

Mayor – Sandy Sanders

City Administrator – Ray Gosack

City Clerk – Sherri Gard

Board of Directors

Ward 1 – Keith Lau

Ward 2 – Andre’ Good

Ward 3 – Mike Lorenz

Ward 4 – George Catsavis

At Large Position 5 – Pam Weber

At Large Position 6 – Kevin Settle

At Large Position 7 – Philip H. Merry Jr.

AGENDA

Fort Smith Board of Directors

REGULAR MEETING

February 18, 2014 ~ 6:00 P.M.

Fort Smith Public Schools Service Center

3205 Jenny Lind Road

THIS MEETING IS BEING TELECAST LIVE ON THE GOVERNMENT ACCESS CHANNEL 214

INVOCATION & PLEDGE OF ALLEGIANCE

ROLL CALL

PRESENTATION BY MEMBERS OF THE BOARD OF DIRECTORS OF ANY ITEMS OF BUSINESS NOT ALREADY ON THE AGENDA FOR THIS MEETING

(Section 2-37 of Ordinance No. 24-10)

APPROVE MINUTES OF THE FEBRUARY 4, 2014 REGULAR MEETING

ITEMS OF BUSINESS:

1. Resolution approving a contingent fee agreement with Baron and Budd, P.C. and the Sims Law Office regarding the pursuit of claims against Whirlpool Corporation for TCE pollution ~ *Merry / Weber placed on agenda at the February 11, 2014 study session ~*
2. Ordinance amending Ordinance No. 16-94 *(correction of 1994 annexation legal description)*
3. Ordinance amending Section 16-15 of the Fort Smith Municipal Code regarding the required number of Property Owners Appeal Board members to constitute a quorum
4. Resolution of the Board of Directors of the City of Fort Smith certifying local government endorsement of business to participate in the Tax Back Program (as authorized by Section 15-4-2706(d) of the Consolidated Incentive Act of 2003) *(Butler & Cook, Inc.)*

5. Consent Agenda

- A. Resolution to accept the bids and authorize a contract for the construction of Drainage Improvements, Project No. 12-06-C2 (\$630,662.58 / *Engineering Department / Budgeted – Sales Tax Program Fund*)
- B. Resolution approving priorities for the 2015 session of the Arkansas General Assembly ~ *Merry / Good placed on agenda at the February 11, 2014 study session ~*
- C. Resolution authorizing Change Order No. 2 to the contract with Crawford Construction Company for the Chaffee Crossing Water Supply Improvements – Pump Station (\$6,617.63 / *Utility Department / Budgeted – 2012 Sales and Use Tax Bonds*)
- D. Resolution authorizing the Mayor to execute an agreement and Authorization No. 1 with Hawkins-Weir Engineers, Inc. for providing engineering services associated with the Mill Creek Pump Station and Equalization Tank (\$1,353,600.00 / *Utility Department / Budgeted – 2012 Sales and Use Tax Bonds*)
- E. Resolution accepting the bid of and authorizing the Mayor to execute a contract with BRB Contractors, Inc. for the Mill Creek Pump Station and Equalization Tank (\$12,930,000.00 / *Utility Department / Budgeted - 2012 Sales and Use Tax Bonds*)
- F. Resolution authorizing the Mayor to execute Authorization No. 2 to the agreement with Hawkins-Weir Engineers, Inc. for engineering services for the Mill Creek Interceptor Improvements – Phase II (\$165,000.00 / *Utility Department / Budgeted – 2012 Sales and Use Tax Bonds*)
- G. Resolution accepting the bid of and authorizing the Mayor to execute a contract with Forsgren, Inc. for the Mill Creek Interceptor Improvements – Phase II (\$1,917,753.10 / *Utility Department / Budgeted - 2012 Sales and Use Tax Bonds*)
- H. Resolution accepting the bid of and authorizing the Mayor to execute a contract with Goodwin & Goodwin, Inc. for the “P” Street Wastewater Treatment Plant effluent pump installation (\$87,680.00 / *Utility Department / Budgeted – 2008 Revenue Bonds*)

OFFICIALS FORUM ~ presentation of information requiring no official action

(Section 2-36 of Ordinance No. 24-10)

- Mayor
- Directors
- City Administrator

EXECUTIVE SESSION

- Appointments: Electric Code Appeals Board (2), Parking Authority (1) and Plumbing Advisory Board (3)

ADJOURN

RESOLUTION NO. _____

**A RESOLUTION APPROVING A CONTINGENT FEE AGREEMENT
WITH BARON AND BUDD, P.C. AND THE SIMS LAW OFFICE
REGARDING THE PURSUIT OF CLAIMS AGAINST
WHIRLPOOL CORPORATION FOR TCE POLLUTION**

BE IT RESOLVED by the Board of Directors of the City of Fort
Smith, Arkansas that:

The contingent fee agreement with Baron and Budd, P.C. and the
Sims Law Office of Princeton, Illinois regarding the pursuit of
claims against Whirlpool Corporation for TCE pollution is hereby
approved. The Mayor and City Clerk are hereby authorized to
execute said agreement on behalf of the City.

This Resolution passed this _____ day of February, 2014.

Mayor

ATTEST:

City Clerk

APPROVED AS TO FORM:



No Publication Required



MEMORANDUM

February 14, 2014

TO: Mayor and Board of Directors

FROM: Ray Gosack, City Administrator

SUBJECT: Whirlpool TCE Contamination

Attached for the board's consideration is a resolution approving a contingent fee agreement with the Sims Law Firm. This was requested at the February 11th study session. I've also attached the firm's statement of qualifications.

The agreement hasn't yet been provided to us. When we receive it, I'll forward it to you. I expect the agreement will address, among other things, the arrangement for compensation and how the decisions about proceeding or not proceeding with the case will be made.

Also attached for the board's review is a letter from the city attorney with more information about the pollution enforcement case in Illinois, Fort Smith's ordinances, and the state law regarding the statute of limitations. At this time, it's uncertain whether this case would proceed criminally or civilly. Each possibility has its own set of decisions and consequences that would need to be considered by the board after Ms. Sims conducts her research and makes recommendations. The city attorney and city prosecutor will likely need to have input on these matters.

Based on the study session discussion, board members discussed a possible change in how the city responds to industrial pollution violations. In the past, the city hasn't enforced its nuisance ordinances against industrial polluters. Rather, the city has relied on the Arkansas Dept. of

Environmental Quality to address air, ground, and water pollution. If the board now desires for the city to apply its nuisance ordinances when industrial pollution occurs, that policy should be articulated so that the community knows what to expect and the staff can be consistent in its application.

Please contact me if there's any questions or a need for more information.

A handwritten signature in black ink on a white rectangular background. The signature consists of a short horizontal line followed by the word "Ray" in a cursive, handwritten style.

Attachments

cc: Melissa Sims, Sims Law Office

SIMS LAW OFFICE

MELISSA K. SIMS, ATTORNEY AT LAW

1216 ELLIOTT LANE

PRINCETON, ILLINOIS 61356

TELEPHONE: (815) 878-4674

FACSIMILE: (815) 224-2900

E-MAIL: SIMSMELISSA7@GMAIL.COM

February 13, 2014

Hon. Ray Gosack
City Administrator
623 Garrison Ave
3rd Floor, Room 315
Fort Smith, AR 72901

Re: City of Fort Smith, Arkansas
CONFIDENTIAL COMMUNICATION

Hon. Gosack:

Pursuant to my conference of February 11, 2014, I have agreed to investigate legal claims on behalf Fort Smith, Arkansas, in connection with environmental, and you ask that I forward a copy of my curriculum vitae.

I want to thank you for speaking with me. I look forward to reviewing all factual and legal matters which may support a claim for your city. If a claim is discovered during the course of my investigation which may result in the filing of a claim in court for recovery, myself and a top tier law firm would be representing Fort Smith on a one-third contingent fee basis. Costs in support of the claim, including investigative costs, will not be reimbursed by Fort Smith until the case is settled or a collectable judgment received.

Prior to expending costs by my firm, I would desire a contingent fee agreement to be executed outlining the above arrangement. Kindly advise if you would like a draft mailed to you.

If you have any questions, please contact me at your convenience.

Very truly yours,

MELISSA K. SIMS

Enclosure: cv

Melissa K. Sims



Sims Law Office
1216 Elliott Lane
Princeton, IL 61356
Telephone: (815) 878-4674
Fax: (815) 224-2900
simsmelissa7@gmail.com

Says Bureau County Sheriff John Thompson of Melissa Sims: *"I can think of no other person more qualified to review, assess and investigate possible causes of action for any governmental agency. She will leave no stone unturned."*

Employment History

2010-present	attorney at Sims Law Office, 1611 Fifth Street, Peru, IL 61354
1995-2010	attorney at Wimbiscus Law Firm, 102 East St. Paul Street, Spring Valley, IL 61362
1990-1995	Deputy Sheriff at Bureau County Sheriff's Department, 700 South Main Street, Princeton, IL 61356
1990-1995	Legal Advocate at Freedom House, domestic violence and sexual assault shelter in Princeton, IL 61356

Notable Cases

As a trial attorney in general practice in a small rural community in Central Illinois, Sims has engaged in numerous and varied transactional and trial matters throughout state and federal trial and appeals courts. Sims managed a very active practice for 15 years before venturing out on her own to concentrate on environmental litigation.

Sims has established joint venture agreements with some of the top trial law firms in the country, representing municipal corporations in seeking restitution for environmental contamination.

Federal Cases:

Village of DePue v. Exxon Mobil and CBS/Viacom-Sims represents the Village in a precedent setting case wherein Sims sought to have the defendants fined under a municipal ordinance during the course of a superfund environmental cleanup. Sims obtained a precedent setting opinion finding no federal preemption before the 7th Circuit Court of Appeals. Sims moved immediately to have the village become a home rule unit to fine defendants \$10,000 each per day. Settlement pending.

Village of Roxana vs. Shell, Conoco Phillips, et al-Sims, along with Co-counsel Hanly Conroy and Simmons Law Firm, represent the village in ordinance violations and a civil suit to fine in accordance with the Village of DePue case above referenced. Case set for trial in September 2014.

Parko et al v. Shell and ConocoPhillips, et al.-Sims, along with Co-counsel Hanly Conroy and Simmons Law Firm, filed a class action case for all persons within the benzene plume. Case set for trial in September 2014.

Estate of Peter Navin- very complex federal estate tax return with protective 6166 election to avoid the payment of estate taxes, litigated issues before the Northern District of Illinois with intervenor and U.S. Attorney.

Purvis v. Hall High School, City of Spring Valley, Douglas P. Bernabei-Sims defended the City of Spring Valley in a malicious prosecution case alleging wrongful prosecution by the Chief of Police. Case was dismissed and affirmed on appeal to the Seventh Circuit Court of Appeals.

Balensiefen v. Citizens First National Bank of Princeton-Sims has co-represented Stephanie Balensiefen for wrongful discharge by the Central Illinois Bank. Case is pending.

Bettasso v. Citizens First National Bank of Princeton-Sims co-represented plaintiff and assisted in securing a \$250,000 settlement with the bank for wrongful discharge as the plaintiff was having an affair with the bank president and was terminated.

Walowsky v. Wal-Mart Stores-Sims has co-represented plaintiff in a whistleblower action who was discharged for reporting his superior for being intoxicated at work while operating heavy machinery in violation of OSHA laws. Settlement pending.

Personal Injury Actions (contingent fee cases)

Estate of Christina Clausen- decedent who was 9 months pregnant was killed in a head on collision. Case settled with insurer for policy limits of \$750,000 on a contingent fee basis.

Estate of Madison Rae Poole-the fetus who was killed in the Clausen collision. Sims settled with insurance company for \$250,000 on a contingent fee basis and litigated the matter in a precedent setting opinion with the Illinois Supreme Court regarding intestate distribution of a fetus under the Paternity Act with the putative unwed father.

Estate of Leona Lijewski- wrongful death case settled with insurance company for policy limits of \$250,000. Decedent was an intoxicated passenger and litigated insured regarding distribution of unwed father of decedent's minor child.

Hanson v. Gillen-case pending and set for jury trial. Plaintiff and her husband (whose cause was settled) were hit by an unlit farm tractor at night. Elderly plaintiff suffered numerous long term damage and arthritis to hips, legs, back and knees.

Ferrari v. Yeruski, Ford Motor Company, et al. -Sims represented Ferrari and secured a policy limits settlement of \$100,000. Co-Defendant was in a coma and ultimately became a quadriplegic and settled with Ford Motor Company and ambulance service.

Pena v. Argubright-Plaintiff was injured while driving at night and large tractor trailer tire left its axis and caused a rollover. Case pending.
Numerous other automobile accidents and worker's compensation cases tried, appealed and settled.

Criminal Cases

People v. April Neiderhauser- criminal felony jury trial case with directed verdict in Defendant's favor after the state failed to modify its pleading prior to trial. Sims successfully moved for a directed verdict during the state's first witness testimony.

People v. S.P.-juvenile drug felony charge dismissed by State after Sims moved for dismissal for violating Fourth Amendment search and seizure.

Contingent Fee Cases (non personal injury)

Sims managed thousands of commercial litigation cases on behalf of creditors such as Spring Valley City Bank, St. Margaret's Hospital, Illinois Valley Community Hospital, numerous other banks, doctors and companies in the Illinois Valley area. Sims developed a stream lined approach to prosecuting these thousands of cases with just one support staff. Sims tried hundreds of these cases before bench and jury, seeking summary determination of legal issues prior to trial. Cases varied from \$500 to \$500,000 all on a contingent fee basis depending on the type of note, security instrument and underlying claim. Sims also sought post judgment collection seeking sheriff sales, memorandum of judgment, wage and non wage garnishment of assets and levying personal property, if necessary.

Municipal Litigation

Sims represents numerous municipal agencies, including: Bureau County Sheriff John Thompson in a merit commission/labor issue dispute currently on appeal to the Illinois Supreme Court, the Putnam County Sheriff for a tax levy bond issue to build a new jail, the Village of Standard, Illinois, the Village of DePue, Illinois, the Village of Seatonville, Illinois, Hall High School, and numerous other municipal agencies on a hourly basis depending on the type of issue presented.

Sims has prosecuted hundreds of ordinance violations before bench, jury and the appellate courts.

Family Law Litigation

Family law litigation is inevitable for a small town attorney. Practicing these complex litigation issues keeps trial skills sharp. Sims has tried almost 50 child custody, fault and property cases to trial before a bench and on appeal. Most notably, Sims is currently trying the largest (upwards of \$5 million at issue) and most complex property dispute before the circuit judge in the county's history. The case involves complex issues of accounts receivable, property value of a marital collection business, fixed and non-fixed asset division, cancer diagnosis of wife, permanent maintenance, child custody and reimbursement of non family expenses.

Sims tried---and settled in the middle of trial--- a very complex dissolution case representing the most prestigious family law trial attorney in the Circuit who specifically requested Sims represent her at trial.

DAILY & WOODS

A PROFESSIONAL LIMITED LIABILITY COMPANY
ATTORNEYS AT LAW

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PHILLIP E. NORVELL †

OF COUNSEL

HARRY P. DAILY (1886-1965)
JOHN P. WOODS (1886-1976)
JOHN S. DAILY (1912-1987)
BEN CORE (1924-2007)

JERRY L. CANFIELD, P.A.
THOMAS A. DAILY, P.A.
WYMAN R. WADE, JR., P.A.
DOUGLAS M. CARSON, P.A.
ROBERT R. BRIGGS, P.A. †
C. MICHAEL DAILY, P.A. † ●
COLBY T. ROE, P.A.

† Also Licensed in Oklahoma
● Also Licensed in Wyoming & North Dakota

February 14, 2014

Mr. Ray Gosack
City Administrator
623 Garrison Avenue, 3rd Floor
Fort Smith, AR 72901

Re: Potential Actions Involving Whirlpool Corporation Property

Dear Mr. Gosack:

As you know, the current discussions with Ms. Melissa Sims originated from her contact to our office on January 7, 2014, and my referral of that information to you on January 15, 2014. On October 18, 2013, we issued our letter primarily discussing the primacy of the regulatory powers of the Arkansas Department of Environmental Quality (ADEQ). At your request, I attended the agenda meeting of the Board of Directors held on February 11, 2014. As I indicated to the Board at the agenda session, I have not done an evaluation of ordinances that might be utilized for criminal prosecution regarding the Whirlpool situation. Until a specific ordinance is proposed for prosecution and a specific enforcement procedure is suggested, it is difficult to fairly evaluate the prospects for potential action. As we have noted at various times, we assume the maximum possible powers on behalf of the City consistent with accepted legal principles.

After consultation with the City's Prosecuting Attorney, John Settle, the following are some general observations.

1. Upon initial evaluation of provisions set forth in Chapter 16 of the Fort Smith Municipal Code (cleanup of lands and nuisance provisions), we anticipate difficulty in applying existing language to the Whirlpool situation, and, additionally, the Code provisions require prior notice of violation in advance of prosecution. There are trash and litter provisions in the City's regulations of solid waste in Chapter 25 of the Code. See sections 25-261, 25-266 and 25-267. We believe there would be difficulty in applying the language of those provisions to the Whirlpool situation, especially considering the Arkansas law requirement that criminal provisions be strictly construed.
2. We believe that any "backward look" of asserted violations will be limited by a one year statute of limitations provided for by A.C.A. § 5-1-109(b)(3)(A).
3. As noted in our letter of October 18, 2013, it is possible that the Courts would view any City action as an attempted infringement on the jurisdiction of ADEQ to deal with this and other environmental matters on a state wide basis. See discussion below from Village of Depue

litigation.

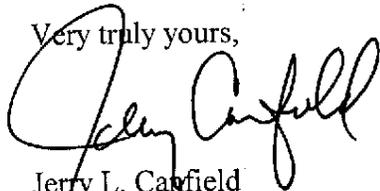
4. There are procedural difficulties with criminal prosecutions led by outside counsel.

Again, it is difficult to evaluate the potential for success in the absence of a specific proposal regarding ordinance and procedure. It may be that proposed action will relate to civil litigation.

I am providing copies of decisions issued by the United States District Court for the Central District of Illinois in the cases of Village of Depue, Illinois v. Viacom International, Inc., 632 F.Supp. 2d 854 (C.D. Ill. 2009) and Village of Depue, Illinois v. Viacom International, Inc., 713 F.Supp. 2d 774 (C.D. Ill. 2010). The decisions provide the history of two actions brought by the Village of Depue against an environmental polluter. The environmental problem was created by a manufacturing plant and was being addressed by the EPA and a consent order issued following legal action by the Illinois Attorney General. The Village of Depue, being dissatisfied with progress, posted notices on the property requiring the owner to abate the nuisance pursuant to a local nuisance ordinance under penalty of a \$750.00 fine for each day the site remained a nuisance. Apparently, criminal prosecution did not occur. Rather, the Village filed a civil action seeking a declaratory judgment that the defendants were in violation of the ordinance, awarding fines of \$750.00 per day, and an injunction requiring the immediate cleanup of the site. The case was removed to federal court. The federal court dismissed the Village's action on the bases of federal and state preemption. The Village appealed to the Seventh Circuit Court of Appeals. The Court of Appeals affirmed the dismissal of the suit generally on the basis that the action was preempted by the state law regulation of the environmental problem. Following dismissal of the initial action, the Village became a home rule local government under Illinois law, and the Village adopted a new "Hazardous Waste and Hazardous Substances Ordinance" which established a one time \$50,000.00 penalty and a recurring daily fine of up to \$10,000.00. Fines were established by resolution of the Village governing body. Civil litigation followed in the form of lawsuits filed by the Village in local trial courts in Illinois which again were removed to federal court. The Village relied on violations of its newly enacted ordinance as well as common law nuisance and trespass theories. While noting the Village's increased powers as a home rule city, the Court nevertheless concluded the actions by the Village were preempted and improper as an attempt to indirectly regulate site cleanup activities. The Court also dismissed the Village's common law nuisance and trespass claims for failure to assert and prove underlying tortious conduct by the defendants. The trespass and nuisance claims were restated in an amended complaint, but subsequently were dismissed with prejudice by the second opinion reported in 713 F.Supp. 2d 774 (C.D. Ill. 2010). By her letter of January 21, 2014, Ms. Sims asserts the Village settled with the defendants for \$975,000.00.

Thank you for your attention to this matter.

Very truly yours,



Jerry L. Carfield

JLC/cmm

Enclosures

- Appeal?
- no subsequent appellate history

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United States District Court, C.D. Illinois.

Vill. of Depue v. Viacom Int'l, Inc. [\(\)](#)

713 F. Supp. 2d 774 (C.D. Ill. 2010)

• Decided May 12, 2010

[\(\)](#) Quick Facts

[Edit](#)

Judge(s) **JOE BILLY McDADE, Senior**
Parallel Citations 713 F. Supp. 2d 774

[775](#)

*775 775 Melissa K. Sims, William J. Wimbiscus, Jr., Wimbiscus Law Firm, Spring Valley, IL, Richard L. Steagall, Nicoara & Steagall, Peoria, IL, for Plaintiff.

[x](#)

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Henry W. Ipsen, Holme Roberts & Owen LLP, Denver, CO, Rex K. Linder, Robert M. Bennett, Heyl Royster Voelker & Allen, Peoria, IL, Wendy Bloom, Peter Michael Stasiewicz, Mark S. Lillie, Kirkland & Ellis, Chicago, IL, Elizabeth McCutcheon Weaver, Howrey LLP, Los Angeles, CA, for Defendants.

OPINION & ORDER

JOE BILLY McDADE, Senior District Judge.

This matter is before the Court on Defendants' Motion to Dismiss Plaintiff's Second *776 776 Amended Complaint and to Strike Damages Allegations. (Doc. 32). Plaintiff has responded in opposition to the Motion. (Doc. 38). On April 9, 2010, the Court found that a Reply Memorandum from Defendants would be helpful, and therefore instructed Defendants to file a Reply, which Defendants did on April 30, 2010. (Doc. 42). In addition, Plaintiff's Motion for Leave to File Supplemental Memorandum is also pending; this motion is denied.¹(Doc. 41). For the reasons stated below, the Motion to Dismiss is granted.

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Background

The background of this case is extensively reviewed in the Court's July 8, 2009 Amended Opinion & Order, 632 F.Supp.2d 854 (/document/F.Supp.2d/632/854) () (C.D.Ill.2009), and this summary draws on that review. (Doc. 27). Defendants' corporate predecessors operated a zinc smelting facility and a diammonium phosphate fertilizer plant on a particular location ("Site") within the Village of DePue, Illinois, from 1903 until 1989. These operations left the Site with elevated levels of cadmium, lead, and other metals, which the United States Environmental Protection Agency ("EPA") and Illinois Environmental Protection Agency ("IEPA") began to investigate in 1992. Also in 1992, the IEPA began filing Fact Sheets about the Site, some of which have been filed with the Court by the parties as Exhibits in this case and in previous litigation over the Site, and which are also available at <http://www.epa.state.il.us/community-relations/fact-sheets/new-jersey-zinc/index.html>.²A map of the Site is included in Fact Sheet # 3, available at <http://www.epa.state.il.us/community-relations/fact-sheets/new-jersey-zinc/new-jersey-zinc-3.html>.

