

Mayor Lioneld Jordan
City Attorney Kit Williams
City Clerk Sondra Smith



Aldermen

Ward 1 Position 1 – Adella Gray
Ward 1 Position 2 – Brenda Thiel
Ward 2 Position 1 – Kyle B. Cook
Ward 2 Position 2 – Matthew Petty
Ward 3 Position 1 – Robert K. Rhoads
Ward 3 Position 2 – Robert Ferrell
Ward 4 Position 1 – Shirley Lucas
Ward 4 Position 2 – Sarah E. Lewis

**Final Agenda
City of Fayetteville Arkansas
Special City Council Meeting
June 9, 2009**

A meeting of the Fayetteville City Council will be held on June 9, 2009 at 5:30 PM in Room 219 of the City Administration Building located at 113 West Mountain Street, Fayetteville, Arkansas.

Call to Order

Roll Call

Pledge of Allegiance

A. New Business:

- 1. Hyland Park Phase II – Water Storage Tank:** A resolution to accept and approve the City Council Sewer Committee's decision to begin construction plans for a 500,000 gallon water storage tower on Lot 22 of Hyland Park Phase II.
- 2. Hyland Park Phase II – Declaratory Judgment Action:** A resolution to authorize the Fayetteville City Attorney to file a declaratory judgment action or other appropriate request for judicial relief concerning the ownership of Lot 22 of Hyland Park Phase II and the City's right to construct a water tower thereon.

Agenda Additions:

Announcements:

Adjournment:

NOTICE TO MEMBERS OF THE AUDIENCE

All interested parties may appear and be heard before the City Council. If you wish to address the City Council on an agenda item please queue behind the podium when the Chair asks for public comment. Once the chair recognizes you, go to the podium and give your name and address. Address your comments to the Chair, who is the presiding officer. The Chair will direct your comments to the appropriate elected official, staff member or others for response. Please keep your comments brief, to the point and relevant to the agenda item being considered so that everyone has a chance to speak.

Interpreters or TDD for hearing impaired are available for all City Council meetings, a 72 hour advance notice is required. For further information or to request an interpreter, please call 575-8330.

As a courtesy please turn off all cell phones and pagers.

A copy of the City Council agenda is available at accessfayetteville.org or in the office of the City Clerk, 113 West Mountain, Fayetteville, Arkansas.

**City Council Agenda Items
and
Contracts, Leases or Agreements**

6/9/2009

City Council Meeting Date
Agenda Items Only

David Jurgens

Submitted By

Water & Wastewater

Division

Utilities

Department

Action Required:

Approval of a resolution to accept and approve the City Council Sewer Committee's decision to begin construction plans for a 500,000 gallon water storage tower on lot 22 of Hyland Park Phase II.

\$ -

Cost of this request

\$ 2,189,147

Category / Project Budget

Mt Sequoyah Press Plane Imprvmt

Program Category / Project Name

5400.5700.5314.02

Account Number

\$ 139,888

Funds Used to Date

Water and Wastewater

Program / Project Category Name

04036-1

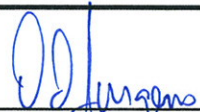
Project Number

\$ 2,049,259

Remaining Balance

Water/Sewer

Fund Name

Budgeted Item ☒ XXBudget Adjustment Attached ☐


Department Director

2 Jun 09

Date

Previous Ordinance or Resolution # 151-04

Original Contract Date: 10/5/2004



City Attorney

June 2, 2009

Date

Original Contract Number: 900

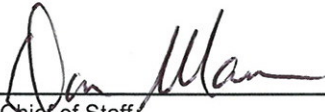


Finance and Internal Services Director

6-2-2009

Date

Received in City
Clerk's Office



Chief of Staff

6/2/09

Date

Received in
Mayor's Office



Mayor

6/2/09

Date

Comments:

CITY COUNCIL AGENDA MEMO

To: Mayor Lioneld Jordan
Fayetteville City Council

Thru: Don Marr

From: David Jurgens, Utilities Director
Fayetteville Sewer Committee



Date: June 2, 2009

Subject: Approval of a resolution to accept and approve the City Council Sewer Committee's decision to begin construction plans for a 500,000 gallon water storage tower on lot 22 of Hyland Park Phase II

RECOMMENDATION

Staff recommends approval a resolution to accept and approve the City Council Sewer Committee's decision to begin construction plans for a 500,000 gallon water storage tower on lot 22 of Hyland Park Phase II.

BACKGROUND

Lot 22 of the Hyland Park Phase II subdivision was designated as the site for the water storage tank when the subdivision plat was filed in July 1974, with the following statement on the plat: "Lot 22 has been approved by the Planning Commission for construction of a water tower and is to become the property of the City of Fayetteville."

DISCUSSION

At a Sewer Committee meeting on August 15, 2008, the Committee reviewed all viable tank alternatives and directed staff to proceed with negotiations with the Hyland Park Homeowner's Association regarding a potential land swap for another suitable property near the site. After information was sent to the HOA in September, 2008, no response was received from the HOA. In response to a letter sent by the City on 15 April, 2009, the HOA stated their refusal to negotiate or support the City's actions in any way. Negotiations have recently resumed, but a firm decision is required in order to proceed with tank construction.

Additional detail is included in the enclosed fact sheet.

A full presentation of the issues will be made at the City Council meeting.

BUDGET IMPACT

There is currently \$2,049,259 in the impact fee fund and \$128,549 in the Water/Sewer fund budgeted for this project.

