watkins stated his advice would be that if the meeting was not required to be in public, an example, say the Mayor met once a week with the Directors of the various departments, and the Mayor called these meetings on a regular basis to find out what was up and one of the aldermen wanted to come sit in the meeting, it was the Mayor's call. It was his meeting. That meeting was not open to the public under the FOI, because that was not a governing body. So the Mayor can

determine who he wanted to have at his meeting. If they did not have to meet in public then they did not have to let anyone in. He would argue that just because he was an alderman did not mean that he had a right to attend that meeting, than he would have as a member of the general public. The question would be who's meeting is it? Remember the FOI only applied to meetings of governing bodies. The hallmark of a governing body is that it had final decision making authority. There were lots of meeting which took place every day in this building that were not open to public under the FOI, because they did not involve a governing body. One of the other misconceptions is that just because they were meeting in a public building, the meeting was open to the public. That was not true. It was a question of whether they had a governing body.

Alderman Zurcher asked that if by inviting the press once or twice or ten or twenty times, if they were not setting a precedence where they had to invite the press.

Mr. Watkins replied, no, but it would not be advisable as a political matter to say all of a sudden they were cutting off the water. His advice to them was when in doubt error on the side of openness. That was the best advice they could get. The Arkansas Supreme Court used a similar approach when it interpreted the FOI Law. When it was ambiguous as it was in many places, the Supreme Court had a general rule that said, this law was passed in the public interest to make government more accessible to citizens. So they were going to keep that in mind when we interpret it. If there are any ambiguity in the law, we were going to resolve that ambiguity in favor of openness. That was the same thing that they should do. When there was an ambiguity, resolve it in favor of public access and openness.

Alderman Trumbo stated he found it interesting that the Arkansas Municipal League recommended to it's clients that if the Mayor and Aldermen were discussing something, that they comply with the FOI, just as an overabundance of caution.

Mr. Watkins stated that was the position Jerry had taken and he agreed with him completely. He knew the Municipal League disagreed with the Attorney General's opinion on the Mayor's status as a member of the Council. In the Mayor/Council form of government the Mayor was the CEO of the City. The analogy would be if they were in State government the Council would be the legislature and the Mayor would be the Governor. The trouble was that with cities, unlike in State government, the Mayor also played a role at the Council level. That was where the ambiguity came in.

Mr. Rose suggested that they take Professor Watkins up on his suggestion that he meet with them at their Agenda Session.

Mr. Watkins stated he would be glad to do it. They could then talk about the records issue. He could give them a briefing on what could be expected under the new law that they had been working on involving electronic records. He expected it in some form to pass this session.

Alderman Thiel asked as far as the Council members wanting to have a meeting, did they do the notifying?

Ms. Woodruff replied if they would call her she would be glad to notify the public. They had a standard procedure that they followed.

Mr. Watkins stated one thing that was clear from the Supreme Court decision, say that they create a special committee comprised of three aldermen to study a certain issue and then report back to the full council. Even though that three member committee did not have any formal decision making power, and was just making a report or recommendation to the council. The Supreme Court had said since the committee was composed of all members of the governing body, the council, then the FOI also applied to the committee. Even though it was not a standing committee, it was a special committee, then they had to give notice to the people who had requested it.

Mayor Coody asked if any members of the press had any questions?

Mr. Charlie Alison, Morning News, stated he agreed with most of what had been said, especially the pragmatic part. If they wanted to avoid any entanglements with the press regarding FOI do their meetings in public. They had more committees in this City than any five others in the State combined. If they could do their work in the committees and in public where people could hear what their thoughts were, he would not try and sort out what their intent was, if they met with someone else. He would assume the worst. He was a very cynical public. He would assume they were trying to meet to avoid FOI requirements and he would take them to task for it. He thought members of the public will too, because they were the ones that wanted to know what they thought and why they thought it. If two of them were meeting, how did their colleagues know what their thoughts were and how did their constituents know and how did the public know. He agreed with Jerry and Dr. Watkins with the regard to the pragmatic thing and giving the advice to meet in public. For his part, he appreciated all the effort they had done to be public about their meetings and to provide documents in a timely fashion. He had never had any complaints and hoped to never have any in the future.

