



TO: Mayor Jordan
City Council

Kit Williams
City Attorney

Jason B. Kelley
Assistant City Attorney

CC: Don Marr, Chief of Staff
Jeremy Pate, Development Services Director
Chris Brown, City Engineer

FROM: Kit Williams, City Attorney

DATE: December 27, 2011

RE: Kum & Go Appeal
Potential costs to taxpayers if left turn in access is denied

MOTION TO TABLE

When Alderman Ferrell asked if denying the left turn in from Martin Luther King Boulevard was a “deal killer” and Kum & Go’s representative said “Yes,” I became concerned that the City Council’s decision could have costly implications for our taxpayers. This concern was reinforced when the property owner came forward to explain the difficulties in selling this large parcel with 360 feet of street frontage on Martin Luther King Boulevard without at least a full right and left in curb cut on MLK.

What concerned me were clear holdings by the Arkansas Supreme Court that a **city may not take away a property owner’s access easement to an abutting street without the payment of just compensation.**

“Under our decisions, the owner of property abutting upon a street or highway has an easement in such street or highway for the purpose of ingress and egress which attaches to his property and in which he has a right of property as fully as in the lot itself; and **any subsequent act, by which that easement is substantially impaired for the benefit of the public, is a damage to the lot itself within the meaning of the constitutional provision for which the owner is entitled to compensation.**” *Campbell v. Arkansas State Highway Commission*, 183 Ark. 780, 38 S.W. 2d 753, 753-754 (1931). (emphasis added).

Four decades later, the Arkansas Supreme Court reaffirmed this access easement right as a property right for a lot abutting a street.

“The owner of property abutting upon a street has an easement in such street for the purpose of ingress and egress which attaches to his property and in which he has a right of property as fully as in the lot itself. *Flake v. Thompson*, 249 Ark. 713, 460 S.W. 2d 789, 795 (1970).

In that case, the City of Little Rock had passed an ordinance that would have denied access to University Avenue to the property owner and argued that it could do so because the property owner had access to another (lower level) city street. The Arkansas Supreme Court held “that the ordinance constituted an unwarranted invasion of private rights and was discriminatory and oppressive, and thus it is unreasonable and arbitrary.” *Id.* at 796

“The property right of ingress and egress of appellants in the easement was one that could not be taken from them by the city, **at least without the payment of just compensation.**” *Id.* (emphasis added).

If denying Kum & Go’s requested left turn in access from MLK would kill this \$3.5 million project and leave the property owner with several acres of prime commercial land which cannot be reasonably sold, this “taking” by the City could be very expensive for our taxpayers. That concern prompted me to ask the City Council to table this appeal not only so our Engineering Department could analyze the rather “thin” traffic study presented by Kum & Go, but so I could properly advise you on the legal and possible financial ramifications of your decision on the appeal.

BACKGROUND OF KUM & GO’S REQUESTED LEFT TURN IN

Kum & Go had to be granted a variance for access onto Martin Luther King Boulevard because its driveway could not be at least 250 feet from both Royal Oak and Hill Avenue. The driveway’s proposed location on Site Plan F (which Kum & Go is requesting you to approve) is 272 feet from Hill Avenue but only 91 feet from Royal Oak. I believe that legally we must allow Kum & Go some access onto Martin Luther King Boulevard along its 389 foot frontage. Both the Planning Department and Planning Commission agree that a driveway should be allowed. The only issue is its precise location and the possible limitation of such access.

The Access Management section of the Unified Development Code specifies when a curb cut can be limited so as not to provide both left and right turns into and out of the property.

“If a parcel on the corner of an arterial or collector street (like this parcel) provides **such a short frontage** along a major street that there is **no safe ingress/egress functional location** on that street, the (City) may deny the curb cut or may limit such curb cut to ingress or egress only.” §166.08 (F)(1)(e). (emphasis added)

The 389 foot street frontage on MLK is certainly not “short”. It appears much longer than the gas station/convenience store frontage at MLK and Razorback which has unlimited curb cuts on both of these major roads and much more center lane car stacking on MLK to turn left onto Razorback than the Hill Avenue intersection. The same is true for the new fast food restaurant on the southeast corner of MLK and Razorback. The City should present clear scientifically established safety dangers of allowing a left turn in from MLK **at this location** before restricting this normal property right which is being allowed to competitors and will likely cause the loss of this land sale to the property owners and the applicant’s multimillion dollar investment in our City.