MAY 29, 2009

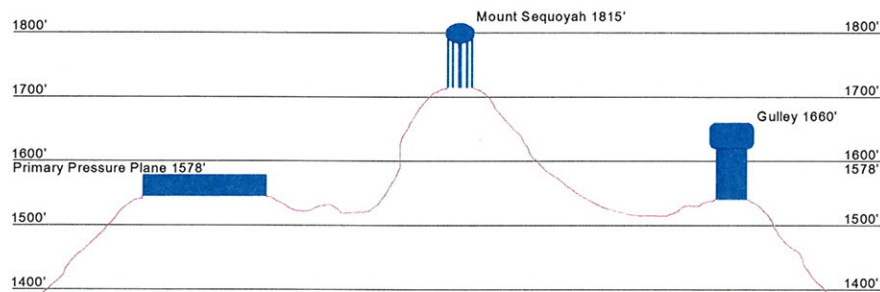
CONTACT: David Jurgens, P.E.
Utilities Director
479-575-8330
djurgens@ci.fayetteville.ar.us

MT. SEQUOYAH PRESSURE PLANE WATER STORAGE FACT SHEET

General

The City of Fayetteville provides water to its customers to meet three basic needs in the following priority order: domestic water consumption (including commercial and industrial uses), fire protection, and irrigation. This service requires a combination of water storage tanks, pump stations, and many miles of pipe.

Elevated water storage tanks, and pump stations to fill them, are required to provide adequate water flow and pressure to higher elevations of town. These tanks, like the one on Mt. Sequoyah, ensure consistent pressure and adequate volume to meet all three of the basic water needs. The majority of our customers receive pressure from the primary pressure plane which contains 27 million gallons of water. Residents on the highest elevations in the City receive water from the Mt. Sequoyah pressure plane, served by the tank on Skyline Drive, holding 250,000 gallons. Residents on the higher area east of the City, in the area around Sassafras Road, are served by the Gulley tank, holding 750,000 gallons of water. These relative elevations are shown below.



Comparison of Water Storage Elevations in Fayetteville

Mt. Sequoyah Pressure Plane Current Condition

In evaluating our system, the City identified a significant shortfall in the higher elevations including the areas of Mt. Sequoyah, Hillcrest, Rockwood, Applebury, Ridgeway, Hyland Park, and Canterbury. The entire affected area, shown on the attached map, contains 1,817 water connections and 162 fire hydrants.

The largest impact of this shortfall is that the entire area has inadequate fire protection, especially during summer peak water usage periods. The general residential fire protection requirement is 1,500 gallons per minute. At this time, fewer than 5% of the hydrants in this area can meet this requirement during peak usage. The shortfall also impacts our ability to provide consistent domestic water pressure and flow during summer peak usage periods. Customers at the highest elevations have very low pressure and flow during these times.



Mt. Sequoyah Pressure Plane Solution

To correct this shortfall, the City must build a water storage tank which will hold approximately 500,000 gallons to meet regulatory and industry design standards and meet water demand requirements during hot weather. This tank must be located on a hilltop, as the water pressure in our system is provided by gravity. The tank elevation is required to be 1815 feet above sea level, to provide adequate pressure and match the existing elevated water storage tank on Mt. Sequoyah, which is on this same system. Using ground storage tanks and/or pumps, both separately and in combination, has been evaluated, and will not meet the requirements due to the size of the area being served, the volume of water required, and the age of the existing water piping system.

In July, 2005, McClelland Consulting Engineers developed a Preliminary Engineering Report of alternatives; costs are shown below. The Arkansas Department of Health identified that our current water storage of 250,000 gallons is approximately 25% of what is needed, and that "additional storage needs to be constructed." The ADH letter of April 7, 2008 states "The Mt. Sequoyah area does not have adequate storage for the water demand in the area and the city needs to address the situation."

McClelland's report identified four possible locations and cost estimates, shown below and on the attached map. These estimates are based on March 2008 prices. They do not include a \$450,000 - \$660,000 pumping station that has to be installed no matter which alternative is selected; nor do they include the cost of purchasing land.

Site	General Location	Height	Pipe Length		Cost
			Required		
1	Hyland Park Phase 2 Platted Tower Lot 22	139'	2,900'		\$ 1,894,425
2	Skyline Dr. by existing Mt. Sequoyah Tank	101'	12,500'		\$ 3,845,760
3	South end of Crest Drive off Rockwood Tr.	109'	9,300'		\$ 3,413,035
4a	NW of Hyland Park Phase 2 Tennis Court	143'	3,500'		\$ 2,126,740

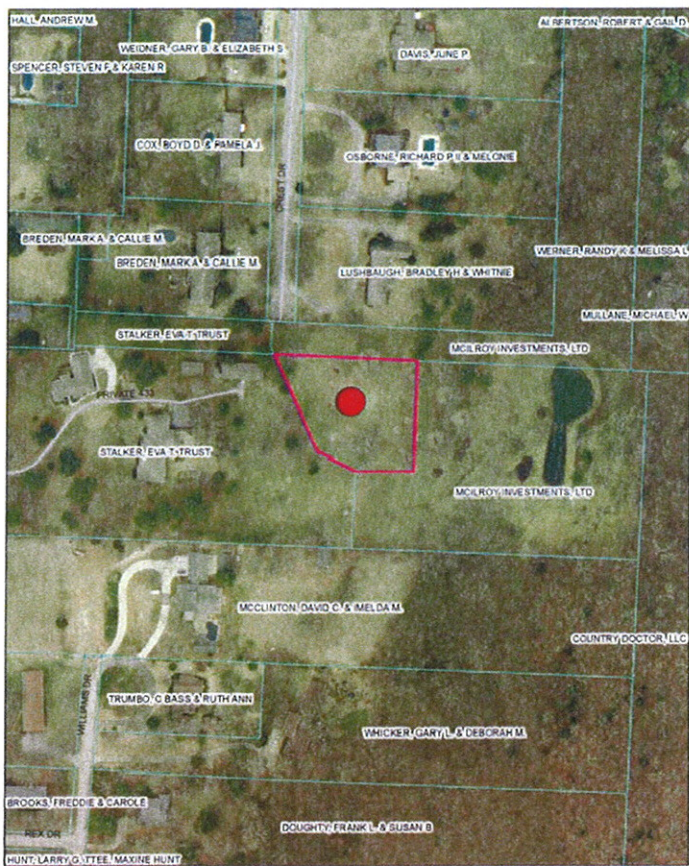
From the water hydraulics/engineering perspective, sites 1 and 4a, on the top of Hyland Park Hill, provide by far the best physical location as they place the storage closer to both the water pump stations that fill the tanks and to the areas of greatest use, balancing the system and providing the most reliable service. They also significantly reduce the amount of piping that would have to be constructed throughout the entire area. With a tank and pump station on both of the prominent hilltops in the system, storage is optimized to meet demand. Site 2, with the new tank being located adjacent to the existing tank on Skyline Drive, is the least desirable alternative. Close-ups of the approximate locations are shown in the attached aerial photos.

