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TO: **Mayor Jordan**

CC: **Susan Norton**, Chief of Staff

FROM: **Kit Williams**, City Attorney

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LITIGATION & NEGOTIATION HIGHLIGHTS OF 2022

I. Litigation Highlights

A. SWEPCO Application for general change in rates and tariffs

In July of 2021, SWEPCO filed a petition with the Arkansas Public Service Commission seeking to raise its rates on customers. Another issue that concerned the City was the plan to extend the life of the Flint Creek Coal Plant in Benton County. On September 14, 2021, the City Council authorized our office to file a petition to intervene in the case and oppose the application to raise rates. On September 15, 2021, our office filed the petition to intervene and the Public Service Commission granted our petition on September 27, 2021.

Our office worked with Environmental Director Peter Nierengarten and filed testimony in the case on December 7, 2021. The testimony describes the City's Energy Action Plan and explains how the SWEPCO rate increase would impact the City's goals. The City has agreed that the rate increase was partially needed to support the cost in acquire wind power generation facilities in North Central Oklahoma; however, the other upgrades and actions that would be funded by the rate increase are largely incompatible with the City's Energy Action Plan. Specifically, extending the life of the Flint Creek Coal Plant will make the City's clean energy goals more difficult to achieve. SWEPCO's plan

also fails to adequately address reliability issues in the Northwest Arkansas load pocket that were identified in a 2013 SWEPCO rate case.

The City recommended that the Public Service Commission closely scrutinize the costs of the proposed transmission upgrades and direct SWEPCO to conduct a study to address the Northwest Arkansas load pocket and transmission reliability issues. The City also recommended that SWEPCO work to increase the percentage of clean energy going into the power pool and increase battery storage in order to reduce reliance on coal powered plants.

On March 15, 2022, the City Attorney presented a very brief opening statement requesting that the Public Service Commission review SWEPCO's plans to spend millions of dollars to extend Flint Creek's coal fire plant to operate an additional eleven years and not allow SWEPCO to invest these millions without any express authority. I requested SWEPCO not be allowed to throw good money after bad to extend the obsolete coal fire technology further into the future.

The City Attorney and Assistant City Attorney jointly listened and reviewed the Public Service Commission Hearing by Zoom for the rest of the 15th and again all day on the 16th

**B. Bell v. Jarrett Geanolous, et. al. Case No. 5:19-cv-5184-PKH-ELW
(Western District of Arkansas)**

Andrew Dawson Bell was arrested by Fayetteville Police Officers Geanolous, Sutley and Jones for Terroristic Threatening, Carrying a Weapon, Disorderly Conduct, and Public Intoxication on September 24, 2016. They transported him to the Washington County Detention Center where he was booked in by County Jail staff. Bell sought to be released on bail, but his mother (Plaintiff herein) did not bail him out. Andrew Bell was able to commit suicide in jail about 15 hours later.

Andrew Bell had been coherent on the ride to the County Jail and did not threaten to commit suicide nor complain about any medical condition to the Fayetteville Police except for a sore hand which was examined by jail medical personnel who determined it was not broken. His mother as administratrix of his estate sued the City and County slightly less than three years later.

Brian Wood as our insurance company lawyer investigated and wrote a compelling brief in support of summary judgment for our officers who had in fact done everything properly and professionally. The Magistrate Judge ordered both the City and County to attend a Settlement Conference with Bell's Estate in the Federal Court House to see if any settlement could be reached.

I spent most of June 3, 2021 along with Blake Pennington, Brian Wood and our officers and the County attorneys and deputies at the Federal Court House as required by the Magistrate Judge. Since Brian had established in his briefs that our officers had done absolutely nothing wrong, I refused to agree that the City would pay a penny to settle this case. The County and Plaintiffs made some efforts to reach a settlement, but failed to finally agree.

The next day the Federal District Judge granted our Summary Judgment motion and dismissed the Estate's case with prejudice. Eventually the Estate filed a Notice of Appeal to the Eighth Circuit. Brian Wood is working on this appeal for the City.

