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TO: Mayor Jordan

CC: Don Marr, Chief of Staff

FROM: Kit Williams, City Attorney

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LITIGATION & NEGOTIATION HIGHLIGHTS OF 2016

I. Litigation Highlights

A. *Washington Regional Medical Center v. Heirs of Stone Family v. City of Fayetteville*, Washington County Circuit Court Case No. CV-14-1288-4

Because of a reversionary clause in the Stones' 1906 deed of the land to the City of Fayetteville for a City Hospital and the Stones' deed of 1909 deleting or changing this reversionary clause, I advised that the City only quit claim the deed of this property to the successor hospital in the City, Washington Regional. Accordingly, Washington Regional needed to file and did file a Quiet Title Action to obtain clear, marketable title before its possible sale to the Fayetteville Public Library.

A few of the Stone heirs objected to this Quiet Title Action and convinced the Circuit Judge to bring the City into this suit shortly before the scheduled trial. I immediately filed an Answer, responded to discovery and filed a Motion for Summary Judgment. **The Circuit Court granted Washington Regional Medical Center's Motion for Summary Judgment as well as the City's Summary Judgment Motion and granted WRMC's Quiet Title Action on March 3, 2015.**

Unfortunately, the Stone Heirs filed their Notice of Appeal in late March. They later filed the Appellants' Brief and Appendix.

On August 21, 2015, the City Attorney's Office filed its Appellee's Brief responding to what we believe are not meritorious or well-founded arguments by the Stone Heirs who continue to challenge our granted Motion for Summary Judgment.

On March 9, 2016, the Arkansas Court of Appeals panel unanimously affirmed Circuit Judge Beaumont's decision to grant Washington Regional and the City of Fayetteville Summary Judgment Motions and to Quiet Title of the old City Hospital property to Washington Regional Medical Center.

Parts of that decision are quoted below:

"The City through proper city resolutions, appointed two new members to the FCH (Fayetteville City Hospital) Board." "(T)he city took appropriate steps to convey the FCH property to WRMC. On September 13, 2011, the City passed a resolution and ordinance approving the transfer of the FCH property by quitclaim deed to WRMC." "Therefore, we conclude that the circuit court correctly quieted title to the FCH property in WRMC." (page 11, 12 of Opinion).

Appellants then filed a Petition for Rehearing before the Arkansas Court of Appeals and a Petition for Review to the Arkansas Supreme Court. I filed a Response to the Appellants' rehearing request in the Arkansas Court of Appeals where I pointed out their claim that a new Arkansas statute entitling a "settlor of a charitable trust" gave these heirs a proper standing to sue in this case was not applicable "because not one of the appellants is a 'settlor of a charitable trust.'"

The Arkansas Court of Appeals' larger panel (6 Justices) technically granted the appellants' rehearing request, but then immediately submitted another almost identical opinion affirming our win which referred to this statute. The Court of Appeals unanimously agreed with the argument I had made. "However, because appellants herein are heirs of the settlor and not the settlor, this provision is inapplicable."

The actions and legal positions of Washington Regional and the City of Fayetteville have now been found legal and proper by Circuit Judge Beaumont and six unanimous Court of Appeals Justices.

I also filed a Response To Appellants' Petition For Review by the Supreme Court. This Petition For Review was granted by the Arkansas Supreme Court, but oral argument denied. Unfortunately, the Arkansas Supreme Court has held this appeal without decision for several months now.

B. *Repeal 119, et al. v. City of Fayetteville, et al., Washington County Circuit Court Case No. CV-15-1510-1*

On August 31, 2015, within hours of the beginning of early voting for or against referred Ordinance No. 5781, An Ordinance To Ensure Uniform Nondiscrimination Protection Within The City Of Fayetteville For Groups Already Protected To Varying Degrees Throughout State Law, the former Repeal 119 and three residents of Fayetteville filed a Verified Complaint and Motion For Declaratory Judgment and requested the Circuit Court to immediately grant the Plaintiffs' Motion For Emergency Temporary Restraining Order (filed concurrently with the Complaint). No service of the Complaint or Motion For Emergency TRO was made against any Fayetteville defendants.

On September 3, 2015, the City of Fayetteville filed its Response To Plaintiff's Motion For Emergency Restraining Order and Renewed Motion For Temporary Restraining Order and later filed its Brief In Support of its Response.