This project also has a significant impact on the City's overall fire protection, or ISO, rating, which directly impacts homeowners' insurance prices. The City is currently at a 4 rating. By adding fire stations, upgrading fire equipment, and improving the water system, we believe this rating can be improved City-wide. Not having this water storage tank project underway would probably negate the other improvements and keep the City at its current rating or cause the rating to be degraded, causing insurance rates city-wide to increase.

Attachments: Mt. Sequoyah Pressure Plane Map with Tank Sites
Tank Site Close-up Aerial Photos



Water Tank Options
Mount Sequoyah Pressure Plane



RESOLUTION NO. _____

A RESOLUTION TO ACCEPT AND APPROVE THE CITY
COUNCIL SEWER COMMITTEE'S DECISION TO BEGIN
CONSTRUCTION PLANS FOR A 500,000 GALLON WATER
STORAGE TOWER ON LOT 22 OF HYLAND PARK PHASE II

WHEREAS, the City Council Sewer Committee considered the scientific, legal, practical and location issues to fulfill the City's demonstrated need for additional water storage in the Mt. Sequoyah Pressure Plane during several lengthy meetings in 2008; and

WHEREAS, the City Council Sewer Committee on August 21, 2008 unanimously determined that the most cost effective, efficient, and safest solution is to build an additional 500,000 gallon water tower on or near Hyland Park Phase II; and

WHEREAS, in response to some suggestions or proposals of some members of the Hyland Park Homeowners Association, the City Council Sewer Committee asked City staff to examine the possibilities and propose any other sites near Lot 22 of Hyland Park Phase II which could be substituted for Lot 22 if the Hyland Park Homeowners Association or other private entities obtained and dedicated such acceptable site to the City of Fayetteville; and

WHEREAS, over eight months have elapsed since two alternate sites were made known to the Hyland Park Homeowners Association which responded to Mayor Jordan's "reminder" letter of April 15, 2009, about the "potential exchange arrangement" with a clear refusal for any cooperation as the "unanimous" position of this Association"; and

WHEREAS, during this Special City Council meeting, the City Council listened to Fayetteville citizens, engineers, the Fayetteville Fire Chief, the Fayetteville Water and Wastewater Director and other interested persons discuss the need for additional water storage, domestic water pressure issues, water necessary for fire fighting capability, fire insurance rate issues, hydraulic considerations for effectively serving residences on the two mountains in the Mt. Sequoyah Water Pressure Plane, aesthetic issues, and the historical record surrounding Hyland Park Phase II, its Final Plat and Lot 22.

**NOW, THEREFORE BE IT RESOLVED BY THE CITY COUNCIL OF THE
CITY OF FAYETTEVILLE, ARKANSAS:**

Section 1: That the City Council of the City of Fayetteville, Arkansas hereby agrees with, accepts and reaffirms the well reasoned decision of the City Council Sewer Committee that the Mt. Sequoyah Water Pressure Plane, which serves not only the numerous homes on the upper level of Mt. Sequoyah, but also many homes and future home sites on the mountain upon which Hyland Park and Stone Mountain developments sit, is in urgent need of expanded water storage not only for adequate pressure for domestic use, but for fire fighting water.

Section 2: That the City Council of the City of Fayetteville, Arkansas hereby agrees with, accepts and reaffirms the well reasoned decision of the City Council Sewer Committee that the most cost effective, efficient and safe location for additional water storage is on or very near the top of the mountain occupied by Hyland Park Phase II.

Section 3: That the City Council of the City of Fayetteville, Arkansas hereby determines that since the Hyland Park Homeowners Association has refused and failed to propose or convey any other scientifically and financially sound alternative to Lot 22 of Hyland Park Phase II, City staff should proceed with construction plans for a 500,000 gallon water storage tower on Lot 22 which Note 3 of the Final Plat of Hyland Park, Phase 2 identified as: "3. Lot 22 has been approved by the Planning Commission for construction of a water tower and is to become the property of the City of Fayetteville."

PASSED and APPROVED this 9th day of June, 2009.

APPROVED:

ATTEST:

By: _____
LIONELD JORDAN, Mayor

By: _____
SONDRA E. SMITH, City Clerk/Treasurer



TO: **Dan Coody**, Mayor
City Council
David Jurgens, Water & Wastewater Director

FROM: **Kit Williams**, City Attorney

A handwritten signature in blue ink, appearing to read 'Kit Williams', with a long horizontal line extending to the right.

DATE: **July 29, 2008**

RE: **Water tank site at Hyland Park**

I. History of the Dedication to the City of the Water Tank Site

The Preliminary Plat for Phase II of the Hyland Park Subdivision was reviewed on March 28, 1974 before the Plat Review Commission of the Fayetteville Planning Commission. Jim Lindsey presented the plat which had been substantially revised from an earlier submission. City employee "Bobbie Jones said the site for water facilities should be shown some way. I would suggest giving it a lot number with a note on the plat that that Lot has been approved by the Planning Commission as a site for a water storage tank or however it is to be used." ((Page 2 of the Minutes of Plat Review Committee of May 16, 1974.))

On May 16, 1974, the Plat Review Committee again considered Hyland Park, Phase 2. City Engineer Paul Mattke noted:

"Lot 22 will be a water storage site and will be deeded to the City. It will not be a utility easement; it will be public property. The note referenced to it should be changed to say that it is to become the property of the City of Fayetteville, then sketch in whatever easements the utility companies need.

...

"Make the note similar to the one used on Rosewood Estates. (That Plat had a note which read, 'Lot ____ has been approved

by the Planning Commission for construction of a water pump station.”) (Page 6 of the Minutes of Plat Review Committee of May 16, 1974.)