All are in agreement that there is a safe right turn in and out functional location in the approximate location shown by Site Plan F. The issue is whether a left turn into the property at this location over 90 yards from the Hill Avenue intersection is so dangerous that the City can deny this normal property right of the owner. **Even if such left turn in access can be legally denied, the Arkansas Supreme Court holdings would probably require just compensation for this taking.**

The City could present several types of evidence to factually support its contention that this left turn in access would be too dangerous to allow. City Staff could present evidence of **sight distance problems** with the proposed location. Staff could present a **traffic study** demonstrating certain traffic movements **at this** location (such as left turns in) are so unreasonably dangerous that such access should be denied. This has yet to be presented. The 20-30 second video (that does not even include a complete traffic signal rotation and with no scientific evidence that the traffic shown is the normal volume, direction and speed for that intersection) provides virtually no evidence for the City Council to determine the safety or danger level of the proposed left turn in from MLK. It is less than 4 hundredths of one percent of one day’s traffic history of that intersection. This is not good evidence of what occurs during the remaining 99.96% of the day at that intersection.

General statistics that left turns on major roads cause the most accidents are probably too general to justify a decision to deny a left turn at this location. If there was no center turn lane, there would be increased danger of rear-end accidents. All of us know the caution we must use when driving in the left lane on North College Avenue

between North Street and Maple Avenue to avoid being stopped behind a driver turning left onto Trenton or Prospect or into one of the numerous businesses (including a coffee shop, restaurant and liquor store) along that stretch of four lane (no center turn lane), high volume, 35 m.p.h. street. The same is true on Highway 71B from Martin Luther King to Dickson Street. Fortunately, in the case of Kum & Go on Martin Luther King, there is a center turn lane on Martin Luther King with enough room to “stack” several cars. This is a far safer situation than AutoZone, IGA and many other businesses including service stations on the newly reconfigured and reconstructed portion of North College from Rock Street to Maple which allow full access curb cuts closer to major intersections.

Please keep in mind that our Access Management Ordinance states: “Where a curb cut must access the arterial street, it shall be located a minimum of 250 feet from an intersection or driveway.” I presume that a 250 foot requirement from an intersection was to ensure safety and lack of conflict with such intersection. Kum & Go’s Site Plan F satisfies that safety requirement for the intersection with Hill Avenue. Thus, the City’s reliance upon possible safety concerns because of the Hill Avenue intersection are substantially weakened because this driveway meets the separation requirements of the Access Management Ordinance.

Kum & Go’s proposed driveway does not meet the separation requirement with Royal Oak because it is only 30 yards away. This is where the variance requested by Kum & Go can best be scrutinized for safety issues. Since Royal Oak would be used almost exclusively by residents of this apartment complex, it would be a low volume exit. I doubt if its actual traffic has been counted. This is much less of a safety issue than numerous other curb cuts permitted elsewhere on MLK, Archibald Yell and College Avenue (even on the City rebuilt section of College Avenue). An equal protection of the laws argument concerns me with this case.

REQUIRING FULL DRIVEWAY ACCESS FROM AND ONTO THE ONE LANE – ONE WAY ROYAL OAK

Kum & Go’s proposed gas station/convenience store has two separate access points on MLK and Hill Avenue. To require it to connect to a one lane, one way Royal Oak so that residents do not have to either go to Hill Avenue or turn right onto MLK seems like an over-reach and a potential violation of Constitutional protections given developers. The City can require exactions (more normally known as “costs”) of a developer **in rough proportion to the impact the developer is causing to City infrastructure** (like streets). Thus, the cost to pay for the erection of a new traffic signal as suggested by its own traffic engineer to reduce any stacking issues could be a reasonably proportionate exaction (or cost) required from Kum & Go for this project’s impact on City streets.