The City explained the weaknesses of Plaintiffs' numerous claims and pointed out:

"4. Plaintiffs and their attorney have known since June 16, 2015 all of the necessary facts to bring their Declaratory Judgment complaint and request a Temporary Restraining Order or Injunction. Rather than filing their lawsuit ten weeks ago and giving the elected Mayor and City Council of Fayetteville and the Election Commission of Washington County fair opportunity to be heard and respond to their frivolous allegations, Plaintiffs delayed filing their case until less than two hours before the Washington County Court House closed on the day before early voting began. Their scheme to delay filing their case and hide their intentions until the 11th hour in an effort to win an *ex parte* order denying Fayetteville citizens their constitutional right to vote is reprehensible and should be denied." City's Response To Motion For TRO.

The Circuit Judge correctly denied Plaintiffs' Motion For Emergency TRO and the voting continued resulting in the citizens approving and enacting the referred ordinance on September 8, 2015. In late September, Mayor Jordan and members of the Fayetteville City Council began to be served with Plaintiffs' Complaint.

On October 2, 2015, the City filed its Motion To Dismiss all claims alleged against it within Plaintiffs' Complaint. The City also pointed out that the Mayor and Aldermen have immunity in their individual capacity for their legislative acts (such as passing Ordinance No. 5781) and therefore it was improper for Plaintiffs to try to sue the Aldermen in their individual capacity. The City supported its Motion To Dismiss by filing its Brief in Support thereof on October 6, 2015.

Repeal 119, et al.'s attorney filed their responses to our Motion To Dismiss and then filed a Motion For Default Judgment on the frivolous and incorrect grounds that the Motion To Dismiss had not been filed on behalf of all Fayetteville defendants whether sued individually or in their representative capacity. The City filed a Reply to Plaintiffs' Response to our Motion To Dismiss Plaintiffs' Complaint.

The City also filed its Response to Plaintiffs' Motion For Default Judgment with supporting brief clearly establishing that Plaintiffs had no grounds to support their Motion. **Circuit Judge Martin agreed with the City and denied Plaintiffs' Motion For Default Judgment.**

Plaintiffs' further filed a Motion To Stay the operation of Fayetteville's Uniform Civil Rights Protection Ordinance. The City of Fayetteville opposed this Motion (which could be more properly termed a Temporary Restraining Order) by filing its response and supporting brief. Following a hearing, **Judge Martin denied Plaintiffs' Motion To Stay determining that Plaintiffs had failed to meet their burden of proof on both grounds needed for a Stay: a likelihood of success on the merits and irreparable harm to Plaintiffs if the TRO is not granted.** Judge Martin denied and dismissed Plaintiffs' Motion To Stay (as the Judge had done for their Motion For Default Judgment) by written Order.

In late November, the Arkansas Attorney General sought to intervene because my brief pointed out that her interpretation of Act 137 would render such Act unconstitutional. The City did not object to and agreed to the Attorney

General's intervention so she filed her Brief on the sole issue of whether Act 137 could constitutionally ban the enactment and enforcement of Fayetteville's Uniform Civil Rights Protection Ordinance.

Following a hearing and oral arguments before the Circuit Court, Judge Martin granted the City's Motion for Summary Judgment and denied the Attorney General's and Plaintiffs' cross motions for summary judgment and dismissed Plaintiffs' Complaint.

The Arkansas Attorney General, later joined by the earlier plaintiffs, filed a Notice of Appeal and ordered the record to be produced. The record was filed in late June. The City Attorney filed the City's Appellee's Brief. The Supreme Court granted Appellees' request for oral argument which has not yet been scheduled.

C. *Rickey Dale Holtsclaw v. Mayor Jordan, Chief Tabor, et al.*, United States District Court for the Western District of Arkansas, Case No. 2:16-cv-02020-PKH

Mr. Holtsclaw has sued officials in Fort Smith and Fayetteville complaining about loud motorcycles. He lives in a very rural area of north Crawford County near the Washington County and Oklahoma border. Mr. Holtsclaw never alleges that he has been in Fayetteville during Bikes, Blues and Barbeque or any other time when he could have heard (much less be disturbed by) loud motorcycles. He alleged he heard loud motorcycles when leaving his church in Fort Smith and also when shopping in Van Buren. His complaint states that Fort Smith and Fayetteville officials have intentionally not enforced motorcycle muffler laws. He claims "Plaintiff suffered the physiological and psychological effects of the unregulated, illegal LOUD motorcycle exhaust emissions...."