On May 28, 1974, the Planning Commission reviewed the proposed Final Plat of Hyland Park, Phase 2, Block 5 with President of Hyland Park, Inc., Jim Lindsey present and representing the developers. The Planning Commission unanimously approved the Final Plat by passing Resolution PC 23-74. Section 2 of that Resolution states:

“That the City of Fayetteville, Arkansas accept the final plat along with the land dedicated for streets and other public uses in the Hyland Park subdivision described as follows”

On June 4, 1974, the Fayetteville Board of Directors approved the Hyland Park Subdivision, Phase II, Block 5 and passed Ordinance No. 2015 which stated:

“That the City of Fayetteville, Arkansas, hereby accepts and confirms the final plat of Hyland Park Subdivision, Phase II, Block 5, hereby accepts and confirms the dedication of the streets and utility easements shown therein and hereby declares said street and utility easements to be public streets and utility easements and the Board of Directors hereby assumes the care, control and jurisdiction of same.”

On July 19, 1974, Nita Lindsey as Secretary for Hyland Park, Inc. signed a corporate resolution as shown on the Final Plat of Hyland Park, Phase 2, Block 5:

“Resolution Resolved that Nita Lindsey, Secretary of Hyland Park, Inc. is hereby authorized to execute the certificate of Ownership and dedication as shown on this Final Plat.”

Also on the recorded Final Plat is:

“Certificate of Ownership and Dedications: We hereby certify that we are the owners of the property shown and described herein and that we do hereby dedicate all streets, alleys, easements, parks and other open spaces to public or private use as noted.”

Both Jim and Nita Lindsey signed this Certificate of Ownership and Dedication on July 19, 1974.

“Notes: ...

3. Lot 22 has been approved by the Planning Commission for construction of a water tower and is to become the property of the City of Fayetteville.”

The Final Plat also shows the:

“Certificate of Acceptance and Dedication: The dedications as shown on this subdivision are hereby accepted by the Fayetteville City Board of Directors on June 4, 1974.”

This was signed by Mayor Russell Purdy and attested to by City Clerk Darlene Westbrook on July 25, 1974. Thereafter, this Final Plat was filed for record at the Washington County Court House.

II. Analysis and Arguments of Hyland Park Residents

Hyland Park resident and outstanding attorney Connie Clark wrote a Memorandum arguing that the City of Fayetteville does not own Lot 22 (the water tank site) or has abandoned any rights it might have had to lot 22. She further asserts that “If the City of Fayetteville Condemns Lot 22, It Will Subject Itself To A Claim For Inverse Condemnation.” I will endeavor to respond to her assertions beginning with the most vital issue of ownership of the water tank site (Lot 22).

A. Does the City own Lot 22?

Ms. Clark notes that A.C.A. §14-301-102 states:

“No street or alley which shall be dedicated to public use by the proprietor of ground in the city shall be deemed a public street or alley, or to be under control of the city council, unless the dedication shall be accepted and confirmed by an ordinance specially passed for that purpose.”

Every year or so, our Planning Department compiles a list of dedicated streets and alleys which we then submit to the City Council for acceptance of the dedication of such streets by ordinance. I do not believe we have passed any such ordinance for easements, water or sewer mains, dedicated park land or other dedicated public space for the last couple of decades. I do not intend to recommend any such ordinance since I do not believe A.C.A. §14-301-102 applies to any dedications except for streets and alleys. This statute was apparently enacted by the Legislature (in 1875) to protect cities from having maintenance responsibilities for streets that could be unilaterally dedicated by a property owner. Not until the City Council accepted the dedicated street did the City have to assume the care and maintenance of the street.

The Property Owners Association admits “this statute refers only to streets and alleys,” but argues it should also be a requirement for any property dedicated to public use. Although I believe the Legislature had much stronger reasons to apply it to streets and alleys than to other public facilities, my opinion and the POA’s opinion of what the law should be is irrelevant. This statute requiring the dedication of streets and alleys to be accepted and confirmed by ordinance to be deemed a public street or alley refers **only** to streets and alleys.

“(T)he basic rule of statutory construction is to give effect to the intent of the legislature. **We construe a statute just as it reads, giving the words their ordinary and usually accepted meaning.**” Gonzales v. City of DeWitt, 357 Ark. 10, 159 S.W. 3d 298, 301 (2004) (citations omitted) (emphasis added)

This most basic rule of interpreting a statute shows it has no application to dedicated public property except for streets and alleys. Even if it did apply, Ordinance No. 2015 of June 4, 1974 and the Certificate of Acceptance of Dedication on the Final Plat signed by the Fayetteville Mayor and Clerk should dispel any issue concerning A.C.A. §14-301-102.

The POA then argues that the Certificate of Ownership and Dedication did not specifically name the water tank site (Lot 22): “We do hereby dedicate all streets, alleys, easements, parks and other open spaces to public or private use as noted.” While the POA emphasizes the “**or private**” use, I think the “**as noted**” is more important. The “Notes” specify that “Lot 22 has been approved by the Planning Commission for construction of a water tower and is to become the property of the City of Fayetteville.” Lot 22 is clearly “open space” and does not

have the designation “common property” as Lot 23 across the street carries. That “common property” is specifically “intended for use by the Homeowners in Hyland Park for recreation ...” and is thus for **private** use. Lot 22 “the property of the City of Fayetteville” “for construction of a water tower” is expressly public, not private property.

The POA challenges the above interpretation of the language of the Final Plat by citing City of Sherwood v. Cook, 315 Ark. 115, 865 S.W. 2d 293 (1993).

“The two essential elements of a dedication are the owner’s appropriation of the property to the intended use and its acceptance by the public.” Id. at 296.

The POA contends “neither of these two elements has been met in our case.” I believe that Note 3 clearly **appropriates** Lot 22 for a “water tower” and “property of the City of Fayetteville.” The Certificate of Acceptance of Dedication by Mayor Purdy along with Ordinance No. 2015 constitutes its **acceptance**.

The Arkansas Supreme Court in the City of Sherwood case held:

“The dedication is sufficient if it appears, from a consideration of the plat as a whole, with reference to the surrounding circumstances, that the spaces were intended to be devoted to a public use.” Id. at 297.

