

**FAYETTEVILLE CITY COUNCIL
SPECIAL MEETING MINUTES
COUNCIL CHAMBER
DECEMBER 11, 2018
6:30 P.M.**

Present: Mayor Mitch Colvin

Council Members Katherine K. Jensen (District 1) (Departed at 6:55 p.m.); Daniel Culliton (District 2); Tisha S. Waddell (District 3); D. J. Haire (District 4); William J. L. Crisp (District 6); Larry O. Wright, Sr. (District 7); Theodore Mohn (District 8); James W. Arp, Jr. (District 9)

Absent: Council Member Johnny Dawkins (District 5)

Others Present: Alicia Young, Assistant City Attorney
Brandon Christian, Police Attorney
Giselle Rodriguez, City Engineer
Jonathan Charleston, Attorney
Keith Johnson, Attorney
George Oliver, Attorney
Larry Walsh, River Landing Center, LLC
David Ferrell, Attorney
Jimmy Kizer, Moorman, Kizer & Reitzel, Inc.
Jennifer Ayre, Deputy City Clerk

1.0 CALL TO ORDER

Mayor Colvin called the meeting to order at 6:47 p.m.

2.0 INVOCATION

The invocation was offered by Council Member Wright.

3.0 APPROVAL OF THE AGENDA

MOTION: Council Member Arp moved to approve the agenda.
SECOND: Council Member Wright
VOTE: UNANIMOUS (9-0)

4.0 ITEMS OF BUSINESS

4.01 Commencement of the hearing on Appeal of an Assessment of Civil Penalties for Violations of the City of Fayetteville's Stormwater Management Ordinance in the Liberty Hills Subdivision

Mayor Colvin stated the process must be fair and impartial. The decision reached by the body must be based only upon the evidence presented at this hearing, and cannot be based upon anything a member of the body has learned or been informed of previously. If a Council member has information regarding the matter, he or she must not consider it in any way during the proceeding. Mayor Colvin further stated if any member of the Council believes that he or she cannot participate in the proceedings, to please ask for an excusal at this time.

Council Member Jensen requested excusal from participating in the meeting based on personal prior experience of the subject matter as well as prior feelings she does not believe she can act impartially on the appeal.

MOTION: Council Member Mohn moved to excuse Council Member Jensen from the proceedings.
SECOND: Council Member Arp
VOTE: UNANIMOUS (8-0)

City Council heard arguments for the two motions that were filed with the City Clerk. The first motion filed was from the City Engineer to define the scope of the appeal and the second motion filed was from

the appellants (River Landing Center and Moorman, Kizer & Reitzel) to dismiss the notice of violations or alternatively refer the matter to an Administrative Law Judge (ALJ). The Council heard the appellants' joint motion first.

Mr. David Ferrell, attorney representing Moorman, Kizer & Reitzel, Inc., stated that the appellants wished to contend that there was no design flaw in the stormwater control system at issue, and that even if there was a design flaw, it did not cause the drainage issues and alleged damages. Mr. Ferrell stated that based on exhibits presented to the Council at an earlier meeting, staff made it seem that they already knew what was wrong and that it was a design flaw. He further stated that because the City Council had already awarded public monies to correct damages from the alleged design flaw, the Council had, in essence, prejudged the case. Therefore based upon controlling caselaw, the Council had bias that could not be overcome. Mr. Ferrell stated that based on State Statute § 7A-758, city councils are allowed to request an ALJ through the Office of Administrative Hearings to hear the case, as a means of removing the potential for bias. Having an ALJ hear the case would be no charge to the City or any party in the matter, also the hearing could be heard wherever City Council requests. Mr. Ferrell stated that the trial of the case and the hearing of the matter could be a logistical nightmare due to the requirements that must be proved and could go on for an extended period of time due to the scheduling restraints of City Council members and any parties related to the matter.

Mr. George Oliver, attorney representing River Landing Center, LLC, stated River Landing Center filed a joint motion with Moorman, Kizer & Reitzel. Mr. Oliver stated much of the concern has to do with the appearance of impropriety. Mr. Oliver stated there is a lot of money at stake and there is a direct economic interest in the proceedings of this hearing; the motion to request an Administrative Law Judge could take care of the appearance of impropriety. Mr. Oliver respectfully asked Council to step aside and allow an ALJ to hear the matter.

Mr. Keith Johnson, attorney representing the City Engineer, stated the City Engineer does not object to the motion allowing an ALJ to preside over the hearing. Mr. Johnson stated if the Council chooses to hear the appeal, it would require each Council member to prove impartiality. A PowerPoint presentation was shown regarding State Statute § 160A-388(e)(2) regarding proving how impartiality can be established.

Mr. Johnson stated there are a few options with an ALJ. If requesting an ALJ to hear the appeal, logistically the Mayor would request the ALJ to hear the appeal and be very specific in what is requesting to be heard. Mr. Johnson urged that there be an agreement stating whatever decision comes from the ALJ would be subject to review in court pursuant to State Statute § 160A-393.

Mr. Ferrell was in agreement to working with Council to move the hearing forward and had no objections to have the hearings done as soon as possible. Mr. Oliver was also in agreement.

Mr. Brandon Christian, Police Attorney and Advisor to the City Council, asked if the civil penalty were upheld, where would it go. Mr. Johnson responded the civil penalties would go into the general storm water fund.

Mr. Christian advised the Council that the City has the authority to request an ALJ to hear the matter regardless of whether the Council believes it has an impermissible bias and the motion is being brought based on both a concern regarding bias and a concern about the logistical difficulties an appeal hearing would engender. Mr. Christian also noted that if the appeal is referred to an ALJ, the City Engineer's motion to limit the scope of the appeal to the amount of the penalties only would remain pending and the ALJ would rule on that motion in first instance.

Mr. Johnson stated part of the motion would also be to have the hearing in Fayetteville.

4.01a Motion to Determine Scope of Appeal and to Dismiss/Refer matter to ALJ for Determination

MOTION: On appellants' motion to refer the appeal in its entirety to the Office of Administrative Hearing for referral to an Administrative Law Judge to step fully into the City Council's place and make all findings of fact, conclusions of law, and entries of judgment on behalf of the City Council with the only appeal able to be taken in the nature of certiorari to the Superior Court of Cumberland County; further understanding that the City Council's authority is unable to alter the jurisdiction or authority of the United States Bankruptcy Court.

VOTE: UNANIMOUS (8-0)

In light of the Council's decision to refer the entirety of the appeal to an Administrative Law Judge, all remaining motions must be reserved for consideration by the ALJ. Therefore, the remaining issues raised by the filed motions were not heard.

5.0 ADJOURNMENT

There being no further business, the meeting adjourned at 7:53 p.m.