Since the Mayor was sued for § 1983 claims, our City Officials insurance policy rather than our police policy was used by our insurer who retained Kutak Rock rather than Brian Wood. This absolutely meritless case by a pro se plaintiff was dismissed pursuant to Fort Smith's and Fayetteville's Motion to Dismiss. However, Mr. Holtsclaw appealed requiring a brief in response. We are waiting for the Eighth Circuit Court of Appeals to rule.

D. Obtaining property and right of way for City improvements.

With the City Council's authorization, the Assistant City Attorney filed several condemnation and/or quiet title actions to initially secure legal possession and eventually ownership of necessary right of way or fee simple ownership of property for City improvement projects. For the first time this century, one eminent domain case had to go to trial to secure about seven acres from the Reading Trust as the last vital piece of the Six Million Dollar Ruppel Road extension from Martin Luther King Boulevard (Highway 62) to Persimmon Street.

The Assistant City Attorney did an extensive heir search and filed a condemnation for a strip of land in the City's Spring Street parking lot which will probably be the site of the \$20 million, plus site of the Theatre Squared's performance center. Condemnation was granted and a quiet title action begun so the City can be assured of a clear title of ownership before leasing it to Theatre Squared, Inc.

The Assistant City Attorney also secured legal possession of a long thirty foot wide strip of land immediately south of the new I-49, Highway 112, and Bypass Interchange so we can move our large water main out of the way of this AHTD construction project. We have requested fee simple ownership because this long strip of land would work well as a multi-use trail connection to the Scull Creek Trail which is part of the Razorback Greenway.

II. Negotiation and Avoidance of Dangerous and Expensive Litigation Risks

A. The City Attorney has had to caution the City Council in a few appeals of approved Preliminary Plats and Large Scale Developments that substantial neighborhood opposition is not a proper consideration or factor that can be considered in the decision to approve or deny such development. The Supreme Court has held that when "a subdivision ordinance specifies minimum standards to which a preliminary plat must conform (as our U.D.C. does), it is arbitrary as a matter of law to deny approval of a plat that meets those standards."

One such appeal of a Planning Commission approved preliminary plat for the Mountain Vista Subdivision is yet to be decided by the City Council, but exposes the City to potentially huge liability if denied by the City Council because of strong opposition by influential Country Club hill residents.

The Supreme Court has held that an abutting owner to a public street has a property interest to access that street that a city cannot deny without compensation paid to such owner for the "taking" of such property interest. In this situation, there could be a claim that such denial of the preliminary plat because of the intersection with 24th Street would operate as a taking of the entire 50 acre tract. An inverse condemnation action could be claimed in the millions of dollars. No such dangerous action has been taken by the City Council during my sixteen years of service. I hope a legally defensible solution can be found.

B. Old Pension Plans Benefit Problems

Both the Old Police and Fire Pension Plan (all beneficiaries retired or survivors), are actuarially unsound with the Fire Pension Plan likely to go bankrupt in just a few more years. Following advice from Finance Director Paul Becker and City Attorney Kit Williams, the City Council refused to agree that our taxpayers should assume the multimillion actuarial liability of the old Fire Pension Plan. Such assumption of this debt is constitutionally questionable as well as potentially unwise. Instead the pensioners should ask the voters to increase the dedicated millage to support the pension plans from the existing .4 to possibly .7, .8 or even a full mill to initially support the old Fire Pension Plan and later support the current LOPFI plan for firefighters and police officers. Unfortunately, neither Pension Board has tried to present the millage question to the voters in 2016 so the problem continues to worsen. Fortunately, rapid rise of the Stock Market in 2016 has provided some relief

III. Conclusion

I believe my legal advice can best serve the citizens and taxpayers when I can caution the City Council to avoid taking legally dangerous positions which could have substantial financial repercussions if litigation opponents would be successful. By avoiding unnecessary litigation risks for the last 16 years while I have served as Fayetteville City Attorney, the multimillion dollar attorney fees assessed against our taxpayers in the early 90's have not happened again.