Note 3 of the Final Plat makes it clear that Lot 22 is intended to become city property for construction of a water tower.

The POA also argues that Note 3 is not a dedication to the public, but instead the developers were “reserving unto themselves the right to sell Lot 22 to the City of Fayetteville for construction of a water tower.” This is clearly not what Note 3 nor the Certificate of Ownership and Dedication says.

Even if the POA could argue that the owner’s Certificate of Dedication and Note 3 were ambiguous, the rules of construction require any doubt to be construed in the City’s favor.

“(A)ny doubt or ambiguity in the meaning of a dedicatory plat is **construed most strongly against the dedicator** and to the reasonable advantage of the grantees of the dedicated

use, *i.e.*, so as **to benefit the public rather than the donor.**
City of Cabot v. Brians, 93 Ark. App. 77, 216 S.W. 3d 627,
631 (2005) (emphasis added)

Therefore, even if there can be some argument about exactly what the dedicator on the Final Plat meant in his Certificate of Ownership and Dedication and Note 3, the argument must be resolved “**so as to benefit the public rather than the donor.**” Id.

B. Has the City abandoned its rights to Lot 22?

The POA contends that any interest the City might have had in Lot 22 has been abandoned and lost through non-use and lack of fencing and maintenance. There appears little statutory or case law support for this assertion.

“(W)hen an owner of land files a plat and thereafter lots are sold with reference to it, such action constitutes an irrevocable dedication of any street or passageway for public use shown or indicated on the plat. Furthermore, whenever a dedication becomes irrevocable, a public authority can accept the dedication for public use **whenever the necessity occurs.** City of Sherwood v. Cook, 315 Ark. 115, 865 S.W. 2d 293, 297 (1993) (emphasis added)

Thus, a city need not begin any active public use of a dedication at any particular time, but is free to do so “whenever the necessity occurs.”

In the City of Cabot v. Brians case, the Brians tried to quiet title (acquire ownership rights) to an access easement designated as “reserved” for a future right of way on a final plat. They asserted they had used the parcel as their own and were entitled to it through adverse possession. A.C.A. §22-1-204 prohibits the adverse possession of realty against a city.

“(A)n owner of land who sells lots by reference to a plat, makes an irrevocable dedication of the streets, alleys, squares, parks, and ‘**other public places marked as such on the plat**’ to the public use and that the dedication “becomes irrevocable the moment that these acts occur ... where lots have been sold

by reference to a plat, 'no formal acceptance by the city' is necessary because, by that act, the dedication becomes irrevocable." City of Cabot v. Brians, supra at 632 (citations omitted)(emphasis added)

The "irrevocable dedication" of public places shown on the plat occurs when any lot is sold and "once the dedication has occurred, the City may accept it at any time or when the necessity should arise." Id. The Fayetteville Water and Sewer Department and the Fire Department say that time is now and the necessity to construct the water tower is now.

"(T)he City need not have formally accepted or confirmed the dedication of the parcel under the circumstances of this case or made immediate use of the parcel once acquired. The irrevocable dedication occurred when lots were sold by reference to the plat, and the City, at that point, could accept the dedication at any time. Such dedication and right to accept it invested the City with, at the very least, a 'right to possession' of the parcel, which under Ark. Code Ann. §22-1-204, would bar appellees' adverse-possession claim." Id.

C. Will the City Be Liable for Inverse Condemnation For Constructing a Water Tower on Lot 22?

Such a contention was presented by the Mintons in Minton v. Craighead, 304 Ark. 141, 800 S.W. 2d 707 (1990). In that case the owners claimed "their residential properties had been devalued because Craighead County had built a jail in their neighborhood." Id. at 708. The Arkansas Supreme Court affirmed the dismissal of their claims as follows:

"It must often happen that the value of a city lot is diminished as a result of the condemnation of adjoining property for some distasteful purpose, such as the construction of a city jail. But as the court convincingly demonstrated in City of Geary v. Moore, 118 Okl. 616, 75 P.2d 891, this is an injury 'for which the law does not, and never has, afforded any relief.'" Id. at 708, 709.

III. Conclusion

The POA's attorney, Connie Clark, has presented good arguments in her Memorandum pointing out all of the possible weaknesses in the City's position that it received Lot 22 as a dedication on the 1974 Final Plat of Hyland Park, Phase II, Block 5. I certainly admit the situation would be more clear if the Certificate of Ownership and Dedication had expressly mentioned Lot 22 or if the Plat had writing on Lot 22 such as: "City property, Water Tower site." The dedicator instead referred in his dedication to "other open spaces to public or private use as noted." He then noted in Note 3 that "Lot 22 has been approved by the Planning Commission for construction of a water tower and is to become property of the City of Fayetteville."

Note 3 itself could have been more clearly worded, but "any doubt or ambiguity in the meaning of dedicatory plat is construed most strongly against the dedicator and to the reasonable advantage of the grantees of the dedicated use, *i.e.* so as to benefit the public rather than the donor." City of Cabot v. Brians, 93 Ark. App. 77, 216 S.W. 3d 627, 631 (2005).

I believe the City has a strong case supporting its position that Lot 22 has been dedicated to the City for use as a water tower site. Reasonable minds can differ in their interpretation of the facts and law so that litigation is always possible and in this case, very likely. Although I believe the City would probably prevail, it is not inconceivable that the POA would be successful.

The impact of placing such a tall water tower within this long established and beautiful neighborhood should not be ignored. All of us realize its impact on the closest neighbors would be very significant. Therefore, **I anticipate protracted litigation from the POA** (which includes several extremely competent attorneys) if no solution other than to build a water tower on Lot 22 can be found. The POA might be able to prevent construction during this litigation by Court injunctive relief. Even without such an injunction, the City Council would have to decide whether to proceed with construction and risk being forced to condemn the property (if the POA was successful) or to delay until the Court could rule.

**City Council Agenda Items
and
Contracts, Leases or Agreements**

6/9/2009

City Council Meeting Date
Agenda Items Only

David Jurgens
Submitted By

Water & Wastewater
Division

Utilities
Department

Action Required:

Approval of a resolution to authorize the Fayetteville City Attorney to file a declaratory judgment action or other appropriate request for judicial relief concerning the ownership of Lot 22 of Hyland Park Phase II and the City's right to construction a water tower thereon.

