IN THE
SUPREME COURT OF ARKANSAS

CONVENT CORPORATION, Individually and on Behalf of all Others Similarly Situated — **APPELLANT**

v. **NO. CV-20-216**

CITY OF NORTH LITTLE ROCK ARKANSAS, a Municipal Corporation, JOE SMITH, Mayor, Individually and in his Official Capacity, City Council Members DEBI ROSS, BETH WHITE, LINDA ROBINSON, MAURICE TAYLOR, STEVE BAXTER, BRUCE FOUTCH, MURRY WITCHER, and CHARLIE HIGHT, each Individually and in his or her Official Capacity, TOM WADLEY, Director, Code Enforcement Division, Individually and in his Official Capacity, and FELECIA MCHENRY, Code Enforcement Officer, Individually and in her Official Capacity — **APPELLEES**

ON APPEAL FROM THE CIRCUIT COURT
OF PULASKI COUNTY

THE HONORABLE ALICE GRAY, CIRCUIT JUDGE

APPELLANT'S BRIEF

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CV-15-912 Interlocutory Appeal – Remanded
CV-17-707 Dismissed – no final order

II. BASIS OF SUPREME COURT JURISDICTION (see Rule 1-2 (a))

(__) Check here if no basis for Supreme Court Jurisdiction is being asserted, or check below all applicable grounds on which Supreme Court Jurisdiction is asserted.

(1) _X_ Construction of Constitution of Arkansas
(2) ___ Death penalty, life imprisonment
(3) _ _ Extraordinary writs
(4) ___ Elections and election procedures
(5) ___ Discipline of attorneys
(6) ___ Discipline and disability of judges
(7) _X_ Previous appeal in Supreme Court
(8) ___ Appeal to Supreme Court by law

III. NATURE OF APPEAL

(1) _X_ Administrative or regulatory action
(2) ___ Rule 37
(3) ___ Rule on Clerk
(4) ___ Interlocutory appeal
(5) ___ Usury
(6) ___ Products liability
(7) ___ Oil, gas, or mineral rights
(8) _X_ Torts
(9) ___ Construction of deed or will
(10) ___ Contract
(11) ___ Criminal

On February 25, 2013, the North Little Rock City Council condemned a structure belonging to Convent Corporation (hereinafter "Convent") and ordered

that the structure be demolished. On March 27, 2013, Convent filed and perfected its appeal in circuit court pursuant to District Court Rule 9. As part of its appeal, Convent asserted claims pursuant to 42 U.S.C. §§ 1983, 1985(3), 1986 and 1988 and the Arkansas Civil Rights Act, Ark. Code. Ann. § 16-23-101, *et.seq.*, for violations of the Fifth, Fourth, and Fourteenth Amendments to the United States Constitution, Article 2, Sections 15 and 22 of the Arkansas Constitution, and a common law claim of Trespass. Convent also sought a declaratory judgment that the City's ordinance relating to condemnation proceedings is unconstitutional and invalid. Convent also sought an injunctive relief barring the City from destroying or otherwise molesting or interfering with Convent's use of its property, preventing the City from destroying any property that has been condemned pursuant to the City's ordinance, and from condemning any additional properties or otherwise enforcing the City's condemnation ordinance. Convent also sought class certification on behalf of all owners of property within the City of North Little Rock whose property has been condemned pursuant to the City's condemnation code.

In an order dated February 3, 2015, the circuit court dismissed Convent's claims holding that the appeal in circuit court pursuant to District Court Rule 9 is an administrative remedy that must be exhausted prior to bringing other claims. The circuit court also denied Convent's Motion for Class Certification. Convent filed an interlocutory appeal and the Supreme Court remanded the case for further

consideration of the evidence submitted in support of Convent's Motion for Class Certification.

Convent next filed a Motion for Judgment on the Record, for Declaratory Judgment, and to Reinstate Claims. In an Order dated May 11, 2017, the Circuit Court upheld the City Council's determination that the property in question was a nuisance and denied Convent's motion to reinstate its other claims. The Circuit Court did not rule on Convent's petition for declaratory judgment. Convent moved for, and the Circuit Court granted voluntary dismissal of the declaratory judgment claim.

Convent next filed an appeal in this court concerning the Circuit Court's order of February 2, 2015 denying its Motion for Judgment on the Pleadings, or in the Alternative, Motion for Summary Judgment; and the Court's dismissal of Convent's claims under 42 U.S.C. §§ 193, 1985(3), 1986, and 1988; the Arkansas Civil Rights Act; claims under both the United States and Arkansas Constitutions; its claim of trespass, and the denial of declaratory and injunctive relief. This Court dismissed that appeal because the Circuit Court had reserved the issue of civil penalties and the Circuit Court had not ruled on Convent's Petition for Declaratory Judgment.

Convent then refiled its Petition for Declaratory Judgment in Circuit Court. The City withdrew its Motion to Enforce Fines and filed a Motion for Summary Judgment on Convent's Motion for Declaratory Judgment. Convent filed a

Countermotion for Summary Judgment. On December 11, 2019, the Circuit Court entered an order denying Convent's Countermotion and granting the City's Motion for Summary Judgment thereby denying Convent's Motion for Declaratory Judgment. On the City's motion, the Circuit Court entered an order on January 13, 2020 dismissing the City's Motion to Enforce Fines with prejudice leaving no outstanding issues to be resolved. The City demolished the structure at issue in this matter in January of 2020.

Convent filed its Notice of Appeal on January 7, 2020. Convent appeals the Circuit Court's order of February 2, 2015 denying its Motion for Judgment on the Pleadings, or in the Alternative, Motion for Summary Judgment; and the Court's dismissal of Convent's claims under 42 U.S.C. §§ 193, 1985(3), 1986, and 1988; the Arkansas Civil Rights Act; claims under both the United States and Arkansas Constitutions; its claim of trespass, and the denial of declaratory and injunctive relief. Convent specifically appeals the circuit court's finding that an appeal in circuit court pursuant to District Court Rule 9 is an administrative remedy that must be exhausted prior to pursing other claims. Convent also maintains that the circuit court should not have proceeded as if it was conducting an administrative proceeding on behalf of the City as this violates the Separation of Powers Clause of the Arkansas Constitution.

Convent also appeals the Circuit Court's order of May 11, 2017 upholding the City Council's administrative decision to condemn Convent's property was supported by substantial evidence and was not arbitrary and capricious.

Convent also appeals the Order of the Circuit Court entered June 18, 2019 denying Plaintiff's Renewed Motion to Strike Amended Answer.

Finally, Convent also appeals the Order of the Circuit Court entered December 11, 2019 granting Defendants' Motion for Summary Judgment, Denying Plaintiff's Countermotion for Summary Judgment, and Dismissing Plaintiff's Amended and Reinstated Petition for Declaratory Judgment.

IV. IS THE ONLY ISSUE ON APPEAL WHETHER THE EVIDENCE ISSUFFICIENT TO SUPPORT THE JUDGMENT?

No.

V. EXTRAORDINARY ISSUES. (Check if applicable, and discuss in PARAGRAPH 2 of the Jurisdictional Statement.)

(_X_) appeal presents issue of first impression,
(_ _) appeal involves issue upon which there is a perceived inconsistency in the decisions of the Court of Appeals or Supreme Court,
(_X_) appeal involves federal constitutional interpretation,
(_X_) appeal is of substantial public interest,
(_X_) appeal involves significant issue needing clarification or development of the law, overruling of precedent,
(_X_) appeal involves significant issue concerning construction of statute, ordinance, rule, or regulation.

VI. CONFIDENTIAL INFORMATION.

(1) Does the appeal involve confidential information as defined by Sections III(A)(11) and

VII(A) of Administrative Order 19?

_____Yes __X__ No

(2) If the answer is “yes,” then does this brief comply with Rule 4-1(d)?

_____ Yes _____ No

II. JURISDICTIONAL STATEMENT

The Orders of the Circuit Court dated February 2, 2015 and May 11, 2017 disposed of all of claims except for a claim for Convent's declaratory judgment action and the City's Motion to Enforce Fines. The Circuit Court's Order entered December 11, 2019 disposed of Covent's Motion for Declaratory Judgment. The Circuit Court's Order entered January 13, 2020 disposed of the City's Motion to Enforce Fines leaving no outstanding issues to be resolved. Because all claims have been ruled on by the Circuit Court, the Court has jurisdiction to review all prior orders in the case.

Defendant appeals to the Arkansas Supreme Court which has jurisdiction pursuant to Rule 1-2(a)(1) as this matter involves interpretation of provisions of the Arkansas Constitution relating to due process, property rights, and separation of powers. Specifically, this matter involves questions relating to the extent of due process protections required by the Arkansas Constitution in nuisance abatement actions, the extent of protection of property rights is afforded by the Arkansas Constitution in nuisance abatement actions, issues relating to notice and due process required prior to the seizure of a property, and whether the Separation of Powers Clause of the Arkansas Constitution permits a circuit court to conduct an administrative proceeding on behalf of a city. A significant question involved here is whether a party is required to exhaust the judicial appeal pursuant to District Court

Rule 9 prior to bringing claims under the Arkansas Constitution. Some of these issues are also issues of first impression such as the amount of protection afforded to a property owner in a nuisance abatement action by Article 2, Sections 15 and 22 of the Arkansas Constitution. Questions of first impression include whether "red-tagging" of a property is a seizure pursuant to the Arkansas Constitution and, if so, what due process protections are required prior to such a seizure; whether the due process protections of the Arkansas Constitution require notice of specific violations in a nuisance abatement action; and whether due process requires that a property owner should be permitted to repair a property prior to condemnation.

This matter also involves questions regarding federal constitutional interpretation relating to the extent of due process protections required by the United States Constitution in nuisance abatement actions, the extent of protection of property rights is afforded by the United States Constitution in nuisance abatement actions, issues relating to notice and due process required prior to the seizure of a property, and whether a party is required to exhaust a judicial remedy before bringing constitutional claims.

The fact that the City uses a uniform nuisance abatement procedure and has condemned hundreds of properties in the last few years makes this an issue of substantial public interest. Additionally, these issues are of interest to other municipalities who also condemn properties in nuisance abatement actions. The

fact that Convent has sought declaratory and injunctive relief also makes this an issue of substantial public interest.[1]

Some of the issues involved have not been clearly addressed in prior decisions of the appellate courts leading to some confusion and some inconsistencies. There is a need to clarify the law on these issues so that both municipalities and property owners have clear guidance relating to their rights and responsibilities in these types of actions. This matter further involves substantial questions of law concerning the validity of the City's nuisance abatement ordinance including whether the ordinance complies with the requirements of both the United States and Arkansas Constitutions.

Finally, this matter involves the question of whether the City's nuisance abatement code and procedures constitute a "Bill of Attainder" which is prohibited by both the United States and Arkansas Constitutions.

[1] See *Cammack v. Chalmers*, 680 S.W. 2d 689, 284 Ark. 161 (1984).

III. POINTS ON APPEAL

1. Strict Scrutiny Standard of Review - The Arkansas Constitution requires that laws involving property rights be evaluated under the "strict scrutiny" standard and the ordinance at issue fails under that standard.

Ark. Const. Art. 2, § 22
Board of Trustees of the Univ. of Arkansas v. Andrews, 535 S.W.3d 616 (2018).

2. Administrative agencies must provide Substantial Evidence to support their determinations.

Arkansas Appraiser Licensing v. Quast, 2010 Ark. App. 511 (2010).
Bryant v. Ark. Pub. Serv. Comm'n, 45 Ark.App. 56, 63, 871 S.W.2d 414 (1994).

3. The Circuit Court's determination that an appeal to circuit court pursuant to District Court Rule 9 is an "administrative remedy" that must be exhausted prior to asserting constitutional claims is contrary to established law, is clearly erroneous, and represents an abuse of discretion.

Dove v. Parham, 181 F.Supp. 504, 512 (E.D.Ark 1960).
City of Little Rock v. Alexander Apartments, LLC, 2020 Ark. 12, 10.

4. The Circuit Court's holding that a Rule 9 appeal is merely an extension of the City's administrative procedure violates the separation of powers doctrine in Article 4, Section 2 of the Arkansas Constitution.

Oates v. Rogers, 201 Ark. 335, 337-339,144 S.W.2d 457, 458 (1940)
Spradlin v. Arkansas Ethics Com'n, 858 S.W.2d 684, 314 S.W.2d 684 (1993)

5. While Plaintiff maintains that it has exhausted all remedies available at the administrative level, exhaustion of administrative remedies is not required prior to bringing claims pursuant to 42 U.S.C. § 1983 or the Arkansas Civil Rights Act.

Patsy v. Bd. of Regents, 457 U.S. 496, 500-501, 102 S. Ct. 2557, 73 L. Ed. 2d 172 (1982)

Harmon v. Jackson, 547 S.W.3d 686, 689 (Ark. 2018).

6. The City failed to provide adequate notice, a meaningful hearing before an unbiased decision maker, or an opportunity to repair the property prior to seizure and condemnation of the property.

United States v. James Daniel Good Real Prop., 510 U.S. 43, 53, 114 S.Ct. 492 (1993)
Connecticut v. Doehr, 501 U.S. 1, 11, 111 S.Ct. 2105 (1991),

7. The City's seizure of Convent's property by red-tagging was without prior notice or hearing and was unreasonable.

Franklin v. State, 267 Ark. 311, 590 S.W.2d 28 (1979).
Soldal v. Cook County, Ill., 506 U.S. 56, 113, S.Ct. 538 (1992).

8. The City failed to provide any notice, prior to the seizure of Convent's property and failed to provide notice of specific violations or rights to appeal prior to condemnation of the property.

In re Gault, 387 U.S. 1, 33, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967)(emphasis added).
Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 14-16, 56 L. Ed. 2d 30 (1978).

9. The City never afforded Convent an opportunity to repair its property prior to seizure and condemnation.

Shaffer v. City of Atlanta, 154 S.E.2d 241, 223 Ga. 249 (Ga. 1967).
City of Aurora v. Meyer, 230 N.E.2d 200, 38 Ill.2d 131 (Ill. 1967)

10. The City failed to provide a meaningful hearing at which Convent could confront and cross examine witnesses prior to the seizure and condemnation of Convent's property.

Goldberg v. Kelly, 397 U.S. 254, 269, 90 S.Ct. 1011, 25 L.Ed. 287 (1970)
Harness v. Arkansas PSC, 60 Ark. App. 265, 271 (1998)

11. Convent was entitled to a predeprivation hearing before an unbiased decision maker.

Goldberg v. Kelly, 397 U.S. 254, 271, 90 S.Ct. 1011 (1970).
Acme Brick Co. v. Missouri Pacific R. Co., 307 Ark. 363, 821 S.W.2d 7, 10 (1991).

Denial of Convent's Petition for Declaratory Judgment

12. The City's ordinance contains important and material terms which are undefined and unconstitutionally vague.

S*essions v. Dimaya*, 138 S. Ct. 1204, 200 L.Ed.2d 549 (2018)
Arkansas Tobacco Control Bd. v. Sitton, 357 Ark. 357, 166 S.W.3d 550 (2004).

13. Because it is vague and not sufficiently specific, the City's ordinance provides public officials with too much discretion and is, therefore, unconstitutional.

Arkansas Tobacco Control Bd. v. Sitton, 357 Ark. 357, 166 S.W.3d 550 (2004).
Johnson v. United States, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015)

14. The City's ordinance results in Bills of Attainder and the Resolution regarding Plaintiff's property is a Bill of Attainder.

United States v. Brown, 381 U.S. 437, 85 S.Ct. 1707, 14 L.Ed.2d 484 (1965)
Crain v. City of Mountain Home, 511 F.2d 726 (8th Cir. 1979).

15. Convent's Renewed Motion to Strike Amended Answer and Affirmative Defenses should have been granted.

Ark. R. C. P 12(a)(3).

IV. TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Treatises

V. ABSTRACT

A. Meeting of North Little Rock City Council – Feb. 25, 2013

Mr. Stevens: It's my understanding that the damage is from vandalism and that the owners didn't really know about this until the condemnation proceeding started. Some people broke in, ripped out the wires in the ceiling for copper and the fell through the ceilings. They just really left a mess. But, most of the problems were cosmetic and the owners want to rehab the property. They want to fix it up but are afraid to do so under a condemnation order because they are afraid whatever they do won't be enough. **R 707.**

The problem with the condemnation order is that under District Court Rule 9 we only have 30 days to appeal that order. We would lose our right to appeal very quickly if the property is condemned. The owners want to come up with a plan with the City, postpone the condemnation vote and come up with a plan to rehab the building in agreement. They had talked with Code enforcement about doing tis but were told they couldn't get a permit until after condemnation. **R 707.**

Mayor Smith: I believe the rule is that your owners have 30 days to negotiate with our attorneys and Code Enforcement on your plan and

you'll be required to put up a bond. You don't have to do all the work in the 30 days, you just have to negotiate the plan in 30 days. **R 708.**

Mr. Stevens: My concern is that after 30 days we have no basis to appeal to the circuit court. District Court Rule 9 says you have to appel within 30 days or you lose it. We don't want to be under that gun. **R 708.**

Mr. Fleming: Should the Council go ahead and do the condemnation, there's nothing to prohibit them from filing their appeal and, at the same time, kind of twin-track it and work with Code Enforcement to abate it. I don't see that they're going to lose their right to appeal. **R 708.**

Ms. Ross: Have they tried to do anything before now?

Mr. Stevens: They cleaned it out. They were told by Code Enforcement that they couldn't do any kind of work because they wouldn't get a permit until after the condemnation. **R. 708.**

Ms. Ross: I'm just wondering if anybody has been checking on it because this looks like a lot more than just vandals.

Mr. Stevens: That's part of the ceiling that fell down. They climbed up in there to get the copper out and fell through the ceiling. All the

clutter has been cleaned out. I haven't seen it myself. **R 708.** There is some water damage. They're willing to put a new roof on it. They just don't want to spend the money under a condemnation order and the City tear it down anyway. **R 709.**

Ms. Robinson: What are they wanting to put in there?

Mr. Stevens: They don't have any plans for the building right now. I understand there has been some concern about the kind of business that was there before and there was a settlement and a covenant put in place so that a club of that sort couldn't go in there again. The owners just don't want the building torn down because they feel it adds value to the property. **R 709.**

Ms. Robinson: The Meadowpark Neighborhood Association wants that building torn down. They feel like it is a nuisance and a distraction to their community. They've asked that we vote to condemn it—to tear it down. **R 709.**

Mayor Smith: Quickly Counselor. **R 709.**

Mr. Stevens: We're concerned that the condemnation ordinance doesn't meet constitutional due process requirements. Three minutes is not enough for use to put on witnesses and evidence. We'd ask that the condemnation vote be postponed until we can have a full

hearing and to be able to bring in witnesses and evidence. **R 709.**

Mayor Smith: I appreciate your eagerness but remember we're a legislative body not a judicial body so we're not here to hear cases. That's what the court system is for. **R 709.**

Mr. Stevens: Due process requires a meaningful opportunity to be heard and this ordinance just doesn't provide for that. I don't think it will hold up to a constitutional challenge. **R 709.**

Mr. Taylor: It's always interesting to me that nobody ever wants to do anything until we're getting ready to condemn and then all of a sudden there's a problem. I drive by this building quite often and it's been a mess for a while. **R 709.**

Mayor Smith: I agree. Any final comments Counselor? **R 710.**

Mr. Stevens: I have a brief I'd like to submit that's got some additional issues covered since we don't have more time. **R 710.**

Mayor Smith: Just pass it to our city attorney and he'll pass it around. I would suggest what our city attorney advised I think will probably be the best way to go. Anybody else wanting to speak on this particular address? Thank you Counselor. I'm going to close the public hearing on the motion.

(All council members present voted "Yes.") **R 711.**

B. Motion Hearing – February 3, 2015

1. Standard of Review:

The Court: I understand there is a disagreement between the parties, as to the Standard of Review. **R 1850**

The Plaintiff contends that Plaintiff should be able to proceed in this case with the class action. I have never seen that before on appeal because the Court obtains jurisdiction because of the proceedings that were held below. I've never had an appeal in which once the appeal reached circuit court, then more parties started being added. There is nothing for them to appeal. **R 1850.**

One of the problems is that ya'll are asking for some sort of ruling on some of the merits of the case in that you're asking the Court to make some determination as to what its standard of review is. Normally, the Court doesn't start making those kinds of rulings until you've got a class certified and people have been given a chance to opt out. **R 1850-51.**

If we start the case and the Court starts making rulings and then you bring the class in they've missed out on part of the case. At some point I'm going to need to see something that

affirmatively gives this Court the authority to proceed with class action issues in a circuit court appeal. **R 1851**

But let's start with the standard of review issue and I'll hear your arguments on that. **R 1850-51.**

Mr. Stevens: I believe the filing of an appeal requires the initiation of a lawsuit. We filed our Motion for Class Certification at a stage before any other rulings had been made. I think if the Court did go ahead and certify the class then that would give any class members the ability to opt out or to put their input in before any rulings are made. **R 1852.**

The Court: But, you understand a major ruling would have been made regarding what the standard of review is. That ruling matters to both sides. One side wants to basically have a new hearing to be able to put in other evidence and the other side does not want that to happen. **R 1852.**

Mr. Stevens: What we're attacking is the process the City uses before we get to the appeal stage. I'm not sure that the standard of review is something that would affect the class members. What we're arguing about is whether the City provided due process at the administrative level. **R 1852.**

The Court: At this time, I'm only taking up the standard of review issue.

Mr. Stevens: The City has argued that the standard of review should be de novo based on 14-56-425 which says that an appeal from the final administrative decision by the municipal body in administering this subchapter. Those three words, administering this subchapter, are very important. The statute relied on by the City to raze and condemn building sis not found in that subchapter. That statute has no applicability to a nuisance abatement action such as this. **R 1853.**

In the absence of a statute, we have to look to Rule 9 which does not provide for de novo review. In *Wayne Alexander Trust v. City of Bentonville*, the court held that circuit courts may not conduct a de novo trial of nuisance abatement actions by city councils. In *Wayne* and other cases the court has said that that subchapter, that language means that 14-56-425 applies only to that subchapter. **R 1853-54.**

The Court: Let me have the other side respond to that particular point.

Mr. Fleming: In Arkansas Code 14-56-203, the legislature gave cities the power to order the removal and razing of buildings that are

deemed to be unsafe. That is done by the process of condemnation. **R 1854.**

The section he cited, 14-56-425 says in part A-2, the final administrative or quasi-judicial decision shall be tried de novo with the right of trial by jury. I think it's pretty clear that the legislature was giving cities the ability and right to condemn property in an administrative process. Then, if the complainant, if the Plaintiff here, wants to appeal that, its appealed de novo with the right of jury trial. **R 1855.**

I think the *Talley v. City of North Little Rock* case is instructive. That's a case where the City of North Little Rock condemned a piece of property. The person then filed suit in the circuit court alleging all kinds of violations of civil rights. A jury returned a verdict in favor of the Plaintiff and awarded damages. The City then filed a Motion for Judgment Notwithstanding the Verdict that was granted and appealed to the Supreme Court. The Supreme Court affirmed saying that until that Rule 9 was heard de novo, the circuit court had no jurisdiction. They remanded and dismissed that case because the plaintiff had not filed a Rule 9 appeal. **R 1855-56.**

Here, paragraph 1 of Convent's complaint says that they are appealing the Rule 9. It is our contention that should be heard first, de novo with a jury trial. If Convent wins that case, there's nothing else to litigate, they've won. But if its' upheld then this Court can proceed with the other issues that are before it. **R 1856.** Subchapter 2 is a grant of power from the legislature to the City. **R 1857.** The City only has that power and those powers that the legislature has granted it. Chapter 4 deals with land us, with building and zoning. Part and parcel to that is if a piece of property becomes in violation of zoning regulations it can be condemned. If it becomes hazardous, if it becomes unsafe, if it becomes a problem with the control and ordinance or regulations that regulate land pursuant to chapter 4, then udner chapter 2, the City has the power to condemn. **R 1857-58.** It was done pursuant to the power granted under 203. That's the general power to condemn those properties. **R 1858.**

The Court: So, subchapter 2. 14-56-203 is contained in subchapter 2 of chapter 56. So you are saying the City took the action that it

did pursuant to a statue under subchapter 2. That is Arkansas Code Annotated 14-56-203. **R 1858.**

Mr. Fleming: It is our contention that that particular statutes grants us the power to regulate, through condemnation, those properties that are deemed unsafe and unsanitary as part of our overall zoning and right, under subchapter 4 to apply zoning and other plans and regulations for the safety and welfare of the City. **R 1859.** The Resolution, 8272, does not cite the specific Arkansas statute that grants the City that authority. **R 1859.**

Mr. Fleming: We argue that 14-56-203 grants all cities of the first and second class the power to condemn property that is unsafe, unsanitary, and all those, obnoxious, detrimental to the public welfare. **R 1859.** Our argument is that the power and procedures used are in accordance with not only that but with overall regulation of the building and zoning, as outlined and adopted by the State in chapter 4. **R 1860.** In *Talley v. City of North Little Rock*, The Supreme Court said in *Ingram v. City of Pine Bluff,* that Rule 9 applies to city council and planning commission resolutions in Arkansas Code Annotated 14-56-425. It quotes that particular statute. **R 1861.** *Ingram* said it shall be tried de novo,

according to the same procedure which applies to appeals in civil actions from decisions in inferior courts, including the right to trial by jury. *Ingram* and *Talley* are both condemnation cases and both cases said the standard of review is trial de novo. **R 1862.**

Mr. Stevens: Mr. Fleming said the *Talley* case said that the Rule 9 proceeding had to be completed before the Court had jurisdiction. There is no case that says that. There are many cases that say the filing requirements of Rule 9 have to be met before the Court has jurisdiction. Once the filing requirements are met, the appeal is perfected and the court has jurisdiction. There is no case, no authority that says the Rule 9 proceeding has to be completed before the court has jurisdiction over anything else. *Mount Pure LLC v. Little Rock Waste Water* says that the construction and language of subsection F-2 of Rule 9 indicates that the appeal from a final decision of a governmental body is to be tried on the record developed in the proceeding below. **R 1863.** Without a statute providing for de novo review, that is the section of Rule 9 that we go to – F-2.

The City never provided a hearing in this matter. There has been no administrative hearing. The City is arguing that the hearing in this court is our administrative hearing. That's problematic for several reasons. By definition, an administrative proceeding is defined as a non-judicial proceeding before an administrative body or commission. **R 1864.** This is also a violation of separation of powers which is a significant constitutional issue. The City can't delegate to the Court its responsibility to provide an administrative hearing. **R 1865.**

Mr. Fleming was also talking about the section of the statute there in zoning. Zoning cases are different from land use cases. They get an appeal to another body. There's different procedures for those and those procedures were not followed in this case. If they're saying that's what applies then we were denied those procedures too. **R 1865.**

2. Failure to Exhaust Administrative Remedies:

Mr. Stevens: We've exhausted all our administrative remedies. The administrative remedy at the City level consisted of a three minute appearance. Without proper notice and without a

chance to repair the property, there was nothing more we could do at the administrative level. The filing of this appeal began a judicial remedy. **R 1870.**

A case we cited in our Supplement Brief, *Dove v. Parham,* conclusively settles this issue. This case involved a statute regarding school assignments. The statute provided for an appeal to circuit court if a parent didn't like the school their child was assigned to. The Eastern District of Arkansas specifically held that parents were not required to exhaust their statutory judicial appeal prior to bringing constitutional claims. The Court said the appeal was a judicial remedy, not an administrative remedy. The court said that such a proceeding has all the characteristics of a conventional judicial proceeding and it is the same here. We had to initiate a lawsuit and that is not an administrative remedy. **R 1871.**

I've already talked about definitions and separation of powers. **R 1871-72.**

Mr. Fleming: All that has occurred in this case, up to this point, is that the City has passed a resolution condemning the property. There has been no taking. There has been no seizure. In *Pitchford v.*

Earle, the U.S. District Court case out of the Eastern District, said that cities have the power to condemn unsafe and dilapidated buildings. If the property owner does not agree he may appeal to circuit court. We think that stands for the proposition that it's not "an administrative appeal." It's a District Court Rule 9 appeal. **R 1872.** I'm going to try to get away from the word "administrative." **R1872-73.** The Rule 9 appeal is an appeal of an administrative decision giving the Plaintiff due process in this Court to appeal that decision and let this Court and a jury decide. **R 1873.**

The condemnation of this property does not deprive them of any particular property right. The taking actually occurs when bulldozers are dispatched. **R 1873.**

Mr. Fleming: They can do whatever they want to with the property, consistent with abatement of the nuisance. Once a property is condemned, its incumbent upon the property owner to abate the nuisance however he wishes to do that. **R 1873.**

North Little Rock has a process by which an owner can enter into an agreement to rehab the property. **R 1874.** A property owner's right of recourse is to contest the condemnation in

circuit court by filing an appeal under the guidelines of District Court Rule 9. **R 1874.** The City has told him in the resolution that the City can demolish the property at any time, without further notice. Until the property is demolished, there is no taking by the City. **R 1874.**

Mr. Stevens: There is a big difference in the *Pitchford* case. In that case, the resolution did not call for the building to be torn down. There was no realistic threat in that case. Here we have a resolution that says the building will be torn down if the nuisance isn't abated. The only way we were permitted to abate the nuisance is to tear the building down. We were denied the opportunity to repair the property. We were told no repair permit would be issued. **R 1876.**

There is a rehab process after condemnation which requires a bond. If the City denies the rehab plan, the City can proceed to tear it down. Even after you posted a bond and made repairs, if the City is not satisfied, they can tear the building down. **R 1876.** We were not comfortable entering a plan while we had this condemnation order saying the building could be torn down at any time. **R 1877.**

Mr. Fleming: The City made the conscious decision not to do that, pending the outcome of any litigation. **R 1877.** Our people in code enforcement have instructions not to do anything. **R 1877.**

Mr. Stevens: We believe not only is it a Fifth Amendment taking, but also a Fourth Amendment seizure. As soon as the property was red-tagged, with no notice, no hearing, anything, we were not permitted to make repairs to the property or use the property. That is both a taking and a seizure. There is case law that says any meaningful interference with property is a seizure. We cited a dance hall case where the sheriff padlocked a dance hall and that was deemed, I believe, to be both a taking and seizure. **R 1878.**

The Court: I just want to make sure the record is clear regarding what motions you're asking the Court to decide. **R 1878.**

Mr. Stevens: We're asking the Court to go ahead and decide all pending motions. **R 1879.**

C. Motion Hearing – Oct. 28, 2015

*Note: The record was initially prepared for a prior interlocutory appeal. When preparing the remaining record for this appeal, the reporter started numbering at 1 again. The record page numbers that follow are from the second part of the record.

Mr. Stevens The motion to strike is in reference to certain photographs that are in the record. **R 266.*** There is not any information identifying or authenticating the pictures. At the time they were taken, the property had not yet been cleaned up. The building was cleaned after the photos were taken. We attached a declaration from Roberto Alverez as he was the contractor who cleaned the building. The City knew that the building had been cleaned. We attached a letter from an assistant city attorney that references the fact that the building had been cleaned. No one from the City reinspected the property after it was cleaned. **R 267.** There was no testimony or explanation of the pictures at the City Council meeting. There was no contemporaneous evidence presented to authenticate the pictures. Because the pictures were taken before the building was cleaned up, they have little probative value and the potential for prejudice is great. In response to interrogatories, six of the council members admitted that their vote was, in part, based on the clutter shown in the pictures, and that clutter did not exist at the time of the condemnation. **R 268.**

Mr. McFadden The City submits that this was part of the record and was presented before the City Council. **R 268.** In the interrogatory that Mr. Stevens referred to, Officer McHenry confirmed that she took the pictures. **R 268-69.** Because the pictures that were provide in the record were printed in black and white, and those are not the same pictures that were presented to the city council at that meeting. Those pictures were in color. The Defense would agree that may potentially be prejudicial to Convent Corporation because, at least with color, that provides clarity. **R 269.** The City submits that they should not be stricken from the record, but in the event the Court strikes them, we would submit that the proper pictures are the color pictures that were presented at the city council meeting. **R 269.** The property was cleaned up on the outside after the pictures were taken. The interior, to my knowledge, was not cleaned up. **R 270.**

Mr. Stevens Mr. Alverez did clean the interior of the building and that is addressed in his affidavit. **R 270.**

Mr. McFadden The City submits that this was part of the record and is relevant to the proceeding. The rules of evidence don't necessarily apply to an administrative remedy or an administrative hearing. **R 270.**

The Court I think what the Plaintiff is asking is that the Court not give the pictures any weight or to ignore them. **R 270.**

Mr. Stevens We're asking that they be stricken. Alternatively, if the Court is not going to strike them, that would be our preference. They are overly prejudicial because they don't show the condition of the property at the time it was condemned. And, the council members admitted that the clutter, which was gone at the time the property was condemned, influenced their vote. **R 271.**

The Court The Court is not going to consider the photographs. **R 274.** I will leave it open to the other side to present some argument at some point that the photographs should be considered, but they'll have that burden. **R 274-75.**

D. Motion Hearing- March 14, 2017

Mr. Stevens We're asking that the Court go ahead and make a determination on the appeal issue itself; the actual upholding or overturning of the city council's decision. **R 307.** The other side is asking for

a de novo hearing. Judge Gray ruled that the review would be on the record so there would not be a de novo hearing. **R 308.** We have also asked that, after the court rules on the appeal issue, that we be allowed to proceed on our declaratory judgment action and that our constitutional claims be reinstated. Regarding the administrative appeal, we believe there are two issues that the Court should look at. **R 309.** First, the Court should decide whether the administrative procedures utilized to seize and condemn the property meet the procedural due process and substantive due process requirements of the constitution. The second issues is whether the administrative decision is supported by substantial evidence and is not arbitrary and capricious. Our contention is that the record in this case is not adequate to show that constitutional due process was complied with. The record does not contain information about the type of notice that was given. The record does not show that full and fair hearing was held. The record does show a full and fair hearing was requested. The record does not show that there was ever an opportunity to repair the property. In addition to the constitutional defects, the record does not

contain evidence to support the decision. **R 310.** The city council's decision consists mostly of conclusory statements without any facts in the record to back them up. **R 310-11.** If I could quote from Bryant v. Public Service Commission on the adequacy of the record. "Courts cannot perform the reviewing functions assigned to them in the absence of adequate and complete findings on all essential elements pertinent to the determination." That's really the heart f what we're saying. **R 311.** The record does not show compliance with constitutional due process and it doesn't show facts to support the city council decision. **R 311-12.** We're asking that the decision be overturned. **R 312.**

Ms. Miller The city council's decisions are not judicial decisions. They are not hearings in which witnesses are called, people sworn in. This is a decision that the city has been given the authority to determine what is a nuisance in their city by the state legislature, and it reviews the information that has been provided to it by its code enforcement people, including photographs, and including any statements that may be made by the code enforcement persons attending the city council

meeting, and then it opens it to the public to make its comments. The Plaintiff was given notice of this hearing and appeared at the city council hearing on the nuisance allegation. The Plaintiff was given the opportunity to speak. The city council determined that the property was a nuisance. Thereafter, the appeal process is provided. **R 316.** This is to allow Convent Corporation to appear before an impartial trier of fact and put on its evidence as to why the decision of the city council was incorrect, that it was not a nuisance. **R 316-17.** The issue before the Court is whether it is a nuisance or not a nuisance. **R 319.** All of these tangential issues of constitutionality and depriving of notice and all of that should not be before this Court. If Plaintiff wants to take these issues up in a separate case before this Court and file a 1983 action is some manner, they can do so. **R 320.** There has been no deprivation. The building is still there. **R 318, 321.** The City intends to request civil penalties pursuant to 14-55-606. The amount requested will be over $70,000. **R 322.**

Mr. Stevens The building is still there but my client has not been able to use or repair the building. He has had offers to sell the building but he can't sell it. He's paying taxes on it. It's a burden. **R 324**

The Court Isn't there case law that you have not been deprived merely by finding that it should be condemned, only once the City is in the process of knocking it down? **R 324.**

Mr. Stevens Not necessarily. One of the issues in the particular case I'm thinking of was that a final hearing had not been held. The city council said you've got to repair this property or we're going to tear it down. **R 324.** The city was not ready to tear it down and the owner would have the opportunity for another hearing before that would happen. We also filed a Fourth Amendment claim. There is an Arkansas case in which a sheriff padlocked a dancehall. The Court held that was a meaningful interference with property and was a seizure. As soon as Convent's property was red-tagged, my client couldn't use it. That was a seizure in the same way. **R 325.** The City won't issue a permit to repair the property. The City has said, in writing, that they would not issue a permit prior to condemnation. There is a Georgia case where the Georgia Supreme Court looked at a

similar situation and said this puts the property owner between a rock and a hard place. **R 325.** We've never been given an opportunity to fix the building. That's the issue. **R 326.**

Ms. Miller They were given an opportunity to repair. The City condemned the property and by condemning the property the only way the property can be repaired or a permit would be issued is if there would be some type of settlement between the City and Convent Corporation. The building is still there. The City has not deprived them of the building. **R 327. T**here has been no effort to reach any type of settlement with the City regarding this building. **R 327.** The City would be more than willing to listen to proposals about how he was going to bring it up to whatever standard the city wants to enforce. **R 327.**

Ms. Miller Correct. **R 327.**

The Court I came prepared today to rule on the motions. I didn't really realize that you wanted a ruling on the ultimate issue. It would appear to me that the City does have a pretty wide leeway. A city council meeting where they decide if something is or isn't a nuisance doesn't look very much like a court hearing. I don't think it has to. They had code enforcement people go out and

look at it. They brought it before the city council. They allowed comment by the property owner and they determined that it was a nuisance. **R 330.** I don't believe that was an arbitrary or capricious decision. The decision of the City Council of North Little Rock is upheld on this administrative appeal.

The Records citations from here forward are from Part 3 of the Record.

E. **Motion Hearing – June 4, 2019**

The Court — We're scheduled for a hearing today on defendants' motion to dismiss or for summary judgment on plaintiff's amended and reinstated petition for declaratory judgment. **R. 560**

Mr. Mosley — Mr. Stevens has also filed a motion to strike the answer and on whether he can get a jury trial on a declaratory judgment. I believe the motion to dismiss is dispositive of this issue. In her order in March of 2017, Judge Brantley found that the property in question was a nuisance. **R. 561.** She also intimated that the plaintiff had sufficient process. **R. 562.** The city code enforcement officer observed the property and submitted their findings to the city council. Judge Brantley said, "Plaintiff was provided an opportunity to comment, and thereafter the council

decided the property was a nuisance." So, on the merits, I think the declaratory judgment action for constitutional violations has already been decided and we would ask the Court for that. **R. 562.** But, our motion to dismiss regards the statute of limitations. The Court dismissed Plaintiff's constitutional claims without prejudice on July 9, 2015. **R. 563.** The plaintiff then filed these constitutional claims under the guise that they are being sought under the declaratory judgment statute. The plaintiff dismissed those April 30, 2017 and then refiled them on July 30, 2018. So, we have two dismissals without prejudice of constitutional claims here and that is a dismissal with prejudice. So, the easiest and most efficient way and correct way to handle this case and get finalities so the plaintiffs can take their appeal is say the declaratory judgment action has already been dismissed with prejudice when they nonsuited it. **R. 563.** **T**hey have always said they didn't get due process as of February 25, 2012. It's a three-year statute of limitations. When they nonsuited in April of 2017 and then waited greater than a year, they lost their three years, and they lost their one-year savings statute. So, the declaratory judgment action is

time-barred. **R. 564.** They are going to say, we've always said that they can't bring those claims anyway because they have to exhaust their administrative remedies. **R. 566.** Exhaustion of remedies is not required under 42 U.S.C. Section 1983. Whether we argued that or not, that's wrong. It is only correct as to takings claims and that is under Williamson County v. Regional Solid Waste from the United States Supreme Court. **R. 567.** A takings claim has not been brought her, and it couldn't because this is a nuisance. **R. 568.** Under Williamson County you have to exhaust the state remedy which is inverse condemnation. For due process you have to look at *Parratt v. Taylor* and *Hudson v. Palmer* from the United States Supreme Court and only where it is random and unauthorized state action or city action does the exhaustion defense work. So, to the extent we've said they have to exhaust, that's only partially true. The Eighth Circuit has said, in Wax Works, that you do have to exhaust the due process claim. **R. 568** And, the last thing I want to say is the building is still standing. It is threatening collapse right now and, we would like to have it torn down. Mr. Stevens sent a letter to the Court saying we

want to reserve our legal issues but we agree that its dilapidated and the City can tear it down. **R. 569.** Their main argument is that they weren't given sufficient due process. **R. 570.** They don't have a right to due process until we tear it down. That's what the Eastern District of Arkansas said in the case against Earle and what many other courts have said. We're getting complaints; it is an attractive nuisance, and the pictures from day to day show that the second story is threatening collapse. But, if I tell my clients to tear it down, then they might have a due process claim to try. So, we would like a ruling on the merits of the due process claim, whether it is still there because I don't think they have a due process claim until we take bulldozers out there. **R. 570.**

The Court — Let's take the motion to strike answer first. **R. 571-72.**

Mr. Stevens — The rule requires that an answer be filed within 30 days from the date of receipt of the remand notice. **R. 573.** We sent them notice and they did not file it until much later than 30 days. They didn't really file an amended answer, they attached it as an exhibit to a brief or motion. **R. 573.**

The rule says that you can't get a default judgment if the defendant fails to file their answer but it does not say anything about the other consequences of failing to file an answer. **R. 574.** Their position is that there is nothing that requires them to file an answer at all in state court. **R. 575.** The problem with that is the state circuit court can not take judicial notice of the pleadings in federal court. The intent of the rule is that they file an answer. We're not asking for a default judgment, we're just asking for the pleading to be stricken. **R. 575-76.**

The Court — All right, now go on with your response to the other motion. **R. 576.**

Mr. Stevens — There's a theory called the doctrine of inconsistent positions where a party is not allowed to argue a different position than what they've relied on successfully before. They were successful in arguing that we couldn't bring these constitutional claims until we exhausted our administrative remedies and those remedies extend into circuit court. The Court agreed with them and dismissed our constitutional claims. **R. 576.** So, what we believe isn't important, its what the Court ruled. **R. 576-77.** So, if we had not exhausted our administrative remedies, then

our claim was not a complete claim at the time. **R. 577.** "A statute of limitations beings to run when there is a complete and present cause of action." According to their arguments and the Court's holding, we could not have brought our constitutional claims until this Court had ruled on the nuisance abatement action. That's when the statute of limitations started to run. We filed our renewed petition well within the three years of the order that Judge Brantley issued. **R. 577.**

Mr. Mosley If Mr. Stevens is saying they couldn't have brought their constitutional claims, they how can their declaratory judgment action based on alleged constitutional claims survive their own argument? **R. 578.**

Mr. Stevens They've always argued that we couldn't bring the claim until this Court had ruled on the nuisance abatement action. This Court's done that. **R. 578.** They're saying now that we didn't have to exhaust administrative remedies, so I'm not sure if they're saying we've exhausted them or haven't exhausted them. The bottom line is that this Court ruled that we had to exhaust administrative remedies before we could bring the constitutional claims. We've exhausted the administrative

remedies at this point and that is when the statute of limitations started to run. We filed our amended petition well within three years of that. **R. 579.**

Ms. Miller I was going to respond to the motion to strike amended answer. I think the response to the motion is pretty clear that what Convent Corp. is asking for is indeed a motion for default judgment. **R. 579-80.** If you strike the answer, then that means that there was no answer filed in a timely fashion and, consequently, the Court would determine that the City was in default in responding to the complaint. Rule 55(f) specifically states that no judgment by default shall be entered against a party in an action removed to federal court and subsequently remanded if that party filed an answer or motion permitted by Rule 12 in federal court during removal. **R. 580.** The 2004 amendment to the reporter's notes, discusses exactly how 55(f) and 12(a)(3) coincide. **R. 581. "**Amended rule 12(a)(3) expands the grace period to 20 days during which time a defendant who filed neither an answer nor a Rule 12 motion in the federal court must take such action in state court. By contrast, if the defendant responded to the complaint in federal

court while the case was pending there, Rule 55(f) prohibits entry of judgment by default upon remand. Consequently, the defendant need not respond again in circuit court within" the 30-day period to "avoid such judgment." It does specifically state that Rule 55(f) does not require the circuit court to adopt the documents filed in federal court for all purposes, and it allows the Court to require the defendant,at the request of the plaintiff, to require the defendant to reconcile or to adapt their answer in federal court to the style of the state court, style of the case, and any of the other formatting that the state court has that differs from federal court. Convent Corp. did not request that. The reason that the complaint was attached to the amended answer was to let the Court know that an answer had indeed been filed as is required, to give notice to the Court. So, I think when Mr. Stevens says that he's not asking for a default judgment, I think that's disingenuous because that's exactly what he's asking for, and there are no other consequences. He does allude that the Court could keep the City from filing affirmative defenses or a counterclaim, yet he cites nothing. I can find nothing in the rules that say specifically anything about

that. The result of striking an answer is that the City would be in default and the motion should be dismissed. **R. 582.** We filed an answer when he refiled in July of 2018. So, I would say that the argument for striking the answer is moot because he has refiled after his nonsuit and we have timely answered. The amended petition supersedes the original petition. **R. 583.**

Mr. Stevens The initial complaint we filed included a lot of constitutional claims and many other issues. **R. 584.** The petition we most recently filed that Ms. Miller was referring to pertains only to the request for declaratory judgment. The Court dismissed the other claims. And, we're dealing with two rules here. Rule 55 deals with default judgment. Rule 12 deals with the filing of an answer. Rule 12 was revised a couple of times. In 2011 the time allowed for filing an answer was extended to 30 days. The bar on a default judgment was in the 2004 revision to Rule 55. If they intended to relieve a defendant from the obligation to file an answer as required by Rule 12(a)(3), whey some seven years later did they extend the time to file? **R. 584.** If you don't have to file an answer, what difference does not make if you file it in ten days or thirty days? **R. 584-85.** The fact that they

kept it in there and expanded the time is an indication that they still expect the answer to be filed. And, there are other consequences other than a default judgment, such as affirmative defenses, disputing facts, that sort of thing. And, how is the Court to know what the responses are to the allegations if they're not required to file an answer at all. The Court can't go research federal court filings. **R. 585.**

Mr. Mosley I want to reiterate that what's occurring here is they are trying to bring their Arkansas Civil Rights claims and Section 1983 claims through the declaratory judgment action. That's why their nonsuit was a second dismissal without prejudice, and that's why it constitutes a decision on the merits.

Mr. Stevens I'd like to address the issue of seizure. There's a lot of case law that says a seizure is any meaningful interference with property. My client was barred from repairing or using the property. That's a meaningful interference. He couldn't do anything with it. He couldn't sell it. That was a seizure. There's a case where a sheriff padlocked a dance hall. The court found that was a seizure. The seizure occurred when the property was red-

tagged by the City because my client was barred then from using or repairing it.

F. Conference Call – June 17, 2019

The Court — The Court finds that Plaintiff's Amended and Reinstated Petition for Declaratory Judgment was filed timely and the time for filing these claims began to run on May 11, 2017 when the Court entered its Order affirming the City Council's determination that the property at issue is a nuisance. Defendants Motion to Dismiss is denied. **R. 603.**

G. Motion Hearing – November 14, 2019

The Court — We'll start with defendant's motion for summary judgment. **R. 610.**

Mr. Mosley — I really think the only proper defendant here left is the City itself because this is a facial challenge to Chapter 8 of the North Little Rock Municipal Code. **R. 610.** Basically, in a facial challenge, there's two claims that we've got to address today. One is a facial challenge arguing that Chapter 8 of the North Little Rock Municipal Code does not provide sufficient procedural due process to property owners. **R. 610-11.** The plaintiff also claims that the code itself and the resolution

condemning their property constitutes an unlawful bill of attainder under both the federal and Arkansas constitutions. **R. 611.** In *Hagen v. Traill County*, the Eighth Circuit said that if you have failed to show that the procedure, code, whatever is unconstitutional as applied to you, then you don't have standing to allege on its face the code is unconstitutional. **R. 612.**

The Court — I need to hear from the other side, and then you defend it. **R. 613.**

Mr. Mosley — This Court has already ruled that there are no disputed issue of fact and I believe the issues before the Court are simply legal issues. **R. 614.**

Mr. Stevens — In the response to paragraph 16 of our petition, they denied the characterization of what we'd stated but they didn't deny the facts therein. **R. 614.** The facts that they did not deny are that a property owner is allowed to make repairs only if the City approves a plan that requires a letter of credit and a bond equal to the cost of demolition, and only under a condemnation order which the property owner cannot appeal after 30 days. The City's code allows the owner 30 days in which to develop a plan, secure city council approval, post a bond, and repair the

property. The City's code provides that after 30 days the condemned structure shall be destroyed and removed from the premises. A lien is then placed on the property for the cost of demolition. **R. 615.** The City's code allows these actions without ever providing the property owner any opportunity to repair the property prior to condemnation and without posting a bond and without affording an opportunity to be heard. **R. 615-16.** If we look at the cases the City cited, *Samuels*, *Hagen*, even the *City of El Dorado* that was attached to one of their pleadings, in each of those cases, the property owner was given the chance to repair the property prior to the condemnation. In *Samuels*, the owner was given specific notice of the violations and was permitted to make those repairs prior to condemnation. The City has not pointed to any case that is analogous to this case with no opportunity to repair and no notice of specific violations. There has to be an opportunity to repair the property prior to condemnation. **R. 616.** We have also challenged whether the Code provides for a meaningful hearing. **R. 617.** The code uses the phrase "public hearing." The phrase is not defined in the code so it's appropriate to look at how the City

interprets it in the practice and procedures. The City's standard agenda they use provides for a three-minute hearing, and that's the same type of public hearing for pretty much any other agenda item. It does not provide for any opportunity to confront witnesses. It doesn't really provide much of a hearing at all. The three minutes is not in the code but that's base don the City's interpretation through its policies and practices. **R. 617.** They don't intend for that to be a due process hearing. **R. 618.** I think the mayor in his comments made that pretty clear when he said that they don't hold hearings. If there's one point that proves the case here its' the mayor's comments in the city council meeting. He emphatically stated that they don't hold hearings. That's his interpretation of the City's code. He knew that we were talking about a full and fair hearing. We had filed a written motion asking for one. The mayor said no, you're not going to get that. Maybe the mayor didn't interpret the code right but the deputy city attorney was sitting right there in the council meeting and didn't correct him. **R. 618.** We made some arguments in our brief about the Arkansas Constitution and the fact that it says the right of properties is before and

higher than any other constitutional sanction. **R. 619.** There was a recent case involving sovereign immunity where the Arkansas Supreme Court said you have to interpret the Arkansas Constitution as it reads. We've got the agenda from the city council in the record. We have attached some responses to interrogatories to our motion that have the council members' responses. The record is really full of examples of the way the City interprets its ordinance. There was some case law cited in our brief that the Court can look to an as-applied circumstance. The record is full of how they handled the particular case with Convent. Either that's the way they interpret their policies, or they didn't apply their policies.**R. 621.** This is a facial challenge and the other side has argued that the Court should look for any circumstance out there possible where this could be constitutional. **R. 622.** If the Court can find one, it has to say it's constitutional. They based that on the Salerno case – the Salerno Rule. Justice Stevens pretty specifically said that rule is not applied across the board. He said, "The rule's never been a decisive factor in any decision of this Court, including Salerno itself." **R. 622.** He

said, “The rule does not accurately characterize the standard for deciding facial challenges, nor is it consistent with a wide array of legal principles. This rigid and unwise dictum has been properly ignored in subsequent cases.” **R. 622-23.** So, even Justice Stevens said, no, that’s not the rule. The Court should consider the ordinance as it’s written but without assuming the City is going to take additional actions. I think the way that they’re arguing would be that the City could hold a full and fair hearing, and in that situation it would be constitutional. But, we’ve cited several cases in our brief that say it’s not appropriate for the Court to imagine those kind of supplemental actions or to add to the ordinance in that way. Another problem is that the ordinance does not provide for an unbiased decision maker. **R. 623.** The city council has all kinds of political influences, and some of those were obvious at the meeting. **R. 624.** One of the council members talked about how the neighborhood association wanted the building demolished. It’s thinks like that that made my client think the City had no interest in seeing this building repaired. The fact is, the city council is not an unbiased decision maker. They’ve got

political influences. They City may have to expend money in these cases. Notice is another issue. There's no notice of rights to appeal. We've cited case law in our brief that says that's required. **R. 624.** The case we cited had to do with utility bills and the federal court said its not a big deal to put a sentence in there or two about how you appeal. **R. 624-25.** If it's important enough to do that in a utility billing situation, certainly property rights are important enough that it be done. In their latest brief, they've talked about avenues of appeal that have never been mentioned before in this case that are supposedly now available. So, a notice regarding that is important. The In Re Gault case, cited in our brief, says, "The notice must set forth the alleged misconduct with particularity." The ordinance doesn't provide for any specific notice of violations. There is a notice of violations in another section of the code that has to do with weeds and garbage. Again, if we look to the City's interpretation, they don't provide this in condemnation cases. They seize property with what they call red-tagging, actually it's placarding. **R. 625.** The placarding is in the weeds and garbage section. That is supposedly what red-

tagging is. **R. 626.** This code stuff is just a mess. How is a person to know what's what? Now they are saying the placarding or the red-tagging could have been appealed somewhere. But, its taken six years to figure that out. If they can't figure out their own code in six years, then its vague, I would say. In addition to the public hearing, the other terms we are claiming are vague are terms like "unfit for human occupancy, otherwise detrimental to the life, property, or safety of the public." **R. 626.** The problem with these terms and other terms we've cited is that they leave the council with complete discretion. **R. 626-27.** We've attached interrogatories and responses to interrogatories to our brief that show the different answers on these things from the council members. The terms aren't defined. The case law we've cited in our brief says you can't leave that much discretion to the officials enforcing these things. I like the one "fit for human occupancy." What about freestanding garages, backyard storage buildings? Do those have to have heat? Plumbing? The code doesn't address those things. What about a vacant building? Is it required to be fit for human occupancy? This was a vacant building we're

talking about. **R. 627.** The City's basically argued that they can write language that's broad and undefined and interpret the language and act in a particular way that we contend is [un]constitutional. **R. 627-28.** To allow any level of government to make a law that allows them to act in one way when they want to, but when they're challenged to come back and say, no, the law means this is problematic.

Part of our due process challenge, is the interpretation of the code and how its applied. We've raised the vagueness of the terms previously in this case and the City's known we've been claiming this. We're also bringing a challenge based on the bill of attainder clause. The code permits the City to do exactly what the bill of attainder clause is supposed to protect against. They said something about ticketing in district court but there is nothing in the code that says that. The code says punishment applies once they've made their decision. They made the law. They decide the punishment. Even if you take into consideration that a person may get to go to district court, the offense is keeping a condemned structure. Its not maintaining a nuisance, or keeping a building that's dangerous or anything.

R. 629. So, all that is required for a conviction in district court is the fact that the city council has already condemned the structure. **R. 629-30.** There is never a trial provide on the issue of whether the property is dangerous, whether it's a nuisance. The city council is the sole arbiter of that issue. A person can be found guilty in district court without ever being given a chance to refute that. Whether you call it a resolution or an administrative decision, it is still an act by a legislative body that finds a person guilty and inflicts punishment. In Carmell v. Texas, the court said "The legislature should not meddle with the judiciary's task of adjudicating guilt and innocence in individual cases." That's exactly what this code allows the city council to do. **R. 630.** As far as the other cases they've relied on, the City of Eldorado case, Samuels, Ingram, there were other factors. They were given an opportunity to repair the property. That was not done in this case. **R. 633.** The code does not allow anyone to repair the property. **R. 633-34.** The letter from Assistant City Attorney Bill Brown says, "No permits will be issued prior to condemnation." That's clear

evidence in the record and they haven't cited to a single case in support of their position.

Mr. Mosley The mayor didn't say you're not getting a trial. The mayor said we're not a judicial body. **R. 633.** As far as the Salerno case, you shouldn't speculate about cases that are not before the Court. **R. 634.** That's what a facial challenge is. The as-applied challenge has already failed here and we say there's no standing under Hagen. But, let's assume the Court goes beyond that. In a facial challenge you are only looking at the text. The reason there is not standing is because Convent was found to have been given due process by Judge Brantley and the Court would be issuing an advisory opinion and speculating about cases not before the Court if it went any further on the facial thing. Salerno says that you've got to find the code unconstitutional in all its applications. **R. 634.** Mr. Stevens cited Justice Stevens' concurrence which is not authoritative. **R. 634-35.** He's also cited opinions on the denial of certiorari to the United States Supreme Court, not authoritative. All that is really beside the point because in Abram which is a 2015 case form our Supreme Court, Salerno is the test. You have to

show that as written it's unconstitutional in all of its applications. So, is unfit for human occupancy unconstitutional in all its applications? No. Holes in the roof, a burned-out structure – these are things that actually happened in that case. Under state legislative enactment 14-54-203, the council gets to make the determination if something constitutes a nuisance. These terms are not vague and that's not a claim made in the complaint. **R. 636.** I've cited a case from a federal district court in Iowa that said that these sorts of terms mean nuisance. **R. 636-37.** There's been no proof that a majority of the council was biased to show that they were given too much discretion. More importantly, the structure has now been razed at the City's expense and there is no lien on their property. It was not razed after a hearing by the city council but was razed after a hearing before Judge Brantley, sitting as special circuit judge. Surely, Mr. Stevens is not suggesting that Judge Brantley is a biased decision maker. **R. 636.** Pitchford v. Earle says condemnation is not a deprivation of a property right entitling you to due process. **R. 637.** When the bulldozers go out there and tear it down, that's a deprivation of a property

right. They had a full hearing in circuit court. They had a hearing at the city council. If they had read Chapter 8 instead of shuffling it around and reading parts of it only, they could have seen that the notices of violations could have been appealed to the North Little Rock Board of Adjustment. Mr. Stevens has argued that there's no notice in the ordinance about your right to appeal. The Supreme Court of the United States and the Supreme Court of Arkansas have held that you are deemed to know the law. **R. 637.** A reasonable person is deemed to know the law and we don't have to put that in there. **R. 638.** There's no binding precedent that says if you're maintaining a nuisance structure that you get an opportunity to repair the property all of a sudden because the City's finally going to take action to fix the property. There's no case that says that. They were given the opportunity. They refused to do it. The condition was that they have to enter into a rehabilitation agreement, submit a bond so that the City can ensure you are going to finally deal with your nuisance and do it on an appropriate schedule and you're going to do it correctly. **R. 638-39.** You're going to do it per electric code.

You're going to do it per plumbing code. **R. 639**The code says notice can be done by placarding and you've got to do written notice by mail, personal service. The code doesn't say you can cross-examine witnesses but, it doesn't say you can't. The prevailing authority is Samuels v. Meriweather. Samues and Ingram, from the Arkansas Supreme Court said you have to get written notice and the opportunity to present your position to the decision maker. **R. 640.** The three minute period is not written in the text of the code. I believe that Mr. Stevens in incorrect in saying that you look beyond the text of the code. Even if that were the case, they allege they were only given three minutes and they were found to have been given sufficient due process. As long as you get to present your position, you have been given sufficient due process. **R. 641-42.** You get an appeal to circuit court. You get the opportunity to have a de novo review in circuit court under Rule 9.

I don't think a person should have their opportunity to cross-examine witnesses and present witness at this level because the courts have said due process depends on the context of the situation. **R. 642.** The U.S. Supreme Court has said that in

these types of administrative matters, you might get to cross-examine witnesses but it is not necessary. It's not the best way to handle things because you've got an administrative body that's not equipped to have a full-blown evidentiary judicial-type trial. **R. 642.** The cases they cite about cross-examination are factually inapplicable. **R. 643.** One involves the seizure of property due to a drug confiscation, drug forfeiture. The City has the police powers and those exist to protect the public health and welfare. You have to balance the right of the property owner here with the right of the public to be protected. The City's right and interest is greater in cases involving putative nuisances that it is in cases involving seizing of a Range Rover as part of a drug forfeiture, or public utility cases, when it involves the protection of the public health and welfare. **R. 643.** The question on its face is, does the text of Chapter 8 give somebody fair notice? **R. 644.** It does. Does it give somebody the opportunity to understand what they're being accuse of? It does. Does it give them the opportunity to repair the property if they'll do a rehabilitation agreement? It does. With a bond, it does. And, does state law give them the

opportunity for further due process via an appeal de novo to circuit court? **R. 644.** You couldn't have more due process here. **R. 645.**

The Court — You could actually have more, but the question is whether there should be more. The City of Little Rock has an environmental court and you do get to go in before a district judge and present your case. **R. 645.**

Mr. Mosley — When someone is charged in district court with maintaining a nuisance, it doesn't have anything to do with the city council's determination. You get a full and fair trial in front of Judge Morley as to whether or not you're maintaining a nuisance. This whole idea that the council makes the decision and then it is somehow transmuted to the North Little Rock District Court and the district court just signs off on it, is absolutely incorrect. **R. 646-47.** It is not reflected on the text of Chapter 8 and its wrong. **R. 647.** If the rule is as Abrams, from the Arkansas Supreme Court said, that the ordinance must be unconstitutional in all of its applications, because there note been a due process violation as applied to Convent, its impossible for the code to be unconstitutional. **R. 651.** Moving on to the bill of attainder.

It was a resolution. **R. 651.** These sorts of decisions are not making new law, you're just applying the law to new factual circumstances, that's administrative. **R. 652.** The bill of attainder clause only applies to legislative decisions. If it were legislative, as long as the legislation serves nonpunitive purposes, it is also not violative of the bill of attainder clause. Protecting the public health and welfare from nuisance properties is serving a nonpunitive purpose. **R. 652.**

Mr. Stevens As far as the ability to cross-examine witnesses, Goldberg v. Kelly dealt with termination of public assistance benefits and the court said that confrontation and cross-examination of adverse witnesses was required before those benefits could be terminated. The Arkansas Constitution places a high value on property rights and if we're going to say that property rights are entitled to the highest constitution sanction, then they deserve that much constitutional protection, or we don't mean what we say in the constitution. The Goldberg case clearly stands for the proposition that when any important right is at stake, cross-examination is important. I would like to correct some things that have been raised. Convent was never given the opportunity

to repair the property. He said you can do that after condemnation with a rehabilitation agreement. **R. 654.** I called the city attorney's office and they didn't even want to talk to me about it. **R. 654-55.** The City would not set aside a condemnation order for a rehab plan, and there's no guarantee you can get a rehab plan. You have to have a sponsor. If you look at the transcript of the city council meeting, I don't think any of them would have sponsored a resolution. The City didn't like this building because of its history. The council members didn't like it. Even if we had done a rehabilitation plan, it would have been under a condemnation order. If you look at Talley v. city of [North] Little Rock, the got a rehabilitation agreement under a condemnation order. The city didn't like what they were doing, told them to stop, and tore the building down. **R. 654.** So, unless the condemnation order id set aside, you could be wasting your time and money repairing the building because the City is not going to give you any guarantee they won't tear it down. **R. 654-55.**

The Court — With respect to the facial challenge, are you contending that a party who has a facial challenge on the basis of constitutionality

does not have to be aggrieved? **R. 656.** Do you have to have suffered somehow, or can any citizen just file a facial challenge?

Mr. Stevens The fact that a person has been found guilty of violating a law gives them standing to bring a facial challenge. **R. 656.** Convent has been found by the city council to be guilty of violating the ordinance and that gives standing. Mr. Mosley mentioned Pitchford v. Earle. The problem with that case is that they didn't consider the Fourth Amendment issue because it wasn't raised. We raised a Fourth Amendment seizure challenge. There is a case that says that, in these case, the Court needs to go beyond the nuisance issue and look to the Fourth Amendment. Once the building was placarded, my client couldn't do anything with the building. **R. 657.** Once the building was red-tagged, Convent was prohibited from even making repairs. **R. 657-58.** That's documented in the record. Once the building is placarded, that's a seizure, whether the building is torn down or not. There's an older case where a sheriff padlocked a dance hall and the court said that was a seizure, just padlocking the building. **R. 658.** Mr. Mosley sai

the building was a nuisance, they should have repaired it. I think that exemplifies the kind of bias we're talking about with the city council. At some point, doesn't somebody have to prove it's a nuisance? The assumption is made from the beginning and the city council has their mind made up. There's no due process in that. Your building is seized. Your told you can come to the city council meeting if you want. We'll give you three minutes, and then we're going to condemn your building. **R. 659.** And, if you want to repair it, we might let you if somebody sponsors you and you put up a bond. **R. 659-60.** And then if we don't like what you're doing, we might just tear it down anyway. That's far from meaningful due process. Maybe you get a trial in district court on the nuisance issue. I don't know. But, the code doesn't provide for it. The wording of the code says that the fine is imposed. That's it. The code doesn't say you get a trial in district court. The code doesn't say anything about any further proceedings. **R. 660.** As far as the Salerno Rule, we cited to cases where clearly you can imagine other circumstances where those laws would be

constitutional. But, that didn't affect the court's decision. **R. 660-61.**

VI. STATEMENT OF THE CASE

The building which is the subject of this litigation had been operated as a nightclub since the early 1950s. **Add 141; R 200.** The City of North Little Rock initiated a lawsuit to force the business to close. **Add. 146; R 205.** The City lost this lawsuit but remained determined to force this business that had existed for approximately fifty (50) years to close. Even though the City lost the first lawsuit, it initiated a second lawsuit attempting to force the business to close. **Add. 152; R 211.** Due to the expense and time involved in defending itself against a subsequent lawsuit, the owners of the business entered into a settlement agreement which resulted in the closure of the business on August 1, 2011.1 **Add. 146; R 205.** Since the forced closure of this viable and operating business by the City, the structure at issue has remained vacant.

On November 14, 2012, Officer Felicia McHenry of the City of North Little Rock's Code Enforcement Department "red-tagged" the structure that is the subject of this litigation. **Add. 247, 257, 260; R 309; 319; 322.** The City did not provide any Notice to Convent or a hearing prior to "red-tagging" the property. Once the property was red-tagged, Convent could not use or repair the property. **Add. 143-44, 162; R 202-03, 221.** The Notice does not list any specific code violations or repairs required. **Add. 260, 315-16; R 322; 377-78; See also Add. 256; R 318.**

Upon receiving notice of the proposed condemnation action, Plaintiff contacted Roberto Alvarez to inspect the property and make repairs. **Add. 319-20, 325; R 381-82, 387.** Plaintiff's representative, Richard Livdahl, met with several City officials and attempted to obtain permission to repair the Property. **Add. 143-44; R 202-03.** Convent did clean the clutter out of the building but was informed by the City that a permit to make repairs would not be issued prior to condemnation. **Add. 162; R 221.**

Convent was informed that it would have three minutes to speak to the Council during the meeting at which the property would be considered for condemnation. **Add. 645; R 756.** Prior to the meeting of the City Council regarding the property, Convent's counsel filed a motion asking for a full hearing. **Add. 74-75; R 121-22.** On February 25, 2013, the City Council voted to condemn the property. Convent's counsel appeared at the meeting and again asked for a full hearing or an opportunity to repair the property prior to condemnation. **Ab 1-5; Add. 596-601; R 707-12.** The Mayor stated that "we're not here to hear cases, that is what the court system is for." **Ab 4; Add. 598; R 709.** All Council members that were present voted to condemn the property. **Ab 5; Add. 601; R 712.**

Convent filed its appeal pursuant to District Court Rule 9 in circuit court on March 27, 2013 and asserted claims regarding multiple violations of both the state and federal constitutions, as well as a common law claim of trespass. **Add. 1-23; R**

7-29. Convent contends that its property was seized and condemned without adequate notice of the alleged violations, without a meaningful opportunity to be heard, and without permitting Convent to repair the property prior to condemnation.

On April 29, 2013, Defendants removed the case to federal court. The case was returned to the state circuit court on February 20, 2014. On May 17, 2014, Convent filed a Motion for Judgment on the Pleadings or, in the Alternative, Motion for Summary Judgment arguing that Defendants had failed to timely file an Answer following the return of the case from federal court and that it was entitled to summary judgment on its constitutional claims. **Add. 87-139; R 145-98.** Defendants asserted that Convent had failed to exhaust its administrative remedies, contending that an appeal to circuit court pursuant to District Court Rule 9 is an administrative remedy that must be exhausted prior to asserting other claims. **Add. 375-90; R 476-81.**

On July 9, 2015, the Circuit Court entered an Order denying Convent's Motion for Class Certification stating that Convent did not present any evidence at the hearing and agreeing with Defendants' contention that a Rule 9 appeal is an administrative remedy and dismissing Convent's constitutional claims. **Add. 667; R 1810.** Convent appealed that order to the Supreme Court. **Add. 671, R 1832.** The Supreme Court remanded the class certification issue finding that the Circuit Court had failed to consider the evidence submitted by Convent. The Supreme Court

did not consider the other issues finding that a final order had not yet been entered in the case. **Add 688-89; R. pt 2, 162-63**

On May 11, 2017, the Court granted a motion for voluntary dismissal of the declaratory judgment action and the Court also entered an Order denying Defendants' motion to reconsider the standard of review and finding that the property was a nuisance, the city council's decision was not arbitrary and capricious, denying Convent's motion to reinstate its constitutional claims, and reserving the issue of the City's request for civil penalties. **Add. 778, R. pt 2, 257.** On June 8, 2017, Convent again filed a Notice of Appeal. On February 22, 2019, the Arkansas Supreme Court issued an order dismissing the appeal because the issue regarding fines had not been resolved and because Convent had voluntarily dismissed its Petition for Declaratory Judgment without prejudice.

On July 30, 2018, Convent filed an Amended and Reinstated Petition for Declaratory Judgment. **Add. 779, R. pt 3, 74.** On January 16, 2019, Defendants filed a Motion to Dismiss. **Add. 790, R. pt 3, 88.** On January 29, 2019, Convent filed a Renewed Motion to Strike Amended Answer which was denied by the court in an Order entered June 18, 2019. **Add. 798, R. pt 3, 96** On February 26, 2019, Defendants filed a Motion to Withdraw Motion to Enforce Assessed Fine which was granted by the court. The court later dismissed Defendants' Motion to Enforce Assessed Fines with prejudice. **Add. 1171; R. pt 3, 555.**

On June 26, 2019, Defendants filed a Motion for Summary Judgment. **Add. 731; R. pt. 3, 202.** Convent responded and included a Countermotion for Summary Judgment. **Add. 942; R. pt 3, 313.** On December 11, 2019, the court entered an Order Granting Defendants' Motion for Summary Judgment, Denying Plaintiff's Countermotion for Summary Judgment, and Dismissing Plaintiff's Amended and Reinstated Petition for Declaratory Judgment with Prejudice. **Add. 1166; R. pt. 3, 543.** On January 7, 2020, Convent filed a Notice of Appeal. **Add. 1168; R. pt. 3, 545.**

VII. ARGUMENT

"[R]emember we're a legislative body, not a judicial body so we're not hear to – to hear cases. That's what the court system is for."

Mayor Smith during City Council Meeting on February 25, 2013. **Add. 597. R. 708**.

A. Strict Scrutiny Standard of Review - The Arkansas Constitution requires that laws involving property rights be evaluated under the "strict scrutiny" standard and the ordinance at issue fails under that standard.

"The right of property is before and higher than any constitutional sanction"

Ark. Const. art. 2, § 22. The Court recently held that the Arkansas Constitution should be interpreted precisely as it reads. *Board of Trustees of the Univ. of Arkansas v. Andrews, 535 S.W.3d 616 (2018)*. Thus, a property owner in Arkansas is entitled to not only substantial, but the most and highest due process protections prior to a seizure or condemnation. The highest constitutional sanction as determined by any court is "strict scrutiny." Therefore, pursuant to the Arkansas Constitution, private property cannot be taken in the absence of, at a minimum, **a compelling government interest and the government must provide the least restrictive method available that is narrowly tailored to accomplish the compelling interest.** *See Arnold v. State*, 2011 Ark. 395, 384 S.W.3d 488 (2011).

As demonstrated *infra,* the ordinance at issue permits the City to take private property without demonstrating a compelling government interest, without sufficient notice, without providing a meaningful *pre- or post-deprivation* hearing, and without

providing the owner an opportunity to repair the property prior to seizure and condemnation. In the administrative proceeding, the City did not put forth and did not demonstrate any compelling government interest in seizing and then condemning and destroying appellants property. Additionally, ordering destruction of the property without an opportunity for repair is not the least restrictive method and the ordinance fails under the strict scrutiny standard.

B. Substantial Evidence Standard of Review - Administrative agencies must provide Substantial Evidence to support their determinations and the record in this case does not contain substantial evidence to support the City's condemnation of Convent's property.

In addition to demonstrating a compelling governmental interest, an administrative agency, or as in this case, a municipal body making an administrative determination must demonstrate that their determination is supported by substantial evidence. *Mountain Pure, LLC v. Little Rock Wastewater Util.*, 2011 Ark. 258, 383 S.W.3d 347, 353 (2011). "Substantial evidence is evidence of a sufficient force and character that it will compel a conclusion one way or another; it must force the mind **beyond mere suspicion or conjecture**." *McLain v. City of Little Rock Planning Comm'n*, 2011 Ark. App. 285, 383 S.W.3d 432 (Ark. App. 2011) (citing *Talley v. City of North Little Rock*, 2009 Ark. 601, 381 S.W.3d 753 (2009)(emphasis added)). The Court's review is not directed to the decision of the circuit court but to the decision of the administrative agency. *Mtn. Pure, LLC*, 2011 Ark. 258, 383 S.W.3d at 353. The review is limited to the record developed in the administrative

proceeding. In addition to determining the presence or absence of substantial evidence to support the decision, the court also considers whether the decision was arbitrary, capricious, or characterized by an abuse of discretion. *Id.*

The record in this case is sparse. The administrative record was prepared and certified by the City Clerk and filed by Plaintiff on April 26, 2013. **Add. 36-76; R 62-123.** The record contains the minutes of the February 25, 2013 City Council meeting, **Add. 36-44, R 82-90;** Resolution No. 8272, **Add. 45-46; R 91-92**, a letter dated January 11, 2013 from Felicia McHenry to Mayor Smith, photographs, and a Motion for Full Hearing filed by Plaintiff. **Add. 39-40; R 121-22** Plaintiff filed an additional document, Brief in Support of Motion for Full Hearing, which was part of the administrative proceeding but was omitted from the record. **Add. 79-86; R 126-33.** The City later supplemented the record with a recording of the Council meeting. **Add. 684-85; R part 2, pgs. 16-17.**[2] These materials comprise the entire record of the administrative proceeding and the Court's review should be limited to only these materials. The Circuit Court ruled that the photographs would not be

[2] When the reporters prepared the record of the proceedings that occurred following the prior appeals, each began the numbering at 1 instead of continuing with the numbering from the prior record. Therefore, the page numbering for the two additional sections of the record are designated as "part 2" and "part 3."

considered by the Court in ruling on the appeal and Appellee's have not appealed that ruling. **Add. 686; R part 2, pg. 94.**

The City has a duty to develop an adequate record when it seeks to seize and condemn property. The record must contain adequate findings to demonstrate compliance with constitutional due process requirements and sufficient factual findings to show that the decision is supported by substantial evidence. "Courts cannot perform the reviewing functions assigned to them in the absence of adequate and complete findings . . . on all essential elements pertinent to the determination." *Bryant v. Ark. Pub. Serv. Comm'n*, 45 Ark.App. 56, 63, 871 S.W.2d 414 (1994).

> The threshold question governing our review of an agency determination is whether the agency has provided concise and explicit findings of fact and conclusions of law separately stated in the order. *Olsten Health Servs., Inc. v. Arkansas Health Servs. Comm'n*, 69 Ark. App. 313, 12 S.W.3d 656 (2000). These findings should be sufficient to resolve material issues or those raised by evidence relevant to the decision. *Bryant v. Ark. Public Serv. Comm'n*, 54 Ark. App. 157, 924 S.W.2d 472 (1996). The agency must make findings of fact in sufficient detail that the reviewing court may perform its function to determine whether the agency's findings as to the existence (or nonexistence) of essential facts are supported by the evidence. *Mosley v. McGehee School Dist.*, 30 Ark. App. 131, 783 S.W.2d 871 (1990).

Arkansas Appraiser Licensing v. Quast, 2010 Ark. App. 511, 6 (2010). Where "conclusions of law are without adequate corresponding factual support, they lack substantial evidence and are arbitrary and capricious." *Ark. State Bd. Of Chiropractic Examiners v. Currie*, 2013 Ark.App. 612.

The record in this case does not contain any factual findings that would support the condemnation and demolition of Convent's property. The lack of substantial evidence indicates that the decision was arbitrary and capricious. Prior to the City Council meeting at which Convent's property was condemned, there were no hearings or other proceedings where testimony or evidence was presented and where Convent had an opportunity to cross-examine or otherwise challenge any evidence. No witnesses testified at the City Council meeting on February 25, 2013. The result is a record that only contains conclusory allegations and vague descriptive terms with no factual or evidentiary support.

Neither the Resolution condemning the property, **Add. 45-46; R 91-92,** nor the record from the administrative proceeding contain any specific factual findings regarding the condition of the property. **Add. 36-76; R 62-123.** The Resolution condemning the property contains nothing more than conclusory terms such as "run down, dilapidated, unsightly, dangerous, obnoxious, unsafe, not fit for human habitation and detrimental to the public welfare . . .." **Add. 45-46; R 91-92.** The Resolution contains additional "boilerplate" language which appears in every such resolution labeling the property as "unsafe and hazardous." Neither the Resolution, nor the record of the administrative proceeding contain any facts or competent evidence to support these general, boilerplate conclusions. In the absence of any specific factual findings in either the Resolution or record of the administrative

proceeding, the Circuit Court should have held that the City Council's decision was not supported by substantial evidence and was arbitrary and capricious.

C. Dismissal of Constitutional Claims & Denial of Injunctive and Declaratory Relief

i. Standards of Review

a. The most important function of judicial review is for the Court to determine if the underlying administrative procedure meets constitutional standards.

In reviewing an administrative decision by an agency or governing body, the Court should determine "whether the order or decision under review violated any rights under the laws or Constitution of the United States or of the State of Arkansas." *Harness v. Arkansas PSC*, 60 Ark. App. 265, 269-270, 962 S.W.2d 374, 375 (1998); *Southwestern Bell Tel. 12 Co. v. Arkansas Public Service Com*., 267 Ark. 550, 557, 593 S.W.2d 434, 439 (1980). Judicial review is not a step in the administrative process or an administrative remedy to be exhausted. *Dove v. Parham*, 181 F.Supp. 504, 511-12 (E.D.Ark. 1960) It's purpose is to "make certain that there are definite limits, effectively enforced, upon the tremendous powers exercised by the modern state through the administrative process which affect the lives, properties, and fortunes of its individual citizens." Robert Kramer, *The Place and Function of Judicial Review in the Administrative Process*, 28 FORDHAM L. REV. 1, 7 (1959). Because failure to comply with constitutional due process standards is fatal to any final administrative decision, whether the procedures underlying the

decision pass constitutional muster is pertinent to the determination of whether a decision should be upheld or overturned. The record of an administrative proceeding must contain evidence that, in reaching its decision, the administrative body complied with constitutional due process requirements.

b. The Court should conduct a *de novo* review to determine if the Circuit Court abused its discretion in determining that Defendants were entitled to judgment as a matter of law.

The Court's dismissal was essentially judgment as a matter of law in favor of Appellees. *See, e.g., Travis Lumber Co. v. Deichman*, 2009 Ark. 299, 319 S.W.3d 239, 253 (2009)The denial of injunctive and declaratory relief and the Circuit Court's rulings regarding constitutional issues and matters of law are subject to *de novo* review under the "abuse of discretion" standard. *Wilson v. Weiss*, 368 Ark. 300, 307, 245 S.W.3d 144, 150 (2006); *City of Dover v. City of Russellville*, 363 Ark. 458, 460, 215 S.W.3d 623, 625 (2005) "[A] clearly erroneous interpretation or a clearly erroneous application of a law or rule can constitute a manifest abuse of discretion." *Ford Motor Co. v. Nuckolls*, 320 Ark. 15, 20-21, 894 S.W.2d 897, 900 (1995).

ii. The Circuit Court's determination that an appeal to circuit court pursuant to District Court Rule 9 is an "administrative remedy" that must be exhausted prior to asserting constitutional claims is contrary to established law, is clearly erroneous, and represents an abuse of discretion.

