

April 8, 2009

CALLED MEETING 1

The City Council of the City of Sherwood met for a special called meeting on April 8, 2009, at 4:00 p.m. in the Council Chambers. Those present during roll call were Mayor Virginia R. Hillman, City Attorney Steve Cobb, City Clerk Angela Nicholson, Aldermen Vassar, Davis, Brooks, and Harmon. Alderman Lilly arrived after roll call. Alderman Rankin and Alderman Fender absent.

Steve Cobb, City Attorney, stated he asked the meeting to be called to discuss the AET litigation. The trial began in federal court on Monday, April 6, 2009, and continued until this morning. There was a development with respect to Judge Wright that occurred that would be discussed by David Fuqua, Attorney for the City. This is a jury trial and Judge Wright made certain findings during the course of the trial that become instructions to the jury as to how they are to rule or how they are to consider evidence. In this case the Judge gets to make a ruling on some of the constitutional issues and those will be binding on the jury. The jury will not be able to ignore the directives. What has transpired was at the end of yesterday's session after the jury had been excused, the Judge indicated to the attorney's that she was inclined to grant a directed verdict against the City of Sherwood indicating that she believes there was a breach of contract by the city for which the city could become liable for damages. This would be a determination for the jury. At this point litigation would be determining the dollar amount. The plaintiff is seeking \$760,000 in damages. Mr. Fuqua will discuss this with the council. Mayor Hillman, Steve Cobb, David Fuqua, and Steve Schroeder, an economist on behalf of the city, met this morning to discuss a potential settlement. After the meeting an offer was made to the plaintiff. Timothy Miles with CARMA was present. Mr. Cobb stated there was money available to settle, the amount discussed is \$350,000.00 of which CARMA will pay \$125,000.00 leaving the city with an obligation of \$225,000.00. The seriousness of this trial and what could transpire in court, Mr. Cobb felt it prudent to come before the council and present all the information available.

David Fuqua, an attorney from CARMA that represents the City, stated to the council that this case is different from most of the cases that Sherwood has been involved in. This case involves a breach of contract issue with an overriding question of whether the city violated a federal constitutional due process right. The plaintiff filed a motion for summary judgment. This is a process that the law provides to get a determination prior to trial on a legal or factual issue. The plaintiff asked the court to rule that AET did in fact have a due process interest. The court denied the motion. The Judge was not sure at the time if the case has due process interest. The Judge ruled based on the evidence available in the law, that AET had a property interest in their contract. Mr. Fuqua advised the problem the Judge has with the contract was she could not determine from the evidence presented until trial, what exact kind of due process AET was given before the city cancelled the contract. Because we are dealing with a due process question we have an intervening step where the court can conclude as a matter of law at the end of the evidence, that we improperly terminated the contract. One option is the Judge could decide there is a violation and send it to the jury only on a question of damages. The Judge might decide there is some disputed fact about what process is due, or she could send a question to the jury. The Judge's third option is she could decide that there was a breach of contract, the City did not provide them due process and she could ask the jury whether it was possible for AET to actually fix the problems. Mr. Fuqua was alarmed that the Judge seemed to quickly come to the point of view that she would favor AET's argument. A possible fourth option was the Judge said she could send it to the jury without making a decision, but then if she disagreed with the jury she could overturn their verdict. Mr. Fuqua was concerned about this and that is when he approached City Attorney Steve Cobb about the possibility of offering a settlement. The offer is for \$350,000.00, which is AET's final non-negotiable offer. This offer would include any attorney's fees that their attorney would be entitled to receive. Mr. Fuqua recommends that the City settle this case. Mr. Fuqua explained that AET had a contract for five years and it was terminated about a year and three months into that five-year term. They originally asked the judge for damages for the first five-year term and the second renewal term. Which would have gotten their damages up to about \$1.6 million. On the city's motion the judge rejected their retention that they could recover damages for the renewal period. The judge limited the damages to the initial five-year term of the contract. Mr.