Mr. Rose stated he had been here twelve years. They lather it on thick. He did not know of another city in Arkansas that tries harder to liberally apply our Freedom of Information Act. They write it into our ordinances when they created things that were not covered by the Act. When they gave money to people, they required them to be subject to the Freedom of Information Act. They lathered it on heavy. That had been the feeling of every City Council member that he had in the last twelve years and every Mayor and every Administration he had been associated with. Certainly this Administration's goal is of openness. It was a good act.

Mr. Watkins stated there were a lot of cynics out there in the public and press that will always assume the worst. It was not a legal issue they were getting into, it was a political issue. Even if they were fine on the law and they have not violated the act, you may have created a firestorm which detracted from the good things they were trying to do as aldermen. If they could avoid those firestorms, the better off for everyone.

Alderman Zurcher stated he wanted to point out to the public that up until recently all Freedom of Information Acts were routed through the Mayor's office, for whatever reason. He wanted to let the public know that the Mayor had sent out that our Mayor had sent out a directive that ends that practice, that if they as a citizen wanted any kind of document that was a public document, then they could go directly to that department. That should make their request more timely. He wanted to thank him for that.

Mayor Coody stated he wanted to add to that if someone wanted documentation that would come from several different departments, instead of having to go to several different departments, then they could come to the Mayor's office, they could then distribute the FOI and combine all the paper work at one place and present one package of information, rather than having someone go to several different departments. Other than that the building is open and there was no need for all the paper work. He would like to add that he thought people would find that this was going to be a more open and FOI friendly administration than a lot of cities.

Mr. Watkins thanked the Mayor for having him.

Mr. George Weiss, 1614 Sawyer Lane, asked if the two aldermen Kevin and Lioneld wanted to know from their constituents, and they invited all of them to a meeting, was that FOI?

Mr. Watkins replied, he would say, no. Because what they were doing was seeking input. He could invite everyone to error on the side of safety. When they were not discussing anything among themselves, but were listening. It was hard to say that was a meeting of the group, when the aldermen were attending the session.

Mr. Weiss stated this was the distinction he was trying to make. So informational gathering was okay?

Mr. Watkins replied, no. That was going too far. Too broad of a statement. A government body had to meet in public even if it took no action. Even if it was in an informational gathering mode. Governments were fond of having government retreats. Those meetings were not designed to have any immediate kind of action, the real purpose of those meetings were to sit back and get the big picture and do some informational gathering. That was going to be subject to the FOI, if that is something that was organized by the Council. On the other hand, just because two aldermen, in response to constituent request decide to gather with a citizens group,

doesn't mean that they had violated the two person rule. If it were the two aldermen who were calling the meeting and he was advising the aldermen, he would say notify the press and everyone, open it up to whoever wanted to come.

Mr. Weiss asked if there was a real FOI violation, what were the penalties?

Mr. Watkins replied a violation of the FOI is a crime, if it was a negligent violation. A negligent violation did not mean negligent in tort law, it meant gross or reckless violation. It was punishable by so many days in jail and a fine. The judge could impose a sentence of public education. One example was in a town where the Mayor of a town held an executive session to talk about personnel issues, those were allowable under the terms of the FOI, you could go into executive session to make certain personnel decisions about a specific person. That was what they did, then they got to talking about other stuff that had nothing to do with the purpose of the executive session. So at that point, it became an illegal closed meeting. They went in legitimately, but then they started talking about something beyond the scope of the executive session. The mayor was convicted of violating the FOI because the law was clear that if they had an executive session for personnel matters that was what they could talk about and that was all. The judge sentenced him among other things to read the Freedom of Information and to attend a seminar on the law. It was possible to have a sentence of jail time, but it was very rare.

Mr. Jeff Erf stated his question was a document related question and the charge for photo copies.

Mr. Watkins replied when he did a program, what he usually did was talk about both the records part and the meetings part of the act.

Mayor Coody thanked Mr. Watkins and stated he had learned a lot tonight.

INTERIM CITY ATTORNEY: Interviews with Interim City Attorney candidates.

Mayor Coody stated there was one item that they were going to discuss before they went into executive session. That was the ordinance which they had on the books concerning the salary for this position.

Five minute recess.

Mayor Coody stated they needed to discuss the salary.