In 1995, the Illinois Attorney General filed a suit based on the contamination against Defendants' corporate predecessors in Illinois circuit court, and later entered into an interim consent order with Defendants.³ The Seventh Circuit described the requirements of the Consent Order:

Under this Consent Order, [Defendants] must perform a phased investigation of

*777 777

the site and implement certain interim remedies. [They] also must propose final remedies to the State of Illinois before completing final remedial action for the site. The Consent Order requires [Defendants] to perform ... investigations and remedial actions in compliance with both the ICP (Illinois Hazardous Substances Pollution Contingency Plan) and the NCP (National Oil and Hazardous Substances Pollution Contingency Plan). The State of Illinois, in consultation with the EPA, has sole discretion to decide if the final remedies proposed by [Defendants] are appropriate. The activities completed under the Consent Order are subject to approval by the State of Illinois.

Village of DePue v. Exxon Mobil Corp., 537 F.3d 775 (/document/F.3d/537/775) (), 780 (7th Cir.2008) (internal citations and quotation omitted).⁴ Defendants are currently in the investigatory stage of the cleanup process under the Consent Order, and are in full compliance with it. In addition, the EPA added the Site to the National Priorities List in 1999.

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In August 2006, Plaintiff attempted to compel Defendants to perform an immediate cleanup of the Site through a local nuisance ordinance. In October 2006, Plaintiff brought suit against Defendants under the ordinance in Illinois circuit court, and Defendants removed the suit to this Court. This Court granted the Defendants' motion to dismiss, finding that Plaintiff's claims were preempted by federal and state law. *Village of Depue v. Exxon Mobile Corp.*, 06-1266, 2007 WL 1438581 (C.D.Ill. May 15, 2007). On appeal, the Seventh Circuit affirmed this Court's dismissal, based on state law preemption, relying primarily on the fact that Plaintiff was at that time a non-home-rule municipality. *Village of DePue*, 537 F.3d at 780.

On September 8, 2008, Plaintiff enacted a new ordinance against hazardous waste, and on November 4, 2008, Plaintiff became a home-rule municipality under the Illinois constitution. Plaintiff brought new suits in Illinois circuit court, making the same claims against each Defendant based on the new ordinance; Defendants against removed the cases to this Court, where they were consolidated and Plaintiff added common law claims of nuisance and trespass. This Court dismissed Plaintiff's claims based on the new ordinance with prejudice, finding that the ordinance was an invalid exercise of home-rule authority under the Illinois constitution. Plaintiff's common law trespass and nuisance claims were dismissed without prejudice, and Plaintiff was granted leave to amend them. (Doc. 27). Plaintiff filed its Second Amended Complaint on July 27, 2009, re-alleging its trespass and nuisance claims under Illinois law against Defendants. (Doc. 28). Defendants' instant Motion to Dismiss followed. (Doc. 32).

Legal Standard

"In ruling on Rule 12(b)(6) motions, the court must treat all well-pleaded allegations as true and draw all inferences in favor of the non-moving party." *In re marchFIRST Inc.*, 589 F.3d 901 (/document/F.3d/589/901) (), 904 (7th Cir.2009) (citing *Tamayo v. Blagojevich*, 526 F.3d 1074 (/document/F.3d/526/1074) (), 1081 (7th Cir.2008)). To survive a motion to dismiss under 12(b)(6), a plaintiff's complaint must "plead some facts that suggest a right to relief that is beyond the 'speculative level.'" *EEOC v. Concentra Health Svcs., Inc.*, 496 F.3d 773 (/document/F.3d/496/773) (), 776-77 (7th Cir.2007) (citing *778 778 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (/document/U.S./550/544) (), 560-63, 127 S.Ct. 1955

([/document/S.Ct./127/1955](#)) [\(\)](#), 167 L.Ed.2d 929 ([/document/L.Ed.2d/167/929](#)) [\(\)](#) (2007)). Though detailed factual allegations are not needed, a “formulaic recitation of a cause of action's elements will not do.” *Twombly*, 550 U.S. at 547, [127 S.Ct. 1955](#) ([/document/S.Ct./127/1955](#)) [\(\)](#). “The complaint must contain ‘enough facts to state a claim to relief that is plausible on its face’ and also must state sufficient facts to raise a plaintiff's right to relief above the speculative level.” *Bissessur v. Indiana University Bd. of Trustees*, 581 F.3d 599 ([/document/F.3d/581/599](#)) [\(\)](#), 602 (7th Cir.2009) (*quoting Twombly*, 550 U.S. at 557, [127 S.Ct. 1955](#) ([/document/S.Ct./127/1955](#)) [\(\)](#); *Tamayo*, 526 F.3d at 1084). “A claim has facial plausibility ‘when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.’ ” *Id.* (*quoting Ashcroft v. Iqbal*, ---U.S. ---, [129 S.Ct. 1937](#) ([/document/S.Ct./129/1937](#)) [\(\)](#), 1949, 173 L.Ed.2d 868 ([/document/L.Ed.2d/173/868](#)) [\(\)](#) (2009)).

Discussion

Plaintiff claims that Defendants are liable to it for trespass, by allowing contaminants from the Site to flow onto Village land, and for both public and private nuisance relating to the contamination of Village land. (Doc. 28). The Village land in question is primarily the portion of DePue Lake owned by the Village, though Plaintiff also notes its ownership of the streets and a decline in business revenue and Village property values. (Doc. 28 at 14, 18-19). ²Defendants argue that there are three reasons that the Second Amended Complaint should be dismissed: (1) Plaintiff's claims are time-barred, (2) the doctrine of res judicata prevents assertion of Plaintiff's instant claims as they could have been brought in *DePue I*, and (3) the Second Amended Complaint's allegations are insufficient to state claims for nuisance or trespass. In addition, Defendants argue that Plaintiff's damages allegations should be stricken, as they fail to state a claim for which damages are available. (Doc. 33). The Court finds that Plaintiff's claims are time-barred, and therefore need not address Defendants' other arguments.

Initially, it must be noted that Plaintiff claims two distinct sets of activities to underlie its claims of nuisance and trespass. First, Plaintiff claims that Defendants are liable for the conduct of their corporate predecessors, prior to 1989, in creating the accumulation of contaminants at the Site. (Doc. 28 at 13-14, 16). Plaintiff also claims that Defendants are liable for their “ownership and occupation of the Site.” (Doc. 28 at 15-17). As noted by the Court in its July 8, 2009 Amended Opinion & Order, “the Site's mere existence, absent some specific unreasonable conduct by Defendants, is not a proper basis for a nuisance claim.” (Doc. 27 at 18). Likewise, merely owning a piece of contaminated land is not alone enough, since such “conduct” does not cause the nuisance or trespass-the alleged injuries would occur whether or not Defendants owned the Site. Therefore, Plaintiff's claims must result from the actions of Defendants' corporate predecessors in accumulating the contaminants on the Site.

Plaintiff claims four sets of damages from the alleged trespass and nuisance: a diminution in the assessed property values within the Village, resulting in lower tax receipts for the Village; a “loss of business opportunity and loss of revenue for utilizing its once pristine lake as fishing community;” the “cost of remediating the lithopone ridges to cease continuing runoff of heavy metal toxicants;” and the “costs of remediating Lake DePue.” (Doc. 28 at 18). Plaintiff asserts that these damages *779

779 are “in excess of ... \$20 million.” (Doc. 28 at 21). Plaintiff also claims punitive damages, which it calculates in the amount of one billion dollars against each Defendant. (Doc. 28 at 21).

Illinois law provides for a five-year statute of limitations on nuisance and trespass claims. ⁶735 Ill. Comp. Stat.. 5/13-205. Plaintiff's suit was filed on August 10, 2008, and Plaintiff does not allege any tortious conduct by Defendants since 1989. Thus, Plaintiff's claim is facially barred by the statute of limitations, so the Court must look to whether the continuing tort doctrine, discovery rule, or sovereign immunity prevent dismissal.

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I. Continuing Tort Doctrine

Plaintiff argues that the continuing tort doctrine should apply to this case, such that the statute of limitations would not bar the nuisance and trespass actions. On the contrary, a continuing tort “is occasioned by continuing unlawful *acts and conduct*, not by continual ill effects from an initial violation.” *Feltmeier v. Feltmeier*, 207 Ill.2d 263, 278 Ill.Dec. 228, 798 N.E.2d 75, 85 (2003) (*citing Pavlik v. Kornhaber*, 326 Ill.App.3d 731, 260 Ill.Dec. 331, 761 N.E.2d 175, 186-87 (2001); *Bank of Ravenswood v. City of Chicago*, 307 Ill.App.3d 161, 240 Ill.Dec. 385, 717 N.E.2d 478, 484 (1999); *Hyon Waste Mgmt. Serv., Inc. v. City of Chicago*, 214 Ill.App.3d 757, 158 Ill.Dec. 335, 574 N.E.2d 129, 133 (1991)) (emphasis added). See also (*Hyon*, 158 Ill.Dec. 335, 574 N.E.2d at 132-33) (*citing Ward v. Caulk*, 650 F.2d 1144 (/document/F.2d/650/1144) () (9th Cir.1981)). In cases where the tortious activity ceased at a certain date, the courts do not apply the continuing tort doctrine because to do so would be “to confuse the concept of a continuing tort with that of a continuing injury.” *Powell v. City of Danville*, 253 Ill.App.3d 667, 192 Ill.Dec. 675, 625 N.E.2d 830, 831 (1993). Here, as noted above, the last possible tortious conduct ceased in 1989, when the operation of manufacturing facilities at the Site ended. Plaintiff alleges that it is continually re-injured by water flowing from the Site onto its property. Plaintiff does not allege that Defendants or their corporate predecessors engaged in any conduct aside from merely owning the Site after that date; the continuing tort doctrine therefore does not apply, as the last allegedly tortious conduct occurred in 1989. See also *Muniz v. Rexnord Corp.*, 04-c2405, 2006 WL 1519571, *4-5 (N.D.Ill. May 26, 2006) (continuing tort doctrine did not apply where defendant stopped polluting in 1980, though plaintiffs suffered effects of polluted water until 2003); *Soo Line R. Co. v. Tang Industries, Inc.*, 998 F.Supp. 889 (/document/F.Supp./998/889) (), 896-97 (N.D.Ill.1998) (continuing tort doctrine did not apply where defendant ceased toxic dumping in 1982, though plaintiff continued to be harmed).

II. Discovery Rule

Illinois follows the discovery rule, which starts the limitations period at the point when the plaintiff “becomes possessed of sufficient information concerning its injury to put a reasonable person on inquiry to determine whether actionable conduct is involved.” ²*780 780 *Vector-Springfield Properties, Ltd. v. Central Illinois Light Co.*, 108 F.3d 806 (/document/F.3d/108/806) (), 809 (7th Cir.1997) (*citing Jackson Jordan, Inc. v. Leydig, Voit & Mayer*, 158 Ill.2d 240, 198 Ill.Dec. 786, 633 N.E.2d 627, 630-631 (1994); *Knox College v. Celotex Corp.*, 88 Ill.2d 407, 58 Ill.Dec. 725, 430 N.E.2d 976, 980-981 (1981); *Abramson v. Abramson*, 772 F.Supp. 395 (/document/F.Supp./772/395) (), 397-98 (N.D.Ill.1991)). “[T]he statute starts to run when a person knows or reasonably should know of

his injury and also knows or reasonably should know that it was wrongfully caused.” *Id.* (quoting *Knox College*, 58 Ill.Dec. 725, 430 N.E.2d at 980). As noted above, Plaintiff’s suit was filed on August 10, 2008, so in order for the statute of limitations to bar the instant claims, it must be shown that the injury was or should have been discovered before August 10, 2003.

The Illinois discovery rule does not make Plaintiff’s claims timely. Plaintiff claims that the “discovery rule would lend [Defendants] no aid,” as it “relied [on] the statement in the [May 1999] Fact Sheet that there was no short term risk to health,” which “has been superseded by the July, 2009 Fact Sheet.” (Doc. 38 at 12). Though Plaintiff’s argument on this point is not well-developed, it appears to argue that, because it did not know the extent of harm caused by the Site contamination until sometime in 2009, the limitations period did not begin until at least 2009.

Plaintiff’s discovery rule argument is unavailing, as it knew or should have known of the injury to its property well prior to August 10, 2003. As outlined above, 1992 marked the first investigations of the Site contamination by both the EPA and the IEPA. As early as October 1992, the IEPA’s Fact Sheet # 1 stated that elevated levels of cadmium, copper, mercury, selenium, zinc, and ammonia were present in DePue Lake. IEPA, New Jersey Zinc/Mobil Chemical Site, Fact Sheet # 1, October 1992. At that time, the IEPA noted that these metals could cause chronic health problems with long term exposure. *Id.* In September 1995, the IEPA noted in Fact Sheet # 3 that “[w]ater containing elevated levels of metals is discharging into DePue Lake via a ditch south of the site [the “South Ditch”] and occasionally flowing over the sidewalk along Marquette Street.” IEPA, New Jersey Zinc/Mobil Chemical Site, Fact Sheet # 3, September 1995. The health consequences, for both people and animals, of the heavy metals in the South Ditch were strongly stated in the September 2002 Fact Sheet. IEPA, New Jersey Zinc/Mobil Chemical Site, Fact Sheet # 7, September 2002. This Fact Sheet also noted that DePue Lake receives the discharge from the South Ditch, and thus that the Lake and the animals living in and around it would be affected by the contaminants in the South Ditch. *Id.*

These Fact Sheets served to put Plaintiff “on inquiry to determine whether actionable conduct is involved.” *Vector-Springfield Properties, Ltd.*, 108 F.3d at 809. In 1992, Plaintiff knew that elevated levels of certain contaminants were present at the Site, and that these contaminants *781 781 could cause health problems; Plaintiff also knew that the source of the contaminants was the industrial operation at the Site. In 1995, Plaintiff knew that contaminated water from the Site discharged into DePue Lake and over a Village street, and in 2002, it was confirmed that the water thus discharged into the Lake contained sediments that were very harmful to people and animals. ⁸Plaintiff cannot now claim that this information was insufficient to put it on notice of a potential injury to its property. There is no factual dispute that well before August 10, 2003, Plaintiff was on notice that there was a potential risk to health and that contaminated water was flowing onto Village property; the fact that it obtained more detailed information in 2009 does not negate this knowledge.

III. Sovereign Immunity

Finally, Plaintiff argues that it has, as a municipality, sovereign immunity from the application of the statute of limitations. Governmental entities are immune from statutes of limitations when they act in their public capacity,

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but are not immune if they act in a private capacity. *Champaign County Forest Preserve Dist. v. King*, 291 Ill.App.3d 197, 225 Ill.Dec. 477, 683 N.E.2d 980, 982 (1997) (citing *City of Shelbyville v. Shelbyville Restorium, Inc.*, 96 Ill.2d 457, 71 Ill.Dec. 720, 451 N.E.2d 874, 877-78 (1983); *Board of Education v. A, C & S, Inc.*, 131 Ill.2d 428, 137 Ill.Dec. 635, 546 N.E.2d 580, 600-02 (Ill.App.1989)).

In order to determine if a governmental activity is public or private, courts should consider who would benefit by the government's action and who would lose by its inaction. Three factors must be addressed: (1) the effect of the interest on the public, (2) the obligation of the governmental unit to act on behalf of the public, and (3) the extent to which the expenditure of public revenues is necessitated.

Champaign County, 225 Ill.Dec. 477, 683 N.E.2d at 982 (citing *A, C & S, Inc.*, 137 Ill.Dec. 635, 546 N.E.2d at 602; *Shelbyville*, 71 Ill.Dec. 720, 451 N.E.2d at 877-78). The fact that the residents of a particular municipality would benefit from the action is not alone sufficient to render it "public" in nature; the right must belong "to the general public," rather than "only to the government or some small, distinct subsection of the public at large." *Id.*, 225 Ill.Dec. 477, 683 N.E.2d at 984 (citing *Shelbyville*, 71 Ill.Dec. 720, 451 N.E.2d at 876-77; *People ex rel. Department of Transportation v. Molter*, 133 Ill.App.3d 164, 88 Ill.Dec. 494, 478 N.E.2d 1102, 1104 (1985)). See also *Savoie v. Town of Bourbonnais*, 339 Ill.App. 551, 90 N.E.2d 645, 649 (1950) ("[P]ublic rights or uses are those in which the public has an interest in common with the people of such municipality, whereas private rights or uses are those which the inhabitants of a local district enjoy exclusively, and the public has no interest therein."). Each of the *Champaign County* factors is considered in turn.²*782 782 A. **Effect of the interest on the public**

In *Champaign County*, the court distinguished the cases of *Shelbyville* and *A, C & S*, explaining that in each of those cases the municipal plaintiff sought to recover costs incurred in repairing streets and abating asbestos, respectively. 225 Ill.Dec. 477, 683 N.E.2d at 982-83. In *Shelbyville*, the city sought to recover the money from a builder who had failed to construct streets, which action "directly affected the safety of the general public." *Champaign County*, 225 Ill.Dec. 477, 683 N.E.2d at 983 (citing *Shelbyville*, 71 Ill.Dec. 720, 451 N.E.2d at 877-78). Likewise, in *A, C & S*, school districts sought to recover from asbestos suppliers and distributors the costs they had incurred in abating the asbestos, which affected the general public "because the school districts were addressing a significant health concern." *Id.* (citing *A, C & S*, 137 Ill.Dec. 635, 546 N.E.2d at 602). In this case, as in *Champaign County*, Plaintiff's suit will have no effect on the general public, as it will neither "make the public safer, nor [will] it reduce the likelihood of injury on plaintiff's property." *Id.*

First, *Champaign County* makes clear that lost potential tax and business revenues, in and of themselves, are not damages that are part of a "public" cause of action, as they do not implicate the public's interest in health and safety, and merely affect the economic interests of the residents of the Village. In addition, though Plaintiff tries to cast its action as one involving the health and safety of Village residents, its recovery of damages purportedly for cleanup costs in this case will not affect public safety, as the cleanup and remediation of the Site are controlled by the IEPA and the Consent Order.¹⁰ Plaintiff has no authority to pursue remediation of the Site itself, which is still owned by Defendants and the remediation of

which is controlled by the Consent Order. Therefore, Plaintiff cannot recover, in order to improve public health and safety, for “the cost of remediating the lithopone ridges [which are on the Site] to cease continuing runoff of heavy metal toxicants.” (Doc. 28 at 18).

Further, the Consent Order explicitly provides that Defendants and the IEPA are to develop a plan to prevent further runoff of contaminated water from the Site, including into the Lake, which is a necessary first step to any cleanup efforts; Defendants and the IEPA are also to investigate and develop potential remedies for “contamination ... in any area ... impacted by the releases [of contaminants from the Site], which necessarily includes the Lake.” (Consent Order, Attachment 1 at 2 (Doc. 21, Ex. B at 61); Consent Order at 6-7 (Doc. 21, Ex. B at 11)). Therefore, the recovery by Plaintiff of the “cost of remediating Lake DePue of its heavy metal contaminants” will not improve public health and safety, as Plaintiff has not, and cannot, undertake this task itself. ¹¹(Doc. *783 783 28 at 18). *Cf. City of Chicago v. Latronica*, 346 Ill.App.3d 264, 281 Ill.Dec. 913, 805 N.E.2d 281, 288-89 (2004) (city had purchased relevant site and so could and did undertake remediation); *A, C & S*, 137 Ill.Dec. 635, 546 N.E.2d at 602 (school buildings from which asbestos to be removed owned by school district plaintiffs); *Shelbyville*, 71 Ill.Dec. 720, 451 N.E.2d at 877-78 (city owned streets to be repaired). This first factor turns against Plaintiff's position that the statute of limitations does not apply.

B. Plaintiff's obligation to act on behalf of the public

Further, *Champaign County* explains that “whether the governmental entity was obligated to act on behalf of the public” must be addressed in determining whether an action is public or private. *Id.*, 225 Ill.Dec. 477, 683 N.E.2d at 983. This factor turns on whether there is an obligation in law for the governmental entity to undertake the action for which it seeks to recoup its costs. Here, Plaintiff does not point to, and the Court cannot identify, any source of legal obligation for Plaintiff either to maximize potential tax and business revenues, or to perform environmental cleanup of DePue Lake or other Village property, especially where the Consent Order covers such cleanup.

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In each of the Illinois cases cited to the Court in which a governmental entity was immune from the statute of limitations, the governmental entity had a legal obligation to undertake the action for which it sought to recover its costs. In *Shelbyville*, a city ordinance required that the city bear no part of the cost of constructing the streets at issue, which were to be constructed as part of a subdivision, while an Illinois statute required the city to “ensure [the] construction and maintenance” of city streets. *Shelbyville*, 71 Ill.Dec. 720, 451 N.E.2d at 878. In *A, C & S*, the Illinois Asbestos Abatement Act required the school districts to remove asbestos-containing materials from schools. *A, C & S*, 137 Ill.Dec. 635, 546 N.E.2d at 602. Similarly, in *Latronica*, the city of Chicago was “authorized and obligated by law to clean up the Site” under the municipal code. *Latronica*, 281 Ill.Dec. 913, 805 N.E.2d at 288-89. On the other hand, in *Champaign County*, the court found that there was no legal obligation to undertake the relevant action, and so the suits to recover the governmental entities' costs were subject to the statute of limitations. *Champaign County*, 225 Ill.Dec. 477, 683 N.E.2d at 983 (though municipality “authorized to purchase insurance, it was not required to do so” under statute). *See also People ex rel. Ill. Dept. of Labor v. Tri State Tours, Inc.*, 342 Ill.App.3d 842, 277 Ill.Dec. 322, 795 N.E.2d 990, 994 (2003) (*citing People ex rel. Hartigan v. Agri-Chain Products*,

Inc., 224 Ill.App.3d 298, 166 Ill.Dec. 577, 586 N.E.2d 535 (1991); *Stafford v. Bowling*, 85 Ill.App.3d 978, 41 Ill.Dec. 273, 407 N.E.2d 771 (1980)) (no immunity where governmental entity had option, but no legal duty to act).

Here, as in *Champaign County*, there is no legal obligation on the part of the Village to maximize potential tax and business revenues by ensuring that land within the Village is pristine. Likewise, there is no legal obligation for the Village to undertake remediation of the Site; indeed, the *784 784 State of Illinois has placed this burden on Defendants. Further, there is no legal obligation for the Village to undertake a cleanup of non-Site contaminated property. Though the Village might wish, as a landowner, to undertake such efforts, it is not legally obligated to do so and therefore is not asserting a right of the general public.