"[E]xhaustion of remedies is not required under 42 U.S.C. Section 1983."

Mike Mosley, Assistant City Attorney, Motion Hearing, June 4, 2019. **AB 27; R. 567.** Convent had exhausted all administrative remedies prior to filing its appeal in the circuit court and should have been permitted to pursue its constitutional claims. A judicial remedy is not an administrative remedy. *Dove v. Parham*, 181 F.Supp. 504, 512 (E.D.Ark 1960). Black's Law Dictionary defines an "administrative remedy" as a "a **nonjudicial** remedy provided by an **administrative agency**." *Black's Law Dictionary* 1296 (7th ed. 1999) (emphasis added). Other sources define an administrative remedy as "the **non judicial** remedy provided by an a**gency, board, commission or any other like organization**," (*Administrative Remedy Law & Legal Definition*, USLegal.com, http://definitions.uslegal .com/a/administrative-remedy/ (emphasis added)), or "[o]btaining the redress or the enforcing of your rights by putting a matter before an **administrative agency**." *What is Administrative Remedy?*, The Law Dictionary, http://thelawdictionary .org/administrative-remedy/ (emphasis added). Thus, an "administrative remedy" is one that is both "**nonjudicial"** and is before "**an administrative agency**." District Court Rule 9 provides for a judicial remedy, not an administrative remedy.

The school district in *Dove v. Parham*, 181 F.Supp. 504, 509 (E.D.Ark. 1960) made the same argument Defendants asserted in this case, that the appeal to circuit court was an administrative remedy which must be exhausted prior to bringing an

action in federal court. The federal court held that, while the plaintiffs were required to exhaust their administrative remedies before the school board, they were not required to "carry their contention into the State courts" prior to bringing their constitutional claims in federal court. *Id.* at 512. Also, the Court noted that the Arkansas legislature could not validly confer administrative powers on the circuit courts. *Id.* More recently, in *City of Little Rock v. Alexander Apartments, LLC*, 2020 Ark. 12, 10 (2020), the Arkansas Supreme Court held that the ability of plaintiffs to file an action in court did not relieve the City of its obligation to provide due process. The holdings in *Dove*, affirmed by the Eighth Circuit (282 F.2d. 256), and in *Alexander Apartments* clearly demonstrate that, in the present case, the Circuit Court's finding that a Rule 9 appeal is an administrative remedy that must be exhausted prior to bringing constitutional claims is contrary to established law, clearly erroneous, and constitutes an abuse of discretion.

In nuisance abatement actions, the City provides a brief (3 minutes according to council agenda) appearance before the City Council and does not provide any additional administrative remedies. **Add. 182, R. 241; Add. 645, R. 756.** Therefore, the City Council's Resolution condemning the property was a final administrative decision. The Circuit Court's adoption of the City's contention that an appeal in circuit court pursuant to District Court Rule 9 was clearly erroneous and constitutes an abuse of discretion.

iii. The Circuit Court's holding that a Rule 9 appeal is merely an extension of the City's administrative procedure violates the separation of powers doctrine in Article 4, Section 2 of the Arkansas Constitution.

Article 4, Section 1 of the Arkansas Constitution provides for three distinct branches of government and Article 4, Section 2 explicitly requires a separation of powers. The powers that belong to the executive branch of government cannot be delegated or shifted to the judicial branch, even where the executive branch chooses to forego its constitutional responsibility to provide due process. *See, e.g., Oates v. Rogers,* 201 Ark. 335, 337-339,144 S.W.2d 457, 458 (1940) (citing 16 C.J.S. *Constitutional Law* § 111 (1984)); *See also Spradlin v. Arkansas Ethics Com'n,* 858 S.W.2d 684, 314 Ark. 108 (Ark. 1993) (holding that the appointment of the Chief Justice of the Supreme Court to the Commission was a violation of the separation of powers).

If it were affirmed, the Circuit Court's holding that a proceeding held in Circuit Court pursuant to Rule 9 is an extension of the City's administrative procedures would effectively render the sections of Rule 9 pertaining to administrative appeals unconstitutional. Additionally, had Convent not brought its constitutional claims with its appeal, it may have lost the right to bring such claims later. The grant of judgment as a matter of law to Defendants and the dismissal of Convent's claims and denial of injunctive relief was contrary to law, clearly erroneous, and constitutes an abuse of discretion.

iv. While Plaintiff maintains that it has exhausted all remedies available at the administrative level, exhaustion of administrative remedies is not required prior to bringing claims pursuant to 42 U.S.C. § 1983 or the Arkansas Civil Rights Act.

"[E]xhaustion of remedies is not required under 42 U.S.C. Section 1983."

Mike Mosley, Assistant City Attorney, Motion Hearing, June 4, 2019. **AB 27; R. 567.** As the Assistant City Attorney admitted, in general, exhaustion of administrative remedies is not required prior to bringing an action under 42 U.S.C. § 1983. **R. 567.** It is also not required under the Arkansas Civil Rights Act. Ark. Code. Ann. § 16-123-101, *et.seq.* The U.S. Supreme Court "has stated categorically that exhaustion is not a prerequisite to an action under § 1983, and [the court has] not deviated from that position in the 19 years since *McNeese*." *Patsy v. Bd. of Regents*, 457 U.S. 496, 500-501, 102 S. Ct. 2557 (1982) (emphasis added). *See also, e.g., McNeese v. Board of Educ. for Community Unit School Dist*. 187, 373 U.S. 668, 83 S.Ct. 1433 (1963). The ability to bring federal constitutional claims without exhausting administrative remedies has also been recognized by the Arkansas Supreme Court.

> The United States Supreme Court has held that a litigant is not required to exhaust his or her administrative remedies before filing a civil rights action in federal courts. *Patsy v. Florida Bd. of Regents*, 457 U.S. 496, 73 L. Ed. 2d 172, 102 S. Ct. 2557 (1982); *McNeese v. Board of Educ.*, 373 U.S. 668, 10 L. Ed. 2d 622, 83 S. Ct. 1433 (1963) . In *Felder v. Casey*, 487 U.S. 131, 101 L. Ed. 2d 123, 108 S. Ct. 2302 (1988) , the United States Supreme Court extended this holding to civil rights actions that are filed in state courts.

Ford v. Arkansas Game & Fish Comm'n, 335 Ark. 245, 252, 979 S.W.2d 897 (1998).

Also, when actions are brought for violations of rights guaranteed by the Arkansas Constitution, exhaustion of administrative remedies is not required. *Harmon v. Jackson,* 547 S.W.3d 686, 689 (Ark. 2018). Furthermore, it is not necessary for a litigant to have exhausted available *postdeprivation* remedies when the litigant contends that he was entitled to *predeprivation* process. *Keating v. Nebraska Pub. Power Dist.*, 562 F.3d 923, 929 (8th Cir. 2009). See also *Zinermon v. Burch*, 494 U.S. 113, 132, 110 S. Ct. 975 (1990). Regardless, the City's admission in the Motion Hearing on June 4, 2019 (**AB 27;R. 567)**, is significant and establishes that Convent should have been permitted to pursue its claims under both the U.S. and Arkansas Constitutions.

v. The City failed to provide adequate notice, a meaningful hearing before an unbiased decision maker, or an opportunity to repair the property prior to seizure and condemnation of the property.

The extent to which due process rights are required in administrative proceedings is determined by a balancing approach. *Mathews v. Eldridge*. 424 U.S. 319, 96 S.Ct. 893, 47 L.ed. 2d 18 (1976). The Eldridge standard balances three factors: (1) the extent that private interests are affected in the proceeding; (2) the risk of wrongfully depriving a party of its interest under the current procedures along with the utility of additional procedures that could lessen this risk; and (3) the government's interest at stake, such as the administrative and financial burdens

imposed upon a public actor if additional procedures are incorporated. *Id*. at 334-35. These factors require a factual analysis and, thus, a case like this is not susceptible to a motion to dismiss. *City of Oakland v. Abend*, No. 3:07-cv-02142, 2007 U.S. Dist. LEXIS 53186, 24-25, 2007 WL 2023506 (N.D. Cal. 2007).

Real property ownership has substantial value to an individual under the first *Eldridge* factor. *United States v. James Daniel Good Real Property*, 510 U.S. 43, 53-54, 114 S.Ct. 492 (1993). In *Connecticut v. Doehr*, 501 U.S. 1, 11, 111 S.Ct. 2105 (1991), the Supreme Court described attachment interests on property to be "significant" in regards to how they affect private interests under Eldridge because attachments can result in great economic hardship to a property owner. The Court held that even where a decision does not amount to a complete, physical, or permanent deprivation of real property, due process concerns still exist. *Id.* at 12. Property nuisance cases require increased caution because destroyed property cannot be restored and the best evidence of whether the seizure was justified will have been demolished. *See* Alex Cameron, *Due Process and Local Administrative Hearings Regulating Public Nuisances: Analysis and Reform*, 43 St. Mary's L.J. 619 (2012). The demolition of one's property is a substantial private interest under the first *Eldridge* factor and, thus, determine that it warrants substantial protection for due process purposes.

The burden of holding a hearing where evidence could be presented and witnesses cross-examined is minimal when compared with the substantial constitutional rights at issue. Municipalities and administrative agencies at both the federal and state levels hold thousands of such hearings every day on a variety of issues across this country.[3]

In its Motion for Judgment on the Pleadings or, in the Alternative, Motion for Summary Judgment (**Add. 87-374; R 145-98)**, Convent conclusively demonstrated that there were no genuine issues of material fact by which the City could show that it provided adequate notice prior to seizing and condemning Convent's property, that it provided Convent with a meaningful opportunity to be heard and an unbiased decision maker prior to seizing and condemning its property, or that it provided Convent with an opportunity to repair the property prior to condemning the property.

[3] If courts were to adopt the City's argument that, because a person can file a case in court, a hearing is not required at the administrative level, hundreds of administrative hearing offices and operations in agencies at both the federal and state level could be dismantled. The very existence of these hearing offices in federal and state agencies is to provide the type of due process the City claims is unnecessary.

The City seized and condemned Plaintiff's property through a summary proceeding without providing any substantial due process, whatsoever. The City initially seized the property by red-tagging it with no prior notice. **Add. 257, R. 319.** The City failed to provide adequate notice of the alleged violations. **Add. 260; R 322.** The City refused to issue a permit to allow the owner to repair the property prior to condemnation. **Add. 162; R 221.** Plaintiff requested a full hearing and the ability to present evidence but the City steadfastly refused. **AB 1-5; Add. 261-63, 596-97; R 325-26, 707-12**. The City's code does not contain any provisions for a meaningful hearing with an unbiased decision maker, at any level, and the only avenue for appeal requires that the property owner initiate an action in state court after the property has been condemned. **Add. 182, 215, 231, 230-79, 264-313; R 241, 274, 290, 326-75.**

a. The City's seizure of Convent's property by red-tagging was without prior notice or hearing and was unreasonable.

Once the City red-tagged Convent's property a seizure occurred. Convent could no longer occupy, utilize, or repair the property. **Add. 162, R. 221.** "A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property," *Soldal v. Cook County, Ill.*, 506 U.S. 56, 113, S.Ct. 538 (1992); *Franklin v. State*, 267 Ark. 311, 590 S.W.2d 28 (1979). In another nuisance abatement case, the Arkansas Supreme Court held that a statute that authorized a temporary or permanent injunction without affording the

owners of a dance hall an opportunity for notice and a hearing violated the owners' due process rights under both the federal and Arkansas constitutions. *Franklin v. State*, 267 Ark. 311, 590 S.W.2d 28 (1979). In *Franklin*, the prosecuting attorney obtained an order requiring that the dance hall be temporarily padlocked. *Id*. at 312, 590 S.W.2d at 29. The temporary order was nailed to the door of the business. *Id.* The Court stated "the requirement of notice and an opportunity to be heard raised no impenetrable barrier to the taking of a person's property. Such safeguards are necessary to avoid unfair or mistaken deprivation of property interest." *Id.* at 315, 590 S.W.2d at 30. In *Franklin,* the Arkansas Supreme Court stated that notice and hearing should "precede" any property deprivation. *Id. See also, Zinermon v. Burch*, 494 U.S. 113, 132, 110 S. Ct. 975, 108 L. Ed. 2d 100 (1990). "The availability of *post-deprivation* remedies is not a defense to the denial of procedural due process where *predeprivation* process is practicable." *Westborough Mall, Inc. v. City of Cape Girardeau*, 794 F.2d 330, 337 (8th Cir. 1986). Because the red-tagging of its building was a seizure, Convent was entitled to the protections of the Fourth Amendment to the U.S. Constitution and Article 2, section 15 of the Arkansas Constitution.

City of Little Rock v. Alexander Apartments, LLC, 2020 Ark. 12, is a very recent case where the Arkansas Supreme Court addressed the issue of due process rights involving municipal actions relating to property interests. In that case, the

City's fire chief issued an order requiring the apartment complex to cease operations and requiring the tenants to vacate. *Id.* at 9. The actions taken by municipal officials in both *Franklin* and *Alexander Apartments* are very similar to the case at bar where the City red-tagged Convent's property preventing its occupancy, use or repair. The Supreme Court upheld judgment as a matter of law against the City affirming the Circuit Court's holding that the City violated the Apartment company's rights to due process under the Arkansas Constitution by taking their property without adequate notice and opportunity to be heard. *Id.* at 5, 9.

Significantly, the Supreme Court rejected the City's claim that an emergency situation rendered any *predeprivation* hearing impractical or impossible because the order did not mandate the closure until twelve days later. *Id.* at 11, The Court noted that "[t]he urgent situation described by the City was belied by its own delay." Likewise, in the case at bar, the City cannot argue that an emergency prevented a *predeprivation* hearing because they waited more than 6 years after the Resolution permitting it to demolish the structure was enacted to demolish it. *See* **AB** 27; **R. 569**

b. The City failed to provide any notice, prior to the seizure of Convent's property and failed to provide notice of specific violations or rights to appeal prior to condemnation of the property.

To satisfy the requirements of due process, notice must convey the required information. *Mullane v. Cent. Hanover Bank & Trust Co*., 339 U.S. 306, 314, 70

S. Ct. 652 (1950). **Notice must provide a party with sufficient information to make informed decisions as to how to proceed in order to protect his property interest.** *See Grayden v. Rhodes*, 345 F.3d 1225, 1242 (11th Cir. Fla. 2003)(citing *Mullane*, 393 U.S. at 314, 70 S. Ct. at 657). "The right to be heard has little reality or worth unless one . . . can choose for himself whether to appear or default, acquiesce or contest." *Id.*. **Notice must "set forth the alleged misconduct with particularity**." *In re Gault*, 387 U.S. 1, 33, 87 S. Ct. 1428 (1967)(emphasis added). S*ee also Bliek v. Palmer*, 102 F.3d 1472, 1475 (8th Cir. 1997). Where Notice fails to advise of the specific violations so that a party may prepare for a hearing, appearance does not cure inadequate notice. *In re Gault*, 387 U.S. at 33.

To be adequate, notice should also advise the party of procedures to appeal an adverse decision. *See Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 14-16, 56 L. Ed. 2d 30 (1978). The Eleventh Circuit has addressed this requirement specifically in the context of condemnation proceedings:

> To include a one-sentence statement of a tenant's right to appeal the condemnation order in this notice to vacate would not be burdensome. In fact, Rhodes testified that the City amended its standard eviction notice to include a statement regarding the tenants' right to appeal the condemnation order, which suggests that the fiscal and administrative burden of such notice is not prohibitive.

Grayden v. Rhodes, 345 F.3d at 1236. Notice must be executed in a reasonable manner to adequately inform the parties of proceedings that may affect their legal rights. *Armstrong v. Manzo*, 380 U.S. at 550.

The general rule is stated thus in Charles S. Rhyne, *Municipal* Law, 559 (1957).

> Except in clear cases of emergency, a prior notice and a reasonable opportunity to be heard is required to be given to a property owner before attributing legal effectiveness to any order to demolish, repair, alter or improve a substandard building. The owner should also be **apprised of the defects in his building** to give him an opportunity to remedy them. * * *" See also 14 A.L.R.2d annotation, supra, p. 74 ff.; 16A C.J.S. Constitutional Law § 645, p. 913.

As quoted in *Albert v. Mountain Home*, 81 Idaho 74, 80-81, 337 P.2d 377 (Idaho 1959)(emphasis added).

Considering the City's condemnation procedure, notice of the right to appeal is especially important. Many of the property owners whose properties are condemned lack the knowledge or resources to initiate court action. Most are unlikely to be aware of the requirements of District Court Rule 9, including the provision that an appeal must be filed within thirty days. Additionally, the requirement of the submission and approval of a rehabilitation plan means that some property owners may not even consider their options for filing an appeal until a submitted plan has been denied. It is likely this process would take more than thirty days.

Notice should contain both a list of specific violations or conditions and information about rights to appeal. The Notice provided in this case contains neither. Without knowing what violations had been alleged, Convent could not

adequately prepare for a hearing, had one been provided. Notice was inadequate and these inadequacies could not be cured by appearance. Appellant had been told that it would be permitted to speak for three minutes before the City Council. **Add. 182, R. 241,** Convent's counsel appeared for the limited purpose of asking for a full and fair hearing or the issuance of a permit to repair the property. Because Convent had not been provided with a list of specific violations, it could not adequately prepare to present its case.

c. **The City never afforded Convent an opportunity to repair its property prior to seizure and condemnation.**

Many state's courts have considered this issue and determined that a property owner is entitled to repair his property before an order for demolition is issued. *City of Aurora v. Meyer*, 230 N.E.2d 200, 38 Ill.2d 131 (Ill. 1967); *See also, e.g., City of Safford v. Seale*, No. 2 CA-CV 2008-0185, 2009 WL 3390172, 3 (Ariz. Ct. App. 2009); *Hawthorne Savings & Loan Ass'n v. City of Signal Hill*, 19 Cal.App.4th 148, 23 Cal.Rptr.2d 272 (1993); *Miles v. District of Columbia*, 354 F.Supp. 577 (D. D.C. 1973); *Horne v. City of Cordello*, 230 S.E.2d 333, 140 Ga.App. 127 (1976)(any ordinance which authorizes demolition of a structure without first allowing opportunity to repair is unconstitutional and void); V*illage of Lake Villa v. Stokovich*, 211 Ill. 2d 106, 810 N.E.2d 13, 284 Ill.Dec. 360 (Ill. 2004); *Nazworthy v. City of Sullivan*, 55 Ill. App. 48, 52 (1893); *Washington v. City of Winchester*, 861 S.W.2d 125 (Ky.App.1993) *Polsgrove v. Moss*, 157 S.W. 1133, 1136 (Ky.

1913); *Horton v. Gulledge*, 277 N.C. 353, 177 S.E.2d 885 (1970) (overruled on other grounds); *Herrit v.Code Management Appeal Board*, 704 A.2d 186 (Pa.Commw.1997); *Newton v. Highland Park*, 282 S.W.2d 266 (Tex.App. 1955); *West v. City of Borger*, 309 S.W.2d 250, 253 (Tex.App. 1958). Courts have disfavored decisions that issue an order for demolition without any kind of relief afforded to a property owner prior to the order. This treatment is in congruity with the first Eldridge factor, which considers the gravity of potential loss to an individual. *Mathews*, 424 U.S. at 334-35. Ordering demolition without any kind of relief prior to the order is a harsh remedy and has due process implications associated with it.

Convent informed the council prior to the condemnation vote that it wanted to rehab the property and had prepared to do so. **Add. 596-98; R. 707-09; Add. 314-27; R. 376-89.** The Council refused to permit Convent to make repairs (**Add. 162, R. 221)** and the Code and the City's procedure are designed to only permit a property owner to repair property only after a condemnation resolution that requires the property be demolished and only under a rehab agreement which requires a substantial bond. The City has some history of approving such agreements only later to order that work be stopped and the property be demolished. *Talley v. City of North Little Rock*, 2009 Ark. 601, 381 S.W.3d 753 (2009). The *Talley* case indicates it

would have been foolhardy for Convent to expend resources to repair the property while the Resolution ordering its destruction was still in effect.

Even though the City says it will consider a rehab plan, the City's Code does not provide for such plan and does not provide any standards to guide a decision maker in determining whether such plan should be approved or for evaluating compliance with the plan. The approval of such a plan is left completely to the whim of elected officials who are influenced by political and other considerations. Given the animosity of the City to this property which is related to its history, In fact, based on the *Talley* case (2009 Ark. 601, 381 S.W.3d 753), Convent had reason to be concerned that the City may proceed to demolish the property even after a rehabilitation plan had been approved. Convent had no reason to believe a rehab plan would be approved or that any council member would even sponsor it, no standards to guide it in preparation of such a plan, and no way to know if the City may proceed to demolish the property anyway. Furthermore, in this particular case, counsel for Convent contacted the city attorney's office after the condemnation to discuss a plan to repair the property. The deputy city attorney didn't want to talk about it and said the City would not set aside the condemnation order under a rehabilitation plan. **Add. 1207, R. pt 3, 72.**

The fact is, the Resolution condemning the property states that the structure must be razed and or removed and makes no provisions for a rehabilitation plan.

Add. 46, R. 92. Section 1.7.4 of the City's ordinance states that "[c]ondemned structures shall be destroyed and removed from the premises." **Add. 277, R 330.** There is no provision for any plan to repair the property.

The Georgia Supreme Court faced a very similar ordinance as the one at issue in this matter:

> [Y]et, where, as here, the ordinance seeks to prevent the owner from repairing his property pending the outcome of the abatement proceedings, which he alleges is a sham and will only judge him guilty of refusing to abate the nuisance after the finding by other officials, without notice and a hearing, to be a nuisance, it in effect seeks to condemn his property by preventing him from remedying the nuisance situation so found, and to so declare it a nuisance by ordering him 'to demolish the structure within 60 days,' without a judicial hearing of the existence of a nuisance . . ., and preventing him by ordinance from repairing or improving same by denying him building permits for that purpose after so finding a nuisance without notice and a hearing. The effect of said ordinance and the application thereof here alleged is to take from the plaintiff his property, not through eminent domain but by crushing him between the 'bureaucratic rocks' by denying him a right to rebuild under the zoning code and requiring him to demolish under the slum clearance code. If the city desires him to demolish the property without giving him the right to correct any and all deficiencies found in a judicial hearing of whether or not a nuisance exists . . ., then let the property be condemned and pay him for it, but not through indirect means prevent him from abating an alleged nuisance before a trial thereon. The ordinance by thus placing him in a position of demolishing the property as his only means of abating the alleged nuisance is unconstitutional, null and void.

Shaffer v. City of Atlanta, 154 S.E.2d 241, 223 Ga. 249 (Ga. 1967). Neither the Resolution nor the Ordinance at issue in this matter provide an opportunity for the property owner to repair the property prior to condemnation and the Ordinance

requires that the property be demolished. Therefore, as in *Shaffer*, both are unconstitutional. And, regardless of whether a *post-condemnation* rehabilitation plan was a realistic option, the City was required to provide *pre-deprivation* due process.

d. The City failed to provide a meaningful hearing at which Convent could confront and cross examine witnesses prior to the seizure and condemnation of Convent's property.

"[R]emember we're a legislative body, not a judicial body so we're not hear to – to hear cases. That's what the court system is for."

Mayor Smith during City Council Meeting on February 25, 2013. **Add. 597. R. 708**.

To satisfy the requirements of due process, a party must be afforded a "meaningful opportunity to be heard" and this opportunity is generally required prior to a deprivation of property. *See, e.g., United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 53, 114 S.Ct. 492 (1993); *Fuentes v. Shevin*, 407 U.S. 67, 80, 92 S.Ct. 1983 (1972). *Post-deprivation* process is only justified in "extraordinary situations." *James Daniel Good*, 510 U.S. at 53. Prior to the seizure of private property, a hearing "must be granted at a meaningful time and in a meaningful manner." *Fuentes*, 407 U.S. at 80 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187 (1965)).

> If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented. At a later hearing, an individual's possessions can be returned to him if they were unfairly or mistakenly taken in the first

> place. Damages may even be awarded to him for the wrongful deprivation. But **no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred. "This Court has not . . . embraced the general proposition that a wrong may be done if it can be undone." *Stanley* v. *Illinois*, 405 U.S. 645, 647. This is no new principle of constitutional law. The right to a prior hearing has long been recognized by this Court under the Fourteenth and Fifth Amendments.**

Fuentes, 407 U.S. at 80-82 (emphasis added). *See also Matthews*, 424 U.S. at 333.

Arkansas courts have held that due process requires "a full and fair hearing, including the right to submit evidence and testimony, to examine witnesses, and an opportunity to present evidence or testimony in rebuttal to adverse positions." *Harness v. Arkansas PSC*, 60 Ark. App. 265, 271 (1998) (citing *Arkansas Elec. Energy Consumers v. Arkansas Pub. Serv. Comm'n*, 35 Ark. App. 47 (1991)). Crucial due process components in light of the second Eldridge factor include affording property owners multiple opportunities to confront the issues charged against them for the condition of their properties and providing property owners with the opportunity to present their case. *See, e.g., James Daniel Good*, 510 U.S. at 48, 53-56. The right to cross-examine witnesses is regarded as substantial in connection with examining the entire scope of evidence and making a complete inquiry into the truth. Where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses. *See, e.g. Goldberg v. Kelly*, 397 U.S. 254,

269, 90 S.Ct. 1011 (1970**).** Rulings based on expedited summary hearings that offer scant evidence of their respective decisions fall short of due process requirements.

Indeed, Appellant submits that the City's policy of condemning properties without considering any substantial evidence or testimony poses a substantial and unacceptable risk of erroneous deprivation. This is especially true considering that many of the affected property owners lack the knowledge and resources to fully protect their interests. Furthermore, the burden on the City to conduct a hearing would be minimal.

The City simply cannot credibly claim that this was an extraordinary situation in which it could not reasonably provide meaningful *predeprivation* process. Indeed, the reason given by the Mayor at the Council meeting for the denial of Plaintiff's request for a full hearing had nothing to do with the exigency of the situation. Instead, the Mayor said that a hearing would not be granted because the Council was a legislative body and did not conduct those types of hearings. **Add. 597. R. 708.** Even though Convent filed a written motion seeking a hearing (**Add. 74, R. 121)**, the City steadfastly refused to provide a *predeprivation* hearing.

As further evidence of the lack of exigency here is the fact that the City did not act for more than 6 years after the resolution authorizing the destruction of the property to actually tear down the structure. If the City believed the structure posed an imminent threat to anyone, would they have permitted that threat to remain for 6 additional years?

In condemnation proceedings in the City of North Little Rock, no hearing is provided prior to seizure of the property. The only process afforded to a property owner is an appearance which, according to the council agenda, is limited to three minutes. **Add. 645, R. 756.** At these "public hearings," no witnesses testify, there is no opportunity to cross examine witnesses, and the only evidence presented is the limited code enforcement file, which contains no information regarding specific code violations, and recommendation. *See* **Add. 596-601; R. 707-12.** This is hardly the type of due process hearing that satisfied constitutional standards when the City is substantially interfering with private property rights.

The admission by the Mayor that the City Council does not hold hearings (**Add. 597. R. 708)** and other comments on the part of the Mayor demonstrates what the City has repeatedly argued, that it believes it is not obligated to provide due process in nuisance abatement actions because a property owner can file an action in circuit court.

e. Convent was entitled to a *predeprivation* hearing before an <u>unbiased</u> decision maker.

The United States Supreme Court has declared that in an administrative hearing, the right to a hearing before a neutral decision maker is essential. *Goldberg v. Kelly*, 397 U.S. 254, 271, 90 S.Ct. 1011 (1970). Because certain procedural safeguards are commonly absent from administrative proceedings, the bias requirement should be applied with greater force. *Ventura v. Shalala*, 55 F.3d 900,

902 (3d Cir. 1995). The purpose of an adversary hearing is to ensure the requisite neutrality that must inform all governmental decision-making. *James Daniel Good*, 510 U.S. at 55. The deciding officers must be "independent and objective-inwardly free from influences of . . . partisan or popular bias, and outwardly free from external direction by political" influences. Kramer, *supra* at 8.

In Arkansas, administrative boards and commissions are subject to the "appearance of bias standard." *Acme Brick Co. v. Missouri Pacific R. Co.*, 307 Ark. 363, 821 S.W.2d 7, 10 (1991). *See also Arkansas Racing Comm'n, v. Emprise Corp.*, 254 Ark. 975, 497 S.W.2d 34 (1973).

The "public hearing" as interpreted by the City in its practices, is conducted by the city council and they are the decision makers. The Council members are politically elected and, as such, have a significant interest in pleasing their constituents. In fact, it is to be expected that the interest in pleasing voters will outweigh any interests in providing a fair and just adjudication to the property owner. Judges refrain from discussing cases before them with outside parties and it would certainly be inappropriate be a judge to be influenced by such conversations. However, City council members hear complaints from and discuss properties with citizens. And, they may be influenced by such discussions. This fact was illustrated in the case involving Appellant's property in which one of the council members

stated that the neighborhood association wanted the structure demolished. **Add. 598, R. 709.** *See also* **Add. 175-77, R 234-36.;**

The proposed Resolution is sponsored by and signed by the Mayor. The Mayor also presides over the proceeding. The Mayor and Council members are all elected officials and are subject to political pressures and influences. Questions were also asked regarding the intended use of the property. **Add. 598, R. 709.** These questions were likely related to the prior use of the property and signaled that, at least this council member had no intention of permitting the structure to be repaired. During the Council meeting at which the property was condemned, it was apparent that none of the Council members were interested in hearing any evidence. **Add. 596-601; R. 707-12.** It was apparent that their minds were made up and nothing was going to change them.

A decision of this magnitude that greatly infringes on private property rights should be made based on the evidence presented regarding the condition of the property, not on political considerations. City council members often will have other influences and motives for wanting a property condemned and there is a significant risk that a property owner will be deprived of a fair and just adjudication when the decision makers have such biases. The fact that the ordinance fails to provide for an unbiased decision maker means that it fails to provide adequate due process protections and is, therefore, unconstitutional.

D. Denial of Convent's Petition for Declaratory Judgment (Add. 779, R. part 3, 74).

i. The City's ordinance contains important and material terms which are undefined and unconstitutionally vague.

A denial of a declaratory judgment is reviewed under the clearly erroneous standard while issues of statutory construction are reviewed *de novo*. *Haile v. Jonston*, 482 S.W.3d 323, 325 (2016). A vague statute violates the first essential of due process. *Connally v. General Constr. Co*.,269 U.S. 385, 391, 46 S.Ct. 126 (1926)). The long-established "law of the land" is that that "no one [could] be taken by surprise" by having to "answer in court for what [one] has not been warned to answer". *Goldington v. Bassingburn*, Y.B. Trin. 3 Edw. II, f. 27b (1310)(as cited in S*essions v. Dimaya*, 138 S. Ct. 1204, 200 L.Ed.2d 549 (2018)).

Appellant contends that the term, "public hearing" is defined by the City's practices. However, if the City were to disagree with this definition, then alternatively, it would appear that the provision was vague. The "public hearing" requirement contains extremely vague language. It requires that the "public hearing" include findings that the structures are "unfit for human occupancy, or otherwise detrimental to the life, property or safety of the public." Aside from the lack of clarity or specificity in the terms themselves, the ordinance does not provide any direction or standards, and is therefore vague as to how these determinations are to be made and on what types of information or evidence such determinations should

be based. The vague terms do not provide any standards or guidance in interpreting and applying these very broad and generalized terms.

Starting with "unfit for human habitation." The Mayor and City Council members were asked to define "not fit for human habitation" in interrogatories. **Add. 185-94, R. 244-52; Add. 216-17, R. 275-76**. Mayor Smith's response was "See "dangerous" and "unsafe." For "Unsafe" he said "See 'dangerous.'" For dangerous, he responded: "Means for someone or something that is not familiar with the property that could allow them to wander onto or into the property and become injured." Apparently, a person's familiarity with the property somehow impacts whether it is fit for human habitation?

The definitions provided by council members vary from "can't safely live in" to not able to be safe, to unlivable, to "extreme disrepair, to "Dirty, to "unhealthy, unsafe, not a good place." And, as previously mentioned, the mayor factors in familiarity with the property. None of these definitions provide any significantly clarity and demonstrate how utterly standard less this provision is. In the absence of any standards, this provision vests absolute and total discretion with the Council. This type of unfettered discretion cannot pass constitutional muster.

The ordinance also contains the language "detrimental to the life, property, or safety of the public." The Mayor and council members were not asked to define this specific language. **Add. 185-94, R. 244-52; Add. 216-17, R. 275-76**. The language

they were asked to define was based on the language in the Resolution concerning Plaintiff's property. However, one of the terms in the Resolution is very analogous to this language: "Detrimental to public welfare." Again, the Mayor responded: See 'dangerous, 'unsafe,' and 'not fit for human habitation.'" Exhibit E. So, again, he links familiarity with the property to the issue. Again, the responses from other council members vary significantly, with some merely relying on broad generalizations such as the impact on the community, jeopardy to the general public, or circling back to terms such as unsafe. One indicated that his definition was about criminality and property values. So, that begs the question: is this language about safety issues, crime, property values, the overall impact on the community. One might argue that it involves all of these issues but, if that is the case, why didn't the council members answers more closely resemble that idea. One council member reads that provision and is concerned about property values while another is concerned about safety. This demonstrates that the provision is overly vague and standard less. Again, it vests too much discretion in the council members as each is free to interpret the provision in a wide range of different ways.

Another issue that makes this ordinance vague is simply that it seems to require every structure in the city to be "fit for human occupancy." Section 1.7.1. Certainly, there are many structures within the City which are not meant for human occupancy, garages, storage buildings, etc. Must each one of these structures be "fit

for human occupancy?" Does this mean such structures as a backyard storage shed must have plumbing and electricity. A plain reading of the code would seem to suggest so.

The Code is also vague with regard to its notice provisions. Section 1.7.3 states that "[t]he Code Enforcement Department shall be responsible for publication, mailing or delivery of all notices required to condemn structures." Yet, the code does not specify exactly what notices are required to condemn structures. The ordinance simply refers to "notice of any proposed condemnation." The Code does not insure proper notice is provided.

ii. **Because it is vague and not sufficiently specific, the City's ordinance provides public officials with too much discretion and is, therefore, unconstitutional.**

Vague laws invite arbitrary power by investing excessive discretion in public officials. As the U.S. Supreme Court has recognized, government officials cannot always be trusted to safeguard the rights of the people and they should not be left with too much discretion. *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004). "Vague standards are manipulable." *Id*. If arbitrary and discriminatory enforcement are to be prevented, laws must provide explicit standards for those who apply them. *E.g., Sessions v. Dimaya*, 138 S.Ct. 1204 (2018). A vague law impermissibly delegates matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and

discriminatory applications. *Id*. "[A] statute must not be so vague and standardless that it leaves judges free to decide, without any legally fixed standards, what is prohibited and what is not on a case-by-case basis. *Arkansas Tobacco Control Bd. v. Sitton*, 357 Ark. 357, 166 S.W.3d 550 (2004).

The arbitrary enforcement branch of the vagueness doctrine "is focused on the conduct of regulators—specifically, unguided discretion within the process of lawmaking and law enforcement." *United States v. Davis*, No. 07-1964 (6th Cir. 12/19/2008). Where a law is so vague or so standard less that it invites arbitrary enforcement, the statute or ordinance violates the Fifth Amendment. *Johnson v. United States*, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015) (citing *Kolender v. Lawson*, 461 U.S. 352, 357–358, 103 S.Ct. 1855 (1983); *see also Sessions*, 138 S. Ct. 1204. The U.S. Supreme Court has found statutes to be insufficient that used the words "credible and reliable," *Kolender*, at 358., "criminal street gang members," and "loitering." *City of Chicago v. Morales*, 527 U.S. 41, 119 S.Ct. 1849 (1999). The Arkansas Supreme Court took issue with terms such as "trade discounts" and "rebates" in a statute related to the sale of tobacco. *Sitton*, 357 Ark. 357, 166 S.W.3d 550. *See also Meade v. Richardson Fuel, Inc.*, 357 Ark. 357, 166 S.W. 3d 55 (2005). The vague and standard less terms in the City's ordinance leave council members with almost unfettered discretion in deciding whether a property is a nuisance and the ordinance invites arbitrary enforcement.

E. The City's ordinance results in Bills of Attainder and the Resolution regarding Plaintiff's property is a Bill of Attainder.

Article I, § 10 of the United States Constitution states that no state shall pass any "Bill of Attainder." A bill of attainder is a law that legislatively determines guilt and inflicts punishment without provision of the protections of a judicial trial. *United States v. Brown*, 381 U.S. 437, 448-49, 85 S.Ct. 1707 (1965). Additionally, a law that permits a conviction with less evidence than would otherwise be required may be a bill of attainder: *Carmell v. Texas*, 529 US 513; 120 S. Ct. 1620, 146 L. Ed. 2d 577 (2000). A bill of attainder may affect the life of an individual, or may confiscate his property, or do both. *Brown*, 381 U.S. at 447, S.Ct. 1707. A municipal ordinance may be a bill of attainder. *See Crain v. City of Mountain Home*, 511 F.2d 726 (8th Cir. 1979).

The City's condemnation code permits the City to enact unconstitutional Bills of Attainder, in part, because it permits the City Council, a legislative body, to inflict punishment in the absence of any judicial proceedings.

> 1.7.1 Keeping condemned structures prohibited. It shall be unlawful for any person to own, keep, or maintain any structure within the corporate limits of the city which is condemned by resolution of the city council.
>
> . . . .
>
> 1.7.7 Penalty for violation of article. A penalty as provided by this Code is hereby imposed against the owners of any structure condemned by resolution of the City Council thirty (30) days after such structure has been condemned; and each day thereafter such nuisance be not abated constitutes a separate and distinct offense, provided the

> notice as provided in subsection 1.7.3.2 has been given within ten (10) calendar days after such structure has been condemned.

Add. 276, R. 338.

Nothing in these sections, nor anywhere else in the condemnation code provides for trial. Section 1.7.7 states explicitly that the penalty "is hereby imposed." It does not say that it will be imposed at a later time or following any judicial proceeding. Nor does the Resolution enacted by the Council. **Add. 45-46; R 91-92.** The Resolution states that each day, after the initial ninety (90) days "shall constitute a separate and distinct offense." The implication is that the punishment is automatic.

Because the offense is "[k]eeping a condemned structure . . .," even if a property owner were provided a trial in district court, he would be found guilty simply because the City Council passed a resolution to condemn the property. The issue is not whether the property is actually nuisance, simply whether it was condemned by the city council. A conviction would be practically automatic, based only on the fact that the City Council passed a resolution. Once the council passes the resolution, the issue of whether the property is actually a nuisance becomes irrelevant. Any trial in district court would merely be a formality. There is no provision for a trial on the underlying issue as to whether the property was, in fact, a nuisance. A property owner would be convicted solely because the City Council passed a resolution without ever having had any type of trial, meaningful hearing, or

any other opportunity to meaningfully contest the Council's action. A conviction would likely occur even in a case where there was no evidence the property was a nuisance. As the Supreme Court noted in *Brown*, this type of "accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." *Id.* at 443, 85 S.Ct. 1707 (quoting from The Federalist, No. 47, pp. 373—374 (Hamilton ed. 1880)).

The City's statutory scheme meets all the elements of a bill of attainder. The resolution passed by the City Council is directed at the property owner and therefore, it specifies the affected persons. First, the resolution deprives the property owner of the property by ordering that the building be demolished. Second, the passing of the resolution permits the City to charge the property owner with a criminal offense and impose substantial fines. Third, the scheme fails to provide for a judicial trial on the underlying issue of whether the building in question was a nuisance. While the property owner may appear in district court and contest the charge, once the resolution is passed, the owner will, almost certainly, be deemed guilty of violating the ordinance that prohibits keeping a condemned structure without ever being provided with a meaningful hearing on the question of whether, in fact, the property in question is actually a nuisance. This exactly the type of situation the Bill of Attainder Clause was intended to prohibit.

F. Convent's Renewed Motion to Strike Amended Answer and Affirmative Defenses (Add. 798, R. part 3, 96; See also Add 1173, R. 770) should have been granted.

The denial of a motion to strike is reviewed under the abuse of discretion standard. *See Maple Leaf Canvas, Inc. v. Rogers*, 311 Ark. 171, 842 S.W.2d 22 (1992). Appellant filed its initial Motion to Strike Defendants' Amended Answer and Affirmative Defenses on June 23, 2014 because Defendants failed to timely file an Answer after the case was remanded from federal court as required by Rule 12(a)(3) of the Arkansas Rules of Civil Procedure. **Add. 1173**, **R. 770.** The Circuit Court did not rule on that Motion prior to dismissing Convent's constitutional claims. After the second remand from the Supreme Court, Convent filed an Amended and Reinstated Petition for Declaratory Judgment and filed a renewed Motion to Strike Amended Answer and Affirmative Defenses. **Add. 798, R. part 3, pg. 96.** The Circuit Court denied this Motion holding that the motion was moot because Defendant's timely filed an answer to Covent's Amended and Reinstated Petition for Declaratory Judgment. **Add. 829, R. pt 3, pg. 200.**

Instead of dismissing Convent's constitutional claims, the court should have granted Convent's Motion to Strike. **Add. 1173**, **R. 770.** Furthermore, Convent only reinstated its Petition for Declaratory Judgment (**Add. 779, R. part 3, pg. 1)** and Defendants only answered to this reinstated Petition. **Add. 785, R. part 3, pg. 80.** Defendants never filed a timely answer to Convent's constitutional claims that

were dismissed by the Circuit Court. Therefore, the court should have granted Convent's initial Motion to Strike Amended Answer and Affirmative Defenses.

VIII. CONCLUSION

The City has admitted that "exhaustion of remedies is not required under 42 U.S.C. Section 1983" **AB 27; R. 567:**

"[E]xhaustion of remedies is not required under 42 U.S.C. Section 1983."

Mike Mosley, Assistant City Attorney, Motion Hearing, June 4, 2019. **AB 27; R. 567.** Therefore, the circuit court's dismissal of Convent's constitutional claims on that basis was clearly in error.

The Mayor made an admission during the city council meeting that the City does not provide a hearing in these cases:

> ***"[R]emember we're a legislative body, not a judicial body so we're not hear to – to hear cases. That's what the court system is for."***

Add. 597. R. 708. The Mayor's statement goes to the heart of this case. It demonstrates, and the City has argued, that the City believes it is not required to provide due process in nuisance abatement / condemnation cases because a property owner may file a case in circuit court. Based on this belief, the City fails to provide any notice prior to seizing properties by red-tagging, does not provide notice of code violations or required repairs, does not provide a meaningful hearing with an unbiased decision maker, and does not provide any opportunity to repair the property

prior to condemnation. Specifically, on the issue of repairs, the City, through its City attorney's office adnitted that

"since the structure has been Red-Tagged no construction or remodeling permits should be issued at this time without approval of City Council."

Add. 162, R. 221. The City's Code and its practices and procedures fail to provide due process as required by both the U.S. and Arkansas Constitutions.

Appellant asserts that the Court should reverse the Circuit Court's finding that there was substantial evidence to support the City's condemnation of Appellant's property, reverse the Circuit Court's grant of judgment as a matter of law dismissing it's constitutional claims, reverse the Circuit Court's denial of Appellant's Petition for Declaratory Judgment, find that the City's condemnation ordinance is unconstitutional because it fails to provide adequate due process, is impermissibly vague and that it permits the City to issue Bills of Attainder, and reverse the Circuit Court's denial of Appellant's Motion to Strike Amended Answer and Affirmative Defenses.

Respectfully submitted,
/s/*Mickey Stevens*
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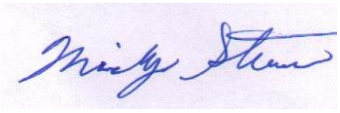
IX. CERTIFICATE OF SERVICE

I hereby certify that I served a copy of Appellant's Brief by personal delivery to Marie Bernarde Miller, Assistant City Attorney, North Little Rock, Arkansas on this _____day of October, 2020 A copy has also been delivered to the Circuit Court on the same date.



_____

Mickey Stevens

IN THE
SUPREME COURT OF ARKANSAS

CONVENT CORPORATION, Individually and on Behalf of all Others Similarly Situated	**APPELLANT**
v.	**NO. CV-20-216**
CITY OF NORTH LITTLE ROCK ARKANSAS, a Municipal Corporation, JOE SMITH, Mayor, Individually and in his Official Capacity, City Council Members DEBI ROSS, BETH WHITE, LINDA ROBINSON, MAURICE TAYLOR, STEVE BAXTER, BRUCE FOUTCH, MURRY WITCHER, and CHARLIE HIGHT, each Individually and in his or her Official Capacity, TOM WADLEY, Director, Code Enforcement Division, Individually and in his Official Capacity, and FELECIA MCHENRY, Code Enforcement Officer, Individually and in her Official Capacity	**APPELLEES**

ON APPEAL FROM THE CIRCUIT COURT
OF PULASKI COUNTY

THE HONORABLE ALICE GRAY, CIRCUIT JUDGE

APPELLANT'S ADDENDUM

Vol. 1 of 5

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Volume III

**Note: The record prior to this point was initially prepared for a prior appeal. The record page references from this point forward are from the additional record prepared for the second appeal (pt. 2).*

Volume IV

**Note: The record page references from this point forward are from the additional record prepared for this appeal (pt. 3).*

Volume V

The following are from the first part of the record.

The following is from the third part of the record.

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS,
_____ DIVISION

CONVENT CORPORATION,
Individually and on Behalf of all
Others Similarly Situated — **PLAINTIFF**

v. **NO. _____**

CITY OF NORTH LITTLE ROCK, ARKANSAS, a Municipal Corporation, JOE SMITH, Mayor, Individually and in his Official Capacity, City Council Members DEBI ROSS, BETH WHITE, LINDA ROBINSON, MAURICE TAYLOR, STEVE BAXTER, BRUCE FOUTCH, MURRY WITCHER, and CHARLIE HIGHT, each Individually and in his or her Official Capacity, TOM WADLEY, Director, Code Enforcement Division, Individually and in his Official Capacity, and FELECIA MCHENRY, Code Enforcement Officer, Individually and in her Official Capacity — **DEFENDANTS**

VERIFIED COMPLAINT FOR INJUNCTIVE RELIEF, DELCARATORY JUDGMENT, AND DAMAGES

COMES NOW the Plaintiff, Convent Corporation, by and through its attorney, Mickey Stevens, and for its Complaint against Defendants, states:

1. Pursuant to District Court Rule 9, Plaintiff Convent Corporation appeals a decision of the North Little Rock City Council condemning Plaintiff's property located at 6615 Highway 70 in North Little Rock, Pulaski County, Arkansas.

2. Plaintiff also brings claims against Defendants pursuant 42 U.S.C. §§ 1983, 1985(3) 1986 and 1988 and the Arkansas Civil Rights Act, Ark. Code Ann. § 16-123-101, *et.seq.*, for violations of the Fifth, Fourth, and Fourteenth Amendments to the United States Constitution, Article 2, Sections 15 and 22, and a common law claim of Trespass.

3. Plaintiff seeks a declaratory judgment that the City's ordinance relating to condemnation proceedings (*Exhibit A: Chapter 8, Article 1, Section 7 of the City's Code*) is unconstitutional and is, therefore, invalid.

4. Plaintiff seeks an injunction pursuant to Ark. Code Ann. § 16-113-301, *et. seq.*, and Rule 65 of the Arkansas Rules of Civil Procedure to enjoin Defendants from destroying or otherwise molesting or interfering with Plaintiffs use of the property located at 6615 Highway 70 in North Little Rock, Pulaski County, Arkansas during the pendency of this action.

5. Plaintiff seeks an injunction pursuant to Ark. Code Ann., § 16-113-301, *et. seq.*, and Rule 65 of the Arkansas Rules of Civil Procedure to enjoin Defendants. from destroying any property that has been condemned pursuant to Chapter 8, Article 1, Section 7 of City's Code (Condemnation), from condemning any additional property or otherwise enforcing Article 1, Section 7 of the City's Code, or taking any action to file or collect liens for the demolition of properties during the pendency of this action.

THE PARTIES

6. Convent Corporation is a corporation organized under the laws of the State of Arkansas with its principal place of business in Pulaski County, Arkansas.

7. The City Defendant is a municipal corporation organized under the laws of the State of Arkansas.

8. Debi Ross, Beth White, Linda Robinson, Maurice Taylor, Steve Baxter, Bruce Foutch, Murry Witcher, and Charlie Hight are all elected members of the North Little Rock City Council and, upon information and belief, are all residents of North Little Rock.

9. Tom Wadley is the Director of the City's Code Enforcement Division and, upon information and belief, is a resident of North Little Rock.

10. Felecia McHenry is a Code Enforcement Officer employed in the City's Code Enforcement Division and, upon information and belief, is a resident of North Little Rock.

CLASS ACTION ALLEGATIONS

11. Plaintiff brings this action pursuant to Arkansas Rule of Civil Procedure 24 on its own behalf and on behalf of all persons similarly situated.

12. The class that plaintiff represents is comprised of the following persons: All owners of property within the City of North Little Rock whose property has been condemned pursuant to the Chapter 8, Article 1, Section 7 of the City's Code without being afforded a full due process hearing or an opportunity to repair the property prior to condemnation within the five (5) year period preceding the filing of this action.

13. The persons in this class are so numerous that joinder of all such persons is impracticable and the disposition of their claims in a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

14. There are questions of law and fact common to all members of the class and these questions predominate over any questions affecting only individual members.

15. The claims or defenses of the representative party are typical of the claims or defenses of the class.

16. The representative parties and their counsel will fairly and adequately protect the interests of the class.

JURISDICTION AND VENUE

17. Venue is proper pursuant to Ark. Code Ann. § 16-60-101 because the property that is the subject of this action is located in Pulaski County, Arkansas.

18. Subject-matter jurisdiction for Plaintiff's appeal from the City' Council's

condemnation decision arises under Ark. Code Ann. § 16-13-201(c).

19. Arkansas Courts have concurrent jurisdiction in claims involving 42 U.S.C. §§ 1983, 1985(3) 1986 and 1988 and federal constitutional claims.

20. Subject-matter jurisdiction for Plaintiff's state law claims arise under Ark. Code Ann. § 16-13-201(a) and the Arkansas Constitution.

21. All Defendants reside in Pulaski County, Arkansas and are subject to personal jurisdiction of this Court.

FACTUAL ALLEGATIONS

22. For more than a year, the City of North Little Rock has been engaged in a campaign to condemn and remove structures that it deems unsightly or undesireable.

23. As part of this campaign, the City has developed a policy and practice of condemning property without providing any significant due process protections to property owners.

24. Pursuant to this policy and practice, the City condemns property without providing adequate notice to the property owner and without affording the owner a hearing in which he may present evidence and witnesses or cross-examine the City's witnesses.

25. The City Council routinely votes to condemn properties without considering any specific evidence of any building code violations or that the property actually constitutes a nuisance.

26. . Properties are condemned through a summary procedure in which due process is completely lacking. The City has condemned numerous properties in this manner.

27. The City's Code contains no provision for a hearing either before or after condemnation, nor does it provide for any appeal.

28. Additionally, pursuant to this policy and practice, the City refuses to issue a permit, thereby refusing to allow the property owner to repair the property prior to its condemnation.

29. A property owner is allowed to make repairs only if the City approves a plan that requires a letter of credit, a substantial and oppressive bond equal to the cost of demolition, and only under a condemnation order which the property owner cannot appeal after thirty (30) days. The City's Code allows the owner a mere thirty (30) days in which to develop a plan, secure City Council approval, post a bond, and repair the property. The City's Code provides that, after thirty (30) days the condemned structure may be destroyed and removed from the premises. A lien is then placed on the property for the cost of demolition. The City's Code allows these actions to be taken without ever providing the property owner with any opportunity to repair the property prior to condemnation and without posting a substantial and oppressive bond and without affording the property owner a meaningful opportunity to be heard.

30. District Court Rule 9 requires that an appeal from the decision of a City Council be filed within thirty (30) days. The City's condemnation procedure appears to be designed to deter a party from filing a timely appeal. By the time a party submits a plan to the City and attempts to secure approval of the City Council, if the Council were to disapprove the plan, there likely would not be sufficient time left to appeal the condemnation. The City could then proceed to demolish the property and the owner would have no recourse. The City's policy is deliberately designed to circumvent due process. Under this procedure, a property may be condemned and demolished without the property owner ever being permitted to repair the property or being afforded a meaningful opportunity to be heard.

31. The fact that the City's process is completely lacking in due process protections is

particularly disturbing considering the fact that some of the property owners subjected to these actions are too poor to hire legal counsel to appeal the condemnation.

32. In 2011, the business located on the property at 6615 Highway 70 in North Little Rock was forced to close as a result of an agreement with the City after the City enacted a zoning ordinance regulating sexually oriented businesses. To date, the owner has been unable to find another productive use for the property.

33. The structure in question was built in 1949 and has been in approximately the same condition for years, except for some wind damage to the roof that occurred this spring. The property is located in a semi-industrial area where it fits in with the surroundings as to age and condition, is surrounded by railroad track, auto salvage yards, and wetlands. There is also a large recycling facility nearby that contains large piles of debris and generates dust, noise and pollutants. *Exhibit B, Satellite photo of property lying directly east of the subject property.* Although the property is in need of some repairs, it is in better condition than many structures in the area. This property is actually one of the better properties in the area. The structure does not now, nor has it in the past, posed any immediate threat to health and welfare.

34. At some point, the property was vandalized. Unknown persons broke into the building and removed copper wiring from the ceilings. Apparently the vandals fell through the ceiling in several areas. The vandals stole some of the contents of the building and left other contents in a pile by the door. The vandals ripped out plumbing and caused other damage to the interior of the building.

35. The owners were unaware of the damage to the building until they were contacted by the City regarding the proposed condemnation.

36. Chapter 8, Article 1, section 3, paragraph 1 (1.3.1) of the City's Code (*Exhibit C*)

authorizes Code Enforcement Officers to enter structures "subject to constitutional restrictions on unreasonable searches and seizures." This section states that officers may pursue a search warrant "if entry is refused or not obtained."

37. On January 14, 2013, a representative of Convent Corporation, Richard Livdahl contacted the City in an attempt to resolve the situation. A meeting was scheduled for January 17, 2013 for Mr. Livdahl with Tom Wadley, Director of Code Enforcement, and Bill Brown, Assistant City Attorney.

38. On January 16, 2013, without contacting the owner of the building, Defendant Felecia McHenry obtained a search warrant and broke into the building to inspect the interior. Upon leaving, the City left the building unsecured. Even though Mr. Livdahl, as a representative of the owner, was scheduled to meet with Mr. Wadley and Mr. Brown the following day, the City made no attempt to obtain permission to inspect the property. In failing to attempt to obtain permission from the owner, McHenry failed to comply with the City's Code. *Exhibit C.* Because the Affidavit that was submitted to obtain the search warrant does not indicate that permission was refused or could not be obtained, the search warrant was issued in violation of the City Code. The City also made no attempt to notify the owner that the building was left unsecured. The City acted irresponsibly and unreasonably in conducting its inspection of the property.

39. The property was "red-tagged" by Code Enforcement staff. This action was allegedly based on building code violations. However, the property owner has never been provided with any list of violations as required by the City's Code. *Exhibit D: Chapter 8, Article 1, section 6, paragraph 1.*

40. On January 17, 2013, Mr. Livdahl, as an agent of the owner, met with Mr.

Wadley and Mr. Brown. The City refused to work with Mr. Livdahl because he was not listed as the owner of record.

41. Even though the owner of the building had a contractor ready to begin repairs, the City informed Mr. Livdahl that a permit to repair the building would not be issued. *Exhibit E: Letter from William Brown to R.C. Livdahl, January 31, 2013.* By refusing to issue a permit, the City denied Plaintiff the opportunity to repair the property and avoid condemnation. Because the owners have been denied a permit to repair the previously mentioned storm damage, the property has sustained additional damage from the weather which could have been prevented if the owner was permitted to make repairs. As a result, the structure is in much worse condition and will cost significantly more to repair.

42. Plaintiff cleaned out the property but, due to the lack of a permit from the City, could not make other repairs.

43. Plaintiff was notified that the proposed resolution condemning the property would be put to a vote of the City Council on February 25, 2013. Plaintiff was informed that it would only be permitted to speak for three minutes.

44. On February 22, 2013, counsel for Plaintiff emailed a Motion for Full Hearing to the Mayor, City Clerk, and City Attorney. The City did not respond to this Motion.

45. Counsel for Convent Corporation appeared at the February 25, 2013 council meeting and was given three minutes in which to present Plaintiff's case in opposition to the proposed condemnation. Convent's attorney again requested a full hearing but was denied. The Mayor stated that the City Council was not a judicial body and would not hold a full hearing.

46. A council member asked Convent's counsel about plans for future use of the property, alluding to the prior use which was a sexually oriented business.

47. At the Council meeting, Convent proposed delaying the condemnation vote and allowing Convent to enter an agreement with the City to repair the property.

48. Despite Convent's request to be permitted to repair the property, the City Council voted to approve the resolution condemning Plaintiff's property without affording Plaintiff a full hearing, the opportunity to present witnesses, to cross-examine witnesses or to present evidence. The City Council made findings of fact that the property was run down, dilapidated, unsightly, dangerous, obnoxious, unsafe, not fit for human habitation and detrimental to the public welfare without hearing or examining any evidence, hearing from any witnesses, or obtaining any other information to support the findings.

49. Chapter 8, Article 1, section 6, paragraph 1 (*Exhibit D*) of the City's Code states that a "Notice of Violations" must contain a description of the violation or violations. Neither the City's "Original Violation Report" nor any of the Notices sent by the City contain a list or description of violations. Additionally, none of these documents contain information about Rights of Appeal as required by the City Code. In fact, Plaintiff has obtained a copy of the Code Enforcement Division's file regarding this matter and it does not contain, anywhere, a description or list of violations. Despite the fact that it is required by the City's Code and a request was made by the Plaintiff, the City has, to date, refused to provide a list of violations. Without a list or description of violations, Plaintiff could not adequately prepare to defend itself against the City's allegations.

50. Because the Mayor sponsored and signed the resolution condemning Plaintiff's property and also presided over the three-minute proceeding, Plaintiff was denied a hearing before an impartial decision maker. Further, although in making this type of administrative decision, council members are subject to the "appearance of bias" standard applicable to judges,

it was clear that the council members had their minds made up and were not interested in considering any evidence on the matter.

51. The City's Director of Code Enforcement admitted that the motivation of the Council in this matter was based on the property's prior use as a sexually oriented business.

52. There are structures in the area surrounding the subject that are in similar or worse condition that the City has not condemned. Additionally, there is a large recycling facility near the property at issue with large piles of debris and which causes a significant amount of dust and pollutants to enter the air and may be discharging hazardous substances into the ground and the City has not taken any action to abate this significant nuisance. *Exhibits F-T.* The City has treated Plaintiff differently than other similarly situated property owners and this disparate treatment was motivated by the Defendant's exercise of free expression.

COUNT I

Procedural Due Process
Fifth and Fourteenth Amendments to the U.S. Constitution
Article 2, Sections 2 & 22 of the Arkansas Constitution

53. Plaintiff incorporates by reference and realleges each and every allegation contained above, as though fully set forth herein.

54. Both the United States Constitution and the Arkansas Constitution require due process of law prior to any significant taking of property by the government.

55. The Arkansas Constitution provides that "[t]he right of property is before and higher than any constitutional sanction." Ark. Const. Art. 2, § 22. The Arkansas Constitution further guarantees the right to possess and protect property in Section 2 of Article 2.

56. Prior to a governmental decision which deprives individuals of a property interest procedural due process requires that a hearing before an impartial decision maker be provided at

a meaningful time and in a meaningful manner, including the right to submit evidence and testimony, to examine witnesses, and an opportunity to present evidence or testimony in rebuttal to adverse positions.

57. Property nuisance cases require increased caution because destroyed property cannot be restored and the best evidence of whether the seizure was justified will have been demolished.

58. The City failed to provide adequate Notice of the proposed condemnation to Convent Corporation. The Notice did not meet the requirements of the City's Code. (*Exhibit C*).

59. The City refused to provide a list of violations as required by its own ordinance.

60. The City refused to issue a permit to Convent Corporation so that it could repair the property prior to the condemnation.

61. A fair trial by a fair tribunal is a basic requirement of due process and this rule applies to decisions by administrative bodies as well as to courts.

62. Plaintiff requested and was denied a full hearing with the opportunity to present witnesses, to cross-examine the City's witnesses and to present evidence.

63. The City Council voted to approve the resolution condemning Plaintiff's property after a three minute hearing and made findings of fact when no evidence or testimony was presented to support those findings.

64. The Mayor sponsored the proposed resolution and presided over the proceedings. The City Council members had clearly already made up their minds and refused to consider any evidence or hear from any witnesses. Thus, Plaintiff was denied a hearing before an impartial decision maker.

65. The City seized Plaintiff's property through condemnation without providing due

process of law as required by both the United States and the Arkansas Constitutions.

66. The procedural due process protections guaranteed by the Fifth and Fourteenth Amendments to the U.S. Constitution, and the protections afforded by Article 2, Sections 2 and 22 of the Arkansas Constitution have long been clearly established.

67. The Defendants acted under color of law and with deliberate indifference to Plaintiff's rights under the U.S and Arkansas Constitutions.

68. The City has established a policy of denying procedural due process to property owners through its condemnation ordinance, practices and procedures and, pursuant to this policy, has deprived numerous property owners of their property without due process of law.

69. The City has established a policy of refusing to allow property owners to repair their property prior to condemnation, requiring a substantial and oppressive bond before being allowed to repair a property, and limiting the property owners ability to appeal the condemnation.

70. The City's policies and practices deprive individuals of property without due process of law shock the conscience, violate the decencies of civilized conduct, fail to comport with traditional ideas of fair play and decency, and interfere with rights implicit in the concept of ordered liberty.

71. The City's Code relating to condemnation procedures fails to provide constitutionally required due process protections, including a hearing with the opportunity to present witnesses and evidence and to cross examine witnesses, an impartial decision maker, and an appeal process.

72. All named Defendants conspired to violate Plaintiff's rights and committed acts in furtherance of the conspiracy.

COUNT II

Substantive Due Process
Fifth and Fourteenth Amendments to the U.S. Constitution
Article 2, Sections 2 & 22 of the Arkansas Constitution

73. Plaintiff incorporates by reference and realleges each and every allegation contained above, as though fully set forth herein.

74. Private property rights are deeply rooted in this Nation's history and tradition and are protected by the Fifth and Fourteenth Amendments to the U.S. Constitution and Article 2, sections 2 & 22 of the Arkansas Constitution.

75. The Arkansas Constitution provides that "[t]he right of property is before and higher than any constitutional sanction." Ark. Const. Art. 2, § 22. The Arkansas Constitution further guarantees the right to possess and protect property in Section 2 of Article 2.

76. Both the United States Constitution and the Arkansas Constitution require due process of law prior to any significant taking of property by the government.

77. The Defendants acted arbitrarily, capriciously, and irrationally in refusing to issue a permit to Plaintiff that would have allowed them to repair the property prior to condemnation.

78. The City Council acted arbitrarily, capriciously, and irrationallly when it voted to deprive Plaintiff of its property through condemnation without hearing any witnesses, considering any evidence, or obtaining any other information to support its findings of fact.

79. The City's requirement that Plaintiff post a substantial and oppressive bond without allowing the Plaintiff to repair the property prior to condemnation is arbitrary, capricious, and irrational.

80. The substantive due process protections guaranteed by the Fifth and Fourteenth Amendments to the U.S. Constitution, and the protections afforded by Article 2, sections 2 & 22

of the Arkansas Constitution have long been clearly established.

81. The Defendants acted under color of law and with deliberate indifference to Plaintiff's rights under the U.S and Arkansas Constitutions.

82. The City has established a policy of denying substantive due process to property owners through its condemnation ordinance, practices and procedures and has deprived numerous property owners of property without due process of law.

83. The City's policies and practices deprive individuals of property without due process of law shock the conscience, violate the decencies of civilized conduct, fail to comport with traditional ideas of fair play and decency, and interfere with rights implicit in the concept of ordered liberty.

84. The City's Code relating to condemnation procedures which allows the City to condemn properties without affording the owner an opportunity to repair the property without posting a substantial and oppressive bond and without providing for a hearing fails to provide constitutionally required substantive due process.

85. All named Defendants conspired to violate Plaintiff's rights and committed acts in furtherance of the conspiracy.

COUNT III

Unreasonable Search
Fourth Amendment to the U.S. Constitution
Article 2, Section 15 of the Arkansas Constitution

86. Plaintiff incorporates by reference and realleges each and every allegation contained above, as though fully set forth herein.

87. The protections from unreasonable searches guaranteed by the Fourth Amendment to the U.S. Constitution and Article 2, Section 15 of the Arkansas Constitution have

long been clearly established.

88. The Defendants' actions in breaking into the property without first asking the owner's permission was unreasonable.

89. The Defendants violated the City's own ordinance by not seeking permission to inspect the property before seeking a search warrant and breaking in.

90. The Defendants acted unreasonably by failing to seek Mr. Livdahl's permission to inspect the property before seeking a search warrant and breaking in.

91. The Defendants acted unreasonably by leaving the property unsecured without notifying the owner.

92. The Defendants acted under color of law and with deliberate indifference to Plaintiff's rights under the United States and Arkansas Constitutions.

93. The Defendants actions were pursuant to a policy, custom or practice established by the City.

94. The Defendants actions shook the conscience, violate the decencies of civilized conduct, fail to comport with traditional ideas of fair play and decency, and interfere with rights implicit in the concept of ordered liberty.

95. All named Defendants conspired to violate Plaintiff's rights and committed acts in furtherance of the conspiracy.

COUNT IV

Unreasonable Seizure
Fourth Amendment to the U.S. Constitution
Article 2, Section 15 of the Arkansas Constitution

96. Plaintiff incorporates by reference and realleges each and every allegation contained above, as though fully set forth herein.

97. The protections from unreasonable seizures of property guaranteed by the Fourth Amendment to the United States Constitution and Article 2, Section 15 of the Arkansas Constitution have long been clearly established.

98. A seizure of property occurs when there is some meaningful interference with a person's possessory interests in that property.

99. The Defendants violated Plaintiff's rights under the United States and Arkansas Constitutions by unreasonably seizing Plaintiff's property through condemnation without allowing Plaintiff to repair the property prior to the condemnation, by refusing to allow a hearing prior to the condemnation, and by voting to condemn the property without considering any evidence or hearing from any witnesses.

100. The Defendants acted under color of law and with deliberate indifference to Plaintiff's rights under the United States and Arkansas Constitutions.

101. The City has established a policy and practice of unreasonably seizing property in violation of both the United States and Arkansas Constitutions.

102. The Defendants' actions shock the conscience, violate the decencies of civilized conduct, fail to comport with traditional ideas of fair play and decency, and interfere with rights implicit in the concept of ordered liberty.

103. All named Defendants conspired to violate Plaintiff's rights and committed acts in furtherance of the conspiracy.

COUNT V

Trespass

104. Plaintiff incorporates by reference and realleges each and every allegation contained above, as though fully set forth herein.

105. Even though a meeting was scheduled for the following day with a representative of the owner, Defendant Felecia McHenry broke into Plaintiff's property without seeking permission from the owner.

106. Defendant Felecia McHenry failed to comply with the City Code, Article 1, Section 3, Paragraph 1, when she failed to seek permission to enter the property from the owner prior to seeking a search warrant.

107. The Affidavit that was submitted to obtain the search warrant does not indicate that permission was refused or could not be obtained; the search warrant was issued in violation of the City Code. *F: Affidavit for Administrative Search Warrant.* A search warrant issued in violation of a statute is invalid.

108. Defendant Felecia McHenry broke into Plaintiff's property without seeking permission from the owner and without a valid search warrant.

109. Plaintiff has been damaged by Defendant McHenry's actions which were committed as an employee of the City, in furtherance of the City's interest, and pursuant to a policy and practice established by the City.

COUNT VI

Selective Prosecution – Equal Protection
Fourteenth Amendment to the U.S. Constitution

110. Plaintiff incorporates by reference and realleges each and every allegation contained above, as though fully set forth herein.

111. The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution requires that local governments provide equal protection under the law to all persons within its jurisdiction.

112. Other buildings in the vicinity of the property are in similar or worse condition

than Plaintiff's property and the City has not acted to condemn these properties.

113. There is a large recycling facility near the property at issue which causes a significant amount of dust and pollutants to enter the air and may be discharging hazardous substances into the ground and the City has not taken any action to abate this significant nuisance.

114. The Plaintiff's property was previously occupied by a gentleman's club that featured semi-nude dancing.

115. Semi-nude dancing is a form of expression protected by the First Amendment to the United States Constitution and Article 2, Section 6 of the Arkansas Constitution.

116. Defendant Tom Wadley admitted that the City Council's actions were motivated by the fact that the property was previously occupied by a gentleman's club.

117. During the City Council meeting at which the Plaintiff's property was condemned a council member inquired about whether there were plans to put another business in there, alluding to the prior use of the property.

118. The City's condemnation of the property in question was based on the fact that the business was formerly occupied by a gentleman's club and is intended to suppress expression.

119. Demolishing the property does not serve either a compelling or a substantial governmental interest because, under an agreement with the City and according to the City's zoning ordinance the property cannot be used as a sexually oriented business in the future.

120. Defendants' attempt to demolish Plaintiff's property is an attempt to suppress the exercise of free expression and has resulted in the Plaintiff being treated differently than similarly situated persons and is in violation of the Equal Protection Clause of the Fourteenth

Amendment.

COUNT VII

Civil Conspiracy

121. Plaintiff incorporates by reference and realleges each and every allegation contained above, as though fully set forth herein.

122. All named Defendants combined to accomplish the unlawful and oppressive purpose of depriving Plaintiff's of their property without due process of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article 2, Sections 2, and 22 of the Arkansas Constitution; to unreasonably search and seize Plaintiff's property in violation of the Fourth Amendment to the United States Constitution and Article 2, Sections 2 and 15 of the Arkansas Constitution; to deny Plaintiff equal protection under the law in violation of the Fourteenth Amendment to the United States Constitution; and to cause a Trespass to Plaintiff's property.

123. All named Defendants combined to establish a policy and practice which deprives owners of property without due process of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article 2, Sections 2, and 22 of the Arkansas Constitution; permits and condones unreasonable searches and seizures property in violation of the Fourth Amendment to the United States Constitution and Article 2, Sections 2 and 15 of the Arkansas Constitution; and which deny certain property owners equal protection under the law in violation of the Fourteenth Amendment to the United States Constitution.

124. Each and every named Defendant committed acts in furtherance of this conspiracy.

125. Plaintiff and members of the defined class have been damaged by the acts

committed by Defendants in furtherance of this conspiracy.

126. The actions of the Defendants were willful and malicious and Plaintiffs are entitled to actual, compensatory, and punitive damages.

INJUNCTIVE RELIEF AND TEMPORARY RESTRAINING ORDER

127. If the City proceeds to demolish the structure on Plaintiff's property, Plaintiff will suffer irreparable harm by the loss of the building and diminution in value of the property.

128. If the City proceeds to demolish the structure on Plaintiff's property, evidence that is essential to Plaintiff's case will be destroyed.

129. In accordance with Ark. Code Ann. § 16-113-301, *et. seq.*, and Rule 65 of the Arkansas Rules of Civil Procedure, the Court should issue a temporary restraining order or preliminary injunction directing that the Defendants are prohibited from destroying or otherwise molesting or interfering with Plaintiffs use of the property located at 6615 Highway 70 in North Little Rock, Pulaski County, Arkansas during the pendency of this action.

130. If the City continues to condemn properties pursuant to its current policies and practices, other property owners and class members will suffer irreparable harm by the loss of valuable structures and diminution in property values.

131. In accordance with Ark. Code Ann. § 16-113-301, *et. seq.*, and Rule 65 of the Arkansas Rules of Civil Procedure, the Court should issue a temporary restraining order or preliminary injunction directing that the Defendants are prohibited from destroying any property that has been condemned pursuant to Article 1, Section 7 of City's Code (Condemnation), from condemning any additional property or otherwise enforcing Article 1, Section 7 of the City's Code, or taking any action to file or collect liens for the demolition of properties during the pendency of this action.

Demand for Jury Trial

132. Plaintiff demands a trial by jury on all issues so triable.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiff, prays this honorable Court enter judgment against the Defendants as follows:

a. certifying this as a class action;

b. issue a temporary restraining order or preliminary injunction directing that the Defendants are prohibited from destroying or otherwise molesting or interfering with Plaintiffs use of the property located at 6615 Highway 70 in North Little Rock, Pulaski County, Arkansas during the pendency of this action;

c. issue a temporary restraining order or preliminary injunction directing that the Defendants are prohibited from destroying any property that has been condemned pursuant to Article 1, Section 7 of City's Code (Condemnation), from condemning any additional property or otherwise enforcing Article 1, Section 7 of the City's Code, or taking any action to file or collect liens for the demolition of properties during the pendency of this action;

d. award of actual, compensatory, and punitive damages against all Defendants, jointly and severally, in an amount to be specifically determined at trial but exceeding $75,000 exclusive of costs and interest for Defendants' violations of Plaintiff's rights under the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution;

e. award of actual, compensatory, and punitive damages against all Defendants, jointly and severally, in an amount to be specifically determined at trial but exceeding

$75,000 exclusive of costs and interests for Defendants' violations of Plaintiff's rights under the Arkansas Constitution;

f. award of damages for Defendants' trespass to Plaintiff's property;

g. award of actual, compensatory, and punitive damages for acts committed by Defendants pursuant to the conspiracy to violate Plaintiff's rights under both the United States and Arkansas Constitutions;

h. award of attorneys fees, costs, and interest; and

i. for all other and further relief as may be just and proper.

Respectfully submitted,

Mickey Stevens, Ark. Bar No. 2012141
Attorney for Plaintiff
P.O. Box 1295
Benton, AR 72018
T: 501-303-6668
F: 877-338-6063
Stevens_mickey@yahoo.com

VERIFICATION

I, Mickey Stevens, having first been duly sworn, under oath do state that the facts set forth in the foregoing Complaint are true and correct.

Mickey Stevens

SUBSCRIBED AND SWORN TO before me, a Notary Public, on this the 27th day of March, 2013.

Molly C Richardson
Notary Public

MOLLY C. RICHARDSON
Commission No. 12506851
NOTARY PUBLIC
My Commission Expires June 7, 2017
SALINE CO., ARKANSAS

(C) When the identity or whereabouts of a person is unknown, by weekly publication in a newspaper having general circulation throughout the City for two (2) consecutive weeks.

1.6.2.1 Notice by Mail. Notice by mail shall be sent to the owner's address of record with the applicable county treasurer or collector. When sent to the proper address with proper postage, notice by mail shall be deemed properly served without regard as to whether the owner or occupant accepted the mail or the mail was otherwise returned.

1.6.3 Transfer of ownership. After receiving a notice of violation, it shall be unlawful for the owner of any property or structure to sell, transfer, mortgage, lease or otherwise alienate or dispose of the same until:

(A) The property or structure has been caused to conform with this code; or

(B) The owner shall provide the other party a true copy of any notice of violation issued by a Code Enforcement Officer and shall furnish to the Senior Code Enforcement Officer a signed and notarized statement from the other party accepting responsibility for the property or structure.

1.6.4 Exceptions. The Notice of Violation requirements of this section shall not apply to the issuances of citations. Issuance of citations must comply with the procedures described in subsection 4.3.

Section 7
CONDEMNATION

1.7.1 Authority. In addition to other penalties provided herein but not in lieu thereof, the City Council for the City of North Little Rock may condemn structures through the passage of a resolution, after a public hearing that shall include:

(A) A description of the structures;
(B) The owner or owners of the structures;
(C) Findings that the structures are unfit for human occupancy, or otherwise detrimental to the life, property or safety of the public.

1.7.2 Keeping condemned structures prohibited. It shall be unlawful for any person to own, keep or maintain any structure within the corporate limits of the city which is condemned by resolution of the City Council.

1.7.3 Notices. The Code Enforcement Department shall be responsible for publication, mailing or delivery of all notices required to condemn structures.

1.7.3.1 Prior Notice of Proposed Condemnation. The owner of the structure will be provided notice of any proposed condemnation action no less than ten (10) calendar days prior to consideration by City Council. If appropriate, any and all lien holders

EXHIBIT A

will also be provided notice of any proposed condemnation action no less than ten (10) calendar days prior to consideration by City Council. Notice will be provided by the method described in subsection 1.6.2.

1.7.3.2 Notice of Condemnation. After a structure has been condemned by resolution as provided in this Code, a certified copy of such resolution will be mailed to the owners thereof, by the method described in subsection 1.6.2 and if appropriate, may be recorded in the property records of the Pulaski Circuit/County Clerk.

1.7.3.3 Notice of Certification of Costs. After a condemned structure has been removed at City expense, the owner will be provided no less than ten (10) calendar days' prior notice of any action to certify costs by City Council. If appropriate, any and all lien holders will also be provided no less than ten (10) calendar days' prior notice of any action to certify costs by City Council. Notice will be provided by the method described in subsection 1.6.2.

1.7.4 Destruction and Removal. Condemned structures shall be destroyed and removed from the premises.

1.7.4.1 Destruction and Removal by Owner. The owner of any structure that has been condemned by resolution of City Council is permitted to cause, at his or her own expense, to have the same destroyed and removed within thirty (30) days after the City has provided notice under subsection 1.7.3.2. No person is allowed to repair or refurbish a condemned structure without an agreement approved by City Council that guarantees repairs will be done in a proper and timely fashion. It is the owner's responsibility to obtain a sponsor for any legislation that would allow the repair or refurbishment of a condemned structure.

1.7.4.2 Destruction and Removal by City. If the condemned structure has not been torn down and removed, or otherwise abated, within 30 days after the notice requirements of subsection 1.7.3.2 have been met, then the Senior Code Enforcement Officer shall supervise the removal of any such structure in such a manner as deemed appropriate under existing circumstances. If the structure has a substantial value, it or any saleable materials thereof may be sold at public sale to the highest bidder for cash using procedures provided by law. The costs of removal will be presented to City Council for certification and collection from the owner.

1.7.5 Disposition of proceeds of sale or salvage of condemned structures. All the proceeds of the sale or salvage of any structure, and all fines collected from the provisions of this article shall be paid by the persons collecting the same to the city treasurer. If any such structure, or the saleable materials thereof, be sold for an amount which exceeds all costs incidental to the abatement of the nuisance, including the cleaning up of the premises by the city, plus any fines imposed, the balance thereof will be returned by the city treasurer to the former owners of such house, building and/or structure constituting the nuisance.

EXHIBIT A

1.7.6 Lien on property for net costs. If the city has any net costs in the removal of any condemned house, building or structure, the city shall have a lien on the property as provided by A.C.A. §§ 14-54-903 and 14-54-904.

1.7.7 Penalty for violation of article. A penalty as provided by this Code is hereby imposed against the owners of any structure condemned by resolution of the City Council thirty (30) days after such structure has been condemned; and each day thereafter such nuisance be not abated constitutes a separate and distinct offense, provided the notice as provided in subsection 1.7.3.2 has been given within ten (10) calendar days after such structure has been condemned.

1.7.8 Transfer of ownership. After receiving a notice of condemnation, it shall be unlawful for the owner of any structure to sell, transfer, mortgage, lease, or otherwise alienate or dispose of the same until:

(A) The property or structure has been caused to conform with this code; or
(B) The owner shall provide the other party a true copy of any notice of violation issued by a Code Enforcement Officer and shall furnish to the Senior Code Enforcement Officer a signed and notarized statement from the other party accepting responsibility for the property or structure.

1.7.9 Restrictions on utility services to structures declared condemned.

(A) The City shall not provide or permit another to provide public or private utility services, such as water, gas or electricity, to any building or house that has been condemned by the city council pursuant to Ark. Code Ann. § 14-56-203.
(B) Subsection (1) of this section shall not preclude the temporary use of such utility services as may be deemed necessary during construction, repair or alteration. The Senior Code Enforcement Officer shall be responsible for making the determination as to when such temporary services may be necessary.

