

**MINUTES OF A MEETING
OF THE
FAYETTEVILLE CITY COUNCIL
JULY 31, 2001**

A special meeting of the Fayetteville City Council was held on July 31, 2001 at 5:30 p.m. in Room 326 of the City Administration Building located at 113 West Mountain Street, Fayetteville, Arkansas.

PRESENT: Mayor Coody, Aldermen Davis, Santos, Jordan, Reynolds, Thiel, Zurcher, and Trumbo, City Attorney Kit Williams, City Clerk Heather Woodruff, Staff, Press and Audience.

AIRPORT

Review and approval of items related to the City of Fayetteville operations as Fixed Base Operator (FBO) at Drake Field.

Mayor Coody stated they had a contract with Fayetteville Air Service for a long time. By mutual agreement they have found ourselves to be in the position to sell fuel and run the FBO. They were expecting their contract to last until the end of August. However, last week they found out the company would be leaving July 31, 2001.

Mr. Gary Dumas stated they were anticipating bring this forward next month, however, because the time frame has been moved up they were having to call this special meeting. There were several items they needed to take care of today so that they could move forward. They had secured coverage through their insurance broker. They had secured fueling equipment and fuel. They had ninety day contract with Philips 66, they were the only ones that could provide fuel and equipment with only six days notice. They had to find a couple of extra people to provide approximately sixty more hours at the Airport because the FBO operation will have more extended hours than the normal forty hour work week that they currently have at the airport. The FBO will be open from 6:00 a.m. to 9:00 p.m. on weekdays and 6:00 a.m. to 6:00 p.m. in weekends. There were two former employees from the FBO who were contacted and who were interested in coming to work for us. Finally, they needed to secure the appropriate action from the council to make all this happen. They anticipated their revenues will cover all their expenses and as they increased their fuel sales they would be able to increase their revenues down there.

Alderman Davis asked if they were signing a lease with Philips.

Mr. Dumas stated it was a ninety day lease. They had a request for bids going out. They anticipated that to be on the August 21 agenda, but it would not take affect until this ninety day contract was up in October.

Alderman Davis asked what other services were they going to provide at the FBO beside the fuel.

Mr. Dumas stated initially any thing they would need for the airplane. They would try to provide

some rental car services thru a rental car agency. The idea was to move the FBO into the terminal building.

Alderman Davis asked if there would be any type of maintenance.

Mr. Dumas stated they had no ability to provide maintenance. Hopefully if they increase their activity at the airport they could get a business to provide those type of services.

Alderman Reynolds stated at one time they approved another operator at the airport.

Mayor Coody stated Fayetteville did have the second highest fuel prices in the State. Tomorrow they would be the lowest. They should be able to draw quiet a bit of business to Drake Field. They planned to break even.

Mr. Doug Wallace, Airport Board, stated the Airport Board would be looking at this tomorrow. For quiet some time there had been some unhappiness regarding the services at the Airport. These will be brought to an end. This will jump start activity at the airport to suddenly have the most competitive price in Northwest Arkansas. The ninety day period would give them the time to sort out thing and to develop a more comprehensive plan. Seven or eight days is not much notice for an operation such as this. The city's staff is to be commended on acting so fast and not leaving the airport without services.

Mr. Ken Shawsaw stated they had decided to hold off on their operation. They were interested in operating at the airport. His company nor ABP had any intention of going into business in competition with the city. They would rather work with them.

Mr. Williams read the ordinance for the first time.

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

Mr. Williams read the ordinance for the second time.

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

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

Mayor Coody asked shall the ordinance pass. Upon roll call the ordinance passed unanimously.

Alderman Zurcher moved to approve the emergency clause. Alderman Jordan seconded the motion. Upon roll call the motion carried unanimously.

ORDINANCE 4326 AS RECORDED IN THE OFFICE OF THE CITY CLERK.

Alderman Davis suggested incorporating the remaining six items into one resolution.

Alderman Davis moved to approve the remaining five items with one resolution. Alderman Trumbo seconded the motion. Upon roll call the motion carried unanimously.

RESOLUTION 108-01

SHEWMAKER SETTLEMENT

Mr. Williams state the ground rules will be that the Mr. Scott would present the Shewmakers case within thirty minutes. He will then respond to statements for not more than thirty minutes. This was not a question and answer period.

Mr. Scott stated that when they went to trial in October 23, the check book would be held by twelve people who were not residents of Fayetteville. He thought that they had reasonable grounds to exclude any city resident from that jury. They would be common folks with the common idea that were generally pretty favorable toward the plaintiffs.

This case involved his client's allegation of trespass. He presented a photo of the equipment used near their building. He stated the equipment had been operated next to and on the Shewmaker property. In 1992 the city vacated the easement on their property. The summer of 1997 the city was repaving the street. They came onto his client's property. Until July 10, the city had taken the position that they were not on their property. There was the issue of tort immunity. The city has now conceded by sworn affidavit that the city was on their property. The only question now was, were they there by permission. If they were not there by permission, then they trespassed and they were liable for an damages caused to the building. Mr. And Mrs. Shewmaker were going to testify that the city was not invited onto their property. They were going to have a swearing match. The city was going to say they were there by invitation. The Shewmaker's were going to say they were not. The Shewmakers were familiar with their property. Those cracks were not there until after the construction was done. The compactor came by their house and shook the house, after that there were cracks inside the building that were not there before. There had been some indication that they had not raised the claim for eight or nine months after the event. He felt that they had better than a fifty-fifty chance to win the case. He suggested to the council that they offer his clients a settlement of one hundred and fifty two thousand eight hundred and seventy two dollars in a way that they could consider. He did not want to lay their entire case out. What they were trying to do was to have a settlement negotiation. He passed out a copy of the jury instructions for damages in this type of case.