C. Extent of necessary public expenditure

Finally, as explained in *Champaign County*, the public interest at stake must necessitate an expenditure of public revenues, though the fact that public funds have been used is not dispositive of whether the activity is public. *Champaign County*, 225 Ill.Dec. 477, 683 N.E.2d at 983-84 (“[T]he fact that public funds were used ... does not necessarily render it a public act. Otherwise, any use of public funds would always be considered a public act”). The *Champaign County* court noted that in both *Shelbyville* and *A, C & S*, the governmental entities had spent highly burdensome amounts of money on the required actions they had undertaken. *Champaign County*, 225 Ill.Dec. 477, 683 N.E.2d at 984 (citing *Shelbyville*, 71 Ill.Dec. 720, 451 N.E.2d 874; *A, C & S*, 137 Ill.Dec. 635, 546 N.E.2d 580. In *Latronica*, the city had already spent millions on the cleanup of a polluted site that it had purchased. *Latronica*, 281 Ill.Dec. 913, 805 N.E.2d at 290.

As noted above, in *Shelbyville*, *A, C & S*, and *Latronica*, the governmental entities were required by law to undertake these expenditures and were thus entitled to recover; here, there is no obligation on the part of Plaintiff to maximize potential tax or business revenue, or to clean up pollution caused by releases from the Site. In addition, Plaintiff does not allege what costs it has been forced to incur in dealing with pollution from the Site, other than to allege that it has lost potential tax and business revenues from declining property values and tourism, and that the cost of remediation “is believed to be in the multiple millions of dollars.” (Doc. 28 at 18). As Plaintiff is not required by law to undertake the actions that these damages seek recovery for, no expenditure of public funds has been necessitated by the contamination from the Site. Indeed, the Consent Order requires Defendants to assume the costs of remediation at and around the Site.

As the application of the three factors from *Champaign County* demonstrate, Plaintiff's nuisance and trespass claims are not brought in Plaintiff's “public” capacity, but are brought solely to recover damages allegedly incurred because of Plaintiff's interests as a private landowner; sovereign immunity against the application of statutes of limitation thus does not apply here. Notably, in none of the precedential Illinois cases cited to the Court had a state agency already established working relationship with the defendants to deal with the problems the plaintiff sought to address by its suit. The purpose of sovereign immunity from statutes of limitations for public actions is to protect the public from “the negligence of its officers and agents in failing to promptly assert causes of action which belong to the public,” thereby leaving the public without a remedy. *A, C & S*, 137 Ill.Dec. 635, 546 N.E.2d at 601 (citing *Shelbyville*,

71 Ill.Dec. 720, 451 N.E.2d at 876). Here, where Defendants are already bound to address and pay for the remediation of contamination from the Site under the Consent Order, there is little need for Plaintiff's action or for the application of sovereign immunity from the statute of limitations. In addition, neither the discovery rule nor the continuing tort doctrine mitigate the effect of the statute of limitations in this case. Therefore, Plaintiff's claim is barred by the five-year statute *785 785 of limitations applicable to nuisance and trespass actions.

Conclusion

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For the foregoing reasons, Defendant's Motion to Dismiss (Doc. 32) is GRANTED. This matter is DISMISSED WITH PREJUDICE. Plaintiff's Motion for Leave to File Supplemental Memorandum (Doc. 41) is DENIED.

IT IS SO ORDERED.

Notes:

1. The Court directed a Reply from Defendants in order to give Defendants an opportunity to respond to the arguments made by Plaintiff in its Response; it did not seek supplemental briefing from Plaintiff on the issue of a municipality's sovereign immunity from statutes of limitations. Plaintiff filed its Motion for Leave to File, with the attached supplemental brief, prior to the deadline for Defendants' Reply. Plaintiff asserts that "[t] here are additional authorities on the subject which plaintiff has found that should be brought to the court's attention." (Doc. 41 at 1). The Court does not find that Plaintiff's supplemental brief is necessary, as Plaintiff has already had the opportunity to respond to the arguments made by Defendants in their Motion to Dismiss.

2. Courts may judicially notice the reports of administrative bodies and documents contained in the public record. *Menominee Indian Tribe of Wis. v. Thompson*, 161 F.3d 449 (/document/F.3d/161/449) (), 456 (7th Cir.1998). These Fact Sheets are published by the IEPA, an Illinois administrative body.

In 2009, the Judicial Conference of the United States issued guidelines recommending that the Court preserve a "snapshot" of webpages cited in opinions, especially if the information on the webpages is not published elsewhere or the webpages are likely to change over time. All of these IEPA Fact Sheets are available through the IEPA, and several pertinent ones are provided by both Plaintiff and Defendant as Exhibits filed in this case. However, the Court will attach to this Opinion the specific Fact Sheets cited in the Opinion.

3. Judicial notice of the Consent Order is appropriate here, as its terms are not subject to reasonable dispute. See *GE Capital Corp. v. Lease Resolution Corp.*, 128 F.3d 1074 (/document/F.3d/128/1074) (), 1081-82 (7th Cir.1997) (collecting cases). The Consent Order was filed in this case as an Exhibit to Defendants' first Motion to Dismiss. (Doc. 21, Ex. B).

4. Federal courts may take judicial notice of previous judicial decisions. *Consolidation Coal Co. v. United Mine Workers of Am., Dist. 12, Local Union 1545*, 213 F.3d 404 (/document/F.3d/213/404) (), 407 (7th

Cir.2000); *Opoka v. I.N.S.*, 94 F.3d 392 (/document/F.3d/94/392) (), 394-95 (7th Cir.1996); see *Limestone Dev. Corp. v. Village of Lemont*, 473 F.Supp.2d 858 (/document/F.Supp.2d/473/858) (), 868 (N.D.Ill.2007).

5. The page numbering of several of Plaintiff's documents does not square with the page numbers assigned by the electronic filing system when the case was e-filed. For clarity, the Court will refer to page numbers in all documents by the page numbers assigned by the electronic filing system, not those put on the pages by Plaintiff.

6. The Court notes that the original state court action, which was filed on August 10, 2003, did not contain claims for nuisance or trespass, but relied only on the new Village ordinance. (Doc. 1). It was not until the December 12, 2008 Amended Complaint that the nuisance and trespass claims were added. (Doc. 15). As neither party has addressed whether these later claims relate back to the August 10, 2008 Complaint, the Court will assume, without deciding, that they would relate back and that August 10, 2008 is the appropriate date to consider as the date of suit. Given the Court's disposition of the Motion to Dismiss, it does not matter.

7. Plaintiff points out that the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) provides for the application of state statutes of limitations to state-law actions "caused or contributed to by exposure to any hazardous substance, or pollutant or contaminant, released into the environment from a facility," but provides that the limitations period can begin no earlier than "the date the plaintiff knew (or reasonably should have known) that the ... property damages ... were caused or contributed to by the hazardous substance or pollutant or contaminant concerned." 42 U.S.C. § 9658. As Illinois also follows this "discovery rule," Illinois law would not place the starting date any earlier than would CERCLA, and so there is no need to resort to federal law to determine the beginning of the limitations period.

8. The Consent Order itself, issued in 1995, details the results of early testing of both the Site and off-site properties. (Consent Order at 20-24 (Doc. 21, Ex. B at 18-20)).

9. Though it is linguistically appealing to equate a common law "public nuisance" with the vindication of a "public right," such that claims for public nuisance by governmental entities are never subject to the statute of limitations, the court in *City of Chicago v. Latronica*, which considered a public nuisance claim, proceeded to analyze the three factors listed above, though it also found that a public nuisance claim had been adequately stated. 346 Ill.App.3d 264, 281 Ill.Dec. 913, 805 N.E.2d 281, 288-89 (2004).

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10. Plaintiff claims that it is not "bound" by the Consent Order, citing to the "Non-Party Injury or Damages" clause of the Consent Order. (Consent Order at 82 (Doc. 21, Ex. B at 49)). While it is true that Plaintiff is not bound to any action by the Consent Order, and that the Consent Order itself does not limit Plaintiff's remedies, the Consent Order does show which parties are responsible for the remediation of the Site and of contamination from it.

11. The Court also notes the commonsensical observation that Plaintiff's efforts to remediate the Lake before the Site's IEPA-controlled remediation is complete would be ineffective, as water would continue to flow from the Site to the Lake. In addition, Plaintiff owns only 20 acres of the over 600-

acre Lake, and does not explain how an attempted remediation of a mere 3.3% of the Lake would be effective or improve public health and safety. (Doc. 28 at 12).

Fact Sheet # 10 reveals that Defendants and the IEPA are working together with the Illinois Department of Natural Resources and federal agencies to design a remedy for DePue Lake contamination, and that Defendants and the IEPA will negotiate the implementation of the remedy. Defendants and the IEPA are also working on testing off-site soils, and "have agreed to work toward an immediate remedy for affected properties" that require immediate soil removal. IEPA, New Jersey Zinc/Mobil Chemical Site, Fact Sheet # 10, December 2004. These facts indicate the scope of remediation work under the Consent Order.

Citing Documents

Add

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Wilmot Mountain, Inc. v. Lake Cnty. Forest Pres. Dist., 859 F. Supp. 2d 932 (N.D. Ill. 2012) (/case/wilmot-mountain-inc-v-lake-cnty-forest-pres-dist)

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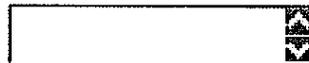
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632 F.Supp.2d 854

VILLAGE OF DePUE, ILLINOIS, a Municipal Corporation, Plaintiff,

v.

VIACOM INTERNATIONAL, INC. n/k/a CBS Operations, Inc. and Exxon Mobil Corporation,
Defendants.

No. 08-cv-1272.

No. 08-cv-1273.

United States District Court, C.D. Illinois, Peoria Division.

July 8, 2009.

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AMENDED OPINION & ORDER

JOE BILLY McDADE, District Judge.

This consolidated civil action, initiated by the Village of DePue ("Village"), is the Village's second recent suit against Viacom International, Inc./CBS Operations, Inc. and Exxon Mobil Corporation regarding environmental contamination at the De-Pue/New Jersey Zinc/Mobil Chemical Corp. Superfund Site ("Site"). The expansive 1500-acre Site is located within the Village in Bureau County, Illinois. The Site's environmental problems and the Village's earlier suit are discussed below.

In the present action, the Village alleges that Exxon and CBS Operations (collectively, "Defendants"), as respective owner and lessee of the Site, are in violation of a recently-enacted hazardous substances ordinance. In addition, the Village seeks to advance claims of common law nuisance and trespass. Defendants have jointly filed a motion to dismiss all of the Village's claims (Doc. 20). For the reasons stated below, the motion is GRANTED.

BACKGROUND

To put this lawsuit in proper context, it is necessary to briefly outline a few points: (1) the Site's environmental history; (2) the Village's earlier suit against Defendants in this Court; and

(3) subsequent actions taken by the Village. The background information provided below is taken from the following sources: this Court's opinion in *Village of Depue v. Exxon Mobil Corp.*, 2007 WL 1438581 (C.D.Ill. May 15, 2007); the decision of the Seventh Circuit Court of Appeals in *Village of DePue v. Exxon Mobil Corp.*, 537 F.3d 775 (7th Cir.2008); and the Environmental Protection Agency's ("EPA") National Priorities List ("NPL") Fact Sheet for the DePue Site, <http://www.epa.gov/region5/superfund/npl/illinois/ILD062340641.htm>

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(updated April 28, 2009) ("4/28/2009 NPL Fact Sheet").¹

1. The Site, State Involvement, and the Ongoing Cleanup

Defendants' corporate predecessors operated a zinc smelting facility and a diammonium phosphate fertilizer plant on the Site from 1903 until the late 1980s.² The manufacturing operations at these facilities generated waste material that contaminated the Site. As a result, the Site and some surrounding areas presently contain elevated levels of

cadmium, lead, and other metals. (4/28/2009 NPL Fact Sheet—Threats and Contamination). According to EPA assessments, the increased concentrations of metals in the area pose no short-term threats to nearby populations; however, the EPA has expressed general concern about potential long-term adverse health effects resulting from elevated amounts of cadmium. *See Village of Depue*, 2007 WL 1438581, at *1 (citing an earlier—but unchanged in relevant part—version of the NPL Fact Sheet).

After taking note of the Site in 1980, the EPA conducted preliminary environmental assessments in following years pursuant to the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9601 *et seq.* In 1992, the Illinois Environmental Protection Agency ("IEPA") also began to investigate the Site pursuant to its authority under Illinois law. *Village of Depue*, 2007 WL 1438581, at *2. As a result of the EPA's and IEPA's investigations and assessments, the EPA added the Site to the National Priorities List in 1999. This addition confirmed the Site's status as one of the most contaminated spots in the United States.

In 1995, prior to the Site's official placement on the NPL, the Illinois Attorney General filed suit against Defendants' corporate predecessors in Illinois circuit court (at the IEPA's request) pursuant to the Illinois Environmental Protection Act ("the Illinois Act"), 415 Ill. Comp. Stat. 5/22.2 & 42(d), (c).³ As a result of the Attorney General's suit, Defendants entered into an interim consent order ("Consent Order") with the People of the State of Illinois. The Seventh Circuit Court of Appeals has described Defendants' responsibilities under the Consent Order as follows:

Under this Consent Order, [Defendants] must perform a phased investigation of the site and implement certain interim remedies. [They] also must propose final remedies to the State of Illinois before completing final remedial action for the site. The Consent Order requires [Defendants] to perform ... investigations and

remedial actions in compliance with both the ICP (Illinois Hazardous Substances Pollution Contingency Plan) and the NCP (National Oil and Hazardous Substances Pollution Contingency

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Plan). The State of Illinois, in consultation with the EPA, has sole discretion to decide if the final remedies proposed by [Defendants] are appropriate. The activities completed under the Consent Order are subject to approval by the State of Illinois.

Village of DePue, 537 F.3d 775, 780 (7th Cir.2008) (citations and quotation omitted) (explanatory parentheticals for ICP and NCP added).⁴

Currently, Defendants are in the process of conducting remedial investigations and feasibility studies at the Site, i.e. gathering data about the nature and extent of the contamination and evaluating possible cleanup options. (Am. Compl. ¶ 17; 4/28/2009 NPL Fact Sheet—Cleanup Progress). As part of this phase of the cleanup, Defendants are collecting information about possible risks to human health. *See Village of DePue*, 537 F.3d at 780. The Consent Order expressly requires this type of health-related investigation. (Ex. B to Mot. to Dismiss, Consent Order ¶ III(B)(2)(b)).⁵

While, overall, Defendants are at the investigatory stage of the cleanup process, they have already implemented certain limited environmental remedies at the Site, including a dust control program and a water treatment system to treat surface water discharging into Lake DePue. (4/28/2009 NPL Fact Sheet—Cleanup Progress). After Defendants complete their remedial investigations, they will conduct design studies and, then, begin permanent remediation at the Site. *See Village of DePue*, 537 F.3d at 780-81. Defendants have spent over \$30 million in connection with Site cleanup, *id.* at 780, and it is undisputed that Defendants are fulfilling their responsibilities under the Consent Order.

2. The Village's Prior Action against Exxon and CBS Operations

Dissatisfied with Defendants' rate of progress in cleaning up the Site, the Village decided to take matters into its own hands in August 2006. Pursuant to a local nuisance ordinance (Section 7-5-3 of the DePue Village Code), the Village posted "Notice[s] to Abate Nuisance" at the Site. These notices directed Defendants to perform an *immediate* cleanup of the Site, under penalty of \$750 for each day the Site remained a nuisance.⁶ In October 2006, the Village brought suit against Defendants in Illinois circuit court, alleging violations of the nuisance ordinance. *Village of Depue*, 2007 WL 1438581, at *3. The Village sought the following relief: a declaratory judgment that Defendants were in violation of the ordinance; fines of \$750 for each day Defendants were in violation; and an injunction requiring Defendants to immediately complete a total cleanup of the Site. *Id.*

Defendants removed the suit to federal court based on diversity jurisdiction and filed a motion to dismiss. This Court granted the motion to dismiss, holding the Village's claims to be preempted by federal and state law. *Village of Depue*, 2007 WL

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1438581, at *12. The Village appealed, and the Seventh Circuit Court of Appeals affirmed this Court's dismissal based on state law preemption. *Village of DePue*, 537 F.3d at 789 (hereinafter "*DePue I*"). The Court of Appeals began its consideration of the state law preemption issue in *DePue I* by stressing the Village's status as a non-home-rule municipality with limited powers under the Illinois Constitution. 537 F.3d at 787-88. Specifically, the court noted the Village's lack of authority to enforce any ordinance conflicting with the spirit and purpose of a state statute. *Id.* at 787. The Court of Appeals went on to hold that the Village's use of its nuisance ordinance to force Defendants to perform an immediate cleanup of the Site undoubtedly conflicted with the spirit and purpose of the

Illinois Environmental Protection Act. The court recognized, "[B]ecause environmental damage does not respect political boundaries, it is necessary to establish a unified state-wide program for environmental protection ... environmental problems are closely interrelated and must be dealt with as a unified whole in order to safeguard the environment." *Id.* at 788 (quoting the Illinois Act, 415 Ill. Comp. Stat. 5/2(a)(ii), (iii)). Applying the preemption standard for non-home-rule municipalities in Illinois, the Court of Appeals concluded as follows:

The Village's application of its nuisance ordinance seeks to address, in a heavy-handed manner, a difficult environmental problem that certainly is not only of local concern. If the Village were permitted to apply its nuisance ordinance to force [Defendants] to complete *immediately* the cleanup of the site, on penalty of \$750 per day for noncompliance, then it could prevent compliance with the measured cleanup process adopted by Illinois through the Consent Order under the authority of Illinois law. Such a result would frustrate the purpose of the Illinois Act.

....

The Illinois legislature enacted the Illinois Act in order to safeguard the environment and to restore contaminated areas through a phased and carefully considered process. Ignoring this process by conducting and concluding a cleanup to the satisfaction of the Village is not a plan in service to the goals of the Illinois Act. The Village's application of its nuisance ordinance in this case is overreaching because it attempts to regulate an environmental hazard that is not local in nature and that already is subject to a cleanup under the authorization and direction of the state. Accordingly, we hold that the Village's claims are preempted by the Illinois Act.

Id. at 788-89 (citations omitted) (emphasis in original).

3. Post *DePue I*

Despite its loss in *DePue I*, the Village has initiated this second lawsuit, against the same defendants, based on the effects of pollution at the Site. There are some key differences this time around, however. First, the Village is now a home-rule unit of local government. According to the Amended Complaint, on November 4, 2008, Village of DePue voters passed a referendum to adopt home-rule status under the Illinois Constitution. (Am. Compl. ¶ 6). As a home-rule municipality, the Village now has greater autonomy in governing its local affairs.

The second difference is that the Village is suing under a new ordinance. On September 8, 2008 (after the Seventh Circuit issued its decision in *DePue I*) the Village enacted a new "Hazardous Waste and Hazardous Substances" ordinance pursuant to authorization under a public health

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provision within the Illinois Municipal Code.⁷ (Ex. 2 to Am. Compl., Ordinance No. 08-9, adding DePue Village Code 7-6). On November 10, 2008, after becoming a home-rule municipality, the Village amended the ordinance to reflect municipal home-rule status. The amended ordinance prohibits any person, entity, or corporation from owning, controlling, or possessing "real property by lease, trust or deed which contains hazardous wastes or hazardous substances." (Ex. 6 to Am. Compl., Ordinance No. 08-12, amending DePue Village Code 7-6 & 7-7, at 7-7-5). The terms "hazardous waste" and "hazardous substances" are defined by cross-references to parallel provisions of the Illinois Act. In addition, the ordinance gives Village authorities the discretion to determine what is hazardous to public health and safety. (DePue Village Code 7-7-1 & 7-7-2).

The original version of the hazardous substances ordinance, enacted on September 8, 2008, provided for a fine of up to \$750 per day of violation. The November 10, 2008 amendment increased that penalty significantly to a one-time fine of up to \$50,000 and a

recurring daily fine of up to \$10,000. (DePue Village Code 7-7-6).

It seems apparent that the Village designed the November 10, 2008 amendment to target Defendants in connection with the Site. In a resolution adopted contemporaneously with the amendment, the Village charged Defendants with adversely affecting the health and safety of Village residents by maintaining hazardous substances at the Site. With this resolution, the Village slapped Defendants with the maximum fines allowed under the amended ordinance. (Exs. 3-4 to Am. Compl., "Resolution Finding Risks to the Public Health from the Abandoned 1500 Acre Manufacturing Site of Exxon Mobil Corporation and CBS Operations, Inc.").⁸

The suit presently before this Court originated in Illinois circuit court, in the form of separate complaints against Exxon and CBS Operations for violations of the Village's newly-enacted hazardous substances ordinance. Defendants removed their respective cases to this Court on diversity grounds in October 2008. The Court consolidated the two cases shortly after removal; the lead case number is 08-cv-1272. The Village filed an Amended Complaint on December 12, 2008 (Doc. 15). In the Amended Complaint, the Village alleges Defendants' pre- and post-November 10, 2008 violations of the hazardous substances ordinance. The Village also sets out claims of common law nuisance and trespass. (Am. Compl. ¶¶ 23-25).

Among other requests for relief, the Village asks for judgment on its ordinance-based claim in the amount of daily \$10,000 fines applicable to each Defendant for the period of November 12, 2008 "until the pollution of the Village of DePue ceases..." (Am. Compl. § VI ¶¶ 5-6). As to its common law claims, the Village requests "[d]amages in the amount of diminished real estate tax and sales tax revenues resulting from the decreased economic value of the property within the limits of the Village of DePue..." (Am. Compl. § VI ¶ 7). Defendants have

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moved to dismiss the Amended Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure and to strike certain requests for relief pursuant to Rule 12(f).

LEGAL STANDARDS

A motion under Rule 12(b)(6) is designed to test the availability of legal relief under the alleged facts. *See Maple Lanes, Inc. v. Messer*, 186 F.3d 823, 824-25 (7th Cir.1999). When ruling on a motion to dismiss under Rule 12(b)(6), a federal court must view the complaint in the light most favorable to the plaintiff, and the complaint's well-pleaded factual allegations must be accepted as true. *Williams v. Ramos*, 71 F.3d 1246, 1250 (7th Cir.1995). To survive a Rule 12(b)(6) motion, a plaintiff must show, through allegations, that his entitlement to relief is plausible. *Windy City Metal Fabricators & Supply, Inc. v. CIT Technology Fin.*, 536 F.3d 663, 667 (7th Cir.2008). A plaintiff meets this burden by alleging a general factual basis which, if true, would warrant relief under a specified legal theory. *See Tamayo v. Blagojevich*, 526 F.3d 1074, 1081-85 (7th Cir.2008). Under Rule 12(f), the Court may "strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter."