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Fuqua explained he felt the city was taking a great risk by not settling. If AET were to win, they could be awarded attorney fees, bringing the loss to around \$900,000.00. According to the city's experts even a victory of \$50,000 win would bring the total recovery to \$200,000.00. Mr. Fuqua felt from an economic stand point that \$350,000.00, which includes attorney's fees is a good settlement number. Mr. Fuqua further explained that this is a Central Arkansas Risk Management (CARMA) case. CARMA has a \$250,000.00 limit. Of this amount CARMA would pay \$125,000 toward attorney fees and the remaining \$225,000.00 would be paid by the city. If there were to be a judgment in excess of what CARMA had to offer the amount would fall to the city. Steve Cobb, City Attorney, stated that if the case continues the cost of defense would continue and there would be considerably less money from CARMA and more responsibility to the city. Alderman Harmon asked if the experts believed even a win for this case would cost the city money. Mr. Fuqua stated it is possible the city get complete victory. The Judge did not allow the death that occurred at Sylvan Hills High School as evidence. Mr. Fuqua further stated that the problem in this case is that the contract did not spell out what is suppose to happen, it stated "they shall have ten days to cure". Cure means to fix the problem. Mr. Cobb informed the council that he conquers with Mr. Fuqua's decision that the City needs to settle. Mayor Hillman stated she did not conquer. Alderman Vassar stated that council and the Mayor are responsible for providing the best services to the citizens of Sherwood. Alderman Vassar believed it was the council and Mayor's moral responsibility to provide the citizens with an ambulance service that would get them to a safe place. The council terminated service with AET because AET did not provide adequate service to the citizens of Sherwood. AET came before the council and stated that the problems had been fixed, and then let the citizens of Sherwood down by not providing adequate service. Alderman Vassar believes the moral emergency is far greater than a contract, and now the council will have to look at dollar signs instead of the moral responsibility to the citizens. Mr. Fuqua explained the city still had to give dues process to AET and due process has nothing to do with their inadequate services. Alderman Harmon stated the laws protect the rights of AET to due process. Alderman Sulcer asked why the city did not counter sue. Mayor Hillman stated that AET is stating that they tried to contact the city and was not given a meeting. Steve Cobb confirmed this statement. Alderman Davis stated that he represents the citizens and there were too many problems with AET. Alderman Lilly stated that he believed a morally just decision was made, but now was the time to pay for it. Mayor Hillman stated we stand the risk of spending more, but we also risk spending less. The city does not have the money. The city is spending one quarter million dollars every quarter. Alderman Harmon stated if we have attorney's informing us that we have a chance of loosing and paying \$900,000.00, and by this time CARMA money will be depleted, the city would have to pay the whole \$900,000.00. Alderman Harmon did not feel this was a good bet. Mayor Hillman stated this was not a guarantee. Mayor Hillman asked why the city engaged in the court battle instead of paying the \$350,000 sooner. Alderman Brooks asked that when this case started if there was a belief the city had a reasonable chance to win. Mr. Fuqua stated the case has changed on the city. AET used the strategy that they did not receive due process. The Judge at this time is focused on the city's action of not giving AET time to cure the problems. Alderman Vassar stated the city is in a situation where the Judge is strictly looking at the legality of the contract. Mr. Fuqua believes the risk in this case is unacceptable and that it is his and Steve Cobb's duty to present the best advise to the city. Mayor Hillman stated that the city has paid to have an economist and he has not even had an opportunity in court and Mayor Harmon's testimony has not been heard. Mayor Hillman felt the city was paying off too soon. Steve Cobb stated before the testimony is presented the judge will have already ruled on the directed verdict. The plaintiff would have rested their case this morning. The directed verdict would have been granted before Mayor Harmon's testimony or any other witnesses. This would be very risky. Mr. Fuqua stated that all of the evidence that would make a difference in the case has already been presented through cross-examination of the plaintiff's witnesses. Alderman Sulcer asked Timothy Miles, with CARMA, if he felt the city would loose. Mr. Miles stated he did not know. He had missed portions of the trial. He further explained there are downsize risks. The city could cap their maximum exposure by offering the settlement or roll the dice, potentially costing the city \$800,000.00 or \$900,000.00. Mr. Miles stated that CARMA has paid money to protect the city and they are offering to put in the rest of their retention

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up to the \$250,000.00 level. If a verdict is rendered against the city it would exceed CARMA's monies. Alderman Brooks stated that the council is supposed to be good stewards of the citizen's money and the city is taking a big risk. Alderman Sulcer asked if AET has agreed to this offer. Steve Cobb stated they have. All that could be negotiated has been done this morning and AET would not take less than \$350,000.00. Alderman Sulcer asked when a decision needed to be made. Steve Cobb informed that Mr. Fuqua had to report to the court the council's decision by 6:00 p.m. this evening. Alderman Lilly asked if the minimum loss would be \$50,000.00. Mr. Fuqua stated that the city has to give the jury a number, plus the city would pay for fees. Alderman Lilly stated that would be approximately \$200,000.00 and the city liability is \$225,000.00. Alderman Harmon, seconded by Alderman Lilly, made a motion to settle the AET lawsuit for \$350,000.00. The roll call vote was 5 ayes. Alderman Davis no. Alderman Fender and Rankin absent.

Alderman Vassar, seconded by Alderman Brooks, made a motion to adjourn at 5:14 p.m.

ATTEST:

Angela Nicholson, City Clerk

Virginia R. Hillman, Mayor