They were willing to settle for exterior damages. There had been some questions on the fair market value of the property. As far as the damage claim that was not relevant. Questions relating to insurance policy did not have any bearing on the lawsuit. The only thing important was who caused the damage and were they legally responsible for the damage and did they had a duty to them to not cause the damage. If the jury concluded yes to all those, then they had to pay them for their damages.

Mr. Williams stated if they went to trial they never knew how it would turn out. It was difficult to represent the government, because there was an anti-government attitude. He did not agree that everyone in Fayetteville would be excluded from the jury. He did not believe they should be excused for cause. He thought there would be a mixture of citizens on the jury. They will go in with a slight handicap of representing the city as opposed to representing a private individual. Normally they could not talk about insurance, but in this case the part of the insurance they would be interested in was how much did the Shewmakers decide to insure their building for. He thought that the value was important. He thought they could not recover a significant amount of money more than what the building was worth. The value of the insurance would be something that he would try and get before the jury. The judge would have to decide if that was admissible. How much was the building appraised for on the tax rolls and how much did they pay for the building. All these things were important. On June 27, 2000, the Shewmakers sued the city for trespass and nuisance. They allege that they city intentionally operated the roller on the Shewmaker property. That allegations was denied by Mr. Rose and he stood by that. Later on they also denied allegations of trespass on the property. Randy Allen had presented his affidavit that the city was personally requested to pay the very section of land on which the Shewmakers now claim we were trespassing. The city had legal tort immunity for any alleged negligence that they would commit. He will assert this immunity in court as a defense. Occasionally there was an exception and that was caused an intentional tort and one of those was trespass. That was what they were trying to alleged. The land that they are alleged to have trespassed on was in fact vacated to them approximately five years before. The city had voluntarily without cost vacated to Mr. Shewmaker at his request. The city should only be liable for an intentionally tort or act. In this case he did not think there was any proof that any city employee ever intentionally trespassed upon their land. If they were invited on there, that was not a trespass. If there was a mistake, that was not an intentionally trespass or act. Statutory immunity was designed to protect cities from mistakes. At best that was what happened here. It was not an intentionally wrongful conduct that was exempted. The city had no intention other than doing a public service, to pave the street. It should also be noted the Shewmakers made no complaint or claim for eight or nine months after the event. He noted two or three months before that Mr. Shewmaker had met with Mr. Venable, Public Works Director, to complain about a drainage problem on his property. Even then, no claim was made at that time. They have the burden of proof. They had to prove that the city damaged their property and that the city did not. He questioned why they waited eight or nine months that the city had damaged their property. That was a difficult burden that they had to face. The city had cooperated with the Shewmakers' insurance company and yet they

had not paid any claim to Mr. Shewmaker. He requested a copy of that report. No claim had been paid their own insurance company for this damage. Over the years they have had no other complaints of damage like this. They had done a similar test with this machine to see if it could cause the type of damage alleged by the Shewmakers. In their report they indicated that they could not see any damage caused. They had recently paved the parking lot behind city hall. There was no damage done to that building. It was always dangerous to go to a jury trial, but his feeling was that the city did not cause any damage to this building. He thought that it would be better to invest the money for an expert and pay more money to try and settle this case.

Mr. Scott stated the issue about the delay, the Shewmakers had lost several close family members. He thought they would get into the issue of inverse condemnation. The Shewmakers bought the property and refurbished it. There was been appreciation with its location.

In response to question from Alderman Zurcher, Mr. Scott stated the wall that the city had done their test on was now cracked. His expert has compared the test run by the city had the actually site were not compatible.

Alderman Davis asked how they were going to overcome the argument that Mr. Shewmaker had met about a drainage problem, but did not bring this problem up.

Mr. Scott stated they were there for a specific problem.

Mr. Shewmaker stated Mr. Venable had asked him to do some paving. He would not agree to do the paving because of the water that was coming onto his property and under his building.

Alderman Santos moved to offer the Shewmakers seventy-six thousand four hundred and thirty-six dollars. Alderman Zurcher seconded the motion.

Mr. Williams asked if they would be willing to accept the offer.

Alderman Thiel stated they were there to protect the citizens interests.

Mr. Williams asked that they would add a date certain.

Mayor Coody stated he had looked at the building and noted that the stone foundation which should have bore the brunt of the damage was not damaged at all and some of the plaster cracks on the side of the walls have been patched before. He knew that in dealing with plaster that it cracked and when it was patch there was a high likelihood that it would crack again.

Alderman Santos and Zurcher agreed to limit the offer to two weeks.

Upon roll call the motion carried by a vote of 5-2-0, Reynolds and Trumbo voting nay.

000403

City Council Minutes
July 31, 2001
Page 6

Meeting adjourned at 7:00 p.m.