ANALYSIS

Defendants Exxon and CBS Operations view this suit as a second attempt by the Village to interfere with the ongoing IEPA-supervised cleanup at the Site. According to Defendants, the Village's application of its hazardous substances ordinance in this action is preempted by the Illinois Act. In a related argument, Defendants contend that the hazardous substances ordinance, as applied here, is not a valid exercise of home-rule authority under the Illinois Constitution. Alternatively, Defendants argue that the Village's attempt to enforce the ordinance is a violation of constitutional due process. In addition, Defendants ask the Court to dismiss the Village's nuisance and trespass claims on state-law preemption grounds and for failure to state a claim.

I. Claim under the Village's Hazardous Substances Ordinance

In holding the Village's similar nuisance ordinance to be preempted under state law in *DePue I*, the Court of Appeals emphasized the Village's status as a non-home-rule municipality and recognized the limited lawmaking power of non-home-rule local governments under the Illinois Constitution. 537 F.3d at 787. Today, the Village is a home-rule municipality. As a home-rule unit of local government, the Village now enjoys more autonomy and flexibility in governing its local affairs than it did under non-home-rule status. Home-rule municipalities derive lawmaking authority from Article VII, Section 6(a) of the Illinois Constitution. *See Schillerstrom Homes, Inc. v. City of Naperville*, 198 Ill.2d 281, 260 Ill.Dec. 835, 762 N.E.2d 494, 497 (2001). The provision states as follows:

Except as limited by this Section, a home rule unit may exercise any power and perform any function pertaining to its government and affairs including, but not limited to, the power to regulate for the protection of the public health, safety, morals and welfare; to license; to tax; and to incur debt.

Ill. Const. 1970, art. VII, § 6(a). Home-rule in Illinois originates from the idea that local problems and issues are usually best addressed at the local level of government. *Schillerstrom Homes*, 260 Ill.Dec. 835, 762 N.E.2d at 497. Section 6(i), Article VII of the Illinois Constitution confirms that "[h]ome rule units may exercise and

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perform concurrently with the State any power or function of a home rule unit to the extent that the General Assembly by law does not specifically limit the concurrent exercise or specifically declare the State's exercise to be exclusive." Put generally, home-rule municipalities can control their own affairs in the areas of public health, safety, welfare, etc., unless the Illinois General Assembly specifically limits them from doing so.

The Illinois Supreme Court has formulated a three-part inquiry to determine whether a purported exercise of home-rule power by a municipality, like the one here, is valid under the state's constitution. First, the municipal exercise of power must fall within Section 6(a), Article VII—which means the exercise must pertain to the municipality's government and affairs. Second, the General Assembly must not have specifically preempted the power or function that the municipality seeks to exercise. Third, if the municipality's exercise of power falls within Section 6(a) and is not specifically preempted by the General Assembly, then it is up to the courts to determine the proper relationship between the local ordinance and the relevant state statute. *Schillerstrom Homes*, 260 Ill.Dec. 835, 762 N.E.2d at 498-99 (citing *County of Cook v. John Sexton Contractors Co.*, 75 Ill.2d 494, 27 Ill.Dec. 489, 389 N.E.2d 553, 557 (1979), *superseded by statute on other grounds as recognized in Village of Carpentersville v. Pollution Control Bd.*, 135 Ill.2d 463, 142 Ill.Dec. 848, 553 N.E.2d 362, 367 (1990)).

When environmental matters are involved, courts must apply the third prong of the test with an eye toward state primacy. *See John Sexton Contractors*, 27 Ill.Dec. 489, 389 N.E.2d at 559-60; *see also City of Wheaton v. Sandberg*, 215 Ill.App.3d 220, 158 Ill.Dec. 584, 574 N.E.2d 697, 701 (1991) (distinguishing environmental cases from other types of cases with respect to home-rule power). While the Illinois Constitution is the source of broad home-rule power that allows municipalities to govern locally in the areas of public health and safety, the state constitution also expressly directs the state to provide a uniform policy for environmental protection. Article XI of the Illinois Constitution provides, "The public policy of the State and the duty of each person is to provide and maintain a healthful environment for the benefit of future generations. The General Assembly shall provide by law for the implementation and enforcement of this public policy." The Illinois Supreme Court has interpreted this provision to mean, "[T]he General Assembly [will] provide leadership and

uniform standards with regard to pollution control...." *John Sexton Contractors*, 27 Ill.Dec. 489, 389 N.E.2d at 559. Accordingly, if home-rule municipalities in Illinois wish to legislate concurrently with the state on matters of environmental protection, they must stay within the boundaries of uniform state-selected standards. *Id.* at 560. As the Illinois Supreme Court recognized in *John Sexton Contractors*, "It is essential to the cause (to preserve our environment) that the inter and intra governmental efforts complement one another, that there be a coordinated plan of action with Uniform standards." *Id.* (quoting 6 Record of Proceedings, Sixth Illinois Constitutional Convention 700) (parenthetical in original).

For purposes of the Village's ordinance-based claim in this action, the Court assumes that the Village could satisfy the first two steps of the three-part test adopted in *John Sexton Contractors* and restated in *Schillerstrom Homes*.⁹ Even

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so, by applying its hazardous substances ordinance in a way that is out of step with the state's uniform standards for environmental protection, the Village fails at the test's final step. The Consent Order is the product of the Illinois Attorney General's 1995 civil action under the Illinois Act to remedy pollution at the Site. The phased and measured Site remediation plan outlined in the Consent Order reflects the uniform standards that the Illinois General Assembly has adopted for cleaning up polluted areas within the state. *See DePue I*, 537 F.3d at 788. The Consent Order requires Defendants to identify potential threats to public health and the environment resulting from contamination at the Site. Once those threats are identified and adequately understood, Defendants are required to eliminate them by developing and implementing customized state-approved plans for remediation. (Consent Order at Section III(B)(1) & (2)). As an unavoidable consequence of this phased process, some hazardous substances will remain at the Site until Defendants and the IEPA can determine the

safest and most effective ways to remove or eliminate them. In fact, at least one remedial action that the IEPA has selected for the Site specifically requires Defendants to provide for on-site containment of contaminated sediment. (Ex. D. to Mot. to Dismiss, 10/3/2003 IEPA Record of Decision and 10/8/2003 EPA concurrence).¹⁰ Conversely, the Village's ordinance penalizes Defendants with significant fines merely because the Site "contains hazardous wastes or hazardous substances." (DePue Village Code 7-7-5 through 7-7-6).

According to the Village, its present attempt to enforce its hazard substances ordinance is not an attempt to regulate pollution at the Site. Despite its intention to penalize Defendants with fines of \$750 or \$10,000 (depending on the date of violation) per day until "the pollution of the Village of DePue ceases," the Village insists,

The action here does not compel Exxon/Mobil and Viacom/CBS to do anything. It assesses a penalty for the damage done to the Village from the pollution contained in the site. The present ordinance does not inject the Village into the clean up. It imposes a penalty for the continuing effects of the pollution on the public health and the economic value of the Village.

(Pl.'s Resp. to Mot. to Dismiss at p. 8) (emphasis added). Essentially, the Village is characterizing its ordinance-based claim as compensatory in nature. This characterization is internally contradictory at a basic level. The ordinance overtly imposes a "civil penalty" for a violation. (DePue Village Code 7-7-6). A monetary penalty is commonly defined as "a sum of money exacted as punishment for ... a civil wrong (as distinguished from compensation for the injured party's loss)." Black's Law Dictionary 1168 (8th ed. 2004) (ending

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parenthetical in original). In other words, a civil penalty is designed to punish a wrongful act and to deter the wrongdoer from doing it again; a penalty is not designed to compensate anyone.

See *United States v. WCI Steel, Inc.*, 72 F.Supp.2d 810, 833 (N.D. Ohio 1999) (recognizing deterrence as a primary purpose of a civil penalty in enforcing an environmental statute). Using its hazardous substances ordinance, the Village seeks to deter Defendants from (and to punish them for) doing what the Consent Order requires them to do: keep contaminants contained at the Site for a period of time until well-designed remediation strategies are implemented.

The hazardous substances ordinance, as applied in this action, is aimed at altering Defendants' conduct in a way that cannot be reconciled with Defendants' performance obligations under the Consent Order. The Village is attempting to indirectly regulate Site cleanup activities using means which conflict with the uniform standards of environmental protection reflected in the Consent Order. Therefore, the Village's attempt to enforce its amended ordinance is an invalid exercise of home-rule authority under the Illinois Constitution.¹¹ It is unnecessary to reach Defendants' due process challenge.

II. Common Law Nuisance & Trespass

Defendants contend that the Village's nuisance and trespass claims are preempted by the Illinois Act. According to Defendants' argument, the availability of these common law causes of action in the present case would interfere with ongoing cleanup at the Site. The Court does not agree with Defendants to the extent they suggest a blanket state-law preemption of common law claims related to contamination at the Site. The Illinois Supreme Court has recognized the existence of common law remedies in addition to remedies under the Illinois Act—at least in situations where the common law remedy complements remedial efforts pursuant to the Act. See *Donaldson v. Cent. Ill. Pub. Serv. Co.*, 199 Ill.2d 63, 262 Ill.Dec. 854, 767 N.E.2d 314, 338 (2002). Unlike the harsh, inflexible penalties endorsed by the Village in its hazardous substances ordinance, common law remedies are

compensatory in nature and are tailored to redress specific injuries.

Nevertheless, in the Amended Complaint, the Village has failed to adequately state a claim for either nuisance or trespass. Even under the liberal notice pleading standard applicable in federal court, a complaint must allege a factual basis sufficient to state a claim that is plausible on its face. *Limestone Dev. Corp. v. Village of Lemont*, 520 F.3d 797, 803 (7th Cir.2008) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). The Village's allegations of common law nuisance and trespass fall short of this standard.

A. Nuisance

Under Illinois law, in order to prevail on a public nuisance claim, a plaintiff must establish that the defendant has unreasonably interfered with a public right. *See City of Chicago v. Am. Cyanamid Co.*, 355 Ill.App.3d 209, 291 Ill.Dec. 116, 823 N.E.2d 126, 131 (2005). Likewise,

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a private nuisance claim requires the plaintiff to show that the defendant has unreasonably invaded her interest in the use or enjoyment of her land. *See In re Chicago Flood Litig.*, 176 Ill.2d 179, 223 Ill.Dec. 532, 680 N.E.2d 265, 277 (1997). Under both theories of nuisance, the plaintiff must point to *tortious conduct* by the defendant. Here, the Village alleges that "[t]he existence of the toxic abandoned manufacturing site owned by Exxon Mobil and Viacom/CBS is a common law nuisance." (Am. Compl. ¶ 24).¹² The Site's mere existence, absent some specific unreasonable conduct by Defendants, is not a proper basis for a nuisance claim. *Cf. Hyon Waste Mgmt. Servs., Inc. v. City of Chicago*, 214 Ill.App.3d 757, 158 Ill.Dec. 335, 574 N.E.2d 129, 132-33 (1991) (noting, in a related statute of limitations context, that "[a] continuing [tort] ... is occasioned by continuing unlawful acts and conduct, not by continual ill effects from an initial violation."). Moreover, in order to state a claim for public nuisance based on Defendants'

cleanup-related activities at the Site, the Village must allege unlawful or negligent conduct. *See Donaldson*, 262 Ill.Dec. 854, 767 N.E.2d at 338 (citing *Gilmore v. Stanmar, Inc.*, 261 Ill.App.3d 651, 199 Ill. Dec. 189, 633 N.E.2d 985, 993 (1994)); *see also City of Chicago v. Beretta U.S.A. Corp.*, 213 Ill.2d 351, 290 Ill.Dec. 525, 821 N.E.2d 1099, 1124 (2004) (addressing a public nuisance claim directed at a highly-regulated enterprise).

B. Trespass

To prevail on a trespass claim under Illinois law, a plaintiff must plead and prove negligent or intentional conduct by the defendant which has resulted in an intrusion on the plaintiff's interest in exclusive possession of land. *Porter v. Urbana-Champaign Sanitary Dist.*, 237 Ill.App.3d 296, 178 Ill. Dec. 137, 604 N.E.2d 393, 397 (1992) (citing *Dial v. City of O'Fallon*, 81 Ill.2d 548, 44 Ill.Dec. 248, 411 N.E.2d 217, 222 (1980)). In its Amended Complaint, the Village alleges, "The run off and downhill migration of the toxic metals ... from the site into the Village of DePue and the Village property is a continuing common law trespass for which [] Exxon Mobil and Viacom/CBS are liable." (Am. Compl. ¶ 23). This allegation is insufficient to state a claim for trespass because the Village, again, does not point to any tortious conduct by Defendants. Merely pointing to the migration of hazardous substances is not enough.

CONCLUSION

For the reasons stated above, Defendants' motion to dismiss the Amended Complaint is GRANTED. The Village's claims under DePue Village Code 7-6; the November 10, 2008 Resolution regarding the Site; and the amended DePue Village Code 7-7 (collectively, all claims set out in Paragraph 25 of the Amended Complaint) are DISMISSED WITH PREJUDICE. The trespass and nuisance claims set out in Paragraphs 23 and 24, respectively, of the Amended Complaint are DISMISSED WITHOUT PREJUDICE. Because the Amended Complaint has been dismissed, Defendants'

motion to strike certain portions of the Amended Complaint is MOOT. The Village is allowed a 30-day period during which it may file a Second Amended Complaint for nuisance and trespass, if it so chooses. Any attempt at a Second Amended Complaint must be consistent

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with this Opinion.¹³

Notes:

1. Federal courts may take judicial notice of previous judicial decisions. *Consolidation Coal Co. v. United Mine Workers of Am., Dist. 12, Local Union 1545*, 213 F.3d 404, 407 (7th Cir.2000); *Opoka v. I.N.S.*, 94 F.3d 392, 394-95 (7th Cir. 1996); see *Limestone Dev. Corp. v. Village of Lemont*, 473 F.Supp.2d 858, 868 (N.D.Ill.2007). Courts may also judicially notice the reports of administrative bodies and documents contained in the public record. *Menominee Indian Tribe of Wis. v. Thompson*, 161 F.3d 449, 456 (7th Cir. 1998).
2. Smelting operations began at the Site in 1903 and phosphate fertilizer production began there around 1967. (4/28/2009 NPL Fact Sheet—Site Description). According to the Village's Amended Complaint, manufacturing activity at the Site ceased in 1987, and the Site has been "abandoned" since that time. (Am. Compl. ¶¶ 5, 9).
3. Going forward, for purposes of convenience, the Court will refer to Defendants and their corporate predecessors interchangeably unless a distinction is otherwise noted.
4. In this cited opinion, the Seventh Circuit Court of Appeals described, in greater detail, the relationships between CERCLA, NCP, ICP and the Illinois Act.
5. Judicial notice of the Consent Order is appropriate here, as its terms are not subject to reasonable dispute. See *GE Capital Corp. v. Lease Resolution Corp.*, 128 F.3d 1074, 1081-82 (7th Cir. 1997) (collecting cases).
6. Without providing a factual basis, the Notices to Abate indicated that the Village Board had declared the Site to be a public nuisance. The notices ordered immediate removal of "the materials" and cleaning of

"all contaminates," but these terms were left undefined.

7. The authorization provision reads, in part, as follows: "The corporate authorities of each municipality may do all acts and make all regulations which may be necessary or expedient for the promotion of health or the suppression of diseases...." 65 Ill. Comp. Stat. 5/11-20-5.

8. The resolution's supporting legislative findings detail the Site's contamination and the resulting ecological and health effects in the area. The Village based these findings on a report authored by the Village's attorney, Melissa K. Sims. Sims is an attorney of record in this case.

9. Defendants are quick to point out language in *DePue I* labeling the polluted Site as a non-local problem. See *DePue I*, 537 F.3d at 789. Defendants read this language as conclusive authority cutting against the Village at the test's first step. The Court disagrees. *DePue I* did not involve the issue of home-rule power under Section 6(a), Article VII of the Illinois Constitution. Generally, home-rule units of local government may legislate concurrently with the state on environmental control. See *City of Evanston v. Create, Inc.*, 85 Ill.2d 101, 51 Ill.Dec. 688, 421 N.E.2d 196, 200 (1981) (citing *John Sexton Contractors*, 27 Ill.Dec. 489, 389 N.E.2d at 559-60). Further, the Illinois Act generally allows for concurrent local environmental legislation. See *John Sexton Contractors*, 27 Ill.Dec. 489, 389 N.E.2d at 559.

10. The Court takes judicial notice of the IEPA's decision. See *Fornalik v. Perryman*, 223 F.3d 523, 529 (7th Cir.2000); *Opoka v. I.N.S.*, 94 F.3d 392, 394 (7th Cir.1996).

11. The amended version of the Village's hazardous substances ordinance is DePue Village Code 7-7, adopted on November 10, 2008 (Ex. 6 to Am. Compl.). As for DePue Village Code 7-6 (Ex. 2 to Am. Compl.), which is the earlier version adopted on September 8, 2008—prior to the Village's November 4, 2008 election of home-rule status—the provision, as applied here, is an invalid exercise of non-home-rule authority. See *DePue I*, 537 F.3d at 787.

12. The Village does not incorporate any other allegation to support its nuisance claim, nor does the Village cross-reference any attachment to the Amended Complaint to support the claim.

13. This Amended Opinion and Order supersedes and replaces the Court's June 25, 2009 Opinion and Order in this action. The amendments included in this version are technical, not substantive. Accordingly,

Plaintiff's 30-day period of leave to file a Second Amended Complaint began to run on June 25, 2009.

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October 18, 2013

Mr. Ray Gosack
City Administrator
City of Fort Smith
623 Garrison Avenue, 3rd Floor
Fort Smith, AR 72901

Re: Whirlpool TCE Release

Dear Mr. Gosack:

The following discussion of powers of the City may be beneficial as the Board of Directors studies the captioned topic. Taken from the language of a draft of a proposed indemnity agreement between the City and Whirlpool Corporation, this topic relates to an historical release of trichloroethylene (TCE) ("TCE Release") which has been investigated by and is regulated under the oversight of the Arkansas Department of Environmental Quality (ADEQ). The TCE Release may impact soil and groundwater on a portion of real properties within the City lying north of Ingersoll Avenue, west of Jenny Lind Road, east of Ferguson Street and south of Brazil Avenue, and property formerly occupied by Whirlpool Corporation.

The following municipal powers of the City of Fort Smith may be relevant.

1. Police Power. In a series of delegations including A.C.A. § 14-55-102, the City as a municipal corporation in this state has the "power to make and publish bylaws and ordinances, not inconsistent with the laws of this state, which . . . provide for the safety, preserve the health, promote the prosperity and the morals, order, comfort and convenience" of the City and its inhabitants. The City's police power could have many applications relevant to the TCE Release. For example, the City's police power was the stated authority for the proposed water well drilling ban once considered by the Board. By its police power, the City might be involved in traffic control or other police activities to provide protection of the inhabitants of the City related to the TCE Release.

As delegated, the City's police power must be exercised so as to not be inconsistent with the laws of the State of Arkansas. Pursuant to Chapter 7 of Title 8 of the Arkansas Code, the Department of Environmental Quality (ADEQ) is delegated extensive authority to deal with hazardous

substances such as are involved in the Whirlpool TCE Release. As we know, the ADEQ is actively involved in investigating and directing remedial action with reference to the TCE Release. The provisions of A.C.A. § 14-43-601 (sometimes referred to as the Home Rule Act) make clear that public health, pollution and safety matters come within the police power of the state. A.C.A. § 14-43-601(a)(1)(J). Pursuant to A.C.A. § 14-43-601(a)(2), a municipality, such as the City, may exercise legislative power upon such state affairs only if the City's action is not in conflict with state action. In the present circumstances involving the Whirlpool TCE Release, the ongoing investigation and direction of remediation efforts by ADEQ are manifestations of controlling state police power action, and thus any action by the City, whether more or less restrictive than action directed by ADEQ, would be in conflict with the current action of ADEQ.¹

2. Streets. The City's governing body is delegated the power to provide for the "care, supervision, and control" of all public streets and alleys within the City. A.C.A. § 14-301-101. Other authorizations delegate to the City the power to operate public water and sanitary sewer utility systems which, according to established Arkansas municipal law, the facilities of which may be located at reasonable depths within public street rights-of-way. Thus, the City represents the public in controlling the uses of the public rights-of-way located in the areas affected by the Whirlpool TCE Release. This power may be relevant in several respects. There has been discussion of the location of a monitoring device within City street right-of-way, and the City will be involved in the approval of any such action. With ongoing utility work (replacement of a significant sanitary sewer line across the Whirlpool property) and street work (reconstruction of portions of Jenny Lind Avenue), the City and Whirlpool have discussed potential impact from the TCE Release. Although the depths of street and utility work are not expected to conflict with the TCE plume, the parties have discussed an indemnity agreement whereby Whirlpool and ADEQ would receive information regarding soil removal and dewatering operations by the City (or its contractors) and Whirlpool would accept responsibility for costs incurred by the City in evaluating whether there was an effect from the TCE Release.

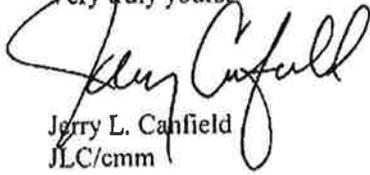
Additional to the two discussed powers of the City, we have given consideration to the facts that the Whirlpool TCE Release may have at least temporary effect on values of property and on the development opportunities for the Whirlpool manufacturing facility. Each of those factors could affect tax collections in which the City shares. We are not aware of any law which would support a contention that the City has related regulatory power or a legal right to recover those

¹We do not intend to limit the right of the City to develop police power regulations more restrictive than state police power regulations. As indicated by A.C.A. § 14-430-601(a)(1)(J), the state police power may provide "minimum public health, pollution, and safety standards" and A.C.A. § 14-43-601(a)(2) allows City action if not in conflict with state law. Arguably, the City could develop hazardous substance prohibition and enforcement legislation with more stringent limits than minimum limits set by the state. That, however, is not the current situation. We do not view the City's current cleanup of lands ordinance (Code of Ordinances Chapter 16) or sanitary sewer discharge limitations (Code of Ordinances Chapter 25, Art. VI) to provide a source of City action in this situation.

economic losses potentially resulting from the TCE Release.²

Thank you for your attention to this matter.

Very truly yours,



Jerry L. Canfield
JLC/cmm

²We have not explored circumstances in which municipal authorities on behalf of their citizens have participated in presenting environmental claims and, through settlement agreement, provide the service of distributing a portion of agreed compensation. Such situations may exist with reference to, for example, the Gulf/BP oil spill or manufacturing process hazardous material spills.