Likewise requiring a developer of a large corner lot to have curb cuts on both MLK and Hill for both its customers' convenience and safety and for fire access would likely be within a city's power. However, requiring a **third access** onto and from a one lane, one way street that functions as an apartment complex driveway is much more difficult to justify. This is especially true because this additional driveway would not only be very expensive (hundreds of thousands of dollars) and use significant portions of the developer's land, it would also force the movement of the curb cut on MLK into the 250 foot "danger zone" from the intersection with Hill Avenue (a real city street).

What small amount of traffic (only from the apartments) might use this driveway would cause conflicts with traffic entering from MLK and could encourage illegal cut through traffic if Royal Oak was ever backed up waiting to enter MLK. The City already approved Royal Oak's right turn onto MLK as safe enough to build this "city street". Certainly a right turn into Kum & Go off MLK is also safe and is recommended by Planning and Engineering as safe. So this very expensive driveway from the one lane Royal Oak is being required to replace two "safe" right turns for a very limited number of drivers.

I fear this requirement exceeds the proportionate impact of this development, and thus the City may lack the constitutional power to require this questionable and very expensive third access from and onto the one way, one lane Royal Oak. In addition, all this extra pavement for the driveway seems to run counter to the City Council's express policy supporting low impact development. The sidewalk alternative proposed by Kum & Go is also more compatible with the City Council's adopted policy to move toward a less car dominated, more pedestrian and walkable environment.

CONCLUSION

"We have held that the owner of property abutting upon a street has an easement in such street for the purpose of ingress and egress which attaches to his property and in which he has a right of property as fully as in the lot itself. *Flake v. Thompson, Inc.*, 249 Ark. 713, 460 S.W. 2d 789 (1970). We have also noted that **this property right is not diminished merely because the property owner has alternative means of ingress and egress.** *Wright v. City of Monticello*, 345 Ark. 420, 47 S.W. 3d 851, 857 (2001). (emphasis added).

Even if we have well proven public safety concerns, **"(t)he property right of ingress and egress ... could not be taken from them by the city, at least without the payment of just compensation"**. *Flake v. Thompson*, supra (emphasis added). I appreciate Kum & Go's proposed compromise not to insist on a left out onto MLK

Boulevard because of concerns for the safety of its customers and the proximity of the traffic signal on Hill Avenue. Accepting such a compromise (Kum & Go originally sought a full access including left out onto MLK) would allow this project to be built and prevent a probably successful inverse condemnation case against the City.

In the late 80's and early 90's, the Fayetteville Board of Directors committed illegal exactions (sometimes after being warned) which they justified as "doing the right thing." These decisions cost our taxpayers several million dollars paid to attorneys who sued us successfully arguing that following the Constitution and state law was actually "doing the right thing."

I was on the City Council who had to clean up those messes and authorize the multimillion dollar payments ordered by the Courts for those attorneys. When I became Fayetteville City Attorney in 2001, I made a commitment to myself to do my best to avoid those multimillion dollar mistakes. Because the City Council has heeded my occasional warnings, our taxpayers have not had to pay these exorbitant attorney fees for over a decade.

I ask you once again to carefully consider the law that gives property owners access rights to City streets and be aware that, if you deny an access right in this case, the result could be writing a fairly large check on our taxpayers' account.

TITLE XV UNIFIED DEVELOPMENT CODE

shared between two or more lots. Where a curb cut must access the arterial street, it shall be located a minimum of 250 feet from an intersection or driveway.

Number of Curb Cuts Permitted	
Length of Street Frontage	Maximum Number of Curb Cuts
0-500 ft.	1
501-1000 ft.	2
1001-1500 ft.	3
More than 1500 ft.	4

(b) Collector Streets. Curb cuts shall be located a minimum of 100 feet from an intersection or driveway. When necessary, curb cuts along collector streets shall be shared between two or more lots.

