

**AGENDA REQUEST**

**FOR: COUNCIL MEETING OF AUGUST 7, 2012**

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**FROM:**

**KIT WILLIAMS, CITY ATTORNEY**

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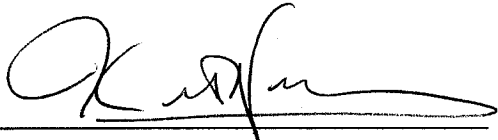
**ORDINANCE OR RESOLUTION TITLE AND SUBJECT:**

A Resolution To Authorize The City Attorney To File A Petition For Writ Of Certiorari To The United States Supreme Court And Appeal The Awarding Of Attorneys Fees In The Rock Quarry Case

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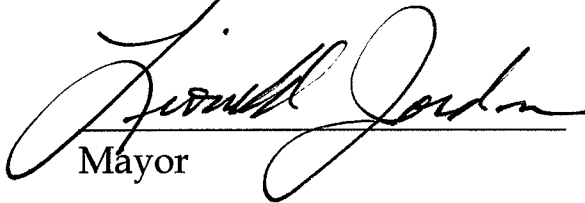
**APPROVED FOR AGENDA:**



City Attorney

July 24, 2012

Date



Mayor

7/24/12

Date

07-24-12 P04:59 RCVD





TO: **Mayor Jordan**  
**City Council**

**Kit Williams**  
*City Attorney*

**Jason B. Kelley**  
*Assistant City Attorney*

CC: **Don Marr**, Chief of Staff  
**Paul Becker**, Finance Director

FROM: **Kit Williams**, City Attorney

A handwritten signature in black ink, appearing to read 'Kit Williams', written over a horizontal line.

DATE: **July 24, 2012**

RE: **Petition for Writ of Certiorari and Appeal to United States Supreme Court**

In my July 5, 2012 memo (attached) I notified you that the Eighth Circuit Court of Appeals had affirmed the lower court's decision to award attorneys fees to the Rogers Group, Inc. I pointed out why I felt this was wrong and recommended that we petition for a Writ of Certiorari to the United States Supreme Court. At that point I believed the cost to appeal would largely be only costs (filing record, printing, my travel expenses) that I could pay out of my office budget.

Unfortunately our insurance company has decided it makes business sense to pay the current attorneys fee award and not risk any further attorneys fees which could be awarded against the City if the Petition for Writ of Certiorari is denied (which is very likely since only a tiny percentage are granted). If a Writ is issued, we could still lose the actual appeal and have more attorney fees awarded against us. The insurance company appears to have this right to pay the attorneys fees now and have no further liability. Thus, all the risk for future attorneys fees would fall upon our taxpayers.

If we go forward and win it all, the insurance company would be entitled to receive back all the attorneys fees it paid while we would receive almost no monetary relief since civil rights attorney fees almost always are assessed against a city if it loses and not assessed against a plaintiff that loses. From a purely **immediate** monetary perspective, filing a Petition for Writ of Certiorari and appealing to the U.S. Supreme Court makes little sense. From a long term perspective, we and every city in the Eighth Circuit might be faced with more frequent declaratory judgment challenges to ordinances being filed in federal court with weak due process claims alleged in an effort to collect attorneys fees. So long term, cities could face increased costs.

But you need to decide what is best for Fayetteville. Our research shows attorneys fees awarded against a government for a Petition for Writ of Certiorari that was denied range between \$30,000.00 to \$40,000.00 which seem excessive to me. (A Washington D.C. lawyer was paid \$403.75 per hour for work responding to a Petition for Writ of Certiorari). But our taxpayers could well face such a large bill if our Petition For Writ of Certiorari is denied (which is likely).

If our Petition was granted, we would not pay any such fees, but could then appeal to the United States Supreme Court. If successful there, no attorney fees would be assessed against us, and we should be able to recover back the \$75,000.00 (plus appellate attorney fees) the insurance company has paid. The City will have paid slightly less than \$8,000.00 of these fees before meeting our deductible.

Thus, we are risking substantially more in attorney fees than what we could hope to recover back (\$8,000.00). The reason to appeal would be to establish the principle that our taxpayers and the taxpayers of every city and county should not be forced to pay attorneys fees unless that government has actually violated someone's civil rights. Our citizens should have their day in court to defend our actions rather than having attorney fees be awarded on bare and untested pleadings in a complaint when a case is decided on a state issue where attorney fees are not allowed.

I believe this is a very important principle that deserves our best efforts to protect which is why I still recommend we bite the bullet and seek a Petition for Writ of Certiorari despite long odds and a fairly significant monetary risk.



**TO: Mayor Jordan  
City Council**

**Kit Williams  
City Attorney**

**Jason B. Kelley  
Assistant City Attorney**

**FROM: Kit Williams, City Attorney**

A handwritten signature in black ink, appearing to read 'Kit Williams', written over a horizontal line.

**DATE: July 5, 2012**

**RE: Eighth Circuit Court of Appeals Decision  
*Rogers Group, Inc. v. City of Fayetteville***

This morning the three judge panel of the Eighth Circuit Court of Appeals affirmed the award of \$75,319.14 in attorney's fees, expenses and costs. (*Rogers* had originally sought \$110,927.31.)