-3-

ORDINANCE NO. _____

AN ORDINANCE AMENDING ORDINANCE NO. 16-94

WHEREAS, Ordinance No. 16-94 was passed and approved on March 22, 1994, for the purpose of annexing certain territory into the City of Fort Smith; and

WHEREAS, the owners of certain property described in Ordinance No. 16-94 did not participate in the original petition to annex property as described in Ordinance No. 16-94; yet by scrivener’s error, the owners’ real property was included in the legal description contained in the Ordinance;

NOW THEREFORE, BE IT ORDAINED AND ENACTED by the Board of Directors of the City of Fort Smith, Arkansas, that Ordinance No. 16-94 is hereby amended to state the legal description of the real property being annexed as follows:

Lot 1, Bieker Business Center Addition to the Greenwood District of Sebastian County, Arkansas.

AND

The East Half (E ½) of the Northeast Quarter (NE ¼) of Section 2, Township 7 North, Range 32 West to Sebastian County, Arkansas.

AND

The West Half (W ½) of the Southeast Quarter (SE ¼); the Southeast Quarter (SE ¼) of the Southeast Quarter (SE ¼) and the West Half (W ½) of the Northeast Quarter (NE ¼) of the Southeast Quarter (SE ¼), all in Section 2, Township 7 North, Range 32 West, Sebastian County, Arkansas, more particularly described as follows:

Beginning at the Northwest corner of said W ½ of the NE ¼ of the SE ¼; thence South 88°05’East, 658.0 feet along the North line of said W ½ of the NE ¼ of the SE ¼ to the Northeast corner thereof; thence South 01°47’ West, 1325.1 feet along the East line of said W ½ of the NE ¼ of the SE ¼ to the Southeast corner of said W ½ of the NE ¼ of the SE ¼; thence South 88°03’East, 658.0 feet to the Northeast corner of said SE ¼ of the SE ¼; thence South 01°47’West, 1325.5 feet along the East line of said SE ¼ of the SE ¼ to the Southeast corner of the said SE ¼ of the SE ¼; thence North 88°02’West, 2635.7 feet to the Southwest corner of said W ½ of the SE ¼; thence North 01°45’East, 2648.2 feet to the Northwest corner of said W ½ of the SE ¼; thence South 88°05’East,

1321.0 feet to the point of beginning, containing 140.34 acres more or less;

LESS AND EXCEPT:

That portion of Section 2 lying in the Northeast Quarter of the Northeast Quarter of Section 2, Township 7 North, Range 32 West located north and east of Old Greenwood Road and south of Zero Street.

PASSED AND APPROVED THIS _____ DAY OF _____, 2014.

APPROVED:

ATTEST:

City Clerk

Approved as to form:



City Attorney

Publish One Time

MEMORANDUM

To: Ray Gosack, City Administrator
From: Wally Bailey, Director of Development Services
Date: February 11, 2014
Subject: Legal Description Correction to Ordinance No. 16-94

The City planning department staff has been reviewing the GIS zoning maps and comparing to our master maps. We discovered what seemed to be an error with a zoning boundary line at property near Old Greenwood Road and Zero Street. The more we investigated we found there was an error with a legal description within an ordinance annexing certain property.

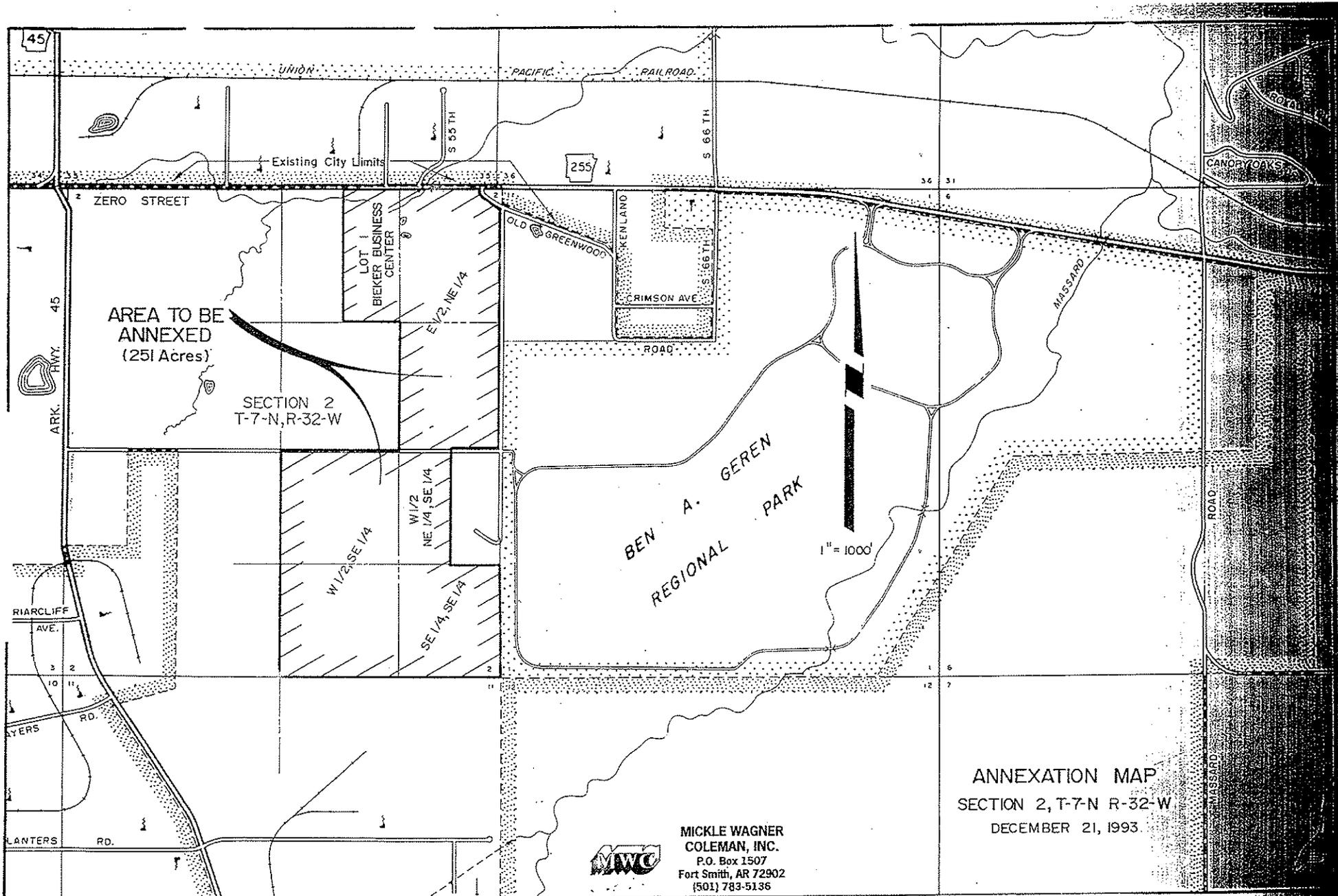
Ordinance No. 16-94 annexed 251 acres (*see attached exhibit A*). The map, which was attached to the Ordinance, accurately shows the intended annexation and the petitioners land. However, the legal description in the Ordinance included property that was not owned by any of the petitioners nor was it the intent to annex this property (*see attached exhibit B*). The petitioners of the annexation did not own the land shown in exhibit B.

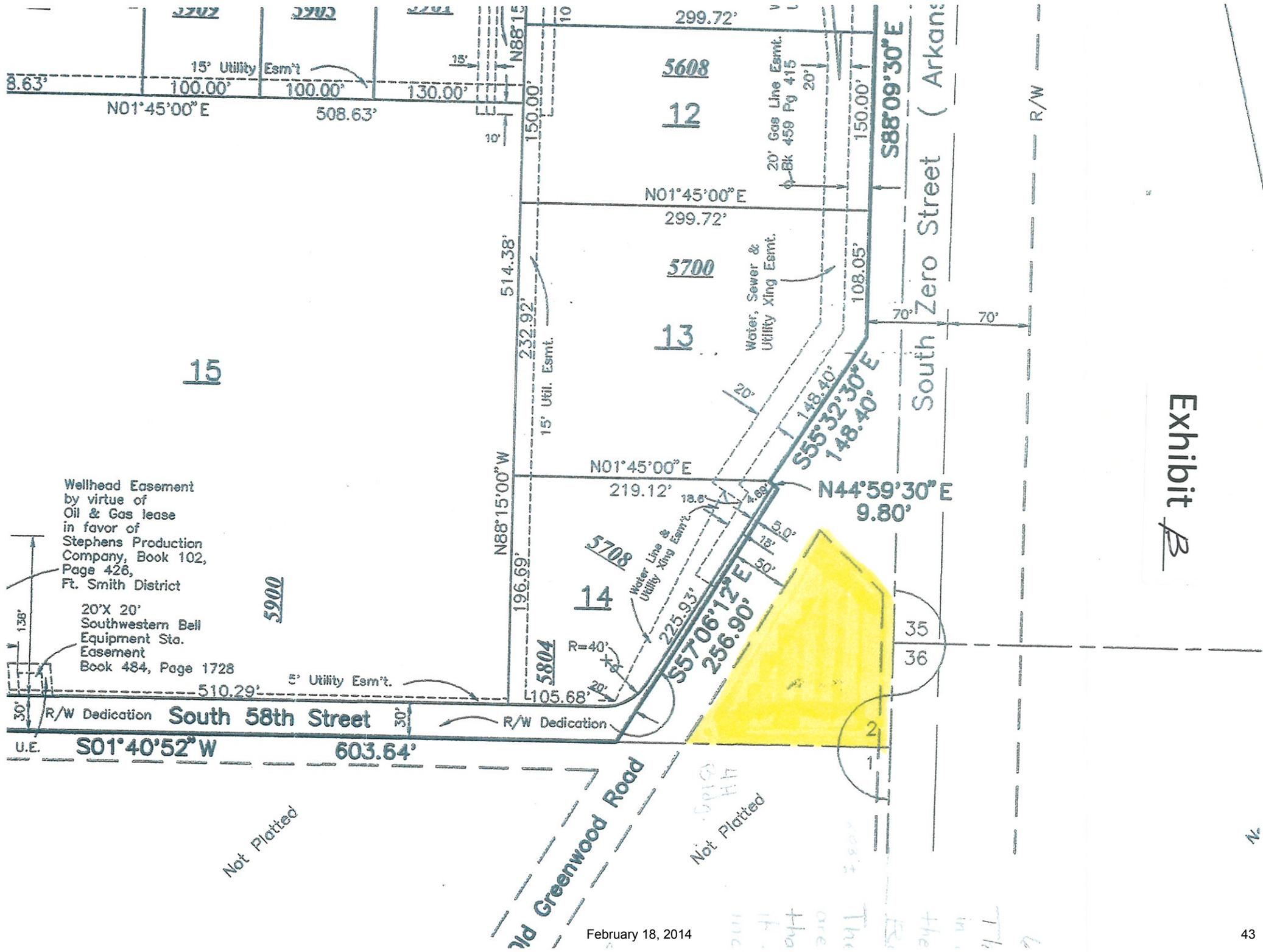
After much research and discussion with several parties involved with this annexation and these properties, and after review of this matter with the City Attorney, we determined it is necessary to amend the annexation ordinance correcting the legal description. I have prepared an Ordinance amending Ordinance No. 16-94 that includes a revised legal description that matches the annexation map and the original petition.

The Ordinance revising the legal description will clarify confusion with regard to the city limit boundaries that have existed at this location. The attached map (*see exhibit C*) shows the city limit boundaries as they should exist.

Please contact me if you have any questions.

Exhibit A





Wellhead Easement
by virtue of
Oil & Gas lease
in favor of
Stephens Production
Company, Book 102,
Page 426,
Ft. Smith District

20'X 20'
Southwestern Bell
Equipment Sta.
Easement
Book 484, Page 1728

Exhibit B



Exhibit C

ORDINANCE NO. _____

AN ORDINANCE AMENDING SECTION 16-15 OF THE FORT SMITH MUNICIPAL CODE REGARDING THE REQUIRED NUMBER OF PROPERTY OWNERS APPEAL BOARD MEMBERS TO CONSTITUTE A QUORUM

BE IT ORDAINED AND ENACTED BY THE BOARD OF DIRECTORS OF THE CITY OF FORT SMITH, ARKANSAS, THAT:

SECTION 1: Section 16-15(g) of the Fort Smith Municipal Code is hereby amended to read as follows:

(g) Quorum. Three (3) members of the board shall constitute a quorum. To grant an appeal shall require the affirmative vote of three (3) members.

THIS ORDINANCE ADOPTED this 18th day of February, 2014.

APPROVED

MAYOR

ATTEST

CITY CLERK

Approved as to form:



Publish one time

MEMORANDUM

February 14, 2014

TO: Ray Gosack, City Administrator

FROM: Sherri Gard, City Clerk

RE: Property Owners Appeal Board

The Property Owners Appeal Board (POAB) consists of five (5) members; however, per Section 16-15(g) of the Fort Smith Municipal Code below, four (4) members currently constitute a quorum:

- (g) *Quorum.* Four (4) members of the board shall constitute a quorum. To grant an appeal shall require the affirmative vote of three (3) members.

A recent situation occurred whereby the attendance of four (4) members was difficult to achieve. Due to such, the POAB discussed the matter at their February 10, 2014 meeting and voted four (4) in favor and zero (0) opposed to recommend the number required to constitute a quorum be reduced to three (3) members.

The attached ordinance has been prepared to accomplish the recommendation. Please note that the proposed ordinance only amends the number of members required to constitute a quorum. To grant an appeal shall still require the affirmative vote of three (3) members.

**Tax Back
Resolution**



RESOLUTION No. _____

RESOLUTION OF THE BOARD OF DIRECTORS OF THE CITY OF FORT SMITH CERTIFYING LOCAL GOVERNMENT ENDORSEMENT OF BUSINESS TO PARTICIPATE IN THE TAX BACK PROGRAM (AS AUTHORIZED BY SECTION 15-4-2706(d) OF THE CONSOLIDATED INCENTIVE ACT OF 2003).

WHEREAS, in order to be considered for participation in the Tax Back Program, the local government must endorse a business to participate in the Tax Back Program; and

WHEREAS, the local government must authorize the refund of local sales and use taxes as provided in the Consolidated Incentive Act of 2003; and

WHEREAS, said endorsement must be made on specific form available from the Arkansas Economic Development Commission; and

WHEREAS, Butler & Cook, Inc., located at 8307 Ball Road, Fort Smith, Arkansas has sought to participate in the program and more specifically has requested benefits accruing from construction and/or expansion of the specific facility; and

WHEREAS, Butler & Cook, Inc. has agreed to furnish the local government all necessary information for compliance.

NOW THEREFORE BE IT RESOLVED BY THE BOARD OF DIRECTORS OF THE CITY OF FORT SMITH, ARKANSAS, THAT:

1. Butler & Cook, Inc. be endorsed by the Board of Directors of the City of Fort Smith for benefits from the sales & use tax refunds as provided by Section 15-4-2706(d) of the Consolidated Incentive Act of 2003.
2. **The Department of Finance and Administration is authorized to refund local sales and use taxes to Butler & Cook, Inc.**
3. This resolution shall take effect immediately.

Mayor

Date Passed: _____

Attest: _____

City Clerk

*Approved as to form:
Jerry Confield
No publication required*

Memo



To: Ray Gosack, City Administrator
From: Jeff Dingman, Deputy City Administrator
Date: 2/11/2014
Re: Tax Back Endorsement: **Butler & Cook, Inc.**

The City has received a request from the Arkansas Economic Development Commission and the Fort Smith Regional Chamber of Commerce for participation in the state "Tax Back" program authorized by the Consolidated Incentive Act of 2003 on behalf of **Butler & Cook, Inc.** This program allows for new or expanding businesses to request refunds of sales taxes paid on building materials, new equipment and other eligible expenses incurred due to construction and/or expansion.

The current request is on behalf of **Butler & Cook, Inc.**, who plans to expand its current facility located at 8307 Ball Road in Fort Smith by investing \$11.2 million in new construction and equipment at the facility. This expansion will add 45 new jobs to the region.

The Tax Back program is a state and local sales tax refund incentive to attract business growth or expansion to Arkansas. The incentive applies to capital purchases associated with construction of new facilities or expansion of existing facilities (such as equipment or building materials) and does not apply to ongoing purchases. The majority of the incentive will be derived from the state sales tax rate. However, in order to participate in the program, the local governments must also agree to the sales tax refund.

Attached is a resolution supporting the participation of **Butler & Cook, Inc** in the "Tax Back" program, and the staff recommends approval. This action will support the board's stated goal of pursuing economic development and job creation.

Please contact me if you have questions regarding this agenda item.

RESOLUTION _____

**A RESOLUTION TO ACCEPT THE BIDS AND AUTHORIZE
A CONTRACT FOR THE CONSTRUCTION OF
DRAINAGE IMPROVEMENTS
PROJECT NO. 12-06-C2**

BE IT RESOLVED BY THE BOARD OF DIRECTORS OF THE CITY OF FORT SMITH, ARKANSAS, THAT:

SECTION 1: The bid of Forsgren Inc. received February 11, 2014 for the construction of Drainage Improvements, Project No. 12-06-C2, in the amount of \$630,662.58 be accepted.

SECTION 2: The Mayor is authorized to execute a contract with Forsgren Inc. subject to the terms set forth in Section 1 above.

SECTION 3: Payment for construction authorized by Section 1 is hereby authorized from the Sales Tax Fund (1105).

This resolution adopted this _____ day of February, 2014.

APPROVED:

Mayor

ATTEST:

City Clerk

Approved as to Form



No Publication Required

INTER-OFFICE MEMO

TO: Ray Gosack, City Administrator
FROM: Stan Snodgrass, P.E., Director of Engineering
DATE: February 12, 2014
SUBJECT: Drainage Improvements
Project No. 12-06-C2

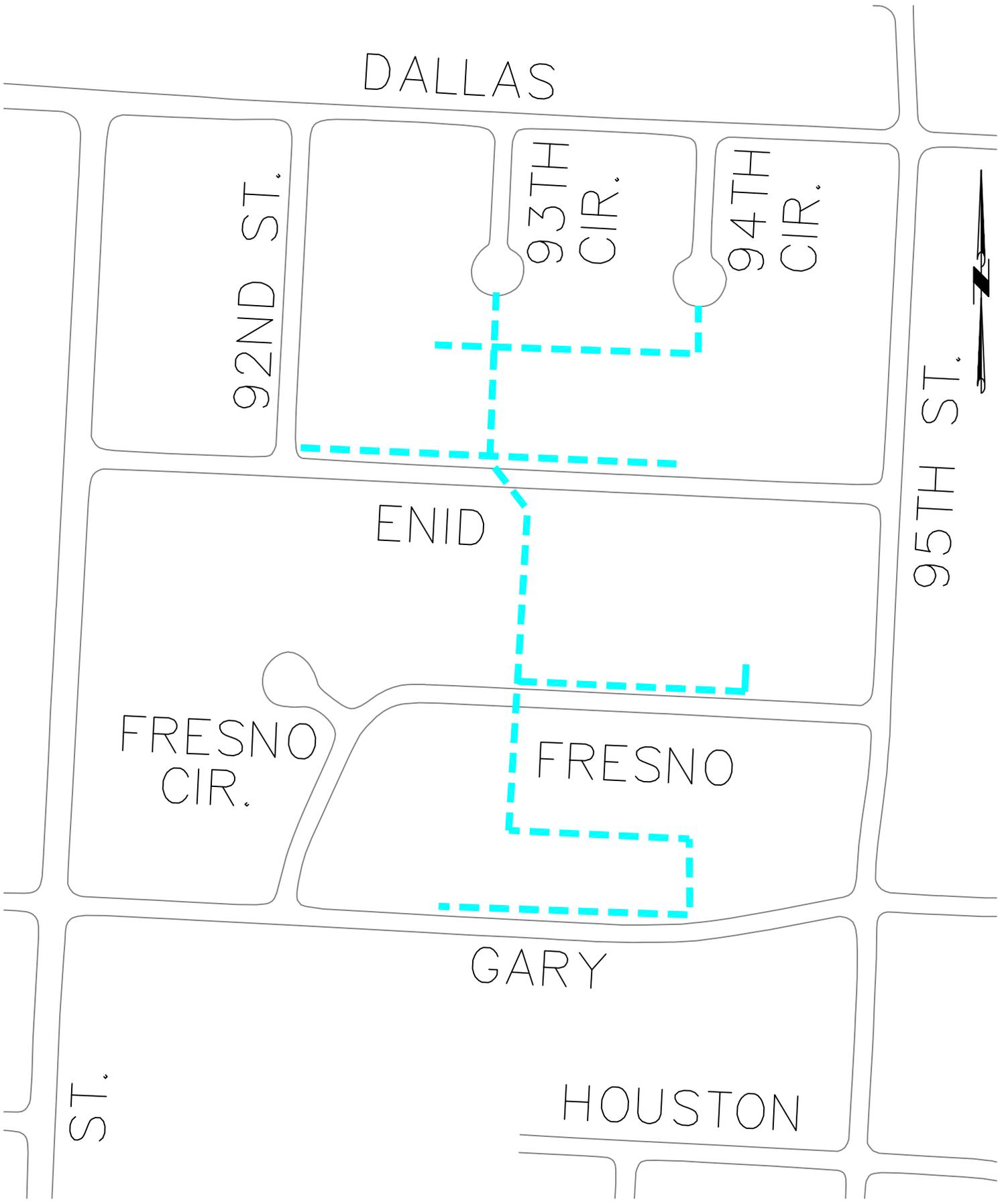
This project consists of drainage improvements to reduce structure flooding that occurred during the heavy rains in spring 2011. The project includes improvements in the Enid Street, Fresno Street and Gary Street area. The locations of the proposed improvements are shown on the attached exhibit.

Construction plans and specifications were prepared by Philip J. Leraris, P.E., L.S., of Fort Smith. An advertisement was published and bids were received on February 11, 2014. Seven contractors requested plans and specifications and five bids were received which are summarized as follows:

CONTRACTOR	AMOUNT
1. Forsgren Inc. Fort Smith, AR	\$630,662.58
2. Goodwin & Goodwin Fort Smith, AR	\$789,478.50
3. Brothers Construction Van Buren, AR	\$796,412.00
4. Township Builders Little Rock, AR	\$857,207.00
5. Steve Beam Fort Smith, AR	\$1,143,248.00
<i>Engineer's Estimate</i>	<i>\$790,000.00</i>

I recommend that the lowest bid be accepted and that the construction contract be awarded to Forsgren Inc. The estimated notice to proceed date for this contract is March 10, 2014. Based on the contract duration of 180 days, the estimated completion date would be September 5, 2014.

Attached is a Resolution to accomplish the above recommendation. Funds are available in the Sales Tax Program (1105).