1.7.10 Court action authorized. If City Council determines that a particular structure be *judicially* condemned, the City Council shall direct the City Attorney to bring such action in the name of the city; and the only notice to be given to the owners and lien holders will be that as now provided for by law. When any such structure has been declared judicially to be a nuisance by a court of law, a penalty as provided by this Code is hereby imposed against the owners thereof from the date such finding is made by the court; and each day thereafter such nuisance is not abated constitutes a separate and distinct offense.

Section 8
EMERGENCY PROCEDURES

1.8.1 Temporary safeguards. Notwithstanding other provisions of this code, whenever, in the opinion of the Senior Code Enforcement Officer, there is imminent danger due to an unsafe condition, the code official shall order the necessary work to be done, including the boarding up of openings, to render such structure temporarily safe whether or not the legal

EXHIBIT A

Property directly East of Plaintiff's property.

EXHIBIT B

of this Code is impractical and the modification is in compliance with the intent and purpose of this Code and that such modification does not lessen health, life and fire safety requirements. The details of action granting modifications shall be recorded and entered in the department files.

Section 3
INSPECTIONS

1.3.1 Right of entry. Code Enforcement Officers are authorized to enter structures or premises at reasonable times to inspect subject to constitutional restrictions on unreasonable searches and seizures. If entry is refused or not obtained, the officers may pursue such search authorizations as are provided by law.

1.3.2 Inspections. Code Enforcement Officers shall make all of the inspections required by this Code. All reports of such inspections shall be in writing and be certified by the responsible officer. Code Enforcement Officers are authorized to rely upon a responsible expert opinion as the officer deems necessary to report upon unusual technical issues that arise.

1.3.3 Required testing. Whenever there is insufficient evidence of compliance with the provisions of this Code, or evidence that a material or method does not conform to the requirements of this Code, or in order to substantiate claims for alternative materials or methods, the Senior Code Enforcement Officer shall have the authority to require tests to be made as evidence of compliance at no expense to the jurisdiction. Reports of tests shall be recorded and entered in the department files.

1.3.4 Material and equipment reuse. Materials, equipment and devices shall not be reused unless a Code Enforcement Officer finds that such elements are in good repair or have been reconditioned and tested when necessary, placed in good and proper working condition and approved.

Section 4
VIOLATIONS

1.4.1 Violations declared to be strict liability misdemeanors. It shall be unlawful for a person, firm or corporation to be in conflict with or in violation of any of the provisions of this Code. Any person who is convicted of a violation of this Code shall be guilty of a misdemeanor, and the violation shall be deemed a strict liability offense.

1.4.2 Fines. Except as otherwise provided, a person convicted of violating any provision of this Code shall be punished by a fine not to exceed $500.00, or double such sum for each repetition thereof. If the violation is continuous in nature, the penalty for allowing the continuance thereof is a fine not to exceed $250.00 for each day that the violation is unlawfully continued. The judge will determine the actual fine.

EXHIBIT C

Enforcement Officer may issue a temporary emergency order when he or she has a reasonable belief that the use of the property or structure:

(A) Poses an *imminent* danger to the health, safety or welfare of the public; or
(B) Threatens the life or poses an imminent danger of serious injury to any citizen.

1.5.3.1 Service of Temporary Emergency Orders. Service of Temporary Emergency Orders may be made by any Code Enforcement Officer upon the owner, manager, employee, or occupant of a structure that is subject to the provisions of subsection 1.5.3. If no one is located at the structure, the Temporary Emergency Order shall be affixed to the structure and written notice shall proceed according to subsection 1.6.2. All notices for this subsection shall clearly state "Temporary Emergency Order" and conform to the requirements of subsection1.6.1.

1.5.4 Special Uses, Conditional Uses, and Other Authorizations Issued by City Council. The City Council for the City of North Little Rock may revoke a special use, conditional use, or any other authorization to use property or conduct business that violates the terms of the use or threatens the property or safety of any citizen, or is detrimental to the health, safety or welfare of the public. Such a revocation may be performed at any regular or special meeting of City Council. The revocation shall be based upon the report of a Code Enforcement Officer, complaint of a citizen, or *sua sponte* action by City Council.

Section 6
ADMINISTRATIVE PROCEDURES

1.6.1 Notice of Violations. "Notice of Violations" shall be written on standardized or letter form approved by the Senior Code Enforcement Officer that shall include the following information:

(A) The name of the owner, if known;
(B) An address or description of the real estate sufficient for identification;
(C) A description of the violation or violations;
(D) Rights of Appeal under subsection 1.9;
(E) A statement that citations may be issued and fines assessed in addition to any administrative remedy imposed by the City.
(F) Include a statement that the City has a right to cause repairs or demolition to be made and that the costs may be assessed against the owner and the property of the owner; and
(G) The information required by Ark. Code Ann. 14-54-903, if applicable.

1.6.2 Method of service. Administrative notices (such as a Notice of Violation) may be issued by any person authorized under Ark. Code Ann. § 14-54-903 by posting on the subject property and:

(A) By personal service;
(B) By regular mail or certified mail, return receipt requested; or

EXHIBIT D

City Of North Little Rock, Arkansas
Office Of The City Attorney

300 Main Street—P.O. Box 5757
North Little Rock, Arkansas 72119
(501) 975-3253—Fax (501) 340-5341

C. Tason Carter
City Attorney
William M. Brown
Assistant City Attorney
Daniel L. McFadden
Assistant City Attorney

Tiana C. Byrd
Assistant City Attorney
Paula Jack Jones
Assistant City Attorney

January 31, 2013

R.C. Livdahl C/O
Sunset Partners LLC
11420 Ethan Allen Dr.
Little Rock, AR 72211-2348

RE: Exterior and Interior Clean-Up of Gentlemen's Club 70.

Dear Mr. Livdhal:

I am in receipt of your letter dated January 29, 2013 concerning the above structure which is scheduled for a condemnation hearing before the North Little Rock City Council on February 25th 2013.

It appears from the your letter that you simply intend to clean-up the numerous amounts of trash and garbage from the interior and exterior of the structure by placing said items in a dumpster. It is my interpretation of the Ordinances of the City of North Little Rock that you do not need to obtain a permit for the dumpster for those specific purposes.

However, any construction, remodeling, repairs or demolition to the structure and permanent fixtures would be outside of your request and you would have to obtain any necessary permits from the Planning Department. It is my understanding that since the structure has been Red Tagged no construction or remodeling permits should be issued at this time without approval of City Council.

If you desire to demolish the structure at this time you can obtain a Demolition Permit without City Council approval before the condemnation hearing if you can present to the Planning Department proof of ownership of the structure.

Sincerely,

William M. Brown
Assistant City Attorney for North Little Rock

EXHIBIT E

IN THE DISTRICT COURT OF NORTH LITTLE ROCK, ARKANSAS,

STATE OF ARKANSAS)
)SS
COUNTY OF PULASKI)

AFFIDAVIT FOR ADMINISTRATIVE SEARCH WARRANT

The undersigned, Felecia McHenry, of the North Little Rock Code Enforcement Department having been duly sworn deposes and states that she has reason to believe and upon reasonable cause does believe that violations of the City of North Little Rock Property Maintenance Code do exist inside the premises and curtilage areas described as being located at 6615 Hwy 70, North Little Rock, Pulaski County, Arkansas. The structure is further described as being a commercial structure with the signage "Gentlemen's Club 70" posted on the structure. Affiant Felecia McHenry states there are now violations of the City of North Little Rock Property Maintenance Code, to wit, there is deteriorating and missing soffit, there is deteriorating and missing fascia, exterior walls have cracks, the roofing materials appear to be deteriorating, there is loose and missing siding, and there are holes on the exterior walls. This tends to demonstrate that violations of the City of North Little Rock Property Maintenance Code do exist and as there exists reasonable cause to believe that the facts and conditions herein to exist, an Administrative Search Warrant should be issued.

FACTS CONSTITUTING REASONABLE CAUSE

1. Affiant McHenry states that she performed an exterior inspection of the vacant structure located at 6615 Hwy 70 on 11/13/12 and found the structure to be in the following condition.

2. Affiant McHenry states there is deteriorating and missing soffit in violation of the City of North Little Rock Property Maintenance Code 3.4.2.

3. Affiant McHenry states there is deteriorating and missing fascia in violation of the City of North Little Rock Property Maintenance Code 3.4.2.

4. Affiant McHenry states there are cracks and holes on the exterior walls where rain or other weather elements as well as where insect infestation may occur in issue violation of North Little Rock Property Maintenance Code 3.4.6.

5. Affiant McHenry states the roofing materials appear to be deteriorating and not in good repair where rain or other weather elements may occur in violation of North Little Rock Property Maintenance Code 3.4.7.

EXHIBIT F

6. Affiant McHenry states there is loose and missing siding where rain or other weather elements as well as where insect infestation may occur in violation of North Little Rock Property Maintenance Code 3.4.6.

7. Affiant McHenry states that due to the neglected appearance to the outside of the structure, it would appear that there are more Property Maintenance Violations located on the interior of the structure creating an unsafe and hazardous environment and an Administrative Search Warrant should be issued to document such violations.

Affiant

Signed and dated at 500 W. Pershing, NLR

on this 16 day of Jan 2023 time 11:45 am

Judge

EXHIBIT F

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS,
_____ DIVISION

CONVENT CORPORATION,
Individually and on Behalf of all
Others Similarly Situated **PLAINTIFF**

v. **NO. _____**

CITY OF NORTH LITTLE ROCK,
ARKANSAS, a Municipal Corporation,
JOE SMITH, Mayor, Individually and in
his Official Capacity, City Council Members
DEBI ROSS, BETH WHITE, LINDA
ROBINSON, MAURICE TAYLOR,
STEVE BAXTER, BRUCE FOUTCH,
MURRY WITCHER, and CHARLIE HIGHT,
each Individually and in his or her Official
Capacity, TOM WADLEY, Director, Code
Enforcement Division, Individually and in
his Official Capacity, and FELECIA MCHENRY,
Code Enforcement Officer, Individually and
in her Official Capacity **DEFENDANTS**

NOTICE OF APPEAL

Notice is hereby given that Convent Corporation hereby appeals to the Pulaski County Circuit Court from a Resolution 8272 passed by the North Little Rock City Council on February 25, 2013 declaring Convent Corporation's property located at 6615 Highway 70 in North Little Rock, Pulaski County, Arkansas to be a nuisance and condemning same.

Respectfully submitted,

/s/ Mickey Stevens
Mickey Stevens
Attorney for Convent Corporation
P.O. Box 2165
Benton, AR 72018
T: 501-303-6668
F: 877-338-6063
Arkansas Bar # 2012141
Stevens_mickey@yahoo.com

CERTIFICATE OF SERVICE

I do hereby certify by my signature hereinabove, I have on this 27th day of March, 2013 served a copy of the foregoing pleading on the following persons by mailing same through the AOC efiling system, email or United States mail, properly addressed, and first class postage paid.

Mark Fleming
Bill Brown
City of North Little Rock
300 Main Street
North Little Rock, AR 72114

Mayor Joe Smith
Debi Ross
Beth White
Linda Robinson
Maurice Taylor
Steve Baxter
Bruce Foutch
Murry Witcher
Charlie Hight
Tom Wadley
Felecia McHenry

/s/ Mickey Stevens
Mickey Stevens

February 25, 2013
Six-thirty o'clock P.M.
North Little Rock City Hall Council Chambers
300 Main Street
North Little Rock, Arkansas

Mayor JOE A. SMITH called a SPECIAL MEETING of the North Little Rock City Council scheduled for Monday, February 25, 2013, at 6:00 p.m. to order.

February 19, 2013 (via email)

Subject: Proposal for 2013 Overlay Program

Honorable Members of the North Little Rock City Council:

The purpose of this email is to advise you that Mayor Smith has called a special meeting of the North Little Rock City Council at 6:00 p.m. on Monday, February 25, 2013, at City Hall Council Chambers, North Little Rock, Arkansas. The following will be on the agenda:

1) A PRESENTATION BY CHIEF CITY ENGINEER MIKE SMITH ON THE CITY'S 2013 ASPHALT RESURFACING PROGRAM.
A copy of Mr. Smith's summary of the overlay program, along with specifications for bid invitations, are attached hereto for your reference.

Pursuant to Section 2-48 (2) of the North Little Rock Municipal Code, you are entitled to 72 hours' *electronic* notice of this meeting. Please acknowledge receipt of this e-mail as soon as possible by replying to the same. A copy of your reply will automatically be sent to City Clerk Diane Whitbey.

City Attorney C. Jason Carter
By: Matthew W. Fleming
Assistant City Attorney

The roll having been called, and the following members answered to their names: DEBI ROSS, BETH WHITE, MAURICE TAYLOR, LINDA ROBINSON, STEVE BAXTER, BRUCE FOUTCH, and CHARLIE HIGHT (7/0), a quorum was declared. Alderman MURRY WITCHER was absent. Assistant City Clerk Linda Marshall and Assistant City Attorney Matt Fleming were also present.

Mayor Smith advised the Main Street Viaduct had damage, specifically, a joint is coming apart. Mr. Mike Smith, Chief City Engineer said repairs will be made over the weekend which will require closing one traffic lane in each direction. Other joints may need repair in the future. Mr. Smith

referenced the State Aid Program Funding and said the city needs to select a couple of projects to submit. Main Street is a priority. Mr. Smith said if the project was approved now, it could be two years before it would begin. Mayor Smith asked Mr. Smith to narrow the list down to three (3) road improvement projects. Mr. Smith then reviewed the upcoming overlay program. He referenced a map which illustrated the area where they began. Every street has to be driven and graded. Grading is based on three things: strata, distortion and roughness. He referenced the difference between different types of streets. Based on the current price, it appears 17 blocks can be over-layed per ward. Alderman Foutch asked about milling. Mayor Smith said the city will ask the low bidder how long the price will be in effect. Alderwoman Ross asked if state money would be used for large projects and if ward money would be divided equally among the wards. Alderman Hight asked the definition of a block. Mr. Smith said about 360 feet (residential street equals 23 feet of asphalt, 1 ½ inch base). You cannot mill all streets as the base could be exposed. Mayor Smith sent a letter to neighborhood groups for additional input. There being no further discussion, the public meeting was adjourned at 6:23 p.m.

The regular meeting of the North Little Rock City Council scheduled for Monday, February 25, 2013, was called to order at 6:31 p.m. by the honorable Mayor JOE A. SMITH. The roll having been called and the following Aldermen answered to their names: DEBI ROSS, BETH WHITE, MAURICE TAYLOR, LINDA ROBINSON, STEVE BAXTER, BRUCE FOUTCH, and CHARLIE HIGHT (7/0), a quorum was declared. Alderman MURRY WITCHER was absent. Assistant City Clerk Linda Marshall and Assistant City Attorney Matt Fleming were also present.

The invocation was given by Mr. Tom White, followed by the pledge of allegiance to the flag which was led by Police Chief Danny Bradley.

On the motion of Alderman Hight and seconded by Alderman Foutch and by consent of all members present, the minutes of a regular council meeting scheduled for Monday, January 28, 2013, were approved, accepted and filed as prepared by the City Clerk (7/0).

On the blanket motion of Alderman Hight and seconded by Alderman Foutch, and by consent of all members present, communication #1was read, accepted and filed (7/0).

Alderman Hight asked members of the Mello Velo Cycling Club to join him at the podium. He thanked Charlie Hart and club members for their donation of a Bike Fixit Station that has been installed under the Main Street Bridge for use by bicyclists of all skill levels utilizing the River Trail. Funds to purchase the Bike Fixit Station were appropriated from the Marilyn Fulper Memorial Fund raised through entry fees and donations to the Wampoo Roadeo. Alderman Hight presented a road sign to the group which will be installed on the trail. Ms. Fulper's sister Becky said Marilyn was an avid biker and was killed while training for a marathon.

Mayor Smith invited Nathan Rutledge, Crews and Associates and Betsy Davies, First Security Bank to come forward.. They then presented Mayor Smith with the 2012 Quality of Life Award in recognition of North Little Rock's work with the City of Little Rock for their joint efforts in regards to the Arkansas River Trail, a 14-mile hiking, walking and riding trail which spans both cities and connects 39 parks and six museums with seven communities and 44,000 residents representing 54,000 jobs who live within a half-mile of the trail.

Mayor Smith then introduced the North Little Rock Police and Fire Video which was shown last week during their annual Awards Ceremony. Following the video Mayor Smith thanked North Little Rock's Police and Fire Department employees for their service.

Mayor Smith convened a public hearing regarding O-13-18 – an Ordinance amending Ordinance No. 7946 (regulations to control development and subdivision of land), Chapters 18 and 46 of the NLRMC and Ordinance No. 7697 (the Zoning Ordinance) re: Hillside Cut Regulations. There being no one present wishing to be heard, the public hearing was adjourned.

UNFINISHED BUSINESS

R-13-23

A RESOLUTION APPROPRIATING $500,000.00 FROM THE GENERAL FUND FOR THE STREET OVERLAY PROGRAM; AND FOR OTHER PURPOSES, was called and held by the sponsor, Mayor Smith.

R-13-28

A RESOLUTION EXPRESSING THE WILLINGNESS OF THE CITY OF NORTH LITTLE ROCK, ARKANSAS TO UTILIZE STATE AID STREET MONIES FOR CITY STREET PROJECTS; AND FOR OTHER PURPOSES, was called and held by the sponsor, Mayor Smith.

O-13-12

AN ORDINANCE ESTABLISHING PROCEDURES TO BE FOLLOWED IN THE ABSENCE OF THE MAYOR; DECLARING AN EMERGENCY; AND FOR OTHER PURPOSES, was read two times January 28, 2013, was called and withdrawn by the sponsor, Mayor Smith. The city is working with the Arkansas Municipal League to make changes to State Law.

O-13-18

AN ORDINANCE AMENDING ORDINANCE NO. 7946 (REGULATIONS TO CONTROL DEVELOPMENT AND SUBDIVISION OF LAND), CHAPTERS 18 AND 46 OF THE NORTH LITTLE ROCK MUNICIPAL CODE (NLRMC), AND ORDINANCE NO. 7697 (THE ZONING ORDINANCE) REGARDING HILLSIDE CUT REGULATIONS; DECLARING AN EMERGENCY; AND FOR OTHER PURPOSES, was read one time February 11, 2013. A public hearing was held this date, the legislation was read a second time and held by the sponsor, Alderwoman Ross.

this was not included. On the motion of Alderman Taylor and seconded by Alderwoman Ross, and by consent of all members present, the ordinance was adopted (7/0). Emergency clause adopted (7/0).

O-13-20 (ORDINANCE NO. 8511 – MAYOR SMITH)
AN ORDINANCE WAIVING FORMAL BIDDING REQUIREMENTS FOR INSURANCE FOR THE MURRAY HYDROELECTRIC PLANT; AUTHORIZING THE MAYOR AND CITY CLERK TO ENTER INTO AN AGREEMENT WITH THE HOLMES ORGANISATION, INC.; DECLARING AN EMERGENCY; AND FOR OTHER PURPOSES, was read. On the motion of Alderwoman Robinson and seconded by Alderman Taylor, and by consent of all members present, the rules were suspended and the ordinance was placed on its second reading (7/0). On the motion of Alderman Hight and seconded by Alderman Taylor, and by consent of all members present, the rules were again suspended and the ordinance was placed on its third and final reading (7/0). The ordinance was read a third and final time. Alderwoman Ross asked about Business Interruption. On the motion of Alderman Hight and seconded by Alderman Taylor, and the roll having been called, and all members present having voted in the affirmative, the ordinance was adopted (7/0). Emergency clause adopted (7/0). Mayor Smith has asked City Attorney C. Jason Carter, acting General Manager North Little Rock Electric Department to look at extending the term of future agreements.

O-13-21
AN ORDINANCE GRANTING A CONDITIONAL USE TO ALLOW A SELF-SERVICE ICE VENDING UNIT IN A C-3 ZONE FOR CERTAIN REAL PROPERTY LOCATED AT 4032 JOHN F. KENNEDY BOULEVARD IN THE CITY OF NORTH LITTLE ROCK, ARKANSAS; DECLARING AN EMERGENCY; AND FOR OTHER PURPOSES, was called and held by the sponsor (*for consideration only*) Mayor Smith. (*applicant: Clint Davis*)

O-13-22 (ORDINANCE NO. 8512 – ALDERMAN TAYLOR)
AN ORDINANCE RECLASSIFYING CERTAIN PROPERTY LOCATED AT 4816 EAST BROADWAY IN THE CITY OF NORTH LITTLE ROCK, ARKANSAS FROM C-3 TO PLANNED USE DEVELOPMENT (PUD) TO ALLOW A LIQUOR STORE BY AMENDING ORDINANCE NO. 7697 OF THE CITY OF NORTH LITTLE ROCK, ARKANSAS; DECLARING AN EMERGENCY; AND FOR OTHER PURPOSES, was read. On the motion of Alderman Taylor and seconded by Alderwoman Robinson, and by consent of all members present, the rules were suspended and the ordinance was placed on its second reading (7/0). The ordinance was read a second time. A motion to suspend the rules and place the ordinance on its third and final reading was made by Alderman Taylor and seconded by Alderwoman Robinson. Alderwoman Robinson asked if this was the location of Stella's Liquor Store. Alderman Taylor advised it was. The owner decided to build a new building next to the old building. Alderwoman Ross asked why the zoning isn't C-4. Alderman Taylor said this proposed use is better for the ward. On the previous motion, and by consent of all members present, the rules were again suspended and the ordinance was placed on its third and final reading (7/0). The ordinance was read a third and final time. On the motion of Alderman Taylor and

CONSENT AGENDA

No Items.

NEW BUSINESS

R-13-29 (RESOLUTION NO. 8264 – MAYOR SMITH)
A RESOLUTION AUTHORIZING THE MAYOR TO SUBMIT AN APPLICATION ON BEHALF OF THE CITY OF NORTH LITTLE ROCK TO OBTAIN GRANT FUNDS FROM THE ARKANSAS HIGHWAY AND TRANSPORTATION DEPARTMENT'S "SAFE ROUTES TO SCHOOL PROGRAM"; AND FOR OTHER PURPOSES, was read. On the motion of Alderwoman Ross and seconded by Alderman Taylor, and by consent of all members present, the resolution was adopted (7/0).

R-13-30 (RESOLUTION NO. 8265 – ALDERMEN ROBINSON, ROSS, WHITE, TAYLOR, BAXTER, FOUTCH, HIGHT AND WITCHER)
A RESOLUTION DIRECTING THE CITY ATTORNEY TO APPLY TO THE UNITED STATES DISTRICT COURT FOR DISSOULUTION OF THE CONSENT DECREE ENTERED APRIL 21, 1983; AND FOR OTHER PURPOSES, was read. On the motion of Alderman Taylor and seconded by Alderwoman Robinson, and by consent of all members present, the resolution was adopted (7/0). Without objection, all members were added as co-sponsors.

R-13-31 (RESOLUTION NO. 8266 – MAYOR SMITH)
A RESOLUTION AUTHORIZING THE MAYOR AND CITY CLERK TO SELL PROPERTY LOCATED AT 1023 PARKER STREET IN THE CITY OF NORTH LITTLE ROCK; AND FOR OTHER PURPOSES, was read. On the motion of Alderwoman Ross and seconded by Alderwoman Robinson, and by consent of all members present, the resolution was adopted (7/0). *(to Amber Pye - $94,500.00)*

Items R-13-32 through R-13-38 were held until 7:00 p.m. due to previous public hearing notification.

O-13-19 (ORDINANCE NO. 8510 – MAYOR SMITH)
AN ORDINANCE AMENDING SECTION 20.12 OF ORDINANCE NO. 7697 (THE ZONING ORDINANCE) TO CLARIFY THE EXISTING NOTICE POLICY FOR THE PLANNING COMMISSION; DECLARING AN EMERGENCY; AND FOR OTHER PURPOSES, was read. On the motion of Alderwoman Ross and seconded by Alderwoman Robinson, and by consent of all members present, the rules were suspended and the ordinance was placed on its second reading (7/0). On the motion of Alderman Taylor and seconded by Alderwoman Robinson, and by consent of all members present, the rules were again suspended and the ordinance was placed on its third and final reading (7/0). The ordinance was read a third and final time. Mr. Shawn Spencer, Planning Department advised this was adopted in 1992. When the new zoning ordinance was revised in 2005,

seconded by Alderwoman Robinson, and the roll having been called, and all members present having voted in the affirmative, the ordinance was adopted (7/0). Emergency clause adopted (7/0). (*applicant: James Duncan*)

O-13-23 (ORDINANCE NO. 8513 – ALDERMEN FOUTCH AND BAXTER)
AN ORDINANCE ALLOWING AND APPROVING VARIANCES FOR AN OFF-PREMISE, FREESTANDING POLE SIGN ON CERTAIN REAL PROPERTY LOCATED AT 10307 MAUMELLE BOULEVARD IN THE CITY OF NORTH LITTLE ROCK, ARKANSAS; DECLARING AN EMERGENCY; AND FOR OTHER PURPOSES, was read. On the motion of Alderman Foutch and seconded by Alderman Baxter, and by consent of all members present, the rules were suspended and the ordinance was placed on its second reading (7/0). On the motion of Alderman Foutch and seconded by Alderman Baxter, and by consent of all members present, the rules were again suspended and the ordinance was placed on its third and final reading (7/0). The ordinance was read a third and final time. On the motion of Alderman Baxter and seconded by Alderman Foutch, and the roll having been called, and all members present having voted in the affirmative, the ordinance was adopted (7/0). Emergency clause adopted (7/0). (*applicant: Phil Dively*)

R-13-32 (RESOLUTION NO. 8267 – MAYOR SMITH)
A RESOLUTION DECLARING CERTAIN BUILDINGS, HOUSES AND OTHER STRUCTURES LOCATED AT 704 WEST 18TH STREET IN THE CITY OF NORTH LITTLE ROCK TO CONSTITUTE A PUBLIC NUISANCE AND CONDEMNING SAID STRUCTURES; PROVIDING A PERIOD OF TIME FOR PROPERTY OWNER TO ABATE SAID NUISANCE; AND FOR OTHER PURPOSES, was read. A motion to adopt was made by Alderwoman Ross and seconded by Alderman Taylor. Mayor Smith convened a public hearing. There being no one present wishing to be heard, the public hearing was adjourned. On the previous motion, and by consent of all members present, the resolution was adopted (7/0). (*owner: JNYLECO, Inc. c/o Jocelyn Dokes*)

R-13-33 (RESOLUTION NO. 8268 – MAYOR SMITH)
A RESOLUTION DECLARING CERTAIN BUILDINGS, HOUSES AND OTHER STRUCTURES LOCATED AT 2713 GRIBBLE STREET IN THE CITY OF NORTH LITTLE ROCK TO CONSTITUTE A PUBLIC NUISANCE AND CONDEMNING SAID STRUCTURES; PROVIDING A PERIOD OF TIME FOR PROPERTY OWNERS TO ABATE SAID NUISANCE; AND FOR OTHER PURPOSES, was read. A motion to adopt was made by Alderman Baxter and seconded by Alderman Taylor. Mayor Hays convened a public hearing. Mr. Robert Jerrod, Sr. wants to tear down the structure, however he needs more time. Mr. Tom Wadley, Code Enforcement Director said the city's process will begin on the 30th day. Contracts would have to be made which would take a while. On the motion of Alderman Taylor and seconded by Alderwoman Robinson, and by consent of all members present, the resolution was amended as follows:: *change thirty 30 days to* SIXTY 60 DAYS (7/0). On the motion of Alderman Taylor and seconded by Alderman Baxter, and by consent of all members present, the resolution was adopted as amended (7/0). (*owners: Jessie and Lewis Ford*)

R-13-34 (RESOLUTION NO. 8269 – MAYOR SMITH)
A RESOLUTION DECLARING CERTAIN BUILDINGS, HOUSES AND OTHER STRUCTURES LOCATED AT 704 GRAHAM AVENUE IN THE CITY OF NORTH LITTLE ROCK TO CONSTITUTE A PUBLIC NUISANCE AND CONDEMNING SAID STRUCTURES; PROVIDING A PERIOD OF TIME FOR PROPERTY OWNER TO ABATE SAID NUISANCE; AND FOR OTHER PURPOSES, was read. A motion to adopt was made by Alderman Taylor and seconded by Alderwoman Robinson. Mayor Smith convened a public hearing. There being no one present wishing to be heard, the public hearing was adjourned. On the previous motion, and by consent of all members present, the resolution was adopted (7/0). (*owner: Cheteer Farrar*)

R-13-35 (RESOLUTION NO. 8270 – MAYOR SMITH)
A RESOLUTION DECLARING CERTAIN BUILDINGS, HOUSES AND OTHER STRUCTURES LOCATED AT 4004 ROGERS STREET IN THE CITY OF NORTH LITTLE ROCK TO CONSTITUTE A PUBLIC NUISANCE AND CONDEMNING SAID STRUCTURES; PROVIDING A PERIOD OF TIME FOR PROPERTY OWNER TO ABATE SAID NUISANCE; AND FOR OTHER PURPOSES, was read. A motion to adopt was made by Alderwoman Robinson and seconded by Alderman Taylor. Mayor Smith convened a public hearing. There being no one present wishing to be heard, the public hearing was adjourned. On the previous motion, and by consent of all members present, the resolution was adopted (7/0). (*owner: Robert J. and Barbara Hoyle*)

R-13-36 (RESOLUTION NO. 8271 – MAYOR SMITH)
A RESOLUTION DECLARING CERTAIN BUILDINGS, HOUSES AND OTHER STRUCTURES LOCATED AT 1304 EAST 16TH STREET IN THE CITY OF NORTH LITTLE ROCK TO CONSTITUTE A PUBLIC NUISANCE AND CONDEMNING SAID STRUCTURES; PROVIDING A PERIOD OF TIME FOR PROPERTY OWNERS TO ABATE SAID NUISANCES; AND FOR OTHER PURPOSES, was read. A motion to adopt was made by Alderman Taylor and seconded by Alderman Foutch. Mayor Smith convened a public hearing. There being no one present wishing to be heard, the public hearing was adjourned. On the previous motion, and by consent of all members present, the resolution was adopted (7/0). (*owner: Mary E. Smith*)

R-13-37 (RESOLUTION NO. 8272 – MAYOR SMITH)
A RESOLUTION DECLARING CERTAIN BUILDINGS, HOUSES AND OTHER STRUCTURES LOCATED AT 6615 HWY 70 IN THE CITY OF NORTH LITTLE ROCK TO CONSTITUTE A PUBLIC NUISANCE AND CONDEMNING SAID STRUCTURES; PROVIDING A PERIOD OF TIME FOR PROPERTY OWNER TO ABATE SAID NUISANCE; AND FOR OTHER PURPOSES, was read. A motion to adopt was made by Alderman Taylor and seconded by Alderwoman Robinson. Mr. Mickey Stevens, Attorney at Law represents Convent Corporation. He advised people have broken into the property and stolen copper wiring, etc. Most of the issues are cosmetic and the owners want to rehab the property. However, they are concerned with a condemnation order and the limited

time to comply with the same. They are requesting a postponement and want to present a plan to the city. Mayor Smith said the owners have 30 days to negotiate with the city's attorneys. Alderwoman Ross asked if the owners have tried to do anything to the property before receiving the condemnation notice. Mr. Stevens said they cleaned up the property. Alderwoman Ross asked how long the property had been vacant. Mr. Stevens said it has been a while. There is some roof damage. Alderwoman Robinson asked what the owners want to put in at this location. Mr. Stevens referenced a settlement agreement. Alderwoman Robinson said Meadowpark Neighborhood Association members believe the building is a nuisance and wants it torn down. Mr. Stevens said the condemnation ordinance may not be constitutional. Mayor Smith said the council is a legislative body, not judicial. Alderwoman Ross asked if there was a fire in the building. Mr. Stevens did not know. Alderman Taylor asked how long the building had been vacant. Mr. Stevens did not know for sure. Mr. Stevens asked to submit a brief which he gave to the city attorney. Mayor Smith adjourned the public hearing. On the previous motion, and by consent of all members present, the resolution was adopted (7/0). (*owner: Convent Corp. Drugstore Cowboys, Inc., Gentlemen's Club 70 c/o Craig Snyder*)

R-13-38 (RESOLUTION NO. 8273 – MAYOR SMITH)
A RESOLUTION CERTIFYING THE AMOUNT OF A CLEAN UP LIEN TO BE FILED WITH THE PULASKI COUNTY TAX COLLECTOR AGAINST CERTAIN REAL PROPERTY LOCATED 2119 MOSS STREET IN THE CITY OF NORTH LITTLE ROCK, ARKANSAS; AND FOR OTHER PURPOSES, was read. A motion to adopt was made by Alderman Taylor and seconded by Alderman Foutch. Mayor Smith convened a public hearing. There being no one present wishing to be heard, the public hearing was adjourned. On the previous motion, and by consent of all members present, the resolution was adopted (7/0). (*amount - $3,407.90*)

PUBLIC COMMENT

Alderman Hight said the next council meeting scheduled for Monday, March 11, 2013, will be held on Thursday, March 14, 2013. Mr. Fleming reminded council members that filing deadline will not change. Alderwoman Robinson reminded Mr. Bob Sisson, Finance Director to get back with her regarding information she requested. She also asked the status of the Leaf Vacuums. Mayor Smith said they are running on-call only until the end of the month. Alderman Baxter has been contacted by anglers who want to know if there has been any resolution regarding low water in Burns Park. Mayor Smith said an additional ramp is being considered in the area of the FOP Lodge and/or Skateboard Park. Alderman Baxter has had calls about the leaf vacs, too. Alderman Baxter said the Little Rock Marathon is this weekend and a lot of city employees will be working this weekend and he appreciated them in advance. Alderman Baxter will be running in the full marathon. Mayor Smith announced the North Little Rock Woman's Club Carousel Ball, Saturday, April 6, 2013. Mayor Smith advised Ms. Diane Whitbey, City Clerk was ill and wished her a speedy recovery. He thanked Mrs. Marshall and Mr. Daven McCoy for their work during the meeting. Alderwoman Ross said the North Little Rock Fire Department is participating in a city-wide shoe drive. Gently used shoes can be dropped off at any fire station between March 1 and March 18, 2013.

There being no further business to come before the Council, and on the motion of Alderman Taylor and seconded by Alderwoman Ross, and by consent of all members present, the meeting was adjourned at 7:31 p.m. (7/0), until the next regularly scheduled meeting scheduled for Monday, March 11, 2013, which was rescheduled to ***Thursday, March 14, 2013***, at six thirty o'clock p.m. in the City Council Chambers in City Hall, located at 300 Main Street, North Little Rock, Arkansas.

APPROVED: Joe A. Smith
MAYOR JOE A. SMITH

ATTEST: Diane Whitbey
DIANE WHITBEY, CITY CLERK

R-13-37

RESOLUTION NO. 8272

A RESOLUTION DECLARING CERTAIN BUILDINGS, HOUSES AND OTHER STRUCTURES LOCATED AT 6615 HWY. 70 IN THE CITY OF NORTH LITTLE ROCK TO CONSTITUTE A PUBLIC NUISANCE AND CONDEMNING SAID STRUCTURES; PROVIDING A PERIOD OF TIME FOR PROPERTY OWNER TO ABATE SAID NUISANCE; AND FOR OTHER PURPOSES.

WHEREAS, the buildings and structures whose location is set forth herein are vacant and have become run down, dilapidated, unsightly, dangerous, obnoxious, unsafe, not fit for human habitation and detrimental to the public welfare of North Little Rock citizens and residents; and

WHEREAS, the condition of such property constitutes a serious fire and health hazard to the City of North Little Rock, and unless immediate actions are taken to remedy this situation by removing, razing and abating said nuisance, there is a great likelihood that the surrounding property may be destroyed by fire originating from such unsafe and hazardous structures, and also that since structures are without proper sanitary facilities and as such are unsafe and hazardous and a breeding place for rats, rodents and other dangerous germ carriers of diseases, such buildings constitute a serious hazard to the health and safety of the citizens of North Little Rock, and they should be moved or razed for the purpose of eliminating such hazards.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF NORTH LITTLE ROCK, ARKANSAS:

SECTION 1: That the City Council hereby declares the buildings, houses and other structures located at the property identified in Section 2 below to be vacant and run down, dilapidated, unsafe, unsightly, dangerous, obnoxious, unsanitary, a fire hazard, a menace to abutting properties, with the current condition of said structures not being fit for human habitation; and because of such conditions, the City Council declares the same to be condemned as a public nuisance and is ordered abated, removed or razed by the owner thereof.

SECTION 2: That the owner of record of the following described property is hereby directed to raze the same or otherwise abate the said nuisance within thirty (30) days after the posting of a true copy of this Resolution at a conspicuous place upon the structure constituting the nuisance described herein, to-wit:

Pt NW SE from the intersection of NLR of Hwy 70 with TH WLN of SE run E'rly AL Hwy 100' to POB TH cont E'rly AL Hwy 100' TH N to SLN of CRI&P Ry TH W'rly AL RY to a Pt directly N of POB S to BG 28 IN 11. (Parcel No. 23N0150004100, located at 6615 Hwy. 70, and owned by

Convent Corp. [Drugstore Cowboys, Inc., Gentlemen's Club 70], c/o Craig Snyder.)

SECTION 3: If the aforementioned structures have not been razed and/or removed within ninety (90) days after posting a true copy of this Resolution at a conspicuous place upon the structures constituting the nuisance, or the nuisance otherwise abated, the structures shall be torn down and/or removed by the Director of Code Enforcement or his duly designated representative. Each day after the aforesaid ninety (90) days in which said nuisance is not abated shall constitute a separate and distinct offense punishable by a fine of $50.00 for each such separate and distinct offense.

SECTION 4: That the provisions of this Resolution are hereby declared to be severable and if any section, phrase or provision shall be declared or held invalid, such invalidity shall not affect the remainder of the sections, phrases or provisions.

SECTION 5: That this Resolution shall be in full force and effect from and after its passage and approval.

PASSED:

2-25-13

APPROVED: Joe A. Smith

Mayor Joe A. Smith

APPROVED:

Mayor Joe A. Smith

ATTEST: Diane Whitbey

Diane Whitbey, City Clerk

APPROVED AS TO FORM:

Tamara Lewis, City Attorney

PREPARED BY THE OFFICE OF THE CITY ATTORNEY/b

FILED 11:10 A.M. _____ P.M.
By Asst. City Atty. Fleming
DATE 2-19-13
Diane Whitbey, City Clerk and Collector
North Little Rock, Arkansas
RECEIVED BY T. Murdock

R-13-37

The City of North Little Rock

TOM WADLEY
DIRECTOR

701 WEST 29TH STREET
NORTH LITTLE ROCK, ARKANSAS 72114
501-791-8581 • Fax 501-791-8561
NLRCodeEnforcement@northlittlerock.org

CODE ENFORCEMENT DEPARTMENT

January 11, 2013

Mayor Smith
City Council Members

6615 Hwy 70
PT NW SE FROM THE INTERSECTION OF NLN OF HWY 70
WITH TH WLN OF SE RUN E'RLY AL HWY 100' TO POB TH CONT
E'RLY AL HWY 100' TH N TO SLN OF CRI&P RY TH W'RLY AL RY
TO A PT DIRECTLY N OF POB S TO BG 28 2N 11
Parcel 23N0150004100
City of North Little Rock, AR

Owner: Convent Corp, Drugstore Cowboys Inc., Gentlemen's Club 70
C/o Craig Snyder

Dear Mayor Smith;

November 2011 officer John Roberts conducted an exterior inspection of this property during a routine inspection of the area. The structure appeared to be vacant and unsecured. Notices of Public Nuisance were mailed and posted to the property.

October 2012 the file was forwarded to Officer F. McHenry. August 2011 this property was a part of an agreement between Drugstore Cowboy Inc. and the City of North Little Rock. Ultimately the business agreed to relocate, and since said time the building as stood vacant.

November 2012 a notice of City Council was mailed to the owners of record Convent Corp, Drugstore Cowboys Inc., Gentlemen's Club 70, c/o Craig Snyder advising them of a February 25th, 2013 City Council Hearing date. After no response a search warrant was obtained for the purpose of an interior inspection. The inspection showed numerous violations, it also showed that the structure has sustained some fire damage.

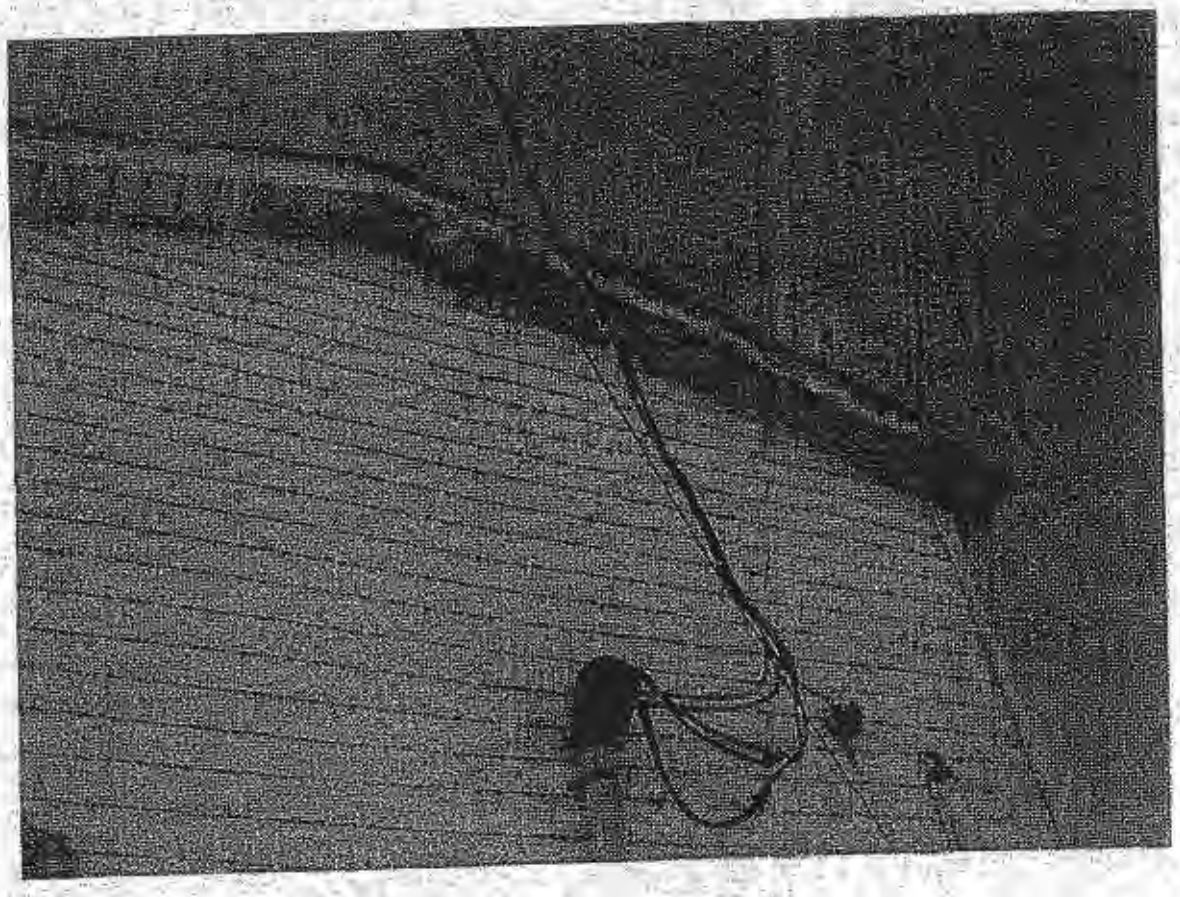
January 2013 I received a call from Rich Livdhal stating that he is the representative for Convent Corp, requesting a meeting regarding this structure, Jan 2013 he met with myself Tom Wadley and Bill Brown. He was advised on what would be required to bring the building into compliance according to City Codes. He was also advised that he is not listed as ownership of record, therefore we are not obligated to work with him, and he stated he is still working on getting the paperwork straight.

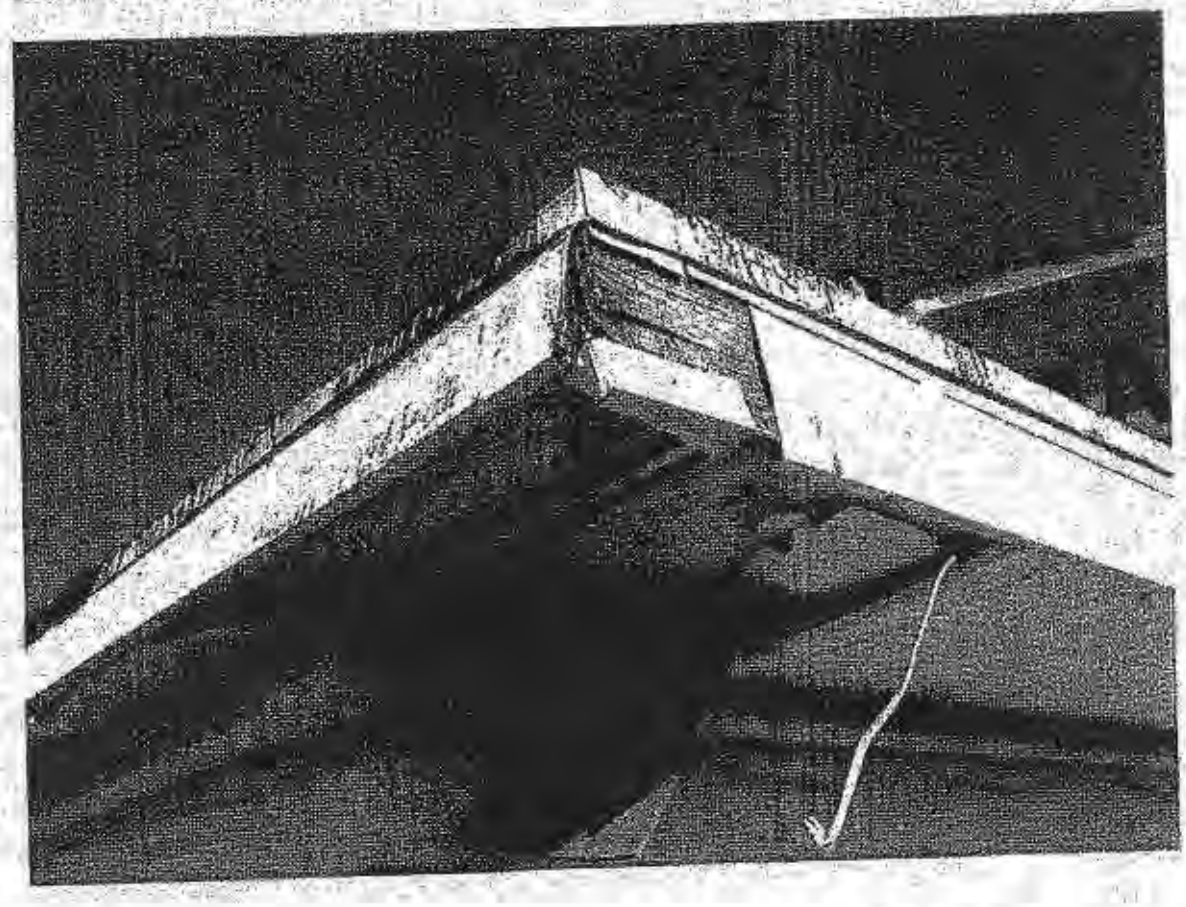
January 2013 Mr. Livdhal again came by our office and stated that he would have someone start cleaning out the building but still has no plans to rehab. He stated that he is just cleaning it out and keeping it boarded up. He was advised that we would still move forward with condemnation. He was again asked about ownership records. He still states that he doesn't have any paperwork showing him as invested owner.

This structure is considered to be a public nuisance and is unfit for human habitation. It is the recommendation of the North Little Rock Code Enforcement Department that the structure be considered for condemnation.

Felecia McHenry
Code Enforcement Officer

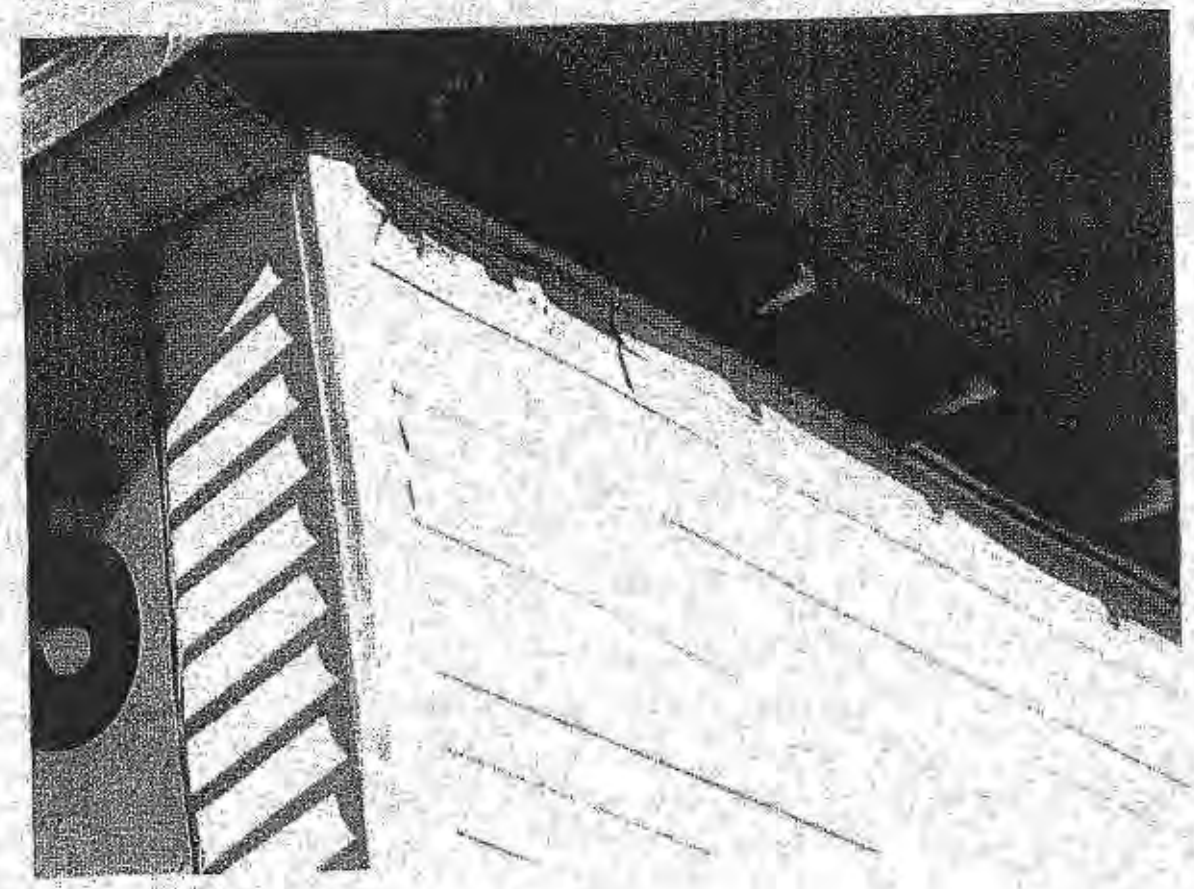
12-1842

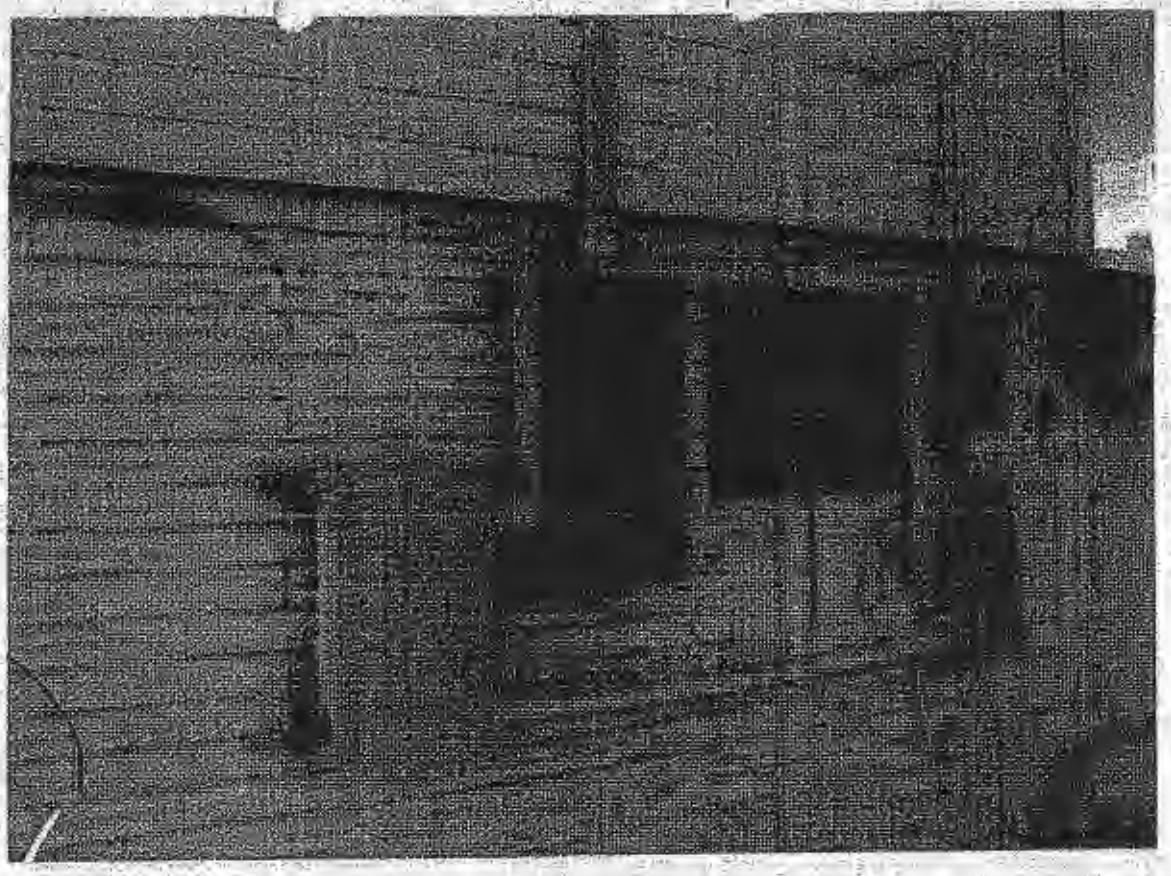


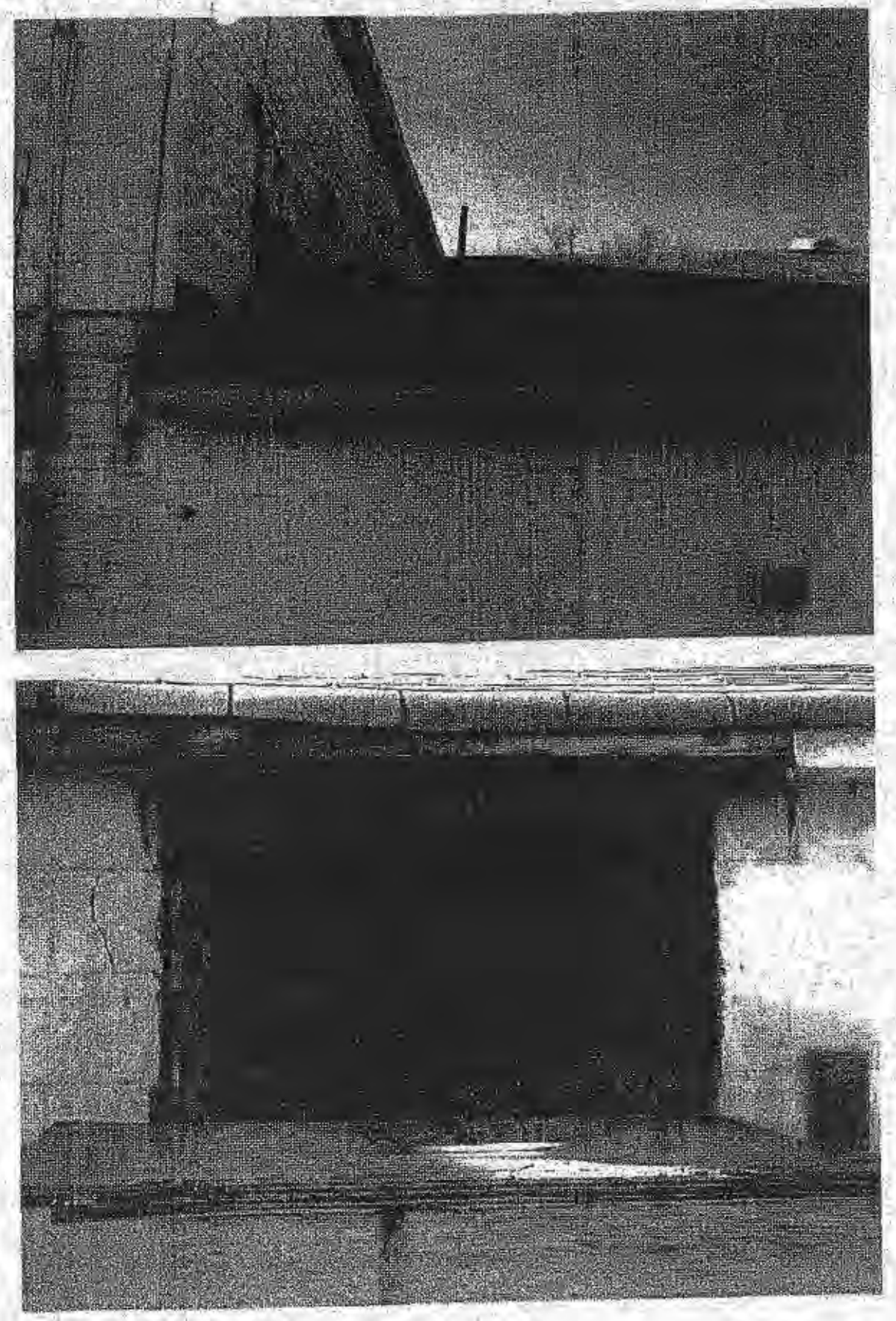


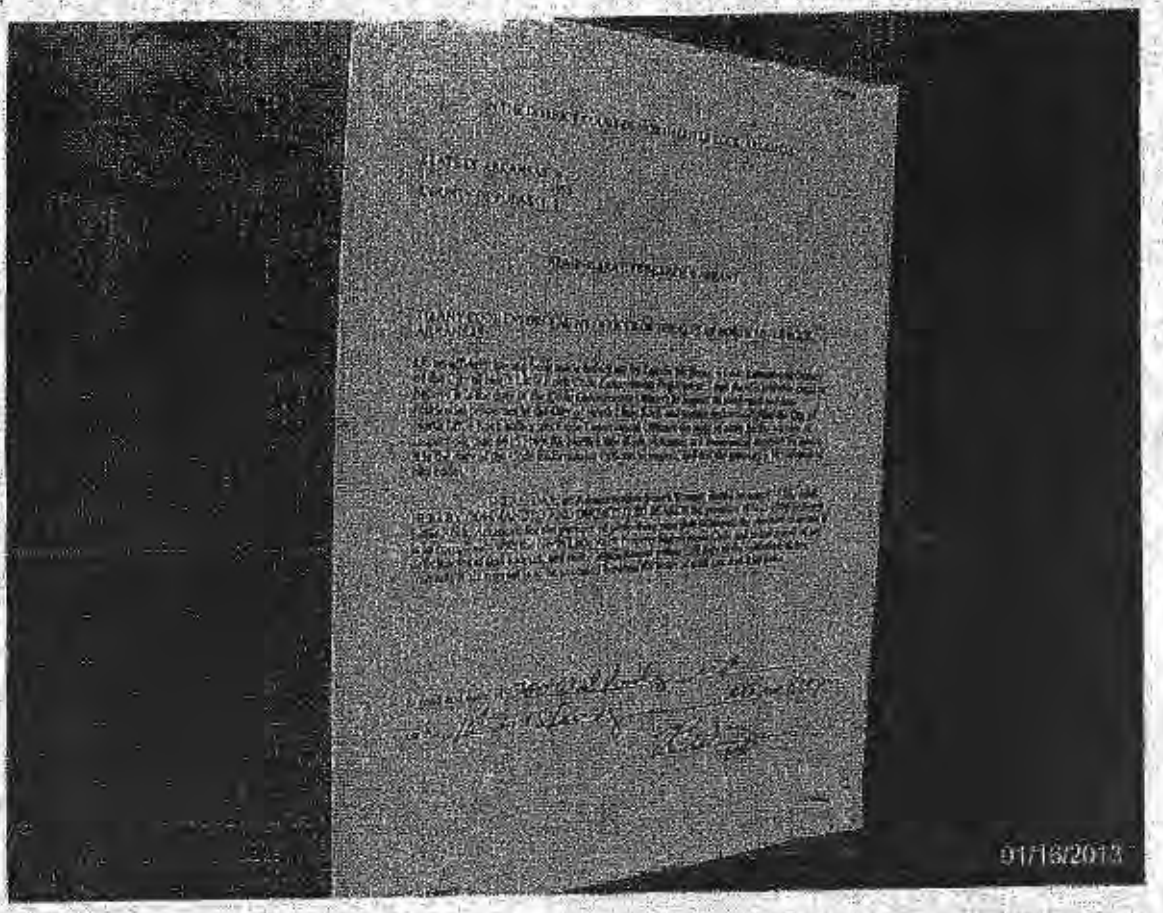

11/13/2012


11/13/2012





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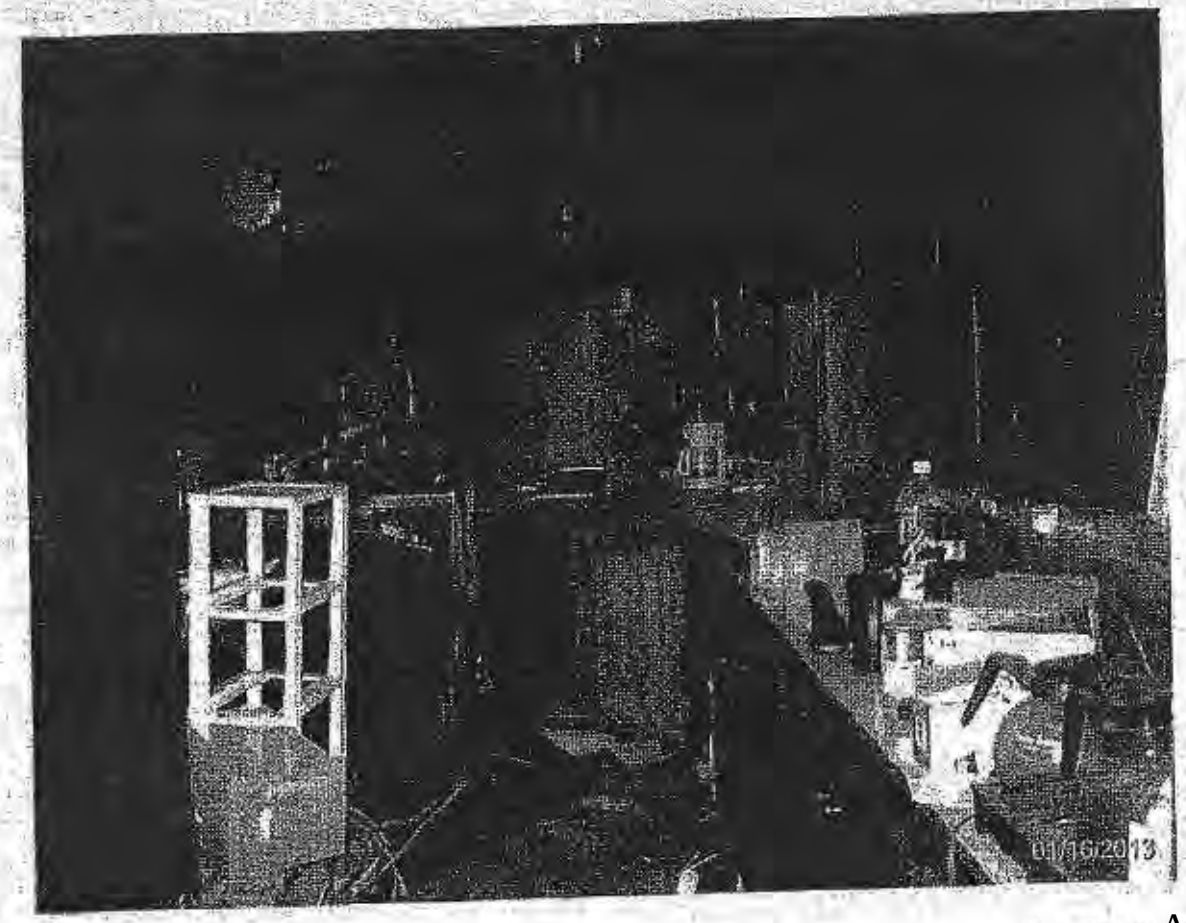
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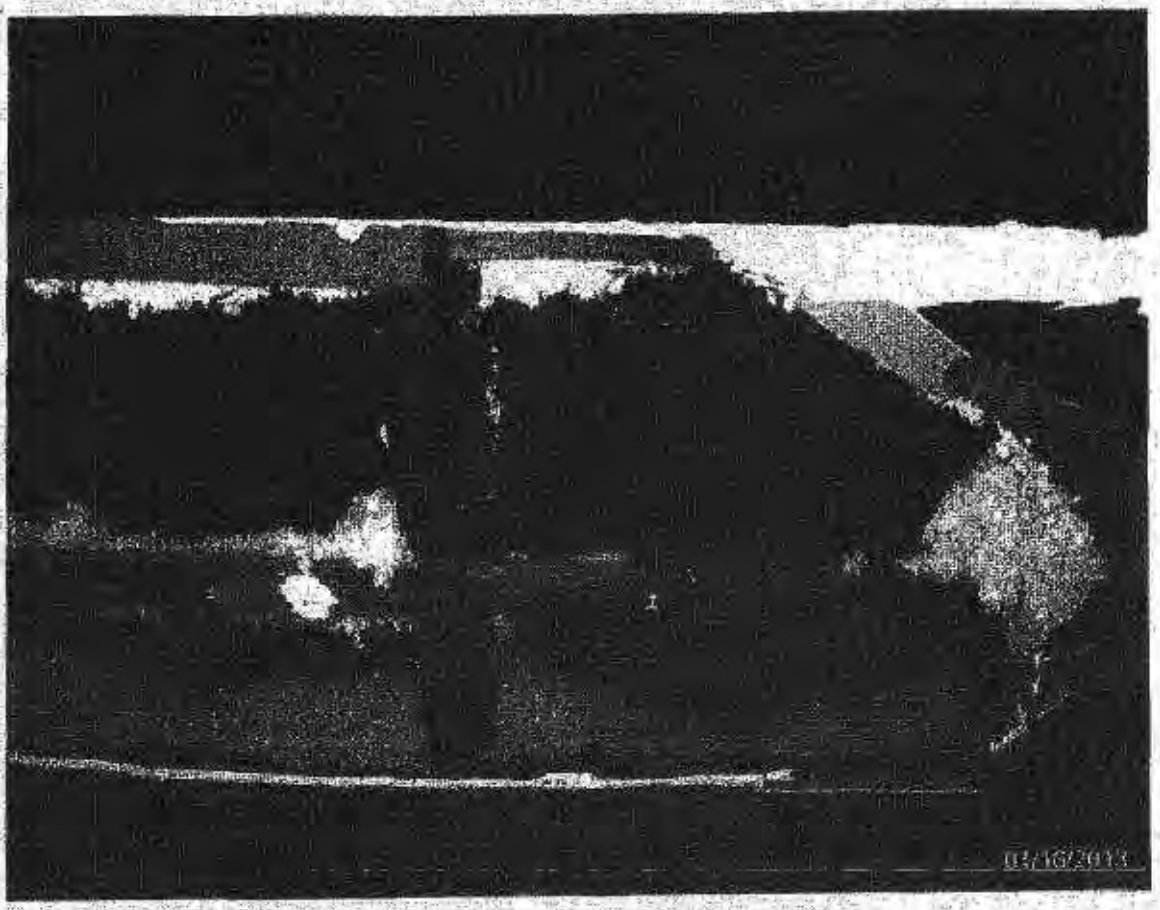
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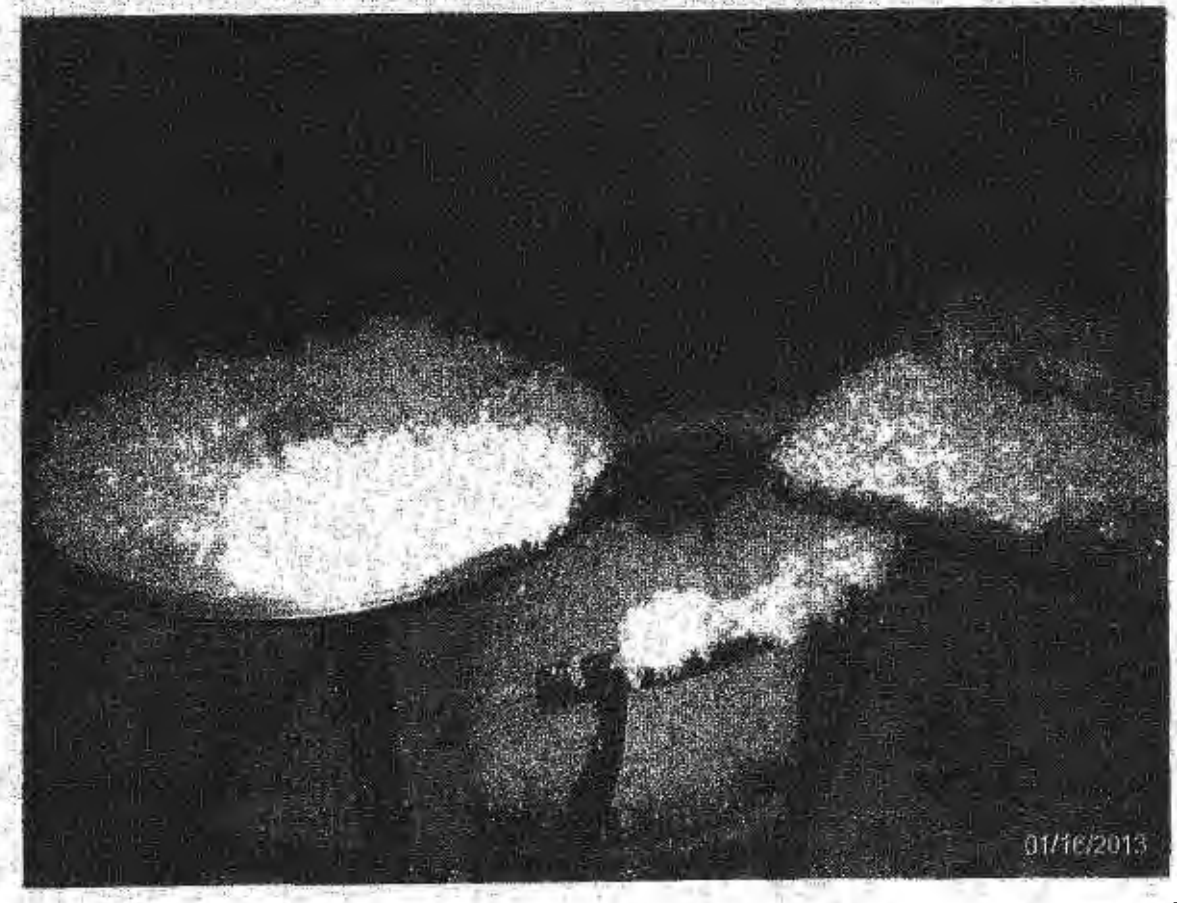
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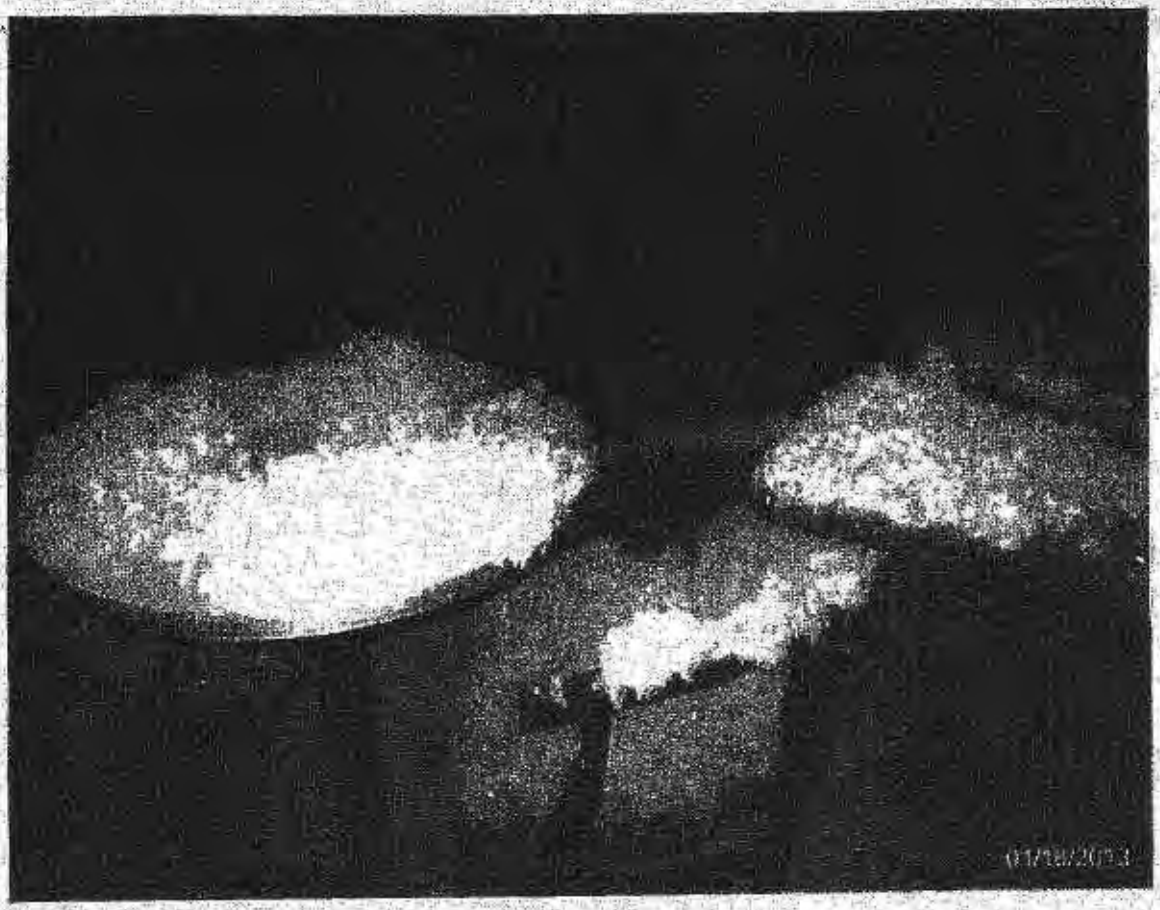

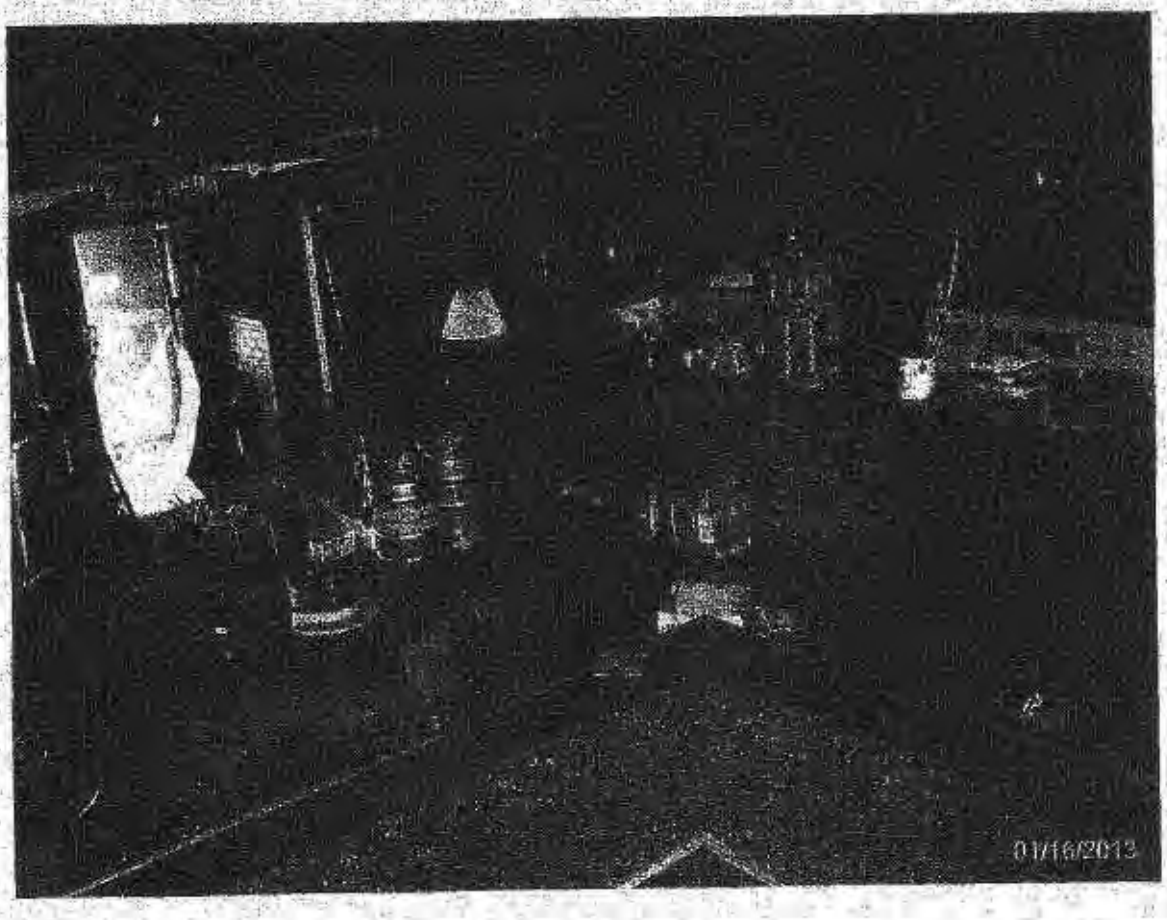
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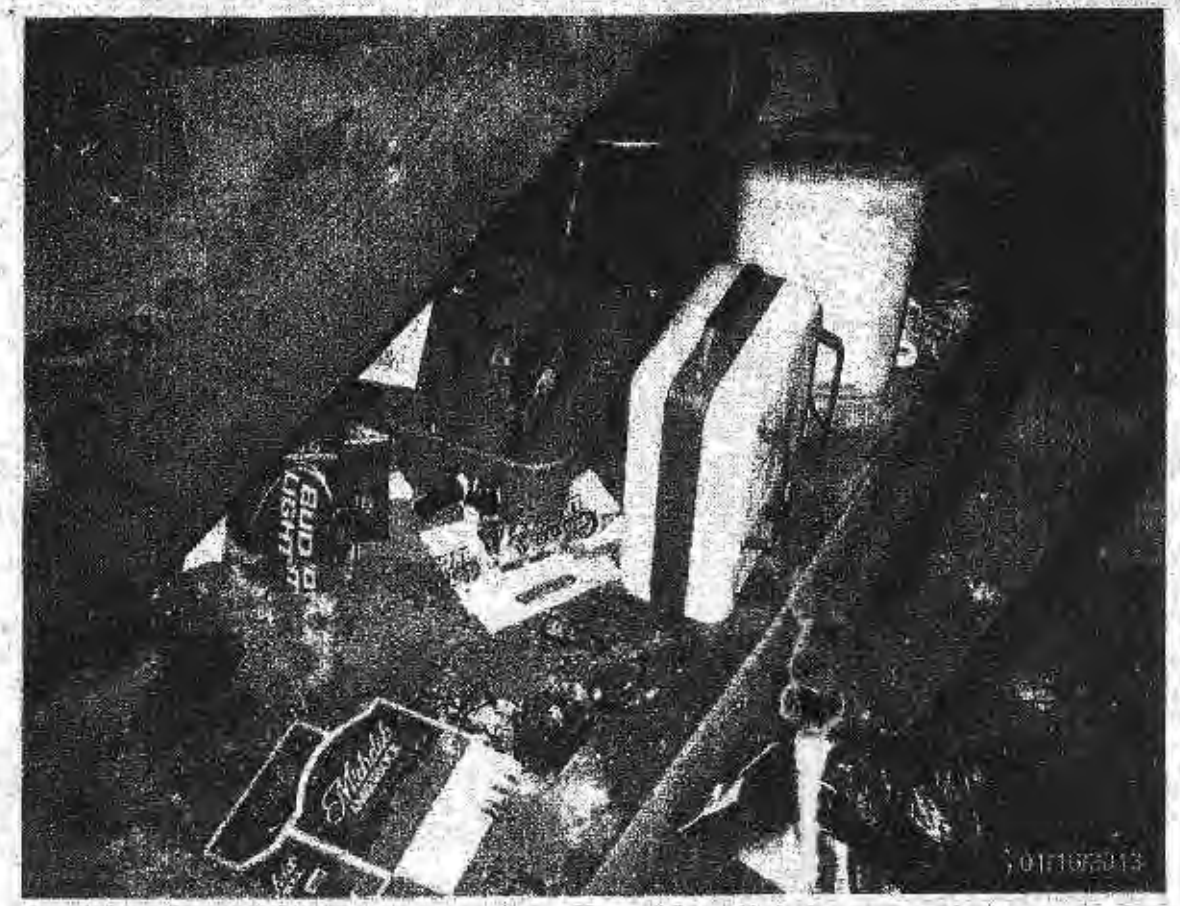
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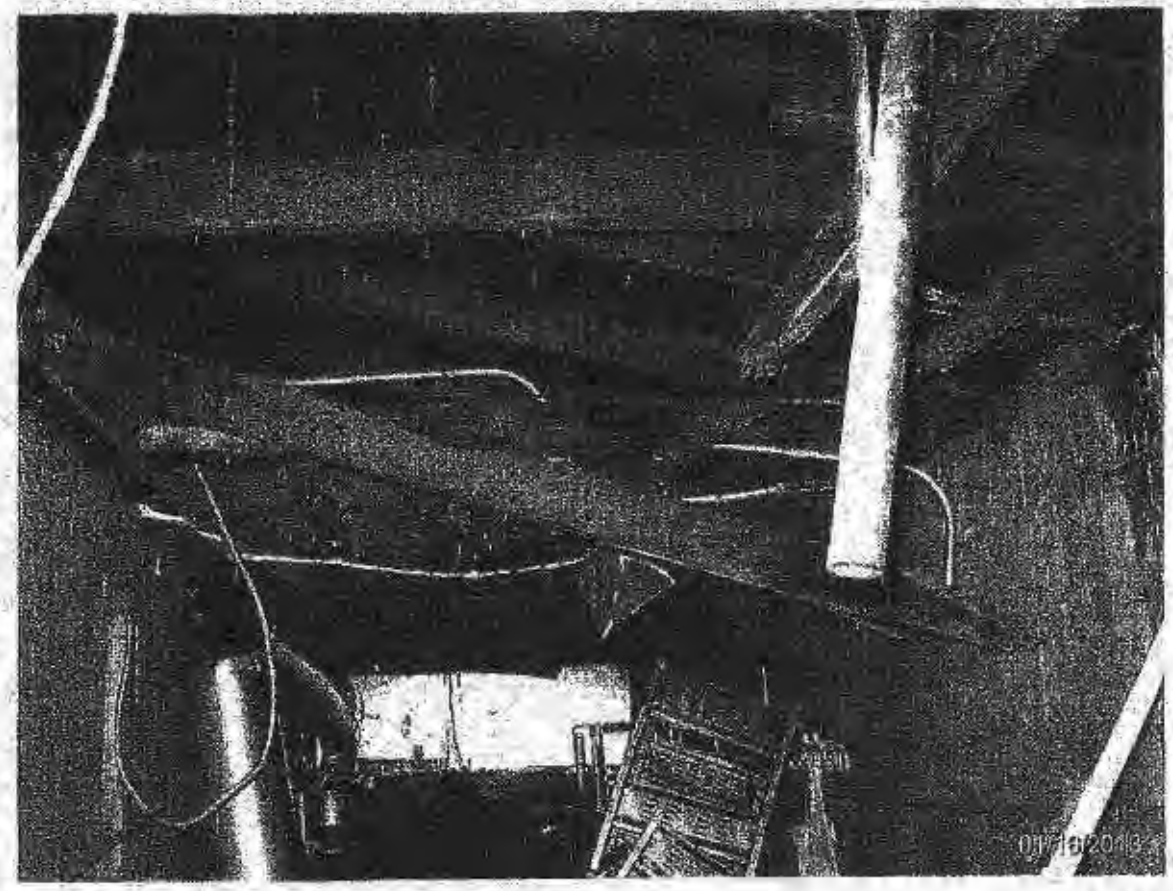