\$ -
Cost of this request

\$ 2,189,147
Category / Project Budget

Mt Sequoyah Press Plane Imprvmt
Program Category / Project Name

5400.5700.5314.02
Account Number

\$ 139,888
Funds Used to Date

Water and Wastewater
Program / Project Category Name

04036-1
Project Number

\$ 2,049,259
Remaining Balance

Water/Sewer
Fund Name

Budgeted Item ☒ XX

Budget Adjustment Attached ☐

[Signature]
Department Director

2 Jun 09
Date

Previous Ordinance or Resolution # 151-04

[Signature]
City Attorney

June 2, 2009
Date

Original Contract Date: 10/5/2004

Original Contract Number: 900

Paul A. Becker
Finance and Internal Services Director

June 2, 2009
Date

Received in City
Clerk's Office

ENTERED
6-2-09 LWS

Jim Man
Chief of Staff

6-2-09
Date

Received in
Mayor's Office

ENTERED
6/2/09
PJT

Twyll Jordan
Mayor

6/3/09
Date

Comments:

CITY COUNCIL AGENDA MEMO

To: Mayor Lioneld Jordan
Fayetteville City Council

Thru: Don Marr

From: David Jurgens, Utilities Director
Fayetteville Sewer Committee



Date: June 2, 2009

Subject: Approval of a resolution to authorize the Fayetteville City Attorney to file a declaratory judgment action or other appropriate request for judicial relief concerning the ownership of Lot 22 of Hyland Park Phase II and the City's right to construction a water tower thereon

RECOMMENDATION

Staff recommends approval of a resolution to authorize the Fayetteville City Attorney to file a declaratory judgment action or other appropriate request for judicial relief concerning the ownership of Lot 22 of Hyland Park Phase II and the City's right to construction a water tower thereon.

BACKGROUND

Lot 22 of the Hyland Park Phase II subdivision was designated as the site for the water storage tank when the subdivision plat was filed in July 1974, with the following statement on the plat: "Lot 22 has been approved by the Planning Commission for construction of a water tower and is to become the property of the City of Fayetteville."

DISCUSSION

At a Sewer Committee meeting on August 15, 2008, the Committee reviewed all viable tank alternatives and directed staff to proceed with negotiations with the Hyland Park Homeowner's Association regarding a potential land swap for another suitable property near the site. After information was sent to the HOA in September, 2008, no response was received from the HOA. In response to a letter sent by the City on 15 April, 2009, the HOA stated their refusal to negotiate or support the City's actions in any way. Negotiations have recently resumed, but a firm decision is required in order to proceed with tank construction.

Additional detail is included in the enclosed fact sheet.

A full presentation of the issues will be made at the City Council meeting.

BUDGET IMPACT

There is currently \$2,049,259 in the impact fee fund and \$128,549 in the Water/Sewer fund budgeted for this project.

RESOLUTION NO. _____

A RESOLUTION TO AUTHORIZE THE FAYETTEVILLE CITY ATTORNEY TO FILE A DECLARATORY JUDGMENT ACTION OR OTHER APPROPRIATE REQUEST FOR JUDICIAL RELIEF CONCERNING THE OWNERSHIP OF LOT 22 OF HYLAND PARK PHASE II AND THE CITY'S RIGHT TO CONSTRUCT A WATER TOWER THEREON

WHEREAS, the City Council has determined that the City needs to construct a 500,000 gallon water storage tank on Lot 22 of Hyland Park Phase II; and

WHEREAS, the Hyland Park Homeowners Association has maintained "that the city does NOT own lot 22," (letter of May 1, 2009; attached as Exhibit A); and

WHEREAS, the Hyland Park Homeowners Association has asserted "that the City will have to prove its ownership of Lot 22 in a Court of competent jurisdiction and (4) such may well result in a substantial pecuniary loss to the city." (letter of May 1, 2009)

NOW, THEREFORE BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF FAYETTEVILLE, ARKANSAS:

Section 1: That the City Council of the City of Fayetteville, Arkansas hereby authorizes the Fayetteville City Attorney to file a Declaratory Judgment action or other appropriate request for judicial relief concerning the ownership of Lot 22 of Hyland Park Phase II and the City's right to construct a water tower thereon.

PASSED and APPROVED this 9th day of June, 2009.

APPROVED:

ATTEST:

By: _____
LIONELD JORDAN, Mayor

By: _____
SONDRA E. SMITH, City Clerk/Treasurer

From: Lioneld Jordan
To: Williams, Kit
Date: 5/4/2009 12:23 PM
Subject: Fwd:
Attachments: Hyland Park HOA.wpd; Hyland Park HOA.doc; Hyland Park HOA.pdf

FYI
Lana

>>> "Chip Wright" <chip_wright@cox.net> 5/1/2009 5:00 PM >>>

To the Mayor and All Council Members:

Attached in three separate formats (Word Perfect – wpd; Word – doc and Acrobat – pdf) is a letter setting forth the position of the Hyland Park Property Owners Association, Phase II, to the letter of April 15, 2009 from Mayor Jordan. In addition, a hard copy of the letter is being sent to the Mayor and those Council members choosing to list their addresses on the City of Fayetteville web site.

By copy of this email to all homeowners in the Association, I am likewise furnishing them with a copy of the already approved letter, also in the three formats noted above.

The President of our Association is Herschel Sandefur; the Secretary is Connie Clark; I am the Treasurer.

Any or each of you should feel free to contact any member of this Association to address any questions you might have concerning our position as the letter does, in fact, set forth the unanimous position of this Association.