2014 CAPITAL IMPROVEMENTS PROGRAM
 GARY/FRESNO/ENID AREA
 DRAINAGE IMPROVEMENTS



Project:	12-06-C2
Date:	JAN. 2014
Scale:	NONE
Drawn By:	RBR

RESOLUTION NO. _____

**A RESOLUTION APPROVING PRIORITIES
FOR THE 2015 SESSION OF THE
ARKANSAS GENERAL ASSEMBLY**

BE IT RESOLVED by the Board of Directors of the City of Fort Smith, Arkansas that:

The City of Fort Smith's priorities for the 2015 session of the Arkansas General Assembly as attached hereto are hereby approved. The City Administrator is hereby directed to forward this Resolution to the Arkansas Municipal League.

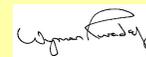
This Resolution passed this _____ day of February, 2014.

Mayor

ATTEST:

City Clerk

APPROVED AS TO FORM



No Publication Required



MEMORANDUM

February 14, 2014

TO: Mayor and Board of Directors

FROM: Ray Gosack, City Administrator

SUBJECT: 2015 Legislative Priorities

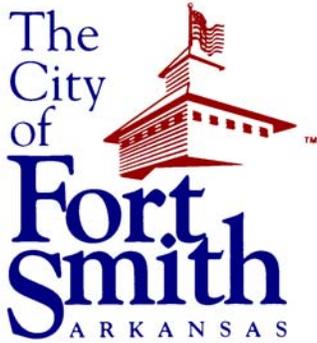
Attached is the list of legislative priorities for the 2015 session of the Arkansas General Assembly. Following adoption by the board, these will be submitted to the Arkansas Municipal League for inclusion in the AML's legislative package.

I've withdrawn one item from the list presented at the study session. That item is the FOIA amendment regarding the definition of a meeting. After reviewing our list of priorities with the AML staff, it became clear that this topic should be addressed in other ways. The better approach is to remove the item from our list and allow the AML to consider it.

The staff recommends approval of the attached resolution adopting our 2015 legislative priorities. Please let me know if there's any questions or a need for more information.

A handwritten signature in black ink that reads "Ray".

Attachments



CITY OF FORT SMITH
Legislative Priorities for the
2015 Session of the
Arkansas General Assembly

► ***Sales Tax Bond Election Ballot Questions***

Amendment 62 to the Arkansas Constitution allows cities and counties to ask voters to approve bonds for local capital improvement projects. Section 1(a) of Amendment 62 requires that if more than one purpose is proposed on the same ballot, each shall be stated separately on the ballot.

Fort Smith undertook a sales tax bond election in 2012 under Amendment 62 in which there were 5 separate purposes/projects for voters to decide. All of these purposes relied on the same 3/4% sales tax to finance the bonds. During voter education presentations before the election, many citizens questioned why each project/purpose had to be voted separately on the ballot. They said it was confusing, particularly considering the same revenue source was being used to pay the bonds for all of the projects/purposes.

This confusion could be eliminated by deleting the following sentence in Amendment No. 62, section 1(a)

If more than one purpose is proposed, each shall be stated separately on the ballot.

Elimination of this requirement would give cities and counties the option of presenting each purpose/project separately, or combining a number of purposes/projects into one vote. In either case, the voters still decide if the issuance of bonds is approved.

► ***Emergency Lights on Police Vehicles***

A combination of blue and red emergency warning lights on police vehicles are becoming more common across the United States. They help the public identify public safety vehicles. They're also cheaper to purchase than lights that are entirely blue. Arkansas statute doesn't allow for a combination of blue and red lights. Arkansas code 27-49-219(d)(1)(A) should be amended as follows:

(A) Motor vehicles used by state, county, or city and municipal police agencies, all of which shall be equipped with:

(i) Blue lights; or

(ii) Blue, red, or white rotating or flashing emergency lights or any combination of these colors;

This change would give police agencies the option of using all blue lights, or of using any combination of red, blue and white lights.

► ***Appointment of District Court Clerk***

Arkansas statute 16-17-108(a)(84) provides that each Fort Smith District Court judge shall appoint a district court clerk. A literal interpretation of this provision would result in the court having 3 court clerks. This is neither practical nor the current practice of the court. The judges are recommending that this language be clarified to reflect that the court shall have 1 clerk. They further recommend that this clerk be appointed by and pursuant to the personnel authority of the City Administrator. The appointment of the clerk will provide stability in the daily administration of the court, provide continuity when new judges are elected or appointed to the court, and will ensure that the appointment and removal from the position will be based on job performance. The statute should be amended as follows:

16-17-108. Salaries of personnel and other requirements of various district courts.

(a) Unless otherwise provided by law, the salaries of the judges and other personnel of the various district courts shall be established as follows:

(84) The Sebastian County District Court — Fort Smith District Judges, Departments 1, 2, and 3, each The Fort Smith City Administrator shall appoint a qualified elector to serve as district court clerk. The salaries salary of the district court clerks and , deputy clerks, court personnel, any special district court judges authorized by this subdivision (a)(84) and the operating expenses of the Sebastian County District Court — Fort Smith District shall be paid seventy percent (70%) by the City of Fort Smith and thirty percent (30%) by Sebastian County;

► ***Police and Fire Pension Plan Funding***

Many cities across Arkansas have unfunded liabilities for police and fire pension plans, particularly older plans which have been closed to new participants. A solution to these unfunded liabilities would be a constitutional amendment which would permit the use of a special local sales tax, with voter approval, to pay for these unfunded liabilities of closed local police and fire pension plans.

RESOLUTION AUTHORIZING CHANGE ORDER NUMBER TWO TO THE CONTRACT WITH CRAWFORD CONSTRUCTION COMPANY FOR THE CHAFFEE CROSSING WATER SUPPLY IMPROVEMENTS - PUMP STATION

BE IT RESOLVED BY THE BOARD OF DIRECTORS OF THE CITY OF FORT SMITH, ARKANSAS, that:

Change Order Number Two in the amount of \$6,617.63, adjusting the contract amount to \$1,417,589.54, and adding 5 calendar days to the contract with Crawford Construction Company, for construction of the Chaffee Crossing Water Supply Improvements - Pump Station, Project Number 12-04-C3, is hereby approved.

This Resolution adopted this _____ day of February 2014.

APPROVED:

Mayor

ATTEST:

City Clerk

APPROVED AS TO FORM:



npr

INTER-OFFICE MEMO

TO: Ray Gosack, City Administrator

DATE: February 7, 2014

FROM: Steve Parke, Director of Utilities

SUBJECT: Chaffee Crossing Water Supply Improvements
Pump Station - Project Number 12-04-C3

On May 21, 2013, the Board authorized a contract with Crawford Construction Company in the amount of \$1,404,600.00, for construction of the Chaffee Crossing Water Supply Improvements - Pump Station, Project Number 12-04-C3. On December 17, 2013, the Board authorized Change Order Number One in the amount of \$6,371.91 with an additional 16 contract days for project completion.

Change Order Number Two covering the following three items of additional work has been submitted:

- Provide a replacement pump hoist beam due to a dimensional error on the construction plans (additional \$2,255.35).
- Remove and replace 35.34 cubic yards of soft material at entry drive with compacted shale and utility slurry (additional \$2,193.12).
- Remove 35.56 cubic yards of buried debris pile discovered within the excavation for the driveway and replace with compacted shale (additional \$2,169.16).

I have attached a Resolution approving Change Order Number Two in the amount of \$6,617.63 plus 5 additional contract days and adjusting the contract amount to \$1,417,589.54. A project summary is attached for you to review. Funds for this change order are available from the 2012 sales tax and use tax bonds issued for water transmission system improvements.

Should you or members of the Board have question or need any additional information, please let me know.

attachment

pc: Jeff Dingman

Project Summary

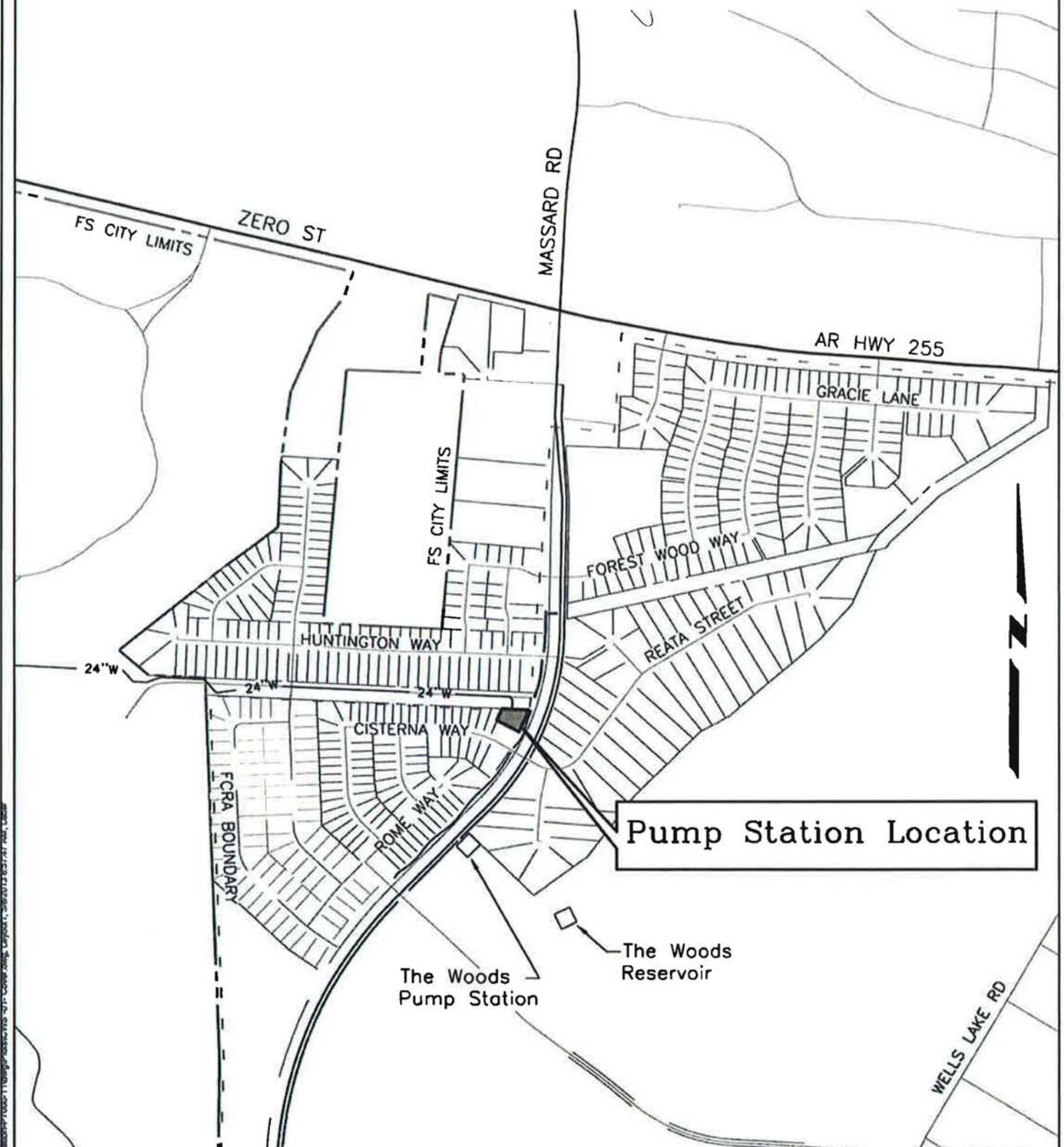
Project status: Under construction	Project name: Chaffee Crossing Water Supply Improvements - Pump Station
Today's date: February 7, 2014	Project number: 12-04-C3
Staff contact name: Steve Parke	Project engineer: Mickle Wagner Coleman, Inc.
Staff contact phone: 784-2231	Project contractor: Crawford Construction Company
Notice to proceed issued: June 21, 2013	
Contract completion date: January 2, 2014	

	Dollar Amount	Contract Time (Days)
Original contract	\$1,404,600.00	180
Change orders:		
Change Order #1	\$6,371.91	16
Change Order #2 (pending)	\$6,617.63	5
Total change orders	<u>\$12,989.54</u>	<u> </u>
Adjusted contract (pending approval of CO #2)	\$1,417,589.54	201
Payments to date (as negative) (as percentage)	\$-853,146.20 60%	
Amount of this payment (as negative)	N/A	
Retainage held	\$23,178.64	
Contract balance remaining (as percentage)	\$564,443.34 40%	
Amount over (under) (as percentage)	\$12,989.54 0.9%	

Final comments:

MICKLE-WAGNER-COLEMAN, INC.
Engineers Consultants Surveyors

3434 Country Club Avenue
P.O. Box 1507
Fort Smith, Arkansas 72902



Pump Station Location

AREA MAP

CHAFFEE WATER SUPPLY (CONTRACT 3) - PUMP STATION

RESOLUTION AUTHORIZING THE MAYOR TO EXECUTE AN AGREEMENT AND AUTHORIZATION NUMBER ONE WITH HAWKINS-WEIR ENGINEERS, INC., FOR PROVIDING ENGINEERING SERVICES ASSOCIATED WITH THE MILL CREEK PUMP STATION AND EQUALIZATION TANK

BE IT RESOLVED BY THE BOARD OF DIRECTORS OF THE CITY OF FORT SMITH, ARKANSAS, that:

SECTION 1: An Agreement and Authorization Number One with Hawkins-Weir Engineers, Inc., for providing engineering construction phase services associated with Mill Creek Pump Station and Equalization Tank, Project Number 10-01-EC1, is hereby approved.

SECTION 2: The Mayor is hereby authorized to execute an Agreement and Authorization Number One in the amount of \$1,353,600.00, for performance of said services.

This Resolution adopted this _____ day of February 2014.

APPROVED:

Mayor

ATTEST:

City Clerk

APPROVED AS TO FORM:



_____ npr

INTER-OFFICE MEMO

TO: Ray Gosack, City Administrator

DATE: February 7, 2014

FROM: Steve Parke, Director of Utilities

SUBJECT: Mill Creek Pump Station and Equalization Tank
10-01-EC1

On February 6, 2014, bids were opened for the construction of the Mill Creek Pump Station and Equalization Tank with the low bid submitted by BRB Contractors, Inc., in the amount of \$12,930,000.00.

As you are aware, this project was designed by CDM Smith in association with Hawkins-Weir Engineers, Inc. As we have done on other, similar projects, we will reverse the rolls of these firms and have Hawkins-Weir take the lead in providing construction management services. Hawkins-Weir will provide an on-site project engineer for the duration of construction as well as inspectors and additional support staff as required. CDM Smith will serve as a subconsultant to Hawkins-Weir and assist with submittal review and technical support. Hawkins-Weir will also manage and coordinate materials testing during construction through a local testing laboratory. It is anticipated that construction management services will be needed for a 24 month period.

A Resolution authorizing an Agreement and Authorization Number One with Hawkins-Weir Engineers, Inc., for providing construction phase services in the amount of \$1,353,600.00, is attached. Under this Agreement and Authorization Hawkins-Weir Engineers, Inc., will provide all of the services described above. Funds for this project are available from the 2012 and 2014 sales tax and use tax bonds issued for the continuation of wet weather sewer improvements.

Should you or members of the Board have any questions or need any additional information, please let me know.

attachment

pc: Jeff Dingman

RESOLUTION ACCEPTING THE BID OF AND AUTHORIZING THE MAYOR TO EXECUTE A CONTRACT WITH BRB CONTRACTORS, INC., FOR THE MILL CREEK PUMP STATION AND EQUALIZATION TANK

BE IT RESOLVED BY THE BOARD OF DIRECTORS OF THE CITY OF FORT SMITH, ARKANSAS, that:

SECTION 1: The bid of BRB Contractors, Inc., for the construction of the Mill Creek Pump Station and Equalization Tank, Project Number 10-01-C1, is hereby accepted.

SECTION 2: The Mayor is hereby authorized to execute a contract with BRB Contractors, Inc., for an amount of \$12,930,000.00, for performing said construction.

This Resolution adopted this _____ day of February 2014.

APPROVED:

Mayor

ATTEST:

City Clerk

APPROVED AS TO FORM:



-----npr

INTER-OFFICE MEMO

TO: Ray Gosack, City Administrator

DATE: February 7, 2014

FROM: Steve Parke, Director of Utilities

SUBJECT: Mill Creek Pump Station and Equalization Tank
Project Number 10-01-C1

On February 6, 2014, the city received and opened seven construction bids for the Mill Creek Pump Station and Equalization Tank. The low bid was submitted by BRB Contractors, Inc., in the amount of \$12,930,000.00. A bid tabulation sheet is attached for your information.

This project is within a series of projects designed to address wet weather overflows that occur throughout the sanitary sewer collection system. This project will construct a new Mill Creek sewer pump station for handling both normal and wet weather flows sent to the city's "P" Street wastewater treatment plant. Peak wet weather flows will be sent to a new 3.5 million gallon equalization tank that will be constructed on site. Also, a new electrical building, standby diesel powered generator and a new access driveway off Navy Road is being constructed. I have attached an exhibit showing the location of the project.

It is staff's recommendation that the bid from BRB Contractors, Inc., be accepted and the Mayor authorized to execute a contract in the amount of \$12,930,000.00. Funds for this project are available from the 2012 and 2014 sales tax and use tax bonds issued for the continuation of wet weather sewer improvements.

Should you are members of the Board have any questions or need any additional information, please let me know.

attachment

pc: Jeff Dingman

CERTIFIED BID TABULATION

OWNER:
 Fort Smith Utility Department
 3800 Kelley Highway
 Fort Smith, AR 72804

Mill Creek Pump Station and Equalization Tank
10-01-C1

ENGINEER:
 CDM Smith
 1401 W Capitol, Suite 230
 Little Rock, AR 72201
 501-374-1620
 CDM Smith Project No.: 2508-82829

Bid Time: 2:00:00 PM CST
 Bid Date: 6-Feb-14

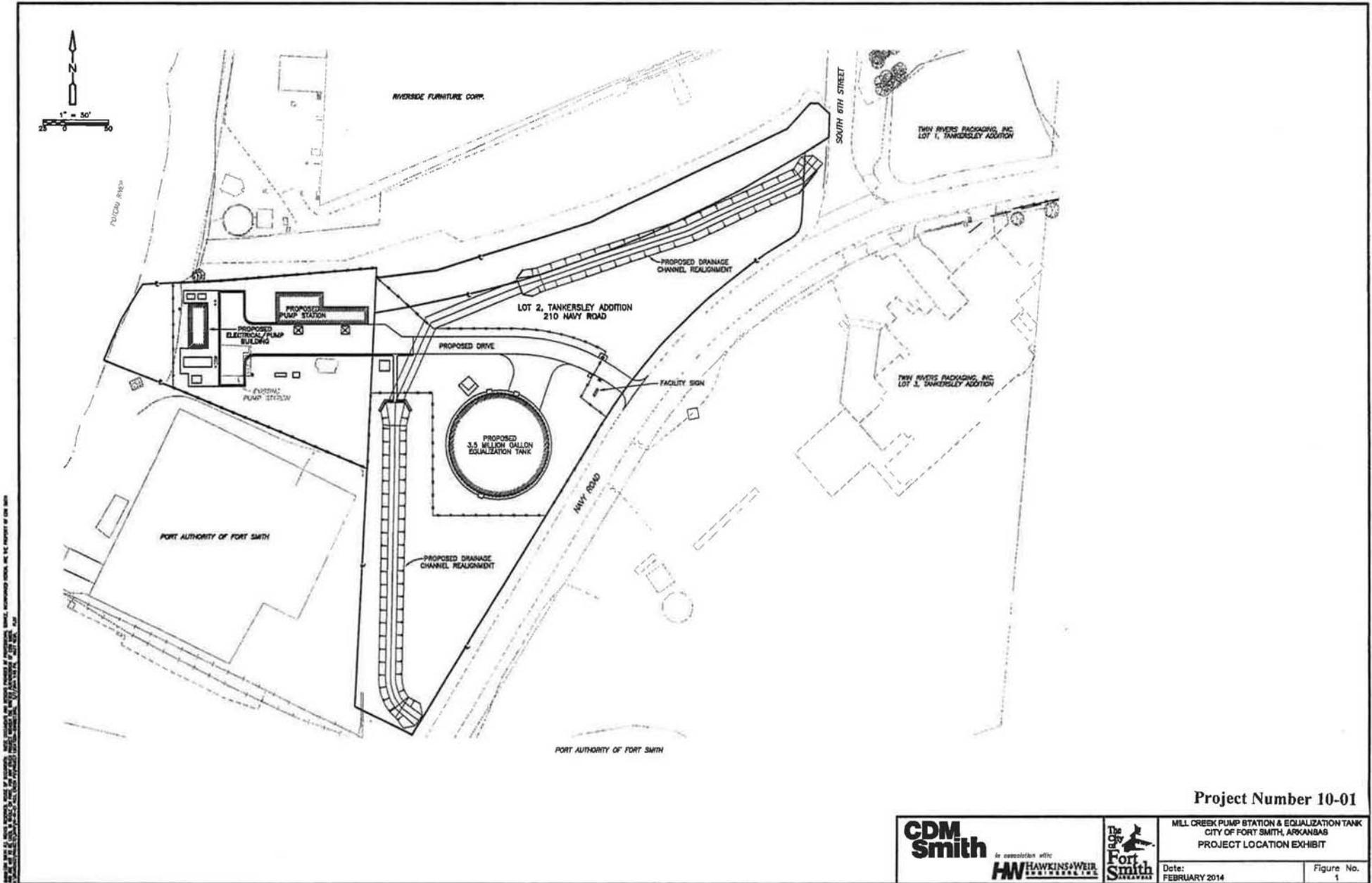
****LOWEST BIDDER****

NO.	ITEM	QTY	UNIT	Archer Western Construction, LLC Irving, TX	Branco Enterprises, Inc. Neosho, MO	BRB Contractors, Inc Topeka, KS	Crossland Heavy Contractors Columbus, KS	Layne Heavy Civil, Inc Jacksonville, FL	Van Horn Construction Russellville, AR	VEI General Contractors, Inc Russellville, AR
				UNIT COST	UNIT COST	UNIT COST	UNIT COST	UNIT COST	UNIT COST	UNIT COST
1	Mill Creek Pump Station and Equalization Tank	1	LS	\$ 14,538,000.00	\$ 17,080,000.00	\$ 12,920,000.00	\$ 13,920,000.00	\$ 18,342,000.00	\$ 13,955,000.00	\$ 16,370,000.00
2	Trench and/or Excavation Safety Systems	1	LS	\$ 15,000.00	\$ 100,000.00	\$ 10,000.00	\$ 5,000.00	\$ 1,000,000.00	\$ 20,000.00	\$ 1,000.00
	TOTAL PRICE FOR PROJECT (Sum of Items 1 through 2)			\$ 14,553,000.00	\$ 17,180,000.00	\$ 12,930,000.00	\$ 13,925,000.00	\$ 19,342,000.00	\$ 13,975,000.00	\$ 16,371,000.00

****LOWEST BIDDER****

Certified Correct
 CDM Smith
 By: Andrew Pownall, P.E.
 Date: February 7, 2014





RESOLUTION AUTHORIZING THE MAYOR TO EXECUTE AUTHORIZATION NUMBER TWO TO THE AGREEMENT WITH HAWKINS-WEIR ENGINEERS, INC., FOR ENGINEERING SERVICES FOR THE MILL CREEK INTERCEPTOR IMPROVEMENTS - PHASE II

BE IT RESOLVED BY THE BOARD OF DIRECTORS OF THE CITY OF FORT SMITH, ARKANSAS, that:

SECTION 1: Authorization Number Two with Hawkins-Weir Engineers, Inc., providing engineering construction phase services for the Mill Creek Interceptor Improvements - Phase II, Project Number 12-12-EC1, is hereby approved.