Number of Curb Cuts Permitted	
Length of Street Frontage	Maximum Number of Curb Cuts
0-100 ft.	1
101-250 ft.	2
251-500 ft.	3
More than 500 ft.	4

(c) Local and Residential Streets. Curb cuts shall be located a minimum of 50 feet from an intersection or driveway. In no case shall a curb cut be located within the radius return of an adjacent curb cut or intersection. Curb cuts shall be a minimum of fifteen (15') feet from the adjoining property line, unless shared.

Number of Curb Cuts Permitted	
Length of Street Frontage	Maximum Number of Curb Cuts
0-50 ft.	1
51-125 ft.	2
126-250 ft.	3
More than 250 ft.	4

(d) Residential Subdivisions. In the case of residential subdivisions, curb cuts shall be discouraged along arterial and collector streets. When necessary, curb cuts along arterial and collector streets shall be shared between two or more lots. Curb cuts along all streets shall be located a minimum of five feet (5') from the adjoining property line, unless shared.

(e) Variance. In order to protect the ingress and egress access rights to a street of an abutting property owner, a variance to the curb cut minimums shall be granted by the Planning Commission to allow an ingress/egress curb cut at the safest functional location along the property. Such a curb cut may be required to be shared with an adjoining parcel if feasible. If a parcel on the corner of an arterial or collector street provides such short frontage along a major street that there is no safe ingress/egress functional location on that street, the Planning Commission may deny the curb cut or may limit such curb cut to ingress or egress only.

(2) Speed. All streets should be designed to discourage excessive speeds.

(G) Non-conforming Access Features.

(1) Existing. Permitted access connections in place on the date of the adoption of this ordinance that do not conform with the standards herein shall be designated as nonconforming features and shall be brought into compliance with the applicable standards under the following conditions:

(a) When new access connection permits are requested;

(b) Upon expansion or improvements greater than 50% of the assessed property value or gross floor area or volume;

(c) As roadway improvements allow.

(H) Easements. Utility and drainage easements shall be located along lot lines and/or street right-of-way where necessary to provide for utility lines and drainage. The Planning Commission may require larger easements for major utility lines, unusual terrain or drainage problems.

(I) Residential lots. The use and design of lots shall conform to the provisions of zoning where City zoning is in effect. When no City zoning applies, the following standards shall govern unless in conflict with more stringent city, county or state regulations:

(1) Bulk and area regulations:

	Planning Area
Lot area minimum	10,000 sq. ft.

RESOLUTION NO. _____

A RESOLUTION TO GRANT THE APPEAL OF KUM & GO, L.C. AND TO AMEND AND APPROVE ITS LARGE SCALE DEVELOPMENT TO MATCH THE PLAT SUBMITTED WITH ITS APPEAL LETTER

BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF FAYETTEVILLE, ARKANSAS:

Section 1: That the City Council of the City of Fayetteville, Arkansas hereby grants the appeal of Kum & Go, L.C. from some of the terms or conditions imposed by the Planning Commission and amends and approves the Large Scale Development plat to conform with the plat submitted by Kum & Go, L.C. as Site Plan F (attached to this Resolution) regarding its driveway access onto and from Martin Luther King, Jr. Boulevard and changing the access from Royal Oak from vehicular to pedestrian. All other terms and conditions approved by the Planning Commission when approving LSD 11-3966 (Kum & Go at Martin Luther King and Hill Avenue) shall remain in full force and effect.