C. Thomas Wooten v. City of Fayetteville
Case No. 5:21-CV-05076

Our insurance company lawyer, Brian Wood, has continued his excellent representation of our police officers when they have been accused of violations of suspects' constitutional rights. In this case, a motorist was properly stopped for inoperable taillights. The officers smelled alcohol in his vehicle. The motorist possessed Hydrocodone, failed sobriety tests, was arrested and taken to the Washington County Detention Center. He complained of chest pain and was taken to the hospital by ambulance and underwent surgery.

Mr. Wooten sued the City of Fayetteville for illegal seizure, false imprisonment, violation of the 8th Amendment, malicious prosecution, and the tort of outrage. Brian Wood in his Motion For Summary Judgment established and the Federal District Judge found that our Fayetteville officers had the right to stop Mr. Wooten for inoperable taillights. Brian also established and the Federal Court also found that Mr. Wooten's failure of sobriety tests and possession of Hydrocodone established probable cause to arrest him for suspicion of driving while intoxicated because of drugs. Because of the officers' valid probable cause to arrest, all of his claims against the City of Fayetteville were Dismissed With Prejudice

**D. Carl Daily v. City of Fayetteville, City Council
Case No. 72CV 22-1162**

Prairie Street Live was granted a continuation of their Conditional Use Permit for outdoor music on a split vote by the Planning Commission which did not grant an extra day (Thursday) of amplified outdoor music as requested by Prairie Street Live. Some neighbors opposed the granting of the Conditional Use Permit extension.

City Council members appealed the decision to the City Council. The City Council by split vote added the extra day of amplified music as requested by Prairie Street Live and approved the Conditional Use Permit extension.

Carl Daily, a neighbor, filed an appeal to Circuit Court in a timely manner. The City Attorney's Office met with Prairie Street Live's owner to ensure she knows of the litigation. We recommended she retain her own private counsel to argue her side of this litigation. Prairie Street Live has not yet intervened in this case.

I filed a timely Answer for the City of Fayetteville and Fayetteville City Council acknowledging that the appeal meant that a Circuit Judge or jury would hear this case de novo (like a brand new trial where no statements or evidence can be considered until it is presented during this new case). Neither the Planning Commission's decision, nor the City Council's decision is entitled to any deference or weight in this case. The Judge or jury sits as if they are the City Council or Planning Commission working on a clean slate to determine whether the Conditional Use Permit should or should not be granted. If granted, the Judge or jury will decide what conditions, if any, should control the authority granted by the Conditional Use Permit.

Plaintiff Daily moved to dismiss his case. The Circuit Judge granted his Motion and dismissed this case without prejudice.

**E. Morgan v. Fayetteville Police Officers Harris and Strange
Case No. 5:21-CV-5118 Federal District Court**

Kristopher Morgan filed suit in the Federal District Court after he was arrested, pled guilty and was sentenced to three years in prison for failing to register as a sex offender in Arkansas. Mr. Morgan sued Detective Strange who

had investigated Morgan, obtained probable cause that Morgan was a convicted sex offender who had failed to properly register in Arkansas and had an arrest warrant from another state. Detective Strange informed Fayetteville Police Officer Harris that there was a probable cause to arrest Morgan for failure to register as a sex offender and asked Officer Harris to arrest Mr. Morgan.

Fayetteville Police Officers Harris and Emig went to Mr. Morgan's apartment to arrest Mr. Morgan and knocked on his door. Mr. Morgan opened his door part way and was told to come out by the Fayetteville Police Officers. Mr. Morgan initially failed to come out and claimed in his deposition that Officer Harris pushed his way into the apartment, grabbed ahold of Mr. Morgan, pulled him out of his apartment, handcuffed him, and took him into custody.