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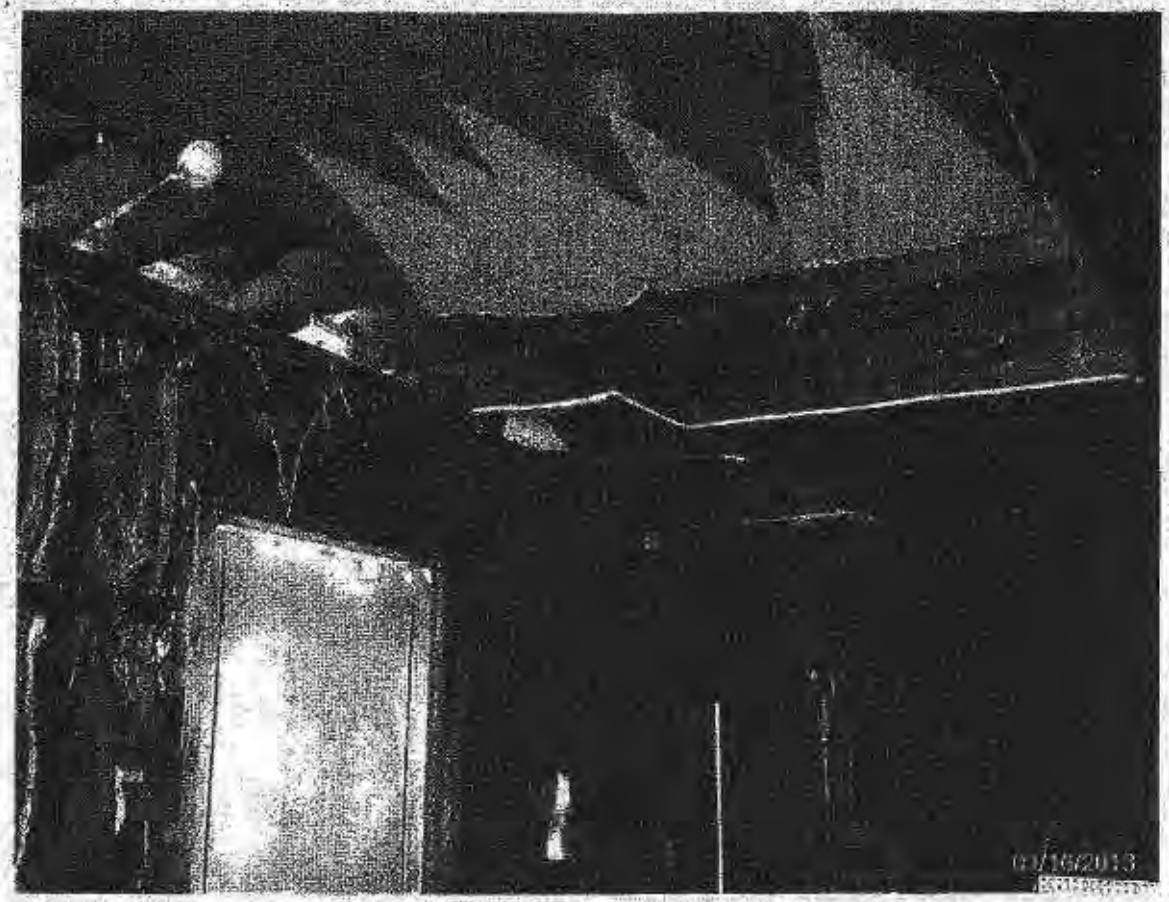
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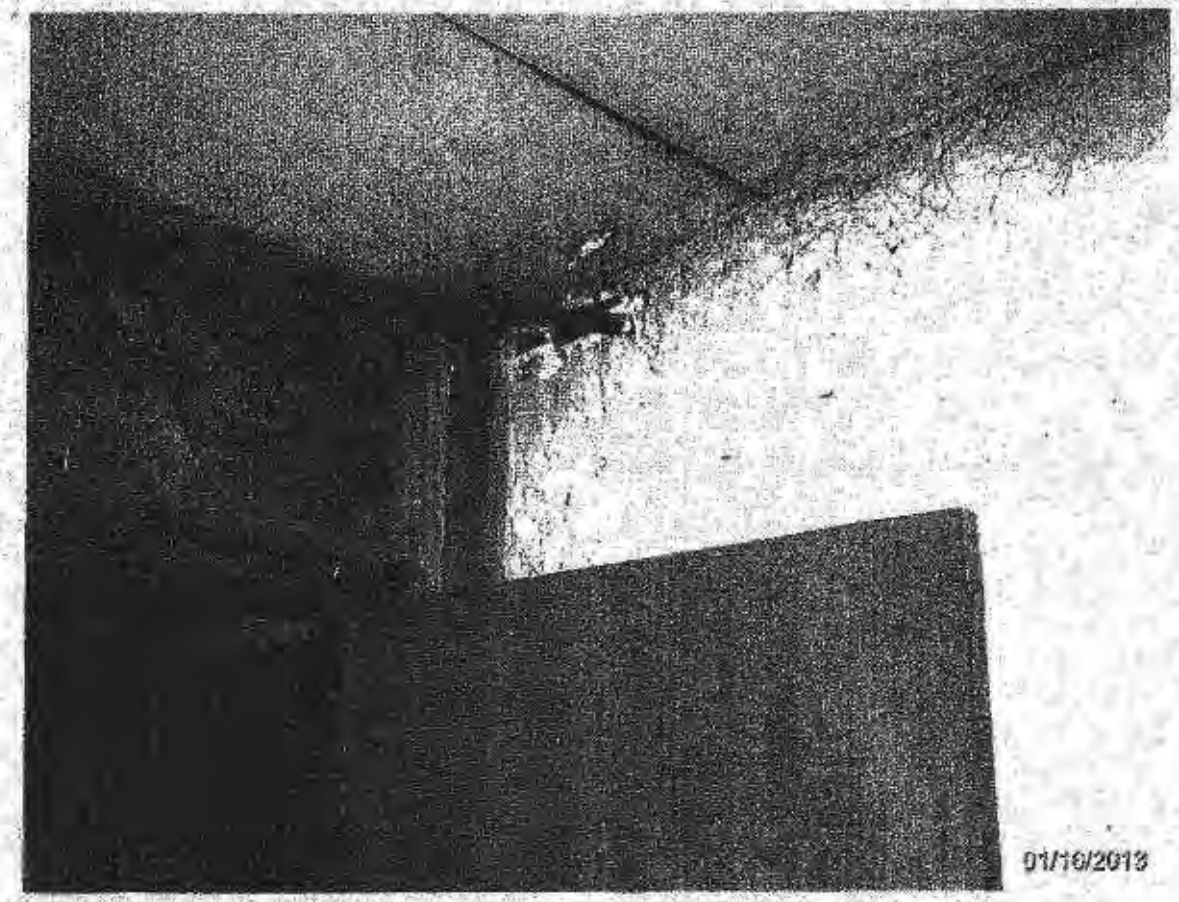
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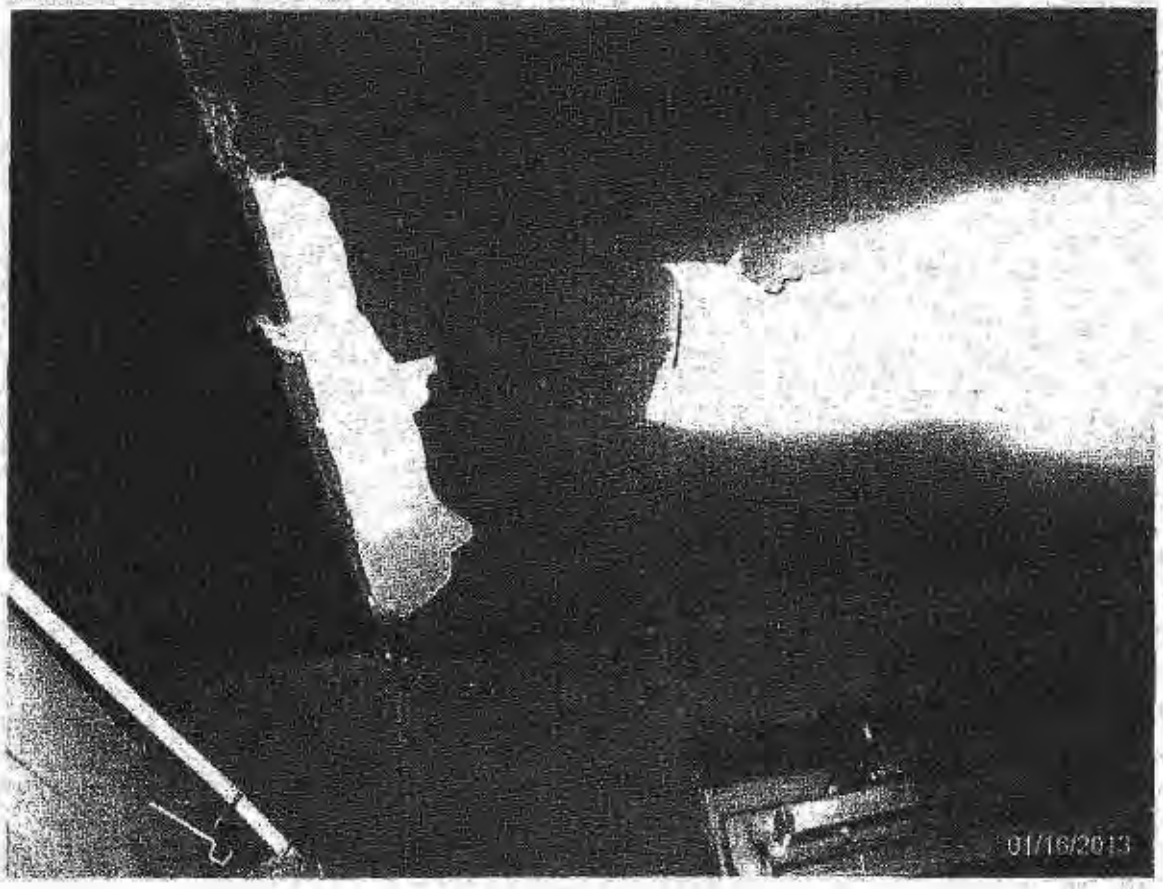
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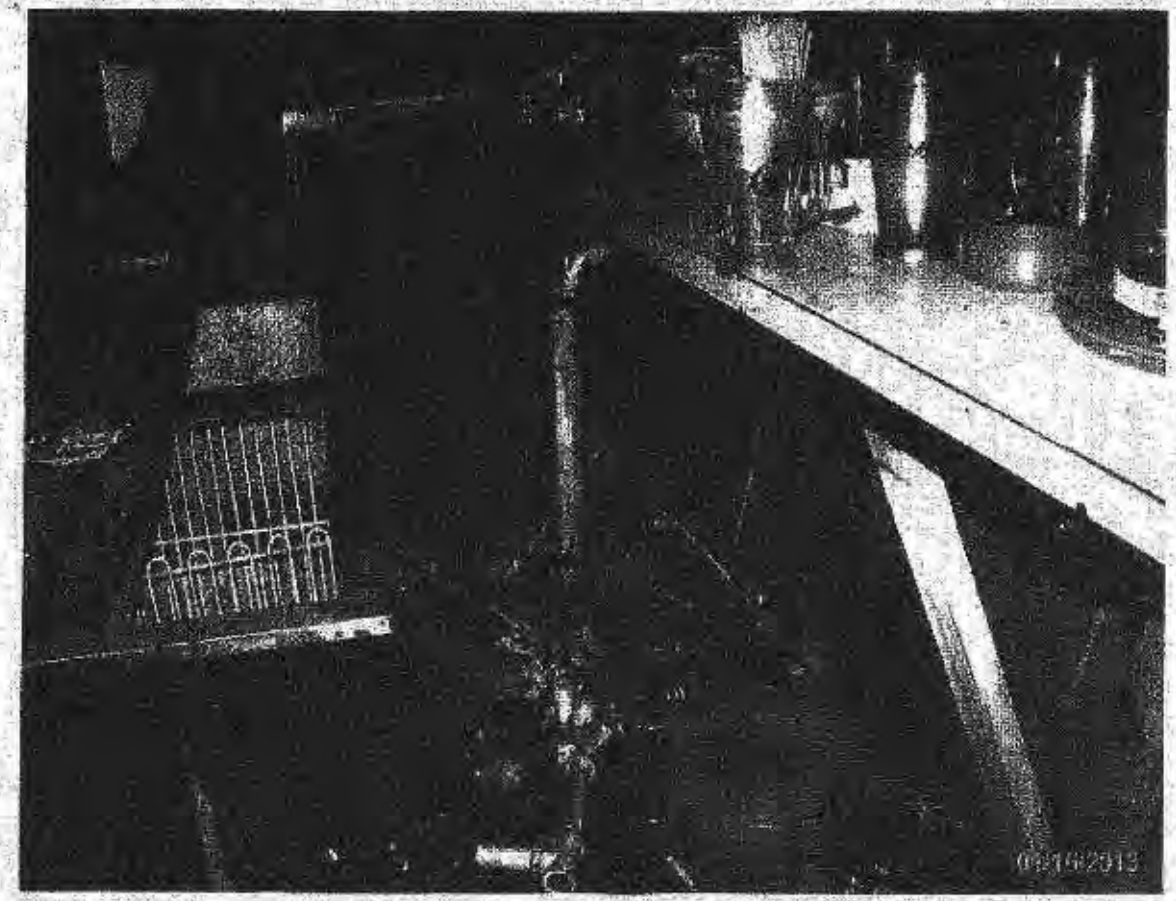
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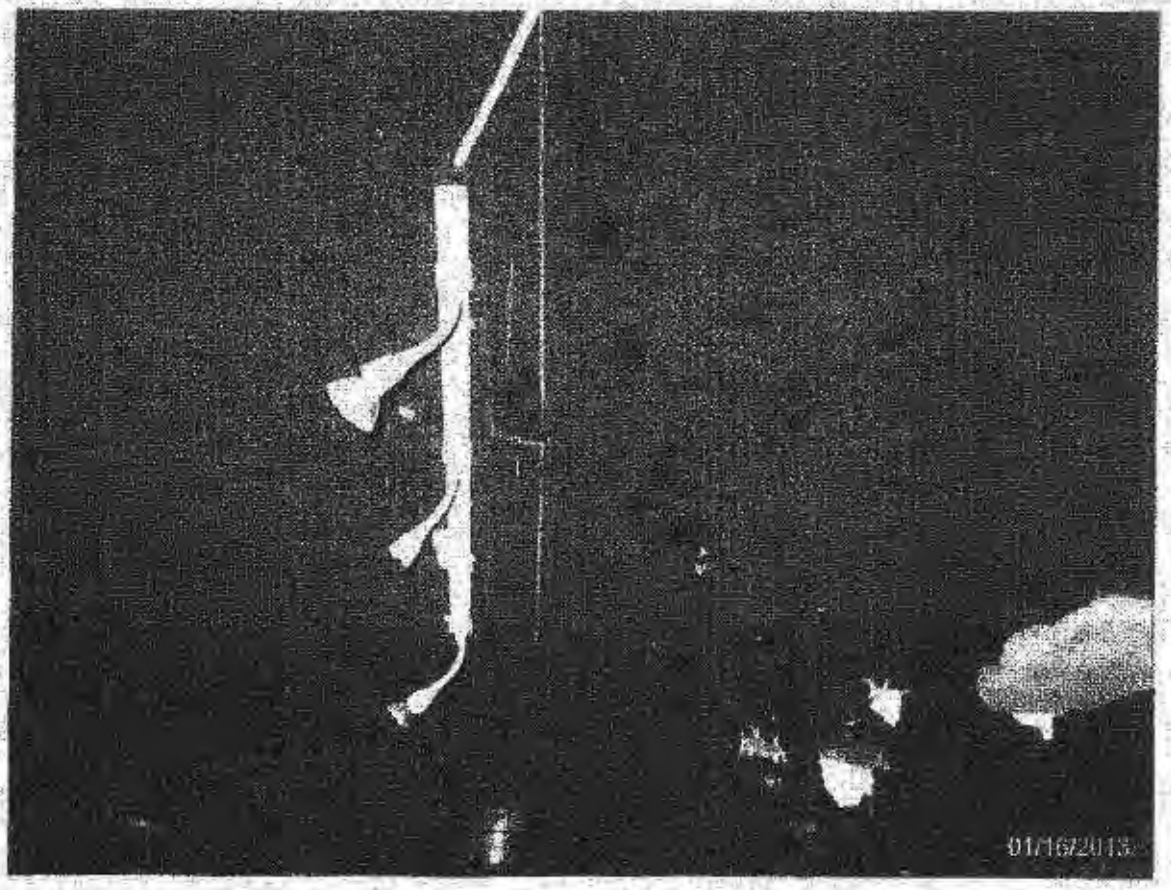
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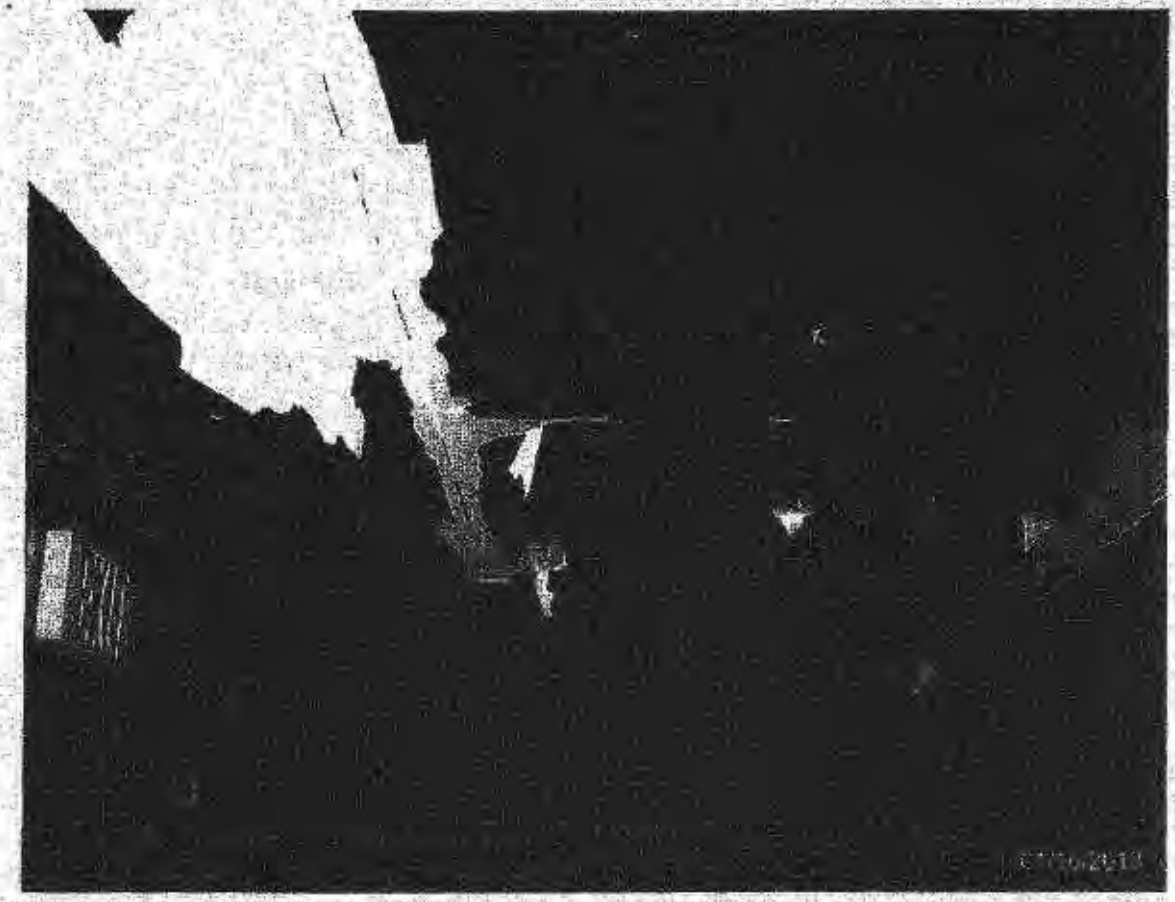

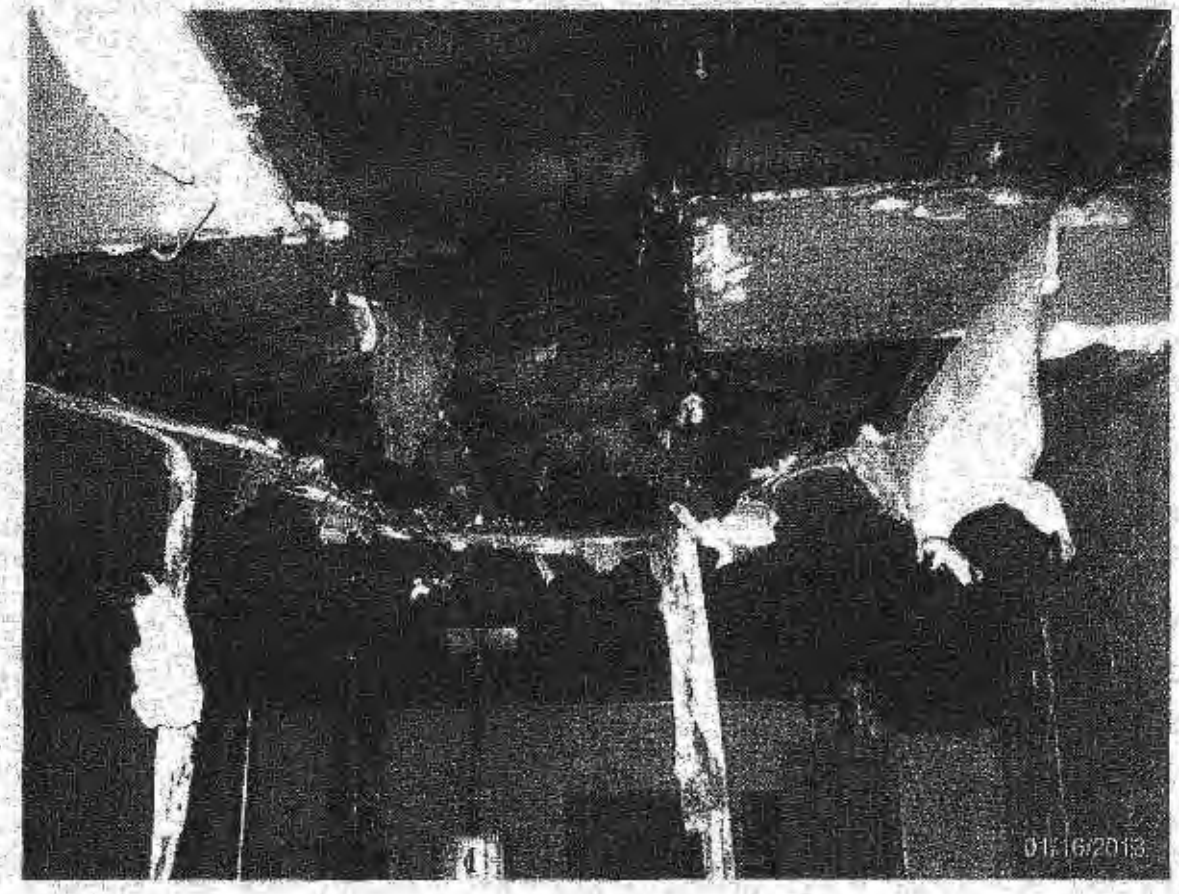

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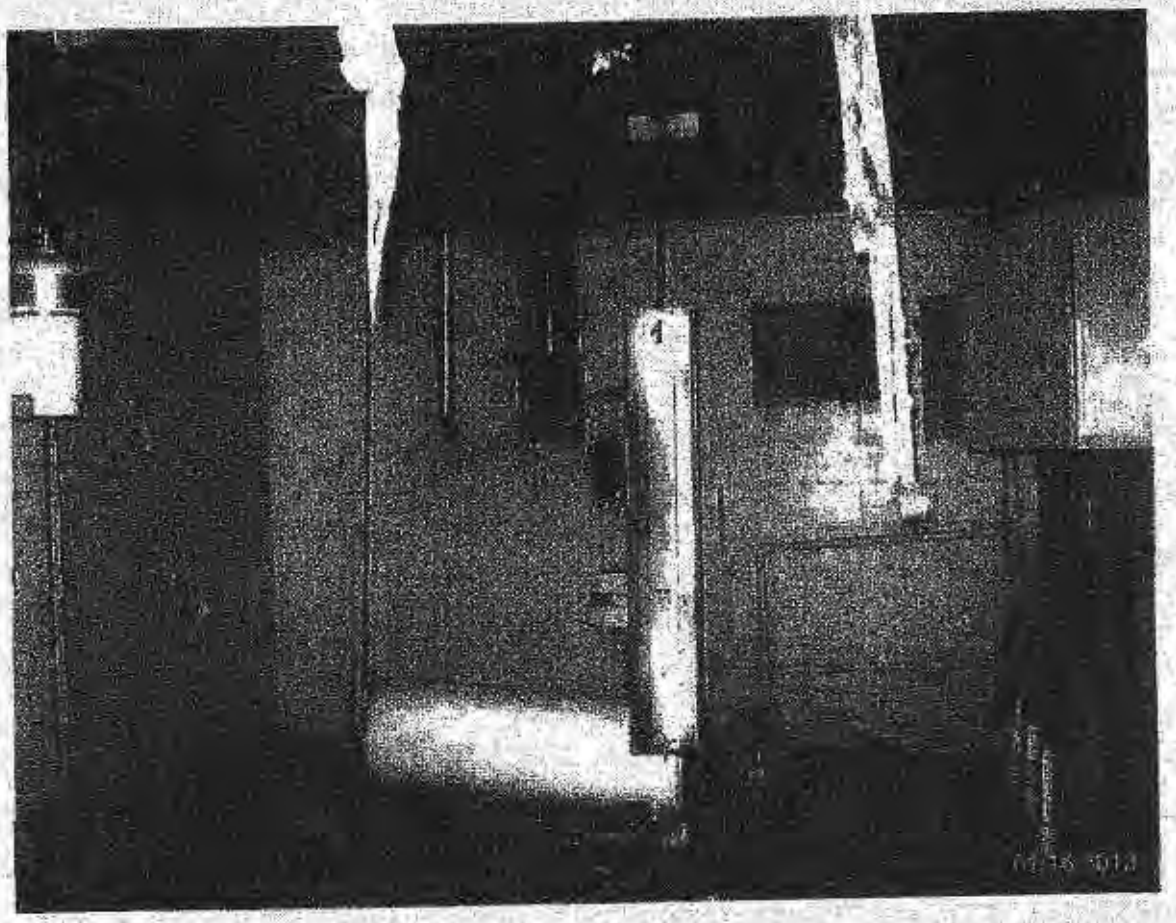

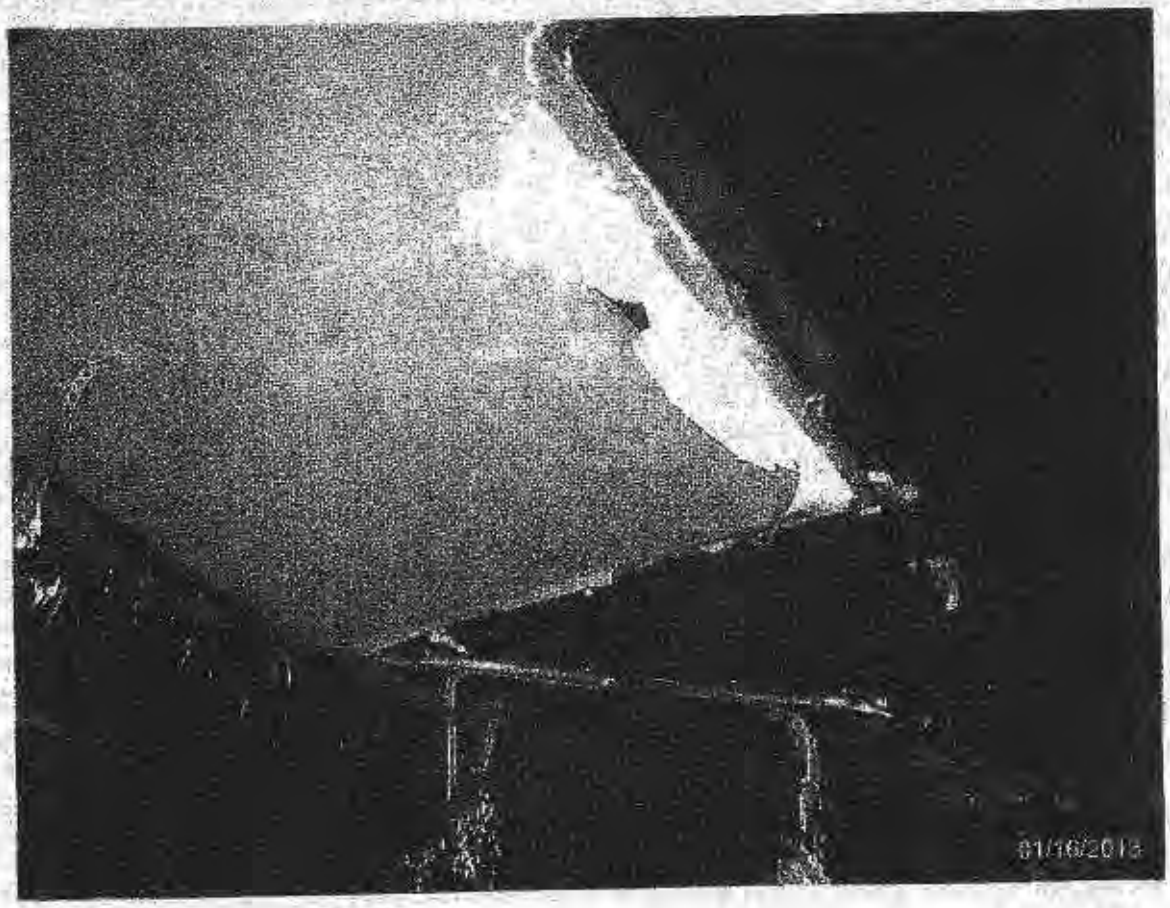

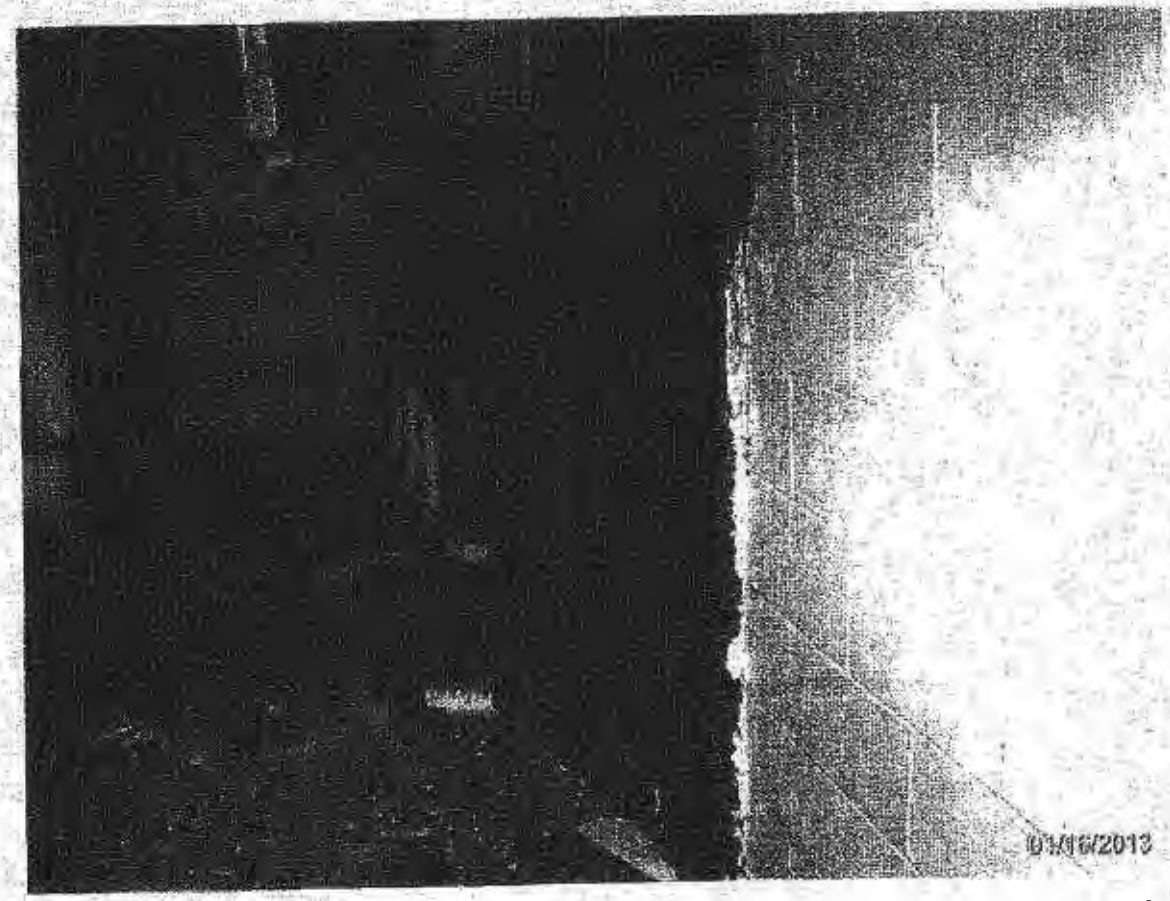

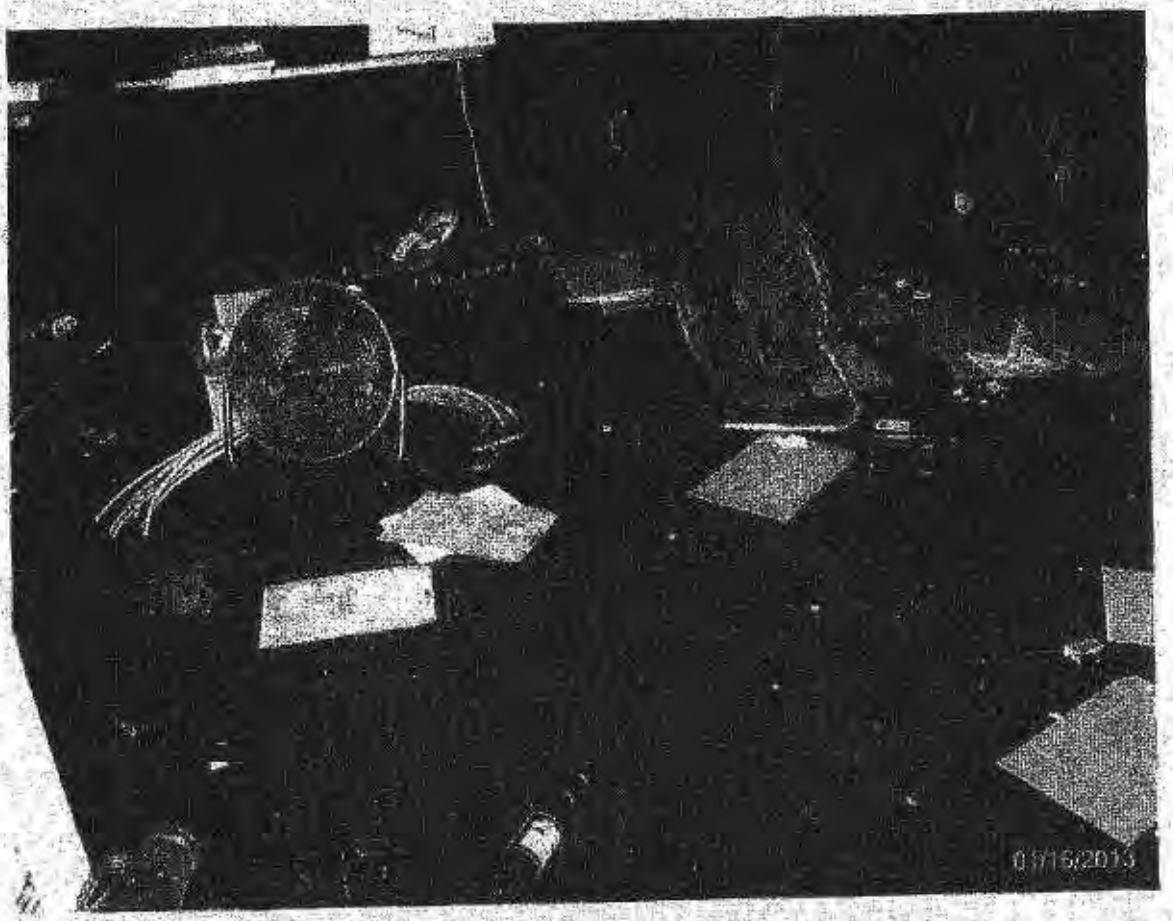

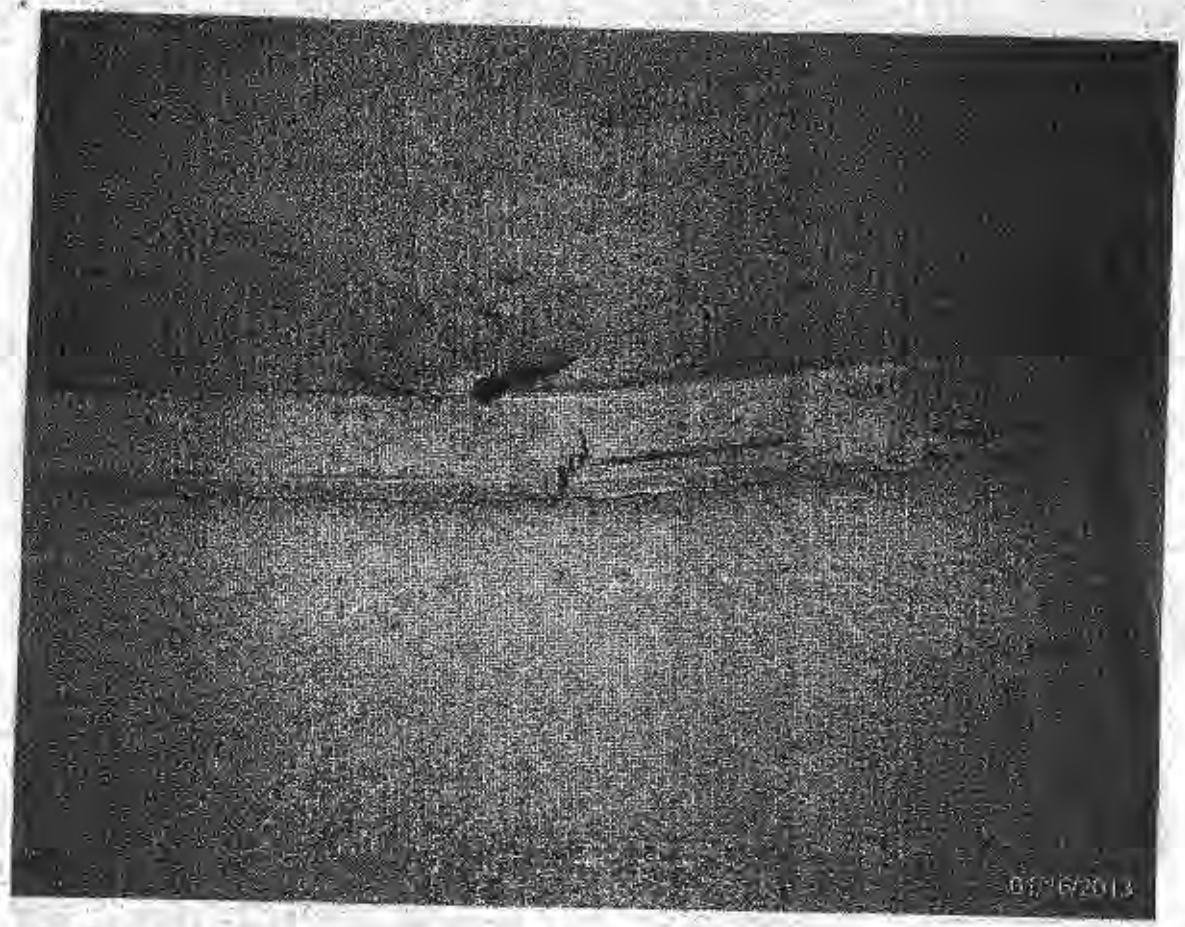

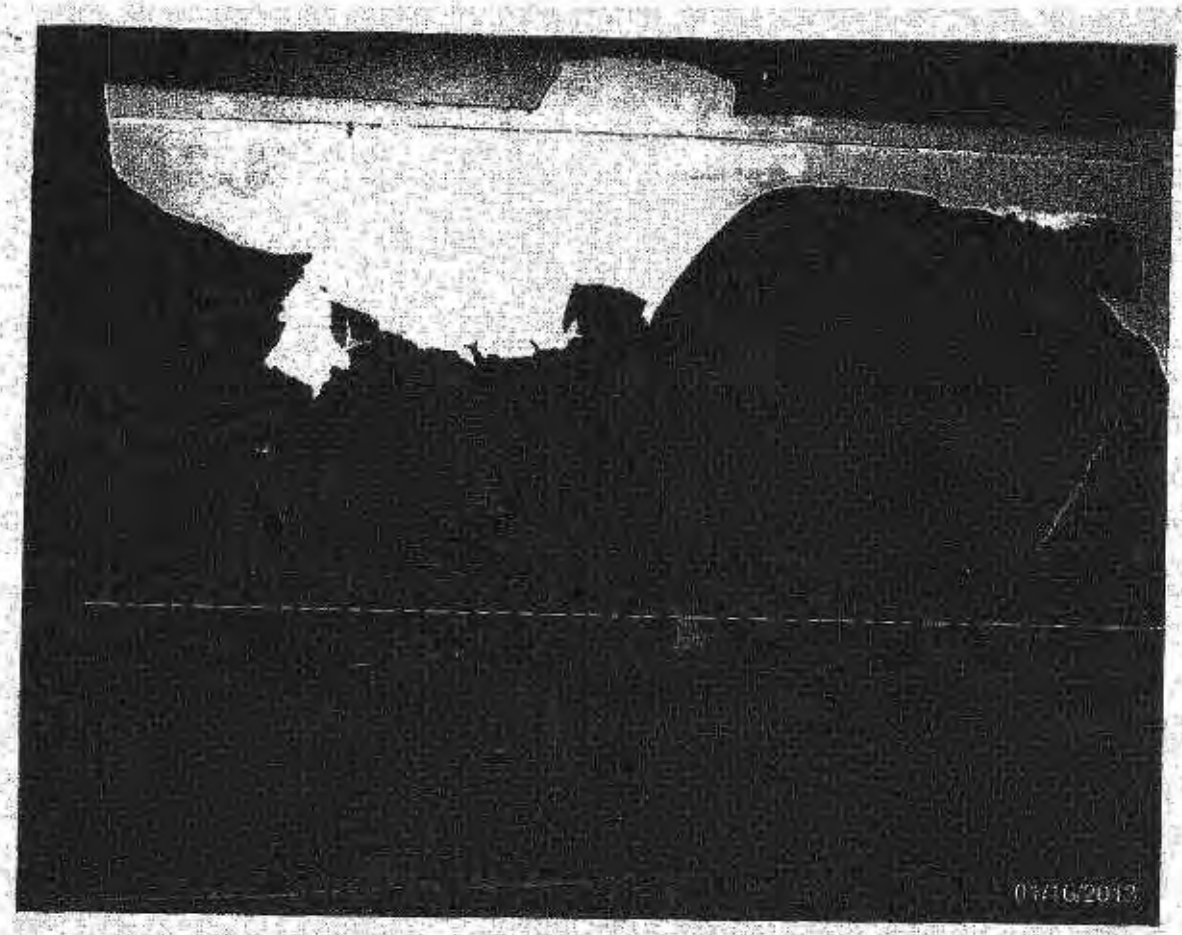
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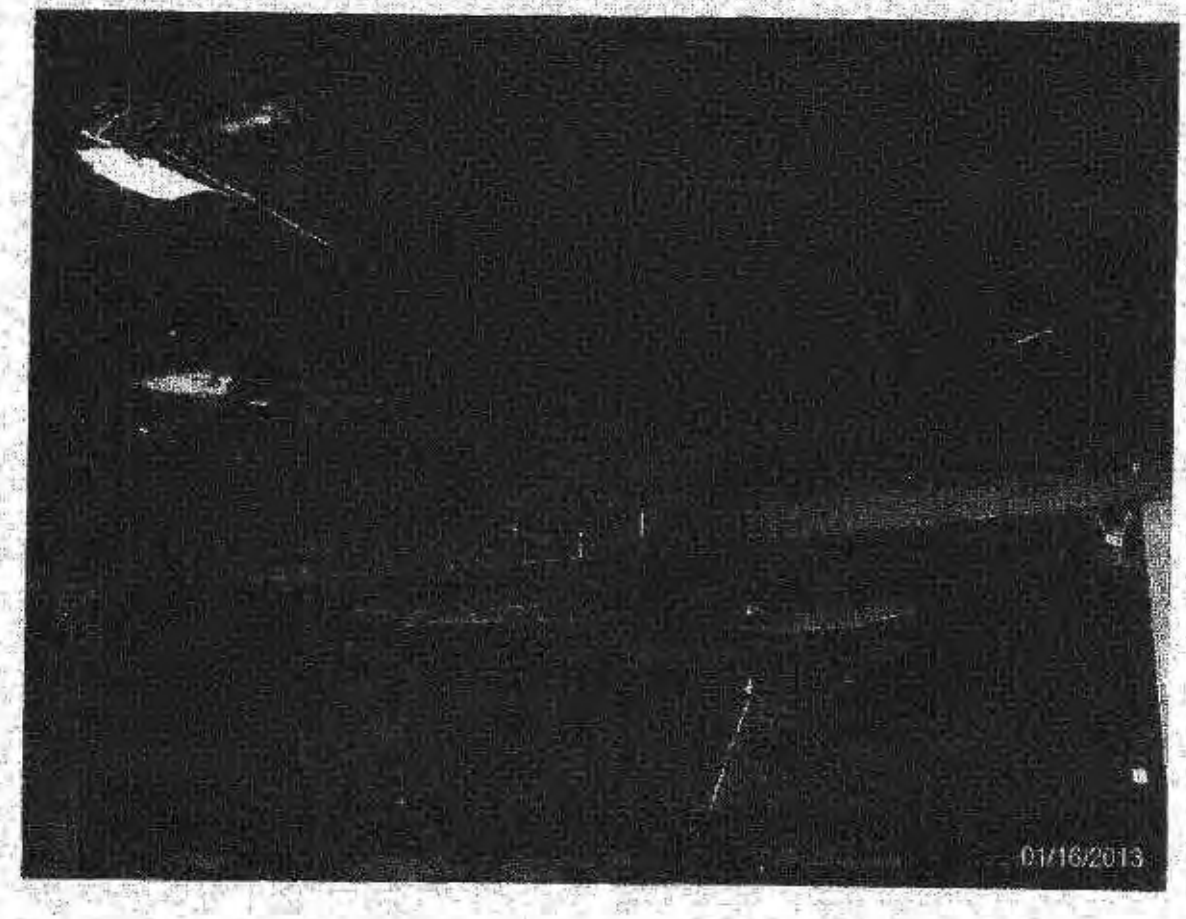
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STATE OF ARKANSAS }
COUNTY OF PULASKI } SS

I, Diane Whitbey, City Clerk and Collector for the City of North Little Rock, Arkansas, do hereby certify that the foregoing instrument is a true and correct copy of the original Minutes Book No. I filed in this office on the 25th day of February 2013.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of this office this 12th day of April, 2013.

Diane Whitbey, City Clerk & Collector

By: _____

1 : 00120

BEFORE THE CITY COUNCIL OF NORTH LITTLE ROCK, ARKANSAS

IN RE CONDEMNATION OF 6615 HWY 70 **RESOLUTION: R-13-37**

MOTION FOR FULL HEARING

COMES NOW Convent Corporation, by and through its attorney, Mickey Stevens, and for its Motion for Full Hearing states:

1. Convent Corporation is the owner of the property located at 6615 Hwy 70 in North Little Rock, Arkansas ("the property").

2. Resolution R-13-37, declaring the property to be a nuisance has been placed on the City Council agenda for February 25, 2013.

3. Convent Corporation has been allowed three minutes to present its case prior to a vote of the City Council.

4. Convent Corporation has not received adequate notice of required repairs to allow it to properly prepare its case in opposition to the condemnation of its property. Specifically, Convent Corporation has not been provided with the listing of code violations required by Section 18-472(b) of the City Code.

5. Due process, as guaranteed by both the United States Constitution and the Arkansas Constitution, requires that Convent Corporation be permitted to fully present its case before the City Council, including examining witness and introducing evidence, prior to the condemnation of its property. Three minutes is not sufficient time for Convent Corporation to adequately present its case to the City Council.

WHEREFORE, Convent Corporation respectfully requests that consideration of this matter be postponed for two weeks and that it be granted a full hearing allowing for adequate time to present its case.

Respectfully submitted,

Mickey Stevens, Ark. Bar No. 2012141
Attorney for Convent Corporation
P.O. Box 2165
Benton, AR 72018
Phone: 501-303-6668
Fax: 877-338-6063
Stevens_mickey@yahoo.com

CERTIFICATE OF SERVICE

I do hereby certify by my signature hereinabove, I have on this 22nd day of February, 2013, served a copy of the foregoing pleading by email to the following:

Mayor Joe Smith
Mayor@nlr.ar.gov

Diane Whitbey
City Clerk
Dwhitbey@nlr.ar.gov

C. Jason Carter
City Attorney
cyielding@nlr.ar.gov

Mickey Stevens

STATE OF ARKANSAS }
COUNTY OF PULASKI } ss

I, Diane Whitbey, City Clerk and Collector for the City of North Little Rock, Arkansas, do hereby certify that the foregoing instrument is a true and correct ~~copy of the original~~ ~~Book No.~~ ~~which is of record in my office on the~~ ~~day of~~

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of this office this 23, day of April, 2013.

Diane Whitbey, City Clerk & Collector
By: [signature]

copy of a motion provided during City Council meeting held on Feb. 25, 2013.
Dw

1:00123

**IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS,
TWELFTH DIVISION**

CONVENT CORPORATION, Individually and on Behalf of all Others Similarly Situated — **PLAINTIFF**

v. **NO. 60CV-13-1398**

CITY OF NORTH LITTLE ROCK, ARKANSAS, a Municipal Corporation, JOE SMITH, Mayor, Individually and in his Official Capacity, City Council Members DEBI ROSS, BETH WHITE, LINDA ROBINSON, MAURICE TAYLOR, STEVE BAXTER, BRUCE FOUTCH, MURRY WITCHER, and CHARLIE HIGHT, each Individually and in his or her Official Capacity, TOM WADLEY, Director, Code Enforcement Division, Individually and in his Official Capacity, and FELECIA MCHENRY, Code Enforcement Officer, Individually and in her Official Capacity — **DEFENDANTS**

Affidavit of Mickey Stevens

State of Arkansas
County of Saline

PERSONALLY appeared before me, the undersigned authority in and for said county and state, Mickey Stevens who, having been being first duty sworn by the undersigned Notary Public, deposes and says:

The attached MEMORANDUM IN SUPPORT OF CONVENT CORPORATION'S REQUEST FOR A FULL DUE PROCESS HEARING is a true and correct copy of the document that was presented by me to the North Little Rock City Council at a public meeting on February 25, 2013.

Mickey Stevens

SWORN to and subscribed before me, this the 26th day of April, 20 13.

Molly C Richardson
NOTARY PUBLIC

My Commission Expires:
June 7 2017

BEFORE THE CITY COUNCIL OF NORTH LITTLE ROCK, ARKANSAS

IN RE CONDEMNATION OF
6615 HWY 70

RESOLUTION: R-13-37

MEMORANDUM IN SUPPORT OF CONVENT CORPORATION'S REQUEST FOR A FULL DUE PROCESS HEARING

INTRODUCTION

Both the United States Constitution and the Arkansas Constitution require due process of law before any significant taking of property by the government. U.S. Const. amend. V;. Ark. Const. Art. 2, § 22. Additionally, the Fourth Amendment of the U.S. Constitution provides protection against unreasonable seizures of private property. The U.S. Supreme Court has ruled that if regulation by a local government in accordance with its police power is done impermissibly, a resulting order amounting to the diminution of property "will be recognized as a taking." *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). The Arkansas Constitution provides that "[t]he right of property is before and higher than any constitutional sanction." Ark. Const. Art. 2, § 22. Thus, a property owner in Arkansas is entitled to substantial due process protections prior to a condemnation.

I. Procedural due process requires that Convent Corporation be afforded a full hearing before its property is condemned.

The extent to which due process rights are required in administrative proceedings is determined by a balancing approach. *Mathews v. Eldridge*. 424 U.S. 319 (1976). The Eldridge standard balances three factors: (1) the extent that private interests are affected in the proceeding; (2) the risk of wrongfully depriving a party of its interest under the current procedures along with the utility of additional procedures that could lessen this risk; and (3) the government's interest at

stake, such as the administrative and financial burdens imposed upon a public actor if additional procedures are incorporated. *Id. at 334-35.*

Prior to a governmental decision which deprives individuals of a property interest procedural due process requires that a hearing before an impartial decision maker be provided at a meaningful time and in a meaningful manner, including the right to submit evidence and testimony, to examine witnesses, and an opportunity to present evidence or testimony in rebuttal to adverse positions. *Ingram v. City of Pine Bluff*, 355 Ark. 129, 135-136 (Ark. 2003) (citing *Samuels v. Meriwether*, 94 F.3d 1163, 1166 (8th Cir. 1996)); *Harness v. Arkansas PSC*, 60 Ark. App. 265, 271 (1998) (citing *Arkansas Elec. Energy Consumers v. Arkansas Pub. Serv. Comm'n*, 35 Ark. App. 47 (1991)).

Real property ownership has substantial value to an individual under the first Eldridge factor. *U.S. v. James Daniel Good Real Prop.*, 510 U.S. 43, 53-54 (1993). In *Connecticut v. Doehr*, 501 U.S. 1, 11 (1991), the Supreme Court described attachment interests on property to be "significant" in regards to how they affect private interests under Eldridge because attachments can result in great economic hardship to a property owner. In *Doehr*, the Court held that even where a decision does not amount to a complete, physical, or permanent deprivation of real property, due process concerns still exist. *Id.* at 12.

Property nuisance cases require increased caution because destroyed property cannot be restored and the best evidence of whether the seizure was justified will have been demolished. *See* Alex Cameron, *Due Process and Local Administrative Hearings Regulating Public Nuisances: Analysis and Reform*, 43 St. Mary's L.J. 619. The demolition of one's property is a substantial private interest under the first Eldridge factor and, thus, determine that it warrants substantial protection for due process purposes.

Crucial due process components in light of the second Eldridge factor include affording property owners multiple opportunities to confront the issues charged against them for the condition of their properties and providing property owners with the opportunity to present their case. *See, e.g., James Daniel Good Real Prop.*, 510 U.S. at 48, 53-56. The right to cross-examine witnesses is regarded as substantial in connection with examining the entire scope of evidence and making a complete inquiry into the truth. Where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses. *See, e.g. Goldberg v. Kelly*, 397 U.S 254, 269 (1970). Rulings based on expedited summary hearings that offer scant evidence of their respective decisions fall short of due process requirements. *See Freeman v. City of Dallas*, 242 F.3d 642, 653-54 (5th Cir. 2001).

Furthermore, the Supreme Court's precedents establish the general rule that Due Process requires that, absent an extraordinary situation, a party cannot invoke the power of the state to seize a person's property without a prior judicial determination that the seizure is justified. *United States v. $ 8,850*, 461 U.S. 555, 562 n.12 143 (1983) (citing *Boddie v. Connecticut*, 401 U.S. 371, 378-379 (1971)); *see also North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975); *Fuentes v. Shevin*, 407 U.S. 67(1972); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1974); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974).

The Supreme Court has further made clear that a party must be afforded a hearing before their property is seized by the government. *See, e.g., Fuentes v. Shevin*, 407 U.S. 67, 81-82 (1972). In *Fuentes*, the Court struck down a replevin statute that provided a hearing to property owners after property was repossessed. *Id.*

Convent Corporation is entitled to substantial due process protections before its property is condemned. The City should afford Convent Corporation a full hearing with the opportunity

to present evidence and cross examine witnesses. The three minutes that Convent has been allowed is insufficient to satisfy the requirements of due process.

II. The City must order that the property be repaired where possible before condemning and destroying the property.

If the condition causing the property to be a nuisance can be remedied through "cleaning, disinfection, alteration, or repair," then these alternatives must be ordered before an order for demolition is made. *See e.g., City of Safford v. Seale*, No. 2 CA-CV 2008-0185, 2009 WL 3390172, 3 (Ariz. Ct. App. 2009); *Nuzworthy v. City of Sullivan*, 55 Ill. App. 48, 52 (1893); *Polsgrove v. Moss*, 157 S.W. 1133, 1136 (Ky. 1913); *Welch v. Stowell*, 2 Doug. 332, 341-42 (Mich. 1846). *Newton v. Highland Park*, 282 S.W.2d 266 (Tex.App. 1955) If a local government contends that remediation is not possible and that the structure as it exists cannot be remedied in such a way to prevent it from becoming a nuisance, then the local government must establish by a preponderance of the evidence that the structure should be demolished. *West v. City of Borger*, 309 S.W.2d 250, 253 (Tex.App. 1958). Courts, have disfavored decisions that issue an order for demolition without any kind of relief afforded to a property owner prior to the order. *See Houston v. Lurie*, 148 Tex. 391 (1949). This treatment is in congruity with the first Eldridge factor, which considers the gravity of potential loss to an individual. *Matthews*, 424 U.S. at 334-35. Thus, ordering demolition without any kind of relief prior to the order is a harsh remedy and has due process implications associated with it.

III. The City has failed to provide Convent Corporation with a list of code violations as required by the City's ordinance, thus, proper notice has not been provided.

Notice is a fundamental part of due process in all kinds of administrative proceedings, and the regulation of public nuisances is no different. Notice must be executed in a reasonable manner to adequately inform the parties of proceedings that may affect their legal rights.

Armstrong v. Manzo, 380 U.S. 545, 550 (1965). Additionally, a City must comply with its ordinances. *See generally Tyrer v. Ryan*, 2003 Ark.App. LEXIS 901 (2003). *City of Fordyce v. Vaughn, supra*; *Mings v. City of Fort Smith*, 288 Ark. 42 (1986); *Potocki v. City of Fort Smith*, 279 Ark. 19 (1983); *Taggart & Taggart Seed Co. v. City of Augusta*, 278 Ark. 570 (1983).

Article VIII, Section 18-472 of the City's Municipal Code requires that a property owner be provided with a list of each individual code violation for which a property is being condemned. Convent Corporation has not been provided with this list. The lack of such list has hampered Convent Corporations ability to prepare to present its case. Convent Corporation is entitled to this list prior to any condemnation of its property.

IV. The City's ordinance is invalid because it fails to provide adequate procedural due process as required by both the U.S. and Arkansas Constitutions.

First, the City's ordinance does not provide for a full hearing either before or after condemnation. The ordinance appears to short-circuit due process because the City is able to condemn a property prior to affording the owner a full hearing and without providing the owner a chance to remedy the problems prior to condemnation.

Convent Corporation was informed that a permit to make repairs would not be issued until after the property is condemned. Not only does this deny the property owner the right to make repairs prior to condemnation, but it significantly limits the ability to appeal the condemnation decision. District Court Rule 9 requires that an appeal from a decision of a city council must be filed within thirty days of the decision. Therefore, if the property is condemned and Convent then agrees to a plan to rehabilitate the property and after the passage of thirty days a dispute arises as to whether the property has been sufficiently rehabilitated, Convent would not be able to appeal the condemnation decision.

Additionally, while the City's ordinance states that a $5,000 bond is required when an agreement to rehabilitate a property has been reached, Convent has been informed that it will be required to post a bond that is equal to the cost of demolition. Requirements of local ordinances must be "reasonably necessary" and not "unduly oppressive" on any person. *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594-95 (1962). Requiring such a sizeable bond without providing the property owner a chance to rehabilitate the property or a full hearing prior to the condemnation is unduly oppressive.

The ordinance also does not provide a clear procedure and is vague in several areas. Many important terms are not defined and it is difficult for a person to know what their rights and remedies are when faced with a condemnation of his property. The constitution requires that an ordinance regulating a public nuisance must be sufficiently clear so that it provides "reasonable certainty" inherent in the language of an ordinance so that "persons of common intelligence are [not] compelled to guess at a law's meaning and applicability." *J.B. Advertising v. Sign Bd. of Appeals*, 883 S.W.2d 443 (Tex. App. 1994).

When an ordinance is declared to be unconstitutional insofar as it does not comply with due process requirements, and property is demolished or taken pursuant to this authority, a property owner may rightfully bring a takings claim. *Pa. Coal Co.*, 206 U.S. at 415-16.

V. Due process requires a neutral decision maker.

The United States Supreme Court has declared that in an administrative hearing, the right to a hearing before a neutral decision maker is essential. *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970). The Supreme Court has also noted that local governments have a direct pecuniary interest in the outcome of a condemnation proceeding and this requires an increased level of scrutiny is warranted with regards to an individual's deprivation of due process rights, especially

when post-order relief is to no avail of a property owner. *James Daniel Good Real Prop.*, 510 U.S. at 56-57. Other courts have said that because certain procedural safeguards are commonly absent from administrative proceedings, the bias requirement should be applied with greater force. *Ventura v. Shalala*, 55 F.3d 900, 902 (3d Cir. 1995).

In the present case the proposed resolution is sponsored by and signed by the Mayor. The Mayor also presides over the proceeding. Thus, the requirement of an impartial decision maker is not met. Convent Corporation should be provided with a full hearing before an impartial decision maker before the City acts to deprive it of its property.

VI. The City is engaging in selective prosecution.

The City has singled out some properties for condemnation while there are many other properties in the surrounding area which also present a nuisance. For example, there is a large recycling facility near the property at issue which causes a significant amount of dust and pollutants to enter the air and may be discharging hazardous substances into the ground. The City must justify why it is going after some properties and not others.

VII. The City entered and inspected the property in violation of the Fourth Amendment of the U.S. Constitution.

Instead of contacting the owners for permission to inspect the property, the City obtained a search warrant and broke the locks to enter the building. The City left the building unsecured on two occasions without contacting the owners. The property has been vandalized and sustained significant damage and loss of property. Had the City contacted the owners, the owners would have allowed the access to the building with no need to break locks or expose the property to potential vandalism. The City's actions in inspecting the property in this manner were unreasonable and in violation of the Fourth Amendment of the U.S. Constitution. The property owners have been damaged by the City's actions.

VIII. The City's seizure of Convent's property without sufficient due process is unreasonable per se and in violation of the Fourth Amendment to the U.S. Constitution.

Fourth Amendment protections are triggered when a government entity seizes a building to enforce compliance with building regulations. *Camara v. Municipal Court of San Francisco*, 387 U.S. 523, 530 (1967). Seizures conducted outside the judicial process, without prior approval by a judge or magistrate, have been held to be per se unreasonable under the Fourth Amendment-subject only to a few specifically established and well delineated exceptions." *U.S. v. Paige*, 136 F.3d 1012, 1022 (quoting *Minnesota v. Dickerson*, 508 U.S. 366, 372 (1993))

CONCLUSION

The City should postpone condemnation of Convent's property, develop an agreement with Convent for the rehabilitation of the property and issue appropriate permits. The City should not condemn the property without providing a full hearing that allows Convent to fully present its case.

Respectfully submitted,

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IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS,
TWELFTH DIVISION

CONVENT CORPORATION,
Individually and on Behalf of all
Others Similarly Situated — **PLAINTIFF**

v. — **NO. 60CV-13-1398**

CITY OF NORTH LITTLE ROCK,
ARKANSAS, a Municipal Corporation,
JOE SMITH, Mayor, Individually and in
his Official Capacity, City Council Members
DEBI ROSS, BETH WHITE, LINDA
ROBINSON, MAURICE TAYLOR,
STEVE BAXTER, BRUCE FOUTCH,
MURRY WITCHER, and CHARLIE HIGHT,
each Individually and in his or her Official
Capacity, TOM WADLEY, Director, Code
Enforcement Division, Individually and in
his Official Capacity, and FELECIA MCHENRY,
Code Enforcement Officer, Individually and
in her Official Capacity — **DEFENDANTS**

PLAINTIFF'S
MOTION FOR JUDGMENT ON THE PLEADINGS
OR, IN THE ALTERNATIVE,
MOTION FOR SUMMARY JUDGMENT

COMES NOW Plaintiff Convent Corporation, by and through its attorney, Mickey Stevens, and for its Brief in Support of Plaintiff's Motion for Judgment on the Pleadings or, in the Alternative, Motion for Summary Judgment states as follows:

Defendants initially seized Plaintiff's property located at 6615 Hwy. 70 North Little Rock, Arkansas (the Property) by "red-tagging" the Property on November 14, 2012.

1. After "red-tagging" the Property, Defendants refused to issue a permit to allow Plaintiff to make repairs to the Property.

2. The North Little Rock City Council voted to condemn the Property on February 25, 2013.

3. Prior to the vote condemning the Property, the City Council only permitted Plaintiff to speak for three (3) minutes and did not consider any evidence of specific code violations or hear testimony from any witnesses.

4. On February 11, 2014, the federal district court issued an Order remanding this case to state court. On February 20, 2014, the clerk filed a certified copy of the Order remanding the case to state court. On April 1, 2014, in compliance with Rule 12(a)(3) of the Arkansas Rules of Civil Procedure, Plaintiff filed and mailed to Defendants' counsel a Notice that the certified copy of the Order remanding the case from federal court was filed in this Court on February 20, 2014. The Notice was delivered to Defendants' counsel on April 2, 2014.

5. Pursuant to Rule 12(a)(3), Defendants were required to file an Answer or Rule 12 Motion within 30 days of receiving the Notice that the federal court's Order was filed. To date, the only documents Defendants have filed in state court are the Notice of Removal and accompanying exhibit. The time for filing a responsive pleading has passed and Defendants have failed to file an Answer or any other response to Plaintiff's Complaint.

6. Because Defendants have not filed an Answer or other responsive pleading in this Court within the time frame required by the Rules of Civil Procedure, the facts and allegations in Plaintiff's Complaint stand uncontroverted. Therefore, based on the pleadings filed in this matter, judgment in favor of Plaintiff on all claims is appropriate.

7. Defendants seized and condemned Plaintiff's property without providing adequate notice, an opportunity to repair the Property, or a meaningful opportunity to be heard. In so doing, Defendants violated Plaintiff's rights to procedural due process under

the Fifth and Fourteenth Amendments to the United States Constitution and Article 2, section 2 and 22 of the Arkansas Constitution.

8. The City never provided Plaintiff with sufficient notice of the alleged violations or rights of appeal.

9. The City did not afford Plaintiff an opportunity to make repairs before seizing and condemning the Property.

10. The City condemned Plaintiff's property in a summary proceeding and refused to provide Plaintiff with a *pre-deprivation* hearing with an opportunity to present evidence and witnesses and cross-examine witnesses.

11. The City refused to provide Plaintiff with a *pre-deprivation* hearing before an impartial decision maker.

12. The actions of city officials and employees in seizing Plaintiff's property, in refusing to permit the property to be repaired, in condemning the property in a summary proceeding completely devoid of any due process protections and the policies and practices that resulting in these actions have resulted in violations of Plaintiff's right to substantive due process under the Fifth and Fourteenth Amendments to the United States Constitution and Article 2, sections 2 and 22 of the Arkansas Constitution. filed their Notice removing the case to this Court.

13. The seizure of Plaintiff's property without proper Notice or without permitting Plaintiff an opportunity to make repairs constitutes an unreasonable seizure (Count IV) in violation of Plaintiff's rights under the Fourth Amendment to the United States Constitution and Article 2, section 15 of the Arkansas Constitution. Pursuant to Rule 6.2(a) of the Local Rules of the Eastern District of Arkansas, the Clerk may enter an

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Mickey Stevens, do hereby certify that on May 17, 2014, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which shall send notification of such filing to the following:

Daniel L. McFadden
Assistant City Attorney
dmcfadden@northlittlerock.ar.gov

Mickey Stevens

**IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS,
TWELFTH DIVISION**

**CONVENT CORPORATION,
Individually and on Behalf of all
Others Similarly Situated** — **PLAINTIFF**

v. — **NO. 60CV-13-1398**

**CITY OF NORTH LITTLE ROCK,
ARKANSAS, a Municipal Corporation,
JOE SMITH, Mayor, Individually and in
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DEBI ROSS, BETH WHITE, LINDA
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MURRY WITCHER, and CHARLIE HIGHT,
each Individually and in his or her Official
Capacity, TOM WADLEY, Director, Code
Enforcement Division, Individually and in
his Official Capacity, and FELECIA MCHENRY,
Code Enforcement Officer, Individually and
in her Official Capacity** — **DEFENDANTS**

**BRIEF IN SUPPORT OF PLAINTIFF'S
MOTION FOR JUDGMENT ON THE PLEADINGS
OR, IN THE ALTERNATIVE,
MOTION FOR SUMMARY JUDGMENT**

COMES NOW Plaintiff Convent Corporation, by and through its attorney, Mickey Stevens, and for its Brief in Support of Plaintiff's Motion for Judgment on the Pleadings or, in the Alternative, Motion for Summary Judgment states as follows:

INTRODUCTION AND RELEVANT FACTS

The building which is the subject of this litigation had been operated as a nightclub since the early 1950s. *Exhibit A: Livdahl Declaration, par. 1; Exhibit B: Settlement Agreement between the City of North Little Rock and Drugstore Cowboy, Inc, d/b/a Gentlemen's Club 70, and Convent Corporation, par. 1.* The City of North Little Rock initiated a lawsuit to force the business to close. The City lost this lawsuit but remained determined to force this business that had existed for

approximately fifty (50) years to close. Even though the City lost the first lawsuit, it initiated a second lawsuit attempting to force the business to close. *Exhibit C: Complaint-City of North Little Rock v. The Southern, Inc. et al., CV-04-5610.* Due to the expense and time involved in defending itself against a subsequent lawsuit, the owners of the business entered into a settlement agreement which resulted in the closure of the business on August 1, 2011.[1] *Exhibit B.* Since the forced closure of this viable and operating business by the City, the structure at issue has remained vacant. Now, the City is determined to demolish the structure.

On November 14, 2012, Officer Felicia McHenry of the City of North Little Rock's Code Enforcement Department "red-tagged" the structure that is the subject of this litigation. Upon receiving notice of the proposed condemnation action, Plaintiff contacted Roberto Alvarez to inspect the property and make repairs. *Exhibit M: Declaration of Claude Skelton; Exhibit N: Declaration of Roberto Alvarez.* Plaintiff's representative, Richard Livdahl, met with several City officials and attempted to obtain permission to repair the Property. Even though Plaintiff stood ready, willing, and able to make the necessary repairs, the City refused to issue a permit for the repairs and proceeded to condemn the property without ever giving Plaintiff the opportunity to make repairs. The City Council then voted to condemn Plaintiff's property as a nuisance in a summary procedure without providing proper notice as to the specific violations alleged, the opportunity to repair the property, and without providing Plaintiff with any meaningful opportunity to be heard. The Council condemned the property without considering any evidence beyond pictures of clutter in the building and damage to the interior caused by vandalism[2] of which the

[1] In paragraph 2c of the Settlement Agreement (*Exhibit B*) the City agreed to provide reasonable assistance in locating a suitable location for the business. However, the City failed to provide such assistance and the business was not able to find a suitable location and was not able to reopen.

[2] The structure became vacant because the City forced the business to close. Thus, the City bears responsibility for the fact that the structure is now vacant and it is the vacancy of the structure that led to the vandalism which caused much of the damage of which the City now complains.

owner was previously unaware. Plaintiff cleaned the interior of the building and engaged an individual to make the necessary repairs but the City refused to issue a permit to allow Plaintiff to make repairs to the building. *Exhibit E: Letter from William M. Brown, Asst. City Attorney, to R.C. Livdahl, Jan. 31, 2013.* The record in this case does not contain any evidence of specific violations (*See Exhibit F: Responses by council members to Interrogatory No. 20; Exhibit G: Response by Mayor Smith to Interrogatory No. 24; Exhibit H: Response by City of North Little Rock to Interrogatory No. 24; Exhibit I: Response by Felicia McHenry to Interrogatory No. 22*)[3] or any evidence demonstrating that the structure is a threat to public health or safety.

Defendants removed this matter to federal court and then argued that the federal court lacked jurisdiction to hear the claims. The case was remanded to this Court and Defendants have failed to file an Answer or any responsive pleading within the time required by the Rules of Civil Procedure. The time for filing a responsive pleading had long since passed. The facts and allegations in Plaintiff's Complaint stand completely uncontroverted. Therefore, based only on the pleadings filed in this matter, judgment in favor of Plaintiff on all claims is appropriate. Alternatively, District Court Rule 9 requires that Plaintiff's appeal be decided on the record of the City Council proceeding. The record of the proceeding before the City Council does not contain any competent evidence to support the Council's condemnation decision. Furthermore, the City's summary condemnation procedure violated Plaintiff's rights under both the state and federal constitutions. There are no genuine issues of material fact in dispute by which Defendants can show that sufficient evidence to support the Council's condemnation of Plaintiff's property is

[3] Indeed, the council members, Mayor Smith, Defendant McHenry and City itself each admitted that they did not have a list of violations or a code inspectors' report and recommendation. Furthermore, at the meeting during which the Property was condemned, the Council did not hear any testimony regarding any violations. The fact that council members voted to condemn the structure without a code inspectors' report identifying specific code violations is a clear indication that the decision was entirely arbitrary.

contained in the record of the City Council proceeding. Additionally, there are no genuine issues of material fact by which Defendants can show that the City's condemnation procedure provides constitutionally required due process. Therefore, summary judgment in favor of Plaintiff is appropriate.

JUDGMENT ON THE PLEADINGS STANDARD

A judgment on the pleadings may be entered if the pleadings show on their face that there is no defense to the suit. *Brunson v. Little Rock Road Machinery Co.*, 251 Ark. 721, 474 S.W. 2d 672 (1972). When considering a motion for judgment on the pleadings, the facts alleged in the complaint must be treated as true in the light most favorable to the party seeking relief. *Landsnpulaski, LLC v. Ark. Dep't of Correction*, 372 Ark. 40, 269 S.W.ed 793 (2007); *Smith v. American Greetings Corp.*, 304 Ark. 596, 804, S.W.2d 683 (1991); *Battle v. Harris*, 298 Ark. 241, 766 S.W.2d 431 (1989); *Rice v. Ragsdale*, 104 Ark.App. 364, 292 S.W.3d 856 (2009); *Real Estate Dev., Inc. v. Fryar*, 2004 Ark.App. LEXIS 376 (2004).

> Being in the nature of a demurrer, a motion for judgment on the pleadings raises an issue of law only . . . But it is proper **where there is an entire failure to state a cause of action or defense**. In a strict motion for judgment on the pleadings, parol evidence is not admissible.
>
> In determining the right of a party to a judgment on the pleadings, the real question to be determined is the sufficiency of the admitted facts to warrant the judgment rendered, and the materiality of those upon which issue is joined. A motion for judgment on the pleadings should be sustained when, under the admitted facts, the moving party would be entitled to judgment on the merits, without regard to what the findings might be on the facts on which issue is joined.

Reid v. Karoley, 229 Ark. 90, 92, 313 S.W.2d 381, 382 (1958).