Thanks,

Tilden P. "Chip" Wright III
Treasurer
Hyland Park Homeowners Association, Phase II
2405 Boston Mountain View
Fayetteville, AR 72701
Home: 479-521-3263
Cell: 479-841-7456
email: chip_wright@cox.net

E-mail message checked by Internet Security (6.0.0.386)

Database version: 5.12300

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HYLAND PARK HOMEOWNERS ASSOCIATION, PHASE II

Tilden P. Wright III, Treasurer

2405 Boston Mountain View

Fayetteville, AR 72701

May 1, 2009

Re: Reply to Water Tower Ultimatum

Mayor Lioneld Jordan
City of Fayetteville
113 West Mountain Street
Fayetteville, AR 72701

Mayor Jordan:

Homeowners in Hyland Park Phase II, an addition to the City of Fayetteville, received copies of your letter of April 15, 2009. As you addressed your letter to me, instead of to our President, it has fallen upon me to respond.

At a regularly scheduled meeting of the Homeowners Association, held on the 20th of April, 2009, your letter was an agenda item. At the outset, let me congratulate you on alienating each and every homeowner in this association. Your letter and delivery of an ultimatum was offensive.

The members of our association have attended numerous meetings with the city, including the engineering office, as well as public forums. At every turn we have tried to inform city representatives that the city does NOT own lot 22. Although at one time offered to the City, a legal dedication, as required by Arkansas law, did not occur solely due to the failure of the governing body of the City to accept such a generous offer long before development and construction of this residential neighborhood. The City has never maintained Lot 22; has never participated in any of the costs incurred by this Association for its maintenance; has not paid any of the Association annual dues nor exercised any of the other normal indicia of a claim of ownership. The payment of property taxes, upon which you so heavily rely, only began when your ownership was first placed in question. Prior to learning of the Associations denial of your ownership, you expressed absolutely no interest in Lot 22. Lot 22 and the proposed water tower site sits in the front yard of one of our neighbors and is within 100 feet of their residence. Lot 22 together with the common area immediately across the street, is the point of entry to this established neighborhood and will be forever blemished by this construction. At a time of significant home devaluation nationwide, your proposed action further makes our property less valuable and certainly less marketable.

Although a task normally relegated to the city, our HOA has suggested several options. We have asked that the city consider the abandoned fire station property on Crossover or an "undeveloped" elevated site to use for water storage. We have asked them to consider underground storage on our common property with a "smart" pump or at least some combination that results in a smaller above ground storage unit. We are not alone in trying to help the city. A site has even been freely offered by the Stone Mountain Developer. These options appear reasonable, and should certainly merit discussion. But, from the very outset of this latest effort to take property from this Association, it became apparent the City did not want to consider alternatives. All of our arguments and requests have fallen on deaf ears. The decision had

§ already been made. In spite of the alternatives offered, Page 2
May 1, 2009

the city remained on target to construct a 14 - story, one-half million gallon water tank at the entry to our neighborhood .

In an amazing show of arrogance and audacity, the city attorney even requested that this Association prove the city does not own lot 22; we were asked by then Mayor Coody to try to negotiate with another neighbor, not a part of our neighborhood association, to obtain a site for the city; we have been asked to find and purchase a suitable site and "donate" it to the city; and we have been asked to swap our common area land on which neighborhood amenities exist for an unclouded title to a lot we already own, lot 22.

We are unaware of the city ever placing such a huge piece of infrastructure in an individuals' yard in an established neighborhood. Orders from the department of health and the shrill cries about fire safety reveal that the city has likely failed to meet its water infrastructure needs for many years. It is wrong to punish homeowners by ruining a well established neighborhood to quickly cover for the administrations lack of planning, poor system maintenance, and failure to build water infrastructure in the new neighborhoods which are the root cause behind the need for the tower.

Here is our answer to your ultimatum:

- a. We will not "swap" a piece of the common area property for an unclouded title to lot 22;
- b. We will not acquiesce in the claim of ownership, by the city, of Lot 22; and
- c. We will not acquiesce in the construction of a water tower anywhere within Hyland Park Phase II.

It is my belief that some, if not all, of the members of this Association will take whatever actions they deem necessary to protect their investments in their homes. I further believe that some outside of this Association will also suffer consequences from this action by the city and I would anticipate they would likewise take action to protect their homes. There is no doubt that the construction of this contemplated water tower at the chosen site will have a significant, negative impact on the values of every home located in its vicinity. Whether the city, its attorney, its governing body or others believe there is real monetary exposure under these circumstances is not the point. The point is (1) the exposure does exist; (2) it will be decided, not by the city and not by the Association, but rather by an independent legal body; (3) it is very likely that the city will have to prove its ownership of lot 22 in a Court of competent jurisdiction and (4) such may well result in a substantial pecuniary loss to the city.

We sincerely hope you reconsider this ill-fated decision.

Tilden P "Chip" Wright III
Treasurer
Hyland Park Phase II

cc: Fayetteville City Council Members, by regular mail and email
Homeowners, Hyland Park Homeowners Association, Phase II



TO: **Lioneld Jordan**, Mayor
City Council

CC: **David Jurgens**, Utilities Department Director

FROM: **Kit Williams**, City Attorney

A blue ink handwritten signature, likely of Kit Williams, written over a horizontal line.

DATE: **May 5, 2009**

RE: **Hyland Park Homeowners' Association letter of May 1, 2009**

The City of Fayetteville has long tried to work with the Hyland Park Homeowners' Association about the City's need to install a water tank at a usable level on that mountain. In late July of 2008, I issued a legal memo (copy attached) detailing how and why Lot 22 of Hyland Park Phase II came to be set off and dedicated to the City of Fayetteville "for construction of a water tower and is to become the property of the City of Fayetteville." (plat of Hyland Park, Phase II)

The POA pointed out potential weaknesses in the language of the plat and argued that the City does not own Lot 22. I quoted in my Conclusion from a 2005 Court of Appeals' case that: "any doubt or ambiguity in the meaning of the dedicatory plat is construed most strongly against the dedicator (developer) and to the reasonable advantage of the grantees of the dedication use, i.e. so as to benefit the public rather than the donor." City of Cabot v. Brians, 93 Ark. App. 77, 216 S.W. 2d 627, 631, (2005).

I stated then and continue to believe that "the City has a strong case supporting its position that Lot 22 has been dedicated to the City for use as a water tower site." I also noted that "Reasonable minds can differ in their interpretation of facts and law so the litigation is always possible and in this case, very likely."

