

City of Fayetteville Staff Review Form

City Council Agenda Items  
and  
Contracts, Leases or Agreements

9/17/2013

City Council Meeting Date  
Agenda Items Only

Kit Williams  
Submitted By

City Attorney  
Division

City Attorney  
Department

Action Required:

A Resolution to approve the Third Amendment to Land Sale Agreement with Kum & Go, L.C. to extend the Closing Date to no later than February 12, 2014 and to agree to equally share the costs of a new traffic signal

<u>\$0</u> Cost of this request	<u>\$ -</u> Category / Project Budget	<u></u> Program Category / Project Name
<u></u> Account Number	<u>\$ -</u> Funds Used to Date	<u></u> Program / Project Category Name
<u></u> Project Number	<u>\$ -</u> Remaining Balance	<u></u> Fund Name

Budgeted Item

Budget Adjustment Attached

*Kit Williams*  
Department Director 9-3-13  
Date

Previous Ordinance or Resolution #

*Kit Williams*  
City Attorney 9-3-13  
Date

Original Contract Date:

Original Contract Number:

*Maisha Hurt*  
Finance and Internal Services Director 9/4/13  
Date

Received in City Clerk's Office 09-04-13 11:13 RCVD  
*dmw*

*Don Man*  
Chief of Staff 9/4/13  
Date

Received in Mayor's Office 9/4/13  
*RM*

*Timothy Jordan*  
Mayor 9/4/13  
Date

Comments:



**Kit Williams**  
*City Attorney*

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

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

**CC: Don Marr, Chief of Staff**  
**Paul Becker, Finance Director**  
**David Jurgens, Utilities Director**  
**Jeremy Pate, Development Services Director**

**FROM: Kit Williams, City Attorney**

A handwritten signature in blue ink, appearing to read 'Kit Williams', with a long horizontal line extending to the right.

**DATE: September 4, 2013**

**RE: Third Amendment to Land Sale Agreement Needed**

Kum & Go, would like to extend the Closing Date from what the contract allows. The Closing Date was initially allowed to be 180 days from the date of the contract (February 5, 2013), plus two optional extensions of 60 days each. This would be approximately 10 months total which would mean the Closing Date would have to occur by about December 5, 2013. As you remember, Kum & Go accommodated our request to extend the time for demolition of the Tyson Factory in the Second Amendment to the Land Sale Agreement for about 2 ½ months so we could sell the building for scrap prior to demolishing the foundation. Thus, it would certainly be reasonable to accommodate Kum & Go now to move the required date for the Closing until February 2014.

Although relatively minor, this change to the contract must be approved by the City Council. I would suggest that we include in this Third Amendment To Land Sale Agreement a further 50/50 cost share agreement for the replacement of the stop light if approved by the Arkansas Highway and Transportation Department. We should soon receive the Department's response to this request and could then estimate cost.

I propose the following sentence be added to paragraph 4:

"Kum & Go, L.C. and the City agree to cost share 50/50 (both to pay equal amounts) of the design, purchase, installation and construction expenses to install a new traffic signal at the intersection of Happy Hollow and Huntsville Road because of the construction of the street entering the City's land at this intersection, which street also provides access to Kum & Go's business."

I am recommending this 50/50 cost share for any such necessary traffic signal improvement pursuant to § 166.04 **Required Infrastructure Improvements-Development in City Limits**, specifically § 166.04 (B)(3) and § 155.06 (C)(1) of the Unified Development Code. These code sections (as well as the United States Constitution) limits what the City (or any government) can demand in the form of city infrastructure improvements to "the 'rough proportionality' of the impact of the development upon the city's infrastructure..." The City will maintain ownership of the majority of the parcel served by the traffic signal. The City's land includes a commercial lot comparably sized to Kum & Go's lot whose primary access will also be through this signalized intersection. It is also anticipated the existing residents in the Ray Avenue neighborhood will take advantage of the new signalized intersection especially during the morning rush hour.

Therefore, in fairness and for constitutional reasons, the City of Fayetteville ought to shoulder an equal share of the costs for this new traffic signal.

## CONCLUSION

Attached is a proposed Third Amendment to the Land Sale Agreement which:

- (1) Extends the Closing date to as late as February 12, 2014; and
- (2) Agrees to the 50/50 cost share with Kum & Go, L.C. for the new traffic signal.

Fayetteville Code of Ordinances

(c) *Water, sewer, or street frontage.* Any lot that is created shall have adequate street frontage or street access that meets the minimum requirements of the zoning code, and access to public water and sewer as required by city and state code. If a lot split would create or exacerbate a nonconforming situation (such as cutting off a lot from public water, sewer, street frontage, or street access), the lot split may not be filed of record until the required easement is dedicated and/or the infrastructure is first constructed to City specifications, or a variance or waiver is granted by the Planning Commission.

(d) *Parkland dedication.* Parks fees shall be assessed for each new residential unit that is constructed on the additional lot(s) in accordance with the parkland dedication requirements outlined in Fayetteville Unified Development Code Chapter 166. Said fees shall be paid prior to issuance of a building permit for construction on the new lot.