A motion for judgment on the pleadings may be filed "[a]fter the pleadings are closed . . ." Ark. R. Civ. P. 12(c); *See also Servewell Plumbing, LLC v. Summit Contrs., Inc.*, 362 Ark. 598, 610-611, 210 S.W.3d 101, 111 (2005). Pleadings include a complaint, answer, counterclaim, reply

to a counterclaim, an answer to a cross-claim, a third party complaint and a third party answer. Once the pleadings have been filed or the time has passed for the filing of the pleadings, a motion for judgment on the pleadings is timely.

DISCUSSION

Plaintiff filed its Complaint in this matter on March 27, 2013. On April 29, 2013, prior to filing any type of Answer or response to Plaintiff's Complaint, Defendants filed their Notice of Removal, removing the case to federal court. On February 11, 2014, the federal court issued an Order remanding the case to state court. On February 20, 2014, the clerk filed a certified copy of the Order remanding the case to state court. On April 1, 2014, in compliance with Rule 12(a)(3) of the Arkansas Rules of Civil Procedure, Plaintiff filed and mailed to Defendants' counsel a Notice that the certified copy of the Order remanding the case from federal court was filed in this Court on February 20, 2014. The Notice was delivered to Defendants' counsel on April 2, 2014. *Exhibit T.* Pursuant to Rule 12(a)(3), Defendants were required to file an Answer or Rule 12 Motion within 30 days of receiving the Notice that the federal court's Order was filed. To date, the only documents Defendants have filed in state court are the Notice of Removal and accompanying exhibit. The time for filing a responsive pleading has passed and Defendants have failed to file an Answer or any other response to Plaintiff's Complaint. Thus, more than two months after this case was remanded to state court, Defendants have entirely failed to state any defense to Plaintiff's allegations.

Defendants cannot rely on their pleadings filed in federal court. "[C]ourts cannot take judicial notice of proceedings of other courts." *White v. Minyard*, 8 Ark. App. 269, 271, 650 S.W.2d 599, 600 (Ark. Ct. App. 1983); *see also Southern Farmers Assn., Inc. v. Wyatt*, 234 Ark. 649, 353 S.W.2d 531 (1962). A pleading filed in another court ordinarily cannot be adopted, even

by agreement of the parties unless it is copied into a pleading or otherwise admitted into evidence. *Reid*, 229 Ark. at 93, 313 S.W.2d 381; *White*, 8 Ark. App. at 271, 650 S.W.2d at 600. A defendant may not rely on an Answer filed in federal court and Rule 55(f) is intended to provide a defendant "an opportunity to plead as it 'might have done had the case not been removed.'" *Ncs Healthcare of Ark. v. W.P. Malone*, 350 Ark. 520, 526, 88 S.W.3d 852, 856 (2002)(quoting Ark. R. Civ. P. 55(f)).[4]

> This court has long held that after remand from federal court, a case stands as if it had never been removed from state court, and what happened in federal court has no bearing on the proceeding in state court. *Steve Standridge Ins., Inc. v. Langston*, 321 Ark. 331, 900 S.W.2d 955 (1995) (relying on *Allstate Ins. Co. v. Bourland*, 296 Ark. 488, 758 S.W.2d 700 (1988), *cert. denied*, 490 U.S. 1006, 104 L. Ed. 2d 156, 109 S. Ct. 1640 (1989)); *B-W Acceptance Corp. v. Colvin*, 252 Ark. 306, 478 S.W.2d 755 (1972); *Trinity Universal Ins. Co. v. Robinson*, 227 Ark. 482, 299 S.W.2d 833 (1957)). Moreover, this line of authority has been expressly reiterated in Rule 55(f) that provides an opportunity for the defendant to plead as it "might have done had the case not been removed." Ark. R. Civ. P. 55(f).
>
> NCS's reliance upon its federal pleadings in the state court proceeding is simply contrary to the policy consistently adopted by this court, as reflected in our case law and Rule 55(f) of the Arkansas Rules of Civil Procedure: trial courts are instructed to proceed on remand as though the case had never been removed and defendants are instructed to plead as though the case had not been removed. A ruling in NCS's favor on this point would not only require this court to overrule the above-cited precedent, but it would also contravene the plain language of Rule 55(f).
>
> Furthermore, the federal pleadings at issue here had no bearing on the case after remand because federal pleadings do not necessarily conform with our rules of civil procedure.

Id.

Because Defendants have not filed an Answer or other responsive pleading in this Court within the time frame required by the Rules of Civil Procedure, the facts and allegations in

[4] At that time Rule 55(f) permitted 10 days for a defendant to file an Answer. Rule 55(f) has since been amended to remove the 10 day limit. However, Rule 12 still requires that an Answer or Rule 12 Motion be filed within 30 days.

Plaintiff's Complaint stand uncontroverted. Therefore, based on the pleadings filed in this matter, judgment in favor of Plaintiff on all claims is appropriate.

SUMMARY JUDGMENT STANDARD

A motion for summary judgment should be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c). The United States Court of Appeals for the Eighth Circuit has stated that the summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy, and inexpensive determination of every action. *Wabun-Inini v. Sessions*, 900 F.2d 1234, 1238 (8th Cir. 1990) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986)).

A fact is "material" if it might affect the result in an action under applicable law. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510 (1986). An issue is "genuine" if a reasonable jury could return a verdict for either party based on the existence of sufficient evidence. *Id.*; *The B & A Pipeline Co.*, 904 F.2d 996, 1002 (5th Cir. 1990). The party moving for summary judgment bears the initial burden of establishing the basis for its motion and identifying all evidence which demonstrates the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. The nonmoving party must then go beyond its own pleadings to designate specific facts raising a genuine triable issue. *Id.* at 324; *see also, Counts v. MK-Ferguson Co.*, 862 F.2d 1338, 1339 (8th Cir. 1988). The mere existence of a factual dispute is insufficient alone to bar summary judgment; rather the dispute must be outcome determinative under prevailing law. *Holloway v. Pigman*, 884 F.2d 365, 366 (8th Cir. 1989).

Although a court is obligated to draw all inferences most favorable to the party opposing

the motion for summary judgment when reviewing the facts, *Anderson*, 477 U.S. at 255, 106 S.C. at 2510, the party opposing a motion for summary judgment must meet the moving parties evidence with competent evidence setting forth specific facts to show that there is a genuine issue of material fact for trial. *See* Fed. R. Civ. P. 56(e); *Matsushita Electric Industrial Company v. Zenith Radio Corporation*, 475 U. S. 574, 587, 106 S.C. 1348, 1356 (1986). If vital evidence regarding a material fact is too weak or tenuous to support a judgment in favor of the non-movant, then summary judgment should be granted. *See Armstrong v. City of Dallas*, 997 F.2d 62, 67 (5th Cir. 1993).

DISCUSSION

I. The record of City Council proceedings is insufficient to support the City's condemnation decision but does demonstrate that the City violated Plaintiff's constitutional rights.

Paragraph (f) of Arkansas District Court Rule 9 was specifically tailored for administrative appeals. *In re Ark. Court Rules*, 2008 Ark. LEXIS 510, 14 (Ark. Oct. 9, 2008). In federal court, Defendants argued that Arkansas Code Annotated § 14-56-425 applies to this matter. However, as the Arkansas Supreme Court noted in *Clark v. Pine Bluff Civ. Serv. Comm'n*, 353 Ark. 810, 813, 120 S.W.3d 541 (2003), section 14-56-425 "only applies to administrative and quasi-judicial agencies concerned in the administration of subchapter 4, *Municipal Planning . . .*." The authority relied on by the City to raze and remove buildings, section 14-56-203 is found in subchapter 2, *Building Regulations*. Because there is no statute that addresses how a party may appeal a city council decision pursuant to section 14-56-203, the procedures contained in subsection (f)(2) of Rule 9 apply. *See Clark*, 353 Ark. at 814-15.

Subsection (f)(2)(B) addresses the procedure for filing the record. Subsection (f)(2)(C) provides the procedure to be followed on appeal:

> Procedure on Appeal. -- As soon as practicable after all the parties have made their initial filing of record materials, the court shall establish a schedule for briefing, hearings, and any other matters needed to resolve the appeal.

The construction and language of subsection (f)(2) indicates that an appeal from a final decision of a governmental body is to be tried on the record developed in the proceeding below. *See Mt. Pure, LLC v. Little Rock Wastewater Util.*, 2011 Ark. 258, 7-8, 383 S.W.3d 347, 353(2011). While, pursuant to Rule 9, this case should be reviewed on the record, the proceedings below were inadequate to establish a proper record upon which the Court may conduct a proper review. The City did not present any testimony or evidence regarding specific code violations and, without notice of specific violations, Plaintiff was not permitted an opportunity to properly prepare or present its case.

The City condemns properties in summary proceedings which are completely devoid of due process protections and the only avenue to challenge the council's summary determination requires the filing of a lawsuit in circuit court. The owners of many of the condemned properties lack the financial resources to seek legal advice and are deprived of their property without ever being afforded a meaningful opportunity to be heard. The City does not provide any notice to property owners of their right to appeal and few would be aware of the procedures required by District Court Rule 9. The City should not be permitted to dodge its responsibility to provide due process simply because a property owner may be able to challenge the decision in court. Almost any administrative decision by a government agency or governing body can be appealed to a court at some point. However, this does not permit the agency, or in this case the local governing body, to ignore the constitutional requirement to provide due process. U.S. Const. amend. XIV, § 1; Ark. Const. art. II, § 8; *see also Smith v. Everett*, 276 Ark. 430, 637 S.W.2d 537 (1982); *Arkansas Pub. Service Comm'n v. Continental Tel. Co.*, 262 Ark. 821, 561 S.W.2d 645 (1978); *Priest v. UPS*, 58

Ark. App. 282, 285-286, 950 S.W.2d 476, 478 (1997); *Arkansas State Bd. of Nursing v. Long, Ark. App.*, 8 Ark. App. 288, 651 S.W.2d 109 (1983); *Aetna Cas. & Sur. Co. v. Dyer*, 6 Ark. App. 211, 639 S.W.2d 536 (1982). Due process protections are even more necessary where the citizens who are being deprived of property may lack the knowledge or resources to initiate legal action to challenge the deprivations. The City cannot be allowed to present only an incomplete and one-sided record after denying the property owner a hearing at which it could challenge the evidence relied on by the City.

In order to create a proper record on which the Court can review an administrative decision, the administrative body must provide proper notice of the evidence to be considered and the property owner should have an opportunity to challenge the evidence, including the opportunity to cross-examine witnesses.

> First, a party must know of or have an opportunity to know what evidence is being considered. In *Greene* v. *McElroy*, 360 U.S. 474 (1959), the United States Supreme Court made the following statement:
>
> > Certain principles have remained relatively immutable in our jurisprudence. One of these is that where government action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue.
> >
> > . . . .
>
> [A] party must have the right of a rehearing for the purpose of subpoenaing and cross-examining adverse witnesses. In *Davis* v. *Industrial Commission*, 103 Ariz. 114, 437 P.2d 647 (1968), the Arizona Supreme Court held: "The very existence of the right to apply for a rehearing vouchsafes his right to a fair hearing on the merits." In *Smith* v. *Everett, supra*, the Supreme Court pointed out that the petitioner had been informed that another hearing could not be held; thus, he was refused the opportunity to confront and cross-examine his adverse witnesses.

Farmer v. Everett, 8 Ark. App. 23, 28-29, 648 S.W.2d 513, 516 (1983). If a party has not been provided with an opportunity to cross-examine witnesses and present rebuttal evidence, a proper

record has not been established upon which the court may conduct its review. *See Smith*, 276 Ark. at 431-32, 637 S.W.2d at 538; *Davis v. Ark. Freight System, Inc.*, 239 Ark. 632, 634, 393 S.W.2d 237, 238 (Ark. 1965); *Priest*, 58 Ark. App. at 286-287, 950 S.W.2d at 478; *Branch v. Hempstead County Mem'l Hosp.*, 539 F. Supp. 908 (W.D. Ark. 1982).

"Courts cannot perform the reviewing functions assigned to them in the absence of adequate and complete findings . . . on all essential elements pertinent to the determination." *Bryant v. Ark. Pub. Serv. Comm'n*, 45 Ark.App. 56, 63, 871 S.W.2d 414 (1994); *see also Arkansas Pub. Serv. Comm. v. Continental Tel. Co.*, 262 Ark. 821, 829, 561 S.W.2d 645, 649 (1978).

> If appellant has been paid benefits to which he was not entitled, due process requires that his liability to repay the amount so received must be determined after he has been afforded the opportunity of a hearing, after proper notice , upon all the issues set out in Ark. Stat. Ann. § 81-1107 (f) (2) (Supp. 1981). Since all those issues were not involved in this proceeding, the Board's finding of liability to repay is reversed and remanded. *Pritchett* v. *Director of Labor*, 5 Ark. App. 194, 634 S.W.2d 397 (1982).

Farmer, 8 Ark. App. at 32, 648 S.W.2d at 518 (1983). "Courts cannot perform the reviewing function which the legislature has assigned to them in the absence of adequate findings; it must be possible for the reviewing court to measure the findings against the evidence from which they were educed." *Bryant*, 45 Ark.App. at 63, 871 S.W.2d 414. Where the administrative body failed to make the necessary factual findings, the Court should not condone the failure to provide due process by taking on the responsibility itself. *Id.*

However, in reviewing an administrative decision by an agency or governing body, it is appropriate for the Court to determine "whether the order or decision under review violated any rights under the laws or Constitution of the United State or of the State of Arkansas." *Harness v. Arkansas PSC*, 60 Ark. App. 265, 269-270, 962 S.W.2d 374, 375 (1998)(citing *Bryant v. Arkansas Pub. Serv. Comm'n*, 57 Ark. App. 73, 941 S.W.2d 452 (1997)); *See also Southwestern Bell Tel.*

Co. v. Arkansas Public Service Com., 267 Ark. 550, 557, 593 S.W.2d 434, 439 (1980). In this case, the failure to provide adequate notice and a hearing or the opportunity to repair the property prior to condemnation provide a sufficient basis for the Court to determine that the City violated Plaintiff's rights under both the state and federal constitutions. Thus, while the record is not adequate to permit a proper review of the City Council's determination, the Court may properly rule on Plaintiff's constitutional claims. Indeed, the lack of a proper record below is evidence that the City failed to provide adequate procedures in making its condemnation decision.

The insufficiency of the record below, the lack of adequate notice, the refusal of the City to provide a hearing, and the seizing and condemning Plaintiff's property without sufficient due process protections demonstrate that the City violated Plaintiff's rights under both the federal and state constitutions. And, as previously noted, Defendants have failed to assert any defense to Plaintiff's constitutional claims in this Court. The facts and allegations in Plaintiff's Complaint stand uncontroverted. Thus, judgment in favor of Plaintiff on its constitutional claims is appropriate.

II. Defendants seized and condemned Plaintiff's property without providing adequate notice, an opportunity to repair the property, or a meaningful opportunity to be heard.

The issue here is simple and basic—denial of due process. The City does not provide any administrative remedies or appeals in condemnation actions by the City Council. *See Exhibit G: Response by Mayor Smith to Interrogatory No. 8; Exhibit F: Response by council members to Interrogatory No. 6; Exhibit H: Response by the City of North Little Rock to Interrogatory No. 9.*[5]

[5] Note that, while the City's response states that "a hearing is held," this "hearing" is simply a three (3) minute appearance. There is no opportunity to cross-examine witnesses or present evidence. At the meeting on February 25, 2013 at which the Property was condemned, it was clear that the Council members were not interested in hearing or considering any evidence and had already made up their minds. Indeed, the Mayor stated that the Council was not a judicial body and would not conduct such a hearing.

The City has seized Plaintiff's property through a summary proceeding without providing any due process, whatsoever. The City failed to provide adequate notice of the alleged violations. *Exhibit J: Notice of Public Nuisance.* The City refused to issue a permit to allow the owner to repair the property prior to condemnation. *Exhibit A, pars. 12-13; Exhibit E.* Plaintiff requested a full hearing and the ability to present evidence but the City steadfastly refused. *Exhibit K: Motion for Full Hearing.* The City's code does not contain any provisions for a hearing, at any level, and the only avenue for appeal requires that the property owner initiate an action in state court after the property has been condemned. *Exhibit L: City of NLR, Ark. Municipal Code, Chapter 8, Nuisance Abatement and Property Maintenance; see also Exhibit G: Response by Mayor Smith to Interrogatory No. 8; Exhibit F: Response by council members to Interrogatory No. 6; Exhibit H: Response by the City of North Little Rock to Interrogatory No. 9.*

The complete lack of any *predeprivation* due process protections is a clear and deliberate violation of both the United States and the Arkansas Constitutions. Defendants have argued that the City is permitted to take property in willful violation of the Constitution and, as long as the owner can appeal to state court, the City has no obligation to provide due process. *See Doc. 4 and Doc. 9.* The Constitutional violations complained of were complete once the City condemned the property. Defendants willfully and intentionally seized and condemned Plaintiff's property without providing any *predeprivation* due process protections.

A. The City never provided sufficient notice of the alleged violations or rights of appeal.

Defendants have argued that a simple "appearance" by Plaintiff's counsel is sufficient to cure the lack of adequate notice. Plaintiff's counsel did not, as alleged in Defendant's Motion to Dismiss filed in federal court, have an opportunity to present Plaintiff's case to the counsel. Indeed, it was obvious that the Council had no interest in hearing Plaintiff's case. Plaintiff had

been told that it would be permitted to speak for three minutes before the City Council. Plaintiff's counsel appeared for the limited purpose of asking for notice of the alleged violations and a full and fair hearing or the issuance of a permit to repair the property. Because, Plaintiff had not been provided with a list of specific violations, as required by the City Code, Plaintiff could not adequately prepare to present its case. The three-minute "appearance" of Plaintiff's counsel does not cure the fact that the Notice provided to Plaintiff failed to specify the alleged violations.

The City's Code requires a notice containing a description of violations and rights of appeal.

> **Notice of Violations.** "Notice of Violations" shall be written on standardized or letter form approved by the Senior Code Enforcement Officer that shall include the following information:
>
> (A) The name of the owner, if known;
> (B) An address or description of the real estate sufficient for identification;
> (C) **A description of the violation or violations;**
> (D) **Rights of Appeal under subsection 1.9;**
> (E) A statement that citations may be issued and fines assessed in addition to any administrative remedy imposed by the City.
> (F) Include a statement that the City has a right to cause repairs or demolition to be made and that the costs may be assessed against the owner and the property of the owner; and
> (G) The information required by Ark. Code Ann. 14-54-903, if applicable.

City of NLR, Ark. Municipal Code, Chapter 8, Section 1.6.1 (emphasis added). *See Exhibit L.*

"[W]hen notice is a person's due, process which is a mere gesture is not due process." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 315, 70 S. Ct. 652, 94 L. Ed. 865 (1950). To satisfy the requirements of due process, notice must convey the required information.

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Milliken* v. *Meyer*, 311 U.S. 457;*Grannis* v. *Ordean*, 234 U.S. 385;*Priest* v. *Las Vegas*, 232 U.S. 604;*Roller* v. *Holly*, 176 U.S. 398.The notice must be of such nature as reasonably to convey the required information, *Grannis* v. *Ordean, supra*, and it must afford a reasonable time for those interested to make their appearance, *Roller* v. *Holly, supra*, and *cf.*

Goodrich v. *Ferris*, 214 U.S. 71.

Id. at 314. Notice must provide a party with sufficient information to make informed decisions as to how to proceed in order to protect his property interest. *See Grayden v. Rhodes*, 345 F.3d 1225, 1242 (11th Cir. Fla. 2003) (citing *Mullane*, 393 U.S. at 314, 70 S. Ct. at 657). "The right to be heard has little reality or worth unless one . . . can choose for himself whether to appear or default, acquiesce or contest." *Id.; see also West Covina*, 525 U.S. at 240, 119 S. Ct. at 681 (citing *Mullane* for this proposition). Notice must "**set forth the alleged misconduct with particularity**." *In re Gault*, 387 U.S. 1, 33, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967)(emphasis added).

The general rule is stated thus in Rhyne, Municipal Law, 1957, p. 559:

> "Except in clear cases of emergency, a prior notice and a reasonable opportunity to be heard is required to be given to a property owner before attributing legal effectiveness to any order to demolish, repair, alter or improve a substandard building. **The owner should also be apprised of the defects in his building to give him an opportunity to remedy them.** * * *" See also 14 A.L.R.2d annotation, supra, p. 74 ff.; 16A C.J.S. Constitutional Law § 645, p. 913.

Albert v. Mountain Home, 81 Idaho 74, 80-81, 337 P.2d 377 (Idaho 1959)(emphasis added). Notice must "apprise the affected individual of, and permit adequate preparation for, an impending hearing." *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 14, 56 L. Ed. 2d 30, 98 S. Ct. 1554 (1978) (internal quotations omitted); *see also Bliek v. Palmer*, 102 F.3d 1472, 1475 (8th Cir. 1997). Where Notice fails to advise of the specific violations so that a party may prepare for a hearing, appearance does not cure inadequate notice. *In re Gault*, 387 U.S. at 33.

To be adequate, notice should also advise the party of procedures to appeal an adverse decision. *See Memphis Light, Gas & Water Div.*, 436 U.S. at 14-16.

> Because of the failure to provide notice reasonably calculated to apprise respondents of the availability of an administrative procedure to consider their complaint of erroneous billing, and the failure to afford them an opportunity to

> present their complaint to a designated employee empowered to review disputed bills and rectify error, petitioners deprived respondents of an interest in property without due process of law.

Id. at 22. The Eleventh Circuit has also addressed this requirement specifically in the context of condemnation proceedings:

> To include a one-sentence statement of a tenant's right to appeal the condemnation order in this notice to vacate would not be burdensome. In fact, Rhodes testified that the City amended its standard eviction notice to include a statement regarding the tenants' right to appeal the condemnation order, which suggests that the fiscal and administrative burden of such notice is not prohibitive.

Grayden, 345 F.3d at 1236.

Notice is a fundamental part of due process in all kinds of administrative proceedings, and the regulation of public nuisances is no different. Notice must be executed in a reasonable manner to adequately inform the parties of proceedings that may affect their legal rights. *Armstrong v. Manzo*, 380 U.S. at 550. Additionally, a City must comply with its ordinances. *See generally Tyrer v. Ryan*, 2003 Ark.App. LEXIS 901 (2003). *City of Fordyce v. Vaughn, supra*; *Mings v. City of Fort Smith*, 288 Ark. 42 (1986); *Potocki v. City of Fort Smith*, 279 Ark. 19 (1983); *Taggart & Taggart Seed Co. v. City of Augusta*, 278 Ark. 570 (1983).

The "Notice of Public Nuisance" simply labels the structure as "unsafe and vacant"[6] and "not fit for human habitation."[7] *Exhibit J.* The Notice does not comply with Chapter 8, section 1.6.1 of the City's Code (*Exhibit L*) in that it does not contain a description of the violations[8] or information about rights of appeal. The Notice provided in this case contains neither. At the

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[6] Again, it should be noted that the City forced the business that was operating at this location to close and now complains that the structure is "vacant."

[7] The City's Code only requires that a vacant property "be maintained in a clean, safe, secure and sanitary condition . . . ." The City's Code does not require that a vacant property be "inhabitable." *Exhibit M, Section 3.1.3.*

[8] It should be noted that, because Defendant McHenry had not inspected the interior of the property, the only specific violations of which she could have been aware would have been those on the exterior of the structure. Thus, her recommendation that the property be considered for condemnation must have been based solely on the exterior conditions which are insufficient to support the assertion that the structure was unsafe or unfit for human habitation.

council meeting on February 25, 2013, Plaintiff's counsel requested a list of violations but was informed that a list would not be provided. Indeed, in its Responses to Interrogatories, the City itself admitted that a notice of specific violations is only provided after condemnation and upon the submission of a rehabilitation plan.[9] *Exhibit H: Response by City of NLR to Interrogatory No. 24.* Without knowing what violations had been alleged, Plaintiff could not adequately prepare for a hearing, had one been provided. Notice was inadequate and these inadequacies could not be cured by appearance.

Considering the City's summary condemnation procedure, notice of the right to appeal is especially important. Many of the property owners whose properties are condemned lack the knowledge or resources to initiate court action. Most are unlikely to be aware of the requirements of District Court Rule 9, including the provision that an appeal must be filed within thirty days.[10] Additionally, the requirement of the submission and approval of a plan means that some property owners may not even consider their options for filing an appeal until a submitted plan has been denied. It is likely this process would take more than thirty days. By the time a rehabilitation plan is submitted, reviewed, and put to a Council vote, the thirty (30) day period in which to appeal will

[9] Thus, a property owner is forced to guess at what repairs the City is requiring and, if the City is not satisfied with the rehabilitation plan, there are no provisions for a property owner to appeal the determination and prevent the destruction of his property. By condemning the property prior to allowing repairs, the City is in a position to deny approval of the rehabilitation plan and demolish the structure. By the time this has been done, it is likely that the thirty (30) day time period for a Rule 9 appeal would have expired and the property owner would be left with absolutely no recourse whatsoever.

[10] This point is illustrated by a recent case from the Pulaski County Circuit Court. *James Gilbert v. Joe Smith, et. al.*, No. 60CV-13-1751, April 24, 2013. The City condemned the property located at 3709 Willow Street in the same summary procedure by which Plaintiff's Property was condemned. A representative of the owner appeared at the Council meeting and asked for additional time to repair the property but the Council proceeded to condemn the property. *Exhibit O: Minutes of City Council Meeting, March 25, 2013, pg. 5 at R-13-60.* Mr. Gilbert hired an attorney who filed an appeal in Circuit Court. However, the attorney failed to file the record as required by Rule 9 and Mr. Gilbert's appeal was dismissed. The Arkansas Court's require strict compliance with Rule 9 and this often thwarts a property owner's efforts to appeal. The City's scheme by which properties are condemned prior to permitting repairs and then requiring the submission of a rehabilitation plan, bond, and letter of credit, all of which require approval of the City Council, makes it unlikely that a property owner will properly file a Rule 9 appeal within the required time frame.

have expired and, if the City rejects the plan and proceeds to demolish the property, the owner is left with absolutely no recourse.

Neither the Notice of Public Nuisance (*Exhibit J*) nor the Resolution condemning the Property (*Exhibit D*) provide any information about rights to appeal. Plaintiff wonders if the failure to include rights of appeal in both notices is intentional and designed to prevent the filing of an appeal. The "Notice of Public Nuisance" and the "Resolution" speak for themselves and there are no genuine issues of material fact in dispute by which the City can demonstrate that it provided adequate notice prior to the condemnation proceeding and Plaintiff is entitled to summary judgment on its procedural due process claim.

B. The City must afford an owner an opportunity to make repairs before condemning and destroying property.

"[T]he authorization of government to take the property of its citizens can be invoked only in the face of compelling necessity, and it extends no further than the emergency which creates it." *Horne v. Cordele*, 140 Ga. App. 127, 129, 230 S.E.2d 333 (Ga. Ct. App. 1976).

> '[W]hile the right exists in the exercise of the police power to destroy property which is a menace to public safety or health, public necessity is the limit of the right and the property cannot be destroyed if the conditions which make it a menace can be abated in any other recognized way. Polsgrove v. Moss, 154 Ky. 408, 157 SW 1133; 39 AmJur pp. 461-462, Sec. 186; 62 CJS, Municipal Corporations, § 281, pages 631-632; Crossman v. City of Galveston, 112 Tex. 303, 316, 247 SW 810, 26 ALR 1210.' City of Houston v. Lurie, 224 SW2d 871, 14 ALR2d 61. See also Albert v. City of Mountain Home, 337 P2d 377; City of Aurora v. Meyer, 38 Ill. 2d 131 (230 NE2d 200); Childs v. Anderson, 344 Mich. 90, 73 NW2d 280; Application of the Village of Suffern, 209 NYS2d 599; Newton v. Highland Park, 282 SW2d 266; Horton v. Gulledge, 277 NC 353 (177 SE2d 278.)

Id. at 129-130, 230 S.E.2d 333.

If the condition causing the property to be a nuisance can be remedied through "cleaning, disinfection, alteration, or repair," then due process requires that these measures be ordered before an order for demolition is made. *See e.g., City of Safford v. Seale*, No. 2 CA-CV 2008-0185, 2009

WL 3390172, 3 (Ariz. Ct. App. 2009); *Nazworthy v. City of Sullivan*, 55 Ill. App. 48, 52 (1893); *Polsgrove v. Moss*, 157 S.W. 1133, 1136 (Ky. 1913); *Welch v. Stowell*, 2 Doug. 332, 341-42 (Mich. 1846); *Newton v. Highland Park*, 282 S.W.2d 266 (Tex.App. 1955). If a local government contends that remediation is not possible and that the structure, as it exists, cannot be remedied in such a way to prevent it from becoming a nuisance, then the local government must establish by a preponderance of the evidence that the structure should be demolished instead of repaired. *West v. City of Borger*, 309 S.W.2d 250, 253 (Tex.App. 1958). **Courts, have disfavored decisions that issue an order for demolition without any kind of relief afforded to a property owner prior to the order**. *See Houston v. Lurie*, 148 Tex. 391 (1949). This treatment is in congruity with the first Eldridge factor (see discussion in section I.D. *infra*), which considers the gravity of potential loss to an individual. *Mathews v. Eldridge*. 424 U.S. 319, 334-35, 96 S.Ct. 893, 47 L.ed. 2d 18 (1976). Thus, ordering demolition without any kind of relief prior to the order is a harsh remedy and has due process implications associated with it.

When faced with a similar situation in which a municipality refused to allow a property owner to make repairs prior to condemnation, the Georgia Supreme Court found the process to be unconstitutional.

> Despite the voluminous pleadings here a careful reading determines that the petition alleges and shows, among other things, that the owner was denied the privilege, by the ordinance and the actions of the officials in conformity thereto, to abate the alleged nuisances himself by not being issued building permits for repairs and maintenance of his properties to cure the alleged violations of the housing code before the hearing on said violations to determine if a nuisance exists, a city official making a determination in one instance that "it is not economically feasible to improve the structure sufficiently to meet requirements of the Housing and Slum Clearance Code and this property is in such state of deterioration that it constitutes a menace and nuisance in the neighborhood." The ordinance, Section 15-22, which authorizes the determination by the city officials of the unfeasibility of rehabilitation of a dwelling amounts to the taking of private property without due process, without just and adequate compensation therefor, and is discriminatory in that it denies the owner the equal protection of the laws in violation of both the

> State and Federal Constitutions, and in that respect the ordinance is null and void. While Sec. 18 of the statute (Ga. L. 1955, pp. 354, 375) provides that any municipality may by ordinance "require the repair, closing or demolition of dwellings or other structures," yet, where, as here, **the ordinance seeks to prevent the owner from repairing his property pending the outcome of the abatement proceedings, which he alleges is a sham and will only judge him guilty of refusing to abate the nuisance after the finding by other officials, without notice and a hearing, to be a nuisance, it in effect seeks to condemn his property by preventing him from remedying the nuisance situation so found, and to so declare it a nuisance by ordering him "to demolish the structure within 60 days," without a judicial hearing of the existence of a nuisance** under *Code* § 72-401, and preventing him by ordinance from repairing or improving same by denying him building permits for that purpose after so finding a nuisance without notice and a hearing. **The effect of said ordinance and the application thereof here alleged is to take from the plaintiff his property, not through eminent domain but by crushing him between "bureaucratic rocks"** by denying him a right to rebuild under the zoning code and requiring him to demolish under the slum clearance code. If the city desires him to demolish the property without giving him the right to correct any and all deficiencies found in a judicial hearing of whether or not a nuisance exists under *Code* § 72-401, then let the property be condemned and pay him for it, but not through indirect means prevent him from abating an alleged nuisance before a trial thereon. The ordinance by thus placing him in a position of demolishing the property as his only means of abating the alleged nuisance is unconstitutional, null and void.

Shaffer v. Atlanta, 223 Ga. 249, 250-251, 154 S.E.2d 241 (Ga. 1967)(emphasis added).

In the *Shaffer* case, the court held that city officials could not prevent a property owner from repairing his property by determining that such repairs were not economically feasible. This is instructive in the current case because, as in *Shaffer*, the City refused to issue a permit for repairs prior to condemnation and also will only permit repairs to be made after condemnation and upon the City's approval of a rehabilitation plan. As in *Shaffer*, in the present case, the City has placed itself in the position of determining the appropriateness of repairing the property. Furthermore, as in *Shaffer*, the City prevents a property owner from making repairs until the property has been condemned in a *sham* proceeding in which the outcome is predetermined. As in *Shaffer*, the City's process does not provide for a "judicial hearing" and, therefore, falls short of the requirements of constitutional due process.

In *Albert v. Mountain Home*, 81 Idaho 7480, 337 P.2d 377 (Idaho 1959), the city declared a nuisance and demolished an old vacant house that was littered with debris and was occupied by transients. The court noted that "these conditions were caused by the use to which the house was put, and were not hazards inherent in the building itself." *Id.* at 79, 337 P.2d 377. The court held that "Where a hazardous condition may be remedied by cleaning and repairs . . . the building may not be destroyed as a nuisance." *Id.* at 79-80, 337 P.2d 377. Similarly, in the present case, some of the council members based their vote to condemn the Property, at least in part, on the fact that the building was filled with clutter and may have been used by vagrants. *Exhibit F.* Plaintiff had cleaned the property prior to the condemnation but the Council did not consider that fact. As in *Albert*, these conditions cannot be the basis of a condemnation action.

> "Municipalities do not possess unrestricted power to abate nuisances; abatement is limited to the necessities of the case. Property may be ordered destroyed under certain conditions, but only if the nuisance cannot be abated in any other way. Here, cleaning and disinfecting will remove the unsanitary conditions, and properly repairing the buildings on the premises will entirely remove the fire hazard, excepting such as is inherent because of the material of which they are constructed." Echave v. City of Grand Junction, 118 Colo. 165, 193 P.2d 277, 280. See also 9 Am.Jur., Buildings, sec. 40, pp. 44-45 (supplement); 14 A.L.R.2d annotation, supra, at pp. 92-97.
>
> Because the nuisance could be abated by cleaning and painting, the city went beyond its authority in ordering the building destroyed. The defendant acted at its peril, and having done so it must respond in damages.

Id. at 80, 337 P.2d 377.

In *Commissioner of State Police v. Anderson*, 344 Mich. 90, 73 N.W.2d 280 (Mich. 1955), the state was attempting to demolish structures which were old and had suffered considerable damage through vandalism. As in the present case, the utilities had been turned off and the only danger of fire would be that vandals and trespassers might start one. The court heard testimony

that "there was no greater chance that these houses would catch fire than the courthouse in which these cases were heard." The property owner offered to remove any items that were inherent fire hazards and board up the property. The court found these actions to be sufficient.

> It has been decided in a number of cases that something less than destruction of the entire building should be ordered where such will eliminate the danger or hazard. See 14 ALR2d 92; 9 Am Jur, Buildings, § 40, p 236. The need for repairs and alternations does not in this case constitute the fire hazard and therefore it is not necessary that we order them.

Id. at 96, 73 N.W.2d 280.

Once Defendant McHenry red-tagged the Property, Plaintiff was barred from making any repairs. *Exhibit A, pars. 12-13; Exhibit E.* Mr. Livdahl, acting as the owner's representative, informed the City that Plaintiff was ready and able to make the necessary repairs. Indeed, Plaintiff had already arranged for the repairs to be done. *Exhibit N: Roberto Alvarez Declaration.* The City steadfastly refused to issue a permit for repairs. *Exhibit A, pars. 12-13; Exhibit E.* At the Council meeting on February 25, 2013, Plaintiff's counsel asked that the condemnation vote be postponed and that a permit for repairs be issued. The Council again refused. While some Council members believed the Property could be repaired (*Exhibit F, Responses by council members to Interrogatory No. 12*), they nevertheless voted to condemn the Property.

At the time of the condemnation vote, the Property was structurally sound and could have been easily and inexpensively repaired (*Exhibit N: Declaration of Roberto Alveraz; Exhibit R, Declaration of Craig Snyder*) but the City refused to permit repairs to be made. *Exhibits A & E.* The City claims that Plaintiff may now submit a rehabilitation plan, which requires a bond and letter of credit. However, because the City steadfastly refused to allow repairs prior to the condemnation, Plaintiff is skeptical that a rehabilitation plan would be approved. If the City chose to deny the rehabilitation plan, the City could then proceed to demolish the structure and Plaintiff

would have absolutely no recourse. The City completely refused to permit the property owner to repair the Property after it was red-tagged. There are no genuine issues of material fact in dispute by which Defendants can show that they provided adequate due process protections as required by the federal and state constitutions. Therefore, Plaintiff is entitled to summary judgment on this claim.

C. Due Process requires a *pre-deprivation* hearing prior to seizure and condemnation of property.

Defendants failed to provide Plaintiff with adequate notice, refused to allow Plaintiff to repair the property prior to condemnation, and refused to afford Plaintiff a meaningful opportunity to be heard prior to the condemnation. To satisfy the requirements of due process, a party must be afforded a "meaningful opportunity to be heard" and this opportunity is generally required **prior** to a deprivation of property. *See, e.g., United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 53, 114 S.Ct. 492, 126 L.Ed. 2d 490 (1993); *Fuentes v. Shevin*, 407 U.S. 67, 80, 92 S.Ct. 1983, 32 L.Ed. 2d 556 (1972); *Boddie* v. *Connecticut*, 401 U.S. 371, 379, 28 L. Ed. 2d 113, 91 S. Ct. 780 (1971). Post-deprivation process is only justified in "extraordinary situations." *James Daniel Good*, 510 U.S. at 53.

> The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decisionmaking when it acts to deprive a person of his possessions. The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment -- to minimize substantively unfair or mistaken deprivations of property . . . . So viewed, the prohibition against the deprivation of property without due process of law reflects the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference. See *Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 552. The requirement of notice and an opportunity to be heard raises no impenetrable barrier to the taking of a person's possessions. But the fair process of decision-making that it guarantees works, by itself, to protect against arbitrary deprivation of property. For when a person has an opportunity to speak up in his own defense, and when the State must listen to what

> he has to say, substantively unfair and simply mistaken deprivations of property interests can be prevented. It has long been recognized that "fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights. . . . [And n]o better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it." *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 170-172 (Frankfurter, J., concurring). If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented. At a later hearing, an individual's possessions can be returned to him if they were unfairly or mistakenly taken in the first place. Damages may even be awarded to him for the wrongful deprivation. But **no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred. "This Court has not . . . embraced the general proposition that a wrong may be done if it can be undone." *Stanley* v. *Illinois*, 405 U.S. 645, 647. This is no new principle of constitutional law. The right to a prior hearing has long been recognized by this Court under the Fourteenth and Fifth Amendments.**

Fuentes, 407 U.S. at 80-82 (emphasis added).

The City claimed that the Property presented an immediate threat requiring immediate action. *Exhibit D: Resolution.* However, this contention is belied by the fact that, although the Property was condemned more than a year ago, the City has not taken any action to remove the supposed threat. Indeed, the City has opposed Plaintiff's attempts to expedite this litigation.[11] This should be taken as an admission that the Property does not pose an immediate threat.

As discussed *supra*, the City has not prepared a report describing specific violations for which the property was condemned. This makes one wonder, if the Council members received no report for an inspector describing specific violations, on what was the condemnation based? The Resolution condemning the property uses words terms such as "run down," "dilapidated," "unsightly," and "obnoxious."[12] *Exhibit D.* These terms are vague, open to varied interpretations,

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[11] First, Defendants' removal of this case to federal court has delayed resolution of the litigation. Second, Plaintiff sought to file the Joint Rule 26(f) report early but Defendants insisted that it be filed on the last day. Third, Defendants then filed a Motion to Stay Discovery.

[12] In *Deschler*, the Ohio court addressed the problem with using language that refers to the aesthetics of the structure.

and allude to the aesthetic characteristics of the property. While the Resolution also uses the terms "unsafe," and "dangerous," the City has admitted that no report of violations which allegedly make the property "unsafe" or "dangerous" has been completed or was considered by the Council. Additionally, the fact that the City has taken no action to eliminate any immediate threat and has sought to delay this litigation demonstrates that the Property did not pose any sort of immediate danger to public health or safety at the time it was condemned. Therefore, the Council members condemned the property simply based on the aesthetic characteristics of the property.

It should be noted that destruction of property for aesthetic reasons has been held an unconstitutional exercise of a city's police power. *Deshler v. Hoops*, 196 N.E.2d 476 (Ohio C.P. 1963). And, so is any other exercise of government's power of uncompensated destruction over the property of a citizen which exceeds the immediate necessity of the occasion. *City of Newport v. Rosing*, 319 S.W.2d 852 (Ky. C.A. 1958). In addition to the fact that the Council did not consider any specific violations, by its inaction, the City has admitted that the Property did not pose an immediate threat. There was no immediate threat requiring immediate condemnation of the Property. There is no rational basis for the City's refusal to issue a permit for repairs prior to the condemnation of the Property. There is also no rational basis for the City's refusal to afford Plaintiff a full and fair hearing.

In a similar nuisance abatement case, the Arkansas Supreme Court held that statute that authorized a temporary or permanent injunction without affording the owners of a dance hall an

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But perhaps the most apparent weakness of the ordinance in question is its consistent use of such phrases as "subject to public view and access," "old and dilapidated," "unpainted," "uncared for," "eye-sore" and phrases of similar import. Such language, considered in conjunction with the general tenor of the ordinance as a whole, impels the conclusion that the considerations for the ordinance were entirely esthetic; that the ordinance comes within the rule of *City of Defiance* v. *Killian*, 116 Ohio App., 60; that it is an unconstitutional exercise of the police power and is void.

Deshler v. *Hoops*, 196 N.E.2d 476 (Ohio C.P. 1963).

opportunity for notice and a hearing violated the owners' due process rights under both the federal and Arkansas constitutions. *Franklin v. State*, 267 Ark. 311, 590 S.W.2d 28 (1979). In *Franklin*, the prosecuting attorney obtained an order requiring that the dance hall be temporarily padlocked. *Id.* at 312, 590 S.W.2d 28. The temporary order was nailed to the door of the business. *Id.* In evaluating the constitutionality of the statute at issue in *Franklin*, the court quoted the United States Supreme Court in *Fuentes* v. *Shevin*, 407 U.S. 67 (1972):

> The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decision making when it acts to deprive a person of his possession. The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment -- to minimize substantively unfair or mistaken deprivations of property, a danger that is especially great when the State seizes goods simply upon the application of and for the benefit of a private party. So viewed, the prohibition against the deprivation of property without due process of law reflects the high value, embedded in our consitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference.

The Court further stated the requirement of notice and an opportunity to be heard raised no impenetrable barrier to the taking of a person's property. Such safeguards are necessary to avoid unfair or mistaken deprivation of property interest. In *Goss* v. *Lopez*, 419 U.S. 565 (1975), the United States Supreme Court spoke of constitutional safeguards in the following language:

> . . . there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.

In the more recent case of *Barry* v. *Barchi*, 47 U.S.L.W. 4812 (S. Ct. June 25, 1979), the Court dealt with a temporary injunction very similar to the one in question. In *Barry* the state had temporarily taken a horse trainer's license, without notice or hearing, because one of his horses, which had finished in the money, was determined to have been drugged. The New York rule, like our statute, provided for temporary suspension of the license without notice or hearing. The United States Supreme Court held that the trainer was entitled to a meaningful hearing before his license could be taken from him.

Franklin, 267 Ark. at 314-315, 590 S.W.2d 28.

Similarly, in the present case, the City "red-tagged" Plaintiff's property without notice or a hearing. Once the property was "red-tagged," Plaintiff was not permitted either to use or repair the property. The City refused to provide Plaintiff with a hearing at which it could present evidence and cross-examine witnesses. To date, Plaintiff has been denied the use of its building for approximately a year and a half without ever being afforded proper notice or a hearing. Because Plaintiff has been denied the opportunity to repair the property, the property has deteriorated and significantly decreased in value. Therefore, even if Plaintiff were to be permitted a full hearing at this time, the damage has been done. The court addressed this very issue in *Franklin*:

> A temporary injunction, under the circumstances of this case, ordinarily turns into a permanent one. **Even a delayed hearing is to a great extent an exercise in futility because even if the rights be restored the deprivation of rights during the temporary injunction cannot be regained.** The statute in question here specifically allows the state to proceed without a bond. Therefore, **damages incurred as a result of a wrongful temporary injunction would seldom, if ever, be recovered.** The record in this case clearly shows there was no threat to life, liberty, or property, at the time the injunction was issued. In fact, the record does not disclose that there was anything more than drinking outside the building going on at this place. There were allegations that fights and other disturbances had occurred but all of the witnesses who testified denied personal knowledge of such occurrences.

Id. at 316, 590 S.W.2d 28.

The court unequivocally held that both the state and federal constitutions require due process prior to even the temporary enjoining of use of property.

> We hold the statute authorizing a temporary or permanent injunction without notice and an opportunity to be heard fails to meet the fundamental requirements of the due process clause of the Fifth and Fourteenth Amendments to the Constitution of the United States and article 2, section 21 of the Constitution of the State of Arkansas. The statute is so broad as to allow the closing of a place of business merely upon the verified allegation of a prosecuting attorney without any proof whatsoever in support thereof. The opportunity for abuse of power in such cases is too great to be allowed to continue. Even an honest mistaken belief that a nuisance was being carried on would deprive the person of his property without

> due process of law. Therefore, we hold that Act 118 of 1937 is unconstitutional. The case is reversed and remanded with directions for the trial court to dissolve the injunction and cause the property to be returned to the appellants.

Id. at 316-17, 590 S.W.2d 28.

Similarly, the City's ordinance in this case permits the City to enjoin the use and repair of property without providing prior notice, presenting any evidence or providing the property owner with a meaningful opportunity to be heard. Thus, as in *Franklin*, , the City's nuisance abatement ordinance also violates the due process requirements of both the federal and state constitutions.

The City simply cannot credibly claim that this was an extraordinary situation in which it could not reasonably provide meaningful *predeprivation* process. Indeed, the reason given by the Mayor at the Council meeting for the denial of Plaintiff's request for a full hearing had nothing to do with the exigency of the situation. Instead, the Mayor said that a hearing would not be granted because the Council was a legislative body and did not conduct those types of hearings. Plaintiff asked for a permit or a hearing and the City did not have any credible reason to deny this request. The City steadfastly denied to provide a *predeprivation* hearing. Therefore, there are no genuine issues of material fact in dispute by which Defendants can show that they provided adequate *predeprivation* process and Plaintiff is entitled to summary judgment on this claim.

D. Due process requires a *predeprivation* hearing conducted in a "meaningful manner."

The Arkansas Constitution provides that "[t]he right of property is before and higher than any constitutional sanction." Ark. Const. Art. 2, § 22. Thus, a property owner in Arkansas is entitled to substantial due process protections prior to a condemnation The highest constitutional sanction is strict scrutiny. Plaintiff asserts that, pursuant to the Arkansas Constitution, private property cannot be taken in the absence of a compelling government interest and a *predeprivation* judicial determination should be required.

A hearing "must be granted at a meaningful time and in a meaningful manner." *Fuentes*, 407 U.S. at 80 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 14 L.Ed. 2d 62 (1965)). The extent to which due process rights are required in administrative proceedings is determined by a balancing approach. *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.ed. 2d 18 (1976). The Eldridge standard balances three factors: (1) the extent that private interests are affected in the proceeding; (2) the risk of wrongfully depriving a party of its interest under the current procedures along with the utility of additional procedures that could lessen this risk; and (3) the government's interest at stake, such as the administrative and financial burdens imposed upon a public actor if additional procedures are incorporated. *Id.* at 334-35.

Prior to a governmental decision which deprives individuals of a property interest procedural due process requires that a hearing before an impartial decision maker be provided at a meaningful time and in a meaningful manner. *Matthews*, 424 U.S. at 333. Arkansas courts have held that **due process requires "a full and fair hearing, including the right to submit evidence and testimony, to examine witnesses, and an opportunity to present evidence or testimony in rebuttal to adverse positions."** *Harness v. Arkansas PSC*, 60 Ark. App. 265, 271 (1998) (citing *Arkansas Elec. Energy Consumers v. Arkansas Pub. Serv. Comm'n*, 35 Ark. App. 47 (1991))(emphasis added). The purpose of an adversary hearing is to ensure the requisite neutrality that must inform all governmental decision-making. *James Daniel Good*, 510 U.S. at 55.

Real property ownership has substantial value to an individual under the first Eldridge factor. *James Daniel Good*, 510 U.S. at 53-54. In *Connecticut v. Doehr*, 501 U.S. 1, 11, 111 S.Ct. 2105, 115 L.Ed. 2d 1 (1991), the Supreme Court described attachment interests on property to be "significant" in regards to how they affect private interests under Eldridge because attachments can result in great economic hardship to a property owner. In *Doehr*, the Court held that even

where a decision does not amount to a complete, physical, or permanent deprivation of real property, due process concerns still exist. *Id.* at 12. Property nuisance cases require increased caution because destroyed property cannot be restored and the best evidence of whether the seizure was justified will have been demolished. *See* Alex Cameron, *Due Process and Local Administrative Hearings Regulating Public Nuisances: Analysis and Reform*, 43 St. Mary's L.J. 619. The demolition of one's property is a substantial private interest under the first Eldridge factor and, thus, determine that it warrants substantial protection for due process purposes.

Crucial due process components in light of the second Eldridge factor include affording property owners multiple opportunities to confront the issues charged against them for the condition of their properties and providing property owners with the opportunity to present their case. *See, e.g., James Daniel Good*, 510 U.S. at 48, 53-56. The right to cross-examine witnesses is regarded as substantial in connection with examining the entire scope of evidence and making a complete inquiry into the truth. Where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses. *See, e.g. Goldberg v. Kelly*, 397 U.S. 254, 269, 90 S.Ct. 1011, 25 L.Ed. 287 (1970). **Rulings based on expedited summary hearings that offer scant evidence of their respective decisions fall short of due process requirements.** *See Freeman v. City of Dallas*, 242 F.3d 642, 653-54 (5th Cir. 2001).

An analysis of the *Matthew v. Eldridge* factors is essential to any assessment of the adequacy of due process. In the present case, the City's condemnation significantly affects Plaintiff's private property rights. The City threatens to demolish the structure and impose a lien on the property to cover the costs of demolition. Once destroyed, the damage is done and the property cannot be easily reconstructed. While the demolition of the structure would likely have a negative impact on the value of the property, the City's seizure of the property from the time the

property was red-tagged has prevented Plaintiff from repairing the property has resulted in substantial deterioration of the property.

Further, Plaintiff has been barred from any productive use of the property since the condemnation action. Thus, even though the City has yet to demolish the structure, the condemnation action has already resulted in a significant impact on the Plaintiff's property interest. The City cannot simply disregard Plaintiff's property rights and seize and destroy property through a summary proceeding. Private property rights are protected by both the federal and state constitutions and, as such, infringement on these rights should not be permitted in the absence of substantial due process protections. A three (3) minute appearance before a body which has already made up its mind and refuses to consider any evidence falls far below the level of protection that these important rights demand. At a minimum, such a substantial interference with property rights requires "a full and fair hearing, including the right to submit evidence and testimony, to examine witnesses, and an opportunity to present evidence or testimony in rebuttal to adverse positions."

Additionally, when such an infringement of property rights is contemplated, a property owner should be afforded an opportunity to remedy the problems prior to condemnation. A property owner should be permitted the opportunity to remedy the problems without being required to post a substantial bond and provide a letter of credit. Furthermore, the City provides no guarantee that a rehabilitation plan will be approved by the City Council or that the work will be deemed acceptable upon completion. The fact that, in most cases, it will take more than thirty (30) days to submit and obtain approval of a rehabilitation plan leaves the owner without any recourse if the City deems the plan or repairs unacceptable.

Regarding the second *Eldridge* factor, the City's summary condemnation procedure

presents great risk of erroneously depriving a property owner. The City admits that an inspection report listing code violations or conditions required to be repaired was never completed by anyone. *Exhibit F: Responses by council members to Interrogatory No. 20; Exhibit G: Response by Mayor Smith to Interrogatory No. 24; Exhibit H: Response by City of North Little Rock to Interrogatory No. 24; Exhibit I: Response by Felicia McHenry to Interrogatory No. 22.* The City did not hear any testimony from anyone who had inspected the property and Plaintiff never had an opportunity to cross-examine such witnesses. The City Council members have admitted that, at the time of their vote, they did not know the specific code violations that were alleged or what was required to be done to remedy the situation so that the property would no longer be considered to be a nuisance. The only evidence considered by the Council were pictures taken more than a month prior to the vote that did not reflect the condition of the property at the time of the condemnation vote. *Exhibit A, par. 14.* The Resolution condemning the property uses vague descriptions such as "run down," "dilapidated," "unsightly," and "obnoxious." *Exhibit D.* When asked, Council members were unable provide any specific definitions of most of these terms and merely responded with terms that were equally vague. *Exhibit F: Responses to Interrogatory No. 8.* This summary procedure results in the condemnation of properties where neither the owner nor the voting officials have been informed of the specific violations or conditions that must be repaired. The lack of information regarding specific violations and the vague language used in the Council's form condemnation resolution results in an arbitrary decision making process that falls significantly short of constitutional due process requirements.

The potential for erroneous deprivation created by the City Council's abbreviated procedures and lack of a report describing specific violations is compounded by the lack of any opportunity to appeal to any city official, board, or commission. While a property owner may

appeal to Circuit Court, the City never provides property owners with notice of their right to appeal in this manner and the shortened timeframe permitted to file an appeal (30 days) means that many property owners will not be able to appeal. Arkansas courts have required strict compliance with Rule 9 and even many attorneys find compliance to be difficult. Many of the properties being condemned in this summary process are owned by people who lack the financial ability to seek legal counsel or by people who don't reside in the area and may have a difficult time initiating legal action. Thus, many property owners have been and will continue to be deprived of their property interests without ever receiving constitutionally required due process.

The second *Eldridge* factor includes consideration of other available procedures that may lessen the risk of erroneous deprivation. The City could easily provide a full hearing before an official, board, or commission prior to the case being submitted to the City Council. The parties could present evidence and witnesses and a record could be created which could then be reviewed by the City Council. Alternatively, the City Council could simply conduct a full and fair hearing itself. This also brings us to consideration of the third *Eldridge* factor—the burden imposed upon the government by providing additional procedures. The City already uses boards and commissions for other determinations and even has procedures in place for administrative appeals of other decisions. Replicating this process for condemnation actions would impose only a minimal burden on the City. Considering the significant property interests at stake, the burden of providing a hearings and appeals process is certainly no more than the City should be expected to shoulder.

In condemnation cases, a *predeprivation* hearing does not impose an unreasonable burden upon a municipality.[13]

[13] The Supreme Court's precedents establish the general rule that Due Process requires that, absent an extraordinary situation, a party cannot invoke the power of the state to seize a person's property without a prior judicial determination

> The burden of conducting a hearing, of course, is likely greater than the cost of adding another sentence to the City's standard notice-to-vacate form. But this cost is hardly daunting, and there is no doubt in our minds that the tenants are entitled to a meaningful hearing at some point in time to contest the condemnation decision.

Grayden v. Rhodes, 345 F.3d 1225, 1236 (11th Cir. 2003).

> However, it is not necessary for a litigant to have exhausted available *postdeprivation* remedies when the litigant contends that he was entitled to *predeprivation* process. See Zinermon v. Burch, 494 U.S. 113, 132, 110 S. Ct. 975, 108 L. Ed. 2d 100 (1990) ("**In situations where the State feasibly can provide a predeprivation hearing before taking property, it generally must do so regardless of the adequacy of a postdeprivation tort remedy to compensate for the taking.**"); Westborough Mall, Inc. v. City of Cape Girardeau, 794 F.2d 330, 337 (8th Cir. 1986) (concluding that "**[t]he availability of post-deprivation remedies is not a defense to the denial of procedural due process where predeprivation process is practicable**" and district court erred in instructing jury otherwise). Accordingly, appellants' failure to exhaust postdeprivation remedies does not affect their entitlement to predeprivation process, and the district court should not have considered this failure in dismissing the claim.

Keating v. Nebraska Pub. Power Dist., 562 F.3d 923, 929 (8th Cir. 2009) (emphasis added).

The City does not provide any *predeprivation* remedies in condemnation actions. That is the essence of Plaintiff's due process claim. The City steadfastly refused to allow the Property to be repaired prior to condemnation and refused to afford Plaintiff a full and fair hearing. Thus, there are no genuine issues of material facts in dispute by which Defendants can show that they provided adequate due process protections as required by both the federal and state constitutions. Therefore, Plaintiff is entitled to summary judgment on this claim.

E. Plaintiff was denied a *predeprivation* hearing before an impartial decision maker.

The United States Supreme Court has declared that in an administrative hearing, the right to a hearing before a neutral decision maker is essential. *Goldberg*, 397 U.S. at 271. The Supreme

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that the seizure is justified. *United States v. $ 8,850*, 461 U.S. 555, 562 n.12 143 (1983) (citing *Boddie v. Connecticut*, 401 U.S. 371, 378-379 (1971)); *see also North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975); *Fuentes v. Shevin*, 407 U.S. 67(1972); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1974); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974).

Court has also noted that local governments have a direct pecuniary interest in the outcome of a condemnation proceeding and this requires an increased level of scrutiny with regard to an individual's deprivation of due process rights. *James Daniel Good Real Prop.*, 510 U.S. at 56-57. Other courts have said that because certain procedural safeguards are commonly absent from administrative proceedings, the bias requirement should be applied with greater force. *Ventura v. Shalala*, 55 F.3d 900, 902 (3d Cir. 1995).

In the present case the proposed resolution is sponsored by and signed by the Mayor. The Mayor also presides over the proceeding. The Mayor and Council members are all elected officials and are subject to political pressures and influences. During the Council meeting at which the property was condemned, it was apparent that none of the Council members were interested in hearing any evidence. It was apparent that their minds were made up and nothing was going to change them. Thus, while Plaintiff contends that the appearance of counsel for three minutes does not constitute a hearing, even if it did, Plaintiff was not afforded a hearing before an impartial decision maker. A property owner must be provided with a full hearing before an impartial decision maker before the City acts to deprive it of its property.

The City denied Plaintiff a full hearing before an impartial decision maker. Therefore, there are no genuine issues of material fact in dispute by which Defendants can show that they provided adequate due process as required by both the federal and state constitutions. Plaintiff is entitled to summary judgment on these claims.

F. *Samuels v. Meriweather and Hagen v. Traill County*[14]

[14] In their Motion to Dismiss filed in federal court, Defendants cited to these cases in support of their contention that simple notice and an appearance before the City Council satisfies the requirements of due process. If Defendants are correct and these cases represent that a mere "appearance," regardless of the meaningfulness of the "appearance," is sufficient, these cases are in conflict with the United State. Supreme Court decisions, cited herein, holding that a hearing must be provided at a meaningful time and in a meaningful manner.

In their Motion to Dismiss filed in federal court, Defendants cited to two Eighth Circuit cases involving nuisance abatement in an attempt to argue that the minimal (really nonexistent) procedures provided by the City in this case were sufficient. However, it is important to note that these cases differ from the present in significant ways. In *Samuels v. Meriweather*, 94 F.3d 1163, 1165 (8th Cir. 1996), the city provided the owner with "a letter outlining twenty conditions found to be in violation of city ordinances. Three days later, the City sent another letter listing additional violations . . . ." In the present case, despite a requirement in the City's Code, to date, the City has failed and refused to provide Plaintiff with a list of alleged violations. Also, in *Samuels*, the property owner was provided with an opportunity to repair the property both before and after condemnation. *Id.* In the present case, the City refused to issue a permit to allow the property to be repaired prior to the condemnation. Next, while the opinion in *Samuels* does not describe the hearing provided, one can assume it was more than a three minute appearance. Furthermore, the resolution adopted by the City directed the property owner to "clean and repair the exterior of the building and to start work on the interior within thirty days . . . ." In the present case, Plaintiff cannot repair the building without submitting a plan to the City, which may or may not be approved, and posting an oppressive bond.

In *Hagen v. Traill County*, 708 F.2d 347, 348 (8th Cir. 1983), the property owner was also given an opportunity to repair the property prior to condemnation. Additionally, the property owner was allowed to discuss the condition with the township supervisors on two occasions and, on another occasion, with the State's Attorney. *Id.* The court noted a significant fact—the property owner did not request further proceedings. *Id.* Whereas, in the present case, Plaintiff's counsel submitted a written motion requesting a full hearing and appeared at the Council meeting for the purpose of requesting a hearing.

III. Private property rights are fundamental rights and property owners are entitled to the protection of substantive due process rights.

The Arkansas Constitution provides that "[t]he right of property is before and higher than any constitutional sanction." Ark. Const. Art. 2, § 22. Thus, a property owner in Arkansas is entitled to substantial due process protections. Certainly, considering the importance afforded property rights by the Arkansas Constitution, a substantive due process analysis is required in regards to Plaintiff's claims under the Arkansas Constitution.

Private property rights are fundamental rights and are specifically guaranteed by the Due Process Clause of the Fourteenth Amendment to the federal constitution. The Due Process Clause specifically prohibits state governments from depriving "any person of life, liberty, **or property** without due process of law." U.S. Const. amend V (emphasis added). A claim that the government has invaded a protected property interest is sufficient to state a violation of substantive due process. *See Austell v. Sprenger*, 690 F.3d 929, 935 (8th Cir. 2012); *Bituminous Materials v. Rice County*, 126 F.3d 1068, 1070 (8th Cir. 1997). While courts have recognized protected fundamental rights in addition to those specifically included in the Bill of Rights, substantive due process protections also include those specifically mentioned in the Constitution. "[A]n 'interest protected by the text of the Constitution' is sufficient to support substantive due process analysis." *Moran v. Clarke*, 296 F.3d 638, 646 (8th Cir. 2002) (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 856, 118 S.Ct. 1708, 140 L.Ed 2d 1043 (1998) (plurality opinion of Kennedy, J.)). Additionally, the right to maintain control over one's property, free from governmental interference, is a private interest of historic and continuing importance. *James Daniel Good Real Prop.*, 510 U.S. at 53-54 (1993). Property rights are specifically mentioned in the Due Process Clause and are, therefore, entitled to substantive due process protections.

It has been well established that the Takings Clause of the Fifth Amendment, made

applicable to the States through the Fourteenth Amendment. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 536, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005)(citing *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 41 L. Ed. 979, 17 S. Ct. 581 (1897)). Defendants are, no doubt, well aware that claims regarding taking by state and local governments are frequently brought under the Fifth Amendment to the US Constitution. *See, e.g., Williamson County Reg'g Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed. 2d 126 (1985); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed. 2d 250 (1987); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 95 S.Ct. 2646, 57 L.Ed. 631 (1978);

Property deprivation claims are frequently analyzed under a substantive due process analysis.

> [I]n the context of land use regulation, that is, in situations where the governmental decision in question impinges upon a landowner's use and enjoyment of property, a land-owning plaintiff states a substantive due process claim where he or she alleges that the decision limiting the intended land use was arbitrarily or irrationally reached.

DeBlasio v. Zoning Bd. of Adjustment, 53 F.3d 592, 601 (3d Cir. 1995)(overruled on other grounds by *UA Theatre Circuit v. Twp. of Warrington*, 316 F.3d 392, 400 (3d Cir. 2003)); *see also Austell*, 690 F.3d 929 (license renewal); *Omni Behavioral Health v. Miller*, 285 F.3d 646 (8th Cir. 2002)(contract with a state entity); *Coleman v. Watt*, 40 F.3d 255 (8th Cir. 1994)(use of an automobile). Courts have evaluated nuisance determinations by the standards of both procedural and substantive due process. *See, e.g., Freeman v. City of Dallas*, 242 F.3d 642, 648-649, 2001 U.S. App. LEXIS 2594 (5th Cir. Tex. 2001); *City of Oakland v. Abend*, 2007 U.S. Dist. LEXIS 53186, 15-16, 2007 WL 2023506 (N.D. Cal. 2007)("Substantive due process concerns the *legitimacy* of the government's actions . . . .").

To prevail in a claim for a substantive due process violation, a plaintiff must show that the

conduct complained of was either arbitrary or "conscience shocking."

> The "core of the concept [of substantive due process is] protection against arbitrary action" by the government. *County of Sacramento v. Lewis*, 523 U.S. 833, 845, 140 L. Ed. 2d 1043, 118 S. Ct. 1708 (1998). "While due process protection in the substantive sense limits what the government may do in both its legislative, and its executive capacities, criteria to identify what is fatally arbitrary differ depending on whether it is legislation or a specific act of a governmental officer that is at issue." *Id.* at 846 (internal citations omitted). In this case, we must assess whether a "specific act of a governmental officer" is arbitrary.
>
> . . .
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> We may also consider conduct that evinces a "deliberate indifference" to protected rights of Putnam, if the College officials had an opportunity to consider other alternatives before choosing a course of action. *Neal v. St. Louis County Bd. of Police Comm'rs*, 217 F.3d 955, 958 (8th Cir. 2000) (providing that "where a state actor is afforded a reasonable opportunity to deliberate various alternatives prior to electing a course of action, **the chosen action will be deemed 'conscience shocking' if the action was taken with 'deliberate indifference'**") (citing *Lewis*, 523 U.S. at 850-51).

Putnam v. Keller, 332 F.3d 541, 547-548 (8th Cir. 2003) (emphasis added). **Note that all that is required to show that an action is "conscience shocking" is to show that the action was taken with deliberate indifference.** *Id.* (citing *Lewis*, 523 U.S. at 850-51).

In the present case, the City Council acted intentionally and deliberately in taking actions that violated Plaintiff's clearly established property rights. Plaintiff informed the City that it was ready and able to make repairs to the Property. *Exhibit A, pars. 12-14.* The City intentionally and deliberately refused to issue a permit for repairs. *Id.*; *Exhibit E.* Prior to the Council meeting on February 25, 2013, Plaintiff's counsel submitted a written motion requesting a full hearing. *Exhibit K.* At the Council meeting on February 25, 2013, Plaintiff requested either a full hearing or a permit to repair the property. Plaintiff's counsel provided the Council members with a brief discussing the constitutional implications. *Exhibit S: Memorandum in Support of Convent Corporation's Request for a Full Due Process Hearing.* Members of the City Council had an opportunity to

consider these alternatives but instead made a deliberate and intentional decision to proceed to condemn Plaintiff's property without affording any due process. The City Council acted with informed deliberate indifference to Plaintiff's constitutional rights.

Private property rights are prominently protected by both the state and federal constitutions. The fact that private property rights are specifically mentioned in both documents indicates an intent to require significant due process protections before a governmental entity can intrude on these important rights. And, while Plaintiff's state law claims mirror, in a sense, Plaintiff's federal claims, Arkansas courts have held that the Arkansas Constitution provides more protection in some cases than the federal Constitution and any assessment of these claims must be made pursuant to the holdings of the Arkansas courts. *See Jegley v. Picado*, 349 Ark. 600, 631 (2002); *Griffin v. State*, 347 Ark. 788, 791 (2002). The Arkansas Supreme Court has held "the police power [of the state] can only be exercised to suppress, restrain, or regulate the liberty of individual action, when such action is injurious to the public welfare." *Jegley*, 349 Ark. at 635 (quoting *Hand v. H& R Block, Inc.*, 258 Ark. 774, 781 (1975)). Taking these holdings into consideration with the provision of the Arkansas Constitution which requires that property rights be afforded the highest constitutional sanction, it can be reasonably inferred that private property rights are afforded even greater protections under Arkansas law than under federal law.

Given the significant protections provide by both the state and federal constitutions, a governing body cannot arbitrarily take private property while thumbing its nose at the requirements of due process. The City Council steadfastly refused Plaintiff's request for due process and, because the Council acted with informed deliberate indifference, their conduct rises to the "conscience shocking" level and resulted in a denial of substantive due process. There are no material facts in dispute by which Defendants can show that they did not deliberately deprive

Plaintiff of its property while deliberately refusing to provide due process protections. Therefore, Plaintiff is entitled to summary judgment on this claim.

IV. The City seized Plaintiff's Property without providing any prior notice to the owner.

The heart of Plaintiff's case is the complete denial of any due process. The holdings of the United States Supreme Court in cases cited herein require adequate notice, a meaningful opportunity to be heard, and an impartial decision maker, all of which were denied in this case. Defendants' contention that the seizure of Plaintiff's property occurred only after notice and hearing is simply wrong. First, the Property was seized at the time that it was red-tagged by Defendant McHenry. At that time Plaintiff was barred from repairing or utilizing the Property. Furthermore, Plaintiff was never provided with notice of the specific violations alleged, the Council steadfastly refused to provide a hearing, and the Council was clearly not even attempting to act as an impartial decision maker. The City's complete and deliberate denial of due process resulted in the unreasonable seizure of Plaintiff's property.

"A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). Fourth Amendment protections are triggered when a government entity seizes a building to enforce compliance with building regulations. *Camara v. Municipal Court of San Francisco*, 387 U.S. 523, 530, 87 S.Ct. 1727, 18 L.Ed. 930 (1967).

> **Seizures conducted outside the judicial process, without prior approval by a judge or magistrate, have been held to be per se unreasonable under the Fourth Amendment-subject only to a few specifically established and well delineated exceptions.**

U.S. v. Paige, 136 F.3d 1012, 1022 (5th Cir. 1998)(quoting *Minnesota v. Dickerson*, 508 U.S. 366, 372 (1993))(emphasis added). **Demolition of a building by a municipality is a Fourth**

Amendment seizure. *Heidorf v. Town of Northumberland,* 985 F. Supp. 250, 255 (N.D.N.Y. 1997); *DeBari v. Town of Middleton,* 9 F. Supp. 2d 156 (N.D.N.Y. 1998); *Suss v. American Soc. for Prevention of Cruelty to Animals,* 823 F. Supp. 181 (S.D. N.Y. 1993); *Freeman v. City of Dallas,* 242 F.3d 642 (2001).

The City has seized Plaintiff's property by condemning it without hearing or considering any evidence. Once the city red-tagged the structure, Plaintiff was barred from using or repairing the structure. The property was effectively seized at that time. No notice or hearing was provided prior to this seizure. It was completely unreasonable for the City to refuse to allow the property to be repaired. It was also unreasonable for the City to condemn the property without considering any evidence beyond pictures of clutter which had already been cleaned up prior to the condemnation vote. The City continues to unreasonably hold the Property by refusing to allow the Property to be repaired without the posting of a substantial bond and letter of credit. As the Arkansas Supreme Court held in the *Franklin* case, the seizure of property in this manner violates both the federal and state constitutions. Cite and refer to previous discussion.

There are no genuine issues of material fact in dispute by which the Defendants can show that they acted reasonably in seizing Plaintiff's property in the absence of any due process protections. Therefore, Plaintiff is entitled to summary judgment on this claim.

V. Defendants conspired to violate Plaintiff's rights.

Claims of Civil Conspiracy based on state law and federal law may be brought in the same action. *See Sastry v. City of Crestwood,* 2011 U.S. Dist. LEXIS 78326 (E.D.Mo. 2011). "A claim of civil conspiracy to violate a person's constitutional rights is actionable under § 1983." *Duckworth v. Ford,* 1992 U.S. Dist. LEXIS 21676, 11, 1992 WL 515340 (W.D. Mo. 1992)(citing *Putman v. Gerloff,* 701 F.2d 63, 65 (8th Cir. 1983); *Simpson v. Weeks,* 570 F.2d 240, 242-43 (8th

Cir. 1978), *cert. denied*, 443 U.S. 911, 61 L. Ed. 2d 876, 99 S. Ct. 3101 (1979)).

> The doctrine of civil conspiracy extends liability for a tort, here the deprivation of constitutional rights, to persons other than the actual wrongdoer. . . . The charge of conspiracy in a civil action is . . . the string whereby the plaintiff seeks to tie together those who, acting in concert, may be held responsible for any overt act or acts.

Id. (quoting *Putnam v. Gerloff*, 701 F.2d 63, 65 (8th Cir. 1983)(quoting *Hostrop v. Board of Junior College Dist. No. 515*, 523 F.2d 569, 576 (7th Cir. 1975)).

To prove a § 1983 conspiracy claim, a plaintiff must show: (1) that the defendant conspired with others to deprive him of constitutional rights; (2) that at least one of the alleged co-conspirators engaged in an overt act in furtherance of the conspiracy; and (3) that the overt act injured the plaintiff. *White v. McKinley*, 514 F.3d 807, 816 (8th Cir. Mo. 2008)(citing *Askew v. Miller*, 191 F.3d 953, 957 (8th Cir. 1999)). The plaintiff is additionally required to prove a deprivation of a constitutional right or privilege in order to prevail on a § 1983 civil conspiracy claim. *Id.*

To prevail on a claim of conspiracy under §1983 a plaintiff

> need not show that each participant knew 'the exact limits of the illegal plan . . . .' 'The question of the existence of a conspiracy to deprive the plaintiffs of their constitutional rights should not be taken from the jury if there is a possibility the jury could infer from the circumstances a 'meeting of the minds' or understanding among the conspirators to achieve the conspiracy's aims.' **Because 'the elements of a conspiracy are rarely established through means other than circumstantial evidence, and summary judgment is only warranted when the evidence is so one-sided as to leave no room for any reasonable difference of opinion as to how the case should be decided. The court must be convinced that the evidence presented is insufficient to support any reasonable inference of a conspiracy**.

Sastry v. City of Crestwood, 2011 U.S. Dist. LEXIS 78326, 51-53 (E.D.Mo. 2011)(emphasis added).

To prove a civil conspiracy under Arkansas law, a plaintiff must show that two or more persons have combined to accomplish a purpose that is unlawful or oppressive or to accomplish

some purpose, not in itself unlawful, oppressive or immoral, but by unlawful, oppressive or immoral means, to the injury of another. *Chambers v. Stern*, 347 Ark. 395, 64 S.W.3d 737, (2002); *Dodson v. Allstate Ins. Co.*, 345 Ark. 430, 47 S.W.3d 866, (2001); *Mason v. Funderburk*, 247 Ark. 521, 446 S.W.2d 543 (1969).

In the present case, the City Council Members are neither employees nor agents of the City. The individual Defendants' are elected policy makers, each making independent decisions regarding his or her actions, not acting as an agent or employee of the City. The Defendants conspired to deprive Plaintiff of its Property while denying constitutionally required due process protections. All Defendants committed acts in furtherance of this conspiracy. Defendants McHenry and Wadley recommended that the property be condemned based only on an exterior inspection and red-tagged the property. The red-tagging was effectively a seizure that barred Plaintiff from repairing or utilizing the Property. This was done without any prior notice or a hearing. Defendants McHenry and Wadley further refused to permit Plaintiff to make repairs. Defendants McHenry and Wadley failed and refused to provide a list of violations as required by the City's Code. The Mayor sponsored the resolution which directly led to the deprivation of Plaintiff's property rights without constitutionally required due process. Each City Council member voted for the resolution condemning Plaintiff's property without providing a hearing. Plaintiff is entitled to summary judgment on this claim.

VI. Defendants are not entitled to legislative immunity.

Because Defendants failed to file an Answer or other responsive pleading within the time frame required by the Rules of Civil Procedure, they should be deemed to have waived the opportunity to present affirmative defenses. Therefore, Defendants should not now be permitted to raise the defenses of legislative or qualified immunity. However, in the event Defendants are

permitted to raise these defenses at this late date, the following arguments conclusively demonstrate that these defenses should fail.

A. Arkansas law does not recognize the doctrine of absolute legislative immunity for local legislative bodies, thus this doctrine does not apply to Plaintiff's claims brought under state law.

The Arkansas Court of Appeals recently held that absolute legislative immunity for local legislative bodies does not exist under Arkansas law.

> Arkansas has no constitutional provision or statute extending absolute immunity to local legislative bodies. The Arkansas Constitution does grant absolute immunity to the members of the General Assembly for "any speech or debate in either house."Ark. Const. art. 5, § 15. **There is no statutory absolute immunity for any other legislative bodies, nor has the Arkansas Supreme Court chosen to extend absolute immunity to local legislative bodies.**

Robertson v. Daniel, 2013 Ark. App. 160, 4-5 (2013) (emphasis added).

B. Because Defendants intentionally and deliberately violated Plaintiff's clearly established constitutional rights, they are not entitled to qualified immunity.

Actions taken by government officials to implement or administer legislation are evaluated under a qualified immunity standard. *Hoekstra v. City of Arnold*, 2009 U.S. Dist. LEXIS 7465, 59, 2009 WL 259857 (E.D. Mo. Feb. 3, 2009)(citing *Torres-Rivera v. Calderon-Serra*, 412 F.3d 205, 214 (1st Cir. 2005); *Morris v. Lindau*, 196 F.3d 102, 111 (2nd Cir. 1999)). However, qualified immunity protects government officials from liability for civil damages only insofar as their conduct does not violate clearly established constitutional rights of which a reasonable person would have known. *Brown v. Griesenauer*, 970 F.2d 431, 436 (8th Cir. 1992) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982)). Therefore, to overcome a defense of qualified immunity, a plaintiff must only show that the defendants violated clearly established constitutional rights of which a reasonable person would have known.

Defendants violated Plaintiff's right to Procedural Due Process under the Fifth and

Fourteenth Amendments and Articles 2 §§ 2 & 22 of the Arkansas Constitution. When the government is seeking to take property, the right to due process is clearly established and well known. Defendants have violated Plaintiff's right to Substantive Due Process under the Fifth and Fourteenth Amendments and Articles 2 §§ 2 & 22 of the Arkansas Constitution. These rights are also clearly established and well-known. Defendants have violated Plaintiff's rights protected by the Fourth Amendment and Article 2, § 15 of the Arkansas Constitution by engaging in an unreasonable search and seizure. These rights are also clearly established and well-known. Defendants have violated Plaintiff's rights protected by the Fourteenth Amendment's Equal Protection clause. These rights are clearly established and well-known.

If there were any doubt as to whether the Defendants were aware of these Constitutional rights, Plaintiff's counsel provided the Council with a brief discussing these issues just prior the Council's vote. Any reasonable council member, city official, or employee would be well aware of these rights. These facts also support Plaintiff's allegation that the Defendants acted with deliberate indifference to Plaintiff's Constitutional rights. Additionally, qualified immunity may be defeated by a showing that government actors conspired to deprive a person of his civil rights. *Paradis v. Brady*, 2006 U.S. Dist. LEXIS 28047, 21-22 (D. Idaho 2006).

As the discussion herein indicates, there are no genuine issues of material fact in dispute by which Defendants can demonstrate that they did not intentionally and deliberately violate Plaintiff's rights under both the state and federal constitutions by unlawfully and unreasonably seizing and condemning Plaintiff's property while completely failing to provide any due process protections. Therefore, Plaintiff is entitled to summary judgment on all claims.

CONCLUSION

Defendants have failed to file an Answer or responsive pleading within the time required

by the Rules of Civil Procedure. The facts and allegations in Plaintiff's Complaint stand uncontroverted and Defendants have not asserted any defenses in this Court to Plaintiff's claims. Therefore judgment on the pleadings in Plaintiff's favor on all claims is appropriate. In the alternative, there are no genuine issues of material fact in dispute by which Defendants can show that the record of the proceeding before the City Council contains sufficient evidence to support the condemnation of Plaintiff's property. However, the record and evidence attached to this Motion demonstrates that Defendants seized and condemned Plaintiff's property without providing constitutionally required due process. Therefore, summary judgment in favor of Plaintiff is appropriate.

This case comes down to four simple points: 1. The City never provided Plaintiff with notice of the specific violations alleged; 2. The City barred Plaintiff from repairing the property prior to seizure and condemnation; 3. The City never provided a meaningful opportunity to be heard; and 4. The City never provided a hearing before an impartial decision maker.

The facts that are material to these four points are not in dispute. The "Notice of Public Nuisance" speaks for itself. In addition to the statements made to Mr. Livdahl, the letter from Assistant City Attorney William Brown proves that the City refused to issue a permit for repairs once the property was red-tagged. The City's Code speaks for itself and does not provide for a full hearing or appeal process. The City's policy is to allow property owners only three (3) minutes to speak to the City Council. Although Plaintiff requested a full hearing, the Mayor specifically stated that the Council would not provide a full hearing. Finally, the Council condemned the property without considering any evidence of specific violations and did not even attempt to appear to be interested in acting impartially.