Before 2001, the Eighth Circuit (and most other Circuit Courts) had expressly allowed attorney fees to be awarded in some cases in which the plaintiff alleged a civil rights violation like due process of law even if the case was decided on other grounds. In 2001, the United States Supreme Court reversed all these Circuit Courts in *Buckhannon Bd. & Care Home, Inc. v. West Virginian Department of Health and Human Resources*, 532 U.S. 598 (2001).

The United States Supreme Court in a 5 to 4 decision held that even if a civil rights allegation could withstand a Motion To Dismiss, it would not support an award of attorney's fees. *Id.* at 605. The Fourth Circuit Court of Appeals properly applied the new *Buckhannon* ruling in 2002.

“(P)laintiffs who do not prevail on the federal claims, but achieve success on supplemental state law claims are not prevailing parties under §1988, and are therefore not entitled to an (attorney’s fee) award under that statute.” *Robles v. Prince George’s County, Md*, 302 F3d 262, 272 (4<sup>th</sup> Circuit 2002).

While our insurance carrier rather than our taxpayers would have to pay this \$75,000.00 attorney’s fee award if it is finally upheld, this Eighth Circuit ruling if

left unchallenged would encourage substantially more litigation with every plaintiff who wishes to challenge any city or county ordinance to plead not only for declaratory judgment but also allege a due process civil rights claim in order to try to get attorneys fees.

I believe that even the four dissenters in the *Buckhannon* case would reject a civil rights attorney fees award when it is clear the City did not violate Federal Due Process by enacting an ordinance after long consultation with Rogers Group Inc. and amendments to the ordinance suggested by Rogers Group, Inc. Even the District Court acknowledged the careful consideration of the City Council in enacting the Rock Quarry Ordinance which his opinion stated “is to be commended in the enactment of laws and regulations ....”

Since the Washington County Circuit Court had already found the City had power to abate a nuisance within a mile of the city limits (Motor Vehicle Racing Facility Ordinance) and the Arkansas Attorney General opined the City had such power, Rogers Group, Inc. could never prove the City Council had violated its Due Process Rights.

**“[S]ubstantive-due-process claims should be limited to ‘truly irrational’ governmental actions. An example would be attempting to apply a zoning ordinance only to persons whose names begin with the first half of the alphabet.”** *Singleton v. Cecil*, 176 F.3d 419 432-33 (8<sup>th</sup> Cir. 1999) (citations omitted, emphasis added).

Unfortunately, even though our city never got its day in Court to disprove Rogers Group, Inc.’s meritless allegation of a Due Process violation, the Eighth Circuit has affirmed an award of attorney’s fees based upon unsupportable and untested “allegations in the complaint ....”

Eventually, the United States Supreme Court will need to reassert its authority over the Circuit Courts and its ruling of the *Buckhannon* case that some sort of a decision on the merits of a **federal civil rights claim** is needed to support an award of **civil rights attorney fees**. Our case would very clearly frame this issue so that the Supreme Court could clarify that the taxpayers of cities and counties will not have to pay federal civil right attorneys fees without the plaintiff having to prove an actual violation of federal civil rights of due process.

Without such an appeal and clarification, every part of the Fayetteville Code (and every other city and county code) and every ordinance we pass including rezonings and code amendments carry the danger of an award of attorneys fees. This carrot of attorneys fees will certainly spur increased litigation against all local governments as well as a stick to try to force local governments to give in to litigation threats.

### **CONCLUSION**

It is very difficult and a very long shot to obtain review before the United States Supreme Court and would require much more additional work for my office. However, I feel this effort must be made.

**RESOLUTION NO. \_\_\_\_\_**

A RESOLUTION TO AUTHORIZE THE CITY ATTORNEY TO FILE A PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT AND APPEAL THE AWARDED OF ATTORNEYS FEES IN THE ROCK QUARRY CASE

**WHEREAS**, the Eighth Circuit Court of Appeals affirmed the Federal District Court's award of \$75,319.14 in attorneys fees for the Rogers Group, Inc. against the City of Fayetteville; and

**WHEREAS**, the City Attorney has recommended that the City file a Petition for Writ of Certiorari to the United States Supreme Court to challenge this ruling; and

**WHEREAS**, the City's insurance carrier for constitutional claims has stated it will exercise its contractual right to pay the currently due attorney fees award, but will not be responsible for any future attorneys fee awarded against the City if the Petition for Writ of Certiorari is not granted or the decision is affirmed by the United States Supreme Court; and

**WHEREAS**, the City Council needs to decide whether or not to risk further city funds by authorizing the City Attorney to seek a Petition for Writ of Certiorari in an attempt to prevent the awarding of attorney fees which were based upon untested pleadings in a complaint.

**NOW, THEREFORE 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 authorizes the City Attorney to proceed with filing the Petition for Writ of Certiorari to the United States Supreme Court and appeal if such Petition is granted.

**PASSED and APPROVED** this 7<sup>th</sup> day of August, 2012.

APPROVED:

ATTEST:

By: \_\_\_\_\_  
**LIONELD JORDAN**, Mayor

By: \_\_\_\_\_  
**SONDRA E. SMITH**, City Clerk/Treasurer