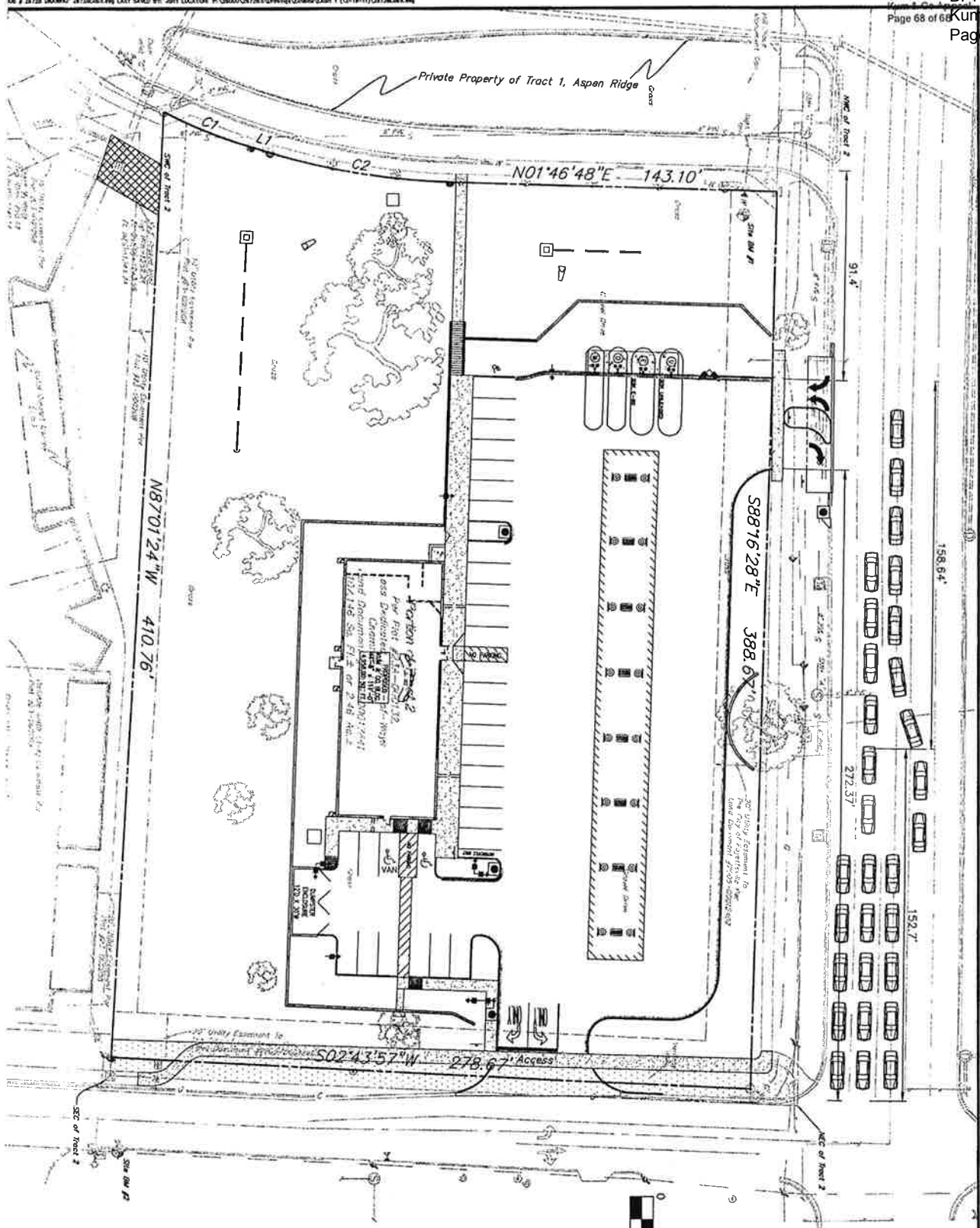
PASSED and APPROVED this 3rd day of January, 2012.

APPROVED:

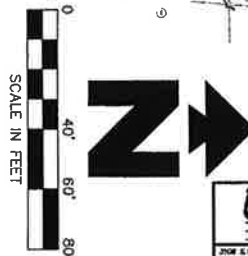
ATTEST:

By: _____
LIONELD JORDAN, Mayor

By: _____
SONDRA E. SMITH, City Clerk/Treasurer



SITE PLAN F



PROJECT NAME	STORE# 26728 - FAYETTEVILLE, AR
DRAWING INFORMATION	SITE PLAN F (KUM & GO REQUEST)
REVISIONS	MLK & HILL
DATE	12-20-11
BY	J. FELDMAN
CHECKED BY	R. M. HALDER
SCALE	1"=50'-0"
SHEET NO.	6 OF 6

PROJECT NAME	STORE# 26728 - FAYETTEVILLE, AR
DRAWING INFORMATION	SITE PLAN F (KUM & GO REQUEST)
REVISIONS	MLK & HILL

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