Thus, there are no genuine issues of material fact in dispute and it is clear that Defendants

intentionally and deliberately refused to provide Plaintiff with constitutionally required procedural due process (Count I) prior to seizing and condemning its property and this resulted in violations of Plaintiff's rights pursuant to the Fifth and Fourteenth Amendments of the United States Constitution and Article 2, sections 2 and 22 of the Arkansas Constitution. The actions of city officials and employees in seizing Plaintiff's property, in refusing to permit the property to be repaired, in condemning the property in a summary proceeding completely devoid of any due process protections and the policies and practices that resulting in these actions have resulted in violations of Plaintiff's right to substantive due process (Count II) under the Fifth and Fourteenth Amendments to the United States Constitution and Article 2, sections 2 and 22 of the Arkansas Constitution. The seizure of Plaintiff's property without proper Notice or without permitting Plaintiff an opportunity to make repairs constitutes an unreasonable seizure (Count IV) in violation of Plaintiff's rights under the Fourth Amendment to the United States Constitution and Article 2, section 15 of the Arkansas Constitution. All Defendants conspired and committed acts in furtherance of a conspiracy to violate the aforementioned Constitutional rights.

Plaintiff respectfully requests that this Court grant its Motion for Judgment on the Pleadings or, alternatively grant summary judgment in Plaintiff's favor on Plaintiff's constitutional claims.

Respectfully submitted,

/s/ Mickey Stevens
Mickey Stevens
Attorney for Convent Corporation
P.O. Box 2165
Benton, AR 72018
T: 501-303-6668
F: 877-338-6063
Arkansas Bar # 2012141
Stevens_mickey@yahoo.com

CERTIFICATE OF SERVICE

I do hereby certify by my signature hereinabove, I have on this 17th day of May, 2014 served a copy of the foregoing pleading on the following persons by mailing same through the AOC efiling system, email or United States mail, properly addressed, and first class postage paid.

Daniel McFadden
City of North Little Rock
300 Main Street
North Little Rock, AR 72114

/s/ Mickey Stevens
Mickey Stevens

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

CONVENT CORPORATION,
INDIVIDUALLY, AND BEHALF ALL
OTHER SIMILARLY SITUATED. PLAINTIFF

V. NO: 4-13-CV-00259

CITY OF NORTH LITTLE ROCK,
ARKANSAS, A MUNICIPAL CORPORATION,
JOE SMITH, MAYOR, INDIVIDUALLY AND IN
HIS OFFICIAL CAPACITY, CITY COUNCIL MEMEBERS,
DEBI ROSS, BETH WHITE, LINDA
ROBINSON, MAURICE TAYLOR,
STEVE BAXTOR, BRUCE FOUTCH,
MURRY WITCHER, AND CHARLIE HIGHT,
EACH INDIVIDUALLY AND IN HIS OR HER OFFICIAL
CAPACITY, TOM WADLEY, DIRECTOR, CODE
ENFORCEMENT DIVISION, INDIVIDUALLY AND IN
HIS OFFICIAL CAPACITY, AND FELECIA MCHENRY,
CODE ENFORCEMENT OFFICER, INDIVIDUALLY AND
IN HER OFFICIAL CAPACITY DEFENDANTS

DECLARATION OF RICHARD LIVDAHL

I, Richard Livdahl, make the following statement in lieu of an affidavit, as permitted by Section 1746 of Title 28 of the United States Code. I am aware that this Declaration will be filed with the United States District Court, Eastern District of Arkansas and that it is the legal equivalent of a statement under oath.

I am an adult resident of 11420 Ethan Allen Drive, Little Rock, Arkansas.

I have direct and personal knowledge of the facts set forth below in each of the following statements, and each is true and correct to my personal knowledge.

EXHIBIT A

1. The real property, and the building which is the subject of this litigation, located at 6615 East Hwy 70 in North Little Rock Arkansas was purchased by Convent Corporation in 1993 from Stillman Penny who operated a Night Club simply know as Club 70, in the building for many years starting sometime as early as the 1950's . By 1993 the Club had been a fixture in the community for more than 40 years and would have likely continued for many more years had Mr. Penny not contracted a terminal illness necessitating his retirement and the sale of the property. A copy of the deed from Stillman Penny to Convent Corporation Inc. is annexed hereto Marked Exhibit 1 and made part hereof.
2. Before the purchase of the building by Convent Corporation Inc. was finalized I was requested by the investors in the corporation, Paul Robert Bekkela , Micheal Eades and Claude Skelton to check out various aspects of the building and verify its suitability for continued use as a Night Club. As a graduate industrial engineer and local resident, I undertook to review the general condition of the building, review various City and State records including business permits, alcoholic beverage licenses, and importantly City zoning. During this process I personally visited with every City agency that I had reason to believe would be involved with the potential Night Club operation to check on the status of Club 70 and to determine what changes would be required for a new operation. I personally reviewed the records with the State Alcoholic Beverage Control Board and the City to determine the status of all permits and licenses.
3. During my inspection of the building in 1993 I observed that while in need of some cosmetic repairs the building was sound with the basic structure of the building being of cinder block or concrete construction on a slab foundation. At that time, the roof needed some repairs as did the aluminum or composite siding on the building and definitely the sewage system.
4. During my review of the suitability of the building I went to and discussed the building and the business there with the City of North Little Rock to verify that the business was fully in compliance with all city code requirements. During this whole process and numerous contacts with the

EXHIBIT A

1 : 00200

City, I was never asked to produce credential of any kind to show that I was authorized to speak on behalf of Convent Corporation Inc. , or its stockholders or anyone else.

5. I attended the closing of the sale of the property at 6615 HWY as the representative of Convent Corporation , Inc. and personally delivered the check for the payment of the cash portion of the agreed upon price of the sale between Convent Corporaton and Stillman Penny, the seller.
6. After the purchase of the property by Convent Corporation Inc., the property was leased to Convention Entertainment, Inc. and that Corporation operated Gentlemen's Club 70 in the building under the general management and control of Paul Robert Bekkela and local management of Craig Snyder starting in 1993.
7. On May 19 2004 the City of North Little Rock initiated the second of two lawsuits designed to require the closure of Gentlemen's Club 70. The first such lawsuit was lost by the City when then Judge Lee Munson ruled that the Club's operation was constitutional. The second suit resulted in a settlement agreement requiring the Gentlemen's Club 70 to relocate or close by August 1 2011. A copy of the complaint and the settlement is annexed as Exhibit 2 and 3 respectively and made part hereof.
8. Approximately one year after the entry of the settlement in the lawsuit brought by North Little Rock seeking to close Club 70, Convent Corporation ,the lessor on the building, requested that I contact the City to review the City Code to see where the Corporation might find or build another building to house the lease that Convention Entertainment had to operate the Gentlemen's Club 70 business. To do this, I contacted the City and they compiled for me a map showing all the locations in the City of North Little Rock that would be zoned to accept the Gentlemen's business operation. During this period I made a number of visits to various City Departments and was never asked to present at any time any form of credential or authorization.
9. Reasonably quickly it was determined that there were no suitable buildings or locations that could be purchased by Convent Corporation Inc. to lease

EXHIBIT A

to Convention Entertainment Inc. to house a continued Gentlemen's Club 70 business operation.

10. As August 1 2011 approached and it became necessary for Gentlemen's Club 70 to close, I was requested to begin looking for another use for the building housing the Club. Unfortunately, Convention Entertainment, filed for Bankruptcy on or about November 28 2011 and since the building contained all of its business records and operational assets and business fixtures, no action could be taken to clean up or repair the building until the bankruptcy issues regarding the assets were settled. A copy of the first page of the Bankruptcy petition dated around November 28 2011 is annexed hereto and marked Exhibit 4,

11. Before the building could be cleaned out and a new use found for it, I was told that the City of North Little Rock had begun proceeding to condemn the building. I was given a copy of the notice that someone had been found nailed to the building and told to immediately go and meet with the City and tell them that the building would be repaired and cleaned up and ask them to tell me what needed to be done to the building and the procedure to get that done.

12. A meeting was scheduled in a couple of days with the Code Enforcement Staff. According my memory it was attended by Tom Watley, Director, Vicki Humphrey, and Bill Brown from the City Attorney's office who I did not know would be attending since I did not bring an attorney along to represent Convent Corporation, nor am I one. I directly informed all those present that Convent Corporation, Inc. was ready, willing and able to immediately begin cleanup and repair the building. I informed them that most of the damage in the building was broken glass, wallboard, ceiling tiles and other materials caused by vandals and was not structural materials from the building. I was not given any kind of list of defects, concerns, or violations for the building. I was told that" the building was "red tagged" and that no building permit could be or would be issued." I was told that" clean –up" was permitted, but no repairs. I was further told that if Convent Corporation Inc. wanted to repair the building we needed to go see the

EXHIBIT A

Mayor and the Aldermen because they would make any decision to allow the building to be repaired.

13. After the meeting, I immediately began to follow the instructions that I was given in an effort to get a building permit. I called and was able to schedule a meeting with the Director of Community and Governmental Affairs, Joe Smith. Mr. Smith was cordial but simply told me that no building permit would be issued and the City would put the matter on its meeting agenda for February 28 2013. I told Mr. Smith that Convent Corporation was ready and able to begin repairs immediately, if the City would issue a permit. In addition to Mr. Smith, following the guidance given I was able to have a short meeting with Maurice Taylor, who represented the area. I made attempts to schedule meeting with other Aldermen without success.

14. Roberto Alveraz, was engaged to board up the building as soon as it became known that the building had been left open and extensively vandalized. I have looked at the pictures taken by the City which form a part of the record in this case and the damage and the debris in those pictures is almost entirely the result of the vandalism that occurred because the building had been left open. Roberto Alveraz cleaned up this debris which was specifically approved by the City and therefore those pictures of the building are no longer an accurate representation of the condition of the building.

15. Based on around 20 years of meeting and dealing with the City of North Little Rock on matters concerning this property, it is my opinion that the City wanted this building destroyed so that it could not house another Night Club of any kind, and that with this objective it was, and had had been determined, that the building would be condemned and destroyed and no building permit would be issued under any circumstances or set of facts.

EXHIBIT A

I declare under penalty of perjury that the foregoing statement containing sixteen paragraphs is true and correct. 28 U.S.C .1746.

16. Executed this 11 day of December 2013.

Richard Livdahl

Richard Livdahl
11420 Ethan Allen Drive
Little Rock Arkansas

EXHIBIT A

1 : 00204

SETTLEMENT AGREEMENT

THIS AGREEMENT ("Agreement") dated January 20, 2010 ("Effective Date") is made by and among the City of North Little Rock, Arkansas, a municipal corporation ("City"), Drugstore Cowboy, Inc. d/b/a Gentlemen's Club 70 (the "Club"), and Convent Corporation (the "Owner"). The City, the Club, and the Owner shall sometimes be referred to separately as a "Party," and collectively as the "Parties."

RECITALS

A. WHEREAS, the Club has operated a night club for over fifteen (15) years within the City's municipal boundary.

B. WHEREAS, on May 28, 2002, the City adopted Ordinance No. 7454 restricting the location of businesses that predominantly exhibit partially-nude dancing and requiring existing businesses to relocate within two years.

C. WHEREAS, the City contends that under Ordinance No. 7454, the Club is subject to its provisions, and is impermissibly located within 1000 feet of a school, a church, and many residences and has failed to relocate as required.

D. WHEREAS, the Club contends Ordinance No. 7454 is invalid, that is not subject to the provisions of the ordinance, and, even if valid, that any alleged non-conforming activities do not constitute the predominant activity at the Club such that the Club is required to relocate under Ordinance No. 7454.

E. WHEREAS, there is presently pending litigation in the Fifth Division of Pulaski County Circuit Court between the City and the Club to determine the application of Ordinance No. 7454, in a case styled *City of North Little Rock v. Drugstore Cowboy, Inc. d/b/a Gentlemen's Club 70*, Case No. CV-04-5610.

EXHIBIT B

1 : 00207

F. WHEREAS, during the pendency of this action, the Arkansas Legislature adopted Act 387 of 2007 regulating the location of adult-oriented businesses, including those which exhibit partially-nude dancing without regard as to whether the partially-nude dancing constitutes a predominance of the business' activity.

G.WHEREAS, on May 11, 2009, the City of North Little Rock adopted Ordinance No. 8175 ("the Revised Ordinance") which caused the City regulations governing sexually oriented businesses to substantially mirror those of the Act 387.

H. WHEREAS, rather than further litigating the lawfulness and applicability of Ordinance No. 7454, the Parties have agreed that after May 11, 2011, the Revised Ordinance will prohibit partially nude dancing, as well as other activities declared to be adult or sexual in nature, at the Club's current location.

I. WHEREAS, in consideration for its willingness to enter this Agreement and in consideration that the Club has existed at its present location for decades, the Parties agree that the Club should be afforded reasonable accommodation, as stated herein, to relocate.

J. WHEREAS, the Owner of the property where the Club is located benefits from the continued operation of the Club as stated herein, by the predictable use of its property, and other good and valuable consideration.

NOW, THEREFORE, in consideration of and reliance upon the respective representations, promises, concessions, terms and conditions contained herein, the City, the Club, and the Owner agree as follows.

1. EFFECTIVE DATE: This Agreement shall be effective from and after the latest date it is signed by the lawful agent or attorney of each Party. PROVIDED THAT, this Agreement shall

EXHIBIT B

not be effective unless and until approved by a majority vote of the North Little Rock City Council as provided by law.

2. THE CITY AGREES that in consideration of the covenants and agreements contained herein, the City shall:

a. Voluntarily dismiss its case against the Club;

b. Allow the Club to operate at its present location until August 1, 2011, in order to allow the Club a reasonable time to relocate;

c. Provide the Club with reasonable assistance in locating an acceptable location in Pulaski County for relocation that conforms with the Revised Ordinance, including review and approval of any potential sites prior to relocation; and

d. At the sole discretion of the City, EITHER

i) Pay the amount of ten thousand dollars ($10,000) to the Club no later than the time of relocation or August 31, 2011, whichever comes first, in order to defray relocation expenses and any outstanding claims for compensation by the Owner; OR

ii) Purchase the present business location of the Club at fair market value no later than the time of relocation or August 31, 2011, whichever comes first. If the Parties are unable to agree to the fair market value, the Parties may jointly employ a professional appraiser whose opinion shall be deemed final, or use such other fair method as they may agree upon.

3. THE CLUB AGREES that in consideration of the covenants and agreements contained herein, the Club shall:

EXHIBIT B

a. Voluntarily dismiss its Counterclaim against the City; and

b. Discontinue all activities at the present business location that are characterized as adult or sexual in nature under any state law or City ordinance, or that otherwise do not conform with the Revised Ordinance, no later than August 1, 2011.

4. THE OWNER AGREES that in consideration of the covenants and agreements contained herein, the Owner shall:

a. Prohibit all activities that are characterized as adult or sexual in nature under state law or City ordinance, or that otherwise do not conform with the Revised Ordinance, after August 1, 2011; and

b. If the City elects to purchase the present business location of the Club under paragraph 2c(ii), the Owner shall sell the same at fair market value without challenge to the purpose for the acquisition.

5. BURDENS RUN WITH THE LAND. The provisions in this Agreement that pertain to the use of land shall run with the land and continue in force without regard to change in ownership.

6. MERGER AND BINDING EFFECT. This Agreement contains the entire agreement and the understanding concerning the subject matter between the parties, and supersedes and replaces all prior negotiations and proposed agreements.

7. RECORDING AND NOTICE. The Owner shall take reasonable steps to provide notice to any person who may hereafter acquire an ownership interest in the subject property of the rights and restrictions contained in this Agreement.

8. DUTY TO COOPERATE. The Parties shall cooperate fully with one another in the execution of any and all other documents and in the completion of any additional actions that

EXHIBIT B

may be necessary or appropriate to give full force and effect to the terms and intent of this Agreement.

9. WAIVER. Failure on the part of any Party to enforce any provision of this Agreement shall not be construed as a waiver of the right to compel enforcement of such provision or any other provision.

10. BINDING EFFECT. This Agreement shall be binding upon and for the benefit of each of the Parties and their respective past and present principals, managers, offices, directors, shareholders, agents, employees, attorneys, successors and assigns and any parents, subsidiaries or affiliated corporations or entities, as applicable.

11. COUNTERPART EXECUTION. This Agreement may be signed in one or more counterparts, each of which shall be deemed an original and all of which together shall constitute one and the same agreement. Signature pages may be transmitted by facsimile and any signature transmitted by facsimile will be given the same force and effect as an original signature.

IN WITNESS WHEREOF, the parties hereto, by their attorneys, have executed this Agreement this 20th day of January, 2010.

CITY OF NORTH LITTLE ROCK, ARKANSAS ("THE CITY")

By: _____
Name: C. Jason Carter
Title: North Little Rock City Attorney

DRUGSTORE COWBOY, INC. d/b/a GENTLEMEN'S CLUB 70 ("THE CLUB")

By: _____
Name: Craig Snyder
Title: Managing Agent

EXHIBIT B

CONVENT CORPORATION ("THE OWNER")

By: _____
Name: Craig Snyder
Title: President

EXHIBIT B

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
5th DIVISION

FILED
2004 MAY 19 PM 1:37
CIRCUIT COUNTY CLERK

CITY OF NORTH LITTLE ROCK PLAINTIFF

VS. NO. CV 04-5610

THE SOUTHERN, INC.
dba MISS KITTY'S CABARET,

AND

DRUGSTORE COWBOYS, INC.
dba GENTLEMEN'S CLUB 70 DEFENDANTS

COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

Comes now the City of North Little Rock, by and through its attorneys, City Attorney, Paul Suskie, and Assistant City Attorney, Andrea G. Woods, and for its Complaint against the Defendants, The Southern, Inc. dba Miss Kitty's Cabaret (hereinafter referred to as "Southern") and Drugstore Cowboys, Inc. dba Gentlemen's Club 70 (hereinafter referred to as "DCI") states as follows:

1. Plaintiff is a city of the first class organized under the laws of the State of Arkansas and located wholly within Pulaski County, Arkansas.
2. Separate Defendant, Southern, is a domestic, non-profit corporation formed under the laws of the State of Arkansas, conducting business as a sexually oriented business within the City of North Little Rock, Pulaski County, Arkansas.
3. Separate Defendant, DCI, is a domestic, non-profit corporation formed under the laws of the State of Arkansas, conducting business as a sexually oriented business within the City of North Little Rock, Pulaski County, Arkansas.

EXHIBIT C

4. This Court has proper jurisdiction pursuant to Ark. Code Ann. §§16-13-201 and 14-56-421.

5. Venue is proper pursuant to Ark. Code Ann. §§16-60-104 and 16-60-105.

6. The Plaintiff is empowered to zone land pursuant to Ark. Code Ann. § 14-56-401, *et seq.*

7. On May 28, 2002, the North Little Rock City Council unanimously passed Ordinance Number 7454, entitled "An Ordinance Regulating the Location of Sexually Oriented Businesses." A certified copy of Ordinance Number 7454 is attached hereto as Exhibit A and incorporated by reference.

8. That North Little Rock Ordinance 7454 was passed for the purpose of, among others, regulating sexually oriented businesses in a manner promoting the health, safety and general welfare of the citizens of the City of North Little Rock. See Exhibit A.

9. That those sexually oriented businesses not conforming with Ordinance 7454 were permitted to continue operations for a period of time not to exceed two (2) years from May 28, 2002, if not discontinued or terminated prior to this date. See Exhibit A.

10. That Defendants currently operate as sexually oriented businesses in the City of North Little Rock, specifically, as Adult Cabarets as defined in Ordinance 7454. See Exhibit A.

11. That, effective May 28, 2002 with respect to Defendants, Ordinance 7454 will prohibit the operation of a sexually oriented business in any zone not classified as I-2 or I-3, or regardless of classification, within 1,000 feet of:

    a. A church or other religious facility;

EXHIBIT C

b. A public or private elementary, secondary or post-secondary school;

c. A boundary of a residential zone or use;

d. A public park;

e. A hospital or other medical facility; or

f. Properties listed on the National Register of Historical Places or local Historic Districts as identified in the Arkansas Historic Preservation Program.

12. That Separate Defendant, Southern, operates a sexually oriented business at 7711 Crystal Hill Road, North Little Rock, Arkansas, a location zoned C-3. A certified copy of a map reflecting zoning classification of 7711 Crystal Hill Road is attached hereto as Exhibit B_1 and incorporated by reference.

13. That Separate Defendant, DCI, operates a sexually oriented business at 6615 Highway 70, North Little Rock, Arkansas, a location zoned C-3, and within 1,000 feet of approximately 120 residences, a church, and elementary school property. A certified copy of a map reflecting zoning classification of 6615 Highway 70 is attached hereto as Exhibit B_2 and incorporated by reference.

14. Ordinance 7454 will potentially affect the business operations of Defendants, and, as such, Defendants are "parties in interest" under Ark. Code Ann. §16-111-106.

15. That Plaintiff seeks this Court's determination and declaration as to the constitutional validity of Ordinance 7454 under the United States and Arkansas State Constitutions in accordance with Ark. Code Ann. §§16-111-101, *et seq.*

16. That Plaintiff seeks an injunction enjoining any activities constituting violations of Ordinance 7454, pursuant to Ark. Code Ann. §14-56-421.

EXHIBIT C

WHEREFORE, Plaintiff, City of North Little Rock, prays this Court find and declare North Little Rock Ordinance 7454 constitutionally valid and, in addition, respectfully requests this Court settle and afford any other relief from uncertainty and insecurity with respect to the validity and enforceability of Ordinance 7454, an injunction enjoining Defendants from conducting business in a manner violating Ordinance 7454 to which it is entitled in law or equity.

Respectfully Submitted,

PAUL SUSKIE
CITY ATTORNEY

By:

Andrea G. Woods (2001189)
Assistant City Attorney
300 Main Street, P.O. Box 5757
North Little Rock, AR 72119
Phone: 501-340-5336
Fax: 501-340-5341
awoods@northlittlerock.ar.gov

EXHIBIT C

CERTIFICATION OF SERVICE
UPON ARKANSAS ATTORNEY GENERAL
Ark. Code Ann. §16-111-106

I hereby certify that a copy of the foregoing Complaint for Declaratory Judgment and Injunctive Relief was served upon the Attorney General of the State of Arkansas as required by Ark. Code Ann. §16-111-106(b).

Andrea G. Woods (2001189)
Assistant City Attorney

EXHIBIT C

ORDINANCE NO. 7454

AN ORDINANCE REGULATING THE LOCATION OF SEXUALLY ORIENTED BUSINESSES; DECLARING AN EMERGENCY; AND FOR OTHER PURPOSES.

WHEREAS, it is the intent and desire of the City Council to use the police powers of the City in an effort to regulate the location of sexually oriented businesses within the City of North Little Rock; and

WHEREAS, these types of businesses in other cities have been located near schools and where children could be expected to walk and patronize and in locations which may have a detrimental effect on the quality of their education; and

WHEREAS, it is desirable that these types of businesses be located away from residential uses, churches, parks, hospitals, historic buildings, schools and other public facilities because of the detrimental effects these businesses have on the various uses of the properties mentioned; and

WHEREAS, the City Council has determined that the image of the City of North Little Rock, as an attractive place to live, will be adversely affected by the presence of sexually oriented businesses within close proximity of the aforesaid; and

WHEREAS, the City Council recognizes that the location of sexually oriented businesses near residential uses, churches, parks, hospitals, schools and historic buildings may lead to increased levels of criminal activity in the vicinity of such uses; and

WHEREAS, merchants and citizens in the City have expressed their concern about the adverse impact these types of businesses have on the value of their property and on their retail trade and their quality of life; and

WHEREAS, the City Council recognizes that such consequences will reduce tax revenues to the City and may cause an area of blight and deterioration in the City; and

1 EXHIBIT A

EXHIBIT C

WHEREAS, the City Council has been advised that numerous cities, including Seattle and Tacoma, Washington; Los Angeles, California; Amarillo, Texas; Indianapolis, Indiana and Phoenix, Arizona, have shown that the location of sexually oriented businesses degrade the quality of the areas of the City where they are located; and

WHEREAS, the City Council recognizes that the location of sexually oriented businesses in a concentrated area will lead to the location of additional and similar uses within the same vicinity, thus multiplying the adverse impact they have on residential areas, churches, parks, historic buildings, schools and other public facilities; and

WHEREAS, it is the desire of the City Council to regulate sexually oriented businesses at this time to prevent a deterioration of the community before the problem becomes critical.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF NORTH LITTLE ROCK, ARKANSAS:

SECTION 1. Purpose and Intent.

It is the purpose of this section to regulate sexually oriented businesses to promote the health, safety and general welfare of the citizens of the City, and to establish reasonable and uniform regulations to prevent the concentration of sexually oriented businesses within the City. The provisions of this chapter have neither the purpose nor effect of imposing a limitation or restriction on the content of any communicative materials, including sexually oriented materials. Similarly, it is not the intent nor effect of this section to restrict or deny access by adults to sexually oriented materials protected by the First Amendment, or to deny access by the distributors and exhibitors of sexually oriented entertainment to their intended market, unless otherwise restricted by law.

SECTION 2. Definitions.

EXHIBIT C

R-13-37

RESOLUTION NO. 8272

A RESOLUTION DECLARING CERTAIN BUILDINGS, HOUSES AND OTHER STRUCTURES LOCATED AT 6615 HWY. 70 IN THE CITY OF NORTH LITTLE ROCK TO CONSTITUTE A PUBLIC NUISANCE AND CONDEMNING SAID STRUCTURES; PROVIDING A PERIOD OF TIME FOR PROPERTY OWNER TO ABATE SAID NUISANCE; AND FOR OTHER PURPOSES.

WHEREAS, the buildings and structures whose location is set forth herein are vacant and have become run down, dilapidated, unsightly, dangerous, obnoxious, unsafe, not fit for human habitation and detrimental to the public welfare of North Little Rock citizens and residents; and

WHEREAS, the condition of such property constitutes a serious fire and health hazard to the City of North Little Rock, and unless immediate actions are taken to remedy this situation by removing, razing and abating said nuisance, there is a great likelihood that the surrounding property may be destroyed by fire originating from such unsafe and hazardous structures, and also that since structures are without proper sanitary facilities and as such are unsafe and hazardous and a breeding place for rats, rodents and other dangerous germ carriers of diseases, such buildings constitute a serious hazard to the health and safety of the citizens of North Little Rock, and they should be moved or razed for the purpose of eliminating such hazards.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF NORTH LITTLE ROCK, ARKANSAS:

SECTION 1: That the City Council hereby declares the buildings, houses and other structures located at the property identified in Section 2 below to be vacant and run down, dilapidated, unsafe, unsightly, dangerous, obnoxious, unsanitary, a fire hazard, a menace to abutting properties, with the current condition of said structures not being fit for human habitation; and because of such conditions, the City Council declares the same to be condemned as a public nuisance and is ordered abated, removed or razed by the owner thereof.

SECTION 2: That the owner of record of the following described property is hereby directed to raze the same or otherwise abate the said nuisance within thirty (30) days after the posting of a true copy of this Resolution at a conspicuous place upon the structure constituting the nuisance described herein, to-wit:

Pt NW SE from the intersection of NLR of Hwy 70 with TH WLN of SE run E'rly AL Hwy 100' to POB TH cont E'rly AL Hwy 100' TH N to SLN of CRI&P Ry TH W'rly AL RY to a Pt directly N of POB S to BG 28 1N 11. (Parcel No. 23N0150004100, located at 6615 Hwy. 70, and owned by

EXHIBIT D

Convent Corp. [Drugstore Cowboys, Inc., Gentlemen's Club 70], c/o Craig Snyder.)

SECTION 3: If the aforementioned structures have not been razed and/or removed within ninety (90) days after posting a true copy of this Resolution at a conspicuous place upon the structures constituting the nuisance, or the nuisance otherwise abated, the structures shall be torn down and/or removed by the Director of Code Enforcement or his duly designated representative. Each day after the aforesaid ninety (90) days in which said nuisance is not abated shall constitute a separate and distinct offense punishable by a fine of $50.00 for each such separate and distinct offense.

SECTION 4: That the provisions of this Resolution are hereby declared to be severable and if any section, phrase or provision shall be declared or held invalid, such invalidity shall not affect the remainder of the sections, phrases or provisions.

SECTION 5: That this Resolution shall be in full force and effect from and after its passage and approval.

PASSED:

2-25-13

APPROVED:

Joe A. Smith

Mayor Joe A. Smith

SPONSOR:

Joe A. Smith

Mayor Joe A. Smith

ATTEST:

Diane Whitbey, City Clerk

APPROVED AS TO FORM:

C. Jason Carter, City Attorney

PREPARED BY THE OFFICE OF THE CITY ATTORNEY/b

FILED 11:10 A.M. _____ P.M.
By Asst. City Atty. Fleming
DATE 2-19-13
Diane Whitbey, City Clerk and Collector
North Little Rock, Arkansas
RECEIVED BY

EXHIBIT D

STATE OF ARKANSAS }
COUNTY OF PULASKI } SS

I, Diane Whitbey, City Clerk and Collector for the City of North Little Rock, Arkansas, do hereby certify that the foregoing instrument is a true and correct copy of the original Res# 8272 Book No. # 35 filed in this office on the 25th day of February 2013.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of this office this 27, day of February, 2013.

Diane Whitbey, City Clerk & Collector
By: K Rogers

EXHIBIT D

City Of North Little Rock, Arkansas
Office Of The City Attorney
300 Main Street—P.O. Box 5757
North Little Rock, Arkansas 72119
(501) 975-3755—Fax (501) 340-5341

C. Jason Carter
City Attorney
William M. Brown
Assistant City Attorney
Daniel L. McFadden
Assistant City Attorney

Tyesia C. Byrd
Assistant City Attorney
Paula Jones Jones
Assistant City Attorney

January 31, 2013

R.C. Livdahl C/O
Sunset Partners LLC
11420 Ethan Allen Dr.
Little Rock, AR 72211-2348

RE: Exterior and Interior Clean-Up of Gentlemen's Club 70.

Dear Mr. Livdhal:

I am in receipt of your letter dated January 29, 2013 concerning the above structure which is scheduled for a condemnation hearing before the North Little Rock City Council on February 25th 2013.

It appears from the your letter that you simply intend to clean-up the numerous amounts of trash and garbage from the interior and exterior of the structure by placing said items in a dumpster. It is my interpretation of the Ordinances of the City of North Little Rock that you do not need to obtain a permit for the dumpster for those specific purposes.

However, any construction, remodeling, repairs or demolition to the structure and permanent fixtures would be outside of your request and you would have to obtain any necessary permits from the Planning Department. It is my understanding that since the structure has been Red Tagged no construction or remodeling permits should be issued at this time without approval of City Council.

If you desire to demolish the structure at this time you can obtain a Demolition Permit without City Council approval before the condemnation hearing if you can present to the Planning Department proof of ownership of the structure.

Sincerely,

William M. Brown
Assistant City Attorney for North Little Rock

EXHIBIT E

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

CONVENT COPRORATION, Individually and on Behalf of all Others Similarly Situated — **PLAINTIFF**

v. **CASE NO. 4:13-CV-0259**

CITY OF NORTH LITTLE ROCK, ARKANSAS, a Municipal Corporation, JOE SMITH, Mayor, Individually and in his Official Capacity, City Council Members DEBI ROSS, BETH WHITE, LINDA ROBINSON, MAURICE TAYLOR, STEVE BAXTER, BRUCE FOUTCH, MURRY WITCHER, and CHARLIE HIGHT each Individually and in his or her Official Capacity, TOM WADLEY, Director, Code Enforcement Division, Individually and in his Official Capacity, and FELECIA MCHENRY, Code Enforcement Officer, Individually and in her Official Capacity — **DEFENDANTS**

SEPARATE DEFENDANTS' RESPONSES TO PLAINTIFF'S INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS

Come Separate Defendants, Aldermen Debi Ross, Beth White, Linda Robinson, Maurice Taylor, Steve Baxter, Bruce Foutch, Murry Witcher, and Charlie Hight, by and through their attorney, Assistant City Attorney Daniel L. McFadden, and for their Responses to Plaintiff's Interrogatories and Requests for Production of Documents, state as follows:

REQUEST FOR PRODUCTION NO. 1: Please provide copies of any and all documents, records, emails, text messages, and all other records regardless of how stored, which have any bearing on the factual questions at issue in the present litigation, including, but not limited to, the claims addressed in the Complaint and Amended Complaints. This includes any

EXHIBIT F

E. Steve Baxter: Defendant objects to Plaintiff's request for production of documents with regards to documents stored on his personal property because this request is irrelevant, the information may not be retrievable, and is not calculated to lead to admissible evidence. Without waiving this objection, see attached Collective Aldermen Response to Request for Production No. 1.

F. Bruce Foutch: Defendant objects to Plaintiff's request for production of documents with regards to documents stored on his personal property because this request is irrelevant, the information may not be retrievable, and is not calculated to lead to admissible evidence. Without waiving this objection, see attached Collective Aldermen Response to Request for Production No. 1.

G. Murry Witcher: Defendant objects to Plaintiff's request for production of documents with regards to documents stored on his personal property because this request is irrelevant, the information may not be retrievable, and is not calculated to lead to admissible evidence. Without waiving this objection, see attached Collective Aldermen Response to Request for Production No. 1.

H. Charlie Hight: Defendant objects to Plaintiff's request for production of documents with regards to documents stored on his personal property because this request is irrelevant, the information may not be retrievable, and is not calculated to lead to admissible evidence. Without waiving this objection, see attached Collective Aldermen Response to Request for Production No. 1.

REQUEST FOR PRODUCTION NO. 2: Please produce a copy of all letters, correspondence, emails, texts, or other communications between you and any other City officials, employees, agents, representatives, citizens and any other person or entity that in any

EXHIBIT F

way relate to the Property or Plaintiff. Please provide copies of all written and electronic communications between you and any other City official, employees, agents, or representative an any other person or entity that in any way relate to the Property or Plaintiff, whether these were communications between employees and staff, elected officials, or with citizens or any other party. Please include text messages, emails, letters, and all other communications, regardless of how they were sent, received, or stored. This includes any communications stored on your personal computer, cell phone, or other electronic device.

RESPONSE:

A. Debi Ross: Defendant objects to Plaintiff's request for production of documents with regards to documents stored on her personal property because this request is irrelevant, the information may not be retrievable, and is not calculated to lead to admissible evidence. Without waiving this objection, see Response to Request for Production No. 1.

B. Beth White: Defendant objects to Plaintiff's request for production of documents with regards to documents stored on her personal property because this request is irrelevant, the information may not be retrievable, and is not calculated to lead to admissible evidence. Without waiving this objection, see Response to Request for Production No. 1.

C. Linda Robinson: Defendant objects to Plaintiff's request for production of documents with regards to documents stored on her personal property because this request is irrelevant, the information may not be retrievable, and is not calculated to lead to admissible evidence. Without waiving this objection, see Response to Request for Production No. 1.

EXHIBIT F

D. Maurice Taylor: Defendant objects to Plaintiff's request for production of documents with regards to documents stored on his personal property because this request is irrelevant, the information may not be retrievable, and is not calculated to lead to admissible evidence. Without waiving this objection, see Response to Request for Production No. 1.

E. Steve Baxter: Defendant objects to Plaintiff's request for production of documents with regards to documents stored on his personal property because this request is irrelevant, the information may not be retrievable, and is not calculated to lead to admissible evidence. Without waiving this objection, see response to Request for Production No. 1.

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G. Murry Witcher: Defendant objects to Plaintiff's request for production of documents with regards to documents stored on his personal property because this request is irrelevant, the information may not be retrievable, and is not calculated to lead to admissible evidence. Without waiving this objection, see response to Request for Production No. 1.

H. Charlie Hight: Defendant objects to Plaintiff's request for production of documents with regards to documents stored on his personal property because this request is irrelevant, the information may not be retrievable, and is not calculated to lead to

admissible evidence. Without waiving this objection, see response to Request for Production No. 1.

REQUEST FOR PRODUCTION NO. 3: Please produce copies of any and all telephone slip messages, notes, or other correspondence reflecting oral, electronic, and/or telephone conversations between you and any City officials, employees, agents, representatives, citizens and any other person or entity that in any way relate to the Property or Plaintiff. This includes any records stored on any cell phone, computer, or other electronic device which is your personal property.

RESPONSE:

A. Debi Ross: Defendant objects to Plaintiff's request for production of documents with regards to documents stored on her personal property because this request is irrelevant, the information may not be retrievable, and is not calculated to lead to admissible evidence. Without waiving this objection, see Responses to Request for Production No. 1 and No.2.

B. Beth White: Defendant objects to Plaintiff's request for production of documents with regards to documents stored on her personal property because this request is irrelevant, the information may not be retrievable, and is not calculated to lead to admissible evidence. Without waiving this objection, see Responses to Request for Production No. 1 and No.2.

C. Linda Robinson: Defendant objects to Plaintiff's request for production of documents with regards to documents stored on her personal property because this request is irrelevant, the information may not be retrievable, and is not calculated to lead to

admissible evidence. Without waiving this objection, see Responses to Request for Production No. 1 and No.2.

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E. Steve Baxter: Defendant objects to Plaintiff's request for production of documents with regards to documents stored on his personal property because this request is irrelevant, the information may not be retrievable, and is not calculated to lead to admissible evidence. Without waiving this objection, see Responses to Request for Production No. 1 and No.2.

F. Bruce Foutch: Defendant objects to Plaintiff's request for production of documents with regards to documents stored on his personal property because this request is irrelevant, the information may not be retrievable, and is not calculated to lead to admissible evidence. Without waiving this objection, see Responses to Request for Production No. 1 and No.2.

G. Murry Witcher: Defendant objects to Plaintiff's request for production of documents with regards to documents stored on his personal property because this request is irrelevant, the information may not be retrievable, and is not calculated to lead to admissible evidence. Without waiving this objection, see Responses to Request for Production No. 1 and No.2.

H. Charlie Hight: Defendant objects to Plaintiff's request for production of documents with regards to documents stored on his personal property because this request is irrelevant, the information may not be retrievable, and is not calculated to lead to admissible evidence. Without waiving this objection, see Responses to Request for Production No. 1 and No.2.

REQUEST FOR PRODUCTION NO. 4: Please produce all diaries, calendars, or any other lists or notes kept by you that in any way relate to the Property or Plaintiff. This includes any records stored on any cell phone, computer, or other electronic device which is your personal property.

RESPONSE:

A. Debi Ross: Defendant objects to Plaintiff's request for production of documents with regards to documents stored on her personal property because this request is irrelevant, the information may not be retrievable, and is not calculated to lead to admissible evidence. Without waiving this objection, see Responses to Request for Production No. 1, No.2, and No. 3.

B. Beth White: Defendant objects to Plaintiff's request for production of documents with regards to documents stored on her personal property because this request is irrelevant, the information may not be retrievable, and is not calculated to lead to admissible evidence. Without waiving this objection, see Responses to Request for Production No. 1, No.2, and No. 3.

C. Linda Robinson: Defendant objects to Plaintiff's request for production of documents with regards to documents stored on her personal property because this request is irrelevant, the information may not be retrievable, and is not calculated to lead to

admissible evidence. Without waiving this objection, see Responses to Request for Production No. 1, No.2, and No. 3.

D. Maurice Taylor: Defendant objects to Plaintiff's request for production of documents with regards to documents stored on his personal property because this request is irrelevant, the information may not be retrievable, and is not calculated to lead to admissible evidence. Without waiving this objection, see Responses to Request for Production No. 1, No.2, and No. 3.

E. Steve Baxter: Defendant objects to Plaintiff's request for production of documents with regards to documents stored on his personal property because this request is irrelevant, the information may not be retrievable, and is not calculated to lead to admissible evidence. Without waiving this objection, see Responses to Request for Production No. 1, No.2, and No. 3.

F. Bruce Foutch: Defendant objects to Plaintiff's request for production of documents with regards to documents stored on his personal property because this request is irrelevant, the information may not be retrievable, and is not calculated to lead to admissible evidence. Without waiving this objection, see Responses to Request for Production No. 1, No.2, and No. 3.

G. Murry Witcher: Defendant objects to Plaintiff's request for production of documents with regards to documents stored on his personal property because this request is irrelevant, the information may not be retrievable, and is not calculated to lead to admissible evidence. Without waiving this objection, see Responses to Request for Production No. 1, No.2, and No. 3.

H. Charlie Hight: Defendant objects to Plaintiff's request for production of documents with regards to documents stored on his personal property because this request is irrelevant, the information may not be retrievable, and is not calculated to lead to admissible evidence. Without waiving this objection, see Responses to Request for Production No. 1, No.2, and No. 3.

INTERROGATORY NO.1: Please explain, in detail, the factual and legal basis for your vote to condemn the Property including a list and description of each item of evidence relating to the condemnation of the Property that you reviewed and considered and a list and description of each and every alleged code violation, fact, condition, or circumstance that you considered which supports your vote to condemn the Property.

RESPONSE:

A. Debi Ross: Based on the information I received in my packet for the City Council meeting and what the property owner's attorney presented at the Council meeting, I voted to condemn the property. The condition of the building and the impact on the surrounding neighborhood were significant in my decision. The ceiling was falling, the building was vacant, and I thought based on the evidence people entered it illegally. Buildings such as these are in my opinion enticing to drug activity. It looked like there was already fire damage in the interior. The exposed toilet demonstrated there was no sanitation and it was inoperable. Sinks were unconnected so you couldn't wash your hands. There was an accumulation of trash, which led me to believe there was an infestation of rodents. The hot water heater was on the ground and inoperable. There was exposed wiring, particularly over the water heater.

EXHIBIT F

B. Beth White: I reviewed my packet. The pictures of inside and outside the structure indicated rotted places in and on the roof line. So much of the interior walling was pulledoff and looked like there had been a fire that had taken place inside. Wires had been pulled down, which made me concerned over safety issues and electrical problems. There was broken glass, and there are pictures from the inside that indicated issues with a rotting roof and a roof caving in. People could be hurt. I believed this to be a nuisance and a threat to public health and safety. Also, the fact that Code Enforcement had to obtain a search warrant indicated to me an unwillingness of the property owner to work with the City to repair the structure. It was made apparent to me that there we no plans for rehabilitation from the owner(s).

C. Linda Robinson: The City Council reviewed the pictures that were provided during the Council meeting. The Council's decision to vote in favor of condemnation was based on the photographs they viewed. The ceiling appeared to have fallen in and debris was scattered all over the place. It appeared the building had caught on fire previously. Cords were hanging out, trash was all over the place, clothes were strewn, and furniture was tilted. Wall insulation was all over the floor. Boards were burned. It looked to me like both levels of the interior were going to fall in. Plastic bags and chairs could trip people. There was tubing, which may have been an air conditioning vent, that had fallen in inside. Boards were falling from the ceiling. Wires were visible. In the kitchen, there were old appliances and cabinetry scattered. Sheet rock was coming off of the wall. Paint buckets and chemicals were strewn throughout. It appeared there may be mold and mildew. It looked like these damages had not just occurred, but had been there for quite some time. The structure did not appear safe to

me at all. The owner did not appear at the time the photographs were taken and did not appear that he had made any attempt to clean up the property or repair the building.

D. Maurice Taylor: It was the recommendation of Code Enforcement that the property was a nuisance. Based on every condemnation case that I've been aware of, Code Enforcement has been correct in its recommendation. The photographs at City Council meeting indicated there were holes in the walls, stuff was falling from the ceilings, there was a leaking roof, trash was scattered throughout, vagrants were using it, and perhaps homeless people were taking shelter in it. And I used my best judgment based on this.

E. Steve Baxter: I voted to condemn the property because of its physical condition. I examined what was in my Council packet, the pictures that were presented at Council meeting, and what the property owner's attorney had to say. I felt it was a safety hazard to the residents around it. In my mind, it was a threat to the public safety and welfare. I thought the building was in grave disrepair. If someone were to walk around it or in it, they could become injured. It shows, in my opinion, a long-standing lack of care. There were holes in the wall, the roof was coming down, and the ceiling in some areas was non-existent. The electrical hazard in and of itself was dangerous. There were broken plumbing fixtures and exposed wall studs. The structure was filthy. All of these reasons supported my vote to condemn the property.

F. Bruce Foutch: As part of the Council's authority to condemn properties, based on the recommendation of the Code Enforcement Department, I voted to condemn the structure. The photographs of the interior and exterior, along with the

recommendation, helped me make this decision. The building appeared in disarray and abandoned for a period of time. In the interior, there was extensive deterioration in the walls and ceilings. On the exterior, the roof and framing appeared to have leaks and damage. There appeared to be water and fire damage, because wood was charred in the interior.

G. Murry Witcher: I was not present and did not vote.

H. Charlie Hight: I voted to condemn the structure based on Code Enforcement's recommendation and eye-balling the structure as I drove by it myself. It was in disrepair and being neglected. The building was an eye-sore and a detriment to the community. Specifically, the roof looked like it was rotten and not protecting the contents of the inside of the building, the outside siding was appearing to be falling off, it looked like there was a hole in the side of the building that used to have an air conditioning unit mounted or installed, a hole looked like a big cavity that allowed outside elements to come inside the structure, the eve of the roofline in the front of the building facing the highway appeared to be rotten and falling down, and there did not appear to be any evidence the owner(s) was trying to repair the structure. The interior of the building indicated the ceiling collapsed, and insulation was falling on furniture. It looked like a bomb exploded inside: chairs all over, walls with holes, and ceiling falling through. The walls didn't have sheetrock or anything in some areas and the framing of the walls and ceiling were exposed. There appeared to have been a fire inside of the building. Because of all of this, it appeared to be a health hazard as well.

INTERROGATORY NO. 2: Please explain, in detail, how the Property first came to your attention.

(a) Were you made aware of any complaints from citizens regarding the Property;

(b) If so, please describe how you became aware of the complaint(s), who made the complaint(s), to whom the complaint(s) was made, and the nature of the complaint;

(c) What actions did you or anyone else take after receiving the complaint(s).

RESPONSE:

A. Debi Ross: It came to my attention when I received my City Council packet on or about February 25, 2013.

a. No.

b. N/A.

c. N/A.

B. Beth White: The property first came to my attention when I received the Council agenda for the February 25, 2013, City Council meeting on February 19, 2013, from the City Clerk, Diane Whitbey. Included in the agenda was the legislation, pictures of the structure, and a letter from Officer Felecia McHenry.

a. No.

b. N/A.

c. N/A.

C. Linda Robinson: The Meadow Park Neighborhood Association complained to me about the building. They were concerned about the structure. They were unsure how it looked on the inside, but felt like it needed extensive work. They informed me the building had been in its condition of disrepair for quite some time. They were

concerned that vagrants and homeless people may be using the property. It looked run down to them on the outside.

a. Yes.

b. The Meadow Park Neighborhood Association's president, Lynn Welsch, contacted me on the telephone, but I do not recall the exact date.

c. I, along with Alderman Maurice Taylor, notified the North Little Rock Code Enforcement Department.

D. Maurice Taylor: I have known about the property since I was a child. It was a club in the 1970s.

a. Yes.

b. I had numerous complaints from citizens and the Meadow Park Neighborhood Association about the condition of the property and that homeless people were suspected of living in it.

c. I notified Code Enforcement of the complaints about the condition of the property.

E. Steve Baxter: It first came to my attention when I saw it was on the Council agenda when I received my packet for the Council meeting on February 19, 2013.

a. No.

b. N/A.

c. N/A.

F. Bruce Foutch: It first came to my attention when it appeared on the agenda for the Council meeting, which I received sometime in the week prior to the February 25, 2013, meeting.

a. No.

b. N/A.

c. N/A.

G. Murry Witcher: I had received complaint from citizens prior to the condemnation hearing, but I do not specifically recall the exact date or time.

a. Yes.

b. Individuals called me to complain about the structure, but I do not recall their names. They had referred to the prior use of the structure, and stated that it was bringing in vagrants. They complained about appearance and status of the structure.

c. I drove by the building prior to the condemnation hearing to look at it myself to verify the status of the structure and in response to the information I received.

H. Charlie Hight: I became aware of the property when I received my packet with the agenda for the City Council meeting on February 19, 2013.

a. No.

b. N/A.

c. I always visit or drive by a structure that is being recommended for condemnation. Here, I drove by the structure on two different occasions. I pulled into the front of the building coming from the east the first time I drove by and the other time I pulled onto the side. I do not recall viewing the rear of the building. Both of these visits were between the times I received my packet and when the condemnation hearing was held.

REQUEST FOR PRODUCTION NO. 5: Please provide all documents, records, emails, text messages, and any other records regardless of how stored, whether written or electronic, relating to your response to the preceding interrogatory. This includes any records stored on any cell phone, computer, or other electronic device which is your personal property.

RESPONSE:

A. Debi Ross: See Response to Interrogatory No. 1.

B. Beth White: See Response to Interrogatory No. 1.

C. Linda Robinson: See Response to Interrogatory No. 1.

D. Maurice Taylor: See Response to Interrogatory No. 1.

E. Steve Baxter: See Response to Interrogatory No. 1.

F. Bruce Foutch: See Response to Interrogatory No. 1.

G. Murry Witcher: See Response to Interrogatory No. 1.

H. Charlie Hight: See Response to Interrogatory No. 1.

INTERROGATORY NO. 3: Have you ever suggested, instructed, or recommended that any city employee or official to inspect or have the Property inspected? If so, please state the approximate date, the name of the person, and the substance e of the instructions given.

RESPONSE:

A. Debi Ross: No.

B. Beth White: No.

C. Linda Robinson: No.

D. Maurice Taylor: No.

E. Steve Baxter: No.

F. Bruce Foutch: No.

G. Murry Witcher: No.

H. Charlie Hight: No.

REQUEST FOR PRODUCTION NO. 6: Please provide all documents, records, emails, text messages, and any other records regardless of how stored, whether written or electronic, relating to your response to the preceding interrogatory.

RESPONSE:

A. Debi Ross: N/A.

B. Beth White: N/A.

C. Linda Robinson: N/A.

D. Maurice Taylor: N/A.

E. Steve Baxter: N/A.

F. Bruce Foutch: N/A.

G. Murry Witcher: N/A.

H. Charlie Hight: N/A.

INTERROGATORY NO. 4: Please explain, in detail, how you first became aware of the condition of the property. Please include who provided you with the information and specifically what information was provided. What steps did you take to verify the information? What actions did you take in response to this information?

RESPONSE:

A. Debi Ross: See Response to Interrogatory No. 2.

B. Beth White: See Response to Interrogatory No. 2.

C. Linda Robinson: See Response to Interrogatory No. 2.

D. Maurice Taylor: See Response to Interrogatory No. 2.

E. Steve Baxter: See Response to Interrogatory No. 2.

F. Bruce Foutch: See Response to Interrogatory No. 2.

G. Murry Witcher: See Response to Interrogatory No. 2.

H. Charlie Hight: See Response to Interrogatory No. 2.

INTERROGATORY NO. 5: Who initially suggested, recommended or proposed that the property be condemned? How and when was this initial suggestion, recommendation or proposal presented to you? Please explain, in detail, all actions you took following and in response to this suggestion, recommendation, or proposal.

RESPONSE:

A. Debi Ross: See Response to Interrogatory No. 2. It was presented in the City Council packet on the recommendation of the Code Enforcement Department. I took no further action.

B. Beth White: See Response to Interrogatory No. 2. The Code Enforcement Department proposed the legislation for the Council meeting on February 25, 2013. I reviewed the packet and legislation.

C. Linda Robinson: See Response to Interrogatory No. 2. Code Enforcement proposed the action and it came to my attention when I received my packet for the City Council meeting on February 19, 2013.

D. Maurice Taylor: Code Enforcement proposed the action and it came to my attention when I received my packet for the City Council meeting on February 19, 2013. I listened at the hearing and voted on the issue.

E. Steve Baxter: It was a recommendation from Code Enforcement based on an on-site inspection. Pictures and documents were provided in the Council agenda, initially

from the Code Enforcement Department, that made its way into the agenda package. I took no further action.

F. Bruce Foutch: Code Enforcement followed their procedures, which I received as legislation in my packet for the Council meeting the week before the meeting. I took no further action.

G. Murry Witcher: To the best of my recollection, the Mayor sponsored the resolution to condemn the structure, at the proposal of the Code Enforcement Department. It came to my attention when I received my packet for the City Council meeting on February 19, 2013.

H. Charlie Hight: See Responses to Interrogatory No. 2 and No. 5. Code Enforcement Department presented the condemnation.

REQUEST FOR PRODUCTION NO. 7: Please provide all documents and records that support your response to the preceding interrogatory.

RESPONSE:

A. Debi Ross: See Response to Request for Production No. 1

B. Beth White: See Response to Request for Production No. 1.

C. Linda Robinson: See Response to Request for Production No. 1

D. Maurice Taylor: See Response to Request for Production No. 1

E. Steve Baxter: See Response to Request for Production No. 1

F. Bruce Foutch: See Response to Request for Production No. 1

G. Murry Witcher: See Response to Request for Production No. 1

H. Charlie Hight: See Response to Request for Production No. 1

EXHIBIT F

INTERROGATORY NO. 6: Please explain, in detail, what due process protections are provided by the City to property owners whose property is under consideration for condemnation?

RESPONSE:

A. Debi Ross: The property owners are provided notice that there will be a hearing at City Council. The owners may or may not show up, but very seldom do. The City votes whether or not to condemn. The City offers an opportunity to rehabilitate the property after it has been condemned. Property owners also have thirty (30) days to appeal the decision to Pulaski County Circuit Court.

B. Beth White: The City complies with state law regarding condemnation proceedings.

C. Linda Robinson: The City complies with state requirements for due process for condemnation proceedings.

D. Maurice Taylor: The City complies with state law with regards to due process requirements in condemnation actions.

E. Steve Baxter: The City complies with state law with regards to due process requirements in condemnation actions. Also, if property owners want to rehabilitate their property, they may rehabilitate it after a property has been condemned. The decision of the City Council may also be appealed.

F. Bruce Foutch: There are numerous opportunities for the owner of the property during the condemnation process to resolve the situation before it gets to the condemnation process. Notice is published that there will be a public hearing on the condemnation. The hearing is held and there is an opportunity for the owners to come forward and state their case. If the property is condemned, there is an opportunity for the owner to

get with the City Attorney's Office and the Code Enforcement Department to draft a rehabilitation plan. This has been done on occasions. The owners can also appeal the decision through the courts.

G. Murry Witcher: The City provides notice of the condemnation proceeding and holds a hearing for the owner to present their case. The owner may appeal the decision as well.

H. Charlie Hight: The condemnation process contains a notice and public hearing. Based on the actions of the City Council, the property owner can work out a rehabilitation agreement with the City if the property is condemned. A property owner is also entitled to appeal the Council's decision to Circuit Court.

INTERROGATORY NO. 7: Please explain, in detail, the City Council's procedure for determining which properties will be subject to condemnation.

RESPONSE:

A. Debi Ross: City Council decides what properties to condemn only based on what's presented to them at City Council meetings for public hearing. The legislation is sponsored by the Mayor at the recommendation of the Code Enforcement Department. During the public hearing, the owner or the representative has the opportunity to present any facts or explanations. This also gives City Council an opportunity to ask the owner or representative questions. Pictures of the property are shown on projector screens during the meeting for all to see. After all of this, the Aldermen may or may not have a discussion and then they vote. Then the property owner has the opportunity to sign a rehabilitation agreement with the Code Enforcement Department and City Attorney's Office. They also have every

opportunity to appeal our decision within thirty (30) days, which has been done in the past.

B. Beth White: The City Council examines legislation and makes a determination what needs to be condemned or not by looking at pictures or visiting to the property, as well as listening to what the Code Enforcement Department presents at the Council meeting. Council also listens to what the property owner has to say. Someone at the Council meeting will remind the property owner, if they are present, that the owner may enter into a rehabilitation agreement and can be successful with the agreement.

C. Linda Robinson: The Code Enforcement Department investigates the property and requests the City Attorney's Office to draft legislation for condemnation. Notice is provided and a hearing is held for the property owner to state their case, and if the owner does not have a compelling enough case before the Council, the Aldermen may vote to condemn the property. If condemned, the property owner may appeal the action or enter into a rehabilitation agreement.

D. Maurice Taylor: Code Enforcement investigates a property and requests the City Attorney's Office to draft legislation for condemnation. The City provides notice and a hearing for the property owner to state their case, and if the owner does not have a compelling enough case before the Council, the Aldermen may vote to condemn the property. If condemned, the property owner may appeal the action.

E. Steve Baxter: Generally, a Code Enforcement Officer will drive by and view the property. They may be informed of conditions from the Fire or Police Department. Then, the Code Department may seek a warrant to conduct an interior inspection. Then, to the best of my knowledge, the Code Enforcement Officer makes a

recommendation to the head of Code Enforcement and they decide to move forward or not. It will be placed on the City Council agenda, and the Councilmen will determine whether or not to vote in favor of the condemnation. The Code Enforcement Department will also work with the property owner for abatement.

F. Bruce Foutch: This comes from the Code Department through the Mayor, who sponsors all condemnation actions. It is read and reviewed and then there is a determination.

G. Murry Witcher: If the Code Enforcement Department cannot work with the property owner to bring the property back into compliance with building and health codes, they make a recommendation to the Council in leave of the Mayor to condemn the property. The condemnation process is supported by letters supplied by Code Enforcement, as well as photographs provided by them. Aldermen may also visit the property to view the exterior. The hearing is heard for the property owner to plead their case and then the Aldermen cast their individual votes to condemn the property or not.

H. Charlie Hight: Aldermen are notified of property considered for condemnation by Code Enforcement when they receive their packet for upcoming City Council meetings, then there is a public hearing before the Council. There are pictures displayed at the hearing and testimony is heard. The Aldermen then determine whether or not to condemn the property. Based on the hearing, the Aldermen may withhold the condemnation action or vote in favor of it.

INTERROGATORY NO. 8: Please define the following terms used in Resolution NO. 8272 as you believe they apply to the Property and list each and every condition, fact, or

circumstance that supports the application of each term to the property and list each item of evidence which supports these findings that you considered prior to your vote to condemn the Property:

(a) Run down

(b) Dilapidated

(c) Unsightly

(d) Dangerous

(e) Obnoxious

(f) Unsafe

(g) Not fit for human habitation

(h) Detrimental to the public welfare

RESPONSE:

A. Debi Ross: Defendant objects to this Interrogatory because it is overbroad and not reasonably calculated to the discovery of admissible evidence. Without waiving this objection, Defendant defines the terms as follows:

a. Run down – Property not kept in a habitable condition

b. Dilapidated – Property that the owner has failed to keep in acceptable condition

c. Unsightly – Property that has not been maintained in a safe and healthy condition that decreases the attractiveness and property values of a neighborhood

d. Dangerous – Increases the risk for fire or injury

e. Obnoxious – Overall condition of a property that has the potential for rodents, drug activity, and unsanitary conditions

f. Unsafe – Possibility of fire, drug activity due to vagrants, injury, lack of structural support

g. Not fit for human habitation – Should not be occupied because someone can't safely live in a property or occupy the space

h. Detrimental to the public welfare – The opportunity for drug activity, vagrants, decrease of property values of surrounding properties, and/or possibility of fire

B. Beth White: Defendant objects to this Interrogatory because it is overbroad and not reasonably calculated to the discovery of admissible evidence. Without waiving this objection, Defendant defines the terms as follows:

a. Run down – In poor condition

b. Dilapidated – In very poor condition

c. Unsightly – Visually detracting from everything around it

d. Dangerous – Probable and unsafe conditions

e. Obnoxious – Blatantly offensive

f. Unsafe - Dangerous

g. Not fit for human habitation – People not able to be safe in the dwelling

h. Detrimental to the public welfare – In this instance, one dilapidated property has a negative impact on the community

C. Linda Robinson: Defendant objects to this Interrogatory because it is overbroad and not reasonably calculated to the discovery of admissible evidence. Without waiving this objection, Defendant defines the terms as follows:

a. Run down – Property in dire need of work, unlivable, not fit for habitation

b. Dilapidated – Not fir for habitation and needing work

c. Unsightly – Here, trash, debris, and other things scattered throughout, walls and ceiling needing repair

d. Dangerous – Hazardous if allowed to remain in the same condition

e. Obnoxious – Here, all the trash left in the structure, including paint buckets and chemicals

f. Unsafe – Unlivable, dangerous

g. Not fit for human habitation - Unlivable

h. Detrimental to the public welfare - Unsafe

D. Maurice Taylor: Defendant objects to this Interrogatory because it is overbroad and not reasonably calculated to the discovery of admissible evidence. Without waiving this objection, Defendant defines the terms as follows:

a. Run down – Trashy, evidence of leaking roofs, materials falling from ceilings, no utilities connected to a building

b. Dilapidated – See "run down," also rotting.

c. Unsightly – Not pleasing on the eyes, trashy, evidence of leaking roofs, exposed installation, ceiling tiles falling

d. Dangerous – Not fit for human habitation

e. Obnoxious – See "run down"

f. Unsafe – Not fit for human habitation

g. Not fit for human habitation – Dangerous and unsafe

h. Detrimental to the public welfare – Dangerous, unsafe, and not fit for human habitation

E. Steve Baxter: Defendant objects to this Interrogatory because it is overbroad and not reasonably calculated to the discovery of admissible evidence. Without waiving this objection, Defendant defines the terms as follows:

a. Run down – Not in a one hundred percent serviceable condition

b. Dilapidated – Worse than run-down

c. Unsightly – Not visually appealing

d. Dangerous – Life threatening or cause serious injury to human life

e. Obnoxious – Offensive by any of the five senses

f. Unsafe – Conditions which would cause injury to human life

g. Not fit for human habitation – I probably wouldn't let my dog live there

h. Detrimental to the public welfare – Placing in jeopardy the general public

F. Bruce Foutch: Defendant objects to this Interrogatory because it is overbroad and not reasonably calculated to the discovery of admissible evidence. Without waiving this objection, Defendant defines the terms as follows:

a. Run down – Appears to be abandoned and no upkeep is on the interior or exterior

b. Dilapidated – In disrepair and doesn't appear any attempts to remedy have been made

c. Unsightly – Poor image to surrounding areas

d. Dangerous – Unsafe, potential for harm or injury

e. Obnoxious – See responses to "run down" and "dilapidated"; an eye sore

f. Unsafe – See response to "dangerous"

g. Not fit for human habitation – Extreme disrepair makes it not fit for people to live

h. Detrimental to the public welfare – Criminal use, harming property values

G. Murry Witcher: Defendant objects to this Interrogatory because it is overbroad and not reasonably calculated to the discovery of admissible evidence. Furthermore, Defendant objects because he was not present at the meeting for the condemnation vote, and did not participate in any vote. Without waiving this objection, Defendant defines the terms as follows:

a. Run down – Absence of maintenance to be in such a state to be unsightly and dangerous

b. Dilapidated – Unkept, dangerous, not habitable, not fulfilling requirements for plumbing and electrical codes

c. Unsightly – Unkept materials falling off and out of a structure

d. Dangerous – Joints falling and building not being properly secured to keep vagrants from utilizing it

e. Obnoxious – Personally repuslvie

f. Unsafe – Structurally unsound

g. Not fit for human habitation – Dirty and does not provide for sanitary inhabitants

h. Detrimental to the public welfare – See previous definitions above

H. Charlie Hight: Defendant objects to this Interrogatory because it is overbroad. Without waiving this objection, Defendant defines the terms as follows:

a. Run down – Worn out; the appearance of the building has not been maintained in this case

b. Dilapidated – Out-of-date

c. Unsightly – Need for repair

d. Dangerous – The inside conditions made it hazardous for physical well-being and health

e. Obnoxious – Ugly

f. Unsafe – Not safe to be around

g. Not fit for human habitation – Unhealthy, unsafe, not a good place for people to be in or living at the time

h. Detrimental to the public welfare – To the community, it is a hazard; here, homeless people or vagrants could live in it, animals could live in it, it was not improving the appearance of the community, and it did not make it a good place to live

INTERROGATORY NO. 9: Please list and describe each item of evidence that you considered prior to your vote to condemn the Property which supports the finding that the property constitutes a serious

(a) Fire hazard

(b) Health hazard

RESPONSE:

A. Debi Ross:

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a. Fire hazard: It was unoccupied, vagrants could have set fire, drug activity could have caused fire, there was evidence that there already was a fire inside the structure because walls were charred, exposed wiring had potential for causing a fire, the accumulation of trash was flammable, unknown items left in the building could be flammable

b. Health hazard: The roof structure and broken beams could hurt someone, the accumulation of trash was unhealthy, there was a possible rodent infestation, the ceiling was falling down, water damage to the ceiling, falling sheetrock

B. Beth White: See Response to Interrogatory No. 1.

C. Linda Robinson:

a. Fire hazard: There were wires on the outside of the building that looked like they were hanging from outside the roof and from the socket. On the pole outside, it looked like a plug-in was deficient. There was an electrical box hanging from a pole that appeared unsafe. The kitchen area had wires or poles coming from ceiling to the counter. There were paint or chemical buckets that could be flammable, and there was exposed insulation. Papers strewn over the place are flammable. Spray canisters throughout may still have chemicals in them and are flammable, and there were open wires.

b. Health hazard: The floor was filthy and junk, including clothes and fabric, were strewn about. There were plastic bags littered throughout. I noticed droppings from mice or rats and it looked like rodents could easily enter the premises and there was evidence they had. Sheet rock, tables, and chairs were overturned and could trip people or they could fall over. The wood was rotting, and was also split

and splintered. There were open wires. I noticed a toilet with potential mold and/or fecal matter in it and there was no way of flushing it. There was mold and mildew on the walls.

D. Maurice Taylor:

a. Fire hazard: Homeless people and/or vagrants are using the property and using it for warmth

b. Health hazard: There is a leaking and exposed roof that led to a mold and mildew infestation

E. Steve Baxter:

a. Fire hazard: Trash, exposed electrical wires, rotten wood

b. Health hazard: Malfunctioning plumbing, possible biohazard (mold, mildew, fecal matter) around the exposed toilet, mold and/or mildew on the walls

F. Bruce Foutch:

a. Fire hazard: Already evidence of one fire with the charred wood so there could be more

b. Health hazard: Broken fixtures, insulation was on the surfaces, items were on the floor all over the place, potential for rodents and other infestations

G. Murry Witcher: I was not present and did not vote.

H. Charlie Hight:

a. Fire hazard: The electrical wires and receptacles were exposed, the outside breaker box was in disrepair, the furniture was on the floor in a pile, the walls were exposed, and it looked like there was already one fire in there based on the photographs. Wires were hanging from the ceiling, wiring with the hot

water heater was exposed, and the hot water heater was on the floor in a horizontal position when it should be vertical. Lights were hanging from the ceiling. Contents of desks and drawers were all over the floor and were a potential fire hazard. Ovens in the kitchen looked like they had been torched already. There were also exposed paint cans.

b. Health hazard: It did not appear that there were good germs growing inside. There was mold and mildew. Kegs of beer may have mold and mildew in them. Pipes and plumbing in the kitchen and bar area appeared busted and broken. Empty pitchers of beer were on the counter, along with trash littered throughout. Germs and mildew were on the floors. There appeared to have been rodents inside at some point in time. The ceiling was exposed. Someone took the sinks off the wall thereby exposing the plumbing. It looked like the office was ransacked. Sinks were on the floor. There was broken glass on the floor. The ceiling joints near an attic appeared to have collapsed and broken a vent pipe. There was an exposed toilet that appeared to have blood or potential fecal matter.

INTERROGATORY NO. 10: If the determination that a property is a fire hazard is based on issues with electrical wiring, did you consider the fact that the electricity was not connected to the property prior to your vote to find that the property is a fire hazard?

RESPONSE:

A. Debi Ross: I could tell the electricity was not connected.

B. Beth White: No.

C. Linda Robinson: No.

D. Maurice Taylor: No.

E. Steve Baxter: I had no knowledge that power was disconnected.

F. Bruce Foutch: Yes, but I'm not sure what other utilities were still connected.

G. Murry Witcher: N/A.

H. Charlie Hight: I was not aware of this, but it did not affect my vote on the condemnation.

INTERROGATORY NO. 11: Please list and describe each item of evidence condition, fact, and circumstance you considered prior to your vote which supports your vote finding as stated in Resolution No. 8272 that "immediate actions" were necessary, that "There is a great likelihood that the surrounding property may be destroyed by fire originating from" the Property, that the property is "a breeding place for rats, rodents, and other dangerous germ carriers of disease," that the property is a "menace to abutting properties," and that the property was an immediate threat to public health or safety.

RESPONSE:

A. Debi Ross: See Response to Interrogatory No. 1 and No. 9.

B. Beth White: See Response to Interrogatory No. 1.

C. Linda Robinson: See Responses to Interrogatory No. 1 and No. 9.

D. Maurice Taylor: See Responses to Interrogatories No. 1 and No. 9. I did not consider anything prior to the Council meeting. I listened to what all parties had to say and made my determination from there.

E. Steve Baxter: See Responses to Interrogatories No. 1 and No. 9. This was based on Officer McHenry's investigation, paperwork, and pictures.

F. Bruce Foutch: See Responses to Interrogatories No. 1. and No. 9. I'm not sure it could have destroyed surrounding property by fire, but there was potential for more vermin.

G. Murry Witcher: N/A.

H. Charlie Hight: See Response to Interrogatory No. 1 and No. 9.

INTERROGATORY NO. 12: In voting to support the condemnation of the Property, did you believe that the alleged conditions which make the property a threat to health and safety cannot be repaired or that demolishing the building is the only way to eliminate these conditions?

RESPONSE:

A. Debi Ross: Anything can be rehabbed, but the property owner would have to sign a rehabilitation agreement. In this case, I thought the property could be rehabilitated.

B. Beth White: In this case, I thought demolishing the building was the only way to eliminate these conditions.

C. Linda Robinson: I felt demolishing the structure was the only way to eliminate the conditions.

D. Maurice Taylor: I believed the property could be rehabilitated, but the property owners indicated they were unwilling to do so.

E. Steve Baxter: I really thought the best thing to do was to demolish the property, but I do know the City has rehabilitation agreement procedures. But, I thought this one was too far gone and I did not think the applicant was interested in this because they were fighting the condemnation from the get-go.

F. Bruce Foutch: Ultimately, I did not believe it could be repaired.

G. Murry Witcher: N/A.

H. Charlie Hight: I did not believe it could be repaired because the evidence indicated to me that there was no movement by the owner(s) to repair the building and demolishing was the only way to eliminate these conditions.

INTERROGATORY NO. 13: Have you ever voted against approving a rehabilitation plan? If so, please provide the date, property address, and owner's name.

RESPONSE:

A. Debi Ross: No.

B. Beth White: No.

C. Linda Robinson: No.

D. Maurice Taylor: To the best of my knowledge, no.

E. Steve Baxter: To the best of my knowledge, no.

F. Bruce Foutch: To the best of my knowledge, no.

G. Murry Witcher: No.

H. Charlie Hight: To the best of my knowledge, I have not.

INTERROGATORY NO. 14: Have you ever been asked to sponsor a rehabilitation plan? If so, how did you respond? Please provide the approximate date, property address, and owner's name.

RESPONSE:

A. Debi Ross: No.

B. Beth White: No.

C. Linda Robinson: To the best of my knowledge, I do not recall.

D. Maurice Taylor: To the best of my knowledge, no.

E. Steve Baxter: No.

F. Bruce Foutch: No.

G. Murry Witcher: No.

H. Charlie Hight: To the best of my knowledge, I have not.

INTERROGATORY NO. 15: In regards to a property for which the City is considering condemnation or which has been condemned, have you ever received, rejected, sponsored, or voted on a request to waive the requirement that an owner post a bond equal to the cost of demolition before being allowed to repair the property? If so, please state the property address, owner's name, and approximate date.

RESPONSE:

A. Debi Ross: To the best of my knowledge, I do not recall.

B. Beth White: No.

C. Linda Robinson: To the best of my knowledge, I do not recall.

D. Maurice Taylor: To the best of my knowledge, no.

E. Steve Baxter: To the best of my knowledge, no.

F. Bruce Foutch: To the best of my knowledge, no.

G. Murry Witcher: Yes, I voted on it. To the best of my knowledge and recollection for the 23 years I have served as an Alderman, I do not recall the property address, owner's name, and approximate date.

H. Charlie Hight: To the best of my knowledge, I have not.

INTERROGATORY NO. 16: In regards to a property for which the City is considering condemnation or which has been condemned, have you ever received or voted on a request that the requirement that an owner provide a letter of credit before being allowed to repair the property? If so, please state the property address, owner's name, and approximate date.

RESPONSE:

A. Debi Ross: To the best of my knowledge, no.

B. Beth White: To the best of my knowledge, I do not recall.

C. Linda Robinson: To the best of my knowledge, I do not recall.

D. Maurice Taylor: To the best of my knowledge, no.

E. Steve Baxter: To the best of my knowledge, no.

F. Bruce Foutch: To the best of my knowledge, no.

G. Murry Witcher: To the best of my knowledge, yes. To the best of my knowledge, I believe I voted on it. To the best of my knowledge, this is for every rehabilitation agreement. See City's Response to Interrogatories and Requests for Production of Documents for property address, owner's name, and approximate date for rehabilitation agreements.

H. Charlie Hight: To the best of my knowledge, I have not.

INTERROGATORY NO. 17: To the best of your knowledge, has the City ever approved a rehabilitation plan and later deemed the repairs made to be unacceptable or incomplete and proceeded demolish the structure? I so, did you participate in or vote on this decision? Please state the property address, owner's name, and approximate date.

RESPONSE:

A. Debi Ross: To the best of my knowledge, no.

B. Beth White: To the best of my knowledge, I do not recall.

C. Linda Robinson: To the best of my knowledge, I do not recall.

D. Maurice Taylor: To the best of my knowledge, no.

E. Steve Baxter: To the best of my knowledge, no.

F. Bruce Foutch: To the best of my knowledge, I do not recall.

G. Murry Witcher: None to my knowledge.

H. Charlie Hight: To the best of my knowledge, I have not.

INTERROGATORY NO. 18: Please explain, in detail, the substance of all communications you have had with other City official, employees, agents, representatives, citizens, or any other persons regarding the Drugstore Cowboys, Gentleman's Club 70 business. Please provide the names of the parties to the communications, and approximate dates.

RESPONSE:

A. Debi Ross: To the best of my knowledge, I do not recall.

B. Beth White: To the best of my knowledge, I may have spoken with City Attorney Jason Carter one time about legislation regarding Drugstore Cowboys, Gentleman's Club 70 business but I do not recall the date.

C. Linda Robinson: See Response to Interrogatory No. 2.

D. Maurice Taylor: See Response to Interrogatory No. 2. To the best of my knowledge, I spoke with whom I believe is Richard Livdahl at the beginning of this year, and he stated to me he was one of the owners of the property, and he wanted to discuss the condemnation process. I believe I spoke with Bill Brown in the City Attorney's Office to notify him that Richard Livdahl had contacted me soon thereafter.

E. Steve Baxter: See Response to Interrogatory No. 2. To the best of my knowledge, no.

F. Bruce Foutch: See Response to Interrogatory No. 2. To the best of my knowledge, no.

G. Murry Witcher: See Response to Interrogatory No. 2. To the best of my knowledge, I believe I spoke with Alderman Linda Robinson one time about the prior use of the

building before condemnation after the resolution for the condemnation was filed and she discussed her point of view and the distaste of the facility by the neighbors.

H. Charlie Hight: No.

REQUEST FOR PRODUCITON NO. 8: Please provide all documents and records that support your response to the preceding interrogatory.

RESPONSE:

A. Debi Ross: N/A.

B. Beth White: N/A.

C. Linda Robinson: N/A.

D. Maurice Taylor: N/A.

E. Steve Baxter: N/A.

F. Bruce Foutch: N/A.

G. Murry Witcher: N/A.

H. Charlie Hight: N/A.

INTERROGATORY NO. 19: Did you make any inquiries or receive any update regarding the condition of the Property as of February 25, 2013? If so, please describe the inquiries made and/or information received.

RESPONSE:

A. Debi Ross: No.

B. Beth White: No.

C. Linda Robinson: No.

D. Maurice Taylor: No.

E. Steve Baxter: No.

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F. Bruce Foutch: No.

G. Murry Witcher: No.

H. Charlie Hight: No.

INTERROGATORY NO. 20: Please list all violations and conditions that must be repaired or corrected so that, in your opinion, the property would no longer deemed to be a nuisance.

RESPONSE:

A. Debi Ross: Defendant objects to this Interrogatory because it is overbroad and requires speculation. Without waiving this objection, I do not have knowledge as to all violations and conditions that must be repaired or corrected because that is determined by City building inspectors as part of the rehabilitation agreement. I cannot list the violations because I do not have the building code inspectors' report and recommendation. For it to no longer be a nuisance, the property must meet all standards the City has in place in its building maintenance code.

B. Beth White: Defendant objects to this Interrogatory because it is overbroad and requires speculation. Without waiving this objection, I do not have knowledge as to all violations and conditions that must be repaired or corrected because that is determined by City building inspectors as part of the rehabilitation agreement. I cannot list the violations because I do not have the building code inspectors' report and recommendation. For it to no longer be a nuisance, the property must meet all standards the City has in place in its building maintenance code.

C. Linda Robinson: Defendant objects to this Interrogatory because it is overbroad and requires speculation. Without waiving this objection, I do not have knowledge as to

all violations and conditions that must be repaired or corrected because that is determined by City building inspectors as part of the rehabilitation agreement. I cannot list the violations because I do not have the building code inspectors' report and recommendation. For it to no longer be a nuisance, the property must meet all standards the City has in place in its building maintenance code.

D. Maurice Taylor: Defendant objects to this Interrogatory because it is overbroad and requires speculation. Without waiving this objection, I do not have knowledge as to all violations and conditions that must be repaired or corrected because that is determined by City building inspectors as part of the rehabilitation agreement. I cannot list the violations because I do not have the building code inspectors' report and recommendation. For it to no longer be a nuisance, the property must meet all standards the City has in place in its building maintenance code.

E. Steve Baxter: Defendant objects to this Interrogatory because it is overbroad and requires speculation. Without waiving this objection, I do not have knowledge as to all violations and conditions that must be repaired or corrected because that is determined by City building inspectors as part of the rehabilitation agreement. I cannot list the violations because I do not have the building code inspectors' report and recommendation. For it to no longer be a nuisance, the property must meet all standards the City has in place in its building maintenance code.

F. Bruce Foutch: Defendant objects to this Interrogatory because it is overbroad and requires speculation. Without waiving this objection, I do not have knowledge as to all violations and conditions that must be repaired or corrected because that is determined by City building inspectors as part of the rehabilitation agreement. I

cannot list the violations because I do not have the building code inspectors' report and recommendation. For it to no longer be a nuisance, the property must meet all standards the City has in place in its building maintenance code.

G. Murry Witcher: Defendant objects to this Interrogatory because it is overbroad and requires speculation. Without waiving this objection, I do not have knowledge as to all violations and conditions that must be repaired or corrected because that is determined by City building inspectors as part of the rehabilitation agreement. I cannot list the violations because I do not have the building code inspectors' report and recommendation. For it to no longer be a nuisance, the property must meet all standards the City has in place in its building maintenance code.

H. Charlie Hight: Defendant objects to Defendant objects to this Interrogatory because it is overbroad and requires speculation. Without waiving this objection, I do not have knowledge as to all violations and conditions that must be repaired or corrected because that is determined by City building inspectors as part of the rehabilitation agreement. I cannot list the violations because I do not have the building code inspectors' report and recommendation. For it to no longer be a nuisance, the property must meet all standards the City has in place in its building maintenance code.

INTERROGATORY NO. 21: Please list all communications to which you were a party relating to the Property or Plaintiff that have not previously been mentioned in these Interrogatories. Please provide the approximate date, parties involved, and summarize the substance of the communication.

RESPONSE:

A. Debi Ross: None known.

B. Beth White: None known.

C. Linda Robinson: None known.

D. Maurice Taylor: None known.

E. Steve Baxter: None known.

F. Bruce Foutch: None known.

G. Murry Witcher: None known.

H. Charlie Hight: None known.

INTERROGATORY NO. 22: Please list all lawsuits to which you have been a party within the last (5) years. Please include the names of the other parties, date filed, court and case number, and disposition.

RESPONSE: Defendants object to the preceding Interrogatory because it is a matter of public record and, therefore, just as available to the Plaintiff as it is to the Defendants. Without waiving this objection, Defendants submit the following lawsuits for which they have been parties to in the last five years, the date filed, court and case number, and disposition.