(3) *Preliminary/Final/Concurrent Plat; Large Scale Development; Large or Small Site Improvement Plan.*

(a) Dedication of right-of-way.

(i) *On-site.* Sufficient right-of-way dedication, to bring those streets which the Master Street Plan shows to abut or intersect the property and new streets proposed interior to the property, into conformance with the right-of-way requirements of the Master Street Plan for said streets, shall be approved by the Planning Commission or Subdivision Committee; provided, the Planning Commission or Subdivision Committee may recommend a lesser dedication in the event of undue hardship or practical difficulties. Such lesser dedication shall be subject to approval by the City Council.

a. *Exemption.* Small Site Improvement Plan applications are exempt from this requirement.

(ii) *Off-site.* Off-site right-of-way dedication may be required as needed to construct off-site street improvements that are required

based on the rough proportionality and rational nexus of the impacts of the project.

(iii) *Dedications.* The City Council accepts all streets and alleys located in Fayetteville that have been previously approved and accepted as dedications by the Fayetteville Planning Commission/Subdivision Committee. The City Council confirms the acceptance of all such streets and alleys dedicated by developers/owners to the city which have been approved by the Fayetteville Planning Commission/Subdivision Committee.

(b) *Monuments and lot stakes.* The surveyor shall cause, preserve, and/or replace monuments and/or lot stakes marking the corners of a parcel to be set in accordance with Section 3.2, general procedures, of the Arkansas Minimum Standards for Property Boundary Surveys and Plats.

(c) *Streets.*

(i) *On-site.* Widening the street adjacent to the project frontage and construction of all interior streets to meet Master Street Plan standards. Street grading, base, and paving according to existing city standards and specifications as adopted by the City Council.

(ii) *Off-site.* Street widening and/or new street construction off-site may be required to address traffic impacts based on the rough proportion and rational nexus of the impacts of the project. Street grading, base, and paving according to existing city standards and specifications as adopted by the City Council.

(iii) *Private street name signs.* Where a structure is addressed on a private street or drive, the developer or property owner(s) shall be required to install, maintain, repair and replace all private street name signs. Any private street name sign existing at the time of passage of this ordinance shall be maintained, repaired and replaced as required by this section. Signs shall meet the standards of the Manual on Uniform

*Rough Proportionality and Rational Nexus to impact of development*

Rough Proportionality To Impact On City's Infrastructure Needs

Fayetteville Code of Ordinances

City Council by an owner of record of the property in question or an alderman on behalf of a resident of the city:

- (1) *Zoning and Development Administrator.*
  - (a) *Design Overlay District requirements.* The decision of the Zoning and Development Administrator not to exempt property from the Design Overlay District requirements as allowed in §161.28(G).
  - (b) *Development Matters.* An interpretation or decision of the Zoning and Development Administrator regarding development matters, including subdivisions, large scale developments, parking and loading, and outdoor lighting may appeal.
- (2) *City Engineer.*
  - (a) *Stormwater, Drainage, and Erosion Control requirements.* The decision of the City Engineer to issue a violation notice related to these requirements.
  - (b) *Development Matters.* An interpretation or decision of the City Engineer regarding development matters, including grading, drainage, water and sanitary sewer systems, and storm drainage systems may appeal.
  - (c) *Floodplain regulations.* The decision of the Floodplain Administrator, provided that the City Council shall hear and decide an appeal only when it is alleged there is an error in any requirement, decision, or determination made by the floodplain administrator in the enforcement or administration of Chapter 168.
  - (d) *Streamside Protection Zones.* An interpretation or decision of the City Engineer concerning the regulated uses, structures and activities, streamside boundary location or land use exemptions.
- (3) *Urban Forester -- Landscape and Tree Preservation and Protection requirements.* Decisions of the Urban Forester related to landscape and tree preservation and protection requirements.
- (4) *Impact Fee Administrator.* Any person aggrieved by any decision of the Impact Fee Administrator made in the enforcement or administration of Chapter 159 Fees.

(B) *Appeals to the Board of Adjustment.* The following interpretations and decisions may be appealed by an owner of record of the property in question or an alderman on behalf of a resident of the city to the Board of Adjustment:

- (1) *Zoning and Development Administrator - Zoning.* An interpretation or decision of the Zoning and Development Administrator regarding zoning matters may appeal.
- (2) *Building Safety Division Director - Airport Zone.* Any person aggrieved, or any taxpayer affected by any decision of the Building Safety Division Director, made in the administration of Airport Zone, Chapter 165, may appeal.

(C) *Appeals to the Planning Commission.*

- (1) Required dedications and improvements.
  - (a) An owner or developer who is aggrieved by the requirements of the Unified Development Code for land, right-of-way or easement dedications, construction of on-site or off-site improvements, or payments in lieu of any dedication or improvement, which are in excess of the "rough proportionality" of the impact of the development upon the city's infrastructure or services may appeal such requirement to the Planning Commission as a part of the submission of the preliminary plat, large scale development, subdivision, building permit, lot split, development permit, or otherwise within 10 days of notification of such development requirements. The appeal must be presented to the Planning Division in writing and state the grounds, or reasons for the appeal.
  - (b) The Planning Commission shall determine after public hearing whether the required dedications and improvements meet the "rough proportionality" of the impact of the development on city infrastructure and services. If the requirements are in excess of the "rough proportionality," the Planning Commission is empowered to modify or reduce such requirements to achieve "rough proportionality."