SECTION 2: The Mayor is hereby authorized to execute Authorization Number Two in the amount of \$165,000.00, for performance of said services.

This Resolution adopted this _____ day of February 2014.

APPROVED:

Mayor

ATTEST:

City Clerk

APPROVED AS TO FORM:



npr

RESOLUTION NO. _____

5 G

RESOLUTION ACCEPTING THE BID OF AND AUTHORIZING THE
MAYOR TO EXECUTE A CONTRACT WITH FORSGREN, INC., FOR THE
MILL CREEK INTERCEPTOR IMPROVEMENTS - PHASE II

BE IT RESOLVED BY THE BOARD OF DIRECTORS OF THE CITY OF FORT
SMITH, ARKANSAS, that:

SECTION 1: The bid of Forsgren, Inc., for the construction of the Mill Creek Interceptor
Improvements - Phase II, Project Number 12-12-C1, is hereby accepted.

SECTION 2: The Mayor is hereby authorized to execute a contract with Forsgren, Inc.,
for an amount of \$1,917,753.10, for performing said construction.

This Resolution adopted this _____ day of February 2014.

APPROVED:

Mayor

ATTEST:

City Clerk

APPROVED AS TO FORM:



npr

INTER-OFFICE MEMO

TO: Ray Gosack, City Administrator

DATE: February 7, 2014

FROM: Steve Parke, Director of Utilities

SUBJECT: Mill Creek Interceptor Improvements - Phase II
Project Number 12-12

This project replaces approximately 33 manholes and 7,700 linear feet of the Mill Creek interceptor sewer. The new interceptor sewer is designed to convey wet weather sewer flows to the new Mill Creek pump station and equalization tank through pipe sizes ranging from 24- to 36-inches in diameter. An additional seven manholes and approximately 725 linear feet of 8- to 18-inch of connecting sanitary sewer mains will also be included within this project. These line segments have had recurring problems with blockages and lack of capacity which causes sewer overflows. A location exhibit is attached for your review.

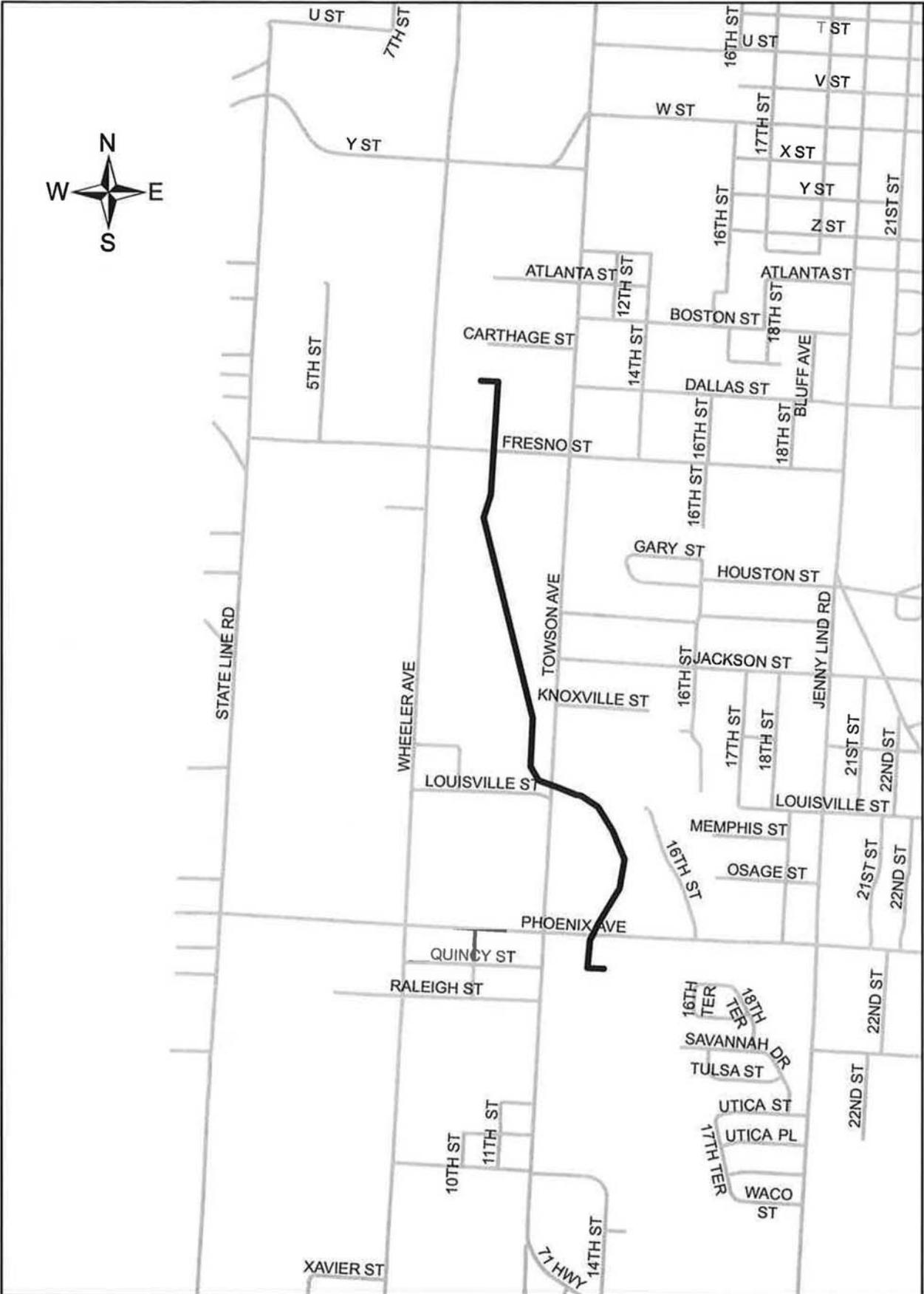
The low bid for the project was submitted by Forsgren, Inc., in the amount of \$1,917,753.10. A bid tabulation sheet showing the bidders and their bid amounts is attached. A Resolution accepting the bid of and authorizing a contract with Forsgren, Inc., is attached.

Also attached is a Resolution authorizing the Mayor to execute Authorization Number Two to the Agreement for engineering services with Hawkins-Weir Engineers, Inc., for construction phase services in the amount of \$165,000.00. Funds are available from the 2012 and 2014 sales tax and use tax bonds issued for continuation of wet weather sewer improvements.

Should you or members of the Board have any questions or desire additional information, please let me know.

attachment

pc: Jeff Dingman



MILL CREEK INTERCEPTOR IMPROVEMENTS
PHASE 2
PROJECT NO. 12-12

Bid Tabulation Sheet

Project Name

Mill Creek Interceptor Improvements -- Phase II
Project Number 12-12-C1

Bid Opening

January 30, 2014
10:00 A.M.

Bids Received

Forsgren, Inc. Fort Smith, AR	<u>\$1,917,753.10</u>
Rosetta Construction, LLC Springfield, MO	<u>\$2,359,355.00</u>
KAJACS Contractors, Inc. Maumelle, AR	<u>\$2,475,000.00</u>
Goodwin & Goodwin, Inc. Fort Smith, AR	<u>\$2,571,131.00</u>
Carstensen Contracting, Inc. Pipestone, MN	<u>\$2,695,316.75</u>
S & J Construction Co., Inc. Jacksonville, AR	<u>\$2,865,893.60</u>

RESOLUTION ACCEPTING THE BID OF AND AUTHORIZING THE MAYOR TO EXECUTE A CONTRACT WITH GOODWIN & GOODWIN, INC., FOR THE "P" STREET WASTEWATER TREATMENT PLANT EFFLUENT PUMP INSTALLATION

BE IT RESOLVED BY THE BOARD OF DIRECTORS OF THE CITY OF FORT SMITH, ARKANSAS, that:

SECTION 1: The bid of Goodwin & Goodwin, Inc., for the construction of the "P" Street Wastewater Treatment Plant Effluent Pump Installation, Project Number 12-17-C2, is hereby accepted.

SECTION 2: The Mayor is hereby authorized to execute a contract with Goodwin & Goodwin, Inc., for an amount of \$87,680.00, for performing said construction.

This Resolution adopted this _____ day of February 2014.

APPROVED:

Mayor

ATTEST:

City Clerk

APPROVED AS TO FORM:



npr

INTER-OFFICE MEMO

TO: Ray Gosack, City Administrator

DATE: February 10, 2014

FROM: Steve Parke, Director of Utilities

SUBJECT: "P" Street Wastewater Treatment Plant
Effluent Pump Installation - Project Number 12-17-C2

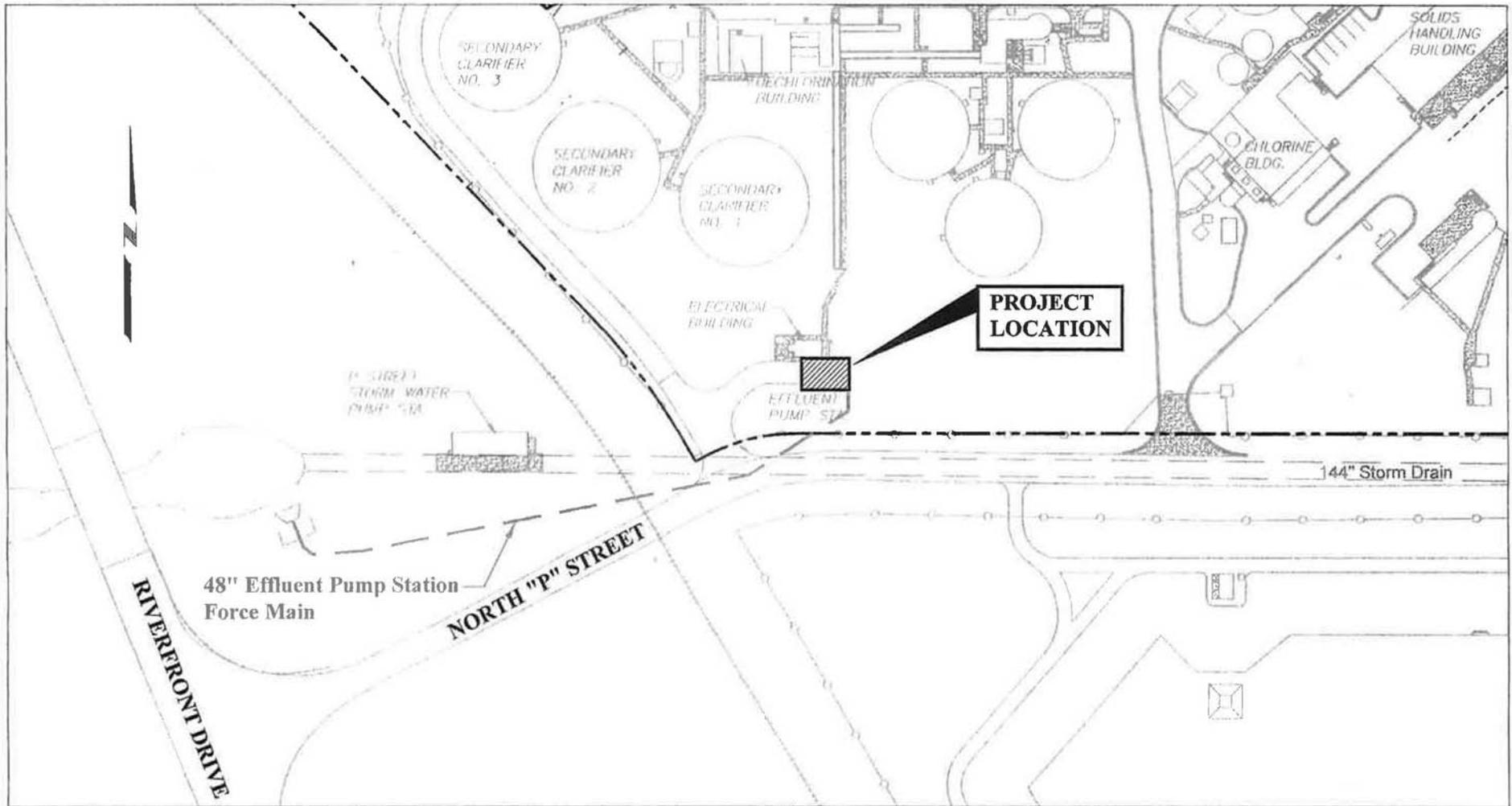
The current "P" Street wastewater treatment plant effluent pump station, which is used to maintain plant discharge during flooding conditions on the Arkansas River, has only one pump with a capacity to pump 24 million gallons a day. This project is to install a second pump that has already been purchased. The second pump will increase the pumping capacity to 45 million gallons a day. This pumping rate matches the peak wet weather biological treatment capacity of the "P" Street treatment plant. The attached exhibit shows the project area.

The low bid for the project was submitted by Goodwin & Goodwin, Inc., in the amount of \$87,680.00. A bid tabulation sheet is attached for you to review. Funds for this work are identified within the 2008 revenue bonds and it is my recommendation that the contract be approved.

Should you or members of the Board have any questions or need additional information, please let me know.

attachment

pc: Jeff Dingman



**"P" STREET WASTEWATER TREATMENT PLANT
 EFFLUENT PUMP STATION UPGRADE
 PROJECT NUMBER 12-17**

Bid Tabulation Sheet

Project Name

"P" Street Wastewater Treatment Plant Effluent Pump Installation
Project Number 12-17-C2

Bid Opening

February 3, 2014
2:00 P.M.

Bids Received

Goodwin & Goodwin, Inc.
Fort Smith, AR \$87,680.00



MEMORANDUM

TO: Mayor and Board of Directors

FROM: Wendy Beshears, Administrative Assistant

DATE: February 11, 2014

SUBJECT: Electric Code Appeals Board

The terms of Marvin Matlock and Bill Kirk of the Electric Code Appeals Board will expire March 31, 2014. Mr. Matlock and Mr. Kirk wishes to be reappointed to this board.

There are no other applicants available at this time.

Appointments are **by the Board of Directors**, two appointment are needed. The term will expire March 31, 2019.

623 Garrison Avenue
P.O. Box 1908
Fort Smith, Arkansas 72902
(479) 785-2801
Administrative Offices FAX (479) 784-2430

Electric Code Appeals Board

The Electric Code Appeals Board has the authority to hear appeals from anyone who wishes to appeal the decision of the City official enforcing the City's Electrical Code. Upon hearing the appeal, the Board of Appeals may modify or reverse the interpretation of the electrical inspector.

The Board consists of five members who are qualified by experience and training to pass on matters pertaining to electrical installation and materials and who are actively engaged in a business related to the building industry, and two members who are citizens at large.

The members are appointed by the Board of Directors and serve five year terms. The Board meets on call.

	<u>Date Appointed</u>	<u>Term Expires</u>
Marvin Matlock Electrical Contractor 3211 South 32 Street (03) 646-5858 (h) 646-6083 (w)	04/20/04	03/31/14
Frank Glidewell Glidewell Electric 10409 Castleton (03) 452-2971(w) frankglidewell@yahoo.com	03/18/86	03/31/16
Tommy Hill Matlock Electric Company 3324 Vicksburg (03) 646-6083 (w) tommy@matlock-electric.com	03/15/11	03/31/16
Charles A. Uerling E D M Consulting Engineers P.O. Box 3290 (13-3290) 782-2127 (h)	03/18/97	03/31/17
Thomas F. McAllister Thomas Electric, Inc. 5505 Gordon Lane (03) 783-1019 (w)	03/16/93	03/31/18

Citizens at Large:

Bill Kirk, P. E.
1514 North 57 Terrace (04)
452-0022 (h)

04/20/04

03/31/14

Jerald W. Walrod
2105 Garner Ln (01)
782-8600 (w)

03/15/05

03/31/18

CITY OF FORT SMITH
Application for City Boards/Commissions/Committees

Note: As an applicant for a City Board, Commission or Committee, your name, address and phone number will be available to the press and the public. You will be contacted before any action is taken on your appointment.

Date: _____

Name: Marvin L. Matlock Home Telephone: (479) 646-5858

Home Address: 3211 S. 32nd St. Work Telephone: retired

Zip: 72903 Email: matelco@aol.com

Occupation: retired - owner matlock electric Comp Inc.
 (If retired, please indicate former occupation or profession)

Education: Master Electrician

Professional and/or Community Activities: _____

Additional Pertinent Information/References: _____

Are you a registered voter in the City of Fort Smith? Yes No
 Have you ever been convicted of a felony, misdemeanor, DWI/DUI or other serious traffic offense?
 Yes NO
 If yes, please identify the offense and the approximate date. A "yes" answer will not automatically preclude you from considering for _____
 Drivers License _____ Date of Birth _____ is
 information will _____ al back ground check of all applicant _____

I am interested in serving on the (please check):

- | | |
|--|--|
| <input type="checkbox"/> Audit Committee | <input type="checkbox"/> Housing Authority |
| <input type="checkbox"/> Advertising & Promoting Commission | <input type="checkbox"/> Library Bd of Trustees |
| <input type="checkbox"/> Airport Commission | <input type="checkbox"/> Mechanical Bd of Adjustments and Appeals |
| <input type="checkbox"/> Animal Services Advisory Board | <input type="checkbox"/> Oak Cemetery Commission |
| <input type="checkbox"/> Arkansas Fair & Exhibition Facilities Bd | <input type="checkbox"/> Outside Agency Review Panel |
| <input type="checkbox"/> Benevolent Fund Board | <input type="checkbox"/> Parking Authority |
| <input type="checkbox"/> Bldg. Bd. Of Adjustment and Appeals | <input type="checkbox"/> Parks & Recreation Commission |
| <input type="checkbox"/> Central Business Improvement District | <input type="checkbox"/> Planning Commission |
| <input type="checkbox"/> Comprehensive Plan Steering Committee | <input type="checkbox"/> Plumbing Advisory Board |
| <input type="checkbox"/> Convention Center Commission | <input type="checkbox"/> Port Authority |
| <input type="checkbox"/> Civil Service Commission | <input type="checkbox"/> Property Owners Appeals Board |
| <input type="checkbox"/> Community Development Advisory Com. | <input type="checkbox"/> Sebastian County Reg. Solid Waste Mgmt. Bd. |
| <input type="checkbox"/> County Equalization Board | <input type="checkbox"/> Sister Cities Committee |
| <input checked="" type="checkbox"/> Electric Code Board of Appeals | <input type="checkbox"/> Transit Advisory Commission |
| <input type="checkbox"/> Fire Code Board of Appeals & Adjustments | <input type="checkbox"/> Residential Housing Facilities Board |
| <input type="checkbox"/> Historic District Commission | |
| <input type="checkbox"/> Housing Assistance Board | |



MEMORANDUM

TO: Mayor and Board of Directors
FROM: Wendy Beshears, Administrative Assistant
DATE: February 11, 2014
SUBJECT: Parking Authority

The term of Loretta Parker of the Parking Authority has expired December 31, 2013. Ms. Parker does not wish to be reappointed at this time.

The applicant available is:

Tiffany Parker

5201 Hardscrabble Way

Appointments are **by the Mayor confirmed by the Board of Directors**, one appointment is needed. The term will expire February 18, 2019.

623 Garrison Avenue
P.O. Box 1908
Fort Smith, Arkansas 72902
(479) 785-2801
Administrative Offices FAX (479) 784-2430

Parking Authority

The Parking Authority is authorized to supervise and control all matters pertaining to the parking of vehicles within the City.

The Parking Authority consist of five members appointed by the Mayor with the approval of the Board of Directors for five year terms. Members shall be qualified electors of the city and cannot hold any elective office of city, county, or state. The Parking Authority meets on call.

	<u>DATE APPOINTED</u>	<u>TERM EXPIRE</u>
Loretta Parker 2720 S. Waldron (03) 452-4224 (h)	12/16/03	12/31/13
John Moates Proprietor 7408 Millennium Drive (16) 221-2083 (w) 926-3122 (h) john@blazenburrito.com	05/20/08	12/31/14
Linda K. Gurlen P.O. Box 180262 (18) 646-8535 (h) 479-424-1152 (w) lgurlen@cox.net	01/23/08	12/31/17
Kyle W. Gilliam 11801 Southcrest Drive (16) 648-2909 (h) 573-1651 (w) kgilliam@arvest.com	03/20/12	12/31/17
Stuart Ghan 4700 South U Street (03) 226-2626 (h) 478-6161 (w)	02/19/13	02/19/18

ATTN: Wendy Beshears

CITY OF FORT SMITH
Application for City Boards/Commissions/Committees

Note: As an applicant for a City Board, Commission or Committee, your name, address and phone number will be available to the press and the public. You will be contacted before any action is taken on your appointment.

Name: Tiffany Parker
Date: 1-14-14
Home Telephone: 479 459 7078
Home Address: 5201 Hardscrabbleway
Work Telephone: 479 782 8313
Zip: 72901
Email: designeraagain@yahoo.com
Occupation: Self employed Designer Again
Education: 1 year college (PHD in life)
Professional and/or Community Activities: I've been in business downtown for over 22 years
Additional Pertinent Information/References: Norman Carter, Richard Griffin, Benny Westphal

Are you a registered voter in the City of Fort Smith? Yes [checked] No
Have you ever been convicted of a felony, misdemeanor, DWI/DUI or other serious traffic offense? Yes NO [checked]
If yes, please identify the offense and the approximate date. A "yes" answer will not automatically preclude you from consideration.
Drivers License / information will be [redacted] Date of Birth [redacted] ground check of all applicants

I am interested in serving on the (please check):

- () Audit Committee
() Advertising & Promoting Commission
() Airport Commission
() Arkansas Fair & Exhibition Facilities Bd
() Benevolent Fund Board
() Bldg. Bd. Of Adjustment and Appeals
() Central Business Improvement District
() Convention Center Commission
() Civil Service Commission
() Community Development Advisory Com.
() County Equalization Board
() Electric Code Board of Appeals & Appeals
() Fire Code Board of Appeals & Adjustments
() Historic District Commission
() Housing Assistance Board
() Housing Authority
() Library Bd of Trustees
() Mechanical Bd of Adjustments and Appeals
() Oak Cemetery Commission
() Outside Agency Review Panel
() Parking Authority
() Parks & Recreation Commission
() Planning Commission
() Plumbing Advisory Board
() Port Authority
() Property Owners Appeals Board
() Sebastian County Reg. Solid Waste Mgmt. Bd.
() Sister Cities Committee
() Transit Advisory Commission
() Residential Housing Facilities Board
() Comprehensive Plan Steering Committee



MEMORANDUM

TO: Mayor and Board of Directors
FROM: Wendy Beshears, Administrative Assistant
DATE: February 11, 2014
SUBJECT: Plumbing Advisory Board

The term of Jan Taylor of the Plumbing Advisory Board will expire February 28, 2014. Mr. Taylor wishes to be reappointed to this board.