The police officers' body cams showed that Mr. Morgan started to comply with the officers' demand to exit his apartment and eventually Mr. Morgan began to walk out of the apartment door. As Mr. Morgan stepped out of his apartment, Officer Harris waited to place his hand on Mr. Morgan's arm until Mr. Morgan began to cross the threshold of the apartment out of the door. The Magistrate Judge determined that the body cams showed that "Morgan either walked out or is gently led out of his apartment, is turned around, and handcuffed." (page 9 of Report and Recommendation of the Magistrate Judge).

The Magistrate Judge's recommendation that our officers' Motion for Summary Judgment be granted shows that the patient but firm and effective effort to arrest Mr. Morgan not only was completely constitutional, but also a great example of how to arrest a convicted felon with no injury to either the felon or our officers. The Federal District Judge agreed with the Magistrate's Report and dismissed all of Morgan's complaints with prejudice.

F. Lakewood Subdivision v. City of Fayetteville and La Hacienda

A development by La Hacienda of Northwest Arkansas was approved by staff and, upon appeal by the Planning Commission and City Council.

The neighborhood adjacent to the proposed development appealed, through its property owners association to Circuit Court claiming that the development created or compounded a dangerous traffic condition, that granting center variances were violations of the Unified Development Code, and that approving parking along Zion Road violated the bond that was being used to

fund the Zion Road Improvements. We filed a response on behalf of the City, Mayor Jordan and the City Council denying all of the allegations made by the neighbors. We met with the developer to discuss our best course of action.

We prepared and filed a Motion For Summary Judgment with affidavits from Planning and Engineering and supporting briefs. We prepared and filed a Response to Plaintiff's Counter-Motion for summary judgement and Replied to his Response to our Motion For Summary Judgment. We had a hearing on these motions, but the Judge requested additional briefs which were submitted. The Circuit Judge granted the City's Motion For Summary Judgment and dismissed Plaintiff's Complaint. The Plaintiff timely filed its Notice of Appeal. Plaintiff's Motion to Stay pending appeal was denied after a Court hearing.

G. Boyle Ventures, Inc. v. City of Fayetteville
Case No. 04CV-22-2109, Circuit Court of Benton County

On July 19, 2022, the City Council unanimously passed an Amendment to the **Animals Chapter** of the *Fayetteville Code* to prohibit puppies from puppy mills (large, mass breeding operations) from being sold in pet stores in Fayetteville. Petland began operating such a retail pet store in Fayetteville before this ordinance went into effect. Prior to the ordinance becoming effective, Petland filed a complaint and motion for injunctive relief. The Benton Circuit Court Judge issued a preliminary injunction.

The City answered Plaintiff's Complaint and filed an extensive Motion For Summary Judgment and Supporting Brief to refute the claims that the City of Fayetteville does not have the legal and constitutional power to adopt the ordinance. Boyle Ventures, Inc. filed its Response, and the City filed its Reply Brief. The City has asked the Court to rule on the briefs or schedule a hearing for our Motion For Summary Judgment.

H. Collection of Overdue HRM taxes

The total overdue HMR and Supplemental Beverage taxes collected in 2022 is **\$251,190.73**. The total collected by the City Prosecutor's Office with substantial help from Accounting during 2021 and 2022 is **\$547,006.36**. The City Prosecutor's Office and Accounting Department's collection efforts of overdue HMR and Supplemental Alcohol tax in the last two years have pushed up the total collection since I requested an emphasis on such collection to over **\$1.7 Million**. This not only ensures a fair and level playing field for all restaurants,

bars and hotels, but also provides substantial needed revenue for the A&P Commission, our Parks Department, and General Fund (Alcohol taxes).

II. 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. I will certainly continue to advise the City Council to ensure that all bonding requirements must be strictly obeyed. By avoiding unnecessary litigation risks for the last 21 years while I have served as Fayetteville City Attorney, the multimillion dollar attorney fees repeatedly assessed against our taxpayers in the early 90's (in bond related cases) have not happened again. 2022 was another normal year in which the City of Fayetteville was successful in all its concluded litigation in Circuit Court and Federal District Court.