(2) Administrative Approvals.

- (a) A resident of the city or an owner/developer who is aggrieved by a decision of the Zoning and Development Administrator regarding development

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

A RESOLUTION TO APPROVE THE THIRD AMENDMENT TO LAND SALE AGREEMENT WITH KUM & GO, L.C. TO EXTEND THE CLOSING DATE TO NO LATER THAN FEBRUARY 12, 2014 AND TO AGREE TO EQUALLY SHARE THE COSTS OF A NEW TRAFFIC SIGNAL

**WHEREAS**, the City of Fayetteville agreed to sell and Kum & Go, L.C. agreed to buy a lot of slightly under two acres for \$1,155,001.00 pursuant to the First Amendment to Land Sale Agreement approved by the City Council by Resolution No. 26-13 on February 5, 2013; and

**WHEREAS**, Kum & Go, L.C. and the City agreed to cost share 50/50 the design and construction costs for the agreed upon new street from the intersection of Happy Hollow and Huntsville to Ray Avenue and agreed that the Closing Date would be in early December at the option of Kum & Go, L.C.; and

**WHEREAS**, the City requested and Kum & Go, L.C. agreed to extend the period allowed for the demolition of the old Tyson factory for about an additional two and a half months to enable the City to sell the building for salvage for a substantial savings for our taxpayers; and

**WHEREAS**, Kum & Go, L.C. has now requested that the City agree to extend the Closing Date to February 12, 2014 (which is less of an extension than Kum & Go, L.C. granted the City for its demotion period); and

**WHEREAS**, Kum & Go, L.C. has requested that the City agree to a further 50/50 cost share for any expenses related to the new traffic signal needed for intersection of Happy Hollow and Huntsville which accesses both City and Kum & Go, L.C. property.

**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 approves the Third Amendment to the Land Sales Agreement attached to this Resolution and authorizes Mayor Jordan to sign this amended Agreement.

**PASSED** and **APPROVED** this 17<sup>th</sup> day of September 2013.

APPROVED:

ATTEST:

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

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

## **THIRD AMENDMENT TO LAND SALE AGREEMENT**

THIS THIRD AMENDMENT TO LAND SALE AGREEMENT (hereinafter, the "Amendment") is made and entered into effective the \_\_\_\_\_ day of September, 2013, by and between the CITY OF FAYETTEVILLE, AR, a municipal corporation ("City" or "Fayetteville"), and KUM & GO, L.C., an Iowa limited liability company ("Kum & Go"), WITNESSETH:

**WHEREAS**, Kum & Go and City have entered into that certain Purchase Agreement (the "Agreement") whereby City has agreed to sell and Kum & Go has agreed to buy certain real estate situated in Fayetteville, Arkansas; and

**WHEREAS**, Kum & Go and City have entered into the First Amendment to Land Sale Agreement on February 5, 2013; and

**WHEREAS**, Kum & Go and City have entered into the Second Amendment to Land Sale Agreement on March 19, 2013; and

**WHEREAS**, Kum & Go and City desire to amend this Agreement for a third time as set forth herein.

**NOW THEREFORE**, in consideration of the mutual promises and covenants herein contained, and for other good and valuable consideration, it is agreed as follows:

1. Extension of Time for Closing. Kum & Go, L.C. and the City of Fayetteville agree that upon Kum & Go, L.C.'s second request to extend the Closing Date pursuant to Paragraph 7 of the Land Sale Agreement, Kum & Go, L.C. shall have the right to extend the Closing Date to not later than February 12, 2014.

2. Traffic Signal Costs to be Shared. Kum & Go, L.C. and the City agree to cost share 50/50 (both to pay equal amounts) of the design, purchase, installation and construction expenses to install a replacement traffic signal at the intersection of Happy Hollow and Huntsville Road because of the construction of the street entering the City's land at this intersection, which street also provides access to Kum & Go's business.



3. Ratification. Except as modified by this Third Amendment, all terms within, the Agreement and its First and Second Amendments are ratified and confirmed by the parties.

4. Counterparts, Facsimile. This Amendment may be executed in two or more counterparts, each of which shall be deemed an original, but all of which taken together shall constitute one and the same agreement. For purposes of executing this Agreement, a facsimile signature shall be as effective as an actual signature.

IN WITNESS WHEREOF, the parties hereto have caused this Third Amendment to be executed all on or as the day and year first above written.

**KUM & GO, L.C.**

**CITY OF FAYETTVILLE, AR**

By: \_\_\_\_\_  
**NIKI DePHILLIPS,**  
SVP Store Development

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

ATTEST:

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