Mr. Rose stated his job was governed by a thing called the Hay Plan. The Hay Plan was by their personnel department did a survey of all the City Attorneys in Arkansas of cities of this size, plus two or three surrounding states. From that their Personnel Director set a low range and a high range on salary. The low range was somewhere around \$55,000. The high range was

approximately \$75,000. After being here for twelve years, he was ceiling out. He was at the top at \$75,000 per year. They had an ordinance on the books which stated that the salary for a newly elected official was established at the minimum of the pay range determined by the most recent public sector survey conducted by the City, that was the Hay Plan. The ordinance stated, "newly elected official". He did not think that what they were doing tonight, was newly electing anybody. A newly elected official was one elected at a general election of the people. He did not think that the ordinance applied to that. Therefore, it was his recommendation to them that they set the salary for this official. That they were going to select as the new city attorney. He thought they set the salary. He suggested that it be somewhere on that range and that they did not go above or below that range, but within that range they could do whatever they wished. It had been pointed out to him that if they currently say they should give someone a \$70,000 salary to do their job, they would then run in November of 2002 and get a \$20,000 reduction in pay under this ordinance. They did have a year and a half to change this ordinance. His guess was that they would be under some degree of pressure to change the ordinance.

Alderman Reynolds asked how did they do the Mayor's salary?

Mr. Rose stated the Mayor's salary was an amalgam of a combination of the highest paid executives in the City.

Mayor Coody stated since they were missing Charlie Venable it turned, they took the next one.

Mr. Rose stated they gave the Mayor a salary of five percent over and above those salaries. There was a real advantage to the Hay Plan. He liked it very much. It took his salary out of the political arena and into an administrative arena. He liked it a lot. I might rob him of some pay, but politically he enjoyed it very much. He liked the fact his salary was taken out of the political area. It struck him that depending on who they selected and their degree of experience in Municipal Law and their degree of experience generally. There was nothing wrong with making a professional selection, then bargaining with them over a salary. Then bringing it back to the Council. Or they could set a certain salary.

Alderman Davis stated that was the way he would like to do, depending on their experience. It was going to take someone awhile to get Jerry's expertise.

Mayor Coody stated basically the folks applying for the job were going in without knowing what the salary was going to be. He thought it would be a fair assessment that it would be in the middle or above, to give them an idea.

Alderman Santos stated he did not believe it should be above. Some of the candidates might not be interested and they might want to drop out of the process now.

Mayor Coody stated he tended to believe with an attorney, and the amount they made. The qualified folks they had applying a mid-range of the salary would not be unfair. That was his personal take on it. He would defer to the Council on the choice on the City Attorney and the choice of the salary though.

Alderman Reynolds stated they would have to think about working for \$55,000 to \$75,000 and then going back to \$55,000 after the election.

Mr. Rose stated he assumed they might want to change the ordinance.

Alderman Zurcher stated from his point of view \$65,000, sure. If the City Attorney ran for this office and won, then he would want to make some kind of provision so there would not be that kind of pay cut, if the person were elected.

Mr. Rose explained about executive session. Executive Sessions are a noted exception, actually it was the only exception to open public meeting in the Freedom of Information Act. They may go into executive session, which means they go into a private session. And they could do that only in considering employment, appointment, promotion, demotion, discipline, or resignation. So the purpose of their executive session would be the employment of the new City Attorney until the next general election. The specific purpose of that executive session has to be announced in public before going into executive session. He would like one of them to articulate that, even though he just did, as to why they were doing it. He thought it would be wise if they voted to go into executive session as opposed to just going. He had been asked by the press to tell them they did not have to go into executive session, however, in the past they had done so. It was therefore the legal reason of developing a degree of candor in private over these kinds of employment matters. There might be some private things they might want to ask or be said, during those. The decision was up to them. They did not have to do that. Only the City Council members will be in the session. That was the eight of them and the Mayor. He would not be there. You will be on their own. There were five candidates for the position for the City Attorney. He had in his hat, numbers one through five. He thought, with their permission, that they would draw. As to how long they take with each interview, that was purely up to them. At the Agenda Session they had talked about fifteen minutes per person. Certainly, that too was not etched in stone. At the end of each individual interview just send them out and at the end of the fifth interview, if they would deliberate on what they wanted to do and who they wanted to select. At the end of their deliberations, they must come back in here and go into public session again. It required a public vote to whom they select. They need a motion and a second and an individual voice vote.