A. Debi Ross:

a. *Lasseigne, et al. v. City of North Little Rock, et al.*, filed on or about January 2, 2012, Pulaski County Circuit Court, 60CV-11-5953, settled.

b. *Metropolitan v. City of North Little Rock, et al.*, April 25, 2012, Pulaski County Circuit Court, 60CV-12-2011, dismissed.

B. Beth White:

a. *Lasseigne, et al. v. City of North Little Rock, et al.*, filed on or about January 2, 2012, Pulaski County Circuit Court, 60CV-11-5953, settled.

b. *Metropolitan v. City of North Little Rock, et al.*, April 25, 2012, Pulaski County Circuit Court, 60CV-12-2011, dismissed.

C. Linda Robinson:

a. *Kaleb Devon Lewis*, December 7, 2011, Pulaski County Circuit Court 60PR-11-2121, granted guardianship.

b. *Lasseigne, et al. v. City of North Little Rock, et al.*, filed on or about January 2, 2012, Pulaski County Circuit Court, 60CV-11-5953, settled.

c. *Metropolitan v. City of North Little Rock, et al.*, April 25, 2012, Pulaski County Circuit Court, 60CV-12-2011, dismissed.

D. Maurice Taylor:

a. *Lasseigne, et al. v. City of North Little Rock, et al.*, filed on or about January 2, 2012, Pulaski County Circuit Court, 60CV-11-5953, settled.

b. *Metropolitan v. City of North Little Rock, et al.*, April 25, 2012, Pulaski County Circuit Court, 60CV-12-2011, dismissed.

E. Steve Baxter:

a. *Lasseigne, et al. v. City of North Little Rock, et al.*, filed on or about January 2, 2012, Pulaski County Circuit Court, 60CV-11-5953, settled.

b. *Metropolitan v. City of North Little Rock, et al.*, April 25, 2012, Pulaski County Circuit Court, 60CV-12-2011, dismissed.

F. Bruce Foutch:

a. *Lasseigne, et al. v. City of North Little Rock, et al.*, filed on or about January 2, 2012, Pulaski County Circuit Court, 60CV-11-5953, settled

b. *Metropolitan v. City of North Little Rock, et al.*, April 25, 2012, Pulaski County Circuit Court, 60CV-12-2011, dismissed.

G. Murry Witcher:

a. *Lasseigne, et al. v. City of North Little Rock, et al.*, filed on or about January 2, 2012, Pulaski County Circuit Court, 60CV-11-5953, settled.

b. *Metropolitan v. City of North Little Rock, et al.*, April 25, 2012, Pulaski County Circuit Court, 60CV-12-2011, dismissed.

H. Charlie Hight:

a. *Lasseigne, et al. v. City of North Little Rock, et al.*, filed on or about January 2, 2012, Pulaski County Circuit Court, 60CV-11-5953, settled

b. *Metropolitan v. City of North Little Rock, et al.*, April 25, 2012, Pulaski County Circuit Court, 60CV-12-2011, dismissed.

Separate Defendants retain the right to supplement any and all responses as discovery progresses.

Respectfully Submitted,

Daniel L. McFadden (2011035)
Assistant City Attorney
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PO Box 5757
North Little Rock, Arkansas 72119
Voice: (501) 975-3755
Fax: (501) 340-5341
Email: dmcfadden@northlittlerock.ar.gov

EXHIBIT F

CERTIFICATE OF SERVICE

I, Daniel L. McFadden, do hereby certify that a copy of the foregoing pleading was deposited into the U.S. mail, postage prepaid on this 4th day of November, 2013, addressed to:

Mickey Stevens
Attorney for Plaintiff
P.O. Box 2165
Benton, AR 72018

Daniel L. McFadden

EXHIBIT F

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

CONVENT COPRORATION,
Individually and on Behalf of all
Others Similarly Situated **PLAINTIFF**

v. **CASE NO. 4:13-CV-0259**

CITY OF NORTH LITTLE ROCK, ARKANSAS, a Municipal Corporation, JOE SMITH, Mayor, Individually and in his Official Capacity, City Council Members DEBI ROSS, BETH WHITE, LINDA ROBINSON, MAURICE TAYLOR, STEVE BAXTER, BRUCE FOUTCH, MURRY WITCHER, and CHARLIE HIGHT each Individually and in his or her Official Capacity, TOM WADLEY, Director, Code Enforcement Division, Individually and in his Official Capacity, and FELECIA MCHENRY, Code Enforcement Officer, Individually and in her Official Capacity **DEFENDANTS**

SEPARATE DEFENDANT'S RESPONSES TO PLAINTIFF'S INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS

Comes Separate Defendant, Mayor Joe Smith, by and through his attorney, Assistant City Attorney Daniel L. McFadden, and for his Responses to Plaintiff's Interrogatories and Requests for Production of Documents, states as follows:

REQUEST FOR PRODUCTION NO. 1: Please provide copies of any and all documents, records, emails, text messages, and all other records regardless of how stored, which have any bearing on the factual questions at issue in the present litigation, including, but not limited to, the claims addressed in the Complaint and Amended Complaints. This includes any records stored on any cell phone, computer, or other electronic device which is your personal property.

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RESPONSE: Defendant objects to Plaintiff's request for production of documents with regards to documents stored on his personal property because this request is irrelevant, the information may not be retrievable, and is not calculated to lead to admissible evidence. Without waiving this objection, see Aldermen's Response to Request for Production No. 1.

REQUEST FOR PRODUCTION NO. 2: Please produce a copy of all letters, correspondence, emails, texts, or other communications between you and any other City officials, employees, agents, representatives, citizens and any other person or entity that in any way relate to the Property or Plaintiff. Please provide copies of all written and electronic communications between you and any other City official, employees, agents, or representative an any other person or entity that in any way relate to the Property or Plaintiff, whether these were communications between employees and staff, elected officials, or with citizens or any other party. Please include text messages, emails, letters, and all other communications, regardless of how they were sent, received, or stored. This includes any communications stored on your personal computer, cell phone, or other electronic device.

RESPONSE: Defendant objects to Plaintiff's request for production of documents with regards to documents stored on his personal property because this request is irrelevant, the information may not be retrievable, and is not calculated to lead to admissible evidence. Without waiving this objection, see Response to Request for Production No. 1.

REQUEST FOR PRODUCTION NO. 3: Please produce copies of any and all telephone slip messages, notes, or other correspondence reflecting oral, electronic, and/or telephone conversations between you and any City officials, employees, agents, representatives, citizens and any other person or entity that in any way relate to the Property or Plaintiff. This

EXHIBIT G

includes any records stored on any cell phone, computer, or other electronic device which is your personal property.

RESPONSE: Defendant objects to Plaintiff's request for production of documents with regards to documents stored on his personal property because this request is irrelevant, the information may not be retrievable, and is not calculated to lead to admissible evidence. Without waiving this objection, see Response to Request for Production No. 1.

REQUEST FOR PRODUCTION NO. 4: Please produce all diaries, calendars, or any other lists or notes kept by you that in any way relate to the Property or Plaintiff. This includes any records stored on any cell phone, computer, or other electronic device which is your personal property.

RESPONSE: Defendant objects to Plaintiff's request for production of documents with regards to documents stored on his personal property because this request is irrelevant, the information may not be retrievable, and is not calculated to lead to admissible evidence. Without waiving this objection, see Response to Request for Production No. 1.

INTERROGATORY NO.1: Please explain, in detail, the factual and legal basis for your vote to condemn the Property including a list and description of each item of evidence relating to the condemnation of the Property that you reviewed and considered and a list and description of each and every alleged code violation, fact, condition, or circumstance that you considered which supports your vote to condemn the Property.

RESPONSE: N/A. I did not vote.

INTERROGATORY NO. 2: Please explain, in detail, how the Property first came to your attention.

(a) Were you made aware of any complaints from citizens regarding the Property;

EXHIBIT G

(b) If so, please describe how you became aware of the complaint(s), who made the complaint(s), to whom the complaint(s) was made, and the nature of the complaint;

(c) What actions did you or anyone else take after receiving the complaint(s).

RESPONSE: The property first came to my attention when legislation was filed to condemn the property.

(a) I do not recall receiving any complaints from citizens.

(b) N/A.

(c) N/A.

REQUEST FOR PRODUCTION NO. 5: Please provide all documents, records, emails, text messages, and any other records regardless of how stored, whether written or electronic, relating to your response to the preceding interrogatory. This includes any records stored on any cell phone, computer, or other electronic device which is your personal property.

RESPONSE: N/A.

INTERROGATORY NO. 3: Have you ever suggested, instructed, or recommended that any city employee or official to inspect or have the Property inspected? If so, please state the approximate date, the name of the person, and the substance e of the instructions given.

RESPONSE: To the best of my knowledge, I do not recall ever instructing, suggesting, or recommending an inspection of the property.

REQUEST FOR PRODUCTION NO. 6: Please provide all documents, records, emails, text messages, and any other records regardless of how stored, whether written or electronic, relating to your response to the preceding interrogatory.

RESPONSE: N/A.

EXHIBIT G

INTERROGATORY NO. 4: Please explain, in detail, how you first became aware of the condition of the property. Please include who provided you with the information and specifically what information was provided. What steps did you take to verify the information? What actions did you take in response to this information?

RESPONSE: I first became aware of the condition of the property when I received my packet the Tuesday before the City Council meeting when the condemnation hearing would be held, which was on or about February 19, 2013. Diane Whitbey, the City Clerk, provided me the packet. I did not take additional steps to verify the Council packet. The only step I took was sponsoring the legislation, which is the standard procedure for condemnation actions that come before City Council.

INTERROGATORY NO. 5: Who initially suggested, recommended or proposed that the property be condemned? How and when was this initial suggestion, recommendation or proposal presented to you? Please explain, in detail, all actions you took following and in response to this suggestion, recommendation, or proposal.

RESPONSE: See Response to Interrogatory No. 4. The North Little Rock Code Enforcement Department initially suggested and recommended that the property be condemned. Upon delivery of the Council meeting packet and agenda was when the issue was first presented to me. The only action I took following and in response to this was to sponsor the legislation.

INTERROGATORY NO. 6: Please explain in detail the City's policy regarding communications with a property owner that is a corporate entity. Specifically, please address the following:

(a) Does the City have a policy that requires that it only deal with a n officer, director, or shareholder of a corporate entity?

(b) Has the City ever dealt with an agent or employee of a corporate entity regarding property issues?

(c) If this is a common or typical practice, please so state? If it is not a common practice, please state when and under what circumstances the City has dealt with employees, agents, or representatives of corporate property owners.

(d) Does the City require that an agent or representative of a corporate property owner prove that he or she has an ownership interest in the property?

(e) What documentation or proof ownership has the City previously required of agents or representatives of corporate owners?

(f) Did the City have any reason to suspect that Mr. Livdahl was not acting as a representative or agent of the corporate owner of the property? If so, please explain in detail.

RESPONSE: To the best of my knowledge, there is no formal policy with regards to communicating to a property owner that is a corporate entity.

(a) I have no knowledge.

(b) I have no knowledge.

(c) I have no knowledge.

(d) To the best of my knowledge, I do not know.

(e) I have no knowledge.

(f) As Mayor of the City of North Little Rock, I did not have any reason to suspect that Mr. Livdahl was not acting as a representative or agent of the corporate owner of the property because I was aware that he was previously involved in the business operations of the Gentlemen's Club.

REQUEST FOR PRODUCTION NO. 7: Please provide all documents and records that support your response to the preceding interrogatory.

RESPONSE: N/A.

INTERROGATORY NO. 7: Please explain the City's policy regarding the issuance of permits to repair properties for which the City is considering condemnation.

RESPONSE: To the best of my knowledge, I am not aware of any such policy.

REQUEST FOR PRODUCTION NO. 8: Please provide copies of any written policies regarding the issuance or denial of permits for properties for which the city is considering condemnation.

RESPONSE: N/A.

INTERROGATORY NO. 8: Please explain, in detail, what due process protections are provided by the City to property owners whose property is under consideration for condemnation?

RESPONSE: The City complies with state requirements for due process protections with regards to property owners whose property is under consideration for condemnation.

INTERROGATORY NO. 9: Please explain, in detail, the City Council's procedure for determining which properties will be subject to condemnation.

RESPONSE: Officers with the North Little Rock Code Enforcement Department investigate properties that are not in compliance with City, state, and/or federal codes. If the property is a deemed to be a nuisance by the Code Enforcement Department, the Department may then present the issue to the City Council for a condemnation resolution, which is sponsored by the Mayor. The property owners are notified and the City holds a hearing to address the issue. The City Council will then vote on the issue. If the property is condemned, the property

owner may sit with the City and work out a rehabilitation agreement or the owner may appeal the decision.

INTERROGATORY NO. 10: Please define the following terms used in Resolution NO. 8272 as you believe they apply to the Property and list each and every condition, fact, or circumstance that supports the application of each term to the property and list each item of evidence which supports these findings that you considered prior to your vote to condemn the Property:

(a) Run down

(b) Dilapidated

(c) Unsightly

(d) Dangerous

(e) Obnoxious

(f) Unsafe

(g) Not fit for human habitation

(h) Detrimental to the public welfare

RESPONSE: Defendant objects to this Interrogatory because it is overbroad and not reasonably calculated to discover evidence admissible at trial. Without waiving this objection, see Response to Interrogatory No. 1. Defendant defines the terms as follows:

(a) Run down – Uninhabitable

(b) Dilapidated – Uninhabitable

(c) Unsightly – Visually obnoxious

(d) Dangerous – Means for someone or something that is not familiar with the property that could allow them to wander onto or into the property and become injured

(e) Obnoxious – See above definitions

(f) Unsafe – See "dangerous"

(g) Not fit for human habitation – See "dangerous" and "unsafe"

(h) Detrimental to the public welfare – See "dangerous," "unsafe," and "not fit for human habitation"

INTERROGATORY NO. 11: Please list and describe each item of evidence that you considered prior to your vote to condemn the Property which supports the finding that the property constitutes a serious

(a) Fire hazard

(b) Health hazard

RESPONSE: N/A. See Response to Interrogatory No. 1.

INTERROGATORY NO. 12: If the determination that a property is a fire hazard is based on issues with electrical wiring, did you consider the fact that the electricity was not connected to the property prior to your vote to find that the property is a fire hazard?

RESPONSE: N/A. See Response to Interrogatory No. 1.

INTERROGATORY NO. 13: Please list and describe each item of evidence condition, fact, and circumstance you considered prior to your vote which supports your vote finding as stated in Resolution No. 8272 that "immediate actions" were necessary, that "There is a great likelihood that the surrounding property may be destroyed by fire originating from" the Property, that the property is "a breeding place for rats, rodents, and other dangerous germ carriers of disease," that the property is a "menace to abutting properties," and that the property was an immediate threat to public health or safety.

RESPONSE: N/A. See Response to Interrogatory No. 1.

INTERROGATORY NO. 14: In voting to support the condemnation of the Property, did you believe that the alleged conditions which make the property a threat to health and safety cannot be repaired or that demolishing the building is the only way to eliminate these conditions?

RESPONSE: N/A. See Response to Interrogatory No. 1.

INTERROGATORY NO. 15: Please explain, in detail, the process by which a property owner may seek approval of a rehabilitation plan? Is a property owner required to secure the sponsorship of a council member? If so, what options are available to a property owner who cannot secure the sponsorship of a council member?

RESPONSE: To the best of my knowledge, after a property has been condemned, the owner has thirty days to establish a plan and post a bond. They do not require sponsorship from a Council member.

REQUEST FOR PRODUCTION NO. 9: Please provide copies of any written policies, procedures, instructions, or guidance relating to the development of a rehabilitation plan.

RESPONSE: N/A.

INTERROGATORY NO. 16: Have you ever voted against approving a rehabilitation plan? If so, please provide the date, property address, and owner's name.

RESPONSE: No.

INTERROGATORY NO. 17: Have you ever been asked to sponsor a rehabilitation plan? If so, how did you respond? Please provide the approximate date, property address, and owner's name.

RESPONSE: No.

INTERROGATORY NO. 18: In regards to a property for which the City is considering condemnation or which has been condemned, have you ever received, rejected, sponsored, or

EXHIBIT G

voted on a request to waive the requirement that an owner post a bond equal to the cost of demolition before being allowed to repair the property? If so, please state the property address, owner's name, and approximate date.

RESPONSE: No.

INTERROGATORY NO. 19: In regards to a property for which the City is considering condemnation or which has been condemned, have you ever received or voted on a request that the requirement that an owner provide a letter of credit before being allowed to repair the property? If so, please state the property address, owner's name, and approximate date.

RESPONSE: No.

INTERROGATORY NO. 20: To the best of you knowledge, has the City ever approved a rehabilitation plan and later deemed the repairs made to be unacceptable or incomplete and proceeded demolish the structure? I so, did you participate in or vote on this decision? Please state the property address, owner's name, and approximate date.

RESPONSE: To the best of my knowledge, I do not know.

INTERROGATORY NO. 21: Please explain, in detail, the substance of all communications you have had with other City official, employees, agents, representatives, citizens, or any other persons regarding the Drugstore Cowboys, Gentleman's Club 70 business. Please provide the names of the parties to the communications, and approximate dates.

RESPONSE: To the best of my knowledge and recollection, I believe I have spoken with Tom Wadley about the condemnation in passing, but do not specifically recall what was discussed or when this discussion occurred. I may have also spoken with Richard Livdahl about the condemnation, but I do not specifically recall if or when we spoke or spoke about Drugstore Cowboys, Gentleman's Club 70 business.

REQUEST FOR PRODUCITON NO. 10: Please provide all documents and records that support your response to the preceding interrogatory.

RESPONSE: N/A.

INTERROGATORY NO. 22: Please list all communications of which you were a party regarding the Property or Plaintiff that have not been previously addressed in these Interrogatories. Please summaries the content of these communications.

RESPONSE: None known.

REQUEST FOR PRODUCTION NO. 11: Please provide all documents and records that support your response to the preceding interrogatory.

RESPONSE: N/A.

INTERROGATORY NO. 23: Did you make any inquiries or receive any update regarding the condition of the Property as of February 25, 2013? If so, please describe the inquiries made and/or information received.

RESPONSE: To the best of my knowledge, I do not recall.

INTERROGATORY NO. 24: Please list all violations and conditions that must be repaired or corrected so that, in your opinion, the property would no longer deemed to be a nuisance.

RESPONSE: Defendant objects to this Interrogatory because it is overbroad and requires speculation. Without waiving this objection, I do not have knowledge as to all violations and conditions that must be repaired or corrected because that is determined by City building inspectors as part of the rehabilitation agreement. I cannot list the violations because I do not have the building code inspectors' report and recommendation. Nor am I aware if one exists. For

it to no longer be a nuisance, the property must meet all standards the City has in place in its building maintenance code.

INTERROGATORY NO. 25: Please list all lawsuits to which you have been a party within the last five (5) years. Please include the names of the other parties, date filed, court and case number, and disposition.

RESPONSE: In addition to the present suit, to the best of my knowledge I have been a party to the following lawsuits within the last five (5) years

(a) *Lynch, et al. v. Stodola, et al.*, 1-24-13, Pulaski County Circuit Court, 60CV-13-360, pending; and

(b) *Gilbert v. Joe Smith*, 4-24-13, Pulaski County Circuit Court, 60CV-13-1751, dismissed.

Separate Defendant retains the right to supplement any and all responses as discovery progresses.

Respectfully Submitted,

Daniel L. McFadden (2011035)
Assistant City Attorney
300 Main Street
PO Box 5757
North Little Rock, Arkansas 72119
Voice: (501) 975-3755
Fax: (501) 340-5341
Email: dmcfadden@northlittlerock.ar.gov

EXHIBIT G

CERTIFICATE OF SERVICE

I, Daniel L. McFadden, do hereby certify that a copy of the foregoing pleading was deposited into the U.S. mail, postage prepaid on this 4th day of November, 2013, addressed to:

Mickey Stevens
Attorney for Plaintiff
P.O. Box 2165
Benton, AR 72018

Daniel L. McFadden

EXHIBIT G

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

CONVENT COPRORATION,
Individually and on Behalf of all
Others Similarly Situated **PLAINTIFF**

v. **CASE NO. 4:13-CV-0259**

CITY OF NORTH LITTLE ROCK, ARKANSAS, a Municipal Corporation, JOE SMITH, Mayor, Individually and in his Official Capacity, City Council Members DEBI ROSS, BETH WHITE, LINDA ROBINSON, MAURICE TAYLOR, STEVE BAXTER, BRUCE FOUTCH, MURRY WITCHER, and CHARLIE HIGHT each Individually and in his or her Official Capacity, TOM WADLEY, Director, Code Enforcement Division, Individually and in his Official Capacity, and FELECIA MCHENRY, Code Enforcement Officer, Individually and in her Official Capacity **DEFENDANTS**

SEPARATE DEFENDANT'S RESPONSES TO PLAINTIFF'S INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS

Comes Separate Defendant, City of North Little Rock, Arkansas, by and through its attorney, Assistant City Attorney Daniel L. McFadden, and for its Responses to Plaintiff's Interrogatories and Requests for Production of Documents, states as follows:

REQUEST FOR PRODUCTION NO. 1: Please produce all documents, records, emails, text messages, and all other records regardless of how stored, which have any bearing on the factual questions at issue in the present litigation, including, but not limited to, the claims addressed in the Complaint.

RESPONSE: See attached Response to Request for Production No. 1.

EXHIBIT H

REQUEST FOR PRODUCTION NO. 1[1]: Please produce any and all written or recorded statements, and reports in the care, custody or control of the City, its officials, employees, agents or representatives obtained from any person having knowledge of facts taken prior to the filing of this lawsuit.

RESPONSE: See preceding response.

REQUEST FOR PRODUCTION NO. 2: Please produce all writings, drawing, graphs, charts, photographs, or other tangible items of any kind intended to be used by you as exhibits or which you intend to admit into evidence at the trial of this case.

RESPONSE: As discovery is on-going in this matter, Defendant City of North Little Rock, Arkansas, has not made a final determination of exhibits or which it intends to admit into evidence, should this case go to trial. Defendant may use any of the documents attached hereto as Response to Request for Production No. 1, as well as any submitted by the remaining Defendants. Defendant reserves to right to supplement this response through the course of discovery as more documents become available.

REQUEST FOR PRODUCTION NO. 3: Please produce a copy of all letters, correspondence, emails, texts, or other communications between City officials, employees, agents, or representatives and any other person or entity that in any way relate to the Property or Plaintiff. Please provide copies of all written and electronic communications to which any employee or elected official of the City was a party, whether these were communications were between employees and staff, elected officials, or with citizens or any other party. Please include text messages, emails, letters, and all other communications, regardless of how they were sent, received, or stored.

RESPONSE: See Response to Request for Production No. 1.

[1] Separate Defendant notes Plaintiff's use of the same sequential number for its Request for Production.

EXHIBIT H

REQUEST FOR PRODUCTION NO. 5: Please produce copies of all expert reports which in any way relate to this lawsuit. If such reports are not in writing, but were given verbally, Plaintiff requests that the reports be reduced to writing and provided to Defendant.

RESPONSE: Defendant objects to the preceding Request for Production to the extent it requests verbal reports be reduced to writing because it requests Defendant to create documentation and evidence for the Plaintiff in this case, and it is not reasonably calculated to discover admissible evidence. Without waiving this objection, to the best of the City's knowledge, there are no known reports.

REQUEST FOR PRODUCTION NO. 6: Please produce all diaries, calendars, or any other lists or notes kept by City officials, employees, agents, or representatives that in any way relate to the Property or Plaintiff.

RESPONSE: See Response to Request for Production No. 1.

REQUEST FOR PRODUCTION NO. 7: Please provide all documents and records relating to the enactment of Chapter 8, Article 1, Section 7 of the City's Code including all public notices, resolutions, and minutes of council meetings.

RESPONSE: See attached Response to Request for Production No. 7.

REQUEST FOR PRODUCTION NO. 8: Please provide copies of all resolutions condemning properties pursuant to Chapter 8, Article 1, Section 7 of the City's Code within the past five (5) years.

RESPONSE: See attached Response to Request for Production No. 8.

REQUEST FOR PRODUCTION NO. 9: Please provide copies of all rehabilitation agreements entered by the City for properties that were condemned or where condemnation was proposed within the past five (5) years.

EXHIBIT H

RESPONSE: See attached Response to Request for Production No. 9.

REQUEST FOR PRODUCTION NO. 10: Please provide a copy of the agreement between Drugstore Cowboys / Gentleman's Club 70 and the City regarding the closing or relocation of the business.

RESPONSE: See Response to Request for Production No. 1.

INTERROGATORY NO. 1: Please explain, in detail, the factual and legal basis for the City's decision to condemn the Property including a list and description of each item of evidence and each and every alleged code violation, fact, condition, or circumstance considered by or presented to the City Council either prior to or at the February 25, 2013 meeting of the Council. Please include a designation of each item of evidence, condition, fact, and circumstance considered by the City Council prior to the condemnation vote which supports its finding as stated in Resolution No. 8272 that "immediate actions" were necessary, that "there is a great likelihood that the surrounding property may be destroyed by fire originating from" the Property, that the Property is "a breeding place for rats, rodents, and other dangerous germ carriers of diseases," and that the property is "a menace to abutting properties." Please also include and designate each item of evidence considered by the City Council prior to the condemnation vote which supports the finding that the property constitutes a serious

(a) Fire hazard;

(b) Health hazard;

(c) An immediate threat to public health or safety.

RESPONSE: See Responses to Interrogatory No. 1, No. 9, and No. 11 of Aldermen Debi Ross, Beth White, Linda Robinson, Maurice Taylor, Steve Baxter, Bruce Foutch, Murry

EXHIBIT H

Witcher, and Charlie Hight. See also Responses to Interrogatory No. 13 and No. 14 of Tom Wadley and Responses to Interrogatory No. 12, No. 13, and No. 16 of Felecia McHenry.

INTERROGATORY NO. 2: Please provide the date of each complaint made by anyone to any City employee or elected official regarding the Property, whether the complaint was made orally, in writing, or submitted electronically. Please also provide the name of the person making the complaint, the nature of the complaint, to whom the complaint was made and what, if any, action was taken by the City following the complaint.

RESPONSE: See Responses to Interrogatory No. 2 and No. 4 of Aldermen Debi Ross, Beth White, Linda Robinson, Maurice Taylor, Steve Baxter, Bruce Foutch, Murry Witcher, and Charlie Hight. See Responses to Interrogatory No. 2 and No. 4 of Mayor Joe Smith. See Response to Interrogatory No. 7 of Tom Wadley. See Response to Interrogatory No. 7 of Felecia McHenry.

REQUEST FOR PRODUCTION NO. 11: Please provide all documents, records, emails, text messages, and any other records regardless of how stored, whether written or electronic, relating to your response to the preceding interrogatory.

RESPONSE: None applicable.

INTERROGATORY NO. 3: Please identify all manuals or other documents or records which contain policies, procedures, instruction, or guidance to Code Enforcement Division employees in regards to inspection and condemnation of properties.

RESPONSE: City Nuisance Abatement Code, City Property Maintenance Code, International Code Council, and International Building and Fire Code.

INTERROGATORY NO. 4: Please explain in detail the City's policy regarding communications with a property owner that is a corporate entity. Specifically, please address the following:

(a) Does the City have a policy that requires that it only deal with an officer, director, or shareholder of a corporate entity?

(b) Has the City ever dealt with an agent or employee of a corporate entity regarding property issues?

(c) If this a common or typical practice, please so state? If it is not a common practice, please state when and under what circumstances the City has dealt with employees, agents, or representatives of corporate property owners.

(d) Does the City require that an agent or representative of a corporate property owner prove that he or she has an ownership interest in the property?

(e) What documentation or proof of ownership has the City previously required of agents or representatives of corporate owners?

(f) Did the City have any reason to suspect that Mr. Livdahl was not acting as a representative or agent of the corporate owner of the property? If so, please explain in detail.

RESPONSE:

(a) None known.

(b) To the best of its knowledge, yes.

(c) The City communicates with corporate property owners on a case-by-case basis. The City may communicate with the director, president, shareholder, or other corporate

officer. The City may communicate with the registered agent of service or corporate employee, or it may communicate with the attorney representing the corporation.

(d) Defendant objects to part (d) of the preceding Interrogatory because it is confusing and misleading. Without waiving this objection, communications are accomplished on a case-by-case basis.

(e) Defendant may require the following proof, which are included, but not limited to, public records on file in any court of law or the Arkansas Secretary of State, business cards, voice verification, and/or letterhead.

(f) See Responses to Interrogatory No. 17, No. 19, and No. 20 of Tom Wadley, Responses No. 9, No. 17, No. 19, and No. 21 of Felecia McHenry. See also Response to Interrogatory No. 6 of Mayor Joe Smith and Response to Interrogatory No. 18 of Alderman Maurice Taylor.

INTERROGATORY NO. 5: Please state how each of the following terms are defined by the City's Code:

(a) Occupancy

(b) Owner

(c) Person

RESPONSE:

(a) Occupancy: The purpose for which a building or portion thereof is utilized or occupied;

(b) Owner: Any person, agent, operator, firm or corporation having a legal or equitable interest in the property; or recorded in the official records of the state, county or municipality as holding title to the property; or otherwise having control of the

property, including the guardian of the state of any such person, and the executor or administrator of the estate of such person if ordered to take possession of real property by a court;

(c) Person: An individual, corporation, partnership, or any other group acting as a unit.

INTERROGATORY NO. 6: Does the City's Code contain different requirements for structures that are "vacant" versus those that are "utilized or occupied?"

RESPONSE: To the best of the City's knowledge and upon information and belief, no.

INTERROGATORY NO. 7: Please explain the City's policy regarding the "red-tagging" of a property. Specifically, please explain what a "red-tag" means, the procedure and criteria used to determine when a property should be "red-tagged," the issuance of a building permit for a property that has been "red-tagged," and what a property owner is permitted to do with a property that has been "red-tagged."

RESPONSE: See Response to Interrogatory No. 22 of Tom Wadley.

REQUEST FOR PRODUCTION NO. 13: Please produce copies of any written policies regarding the practice and procedure of "red-tagging" a property.

RESPONSE: See attached Response to Request for Production No. 13.

INTERROGATORY NO. 8: Please explain the City's policy and practice regarding the issuance of permits to repair properties for which the City is considering condemnation.

RESPONSE: The City does not have a policy or practice concerning the issuance of permits to repair properties for which it is considering condemnation. Once legislation is filed in the City Clerk's office proposing condemnation of a property, the City does not take any action until the City Council has voted upon the issue.

REQUEST FOR PRODUCTION NO. 14: Please provide copies of any written policies regarding the issuance or denial of permits for properties for which the city is considering condemnation.

RESPONSE: None applicable.

INTERROGATORY NO. 9: Please explain, in detail, what due process protections are provided by the City to property owners whose property is under consideration for condemnation.

RESPONSE: The City complies with all state requirements for due process in regards to condemnation proceedings. Notice is provided to the property owner(s) and a hearing is held, whereby the property owner presents his or her position to the City Council. The owner's testimony is heard and photographs are displayed on projector screens for the Aldermen and all present to view. The relevant Code Enforcement officer may also be present to answer any questions an Aldermen or the Mayor may have. After all of the evidence is presented, individual Aldermen vote on whether or not to exercise the authority to condemn the structure. In the event a property is condemned, the property owner is informed he or she may visit with the Director of Code Enforcement and a representative of the City Attorney's office to work together to develop a rehabilitation plan, which may be presented to City Council for approval. Alternatively, a property owner may appeal the condemnation decision to Pulaski County Circuit Court, pursuant to Ark. Code Ann. § 14-56-425 and Ark. Dist. Ct. R. 9.

INTERROGATORY NO. 10: Please explain, in detail, the City's procedure for determining which properties will be subject to condemnation.

RESPONSE: See Responses to Interrogatory No. 7 of Aldermen Ross, White, Robinson, Taylor, Baxter, Foutch, Witcher, and Hight. See Response to Interrogatory No. 9 of Mayor Smith.

INTERROGATORY NO. 11: Please define the following terms as they are used in Resolution No. 8272 and list each and every condition, fact, or circumstance that supports the application of each term to the property and list each item of evidence considered by the city council prior to the condemnation vote which supports these findings:

(a) Run down

(b) Dilapidated

(c) Unsightly

(d) Dangerous

(e) Obnoxious

(f) Unsafe

(g) Not fit for human habitation

(h) Detrimental to the public welfare

RESPONSE: See Responses to Interrogatory No. 1, No. 8, and No. 9 of Aldermen Ross, White, Robinson, Taylor, Baxter, Foutch, Witcher, and Hight. See Response to Interrogatory No. 8 of Mayor Smith.

INTERROGATORY NO. 15:[2] If the determination that a property is a fire hazard is based on issues with electrical wiring, what impact does the fact that the electricity was not connected to the property have on the determination of a fire hazard?

RESPONSE: Unknown.

[2] Separate Defendant notes the absence of Interrogatories No. 12, 13, and 14. Because Plaintiff does not exceed the maximum permitted by Fed. R. Civ. P., Separate Defendant responds in the number and sequence as provided in Plaintiff's requests accordingly.

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INTERROGATORY NO. 16: Is it the City's contention that the alleged conditions which made the property a threat to health and safety cannot be repaired or that demolishing the building is the only way to eliminate these conditions?

RESPONSE: No. It is the position of the City that the conditions may be repaired. The City attempted to enter into a rehabilitation agreement with the Plaintiff and that offer is, and has remained, available and the preferred course of action.

INTERROGATORY NO. 17: Please describe, in detail, the City's policies and procedures for evaluating and approving a rehabilitation plan for a property that has been condemned. Specifically, please address the following:

(a) What is required for a rehabilitation plan and what criteria are used to evaluate the plan?

(b) Who decides whether the plan is acceptable?

(c) Are there any written policies regarding the requirements and evaluation of a rehabilitation plan?

(d) Please explain, in detail, the process by which a property owner may seek approval of a rehabilitation plan?

(e) Is a property owner required to secure the sponsorship of a council member?

(f) If so, what options are available to a property owner who cannot secure the sponsorship of a council member?

(g) Please explain, in detail, the process by which the City determines the amount of the bond it requires for approval of a rehabilitation plan.

RESPONSE:

(a) The owner of the property that has been condemned must submit plans to the City, including the costs involved, a list of licensed and/or bonded contractors to perform the work, bids, and demonstrate the owner has the ability to fulfill the financial obligations of the rehabilitation. A representative of the City Attorney's office will review all of this information. If satisfactory, the plan is brought before the City Council for its approval. Normally, the process provides for six months for rehabilitation, but this may be extended.

(b) All parties involved, including the property owner, the representative of the City Attorney's office, and the City Council, decide whether the plan is acceptable.

(c) None known.

(d) See preceding response to "a."

(e) No.

(f) N/A. The property owner may obtain sponsorship through the Mayor.

(g) The City examines the amount of money it will take to condemn the property, how much money the party performing the actual rehabilitation requires, and/or what the contractor requires.

REQUEST FOR PRODUCTION NO. 15: Please provide copies of any written policies, procedures, instructions, or guidance relating to the development of and approval or denial of a rehabilitation plan.

RESPONSE: See attached Response to Request for Production No. 15.

INTERROGATORY NO. 15: What is the City's policy regarding obtaining or attempting to obtain the owner's permission before inspecting a property? If the City does not have a formal policy regarding this, what is the typical practice?

RESPONSE: The City does not have a formal policy for obtaining or attempting to obtain the owner's permission before inspecting a property. The City complies with its municipal code and applicable state and federal laws. The typical practice for attempting to obtain prior permission before inspecting the interior of a property is to attempt to notify the owner of record or tenant out of common courtesy. If the property owners are unable to be contacted and/or refuse entry, Code Enforcement officers will then draft an affidavit in support of a search warrant and a search warrant to be signed by a North Little Rock District Court judge, subject to his or her approval. Approval for an exterior inspection is not typically sought.

INTERROGATORY NO. 16: Please list and describe every attempt made by any City official, employee, representative, or agent to obtain permission from the property owner to inspect the Property. Please state specifically whether any owner, agent, representative, or any other person purporting speak for the owner denied permission to inspect the property.

RESPONSE: Felecia McHenry, a Code Enforcement Officer, contacted Richard Livdahl and requested his permission to conduct an interior inspection of the property. She requested that he meet her at the property so he could be present with her as she conducted the inspection. Richard Livdahl did not deny permission to inspect the property. Richard Livdahl informed Officer McHenry he had no way to access to interior of the building himself. Because Richard Livdahl, who had presented to the City, Officer McHenry, and others that he was an owner, agent, and/or representative of the property owner, state he could not provide access into the building, Officer McHenry made the determination to have an affidavit for a search warrant and a search warrant drafted for a North Little Rock District Court Judge's approval.

INTERROGATORY NO. 17: Does the city have a policy relating to notification of an owner when a property is found or left unsecured after an inspection by City staff? If the answer is no, what is the City's typical practice for this type of situation.

RESPONSE: To the best of its knowledge, there is no formal policy for providing such notification. If a property is left unsecured, the practice is to notify the owner of record, registered agent of service, tenant, or others that the property has been left unsecured.

INTERROGATORY NO. 18: Please list each and every date on which any City employee or official inspected the Property, the name of the employee(s) or official(s) performing the inspections and the purpose of the inspection.

RESPONSE: The Defendant objects to the preceding Interrogatory because it is overbroad, over burdensome, and not reasonably calculated to the discovery of admissible evidence. The information requested is a matter of public record and, therefore, is just as available to the Plaintiff as it is to the Defendant. At its own time and expense, the Plaintiff may inspect these records at the Code Enforcement Department, subject to coordination with the City Attorney's Office.

REQUEST FOR PRODUCTION NO. 16: Please provide copies of all inspection reports, notes, and all other documents and records of inspections performed by City staff on the property.

RESPONSE: The Defendant objects to the preceding Request for Production because it is overbroad, over burdensome, and not reasonably calculated to the discovery of admissible evidence. The information requested is a matter of public record and, therefore, is just as available to the Plaintiff as it is to the Defendant. At its own time and expense, the Plaintiff may inspect these records at the Code Enforcement Department, subject to coordination with the City

Attorney's Office. Without waiving this objection, see Response to Request for Production No. 1.

INTERROGATORY NO. 19: In regards to a property for which the City is considering condemnation or which has been condemned, has the City ever waived the requirements that an owner post a bond equal to the cost of demolition before being allowed to repair the property or that an owner provide a letter of credit before being allowed to repair the property? If so, please state the property address, owner's name, and approximate date.

RESPONSE: To the best of its knowledge, no.

INTERROGATORY NO. 20: Has the City ever approved a rehabilitation plan and later deemed the repairs made to be unacceptable or incomplete and proceeded demolish the structure? If so, please state the property address, owner's name, and approximate date.

RESPONSE: To the best of its knowledge, no.

INTERROGATORY NO. 21: Has the City ever recommended or required the use of a particular contractor(s) or vendor as part of a rehabilitation plan? If so, please list the approximate date, property address, owner's name, and contractor or vendor.

RESPONSE: To the best of its knowledge, no. The Code Enforcement Department maintains a list of current contractors and/or vendors that bid on City demolitions. This list is a matter of public record and is provided upon request to interested parties.

INTERROGATORY NO. 22: When the City determines that property poses an **immediate** threat to health and safety, what is the City's policy or typical practice for removing the **immediate** threat? If an **immediate** threat is not **immediately** removed, what actions does the City take to prevent the **immediate** harm that may result?

RESPONSE: The practice of the City is to require the property owner(s) to abide by the provisions of the City's property maintenance code and nuisance abatement code, if applicable. If the threat to health and safety is not immediately removed, officials may issue the responsible person a citation to appear in North Little Rock District Court and request the North Little Rock District Court judge to order the abatement of the nuisance and/or the City may take action and abate the nuisance itself. The City may also seek abatement or seek abatement and condemnation. The City may also issue a citation.

INTERROGATORY NO. 23: Please explain, in detail, the events and circumstances that led to the enactment of the City's zoning ordinance regulating sexually oriented businesses. Please include the following:

(a) Did the City receive complaints from citizens about Drugstore Cowboys / Gentleman's Club 70 establishment? If so, please state the name of the complainant, the nature of the complaint, and to whom the complaint was made;

(b) Did the City receive complaints from citizens about any other sexually oriented businesses? If so, please state the name of the complainant, the date of the complaint, the nature of the complaint, and to whom the complaint was made;

(c) Please identify the City employee or official who proposed the ordinance;

(d) Please describe, in detail, the process by which the ordinance was proposed and enacted.

RESPONSE: Separate Defendant objects to the preceding Interrogatory because it is overbroad, over burdensome, and not reasonably calculated to discover admissible evidence. The amount and time involved to recover potential complaints dating back over forty-years is not reasonably calculated to discover admissible evidence and is overbroad and over burdensome.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

CONVENT COPRORATION,
Individually and on Behalf of all
Others Similarly Situated **PLAINTIFF**

v. **CASE NO. 4:13-CV-0259**

CITY OF NORTH LITTLE ROCK, ARKANSAS, a Municipal Corporation, JOE SMITH, Mayor, Individually and in his Official Capacity, City Council Members DEBI ROSS, BETH WHITE, LINDA ROBINSON, MAURICE TAYLOR, STEVE BAXTER, BRUCE FOUTCH, MURRY WITCHER, and CHARLIE HIGHT each Individually and in his or her Official Capacity, TOM WADLEY, Director, Code Enforcement Division, Individually and in his Official Capacity, and FELECIA MCHENRY, Code Enforcement Officer, Individually and in her Official Capacity **DEFENDANTS**

SEPARATE DEFENDANT'S RESPONSES TO PLAINTIFF'S INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS

Comes Separate Defendant, Officer Felecia McHenry, by and through her attorney, Assistant City Attorney Daniel L. McFadden, and for her Responses to Plaintiff's Interrogatories and Requests for Production of Documents, states as follows:

INTERROGATORY NO. 1: Regarding your employment with the City, please state the following:

(a) Date of hire

(b) All positions held

(c) Current position

(d) Date of current position

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(e) Description of duties

RESPONSE:

(a) July 10, 2000.

(b) Code Enforcement Officer.

(c) Code Enforcement Officer.

(d) See (a) above

(e) I am considered the housing officer amongst the other code enforcement officers in the department. I inspect properties that appear to be abandoned or that are fire hazards or have been fire-damaged. I also inspect properties that I receive complaints on. Some properties I inspect are also self-initiated. The properties I inspect usually pose a health or safety hazard. With the assistance of the City Attorney's Office, I prepare legislation for properties that are deemed unsafe or uninhabitable for condemnation for City Council to consider condemning. I prepare this legislation for the entire Code Enforcement Department.

INTERROGATORY NO. 2: Please provide the following information regarding your qualifications and experience:

(a) List all formal classroom, practical, experiential, or other educational programs you have attended that are related to your qualification for your current position;

(b) List all prior work experience that is related to your qualifications for your current position;

(c) List any other training or experience that is related to your qualifications for your current position;

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(d) List any professional licenses you now hold or have held in the past related to your current position.

(e) Have you ever been subject to formal or informal disciplinary action by any licensing board, certification board, or any other regulatory entity relating to any professional license or certification? If so, please explain in detail.

(f) Have you ever been denied a professional license or certification? If so, please explain in detail.

RESPONSE:

(a) I am a Certified Housing and Building Inspector, certified by the Southern Building Code Council. I have been re-certified by the International Code Council. I participate in on-going education for these certifications every two years.

(b) I was hired to conduct rental inspections and I had previously managed real estate properties. In doing that, I had to conduct inspections as well.

(c) N/A.

(d) Certified Housing and Building Inspector.

(e) No.

(f) No.

INTERROGATORY NO. 3: Do you determine which properties will be inspected by Code Enforcement officers or are you told by anyone else which properties should be inspected?

(a) If you determine which properties should be inspected, please explain in detail the procedure by which you determine which properties should be inspected.

(b) If someone else determines what properties are inspected, please describe in detail the process by which the City determines which properties should be inspected.

EXHBIT I

RESPONSE: Normally, the properties I inspect are complaint-driven from the public. Occasionally, the properties I inspect are self-initiated. In some instances, there is a case-file that has been forwarded to me from another Code Enforcement officer, or a North Little Rock Police Department officer due to criminal activity.

(a) I look at the exterior of the property for exterior violations, such as a hole(s) in the roof, hole(s) in siding material, rotting, fascia, and soffit. Normally, the premises are unkempt. I also look at the building to see if it appears to be unsecure because of broken or missing windows and/or doors have kicked in and/or are missing entirely. I also consider fire damage.

(b) If this is sent to me from another officer, it is the same procedure in my previous answer immediately preceding this.

INTERROGATORY NO. 4: What is the City's policy regarding obtaining or attempting to obtain the owner's permission before inspecting a property? If the City does not have a formal policy regarding this, what is the typical practice?

RESPONSE: I am unaware of any policies. Pursuant to the City's Nuisance Abatement Code, if the inspection of the exterior of the property is self-initiated, Code Enforcement officers do not obtain prior permission to conduct an exterior inspection. For an interior inspection, the practice is to request an interior inspection from the property owner or tenant out of common courtesy, but the Nuisance Abatement Code provides enforcements officers right of entry if they obtain a search warrant.

INTERROGATORY NO. 5: Please explain, in detail, the process by which the Code Enforcement Division conducts property inspections.

(a) Please explain, in detail, what you are looking for during an inspection;

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(b) What are the standards, policies, rules, or other guidelines that determine whether a particular condition is a violation?

(c) What do you do when you discover a violation?

(d) How do you document inspections?

(e) What is the procedure for reinspecting a property after a violation has been corrected?

RESPONSE:

(a) See Response to Interrogatory No. 3.

(b) The standards, rules, and guidelines used to determine violations are in the North Little Rock Nuisance Abatement Code, the International Code Council, and International Building and Fire Code.

(c) When I discover a violation, I notify the owner of record by certified mail and regular mail. I also post notice on the property itself. If I deem the property to be unsafe or uninhabitable, I post a red-tag notification on the property deeming it to be unsafe.

(d) I document inspections through written documentation and/or photographs to place in a file for the particular property. The file is usually entered into the Code Enforcement database by a supervisor.

(e) The procedure for reinspection after a violation has been corrected consists of the contractor or property owner contacting the Code Enforcement Department to schedule a re-inspection. Once the officer sees that all violations have been corrected, the owner receives a certificate of occupancy.

INTERROGATORY NO. 6: Do you or have you ever recommended a particular contractor(s) or vendor(s) who may be utilized to correct violations? If so, please provide the dates, property addresses, owner's name, and contractor(s) or vendor(s) recommended.

RESPONSE: No. The Department maintains a list of current contractors and/or vendors that bid on City demolitions. This list is a matter of public record and is provided upon request to interested parties.

INTERROGATORY NO. 7: Please explain, in detail, how the Property first came to your attention.

(a) Were you made aware of any complaints from citizens regarding the Property?

(b) If so, please describe how you became aware of the complaint(s), who made the complaint(s), to whom the complaint(s) was made, and the nature of the complaint?

(c) Were you instructed by anyone to inspect the property?

(d) If so, who instructed you to inspect the property?

(e) If someone instructed you to inspect or have the property inspected, please state exactly what your instructions were.

RESPONSE: The property came to my attention through Officer Russell Elrod. The Meadow Park Neighborhood Association had made complaints regarding the property. Officer John Roberts with Code Enforcement maintained an on-going file for the property because it was not secured and had tall grass. The property owners would consistently fail to maintain the property.

(a) Yes.

(b) The Meadow Park Neighborhood Association complained to me at their monthly meeting about vagrants entering the building and hanging around it, that there was tall grass, that the building was deteriorating, and that the building was bringing down the property values of the other properties in the area.

(c) No.

(d) N/A.

(e) N/A.

REQUEST FOR PRODUCTION NO. 1: Please provide all documents you are aware of which have any bearing on the factual questions in the present litigation, including, but not limited to, the claims addressed in the Complaint.

RESPONSE: See attached Response to Request for Production No. 1. See also City of North Little Rock's Responses to Requests for Production of Documents.

INTERROGATORY NO. 8: For each inspection that you conducted, please provide the following information:

(a) Date of inspection;

(b) What did you do when you arrived at the property?

(c) Did you inspect the exterior of the property? If so, please list each and every code violation that you observed on the exterior of the property.

(d) Did you inspect the interior of the property? If so, please describe, in detail, the progress of your inspection including when and where you discovered each violation and the manner in which each violation was documented.

(e) Was the electrical supply connected to the property at the time of your inspection?

(f) How did you enter the property? Was the entrance locked when you arrived?

(g) Did you take notes during your inspection? Please identify each and every document you completed regarding your inspection of the property.

(h) Did you secure the property before you left? If not, did you contact the owner to advise them that the property was unsecured?

(i) What actions did you take after completing the inspection? Did you report your findings to anyone? If so, to whom did you report and what information did you report?

RESPONSE: Defendant objects to the preceding Interrogatory because it is vague, confusing, and appears to seek speculation from her on every inspection ever conducted at the premises. To the extent the preceding Interrogatory seeks responses concerning every inspection ever conducted, Defendant submits the information is a matter of public record and therefore is just as available to the Defendant as it is to the Plaintiff. In the event the Plaintiff is seeking information concerning every inspection ever conducted, Defendant submits Plaintiff may personally inspect such information at its own time and expense at any time during regular business hours and in coordination with the North Little Rock City Attorney's Office. Without waiving this objection, to the extent Plaintiff is requesting information concerning inspections for the events surrounding the current lawsuit, the Defendant submits the following: I personally conducted two searches at the premises. My first inspection was limited to the exterior of the structure, and my second inspection included both the exterior and interior.

First inspection

(a) On or about November 14, 2012.

(b) When I arrived at the property, I observed the surroundings to make sure there were no vagrants around because that was one of the complaints from the Neighborhood Association. After I assessed the situation and determined there were no vagrants, I began to take photographs of all exterior violations. I took pictures of all sides of the property and any openings or holes in the property. I also took photographs of tall

grass and any other violations according to the Building Code and Nuisance Abatement Code.

(c) Yes. Rotting fascia, rotting soffit, cracks and holes in the bricks, hole in the roof, substantial hole in the side of the brick wall where I was informed vagrants had entered, electrical wiring was disconnected from the panel, covers to panel boxes had been removed, the exterior doors were not secure, tall grass and weeds, and possible infestation.

(d) I did not inspect the interior of the building at this time.

(e) Yes. It was connected at the pole, but it was not turned on at the time of inspection.

(f) I did not enter the interior of the property. I pulled my vehicle into the parking lot, exited the vehicle, and bean the exterior inspection.

(g) I did not physically write notes. I used photographs to document the condition of the structure.

(h) No, I did not secure the property because I did not go inside the property. I did notify the agent of service, the current occupant, Drugstore Cowboy, and Mary Rose Bekkela.

(i) See answer to "h" immediately preceding. I sent notice by certified mail and normal mail, and posted notice of public nuisance to the premises. These notices included a request for the owner to contact me within 7 business days of receipt of notice. I reported my findings of violations to David Schalchlin and Tom Wadley.

Second Inspection

(a) On or about January 16, 2013.

(b) I, along with Code Enforcement Officers Wayne Wainwright and Russell Elrod, arrived at the property and conducted another exterior inspection. After completing the exterior inspection, we went to the front door and found the structure to be unsecure. There was a board on the front door, but some of the nails had been removed. After touching the board, it would slide out of place. We gained entry by sliding the board and opening the door, which was not locked. And then we conducted the interior inspection.

(c) Yes. There was still rotting fascia, rotting soffit, cracks and holes in the bricks, a hole in the roof, a substantial hole in the side of the brick wall where I was informed vagrants had entered, electrical wiring that was disconnected from the panel, covers to panel boxes that had been removed, exterior doors that were not secured, tall grass and weeds, and possible infestation.

(d) Yes. Upon entering the premises, we announced our presence as Code Enforcement Officers in the event that there were vagrants inside because we suspected they may be present due to the substantial holes in and on top of the building and because of complaints from the Neighborhood Association. We then posted the search warrant at the front of the premises at the front entrance area and took a photograph of it. We documented the violations by photograph. We noted collapsing ceilings as we entered the premises. We noted the structure was full of water from defective roof material and from multiple holes in the roof. We noted the ceiling was damaged throughout the structure. We noted mold and mildew throughout the structure. We noticed collapsing ceiling joints. As we progressed, it appeared the structure had been vandalized because sinks had been taken from the wall and broken apart, debris had

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been thrown around the interior of the premises, and desks had been overturned and papers scattered in the office area. The structure appeared to have sustained fire damage because of charred rooms, wood, and sheet rock. When we went upstairs, the floors were extremely weak and failing. There were also holes in the floors. The ceiling, walls, and floors were all collapsing throughout the second floor. There was also mold and mildew on the second floor. We noted a rodent infestation throughout the building. After we finished the interior inspection, we exited the structure and secured the building by placing the loose board back in front of the front door and nailing both sides of it to ensure it would stay secure. Then we left the premises.

(e) Yes. It was connected at the pole, but it was not turned on at the time of inspection.

(f) See answer to "d" preceding this subsection.

(g) I did not physically write notes. I used photographs to document the condition of the structure.

(h) See answer to "d" preceding this subsection.

(i) After completing the inspection, I reported my findings of violations and the condition of the structure to David Schalchlin and Tom Wadley. I also met with Richard Livdahl, to the best of my knowledge, the following day or so to discuss the above described condition of the structure.

INTERROGATORY NO. 9: Who made the decision to obtain a search warrant for the property? Did you or anyone else make any effort to obtain permission from the property owner to inspect the property?

RESPONSE: I made the decision to obtain a search warrant. I contacted Richard Livdahl and requested he meet me at the structure so I could inspect the interior of the property,

but he informed me he had no way to access the interior of the building. Because Richard Livdahl could not provide access to the structure, I made the decision to obtain the search warrant.

INTERROGATORY NO. 10: Please state each and every violation of the City's Code or other applicable law or regulation you alleged in your "Affidavit for Administrative Search Warrant" dated January 16, 2013. Please identify the specific provision of the City Code or other applicable law or regulation that applies to each alleged violation.

RESPONSE: In the affidavit for the administrative search warrant, I listed deteriorating and missing soffit (3.4.2), deteriorating and missing fascia (3.4.2), cracks and holes in the exterior walls where rain or other weather elements as well as insect infestation may occur (3.4.6), roofing material deteriorating or not in good repair where rain or other weather elements may occur (3.4.7), and loose and missing siding where rain or other weather elements as well as insect infestation may occur (3.4.6), all of which are found in the North Little Rock Nuisance Abatement Code.

INTERROGATORY NO. 11: Please state each and every fact on which the following statement in your "Affidavit for Administrative Search Warrant" dated January 16, 2013, is based: "it would appear that there are more Property Maintenance violations located on the interior of the structure creating an unsafe and hazardous environment." Specifically, please list and describe each and every fact that led you to believe the structure was "unsafe" and/or "hazardous."

RESPONSE: See Response to Interrogatory No. 10.

INTERROGATORY NO. 12: You have described this property as "a public nuisance," "unsafe" and "not fit for human habitation." Please explain, in detail, the factual basis of these

allegations. In Please list and describe each condition, fact, or circumstance on which this opinion was based. Also, please provide the applicable reference to the City's Code or other law or regulation pertaining to the condition.

RESPONSE: See Response to Interrogatory No. 8 (Second Inspection) and No. 10.

INTERROGATORY NO. 13: Please list and describe each and every condition, fact, or circumstance which indicates that the property was a threat to public health, safety, or welfare.

RESPONSE: See Response to Interrogatory No. 7, No. 8, and No. 10.

INTERROGATORY NO. 14: How is "occupancy" defined by the City's Code? At the time of your inspection, was the property occupied? Was the building being "utilized" or "occupied" at the time of any of your inspections? Does the City's Code, policies, or procedures in any way differentiate between occupied properties and vacant properties? If so, please explain in what ways the requirements for properties differ.

RESPONSE: The definition under the City's Housing Maintenance Code for occupancy is "the purpose for which a building or portion thereof is utilized or occupied." At the time of both inspections, the property was not occupied or utilized. The Nuisance Abatement Code requires vacant properties to be maintained in safe, clean, secure, and sanitary conditions so they will not cause blight or adversely affect the public health and safety. To the best of my knowledge, the City does not differentiate between occupied and vacant properties.

REQUEST FOR PRODUCTION NO. 2: Please provide copies of all notes or documents that you completed in regards to your inspection of the property.

RESPONSE: See City of North Little Rock's Response to Requests for Production of Documents.

REQUEST FOR PRODUCTION NO. 3: Please provide all documents and records related in any way to your response to the preceding interrogatory.

RESPONSE: Defendant objects to the preceding Request for Production of Documents. The Housing Maintenance Code is a matter of public available online through access to the internet and on paper. Therefore, the information is just as available to the Plaintiff as it is to the Defendant.

INTERROGATORY NO. 15: For each search warrant obtained for this Property, please describe the process by which the warrant was obtained. Specifically, who made the decision to seek the warrant, who approved the decision to seek the warrant and who applied for the warrant. Also, please describe in detail, how the warrant was presented to the judge, who presented the warrant, the specific information disclosed to the judge, and the substance of any and all discussions with the judge regarding the issuance of the warrant(s).

RESPONSE: See Response to Interrogatory No. 8 (Interior Inspection) and No. 9. To the best of my knowledge, only one search warrant was ever obtained for this particular piece of property. I submitted a request to David Schalchlin to prepare an affidavit affidavit and a search warrant based on the violations I had witnessed. David Schalchlin drafted the affidavit and search warrant for me and then I took it to North Little Rock District Court Judge Randy Morley. I then signed the affidavit in front of him as the affiant. Judge Morley reviewed all the documentation then signed the warrant and affidavit. I did not seek approval from anyone to request the warrant, and I applied for the warrant myself. Judge Morley read over the evidence that was presented to him and to the best of my knowledge the only discussion we had was over the condition of the property described in the affidavit.

INTERROGATORY NO. 16: Did you consider the property to be an immediate threat to health and safety? If so, please explain how you arrived at that conclusion and list each and every fact that supports your conclusion. Specifically, please address each and every fact that led you to conclude the property posed an **immediate** threat as all as the nature of the **immediate** threat.

RESPONSE: Yes. See Response to Interrogatory No. 7, No. 8, and No. 10.

INTERROGATORY NO. 17: Please list each and every person with whom you have discussed this property, including but not limited to, elected officials, city employees, and citizens, and summarize the substance of these communications.

RESPONSE: Defendant objects to the extent the preceding Interrogatory seeks information protected by attorney-client privilege. Without waiving this objection, see Response to Interrogatory No. 7 and No. 8. Also, to the best of my knowledge, I spoke with Assistant City Attorney Bill Brown when Richard Livdahl contacted me and stated that he was the attorney for the corporation, which I believe was early this year.

REQUEST FOR PRODUCTION NO. 4: If any of the communications listed in your response to the previous interrogatory were written or electronic, please provide the documents, records, emails, text messages, or other documentation regardless of how stored.

RESPONSE: See Response to Request for Production No. 1.

INTERROGATORY NO. 18: Have you reinspected the property since it was cleaned out? Did you reinspect the property prior to the City Council meeting on February 25, 2013? Did the City Council member or any other City employee or official inquire as to the condition of the property after it was cleaned? Did any City Council member or any other City employee or official inquire as to the condition of the property on February 25, 2013? Did you provide any

update to any City Council member, employee or official as to the condition of the property prior to the City Council meeting on February 25, 2013?

RESPONSE: Defendant objects to the preceding Interrogatory to the extent it requires and seeks speculation. Without waiving this objection, I have no knowledge if the property is cleaned and have not reinspected the property, nor did I reinspect prior to the February 25, 2013, meeting. No one contacted me about the property allegedly being cleaned or about the property on February 25, 2013. I did not provide updates prior to the Council Meeting.

INTERROGATORY NO. 19: What was the date of your first contact with Richard Livdahl regarding this property?

(a) What was the nature and substance of that contact?

(b) Did Mr. Livdahl inform you that he was a representative or agent of the property owner?

(c) Did you have any reason to suspect that Mr. Livdahl was not acting as a representative or agent of the corporate owner of the property?

RESPONSE: To the best of my knowledge and recollection, my first contact with Richard Livdahl regarding the property was December 2012.

(a) Richard Livdahl called me to inform me that Mary Rose Bekkela called him about receiving notice of public nuisance for the property. He identified himself as the attorney for the property owner and he wanted to schedule a meeting with me to discuss abatement of those nuisances and what he needed to do to correct the violations.

(b) Yes, he stated he was the property owner's attorney.

(c) At the time, I did not have any reason to suspect that he was not the attorney, representative, or agent of the corporate owner of the property.

INTERROGATORY NO. 20: When a property is owned by a corporation, does the City require that an officer, director, or shareholder be present for discussions or be a signatory or party to a rehabilitation agreement? Have you ever dealt with a representative, agent, or employee of a corporate property owner? If so, what documentation or proof of ownership did you require? Do you require that a person representing a corporate owner to produce paperwork showing that he or she personally as the "invested owner" of the property?

RESPONSE: Defendant objects to the preceding Interrogatory to the extent it seeks Defendant to use and/or refer to the term "invested owner" because the term "invested owner" is vague and confusing. Without waiving this objection, to the best of my knowledge the City requires an officer, owner, or corporation's attorney be present and/or siganatory or party to a rehabilitation agreement. I have dealt with a representative, agent, or employee of a corporate property owner. Normally, they are listed as the registered agent or the owner of record, which I independently investigate. If they are listed as neither, I request paperwork demonstrating ownership of or partnership interest in the property. To the best of my knowledge, the City has not requested the person to demonstrate they are specifically an "invested owner" of the property.

INTERROGATORY NO. 21: Please describe, in detail, the substance of the meeting in which you participated with Mr. Livdahl, Tom Wadley, and Bill Brown. In your letter to Mayor Smith you state that Mr. Livdahl "was advised on what would be required to bring the building into compliance according to City Codes." Please explain, in detail, exactly what repairs were discussed.

RESPONSE: See Response to Interrogatory No. 8. In the meeting, we attempted to determine who Richard Livdahl was and if he had an interest in the property. Upon learning that he was not a licensed attorney in the State of Arkansas, we all requested paperwork demonstrating he was a partner or owner of Convent Corporation and the property itself. We explained to him the condition of the building, exterior and interior. We gave him a copy of the photographs that were taken of all exterior and interior violations and explained what all needed to be done to bring the building into compliance. The repairs discussed were the hole in the roof, hole in the wall, fascia, soffit, and everything else provided in my Response to Interrogatory No. 8. Mr. Livdahl stated he and his partners were not in position to rehabilitate the structure and only wanted to clean it out. Mr. Livdahl stated he would take this information back to his partners and that he wanted the proposed condemnation removed from the City Council agenda. Mr. Wadley and Mr. Brown stated that they would refuse this request because he and his partners did not intend to have a rehabilitation plan with the City. He also stated he and his partners were not financially able to bring the building into compliance. He spoke with Mr. Brown to obtain a permit to clean out the interior of the structure and was advised that one was not necessary and he could clean out the structure at any time.

INTERROGATORY NO. 22: Please list all violations and conditions that must be repaired or corrected to bring the Property in compliance with all applicable City codes, laws, and regulations and so that the property would no longer deemed to be a nuisance.

RESPONSE: Defendant objects to the preceding Interrogatory because it seeks and requires speculation. Without waiving said objection, I do not have knowledge as to all violations and conditions that must be repaired or corrected because that is determined by City building inspectors once the building use is determined by the Chief Building Inspector. I do not

have access to any building inspector report or recommendation or have direct knowledge that any such report or recommendation exists.

INTERROGATORY NO. 23: In your letter to Mayor Smith dated January 11, 2013, you state that "the structure has sustained some fire damage." Please list each and every fact that supports this statement.

RESPONSE: There was charred wood on the walls and the ceiling that were visible in the upstairs area of the building. Portions of the floor on the first floor indicated smoke damage because the walls had smoke residue.

INTERROGATORY NO. 24: Did you "red-tag" the property? If so, please explain, in detail, why the property was "red-tagged."

RESPONSE: Yes. Once I conducted the first exterior inspection, I made the determination to red-tag the property because it was unsafe in my opinion. Specifically, all of the exterior violations listed in Response to Interrogatory No. 8 and the fact that it was not secured, as well as my suspicion and belief that vagrants had been using the property, made me believe it was uninhabitable. Because of all of the exterior violations, I also believed the interior would have violations as well, which also made me believe it was not fit for habitation.

REQUEST FOR PRODUCTION NO. 5: Please provide copies of any written policies regarding the practice and procedure of "red-tagging" a property.

RESPONSE: None known. Code Enforcement adheres to the City's code requirements for red-tagging. These are a matter of public record and available online and in print. They are just as available to the Plaintiff as they are to the Defendant.

EXHIBIT I

INTERROGATORY NO. 25: In the policy and practice of the City's Code Enforcement Department, how is the term "nuisance" defined and what criteria are considered in determining whether a property is a nuisance?

RESPONSE: The Department does not have a policy for defining "nuisance" or for what criteria constitute a nuisance. The Department defines "nuisance" as it is defined in Article 8, Sections 1, 2, and 3 of the Nuisance Abatement Code. The criteria used to determine whether a property is a nuisance are whether the property is in violation of municipal code, including the Nuisance Abatement and Property Abatement sections, and/or state or federal civil and criminal law.

Separate Defendant retains the right to supplement any and all responses as discovery progresses.

Respectfully Submitted,

Daniel L. McFadden (2011035)
Assistant City Attorney
300 Main Street
PO Box 5757
North Little Rock, Arkansas 72119
Voice: (501) 975-3755
Fax: (501) 340-5341
Email: dmcfadden@northlittlerock.ar.gov

EXHIBIT I

CERTIFICATE OF SERVICE

I, Daniel L. McFadden, do hereby certify that a copy of the foregoing pleading was deposited into the U.S. mail, postage prepaid on this 4th day of November, 2013, addressed to:

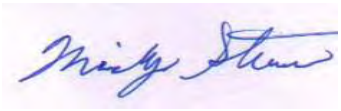
Mickey Stevens
Attorney for Plaintiff
P.O. Box 2165
Benton, AR 72018

Daniel L. McFadden

EXHIBIT I

CERTIFICATE OF SERVICES

I hereby certify that I served a copy of Appellant's Addendum by personal delivery to Marie Bernarde Miller, Deputy City Attorney, North Little Rock, Arkansas on this _____dayof _____, 2020. A copy has also been delivered to the Circuit Court on the same date.



Mickey Stevens

IN THE
SUPREME COURT OF ARKANSAS

CONVENT CORPORATION, Individually and on Behalf of all Others Similarly Situated	**APPELLANT**
v.	**NO. CV-20-216**
CITY OF NORTH LITTLE ROCK ARKANSAS, a Municipal Corporation, JOE SMITH, Mayor, Individually and in his Official Capacity, City Council Members DEBI ROSS, BETH WHITE, LINDA ROBINSON, MAURICE TAYLOR, STEVE BAXTER, BRUCE FOUTCH, MURRY WITCHER, and CHARLIE HIGHT, each Individually and in his or her Official Capacity, TOM WADLEY, Director, Code Enforcement Division, Individually and in his Official Capacity, and FELECIA MCHENRY, Code Enforcement Officer, Individually and in her Official Capacity	**APPELLEES**

ON APPEAL FROM THE CIRCUIT COURT
OF PULASKI COUNTY

THE HONORABLE ALICE GRAY, CIRCUIT JUDGE

APPELLANT'S ADDENDUM

Vol. 2 of 5

Mickey Stevens (2012141)
2615 N. Prickett Rd., Ste 2
Bryant, AR 72022
mickeystevens@outlook.com

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Volume I

Volume II

Volume III

**Note: The record prior to this point was initially prepared for a prior appeal. The record page references from this point forward are from the additional record prepared for the second appeal (pt. 2).*

Volume IV

**Note: The record page references from this point forward are from the additional record prepared for this appeal (pt. 3).*

Volume V

The following are from the first part of the record.

The following is from the third part of the record.

The City of North Little Rock

TOM WADLEY
DIRECTOR

701 WEST 29TH STREET
NORTH LITTLE ROCK, ARKANSAS 72114
501-791-8581 • Fax 501-791-8584
NLRCodeEnforcement@northlittlerock.arg.gov

CODE ENFORCEMENT DEPARTMENT

December 4, 2012

Drugstore Cowboys Inc.
Gentlemen's Club 70
c/o Craig Snyder
510 Water St
North Little Rock, AR 72117

Location: 6615 Highway 70, North Little Rock, AR -. Parcel 23N050004100

Dear Sir and Madam:

NOTICE OF PUBLIC NUISANCE

Attention to any and all owners of, occupants of, heirs of, lien holders of and any other parties having any interest thereof: that this is your legal notice that this structure is deemed to be a public nuisance in violation of North Little Rock Nuisance Abatement/ Property Maintenance Code Articles 1 & 8 for it is an unsafe and vacant structure that is not fit for human habitation.

I represent the City of North Little Rock Code Enforcement Department. Both a title search and the Pulaski County Treasurer/Collector's records on the above described property indicate that you may have a legal interest in this property.

This property is going to be considered for condemnation due to its current condition and this is your legal notice that a public hearing will be conducted by the City Council on **February 25th, 2013** at 7:00 p.m. at City Hall (300 Main Street, second floor, North Little Rock) to consider condemning the above mentioned structure.

Pursuant to Ark. Code Ann 14-54-903(b) you are hereby given seven (7) days notice to remove, abate or eliminate any and all of these aforementioned conditions on this property, or contact our office within said time to discuss a plan to abate the public nuisance.

If you fail to remove, abate or eliminate these conditions the City of North Little Rock will do whatever is necessary to correct the conditions which could include the structure being condemned pursuant to **North Little Rock Nuisance Abatement/ Property Maintenance Code Article 1 Section 7** by the City Council. Should the City of North Little Rock incur any costs or expenses as a result of your failure to remove, abate or eliminate the "public nuisance" the City will seek to enforce a "clean up lien" against you as provided for by Ark Code Ann. 14-54-903.

EXHIBIT J

If you are a lien holder you are required to comply with the requirements of Ark Code Ann 14-54-903©(7)(D) by responding in writing within seven business days of your receipt of this notice as to whether the owner is in default of your note or mortgage.

If it becomes necessary for the City to file a lawsuit to collect on our clean-up lien, this action could result in the property being placed into foreclosure.

If you wish to resolve this situation before the public hearing please contact Felecia McHenry of the North Little Rock Code Enforcement Department immediately at 501-791-8581 or email fmchenry@northlittlerock.ar.gov .

Sincerely,

Felecia McHenry
Code Enforcement Officer

EXHIBIT J

BEFORE THE CITY COUNCIL OF NORTH LITTLE ROCK, ARKANSAS

IN RE CONDEMNATION OF
6615 HWY 70

RESOLUTION: R-13-37

MOTION FOR FULL HEARING

COMES NOW Convent Corporation, by and through its attorney, Mickey Stevens, and for its Motion for Full Hearing states:

1. Convent Corporation is the owner of the property located at 6615 Hwy 70 in North Little Rock, Arkansas ("the property").

2. Resolution R-13-37, declaring the property to be a nuisance has been placed on the City Council agenda for February 25, 2013.

3. Convent Corporation has been allowed three minutes to present its case prior to a vote of the City Council.

4. Convent Corporation has not received adequate notice of required repairs to allow it to properly prepare its case in opposition to the condemnation of its property. Specifically, Convent Corporation has not been provided with the listing of code violations required by Section 18-472(b) of the City Code.

5. Due process, as guaranteed by both the United States Constitution and the Arkansas Constitution, requires that Convent Corporation be permitted to fully present its case before the City Council, including examining witness and introducing evidence, prior to the condemnation of its property. Three minutes is not sufficient time for Convent Corporation to adequately present its case to the City Council.

EXHIBIT K

WHEREFORE, Convent Corporation respectfully requests that consideration of this matter be postponed for two weeks and that it be granted a full hearing allowing for adequate time to present its case.

Respectfully submitted,

Mickey Stevens, Ark. Bar No. 2012141
Attorney for Convent Corporation
P.O. Box 2165
Benton, AR 72018
Phone: 501-303-6668
Fax: 877-338-6063
Stevens_mickey@yahoo.com

CERTIFICATE OF SERVICE

I do hereby certify by my signature hereinabove, I have on this 22nd day of February, 2013, served a copy of the foregoing pleading by email to the following:

Mayor Joe Smith
Mayor@nlr.ar.gov

Diane Whitbey
City Clerk
Dwhitbey@nlr.ar.gov

C. Jason Carter
City Attorney
cyielding@nlr.ar.gov

Mickey Stevens

EXHIBIT K

1 : 00325

CITY OF NORTH LITTLE ROCK, ARKANSAS MUNICIPAL CODE

Chapter 8

NUISANCE ABATEMENT AND PROPERTY MAINTENANCE

Adopted 10-22-07, Ordinance No. 8001
Amended 3-24-08, Ordinance 8065
Amended 7-27-09, Ordinance 8184

EXHIBIT L

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EXHIBIT L

EXHIBIT L

1 : 00328 ADD 266

EXHIBIT L

ARTICLE ONE
ADMINISTRATION

Section 1
INTRODUCTION

1.1.1 General. These regulations shall be known as the *North Little Rock Nuisance Abatement and Property Maintenance Code* and may be referred to herein as *"the Code"* or *"this Code"*. These regulations are intended to ensure public health, safety and welfare insofar as they are affected by the continued occupancy and maintenance of structures and premises within the City of North Little Rock, Arkansas. Code Enforcement Officers may refer to the commentary of similar provisions in the 2003 edition for International Property Maintenance Code and other property maintenance codes that are broadly accepted for interpretive guidance.

1.1.2 Applicability. The provisions of this Code shall apply to **all** residential and nonresidential structures and all premises within the City of North Little Rock, Arkansas and constitute minimum requirements and standards for premises, structures, equipment and facilities for light, ventilation, space, heating, sanitation, protection from the elements, life safety, safety from fire and other hazards, and for safe and sanitary maintenance; the responsibility of owners, operators and occupants; the occupancy of existing structures and premises, and for administration, enforcement and penalties. Structures and premises that do not comply with these provisions shall be altered or repaired to provide a minimum level of health and safety as required herein. Repairs, alterations, additions to and change of occupancy in existing buildings shall comply with the *Arkansas State Fire Prevention Code*. Where different standards or requirements are imposed by this Code and other competent authority or by different sections of this Code, the most restrictive standard or requirement shall govern.

1.1.3 Historic Buildings, Structures and Districts. Existing buildings or structures designated by the City of North Little Rock, the State of Arkansas, or the United States government to be historic or within a designated historic district shall be exempted from the literal requirements of such provisions of this Code that a proper body (such as an Historic Commission or the City Council) determines to infringe upon the historic nature of the building or structure. However, no exemption may be allowed unless the buildings or structures are judged by the Senior Code Enforcement Officer to be safe and in the public interest of health, safety and welfare.

1.1.4 Maintenance. Equipment, systems, devices and safeguards required by this Code or a previous regulation or code under which the structure or premises was constructed, altered or required shall be maintained in good working order. No occupant shall cause any required service, facility, equipment or utility to be removed from or shut off from or discontinued for any occupied dwelling, except for temporary interruptions necessitated by repairs or alterations. The requirements of this Code are not intended to provide the basis for removal

or abrogation of fire protection and safety systems and devices in existing structures. Except as otherwise specified herein, the owner shall be responsible for the maintenance of buildings, structures and premises.

1.1.5 Requirements not covered by code. Requirements necessary for the strength, stability or proper operation of an existing fixture, structure or equipment, or for the public safety, health and general welfare, not specifically covered by this Code, shall be determined by the Code Official. Such decisions are considered to be administrative determinations subject to appeal as provided by section 9. No citations may be issued based upon an administrative decision under this subsection until interested parties have been informed about the decision and been afforded an opportunity to appeal. The Senior Code Enforcement Officer shall maintain, or cause to be maintained, a file of all administrative rules made pursuant to this subsection which shall be available for copy and inspection by the public.

Section 2
CODE ENFORCEMENT OFFICERS

1.2.1 General. This Code shall be enforced by all Code Enforcement Officers of the City of North Little Rock. For the purposes of this Code, a Code Enforcement Officer shall be defined as any city employee who has been duly sworn and authorized to uphold the ordinances of the City and laws of the State of Arkansas related to property uses, maintenance, nuisances, inspections, issuances of building permits, certifications and licensing etc., within the municipal boundaries of the City. This Code may also be enforced by any and all duly sworn law enforcement officers of the North Little Rock Police Department.

1.2.2 Identification. All Code Enforcement Officers shall carry proper identification and present the same upon request when performing duties under this Code.

1.2.3 Rule-making authority. The Senior Code Enforcement Officer shall have authority as necessary in the interest of public health, safety and general welfare, to adopt and promulgate administrative and procedural rules and to interpret and implement the provisions of this Code in a manner consistent with the intent thereof. Such rules shall not have the effect of waiving structural or fire performance requirements specifically provided for in this Code, or of violating accepted engineering methods involving public safety. Rules and interpretations made pursuant to this subsection are considered to be administrative determinations subject to appeal as provided by section 9. No citations may be issued based upon a rule or interpretation under this subsection until interested parties have been informed about the decision and been afforded an opportunity to appeal. The Senior Code Enforcement Officer shall maintain, or cause to be maintained, a file of all administrative rules made pursuant to this subsection which shall be available for copy and inspection by the public.

1.2.4 Modifications. Whenever there are practical difficulties involved in carrying out the provisions of this Code, the Senior Code Enforcement Officer shall have the authority to grant modifications for individual cases, provided the Senior Code Enforcement Officer shall first make written findings that a special condition or circumstance exists such that the strict letter

of this Code is impractical and the modification is in compliance with the intent and purpose of this Code and that such modification does not lessen health, life and fire safety requirements. The details of action granting modifications shall be recorded and entered in the department files.

Section 3
INSPECTIONS

1.3.1 Right of entry. Code Enforcement Officers are authorized to enter structures or premises at reasonable times to inspect subject to constitutional restrictions on unreasonable searches and seizures. If entry is refused or not obtained, the officers may pursue such search authorizations as are provided by law.

1.3.2 Inspections. Code Enforcement Officers shall make all of the inspections required by this Code. All reports of such inspections shall be in writing and be certified by the responsible officer. Code Enforcement Officers are authorized to rely upon a responsible expert opinion as the officer deems necessary to report upon unusual technical issues that arise.

1.3.3 Required testing. Whenever there is insufficient evidence of compliance with the provisions of this Code, or evidence that a material or method does not conform to the requirements of this Code, or in order to substantiate claims for alternative materials or methods, the Senior Code Enforcement Officer shall have the authority to require tests to be made as evidence of compliance at no expense to the jurisdiction. Reports of tests shall be recorded and entered in the department files.

1.3.4 Material and equipment reuse. Materials, equipment and devices shall not be reused unless a Code Enforcement Officer finds that such elements are in good repair or have been reconditioned and tested when necessary, placed in good and proper working condition and approved.

Section 4
VIOLATIONS

1.4.1 Violations declared to be strict liability misdemeanors. It shall be unlawful for a person, firm or corporation to be in conflict with or in violation of any of the provisions of this Code. Any person who is convicted of a violation of this Code shall be guilty of a misdemeanor, and the violation shall be deemed a strict liability offense.

1.4.2 Fines. Except as otherwise provided, a person convicted of violating any provision of this Code shall be punished by a fine not to exceed $500.00, or double such sum for each repetition thereof. If the violation is continuous in nature, the penalty for allowing the continuance thereof is a fine not to exceed $250.00 for each day that the violation is unlawfully continued. The judge will determine the actual fine.

1.4.3 Citations. Code Enforcement Officers are hereby authorized to issue citations to any person, firm or corporation in conflict with or in violation of any of the provisions of this Code. Issuances of citations must comply with the Arkansas Rules of Criminal Procedures. North Little Rock District Court shall have exclusive jurisdiction over citations issued pursuant to this Code.

1.4.4 Appeals. Any person after being found guilty of a violation or after entering a plea of guilty or *nolo contendere* to a violation shall have those appellant rights granted under the Laws of the State of Arkansas, US Constitution and Arkansas Rules of Criminal Procedure. Appeals of convictions of a violation will be with Pulaski County Circuit Court.

1.4.5 Board of Adjustment and Appeals. The authority of the North Little Rock Board of Adjustment and Appeals (also referred to as "the Board of Adjustments") is specifically restricted to administrative matters. The Board of Adjustments is not authorized to adjudicate citations or the appeal of citations.