There are no other applicants available at this time.

Appointments are **by the Board of Directors**, one appointment is needed. The term will expire February 28, 2018.

623 Garrison Avenue
P.O. Box 1908
Fort Smith, Arkansas 72902
(479) 785-2801
Administrative Offices FAX (479) 784-2430

Plumbing Advisory Board

The Plumbing Advisory Board is authorized to serve the City in an advisory capacity in the formulation of rules and regulations regarding plumbing in the City; to hear appeals to the City's inspecting officials regarding plumbing and gas fitting codes and ordinances; to prepare and conduct examinations for the issuance of Fort Smith master and journeyman plumber's and gas fitter's license under certain conditions.

The Board consists of two licensed master plumbers, a licensed registered mechanical or sanitary engineer, a licensed registered architect, two citizens at large, and a designated representative of the Health Department of the City. With the exception of the Health Department representative who serves for an indefinite term, all other members are appointed by the **Board of Directors** for four-year terms.

The Plumbing Advisory Board supersedes the Plumbers Examining Board. The Board meets on call.

	<u>Date Appointed</u>	<u>Term Expires</u>
Jason Davis 3112 South 70 Street (03) 452-8600 Health Department	06/24/09	Indefinite
Herbert V. Davis 2908 Reeder (03) Professional Engineer 782-0474 (w)	02/18/86	02/28/14
Scott Hathaway 602 Garrison, Suite 800 (01) 452-8922 (w) 471-7688 (h) Architect	02/17/98	02/28/14
Charles L. (Woody) Shank 7205 South Q Street (03) Mechanical Contractor & Licensed Master Plumber 461-7556(c) 478-9339 (w)	04/07/92	02/28/16

Plumbing Advisory Board continued-

Citizens at Large:

Jan Taylor Plumber 5203 Moody Dr (03) 484-0984 (h) 452-3142 (w)	03/15/05	02/28/14
Matthew Blaylock 9 Free Ferry North (03) 452-0879 (h) 782-3124 (w)	08/21/07	02/28/16
Alan Q. Anderson Master Plumber 7221 Free Ferry (03) 461-0418 (h) 782-5059 (w) <u>AlanAnderson@mellies.org</u>	02/17/09	02/28/17

CITY OF FORT SMITH Application for City Boards/Commissions/Committees

Note: As an applicant for a City Board, Commission or Committee, your name, address and phone number will be available to the press and the public. You will be contacted before any action is taken on your appointment.

Date: 1-22-14

Name: JAW TAYLOR

Home Telephone: 479 484 0984

Home Address: 5203 Moody DR.

Work Telephone: 479 452-3142

Zip: 72903

Email: JAWTAYLOR55@ATT.NET

Occupation: PLUMBER
(If retired, please indicate former occupation or profession)

Education: HIGH SCHOOL

Professional and/or Community Activities: _____

Additional Pertinent Information/References: _____

Are you a registered voter in the City of Fort Smith? Yes No

Have you ever been convicted of a felony, misdemeanor, DWI/DUI or other serious traffic offense?

Yes NO

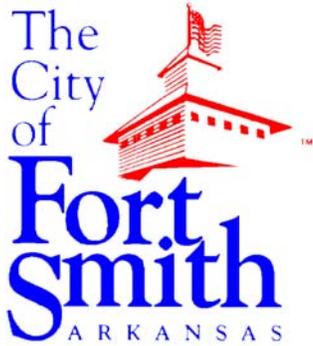
If yes, please identify the offense and the approximate date. A "yes" answer will not automatically preclude you from consideration.

Drivers License _____ Date of Birth _____

information will be use to conduct a criminal back ground check of all applican

I am interested in serving on the (please check):

- Audit Committee
- Advertising & Promoting Commission
- Airport Commission
- Arkansas Fair & Exhibition Facilities Bd
- Benevolent Fund Board
- Bldg. Bd. Of Adjustment and Appeals
- Central Business Improvement District
- Convention Center Commission
- Civil Service Commission
- Community Development Advisory Com.
- County Equalization Board
- Electric Code Board of Appeals & Appeals
- Fire Code Board of Appeals & Adjustments
- Historic District Commission
- Housing Assistance Board
- Housing Authority
- Library Bd of Trustees
- Mechanical Bd of Adjustments and Appeals
- Oak Cemetery Commission
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- Parking Authority
- Parks & Recreation Commission
- Planning Commission
- Plumbing Advisory Board
- Port Authority
- Property Owners Appeals Board
- Sebastian County Reg. Solid Waste Mgmt. Bd.
- Sister Cities Committee
- Transit Advisory Commission
- Residential Housing Facilities Board
- Comprehensive Plan Steering Committee



Mayor – Sandy Sanders

City Administrator – Ray Gosack

City Clerk – Sherri Gard

Board of Directors

Ward 1 – Keith Lau

Ward 2 – Andre’ Good

Ward 3 – Mike Lorenz

Ward 4 – George Catsavis

At Large Position 5 – Pam Weber

At Large Position 6 – Kevin Settle

At Large Position 7 – Philip H. Merry Jr.

AGENDA ~ Summary

Fort Smith Board of Directors

REGULAR MEETING

February 18, 2014 ~ 6:00 P.M.

Fort Smith Public Schools Service Center

3205 Jenny Lind Road

THIS MEETING IS BEING TELECAST LIVE ON THE GOVERNMENT ACCESS CHANNEL 214

INVOCATION & PLEDGE OF ALLEGIANCE

Father John Antony, Immaculate Conception Catholic Church

ROLL CALL

All present (Mayor Sanders presiding)

PRESENTATION BY MEMBERS OF THE BOARD OF DIRECTORS OF ANY ITEMS OF BUSINESS NOT ALREADY ON THE AGENDA FOR THIS MEETING

(Section 2-37 of Ordinance No. 24-10)

Information available by viewing rebroadcast of the meeting on the City Access Channel 214 or City website

APPROVE MINUTES OF THE FEBRUARY 4, 2014 REGULAR MEETING

Unanimously approved as written

ITEMS OF BUSINESS:

1. Resolution approving a contingent fee agreement with Baron and Budd, P.C. and the Sims Law Office regarding the pursuit of claims against Whirlpool Corporation for TCE pollution ~ *Merry / Weber placed on agenda at the February 11, 2014 study session ~*
Defeated 2 in favor (Weber & Merry), 5 opposed (Lau, Good, Lorenz, Catsavis and Settle)
2. Ordinance amending Ordinance No. 16-94 *(correction of 1994 annexation legal description)*
Approved 7 in favor, 0 opposed / Ordinance No. 17-14

3. Ordinance amending Section 16-15 of the Fort Smith Municipal Code regarding the required number of Property Owners Appeal Board members to constitute a quorum
Approved 7 in favor, 0 opposed / Ordinance No. 18-14
4. Resolution of the Board of Directors of the City of Fort Smith certifying local government endorsement of business to participate in the Tax Back Program (as authorized by Section 15-4-2706(d) of the Consolidated Incentive Act of 2003) (*Butler & Cook, Inc.*)
Approved 7 in favor, 0 opposed / Resolution No. R-11-14
5. Consent Agenda
 - A. Resolution to accept the bids and authorize a contract for the construction of Drainage Improvements, Project No. 12-06-C2 (\$630,662.58 / *Engineering Department / Budgeted – Sales Tax Program Fund*)
Approved 7 in favor, 0 opposed / Resolution No. R-12-14
 - B. Resolution approving priorities for the 2015 session of the Arkansas General Assembly ~ *Merry / Good placed on agenda at the February 11, 2014 study session ~*
Approved 7 in favor, 0 opposed / Resolution No. R-13-14
 - C. Resolution authorizing Change Order No. 2 to the contract with Crawford Construction Company for the Chaffee Crossing Water Supply Improvements – Pump Station (\$6,617.63 / *Utility Department / Budgeted – 2012 Sales and Use Tax Bonds*)
Approved 7 in favor, 0 opposed / Resolution No. R-14-14
 - D. Resolution authorizing the Mayor to execute an agreement and Authorization No. 1 with Hawkins-Weir Engineers, Inc. for providing engineering services associated with the Mill Creek Pump Station and Equalization Tank (\$1,353,600.00 / *Utility Department / Budgeted – 2012 Sales and Use Tax Bonds*)
Approved 7 in favor, 0 opposed / Resolution No. R-15-14
 - E. Resolution accepting the bid of and authorizing the Mayor to execute a contract with BRB Contractors, Inc. for the Mill Creek Pump Station and Equalization Tank (\$12,930,000.00 / *Utility Department / Budgeted - 2012 Sales and Use Tax Bonds*)
Approved 7 in favor, 0 opposed / Resolution No. R-16-14
 - F. Resolution authorizing the Mayor to execute Authorization No. 2 to the agreement with Hawkins-Weir Engineers, Inc. for engineering services for the Mill Creek Interceptor Improvements – Phase II (\$165,000.00 / *Utility Department / Budgeted – 2012 Sales and Use Tax Bonds*)
Approved 7 in favor, 0 opposed / Resolution No. R-17-14

G. Resolution accepting the bid of and authorizing the Mayor to execute a contract with Forsgren, Inc. for the Mill Creek Interceptor Improvements – Phase II (\$1,917,753.10 / Utility Department / Budgeted - 2012 Sales and Use Tax Bonds)

Approved 7 in favor, 0 opposed / Resolution No. R-18-14

H. Resolution accepting the bid of and authorizing the Mayor to execute a contract with Goodwin & Goodwin, Inc. for the “P” Street Wastewater Treatment Plant effluent pump installation (\$87,680.00 / Utility Department / Budgeted – 2008 Revenue Bonds)

Approved 7 in favor, 0 opposed / Resolution No. R-19-14

OFFICIALS FORUM ~ presentation of information requiring no official action

(Section 2-36 of Ordinance No. 24-10)

➤ Mayor

➤ Directors

➤ City Administrator

Information available by viewing rebroadcast of the meeting on the City Access Channel 214 or City website

EXECUTIVE SESSION (approximately 6:37 p.m.)

• Appointments: **ELECTRIC CODE APPEALS BOARD**

Bill Kirk (reappointment)

Marvin Matlock (reappointment)

Terms expire March 31, 2019

PARKING AUTHORITY

Tiffany Parker

Term expires February 18, 2019

PLUMBING ADVISORY BOARD

Jan Taylor (reappointment)

Term expires February 28, 2018

ADJOURN

6:41 p.m.

MINUTES OF THE BOARD OF DIRECTORS REGULAR MEETING

TUESDAY ~ FEBRUARY 18, 2014 ~ 6:00 P.M.

FORT SMITH PUBLIC SCHOOLS SERVICE CENTER

The meeting was called to order by Mayor Sandy Sanders, presiding. Invocation was given by Father John Antony of Immaculate Conception Catholic Church, followed by the Pledge of Allegiance. On roll call the following members of the Board were present: Directors Keith Lau, Andre' Good, Mike Lorenz, George Catsavis, Pam Weber, Kevin Settle and Philip H. Merry, Jr. The Mayor declared a quorum present.

The Mayor inquired if any Board member had any item of business to present that was not already on the agenda. There was none presented.

Mayor Sanders recognized Matthew Dawkins from Boy Scout Troop 110, who was in attendance to earn his Citizenship in the Community merit badge.

The minutes of the February 4, 2014 regular meeting were presented for approval. Settle, seconded by Lorenz, moved approval of the minutes as written. The members all voting aye, the Mayor declared the motion carried.

Item No. 1 was a resolution approving a contingent fee agreement with Baron and Budd, P.C. and the Sims Law Office regarding the pursuit of claims against Whirlpool Corporation for TCE pollution ~ *Merry / Weber placed on agenda at the February 11, 2014 study session ~*

City Administrator Ray Gosack briefed the Board on the item as discussed and requested at the February 11, 2014 study session. The resolution originally presented authorized an agreement with only the Sims Law Office; however, such as been revised to include the law firm of Baron and Budd, P.C. The proposed resolution authorizes an agreement to address the arrangement for compensation and the process in which litigation will proceed to pursue claims against Whirlpool Corporation for TCE

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contamination. The city attorney has provided information about the pollution enforcement case in Illinois, Fort Smith ordinances, and the state law regarding the statute of limitations. Currently, it is uncertain whether the proposed litigation will proceed criminally or civilly. Regardless, each possibility maintains its own set of decisions and consequences, all of which will require consideration by the Board after Ms. Sims conducts her research and offers a recommendation. The city attorney and city prosecutor will likely need to have input on such matters.

Director Merry expressed his desire to hold firm to the rule of law citing such applies to everyone; therefore, Whirlpool Corporation should be held accountable for the contamination. Due to such, he spoke in favor of the proposed measure citing various local attorneys have also indicated approval of the prospect that the City of Fort Smith may pursue litigation.

Director Settle advised considerable thought has gone into how he will vote on the proposed item and has considered the effect such will have regarding the future industries that will inhabit the property, as well as the affected homeowners. Much certainty was conveyed that approval of this proposed agreement will hinder the homeowner's ongoing litigation and stifle future industries occupancy of the property. He further noted that contamination violations are strictly regulated by state and federal agencies; therefore, he spoke in opposition of the proposed item.

Director Good noted concurrence with Director Settle's comments. If the proposed resolution is approved and the City receives a settlement, the City is prohibited by law to distribute said funds to private individuals, i.e. the affected homeowners. He also conveyed opposition to the proposed resolution.

Good, seconded by Lau, moved adoption of the resolution as revised. Prior to the vote, Director Weber inquired if settlement proceeds may be utilized to purchase the

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homeowners properties to build a city park whereby Administrator Gosack advised such is a permissible use of said funds.

Director Weber further conveyed much discontent with Whirlpool Corporation citing their failure to address the contamination in a timely manner. Due to such and because a motion to adopt is on the floor, she indicated her intent to vote in favor of the item; however, she noted her preference to table the item to allow additional and more thorough review of the item.

Mayor Sanders implied opposition to the City utilizing settlement funds to purchase the affected properties by simply stating "Whirlpool should purchase the properties."

Director Lau reminded all of the legal opinion provided by the city attorney citing a potential difficulty in applying the existing language of current ordinances to the Whirlpool situation. A city's responsibility is to promote business by being fair and equitable to all companies as well as ensure the safety and welfare of its citizens. Great concern was expressed alleging approval of the proposed resolution will send a bad message to potential businesses contemplating coming to Fort Smith and that such could be detrimental to the lawsuit filed by the affected homeowners. Due to such, he also spoke in opposition to the item.

The motion remaining on the floor, the members voted as follows: ayes – Weber and Merry; nays – Lau, Good, Lorenz, Catsavis and Settle. The Mayor declared the motion defeated.

Item No. 2 was an ordinance amending Ordinance No. 16-94 (*correction of 1994 annexation legal description*).

Administrator Gosack briefed the Board on the item advising such is merely to correct an error in the legal description included within Ordinance No. 16-94, which

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annexed property near Old Greenwood Road and Zero Street in 1994. Staff discovered the error while reviewing the zoning boundary lines in the subject area; therefore and in order to correct the city boundary as per the 1994 annexation petition, he recommended approval of the item.

Settle, seconded by Good, moved adoption of the ordinance. The motion included suspending the rule to allow the three (3) full readings of the ordinance to be by caption and for the readings to occur on the same date. The City Clerk read the ordinance for its readings and the members all voting affirmatively, the Mayor declared the motion carried and the ordinance was adopted and given Ordinance No. 17-14.

Item No. 3 was an ordinance amending Section 16-15 of the Fort Smith Municipal Code regarding the required number of Property Owners Appeal Board members to constitute a quorum.

City Clerk Sherri Gard briefed the Board on the item advising the Property Owners Appeal Board (POAB) consists of five (5) members; however, the Fort Smith Municipal Code specifically states that four (4) members constitute a quorum. The POAB discussed the matter at their February 10, 2014 meeting and voted four (4) in favor and zero (0) opposed to recommend the number required to constitute a quorum be reduced from four (4) to three (3) members.

Merry, seconded by Good, moved adoption of the ordinance. The motion included suspending the rule to allow the three (3) full readings of the ordinance to be by caption and for the readings to occur on the same date. The City Clerk read the ordinance for its readings and the members all voting affirmatively, the Mayor declared the motion carried and the ordinance was adopted and given Ordinance No. 18-14.

Item No. 4 was a resolution of the Board of Directors of the City of Fort Smith certifying local government endorsement of business to participate in the Tax Back

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Program (as authorized by Section 15-4-2706(d) of the Consolidated Incentive Act of 2003) (*Butler & Cook, Inc.*).

Deputy City Administrator Jeff Dingman briefed the Board on the item advising such is per the request from the Arkansas Economic Development Commission and the Fort Smith Regional Chamber of Commerce on behalf of Butler & Cook, Inc., who plans to expand its current facility located at 8307 Ball Road in Fort Smith. The expansion is an \$11.2 million investment and will add 45 new jobs to the region. Participation in the Tax Back Program allows for new or expanding businesses to request refunds of sales taxes paid on building materials, new equipment and other eligible expenses incurred due to construction and/or expansion, and requires governmental endorsement. Participation requires approval from the governing body; therefore, he recommended approval of the proposed resolution.

Director Settle conveyed much gratitude to Administration and staff for their work on the matter citing the Tax Back Program is a good tool to foster aid for local businesses to expand.

Lau, seconded by Lorenz, moved adoption of the resolution. The members all voting affirmatively, the Mayor declared the motion carried. Settle, seconded by Lau, moved adoption of Section 3 the emergency clause. The members all voting affirmatively the Mayor declared the motion carried and the resolution and emergency clause were adopted and given Resolution No. R-11-14.

The Consent Agenda (Item No. 5) was introduced for consideration, the items being as follows:

- A. Resolution to accept the bids and authorize a contract for the construction of Drainage Improvements, Project No. 12-06-C2 (\$630,662.58 / *Engineering Department / Budgeted – Sales Tax Program Fund*)

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- B. Resolution approving priorities for the 2015 session of the Arkansas General Assembly ~ *Merry / Good placed on agenda at the February 11, 2014 study session ~*
- C. Resolution authorizing Change Order No. 2 to the contract with Crawford Construction Company for the Chaffee Crossing Water Supply Improvements – Pump Station (*\$6,617.63 / Utility Department / Budgeted – 2012 Sales and Use Tax Bonds*)
- D. Resolution authorizing the Mayor to execute an agreement and Authorization No. 1 with Hawkins-Weir Engineers, Inc. for providing engineering services associated with the Mill Creek Pump Station and Equalization Tank (*\$1,353,600.00 / Utility Department / Budgeted – 2012 Sales and Use Tax Bonds*)
- E. Resolution accepting the bid of and authorizing the Mayor to execute a contract with BRB Contractors, Inc. for the Mill Creek Pump Station and Equalization Tank (*\$12,930,000.00 / Utility Department / Budgeted - 2012 Sales and Use Tax Bonds*)
- F. Resolution authorizing the Mayor to execute Authorization No. 2 to the agreement with Hawkins-Weir Engineers, Inc. for engineering services for the Mill Creek Interceptor Improvements – Phase II (*\$165,000.00 / Utility Department / Budgeted – 2012 Sales and Use Tax Bonds*)
- G. Resolution accepting the bid of and authorizing the Mayor to execute a contract with Forsgren, Inc. for the Mill Creek Interceptor Improvements – Phase II (*\$1,917,753.10 / Utility Department / Budgeted - 2012 Sales and Use Tax Bonds*)
- H. Resolution accepting the bid of and authorizing the Mayor to execute a contract with Goodwin & Goodwin, Inc. for the “P” Street Wastewater Treatment Plant effluent pump installation (*\$87,680.00 / Utility Department / Budgeted – 2008 Revenue Bonds*)

With regard to Item No. 5B, the following individual was present to address the Board:

- David Harris
Fort Smith, Arkansas

Re: Regarding “Sales Tax Bond Election Ballot Questions”, he simply noted that combining popular and unpopular ballot questions into a one-vote option is an easy way for cities to ensure voter approval of the unpopular measure.

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Catsavis, seconded by Settle, moved adoption of all consent agenda items. The members all voting affirmatively, the Mayor declared the motion carried and the resolutions were adopted and numbered R-12-14 through R-19-14 respectively.

Mayor Sanders opened the Officials Forum with the following comments offered:

➤ Mayor Sanders

Re: Conveyed today's announcement that the Fort Smith Regional Health Foundation will move forward with the development of a College of Osteopathic Medicine, which will be located near Chad Colley Boulevard at Chaffee Crossing. The Fort Chaffee Redevelopment Authority (FCRA) donated approximately 200 acres for the development, which anticipates 150 students per year. Such will bring 65 high-paying jobs and various other jobs to the region and is anticipated to boost the local economy by \$75 to \$100 million.

➤ Director Settle

Re: Announced the University of Arkansas Fort Smith Lions basketball teams will play Thursday, February 20 and Saturday, February 22, 2014 at UAFS Stubblefield Center; therefore, he encouraged all to attend.

The Board entered into executive session at approximately 6:37 p.m. and after reconvening, Mayor Sanders announced the following appointment nominations:

ELECTRIC CODE APPEALS BOARD

Bill Kirk (*reappointment*)

Marvin Matlock (*reappointment*)

Terms expire March 31, 2019

PARKING AUTHORITY

Tiffany Parker

Term expires February 18, 2019

PLUMBING ADVISORY BOARD

Jan Taylor (*reappointment*)

Term expires February 28, 2018

Lau, seconded by Merry, moved acceptance of the appointment nominations.

The members all voting aye, the Mayor declared the motion carried.

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There being no further business to come before the Board, Settle moved that the meeting adjourn. The motion was seconded by Lau, and the members all voting aye, the Mayor declared the motion carried and the meeting stood adjourned at 6:41 p.m.

APPROVED:



Mayor

ATTEST:



City Clerk