Following another City Council Sewer Committee meeting on August 21, 2008, the Committee unanimously determined that an elevated water tank on Hyland Park's mountain was necessary and advisable. The aldermen hoped that

City staff could work with the Hyland Park Homeowners' Association to see if another feasible site for the water tank could be found at a proper elevation on the mountain. City staff did attempt such cooperation. Attached is a copy of my letter to Bill Clark of Hyland Park discussing two other possible locations for the water tower.

Unfortunately, no progress was made. Finally, (seven months after my letter identifying three possible options) on April 15, 2009, Mayor Jordan sent a letter (attached) to Chip Wright, Jim Waselues and Bill Clark who had all been very active in this matter. Although Mayor Jordan's letter was termed "an ultimatum (and) offensive," by Mr. Wright, it was polite, if necessarily clear, that the City could not wait any longer to accomplish the needed upgrade to our water capacity not only for homeowners' normal uses, but for fire protection. I urge you to read Mayor Jordan's letter yourself.

All of the "options" suggested by Mr. Wright in his letter have been examined by City engineers and independent engineers and rejected as not feasible or much more expensive, unfair to other neighborhoods and not the most effective solution to the water capacity needs (especially for fire protection). Most, if not all of these other options were rejected unanimously by the Aldermen Sewer Committee in August of 2008.

WHAT TO DO NOW?

Unless the City Council wishes to reverse the unanimous decision of the Aldermen Sewer Committee, City Staff will need to begin the design of the water tank on the Hyland Park Mountain. Currently the only land owned or dedicated to the City of Fayetteville that will be feasible for such water tower appears to be Lot 22 of Hyland Park, Phase II.

Such an elevated water tank will be expensive to engineer and will need to be engineered for a specific site and elevation. I noted in my conclusion to my July 29, 2008 memo: "Although I believe the City would probably prevail, it is not inconceivable that the POA would be successful." Therefore, in order to give our citizens even more assurance that the tax revenues will not be endangered, we may need to proceed with a Declaratory Judgment suit so a Court can analyze the facts, plat, and law to determine whether our dedication rights prevail over any claims by the POA.

I filed a Declaratory Judgment Action in the TIF bonds case and was glad I did when the Supreme Court ruled the originally approved distribution of property tax increments had to be changed in order to be constitutional. That Declaratory Judgment suit prevented a later illegal exaction suit which would have been successful and would probably have cost our city's and our schools' taxpayers potentially hundreds of thousands of dollars in attorney's fees. Not as much money is probably at stake here, but I still feel it would be worth the expense and effort of litigation to get a judicial decision about Lot 22.

I believe that City staff will present a Resolution for your consideration in the near future to allow full discussion before the entire City Council so that you can determine whether or not you wish to authorize the construction of a water tank on Lot 22. A second section of this Resolution will probably allow you to determine whether or not you wish me to file a Declaratory Judgment action prior to construction to resolve the issue of the dedication of Lot 22 to the City for use as a water tower site.



April 15, 2009

Mr. Chip Wright
Hyland Park II Homeowners' Association
2405 East Boston Mountain View
Fayetteville, AR 72701

Dear Mr. Wright,

At the Water and Sewer Committee meeting August 21, 2008, representatives of the Hyland Park II Homeowners' Association stated they would attempt to identify land that met the stated placement requirements of the water tank site in the vicinity of alternative 4, northwest of the intersection of Canterbury Road and Boston Mountain View. The stated intent was for the land to be swapped, at no expense to the City, for lot 22, designated on the subdivision plat as the water tank site.

Fayetteville must proceed with the construction of this much needed water storage tank, but has not yet received information that a piece of land has been designated and a potential exchange arrangement has been initiated. Adequate time has passed for any arrangements to be made. If the City does not receive information whereby we can review the suitability of an adequate area at the alternative 4 site west of Canterbury Road prior to May 15, 2009, then we shall begin final design, followed by tank construction, for lot 22.

Thank you for your time. Please do not hesitate to contact me at 479-575-8330 if you have any questions.

Sincerely,

City of Fayetteville

A handwritten signature in cursive script, appearing to read "Lioneld Jordan".

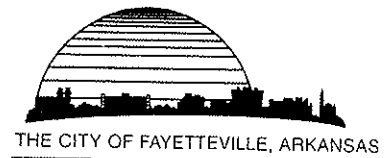
Mayor Lioneld Jordan

cc: Jim Waselues, 1018 North Canterbury Road
Bill Clark, 823 North Canterbury Road

KIT WILLIAMS
FAYETTEVILLE CITY ATTORNEY

DAVID J. WHITAKER
Assistant City Attorney
Judy Housley
Office Manager

Phone (479) 575-8313
FAX (479) 575-8315



113 W. Mountain, Suite 302
Fayetteville, AR 72701-6083

September 15, 2008

Honorable Bill Clark
111 Holcomb
Springdale, AR 72764

RE: Water Tower site

Dear Bill:

The Water and Wastewater Department has studied three potential sites on your mountain and the minimum area needed for each site. Enclosed are area maps of each site:

- (1) Lot 22 (basically the whole lot with any left over being buffer);
- (2) Lot 23 with a portion of the strip of land which is probably still owned by Lindsey. This would not use all of Lot 23 as the pool and clubhouse would be unaffected;
- (3) A portion of lot 7 of John Smyth Addition (Gary Combs' lot with a portion of the Lindsey undeveloped and undedicated jeep trail. This must be larger because we anticipate the need to build a retaining wall and do more grading on this steeper slope.

I also enclosed two larger versions of 2 and 3 for your use in a neighborhood meeting.

The City's engineers looked for cases where water towers had collapsed in the United States and could find no examples in recent years. (They found no examples at all, but only went back a few years.) I believe the Mayor has committed to including your neighborhood input about the design of the water tower. Please let me know if you need further information.

With kindest regards,

A handwritten signature in black ink, appearing to read 'Kit Williams', written over a horizontal line.

KIT WILLIAMS

Fayetteville City Attorney

KW/jh

Enclosures

Cc: Mayor Coody