Alderman Trumbo stated it was his understanding that when they were in executive session that the eight aldermen vote and then they selectively tailor down to the least amount of votes and they just kept voting until there were two and then one and then they come out and the vote would be unanimous.

Mr. Rose replied there was no set procedure that he was aware of as to how they were to do that. Certainly, that method that he mentioned sounded logical and certainly was one that could be followed. There was nothing that was etched in stone as to any particular way in which it must be done, just that they make a decision and that they come out here and make that decision formal.

Alderman Trumbo asked what would happen if it was 4-4 vote.

Mr. Rose stated the Mayor may certainly vote under those circumstances. If they could not arrive at a conclusion.

Alderman Thiel stated he was also saying the Mayor could come out here and cast the vote for the whole.

Mr. Rose stated the Mayor may appear with them. Again, only if his vote was needed for the passage of a measure.

Alderman Young asked if he was correct in that they did not have to vote tonight.

Mr. Rose replied they did not.

Alderman Davis asked if they were allowed if they desired when they went into executive session to set the ground rules that they wanted to vote on.

Mr. Rose replied yes. They could vote for them anyway they wanted to, as long as it was not for an unconstitutional reason.

Alderman Reynolds asked when they went into the executive session, they were not allowed to talk about wages any further. They had to do that out here.

Mr. Rose replied, yes, in the sense that the only thing they could talk about was employment. It was an interesting question where or not, and it was his guess that once they got out of the session that the press was going to ask them what went on back there. The FOI was completely silent to whether or not they were to or can or can not reveal what went on back there. He would think, and his advice to them would be that they went into executive session for a good reason and that good reason continues. His advice to them would be to be discreet with that

information. However, he knew of no legal compunction or any bad thing that would happen to them if they did not.

Alderman Reynolds stated he would like for them to consider the figure of \$69,000 for a City Attorney. They had a municipal judge which worked part time that made \$65,000. He thought an eight to five attorney would respectfully earn \$69,000.

Mr. Rose stated he started out at \$50,000 per year. He thought that would be a good job, coming from the Attorney General's office. He had come in at the bottom twelve years ago. He only reminded them that the scale was there independently of him or anyone else. The scale had not been made up out of thin air. It went to other city's and determined what other cities were getting their City Attorney for.

Alderman Santos stated this session was Council meeting chaired by the Mayor and not a Nominating Committee meeting.

Mr. Rose replied it was a City Council meeting in executive session.

Mr. Estes asked if it was a correct understanding that the salary for this interim position would be \$65,000.

Mayor Coody asked if they should determine a number before they went into executive session.

Mr. Rose replied it was dealers choice. They were breaking new ground here. They needed to decide what they wanted to do.

Alderman Davis stated they had indicated that they wanted to leave it around \$65,000, then they could negotiate, depending on the experience they had.

Alderman Santos moved to set the salary at \$65,000. Alderman Thiel seconded the motion.

Alderman Young asked Mr. Rose if he was topped out under the Hay Plan.

Mr. Rose replied yes. He added the nice thing about the Hay Plan was that it was revised very two years. So ever two years he could move out from under that ceiling.

Mayor Coody stated there was a motion to set the salary at \$65,000.

Upon roll call the motion passed by a vote of 5-3. Reynolds, Davis, Trumbo voting nay.

Mr. Bob Estes stated he must withdraw his name from consideration.

Mr. Rose stated he needed a motion from someone to go into executive session, if that was their desire.

Alderman Davis moved that they go into executive session to discuss the employment of a City Attorney. Alderman Zurcher seconded the motion. Upon roll call the motion carried unanimously.

Executive session.

Mayor Coody asked if they needed to move to come into discussion.

Mr. Rose stated they needed a motion and a second and a vote and discussion if they wished.

Mayor Coody stated the announcement was that they had some excellent candidates and there was a lot of discussion. Everybody was well regarded. The decision was made that Kit Williams would be their City Attorney.

Mr. Rose stated they needed a motion, a second and a vote.

Alderman Zurcher moved to accept Kit Williams as City Attorney. Alderman Thiel seconded the motion. Upon roll call the motion carried unanimously.

Meeting adjourned at 10:45 p.m.