Section 5
REVOCATION OF CERTIFICATES, LICENSES AND PERMITS

1.5.1 General. The purpose of this section is to provide a procedure for the revocation of various certificates, licenses and permits issued by the City of North Little Rock to prevent the use of structures described in subsection 1.5.2. The certificates, licenses and permits subject to revocation under this Code are those relating to the particular or general use of property; including, without limitation and for the purpose of illustration only: certificates of occupancy, zoning variances, certification of appropriateness, business licenses, sign permits, building permits, electrical and pluming inspection approvals, conditional use permits, special use permits, and the like.

1.5.2 Administrative Revocation. Code Enforcement Officers shall have the authority to initiate administrative revocation of any such certificate, license or permit, if he or she has a reasonable belief that the use of the property or structure:

(A) Poses a danger to the health and welfare of the public;
(B) Threatens property or safety of any citizen;
(C) Violates the terms and or scope of the certificate, license, or permit; or
(D) Lacks compliance with applicable State licensing laws and requirements.

The non-emergency administrative revocation of a certificate, license, or permit shall follow the procedures of notice and determination provided in Section 1.6 below.

1.5.3 Temporary Emergency Orders. The Senior Code Enforcement Officer shall have the authority to issue a temporary emergency order in conjunction with notice of an administrative revocation as described in subsection 1.5.2. The Temporary Emergency Order shall have the effect of prohibiting all activity that may be harmful to the public or any person and suspending any certificate, license, or permit authorizing the same. The Senior Code

Enforcement Officer may issue a temporary emergency order when he or she has a reasonable belief that the use of the property or structure:

(A) Poses an *imminent* danger to the health, safety or welfare of the public; or
(B) Threatens the life or poses an imminent danger of serious injury to any citizen.

1.5.3.1 Service of Temporary Emergency Orders. Service of Temporary Emergency Orders may be made by any Code Enforcement Officer upon the owner, manager, employee, or occupant of a structure that is subject to the provisions of subsection 1.5.3. If no one is located at the structure, the Temporary Emergency Order shall be affixed to the structure and written notice shall proceed according to subsection 1.6.2. All notices for this subsection shall clearly state "Temporary Emergency Order" and conform to the requirements of subsection1.6.1.

1.5.4 Special Uses, Conditional Uses, and Other Authorizations Issued by City Council. The City Council for the City of North Little Rock may revoke a special use, conditional use, or any other authorization to use property or conduct business that violates the terms of the use or threatens the property or safety of any citizen, or is detrimental to the health, safety or welfare of the public. Such a revocation may be performed at any regular or special meeting of City Council. The revocation shall be based upon the report of a Code Enforcement Officer, complaint of a citizen, or *sua sponte* action by City Council.

Section 6
ADMINISTRATIVE PROCEDURES

1.6.1 Notice of Violations. "Notice of Violations" shall be written on standardized or letter form approved by the Senior Code Enforcement Officer that shall include the following information:

(A) The name of the owner, if known;
(B) An address or description of the real estate sufficient for identification;
(C) A description of the violation or violations;
(D) Rights of Appeal under subsection 1.9;
(E) A statement that citations may be issued and fines assessed in addition to any administrative remedy imposed by the City.
(F) Include a statement that the City has a right to cause repairs or demolition to be made and that the costs may be assessed against the owner and the property of the owner; and
(G) The information required by Ark. Code Ann. 14-54-903, if applicable.

1.6.2 Method of service. Administrative notices (such as a Notice of Violation) may be issued by any person authorized under Ark. Code Ann. § 14-54-903 by posting on the subject property and:

(A) By personal service;
(B) By regular mail or certified mail, return receipt requested; or

(C) When the identity or whereabouts of a person is unknown, by weekly publication in a newspaper having general circulation throughout the City for two (2) consecutive weeks.

1.6.2.1 Notice by Mail. Notice by mail shall be sent to the owner's address of record with the applicable county treasurer or collector. When sent to the proper address with proper postage, notice by mail shall be deemed properly served without regard as to whether the owner or occupant accepted the mail or the mail was otherwise returned.

1.6.3 Transfer of ownership. After receiving a notice of violation, it shall be unlawful for the owner of any property or structure to sell, transfer, mortgage, lease or otherwise alienate or dispose of the same until:

(A) The property or structure has been caused to conform with this code; or

(B) The owner shall provide the other party a true copy of any notice of violation issued by a Code Enforcement Officer and shall furnish to the Senior Code Enforcement Officer a signed and notarized statement from the other party accepting responsibility for the property or structure.

1.6.4 Exceptions. The Notice of Violation requirements of this section shall not apply to the issuances of citations. Issuance of citations must comply with the procedures described in subsection 4.3.

Section 7
CONDEMNATION

1.7.1 Authority. In addition to other penalties provided herein but not in lieu thereof, the City Council for the City of North Little Rock may condemn structures through the passage of a resolution, after a public hearing that shall include:

(A) A description of the structures;
(B) The owner or owners of the structures;
(C) Findings that the structures are unfit for human occupancy, or otherwise detrimental to the life, property or safety of the public.

1.7.2 Keeping condemned structures prohibited. It shall be unlawful for any person to own, keep or maintain any structure within the corporate limits of the city which is condemned by resolution of the City Council.

1.7.3 Notices. The Code Enforcement Department shall be responsible for publication, mailing or delivery of all notices required to condemn structures.

1.7.3.1 Prior Notice of Proposed Condemnation. The owner of the structure will be provided notice of any proposed condemnation action no less than ten (10) calendar days prior to consideration by City Council. If appropriate, any and all lien holders

will also be provided notice of any proposed condemnation action no less than ten (10) calendar days prior to consideration by City Council. Notice will be provided by the method described in subsection 1.6.2.

1.7.3.2 Notice of Condemnation. After a structure has been condemned by resolution as provided in this Code, a certified copy of such resolution will be mailed to the owners thereof, by the method described in subsection 1.6.2 and if appropriate, may be recorded in the property records of the Pulaski Circuit/County Clerk.

1.7.3.3 Notice of Certification of Costs. After a condemned structure has been removed at City expense, the owner will be provided no less than ten (10) calendar days' prior notice of any action to certify costs by City Council. If appropriate, any and all lien holders will also be provided no less than ten (10) calendar days' prior notice of any action to certify costs by City Council. Notice will be provided by the method described in subsection 1.6.2.

1.7.4 Destruction and Removal. Condemned structures shall be destroyed and removed from the premises.

1.7.4.1 Destruction and Removal by Owner. The owner of any structure that has been condemned by resolution of City Council is permitted to cause, at his or her own expense, to have the same destroyed and removed within thirty (30) days after the City has provided notice under subsection 1.7.3.2. No person is allowed to repair or refurbish a condemned structure without an agreement approved by City Council that guarantees repairs will be done in a proper and timely fashion. It is the owner's responsibility to obtain a sponsor for any legislation that would allow the repair or refurbishment of a condemned structure.

1.7.4.2 Destruction and Removal by City. If the condemned structure has not been torn down and removed, or otherwise abated, within 30 days after the notice requirements of subsection 1.7.3.2 have been met, then the Senior Code Enforcement Officer shall supervise the removal of any such structure in such a manner as deemed appropriate under existing circumstances. If the structure has a substantial value, it or any saleable materials thereof may be sold at public sale to the highest bidder for cash using procedures provided by law. The costs of removal will be presented to City Council for certification and collection from the owner.

1.7.5 Disposition of proceeds of sale or salvage of condemned structures. All the proceeds of the sale or salvage of any structure, and all fines collected from the provisions of this article shall be paid by the persons collecting the same to the city treasurer. If any such structure, or the saleable materials thereof, be sold for an amount which exceeds all costs incidental to the abatement of the nuisance, including the cleaning up of the premises by the city, plus any fines imposed, the balance thereof will be returned by the city treasurer to the former owners of such house, building and/or structure constituting the nuisance.

1.7.6 Lien on property for net costs. If the city has any net costs in the removal of any condemned house, building or structure, the city shall have a lien on the property as provided by A.C.A. §§ 14-54-903 and 14-54-904.

1.7.7 Penalty for violation of article. A penalty as provided by this Code is hereby imposed against the owners of any structure condemned by resolution of the City Council thirty (30) days after such structure has been condemned; and each day thereafter such nuisance be not abated constitutes a separate and distinct offense, provided the notice as provided in subsection 1.7.3.2 has been given within ten (10) calendar days after such structure has been condemned.

1.7.8 Transfer of ownership. After receiving a notice of condemnation, it shall be unlawful for the owner of any structure to sell, transfer, mortgage, lease, or otherwise alienate or dispose of the same until:

(A) The property or structure has been caused to conform with this code; or
(B) The owner shall provide the other party a true copy of any notice of violation issued by a Code Enforcement Officer and shall furnish to the Senior Code Enforcement Officer a signed and notarized statement from the other party accepting responsibility for the property or structure.

1.7.9 Restrictions on utility services to structures declared condemned.

(A) The City shall not provide or permit another to provide public or private utility services, such as water, gas or electricity, to any building or house that has been condemned by the city council pursuant to Ark. Code Ann. § 14-56-203.
(B) Subsection (1) of this section shall not preclude the temporary use of such utility services as may be deemed necessary during construction, repair or alteration. The Senior Code Enforcement Officer shall be responsible for making the determination as to when such temporary services may be necessary.

1.7.10 Court action authorized. If City Council determines that a particular structure be *judicially* condemned, the City Council shall direct the City Attorney to bring such action in the name of the city; and the only notice to be given to the owners and lien holders will be that as now provided for by law. When any such structure has been declared judicially to be a nuisance by a court of law, a penalty as provided by this Code is hereby imposed against the owners thereof from the date such finding is made by the court; and each day thereafter such nuisance is not abated constitutes a separate and distinct offense.

Section 8
EMERGENCY PROCEDURES

1.8.1 Temporary safeguards. Notwithstanding other provisions of this code, whenever, in the opinion of the Senior Code Enforcement Officer, there is imminent danger due to an unsafe condition, the code official shall order the necessary work to be done, including the boarding up of openings, to render such structure temporarily safe whether or not the legal

procedure herein described has been instituted; and shall cause such other action to be taken as the code official deems necessary to meet such emergency.

1.8.2 Closing streets. When necessary for public safety, the code official shall temporarily close structures and close, or order the authority having jurisdiction to close, sidewalks, streets, public ways and places adjacent to unsafe structures, and prohibit the same from being utilized.

1.8.3 Emergency repairs. For the purposes of this section, the Senior Code Enforcement Officer shall employ the necessary labor and materials to perform the required work as expeditiously as possible. Costs incurred in the performance of emergency work shall be paid by the City. The City Attorney shall institute appropriate action against the owner of the premises where the unsafe structure is or was located for the recovery of such costs.

Section 9
APPEALS

1.9.1 Administrative appeal. Administrative determinations may be appealed to the North Little Rock Board of Adjustment and Appeals. The following actions are ***not*** subject to administrative appeal and shall be appealed in the manner provided by law for those particular actions:

(A) Citations heard in North Little Rock District Court; and
(B) Condemnations heard in City Council or a court of law.

1.9.2 Timely Submission of Appeal. Unless otherwise provided in this Code, any person affected by a "Notice of Violation" or other administrative determination under this Code may appeal the determination by submitting a written application to the Community Planning Department or the Code Enforcement Department within five (5) days, excluding weekends and holidays, after notice of the determination has been made.

1.9.3 Contents of Appeal. A request for an administrative appeal must be made upon forms approved by the North Little Rock Board of Adjustment and Appeals or in any written form that contains the following information:

(A) The date the appeal is submitted;
(B) The name and address of the appellant;
(C) The address of affected property;
(D) A description of the administrative decision being appealed; and
(E) The desire that the administrative decision be overturned or reviewed.

1.9.4 Notice of Hearing. The North Little Rock Board of Adjustment and Appeals shall consider the appeal at the next available date. The appellant shall be provided notice of the hearing by first class mail sent to the address shown on the request for administrative appeal no less than five (5) days, excluding weekends and holidays, prior to the hearing.

1.9.5 Actions pending appeal. No Code Enforcement Officer may take action based upon an administrative decision while that decision is being appealed *except* those listed below:

(A) Citations issued under subsection 1.4.3;
(B) Condemnations under section 1.7; or
(C) Temporary Emergency Orders issued under subsection 1.5.3.

1.9.6 Conduct of Hearing. Hearings shall be conducted in an open forum according to such procedural rules as may be adopted by the North Little Rock Board of Adjustment and Appeals. No administrative decision of a Code Enforcement Officer may be overturned unless a determination is made that:

(A) The true intent of this Code or the rules legally adopted there under have been incorrectly interpreted;
(B) The provisions of this Code do not fully apply; or
(C) The requirements of this Code are adequately satisfied by other means.

1.9.7 Orders. Upon the conclusion of an appeal, the North Little Rock Board of Adjustments shall timely issue orders to guide the actions of the Code Enforcement Department regarding the appeal.

EXHIBIT L

Article Two
DEFINITIONS

Section 1
PURPOSE

2.1.1 General. Unless otherwise expressly stated, the following terms shall, for the purposes of this Code, have the meanings shown in this chapter. Where terms are not defined through the methods authorized by this section, such terms shall have ordinarily accepted meanings such as the context implies. Whenever the words "dwelling unit," "dwelling," "premises," "building," "rooming house," "rooming unit," "housekeeping unit," or "story" are stated in this Code, they shall be construed as though they were followed by the words "or any part thereof."

Section 2
LIST OF DEFINITIONS

2.2.1 Definitions.

ABANDONED MOTOR VEHICLE. Any motor vehicle which is left on public or private property, as defined in this section, for a period of more than 72 hours, regardless of whether wrecked or inoperable.

APPROVED. Consented or agreed to in writing by the Senior Code Enforcement Officer, or his proper designee.

BASEMENT. That portion of a building which is partly or completely below grade.

BATHROOM. A room containing plumbing fixtures including a bathtub or shower.

BEDROOM. Any room or space used or intended to be used for sleeping purposes.

BOAT. Any vessel initially designed for the carrying of passengers or cargo upon the water, whether currently seaworthy or not, and regardless of size or design, including, without limitation, barges, motorboats whether inboard or outboard, canoes, rowboats, rafts and sailboats.

CARPORT. A roofed structure providing space for the parking of motor vehicles and enclosed on not more than two sides.

CODE ENFORCEMENT OFFICER. Any city employee who has been duly sworn and authorized to uphold the ordinances of the City and laws of the State of Arkansas related to property uses, maintenance, nuisances, inspections, issuances of building permits, certifications and licensing etc., within the municipal boundaries of the City. All duly sworn law enforcement officers of the North Little Rock Police Department are authorized to exercise authority as Code Enforcement Officers.

CONDEMN. To adjudge unfit for human occupancy.

DWELLING UNIT. Any room or group of rooms located within a structure forming a single habitable unit with facilities that are used or intended to be used for living, sleeping, cooking, eating, and sanitation by a household or family.

EASEMENT. That portion of land or property reserved for present or future use by a person or agency other than the legal fee owner(s) of the property. The easement shall be permitted to be for use under, on or above a said lot or lots.

EXTERIOR PROPERTY. The open space on the premises and on adjoining property under the control of owners or operators of such premises.

EXTERMINATION. The control and elimination of insects, rats or other pests by eliminating their harborage places; by removing or making inaccessible materials that serve as their food; by poison spraying, fumigating, trapping or by any other approved pest elimination methods.

GARBAGE. The animal or vegetable waste resulting from the handling, preparation, cooking and consumption of food.

GRAFFITI. Any inscription, word, figure, or design that is marked, etched, scratched, drawn, painted, pasted or otherwise affixed to or on any structural component of any building, structure, or other permanent facility regardless of the nature of the material of that structural component, or the nature of the inscription, to the extent that the same was not authorized in advance by the owner, or otherwise deemed to be a public nuisance.

GUARD. A building component or a system of building components located at or near the open sides of elevated walking surfaces that minimizes the possibility of a fall from the walking surface to a lower level.

HABITABLE SPACE. Space in a structure for living, sleeping, eating or cooking. Bathrooms, toilet rooms, closets, halls, storage or utility spaces, and similar areas are not considered habitable spaces.

HISTORIC. Any existing buildings or structures designated by the City of North Little Rock, the State of Arkansas, or the United States government to be historic or located within a North Little Rock historic district.

HOUSEKEEPING UNIT. A room or group of rooms forming a single habitable space equipped and intended to be used for living, sleeping, cooking and eating which does not contain, within such a unit, a toilet, lavatory and bathtub or shower.

IMMINENT DANGER. A condition which could cause serious or life-threatening injury or death at any time.

INFESTATION. The presence, within or contiguous to, a structure or premises of insects, rats, vermin or other pests.

INOPERABLE MOTOR VEHICLE. A vehicle which cannot be driven upon the public streets for reason including but not limited to being unlicensed, uninsured, wrecked, abandoned, in a state of disrepair, or incapable of being moved under its own power.

LABELED. Devices, equipment, appliances, or materials to which has been affixed a label, seal, symbol or other identifying mark of a nationally recognized testing laboratory, inspection agency or other organization concerned with product evaluation that maintains periodic inspection of the production of the above-labeled items and by whose label the manufacturer attests to compliance with applicable nationally recognized standards.

LET FOR OCCUPANCY OR LET. To permit, provide or offer possession or occupancy of a dwelling, dwelling unit, rooming unit, building, premise or structure by a person who is or is not the legal owner of record thereof, pursuant to a written or unwritten lease, agreement or license, or pursuant to a recorded or unrecorded agreement of contract for the sale of land.

MOTOR VEHICLE. A machine of conveyance which is self-propelled and designed to travel along the ground, and includes but is not limited to automobiles, buses, electric scooters, mopeds bicycles, motorcycles, trucks, tractors, go-carts, golf carts, campers, motor homes and trailers.

NUISANCE. This term is defined in Section 8 of this Code.

OCCUPANCY. The purpose for which a building or portion thereof is utilized or occupied.

OCCUPANT. Any individual living or sleeping in a building, or having possession of a space within a building.

OPENABLE AREA. That part of a window, skylight or door which is available for unobstructed ventilation and which opens directly to the outdoors.

OPERATOR. Any person who has charge, care or control of a structure or premises which is let or offered for occupancy.

OWNER. Any person, agent, operator, firm or corporation having a legal or equitable interest in the property; or recorded in the official records of the state, county or municipality as holding title to the property; or otherwise having control of the property, including the guardian of the estate of any such person, and the executor or administrator of the estate of such person if ordered to take possession of real property by a court.

PERSON. An individual, corporation, partnership or any other group acting as a unit.

PREMISES. A lot, plot or parcel of land, easement or public way, including any structures thereon.

PRIVATE PROPERTY. Means any real property within the city which is privately owned and which is not defined as public property in this section.

PUBLIC PROPERTY. Means any real property in the city which is owned by a governmental body and includes buildings, parking lots, parks, streets, sidewalks, rights-of-way, easements and other similar property.

PUBLIC WAY. Any street, alley or similar parcel of land essentially unobstructed from the ground to the sky, which is deeded, dedicated or otherwise permanently appropriated to the public for public use.

REMOVAL. The act of clearing all material and debris whenever it becomes necessary to demolish any building that has been condemned and found to be a nuisance by resolution of the city council.

RESIDENCE. A structure serving as a dwelling or home. For the purposes of this Code, the term residence includes dwelling units and rooming houses.

ROOMING HOUSE. A building arranged or occupied for lodging, with or without meals, for compensation. Bed-and-breakfasts, boarding houses, half-way houses, and hotels, as those terms are defined under the North Little Rock Zoning Ordinance, are included within the definition of a Rooming House.

ROOMING UNIT. Any room or group of rooms forming a single habitable unit occupied or intended to be occupied for sleeping or living, but not for cooking purposes.

RUBBISH. Combustible and noncombustible waste materials, except garbage; the term shall include the residue from the burning of wood, coal, coke and other combustible materials, paper, rags, cartons, boxes, wood, excelsior, rubber, leather, tree branches, yard trimmings, tin cans, metals, mineral matter, glass, crockery and dust and other similar materials.

UNCUT WEEDS AND GRASS. See Section 3.2.4 for definition.

SENIOR CODE ENFORCEMENT OFFICER. The Head of the Code Enforcement Department or, in his or her absence, the person who is directed or appointed to temporarily assume the duties of the Head of the Code Enforcement Department.

STRUCTURE. That which is built or constructed or a portion thereof.

TENANT. A person, corporation, partnership or group, whether or not the legal owner of record, occupying a building or portion thereof as a unit.

TOILET ROOM. A room containing a water closet or urinal but not a bathtub or shower.

TRAILER. Means any freewheeling object designed or intended to be pulled or towed behind a motor vehicle, regardless of whether wrecked or inoperable, and regardless of whether

currently inspected and/or registered, including without limitation the following: Boat trailers, camper trailers, cargo trailers, special trailers for items such as golf carts or motorcycles, utility trailers, and farm implements.

VENTILATION. The natural or mechanical process of supplying conditioned or unconditioned air to, or removing such air from, any space.

WORKMANLIKE. Executed in a skilled manner; e.g., generally plumb, level, square, in line, undamaged and without marring adjacent work.

WRECKED MOTOR VEHICLE. Any motor vehicle which does not have lawfully affixed thereto an unexpired license plate and the condition of which is wrecked, dismantled, partially dismantled, incapable of operation by its own power on a public street, or from which the wheels, engine, transmission or any substantial part thereof has been removed.

YARD. An open space on the same lot with a structure.

ARTICLE THREE
GENERAL REQUIREMENTS

Section 1
GENERAL

3.1.1 Scope. The provisions of this chapter shall govern the minimum conditions and the responsibilities of persons for maintenance of structures, equipment and exterior property.

3.1.2 Responsibility. The owner of the premises shall maintain the structures and exterior property in compliance with these requirements, except as otherwise provided for in this Code. A person shall not occupy as owner-occupant or permit another person to occupy premises which are not in a sanitary and safe condition and which do not comply with the requirements of this chapter. Occupants of a dwelling unit, rooming unit or housekeeping unit are responsible for keeping in a clean, sanitary and safe condition that part of the dwelling unit, rooming unit, housekeeping unit or premises which they occupy and control.

3.1.3 Vacant structures and land. All vacant structures and premises thereof or vacant land shall be maintained in a clean, safe, secure and sanitary condition as provided herein so as not to cause a blighting problem or adversely affect the public health or safety.

Section 2
EXTERIOR PROPERTY AREAS

3.2.1 Sanitation. All exterior property and premises shall be maintained in a clean, safe and sanitary condition. The occupant shall keep that part of the exterior property which such occupant occupies or controls in a clean and sanitary condition.

3.2.2 Grading and drainage. All premises shall be graded and maintained to prevent the erosion of soil and to prevent the accumulation of stagnant water thereon, or within any structure located thereon.

***Exception*:** Approved retention areas and reservoirs.

3.2.3 Sidewalks and driveways. All sidewalks, walkways, stairs, driveways, parking spaces and similar areas shall be kept in a proper state of repair, and maintained free from hazardous conditions.

3.2.4 Grass or Weeds. Exceed eight inches in height in all residential districts; or exceeds eight inches in height on lots in all commercial zone districts and industrial zone districts on which a structure is located; or exceed 24 inches in height on lots in all commercial zone districts and industrial zone districts on which a structure is not located; except that the restrictions noted above will not apply to areas specifically designated or recognized by the city, the state or the United States as agricultural, wetlands, open spaces, natural or wild flower areas, or other designated preservation areas.

Exception: Undeveloped land that has been continuously maintained in a natural vegetative state.

3.2.5 Rodent harborage. All structures and exterior property shall be kept free from rodent harborage and infestation. Where rodents are found, they shall be promptly exterminated by approved processes which will not be injurious to human health. After extermination, proper precautions shall be taken to eliminate rodent harborage and prevent reinfestation.

3.2.6 Exhaust vents. Pipes, ducts, conductors, fans or blowers shall not discharge gases, steam, vapor, hot air, grease, smoke, odors or other gaseous or particulate wastes directly upon abutting or adjacent public or private property or that of another tenant.

3.2.7 Accessory structures. All accessory structures, including detached garages, fences and walls, shall be maintained structurally sound and in good repair.

3.2.8 Motor vehicles. Except as provided for in other regulations, no inoperative or unlicensed motor vehicle shall be parked, kept or stored on any premises, and no motor vehicle shall at any time be in a state of major disassembly, disrepair, or in the process of being stripped or dismantled. Painting of motor vehicles is prohibited unless conducted inside an approved spray booth. For specific requirements related to the removal of wrecked or inoperable vehicles, refer to subsection 8.2.2.

Exception: A motor vehicle of any type is permitted to undergo major overhaul, including body work, provided that such work is performed inside a structure or similarly enclosed area designed and approved for such purposes.

3.2.9 Defacement of property. No person shall willfully or wantonly damage, mutilate or deface any exterior surface of any structure or building on any private or public property by placing thereon any marking, carving or graffiti. It shall be the responsibility of the owner to restore said surface to an approved state of maintenance and repair.

Section 3
SWIMMING POOLS, SPAS AND HOT TUBS

3.3.1 Swimming pools. Swimming pools shall be maintained in a clean and sanitary condition, and in good repair.

3.3.2 Enclosures. Private swimming pools, hot tubs and spas, containing water more than 24 inches (610 mm) in depth shall be completely surrounded by a fence or barrier at least 48 inches (1219 mm) in height above the finished ground level measured on the side of the barrier away from the pool. Gates and doors in such barriers shall be self-closing and self-latching. Where the self-latching device is less than 54 inches (1372 mm) above the bottom of the gate, the release mechanism shall be located on the pool side of the gate. Self-closing and self-latching gates shall be maintained such that the gate will positively close and latch when released from an open position of 6 inches (152 mm) from the gatepost. No existing pool

enclosure shall be removed, replaced or changed in a manner that reduces its effectiveness as a safety barrier.

Section 4
EXTERIOR STRUCTURE

3.4.1 General. The exterior of a structure shall be maintained in good repair, structurally sound and sanitary so as not to pose a threat to the public health, safety or welfare.

3.4.2 Protective treatment. All exterior surfaces, including but not limited to, doors, door and window frames, cornices, porches, trim, balconies, decks and fences shall be maintained in good condition. Exterior wood surfaces, other than decay-resistant woods, shall be protected from the elements and decay by painting or other protective covering or treatment. Peeling, flaking and chipped paint shall be eliminated and surfaces repainted. All siding and masonry joints as well as those between the building envelope and the perimeter of windows, doors, and skylights shall be maintained weather resistant and water tight. All metal surfaces subject to rust or corrosion shall be coated to inhibit such rust and corrosion and all surfaces with rust or corrosion shall be stabilized and coated to inhibit future rust and corrosion. Oxidation stains shall be removed from exterior surfaces. Surfaces designed for stabilization by oxidation are exempt from this requirement.

3.4.3 Premises identification. Buildings shall have approved address numbers placed in a position to be plainly legible and visible from the street or road fronting the property. These numbers shall contrast with their background. Address numbers shall be Arabic numerals or alphabet letters. Numbers shall be a minimum of 3 inches (76.2 mm) high with a minimum stroke width of 0.5 inch (12.7 mm) on residential structures and shall be a minimum of 6 inches(152,4 mm) high with a minimum stroke width of 0.5 inch(12.7.mm) for commercial structures.

3.4.4 Structural members. All structural members shall be maintained free from deterioration, and shall be capable of safely supporting the imposed dead and live loads.

3.4.5 Foundation walls. All foundation walls shall be maintained plumb and free from open cracks and breaks and shall be kept in such condition so as to prevent the entry of rodents and other pests.

3.4.6 Exterior walls. All exterior walls shall be free from holes, breaks, and loose or rotting materials; and maintained weatherproof and properly surface coated where required to prevent deterioration.

3.4.7 Roofs and drainage. The roof and flashing shall be sound, tight and not have defects that admit rain. Roof drainage shall be adequate to prevent dampness or deterioration in the walls or interior portion of the structure. Roof drains, gutters and downspouts shall be maintained in good repair and free from obstructions. Roof water shall not be discharged in a manner that creates a public nuisance.

3.4.8 Decorative features. All cornices, belt courses, corbels, terra cotta trim, wall facings and similar decorative features shall be maintained in good repair with proper anchorage and in a safe condition.

3.4.9 Overhang extensions. All overhang extensions including, but not limited to canopies, marquees, signs, metal awnings, fire escapes, standpipes and exhaust ducts shall be maintained in good repair and be properly anchored so as to be kept in a sound condition. When required, all exposed surfaces of metal or wood shall be protected from the elements and against decay or rust by periodic application of weather-coating materials, such as paint or similar surface treatment.

3.4.10 Stairways, decks, porches and balconies. Every exterior stairway, deck, porch and balcony, and all appurtenances attached thereto, shall be maintained structurally sound, in good repair, with proper anchorage and capable of supporting the imposed loads.

3.4.11 Chimneys and towers. All chimneys, cooling towers, smoke stacks, and similar appurtenances shall be maintained structurally safe and sound, and in good repair. All exposed surfaces of metal or wood shall be protected from the elements and against decay or rust by periodic application of weather-coating materials, such as paint or similar surface treatment.

3.4.12 Handrails and guards. Every handrail and guard shall be firmly fastened and capable of supporting normally imposed loads and shall be maintained in good condition.

3.4.13 Window, skylight and door frames. Every window, skylight, door and frame shall be kept in sound condition, good repair and weather tight.

> **3.4.13.1 Glazing.** All glazing materials shall be maintained free from cracks and holes.
>
> **3.4.13.2 Operable windows.** Every window, other than a fixed window, shall be easily opened and capable of being held in position by window hardware.

3.4.14 Insect screens. Any and all residential property and residential apartments which are not serviced by a central heat and air conditioning unit or units shall be required to have a insect screens to provide for ventilation of habitable areas. Such insect screens shall be supplied with approved tightly fitting screens of not less than 16 mesh per inch (16 mesh per 25 mm) and every swinging door shall have a self-closing device in good working condition.

3.4.15 Doors. All exterior doors, door assemblies and hardware shall be maintained in good condition. Locks at all entrances to dwelling units, rooming units and guestrooms shall tightly secure the door. Locks on means of egress doors shall be in accordance with Section 702.3.

3.4.16 Basement hatchways. Every basement hatchway shall be maintained to prevent the entrance of rodents, rain and surface drainage water.

3.4.17 Guards for basement windows. Every basement window that is operable shall be supplied with rodent shields, storm windows or other approved protection against the entry of rodents.

3.4.18 Building security. Doors, windows or hatchways for dwelling units, room units or housekeeping units shall be provided with devices designed to provide security for the occupants and property within.

3.4.18.1 Doors. Doors providing access to a dwelling unit, rooming unit or housekeeping unit that is rented, leased or let shall be equipped with a single cylinder deadbolt lock meeting specifications set forth herein. Such deadbolt locks shall be operated only by the turning of a knob on the inside or a key on the outside and shall have a lock throw of not less than I-inch. For the purpose of this section, a sliding bolt shall not be considered an acceptable deadbolt lock. Such deadbolt locks shall be installed according to manufacturer's specifications and maintained in good working order. All deadbolt locks required by this section shall be designed and installed in such a manner so as to be operable inside of the dwelling unit, rooming unit or housekeeping unit without the use of a key, tool, combination thereof or any other special knowledge or effort.

3.4.18.2 Windows. Operable windows located in whole or in part within 6 feet (1828 mm) above ground level or a walking surface below that provide access to a dwelling unit, rooming unit or housekeeping unit that is rented, leased or let shall be equipped with a window sash locking devices.

3.4.18.3 Basement hatchways. Basement hatchways that provide access to a dwelling unit, rooming unit or housekeeping unit that is rented, leased or let shall be equipped with devices that secure the units from unauthorized entry.

Section 5
INTERIOR STRUCTURE

3.5.1 General. The interior of a structure and equipment therein shall be maintained in good repair, structurally sound and in a sanitary condition. Occupants shall keep that part of the structure which they occupy or control in a clean and sanitary condition. Every owner of a structure containing a rooming house, housekeeping units, a hotel, a dormitory, two or more dwelling units or two or more nonresidential occupancies, shall maintain, in a clean and sanitary condition, the shared or public areas of the structure and exterior property.

3.5.2 Structural members. All structural members shall be maintained structurally sound, and be capable of supporting the imposed loads.

3.5.3 Interior surfaces. All interior surfaces, including windows and doors, shall be maintained in good, clean and sanitary condition. Peeling, chipping, flaking or abraded paint

EXHIBIT L

shall be repaired, removed or covered. Cracked or loose plaster, decayed wood and other defective surface conditions shall be corrected.

3.5.4 Stairs and walking surfaces. Every stair, ramp, landing, balcony, porch, deck or other walking surface shall be maintained in sound condition and good repair.

3.5.5 Handrails and guards. Every handrail and guard shall be firmly fastened and capable of supporting normally imposed loads and shall be maintained in good condition.

3.5.6 Interior doors. Every interior door shall fit reasonably well within its frame and shall be capable of being opened and closed by being properly and securely attached to jambs, headers or tracks as intended by the manufacturer of the attachment hardware.

Section 6
HANDRAILS AND GUARDRAILS

3.6.1 General. Every exterior and interior flight of stairs having more than four risers shall have a handrail on one side of the stair and every open portion of a stair, landing, balcony, porch, deck, ramp or other walking surface which is more than 30 inches (762 mm) above the floor or grade below shall have guards. Handrails shall not be less than 30 inches (762 mm) high or more than 42 inches (1067 mm) high measured vertically above the nosing of the tread or above the finished floor of the landing or walking surfaces. Guards shall not be less than 30 inches (762 mm) high above the floor of the landing, balcony, porch, deck, or ramp or other walking surface.

> ***Exception*:** Guards shall not be required where exempted by the adopted building code.

Section 7
RUBBISH AND GARBAGE

3.7.1 Accumulation of rubbish or garbage. All exterior property and premises, and the interior of every structure, shall be free from any accumulation of rubbish or garbage.

3.7.2 Disposal of rubbish. Every occupant of a structure shall dispose of all rubbish in a clean and sanitary manner by placing such rubbish in approved containers.

> **3.7.2.1 Rubbish storage facilities.** The occupant of every premises shall keep and maintain approved covered containers for rubbish and be responsible for the removal of rubbish.
>
> **3.7.2.2 Refrigerators.** Refrigerators and similar equipment not in operation shall not be discarded, abandoned or stored on premises without first removing the doors, securing the doors with locks, chain, wire, or rope, or using other reasonable methods to prevent opening.

3.7.3 Disposal of garbage. Every occupant of a structure shall dispose of garbage in a clean and sanitary manner by placing such garbage in an approved garbage disposal facility or an approved leak-proof garbage containers.

Section 8
EXTERMINATION

3.8.1 Infestation. All structures shall be kept free from insect and rodent infestation. All structures in which insects or rodents are found shall be promptly exterminated by approved processes that will not be injurious to human health. After extermination, proper precautions shall be taken to prevent reinfestation.

3.8.2 Owner. The owner of any structure shall be responsible for extermination within the structure prior to renting or leasing the structure.

3.8.3 Single occupant. The occupant of a one-family dwelling or of a single-tenant nonresidential structure shall be responsible for extermination on the premises.

3.8.4 Multiple occupancy. The owner of a structure containing two or more dwelling units, a multiple occupancy, a rooming house or a nonresidential structure shall be responsible for extermination in the public or shared areas of the structure and exterior property. If infestation is caused by failure of an occupant to prevent such infestation in the area occupied, the occupant shall be responsible for extermination.

3.8.5 Occupant. The occupant of any structure shall be responsible for the continued rodent and pest-free condition of the structure.

> ***Exception:*** Where the infestations are caused by defects in the structure, the owner shall be responsible for extermination.

ARTICLE FOUR
LIGHT, VENTILATION AND OCCUPANCY LIMITATIONS

Section 1
GENERAL

4.1.1 Scope. The provisions of this chapter shall govern the minimum conditions and standards for light, ventilation and space for occupying a structure.

4.1.2 Responsibility. The owner of the structure shall provide and maintain light, ventilation and space conditions in compliance with these requirements. A person shall not occupy as owner-occupant, or permit another person to occupy, any premises that do not comply with the requirements of this chapter.

4.1.3 Alternative devices. In lieu of the means for natural light and ventilation herein prescribed, artificial light or mechanical ventilation complying with the International Building Code shall be permitted.

Section 2
LIGHT

4.2.1 Habitable spaces. Every habitable space shall have at least one window of approved size facing directly to the outdoors or to a court. The minimum total glazed area for every habitable space shall be 8 percent of the floor area of such room. Wherever walls or other portions of a structure face a window of any room and such obstructions are located less than 3 feet (914 mm) from the window and extend to a level above that of the ceiling of the room, such window shall not be deemed to face directly to the outdoors nor to a court and shall not be included as contributing to the required minimum total window area for the room.

> ***Exception*:** Where natural light for rooms or spaces without exterior glazing areas is provided through an adjoining room, the unobstructed opening to the adjoining room shall be at least 8 percent of the floor area of the interior room or space, but not less than 25 square feet (2.33 m2). The exterior glazing area shall be based on the total floor area being served.

4.2.2 Common halls and stairways. Every common hall and stairway in residential occupancies, other than in one- and two-family dwellings, shall be lighted at all times with at least a 60watt standard incandescent light bulb for each 200 square feet (19 m2) of floor area or equivalent illumination, provided that the spacing between lights shall not be greater than 30 feet (9144 mm). In other than residential occupancies, means of egress, including exterior means of egress stairways shall be illuminated at all times the building space served by the means of egress is occupied with a minimum of 1 footcandle (11 lux) at floors, landings and treads.

4.2.3 Other spaces. All other spaces shall be provided with natural or artificial light sufficient to permit the maintenance of sanitary conditions, and the safe occupancy of the space and utilization of the appliances, equipment and fixtures.

Section 3
VENTILATION

4.3.1 Habitable spaces. Every habitable space shall have at least one operable window. The total operable area of the window in every room shall be equal to at least 45 percent of the minimum glazed area required in Section 4.2.1.

> ***Exception*:** Where rooms and spaces without openings to the outdoors are ventilated through an adjoining room, the unobstructed opening to the adjoining room shall be at least 8 percent of the floor area of the interior room or space, but not less than 25 square feet (2.33 m2). The ventilation openings to the outdoors shall be based on a total floor area being ventilated.

4.3.2 Bathrooms and toilet rooms. Every bathroom and toilet room shall comply with the ventilation requirements for habitable spaces as required by Section 4.3.1, except that a window shall not be required in such spaces equipped with a mechanical ventilation system. Air exhausted by a mechanical ventilation system from a bathroom or toilet room shall discharge to the outdoors or attic and shall not be recirculated.

4.3.3 Cooking facilities. Unless approved through the certificate of occupancy, cooking shall not be permitted in any rooming unit or dormitory unit, and a cooking facility or appliance shall not be permitted to be present in a rooming unit or dormitory unit.

> ***Exception*:** Where specifically approved in writing by a Code Enforcement Officer.

4.3.4 Process ventilation. Where injurious, toxic, irritating or noxious fumes, gases, dusts or mists are generated, a local exhaust ventilation system shall be provided to remove the contaminating agent at the source. Air shall be exhausted to the exterior and not be recirculated to any space.

4.3.5 Clothes dryer exhaust. Clothes dryer exhaust systems shall be independent of all other systems and shall be exhausted in accordance with the manufacturer's instructions.

Section 4
OCCUPANCY LIMITATIONS

4.4.1 Privacy. Dwelling units, hotel units, housekeeping units, rooming units and dormitory units shall be arranged to provide privacy and be separate from other adjoining spaces.

4.4.2 Minimum room widths. A habitable room, other than a kitchen, shall not be less than 7 feet (2134 mm) in any plan dimension. Kitchens shall have a clear passageway of not less than 3 feet (914 mm) between counter fronts and appliances or counter fronts and walls.

4.4.3 Minimum ceiling heights. Habitable spaces, hallways, corridors, laundry areas, bathrooms, toilet rooms and habitable basement areas shall have a clear ceiling height of not less than 7 feet (2134 mm).

Exceptions:

(A) In one- and two-family dwellings, beams or girders spaced not less than 4 feet (1219 mm) on center and projecting not more than 6 inches (152 mm) below the required ceiling height.

(B) Basement rooms in one- and two-family dwellings occupied exclusively for laundry, study or recreation purposes, having a ceiling height of not less than 6 feet 8 inches (2033 mm) with not less than 6 feet 4 inches (1932 mm) of clear height under beams, girders, ducts and similar obstructions.

(C) Rooms occupied exclusively for sleeping, study or similar purposes and having, a sloped ceiling over all or part of the room, with a clear ceiling height of at least 7 feet (2134 mm) over not less than one-third of the required minimum floor area. In calculating the floor area of such rooms, only those portions of the floor area with a clear ceiling height of 5 feet (1524 mm) or more shall be included.

4.4.4 Bedroom requirements. Every bedroom shall comply with the requirements of Sections 4.4.4.1 through 4.4.4.5.

4.4.4.1 Area for sleeping purposes. Every bedroom occupied by one person shall contain at least 70 square feet (6.5 m2) of floor area, and every bedroom occupied by more than one person shall contain at least 50 square feet (4.6 m2) of floor area for each occupant thereof.

4.4.4.2 Access from bedrooms. Bedrooms shall not constitute the only means of access to other bedrooms or habitable spaces and shall not serve as the only means of egress from other habitable spaces.

Exception: Units that contain fewer than two bedrooms.

4.4.4.3 Water closet accessibility. Every bedroom shall have interior access to at least one water closet and one lavatory without passing through another bedroom. Additionally, every bedroom in a dwelling unit shall have access to at least one water closet and lavatory located in the same story as the bedroom or an adjacent story.

4.4.4.4 Prohibited occupancy. Kitchens and non-habitable spaces shall not be used for sleeping purposes.

4.4.4.5 Other requirements. Bedrooms shall comply with the applicable provisions of this Code including, but not limited to, the light, ventilation, room area, ceiling height and room width requirements of this chapter; the plumbing facilities and water-heating facilities requirements of Chapter 5; the heating facilities and electrical receptacle requirements of Chapter 6; and the smoke detector and emergency escape requirements of Chapter 7.

4.4.5 Overcrowding. Dwelling units shall not be occupied by more occupants than permitted by the minimum area requirements of Table 4.4.5.

TABLE 4.4.5
MINIMUM AREA REQUIREMENTS

	MINIMUM AREA IN SQUARE FEET		
SPACE	**1-2 occupants**	**3-5 occupants**	**6 or more occupants**
Living room [a,b]	No requirements	120	150
Dining room a,b	No requirements	80	100
Bedrooms	Shall comply with Section 4.4.4.		

For SI: 1 square foot = 0.093 m^2.

a. See Section 4.4.5.2 for combined living room/dining room spaces.
b. See Section 4.4.5.1 for limitations on determining the minimum occupancy area for sleeping purposes.

4.4.5.1 Sleeping area. The minimum occupancy area required by Table 4.4.5 shall not be included as a sleeping area in determining the minimum occupancy area for sleeping purposes. All sleeping areas shall comply with subsection 4.4.4.

4.4.5.2 Combined spaces. Combined living room and dining room spaces shall comply with the requirements of Table 4.4.5 if the total area is equal to that required for separate rooms and if the space is located so as to function as a combination living room/dining room.

4.4.6 Efficiency unit. Nothing in this section shall prohibit an efficiency living unit from meeting the following requirements:

(A) A unit occupied by not more than two occupants shall have a clear floor area of not less than 220 square feet (20.4 m2). A unit occupied by three occupants shall have a clear floor area of not less than 320 square feet (29.7 m2). These required areas shall be exclusive of the areas required by Items 2 and 3.

(B) The unit shall be provided with a kitchen sink, cooking appliance and refrigeration facilities, each having a clear working space of not less than 30 inches (762 mm) in front. Light and ventilation conforming to this Code shall be provided.

(C) The unit shall be provided with a separate bathroom containing a water closet, lavatory and bathtub or shower.

(D) The maximum number of occupants shall be three.

4.4.7 Food preparation. All spaces to be occupied for food preparation purposes shall contain suitable space and equipment to store, prepare and serve foods in a sanitary manner. There shall be adequate facilities and services for the sanitary disposal of food wastes and refuse, including facilities for temporary storage.

ARTICLE FIVE
PLUMBING FACILITIES AND FIXTURE REQUIREMENTS

Section 1
GENERAL

5.1.1 Scope. The provisions of this chapter shall govern the minimum plumbing systems, facilities and plumbing fixtures to be provided.

5.1.2 Responsibility. The owner of the structure shall provide and maintain such plumbing facilities and plumbing fixtures in compliance with these requirements. A person shall not occupy as owner-occupant or permit another person to occupy any structure or premises which does not comply with the requirements of this chapter.

Section 2
REQUIRED FACILITIES

5.2.1 Dwelling units. Every dwelling unit shall contain its own bathtub or shower, lavatory, water closet and kitchen sink which shall be maintained in a sanitary, safe working condition. The lavatory shall be placed in the same room as the water closet or located in close proximity to the door leading directly into the room in which such water closet is located. A kitchen sink shall not be used as a substitute for the required lavatory.

5.2.2 Rooming houses. At least one water closet, lavatory and bathtub or shower shall be supplied for each four rooming units.

5.2.3 Employees' facilities. A minimum of one water closet, one lavatory and one drinking facility shall be available to employees.

> **5.2.3.1 Drinking facilities.** Drinking facilities shall be a drinking fountain, water cooler, bottled water cooler or disposable cups next to a sink or water dispenser. Drinking facilities shall not be located in toilet rooms or bathrooms.

Section 3
TOILET ROOMS

5.3.1 Privacy. Toilet rooms and bathrooms shall provide privacy and shall not constitute the only passageway to a hall or other space, or to the exterior. A door and interior locking device shall be provided for all common or shared bathrooms and toilet rooms in a multiple dwelling.

5.3.2 Location. Toilet rooms and bathrooms serving hotel units, rooming units or dormitory units or housekeeping units, shall have access by traversing not more than one flight of stairs and shall have access from an interior common hall or passageway.

5.3.3 Location of employee toilet facilities. Toilet facilities shall have access from within the employees' working area. The required toilet facilities shall be located not more than one story above or below the employees' working area and the path of travel to such facilities shall not exceed a distance of 500 feet (152 m). Employee facilities shall either be separate facilities or combined employee and public facilities.
Exception: Facilities that are required for employees in storage structures or kiosks, which are located in adjacent structures under the same ownership, lease or control, shall not exceed a travel distance of 500 feet (152 m) from the employees' regular working area to the facilities.

5.3.4 Floor surface. In other than dwelling units, every toilet room floor shall be maintained to be a smooth, hard, nonabsorbent surface to permit such floor to be easily kept in a clean and sanitary condition.

Section 4
PLUMBING SYSTEMS AND FIXTURES

5.4.1 General. All plumbing fixtures shall be properly installed and maintained in working order, and shall be kept free from obstructions, leaks and defects and be capable of performing the function for which such plumbing fixtures are designed. All plumbing fixtures shall be maintained in a safe, sanitary and functional condition.

5.4.2 Fixture clearances. Plumbing fixtures shall have adequate clearances for usage and cleaning.

5.4.3 Plumbing system hazards. Where it is found that a plumbing system in a structure constitutes a hazard to the occupants or the structure by reason of inadequate service, inadequate venting, cross connection, back-siphonage, improper installation, deterioration or damage or for similar reasons, the Code official shall require the defects to be corrected to eliminate the hazard.

Section 5
WATER SYSTEM

5.5.1 General. Every sink, lavatory, bathtub or shower, drinking fountain, water closet or other plumbing fixture shall be properly connected to either a public water system or to an approved private water system. All kitchen sinks, lavatories, laundry facilities, bathtubs and showers shall be supplied with hot or tempered and cold running water.

5.5.2 Contamination. The water supply shall be maintained free from contamination, and all water inlets for plumbing fixtures shall be located above the flood-level rim of the fixture. Shampoo basin faucets, janitor sink faucets and other hose bibs or faucets to which hoses are

attached and left in place, shall be protected by an approved atmospheric-type vacuum breaker or an approved permanently attached hose connection vacuum breaker.

5.5.3 Supply. The water supply system shall be installed and maintained to provide a supply of water to plumbing fixtures, devices and appurtenances in sufficient volume and at pressures adequate to enable the fixtures to function properly, safely, and free from defects and leaks.

5.5.4 Water heating facilities. Water heating facilities shall be properly installed, maintained and capable of providing an adequate amount of water to be drawn at every required sink, lavatory, bathtub, shower and laundry facility at a temperature of not less than 110°F (43°C). A gas-burning water heater shall not be located in any bathroom, toilet room, bedroom or other occupied room normally kept closed, unless adequate combustion air is provided. An approved combination temperature and pressure-relief valve and relief valve discharge pipe shall be properly installed and maintained on water heaters.

Section 6
SANITARY DRAINAGE SYSTEM

5.6.1 General. All plumbing fixtures shall be properly connected to either a public sewer system or to an approved private sewage disposal system.

5.6.2 Maintenance. Every plumbing stack, vent, waste and sewer line shall function properly and be kept free from obstructions, leaks and defects.

Section 7
STORM DRAINAGE

5.7.1 General. Drainage of roofs and paved areas, yards and courts, and other open areas on the premises shall not be discharged in a manner that creates a public nuisance.

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ARTICLE SIX
MECHANICAL AND ELECTRICAL REQUIREMENTS

Section 1
GENERAL

6.1.1 Scope. The provisions of this chapter shall govern the minimum mechanical and electrical facilities and equipment to be provided.

6.1.2 Responsibility. The owner of the structure shall provide and maintain mechanical and electrical facilities and equipment in compliance with these requirements. A person shall not occupy as owner-occupant or permit another person to occupy any premises which does not comply with the requirements of this chapter.

Section 2
HEATING FACILITIES

6.2.1 Facilities required. Heating facilities shall be provided in structures as required by this section.

6.2.2 Residential occupancies. Dwellings shall be provided with heating facilities capable of maintaining a room temperature of 65°F (18°C) in all habitable rooms, bathrooms and toilet rooms. Cooking appliances shall not be used to provide space heating to meet the requirements of this section.

6.2.3 Heat supply. Every owner and operator of any building who rents, leases or lets one or more dwelling unit, rooming unit, dormitory or guestroom shall supply heat sufficient to maintain a temperature of not less than 65°F (18°C) in all habitable rooms, bathrooms, and toilet rooms.

> ***Exception*:** When the outdoor temperature is less than 20°F (-7°C), maintenance of the minimum room temperature shall not be required provided that the heating system is operating at its full design capacity.

6.2.4 Room temperature measurement. The required room temperatures shall be measured 3 feet (914 mm) above the floor near the center of the room and 2 feet (610 mm) inward from the center of each exterior wall.

Section 3
MECHANICAL EQUIPMENT

6.3.1 Mechanical appliances. All mechanical appliances, fireplaces, solid fuel-burning appliances, cooking appliances and water heating appliances shall be properly installed and maintained in a safe working condition, and shall be capable of performing the intended function.

6.3.2 Removal of combustion products. All fuel-burning equipment and appliances shall be connected to an approved chimney or vent.

> ***Exception***: Fuel-burning equipment and appliances which are labeled for unvented operation.

6.3.3 Clearances. All required clearances to combustible materials shall be maintained.

6.3.4 Safety controls. All safety controls for fuel-burning equipment shall be maintained in effective operation.

6.3.5 Combustion air. A supply of air for complete combustion of the fuel and for ventilation of the space containing the fuel-burning equipment shall be provided for the fuel-burning equipment.

6.3.6 Energy conservation devices. Devices intended to reduce fuel consumption by attachment to a fuel-burning appliance, to the fuel supply line thereto, or to the vent outlet or vent piping there from, shall not be installed unless labeled for such purpose and the installation is specifically approved.

Section 4
ELECTRICAL FACILITIES

6.4.1 Facilities required. Every occupied building shall be provided with an electrical system in compliance with the requirements of this section and Section 6.5 below.

6.4.2 Service. The size and usage of appliances and equipment shall serve as a basis for determining the need for additional facilities. Dwelling units shall be served by a three-wire, 120/240 volt, single phase electrical service having a rating of not less than 60 amperes.

6.4.3 Electrical system hazards. Where it is found that the electrical system in a structure constitutes a hazard to the occupants or the structure by reason of inadequate service, improper fusing, insufficient receptacle and lighting outlets, improper wiring or installation, deterioration or damage, or for similar reasons, the Code official shall require the defects to be corrected to eliminate the hazard.

Section 5
ELECTRICAL EQUIPMENT

6.5.1 Installation. All electrical equipment, wiring and appliances shall be properly installed and maintained in a safe and approved manner.

6.5.2 Receptacles. Every habitable space in a dwelling shall contain at least two separate and remote receptacle outlets. Every laundry area shall contain at least one grounded-type receptacle or a receptacle with a ground fault circuit interrupter. Every bathroom shall contain at

least one receptacle. Any new bathroom receptacle outlet shall have ground fault circuit interrupter protection.

6.5.3 Lighting fixtures. Every public hall, interior stairway, toilet room, kitchen, bathroom, laundry room, boiler room and furnace room shall contain at least one electric lighting fixture.

Section 6
ELEVATORS, ESCALATORS AND DUMBWAITERS

6.6.1 General. Elevators, dumbwaiters and escalators shall be maintained to sustain safely all imposed loads, to operate properly, and to be free from physical and fire hazards. The most current certificate of inspection shall be on display at all times within the elevator or attached to the escalator or dumbwaiter; or the certificate shall be available for public inspection in the office of the building operator.

6.6.2 Elevators. In buildings equipped with passenger elevators, at least one elevator shall be maintained in operation at all times when the building is occupied.

> ***Exception***: Buildings equipped with only one elevator shall be permitted to have the elevator temporarily out of service for testing or servicing.

Section 7
DUCT SYSTEMS

6.7.1 General. Duct systems shall be maintained free of obstructions and shall be capable of performing the required function.

ARTICLE SEVEN
FIRE SAFETY REQUIREMENTS

Section 1
GENERAL

7.1.1 Scope. The provisions of this chapter shall govern the minimum conditions and standards for fire safety relating to structures and exterior premises, including fire safety facilities and equipment to be provided.

7.1.2 Responsibility. The owner of the premises shall provide and maintain such fire safety facilities and equipment in compliance with these requirements. A person shall not occupy as owner-occupant or permit another person to occupy any premises that do not comply with the requirements of this chapter.

Section 2
MEANS OF EGRESS

7.2.1 General. The occupant shall maintain a safe, continuous and unobstructed path of travel shall be provided from any point in a building or structure to the public way. Means of egress shall comply with the Arkansas Fire Prevention Code.

7.2.2 Aisles. The required width of aisles in accordance with the Arkansas Fire Prevention Code shall be unobstructed.

7.2.3 Locked doors. All means of egress doors shall be readily openable from the side from which egress is to be made without the need for keys, special knowledge or effort, except where the door hardware conforms to that permitted by the Arkansas Fire Prevention Code.

7.2.4 Emergency escape openings. Required emergency escape openings shall be maintained in accordance with the building codes in effect at the time of construction, and the following. Required emergency escape and rescue openings shall be operational from the inside of the room without the use of keys or tools. Bars, grilles, grates or similar devices are permitted to be placed over emergency escape and rescue openings provided the minimum net clear opening size complies with the building codes that were in effect at the time of construction and such devices shall be releasable or removable from the inside without the use of a key, tool or force greater than that which is required for normal operation of the escape and rescue opening.

Section 3
FIRE-RESISTANCE RATINGS

7.3.1 Fire-resistance-rated assemblies. The required fire-resistance rating of fire-resistance-rated walls, fire stops, shaft enclosures, partitions and floors shall be maintained.

7.3.2 Opening protectives. Required opening protectives shall be maintained in an operative condition. All fire and smokes top doors shall be maintained in operable condition. Fire doors and smoke barrier doors shall not be blocked or obstructed or otherwise made inoperable.

Section 4
FIRE PROTECTION SYSTEMS

7.4.1 General. All systems, devices and equipment to detect a fire, actuate an alarm, or suppress or control a fire or any combination thereof shall be maintained in an operable condition at all times in accordance with the Arkansas Fire Prevention Code.

7.4.2 Smoke alarms. Single or multiple-station smoke alarms shall be installed and maintained in all residences, regardless of occupant load at all of the following locations:

(A) On the ceiling or wall outside of each separate sleeping area in the immediate vicinity of bedrooms.

(B) In each room used for sleeping purposes.

(C) In each story within a dwelling unit, including basements and cellars but not including crawl spaces and uninhabitable attics. In dwellings or dwelling units with split levels and without an intervening door between the adjacent levels, a smoke alarm installed on the upper level shall suffice for the adjacent lower level provided that the lower level is less than one full story below the upper level. Single or multiple-station smoke alarms shall be installed in other groups in accordance with the Arkansas Fire Prevention Code.

7.4.3 Power source. In all residences, regardless of occupant load, single-station smoke alarms shall receive their primary power from the building wiring provided that such wiring is served from a commercial source and shall be equipped with a battery backup. Smoke alarms shall emit a signal when the batteries are low. Wiring shall be permanent and without a disconnecting switch other than as required for over-current protection.

***Exceptions*:** Smoke alarms are permitted to be solely battery operated when located:

(A) in buildings where no construction is taking place;

(B) in buildings that are not served from a commercial power source; and

(C) in existing areas of buildings undergoing alterations or repairs that do not result in the removal of interior wall or ceiling finishes exposing the structure.

7.4.4 Interconnection. Where more than one smoke alarm is required to be installed within a residence, the smoke alarms shall be interconnected in such a manner that the activation of one alarm will activate all of the alarms in the individual unit. The alarm shall be clearly audible in all bedrooms over background noise levels with all intervening doors closed.

Exceptions:

(A) Interconnection is not required in buildings which are not undergoing alterations, repairs, or construction of any kind.

(B) Smoke alarms in existing areas are not required to be interconnected where alterations or repairs do not result in the removal of interior wall or ceiling finishes exposing the structure.

ARTICLE 8
NUISANCES

Section 1
GENERAL

8.1.1 Intent. It is the intent of this Code to prevent and abate nuisances within the municipal boundaries of the City of North Little Rock. For the purposes of this Code, the word "nuisance" is defined as any act, omission, or property condition that is detrimental to the health, safety and welfare of the public in that it:

(A) Injures or endangers the comfort, repose, health or safety of others;
(B) Offends decency;
(C) Is offensive to the senses;
(D) Unlawfully interferes with, obstructs or tends to obstruct, or renders dangerous for passage any public or private street, highway, sidewalk, stream, ditch or drainage;
(E) In any way renders other persons insecure in life or the use of property; or
(F) Essentially interferes with the comfortable enjoyment of life and property, or tends to depreciate the value of the property of others.

8.1.2 Prohibited. It shall be unlawful for any person or entity to cause, permit, maintain or allow the creation or maintenance of a nuisance within the City of North Little Rock.

8.1.3 Illustrative enumeration of a nuisance. The maintaining, using, placing, depositing, leaving or permitting to be or remain on any public or private property of any of the following items, conditions or actions is hereby declared to be and constitute a nuisance; provided, however, this enumeration shall not be deemed or construed to be conclusive, limiting or restrictive:

(A) Noxious weeds and other rank vegetation;
(B) Accumulations or storage of rubbish, garbage, materials, metals, lumber, and other materials;
(C) Any condition which provides harborage for rats, mice, snakes and other vermin;
(D) Dilapidated structures;
(E) All unnecessary or unauthorized noises and annoying vibrations, including animal noises.
(F) All disagreeable or obnoxious odors and stenches, as well as the conditions, substances or other causes which give rise to the emission or generation of such odors and stenches.
(G) The carcasses of animals or fowl not disposed of within a reasonable time after death.
(H) The pollution of any public well or cistern, stream, lake, canal or body of water by sewage, dead animals, creamery, industrial wastes or other substances.
(I) Any building, structure or other place or location where any activity which is in violation of local, state or federal law is conducted, performed or maintained.

(J) Any accumulation of stagnant water permitted or maintained on any lot or piece of ground.
(K) Dense smoke, noxious fumes, gas, soot or cinders in unreasonable quantities.
(L) Graffiti.
(M) Inoperable, wrecked or abandoned motor vehicles, or any parts thereof.
(N) Unsafe equipment, including, but not limited to, any boiler, heating equipment, elevator, moving stairway, electrical wiring or device, flammable liquid containers or other equipment on the premises or within the structure which is in such disrepair or condition that it is a hazard to life, health, property or safety of the public or occupants of the premises or structure.
(O) The use of tarpaulins, canvas, plastic, oil cloth, sheeting and other similar materials as fencing or to shield or enclose any structure (including, without limitation, openings for windows, doors, walls, roofs, garage doors or carports) except when temporarily necessary to perform repairs under a properly issued building permit.
(P) Permanent or temporary basketball goals (except those approved by the City) on any public street or on any right-of-way adjacent to a public street.

Section 2
GENERAL REMEDIES

8.2.1 Other remedies unaffected. The remedies found in this article are not intended to displace any other remedies of law or equity found in the common or statutory law of Arkansas that may be available to the City of North Little Rock, a citizen of the City of North Little Rock, or any public or private entity to abate or prevent a nuisance.

8.2.2 Citations. Code Enforcement Officers are authorized to issue citations or notices of violation to any person in violation of subsection 8.1.2.

8.2.3 Abatement. In addition to the authority found in this section, Code Enforcement Officers are authorized to take such action as may be reasonably necessary to abate nuisances within the City of North Little Rock. For the specific nuisances that are defined in Section 3 below, Code Enforcement Officers may use the associated method of abatement which is deemed to be both a reasonable and necessary response by the City to abate a nuisance.

Section 3
REMEDIES FOR SPECIFIC NUISANCES

8.3.1 Uncut weeds, grass and unsanitary articles. All property owners and occupants within the municipal boundaries of the City of North Little Rock are required to cut weeds and grass, remove garbage, rubbish and other unsanitary articles and things from their property, and to eliminate, fill up, or remove stagnant pools of water or any other unsanitary thing, place or condition which might become a breeding place for mosquitoes, flies and germs harmful to the health of the community. For specific requirements related to the required maintenance of grass and weeds, refer to subsection 3.2.4.

8.3.1.1 Authorized abatement. If the owner of any lot or other real property within the city shall neglect or refuse to remove, abate or eliminate any condition as may be provided for under subsection 8.3.1, after having been given a Notice of Violation with seven days' notice in writing to do so by a Code Enforcement Officer, the city is hereby authorized to take such action is necessary to correct the condition, including but not limited to entering upon the property and having such weeds, rank grass or other vegetation cut and removed, or climinating any unsanitary and unsightly condition, or causing necessary repairs to be made and charging the cost thereof to the owner of such premises, which shall constitute a lien thereon. The abovementioned seven days' notice shall be calculated by counting the first day of the seven day period as the day after written notice is given to the owner, by counting every calendar day, including weekends and holidays, and by establishing the deadline to take the above required actions as 11:59 p.m. on the seventh day. The City reserves the right to secure a lien for its costs, including a priority clean-up lien pursuant to Ark Code Ann 14-54-903.

8.3.1.2 Special notice rules for weed lots. For purposes of this section, a "weed lot" is a previously platted and subdivided lot that is vacant or upon which an unsafe and vacant structure is located and that contains debris, rubbish, or grass contrary to this Code. Due to the continual growth cycle of vegetation on weed lots, continuous abatement is often necessary. Thus the seven day Notice of Violation described in subsection 8.3.1.1 shall be issued with the following additional statement, "Work to abate this nuisance will not be complete until the end of the growing season." No additional Notice of Violation need be given unless and until the growing season concludes and further abatement is necessary.

8.3.2 Inoperable or wrecked motor vehicles and any parts thereof. The accumulation of inoperable or wrecked motor vehicles in the City is degrading to the environment, property values, and the aesthetic beauty of the City. Thus, the only location where an inoperable or wrecked motor vehicle, or any parts thereof, may be parked, kept, or stored within the City is in an approved storage area on property that is properly zoned and permitted for that purpose. (*See also* Section 12.24 of the Zoning Ordinance.) The parking, keeping, or storing of inoperable or wrecked motor vehicles, or any parts thereof, at any other location, or unauthorized area thereon, in the City is declared to be a nuisance and may be cited for violation of subsection 3.2.8 and, if necessary, abated as provided in subsection 8.3.2.1, below.

8.3.2.1 Presumption of inoperability. A vehicle shall be deemed inoperable when one or more of the following conditions exist:

(A) It has not been moved for more than three days.

(B) One or more tires are flat.

(C) One or more wheels are missing.

(D) The hood or trunk is raised or missing and has appeared to remain so for more than three days.

(E) Weeds or grass have grown up around the vehicle.

(F) The engine is missing.

(G) The vehicle has no current vehicle tags or registration.

(H) The door or doors, fender or fenders are removed or missing.

(I) The front or rear windshield is broken, removed or missing, or the side windows are broken or removed or missing.

8.3.2.2 Removal of inoperable motor vehicles near public streets. If an owner or occupant of property within the City shall neglect or refuse to remove an inoperable or motor vehicle that is parked, kept or stored near a public street without proper authority, a Code Enforcement Officer may cause the removal of the inoperable motor vehicle, provided that a **Notice of Violation** is affixed to the vehicle for a period of no less than three days which shall state that the vehicle is a nuisance and order the property owner, occupant, or whoever has an interest in the vehicle to remove it from the property. If the vehicle is found on private property with one or more occupiable structures, a copy of the notice shall additionally be placed on one of the structures. For purposes of this section, a vehicle shall be deemed "near" a public street if it can be seen with the unaided eye from a public street.

8.3.2.3 Removal of other inoperable motor vehicles. If an owner or occupant of property within the City shall neglect or refuse to remove an inoperable or motor vehicle that is parked, kept or stored without proper authority but away from public streets, a Code Enforcement Officer may cause the removal of the inoperable motor vehicle, provided that a **Notice of Violation** is affixed to the vehicle for a period of no less than thirty days which shall state that the vehicle is a nuisance and order the property owner, occupant, or whoever has an interest in the vehicle to remove it from the property. If the vehicle is found on private property with one or more occupiable structures, a copy of the notice shall additionally be placed on one of the structures.

8.3.3 Impediments to City streets, easements, or rights-of-way. The City owns property rights throughout the jurisdiction of this Code which are necessary to the efficient flow of traffic, storm water, utility service, and the like. Impediments to these property rights are declared to be a public nuisance as they reduce the public benefit of public property and can endanger the health and welfare of the citizens who use and depend upon these property rights. Code Enforcement Officers shall have the authority to order the immediate removal of any impediment to the use of public streets, sidewalks, drains, ditches, utilities, easements, or other right-of-ways. If the apparent owner of the impediment is not known, available, or willing to remove the impediment, a Code Enforcement Officer may cause the same to be

EXHIBIT L

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removed. Any person who is aggrieved by the actions of a Code Enforcement Officer under this subsection may appeal the same pursuant to Section 9 of Article I.

8.3.3.1 Special rules for basketball goals. Code Enforcement Officers and Law Enforcement Officers shall have the authority to order the immediate removal of any permanent or temporary basketball goal (unless approved by the City) that is on any public street or on any right-of-way adjacent to a public street. If the apparent owner of the basketball goal is unknown, unavailable, or unwilling to remove the basketball goal, a Code Enforcement Officer or Law Enforcement Officer may seize and remove it to a City storage site where it may be reclaimed by the owner. Any person who seeks to reclaim a basketball goal and offers proof of ownership (such as the testimony of a witness), may obtain custody of the goal after paying an administrative reclamation fee of $25 per goal. Any person who is aggrieved by the actions taken under this subsection may appeal the same pursuant to Section 9 of Article I.

8.3.3.2 Shopping carts. Code Enforcement Officers shall have the authority to seize any shopping cart that is left unattended on any public streets, sidewalks, drains, ditches, utilities, easements, or other right-of-ways. Any cart so seized shall be removed to a City storage site where it may be reclaimed by the owner. Any person seeking to reclaim a seized shopping cart and offering proof of ownership (such as a label on the shopping cart), may obtain custody of the shopping cart after paying an administrative reclamation fee of $25 per cart. Any person who is aggrieved by the actions of a Code Enforcement Officer under this subsection may appeal the same pursuant to Section 9 of Article I.

8.3.3.3 Property deemed abandoned. Any property seized by the City pursuant to subsection 8.3.3 shall be deemed abandoned after thirty (30) days and properly disposed of by the Senior Code Enforcement Officer.

8.3.4 Nuisance Structures. Any building or other structure which is in such a dilapidated condition that it is unsafe or unfit for human habitation, or kept in such an unsanitary condition that it is a menace to the health or safety of people residing in the vicinity thereof, or presents a more than ordinarily dangerous fire hazard in the vicinity where it is located shall constitute a nuisance.

8.3.4.1 Definitions. For purposes of this Article, the following terms are defined as follows:

(A) Unsafe structures. An unsafe structure is one that is found to be dangerous to the life, health, property or safety of the public or the occupants of the structure by not providing minimum safeguards to protect or warn occupants in the event of fire, or because such structure contains unsafe equipment or is so damaged, decayed, dilapidated, structurally unsafe or of such faulty construction or unstable foundation, that partial or complete collapse is possible.

(B) Unfit structure for human occupancy. A structure is unfit for human occupancy whenever the Code official finds that such structure is unsafe, unlawful or, because of the degree to which the structure is in disrepair or lacks maintenance, is unsanitary, vermin or rat infested, contains filth and contamination, or lacks ventilation, illumination, sanitary or heating facilities or other essential equipment required by this Code, or because the location of the structure constitutes a hazard to the occupants of the structure or to the public.

(C) Unlawful structure. An unlawful structure is one found in whole or in part to be occupied by more persons than permitted under this Code, or was erected, altered or occupied contrary to law.

8.3.4.2 Vacating of Unfit or Unsafe Structures and Utility Services. Any premises declared as unsafe or unfit for human habitation by a Code Enforcement Officer Department and so designated by placard, shall be vacated within seven (7) days after notice of such action has been given to both the owner and occupant of the building. On the eighth (8th) day after said notice the Code Enforcement Department shall notify all utilities to discontinue services to the dwelling or dwelling unit. After utilities services are cutoff no further services shall be made available until a rehabilitation permit is obtained or until the Director of Code Enforcement notifies utilities that services may be provided to the dwelling or dwelling unit.

8.3.4.2.1 Placarding. Upon failure of the owner or person responsible to comply with the Notice of Violation for a nuisance structure or equipment within the time given, the Code official shall then post on the premises or on defective equipment a placard bearing the word **"NUISANCE"** and a statement of the penalties provided for occupying the premises, operating the equipment or removing the placard.

8.3.4.2.2 Placard removal. The Code Official shall remove the placard referred to in this subsection whenever the defect or defects upon which the placarding actions were based have been eliminated. Any person who defaces or removes a condemnation placard without the approval of the Code Official shall be subject to the penalties provided by this Code.

8.3.4.3 Prohibited occupancy. Any person who shall occupy placarded premises and any owner or responsible person of placarded premises who allows another person to occupy such placarded premises shall be subject to the penalties provided by this Code.

8.3.4.4 Abatement. When warranted, Code Enforcement Officers may perform work to secure, abate and otherwise cause a nuisance structures to conform with this ordinance and seek reimbursement for the cost thereof in the manner provided by law.

8.3.4.5 Condemnation. When warranted, Code Enforcement Officers may initiate condemnation proceedings under Section 7 of Article I in lieu of or in addition to the procedures in this section

Ref. Amended 3-24-08 (Ord. 8065), 7-27-09 (Ord. 8184).

EXHIBIT L

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

CONVENT CORPORATION, INDIVIDUALLY, AND BEHALF ALL OTHER SIMILARLY SITUATED. — PLAINTIFF

V. — NO: 4-13-CV-00259

CITY OF NORTH LITTLE ROCK, ARKANSAS, A MUNICIPAL CORPORATION, JOE SMITH, MAYOR, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY, CITY COUNCIL MEMEBERS, DEBI ROSS, BETH WHITE, LINDA ROBINSON, MAURICE TAYLOR, STEVE BAXTOR, BRUCE FOUTCH, MURRY WITCHER, AND CHARLIE HIGHT, EACH INDIVIDUALLY AND IN HIS OR HER OFFICIAL CAPACITY, TOM WADLEY, DIRECTOR, CODE ENFORCEMENT DIVISION, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY, AND FELECIA MCHENRY, CODE ENFORCEMENT OFFICER, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY — DEFENDANTS

DECLARATION OF CLAUDE SKELTON

I, Claude Skelton, make the following statement in lieu of an affidavit, as permitted by Section 1746 of Title 28 of the United States Code. I am aware that this Declaration will be filed with the United States District Court, Eastern District of Arkansas and that it is the legal equivalent of a statement under oath. I am an adult resident of 19 Lorian Drive Little Rock, Arkansas. I have direct and personal knowledge of the facts set forth below in each of the following paragraphs and each is true and correct to my personal knowledge.

1. Convent Corporation, Inc. purchased the real estate and building located at 6615 East Highway 70 in 1993 from Stillman Penny to be used as rental propertyt. A copy of the deed of conveyance dated March 26 1993 is Annexed hereto as Exhibit 1 and made part hereof.

2. At the time of the purchase, the stockholders and investors in Convent Corporation, Inc. were Paul Robert Bekkela, Michael Eades, and Claude Skelton. A true and correct copy of the minutes of the first meeting of shareholders of Convent Corporation Inc. is attached hereto marked Exhibit 2 and made part hereof.

3. Paul Robert Bekkela died testate in 2007 and his stock in Convent Corporation, Inc. passed to a Testamentary Trust with the Cache Bank and Trust Company of Greely Colorado as Trustee and Mike Phillips as Trust Representative. On July 1, 2011 and September 14, 2011 respectively, Mike Phillips, and Claude Skelton conveyed their stock in Convent Corporation, Inc. to Electra Sports, LLC, an Arkansas Limited Liability Company organized by Richard Livdahl. Copies of the Bills of Sale and Articles of Organization of Electra Sports, LLC are annexed hereto marked Exhibits 3, 4, and 5 and are make part hereof.

4. I serve as President of Convent Corporation, Inc. and as controlling member of Electra Sports, LLC.

5. Since 1993, Richard Livdahl has been authorized to carry out various functions and duties for Convent Corporation, Inc. and was fully authorized by me as President of Convent Corporation. Inc. to represent Convent Corporation, Inc. in all phases of this condemnation proceeding involving the property located at 6615 Hwy 70 in the City of North Little Rock Arkansas .

6. As President, and representing the controlling stockholder of Convent Corporation, Inc., as set forth above, I carefully reviewed the Notice of Public

Nuisance that had been provided by the City. From such review, I found the Notice to be completely inadequate inasmuch as it provided no notice whatever concerning the specific conditions of the building about which the City was complaining. The notice simply did not give sufficient information or details, in any manner or form, to allow the Corporation to either repair the property or prepare for a public hearing before the North Little Rock City Council. A copy of the Notice is annexed hereto as Exhibit 6 and is made part hereof.

7. The above referred to Notice states: "that the structure is deemed to be a public nuisance in violation of North Little Rock Nuisance Abatement/Property Maintenance Code Articles 1&8 for it is an unsafe and vacant structure that is not fit for human habitation." The Notice then commands: "you are given seven (7) days' notice to remove, abate or eliminate any and all of these aforementioned conditions on this property, "OR" (emphasis added) contact our office within said time to discuss a plan to abate the public nuisance"

The only information that the Notice provides are the bare legalistic conclusions that the City considers that the building is a "public nuisance," "unsafe," "vacant," and "not fit for human habitation." Absolutely no details are given sufficient to permit "removal," "abatement," or "elimination." The Notice refers to "all of these aforementioned conditions on this property," yet there are absolutely none given. From this information it was impossible to comply with the City demands. No contractor could be hired and told to go abate the nuisance, for at a minimum the contractor would need be told to work inside or outside, on the roof, the foundation, the walls, the façade, the lot or somewhere in between. The Corporation only could act by guessing, at its peril, what the City had in mind.

8. No reasonable individual or corporate entity could, using the information given, know how to comply with this Notice to restore the property. Supposedly,

the City had in its possession details sufficient to allow it to give a useful Notice. It could have said repair the roof because due to storm damage its missing shingles on the East side. Repair the soffit where it is missing, and repair the wind damaged siding on the front of the building, or clean out the debris inside if any—but the City did none of these things. The City provided absolutely no details, leaving the Corporation to guess or spend unlimited funds to totally rebuild the building toward some imagined perfection.

9. As President and representing the controlling stockholder of Convent Corporation, as set forth above, I carefully reviewed the Notice of Public Nuisance that had been provided by the City and, as noted in Paragraph (6) of this Declaration, determined that it was impossible and unreasonable to try to repair or restore the property based on the information in the Notice. There was simply, under any construction of the Notice, insufficient information, to begin any kind of construction.

10. The second option,[1] apart from the first which was immediately repairing the building, provided by the notice was "this is your legal notice that a public hearing will be conducted by the City Council on February 25 at 7: 00 P.M. at City Hall (300 Street, second floor, North Little Rock) to consider condemning the above structure."

Considering that the Notice said that there would be a "public hearing" "to consider," the reasonable inference was that the City Council was going to hear the information put forth by the Code Enforcement employees of the City, or review the record, and then hear what the Corporation had in the way of evidence or facts to explain or justify the condition of the building and then

[1] In reality this was the only option as it soon became clear that the City did not intend to permit any repairs to be made prior to the condemnation vote by the City Council.

"consider the facts" to make a decision which would not be arbitrary and capricious.

Under such reasonable assumption that "hearing"[2] meant such a fact finding proceeding of some sort it was necessary for the Corporation to prepare to attend the hearing and present its side of the story. Again, the Corporation was confronted by the total inadequacy of the Notice. To fully prepare the Corporation had to be prepared to rebut every conceivable fault or defect in the building inside or out. The Corporation would have to prove the negatives that the property was "not a public nuisance", "not unsafe," and "not unfit for human habitation." Trying to assemble information or facts sufficient to defend the building on each and every possible defect inside or outside would be a near impossible burden even if the Corporation assumed that the most notable defects were the likely ones but, not knowing for sure, had to prepare for all.[3]

11. As President and representing the controlling stockholder of Convent Corporation, as set forth above, I carefully reviewed the Notice of Public Nuisance that had been provided by the City and as noted in Paragraph (6) above found the Notice to be inadequate for sending a Contractor to repair the building. Likewise, I reviewed the Notice to determine what had to be done to prepare for a "hearing to consider condemning the building" and again found the Notice inadequate in that it gave only bare legalistic conclusions without giving any details sufficient to allow a reasonable method of preparing for a hearing.

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[2] As it turns out, the City Council had no intention of holding a meaningful "hearing." The Council only evidence considered by the City Council at the meeting on February 25, 2013 were pictures of the clutter that had since been removed. The Council did not hear any testimony concerning any specific code violations or needed repairs. Thus, the condemnation vote was based merely on conclusions unsupported by any facts. The City Council never intended to hold a meaningful "hearing" and, although the Council did permit Plaintiff to speak for three (3) minutes, the outcome of the vote was predetermined.

[3] It has since been discovered that, at the time of the condemnation vote, no one affiliated with the City had prepared a report listing any specific violations or conditions to be corrected.

12. Upon review, the Notice appeared to present a third option, in addition to repairing the building or preparing for a hearing, stating: "OR, (emphasis supplied) contact our office within said time to discuss a plan to abate the public nuisance" and "if you wish to resolve this situation before the public hearing please contact Felecia McHenry of North Little Rock Code Enforcement Department Immediately."

Again, this option offered no details to permit the Corporation to make a reasonable decision because there were still no details as to what exactly the City considered to be the conditions supporting its finding of "Public Nuisance." But, "contacting the North Little Rock Enforcement Department" try to resolve the situation before the public hearing required far less detail than the other options. Of course, the outcome of this option was less certain than just repairing the building if the Notice had supplied adequate details to do that.

13.. As President and representing the controlling stockholder of Convent Corporation, as set forth above, and after carefully review the options as set forth above in this Declaration, I determined that the Corporation wanted to satisfy the City as quickly and fully as possible and that the best way to do that was to pursue all three options to the extent each was feasible and to do so simultaneously.

Consequently, I discussed this with Richard Livdahl and immediately began to take steps to remedy whatever problems the City had with the building. In accordance with the Notice, Richard Livdahl called the North Little Rock Code Enforcement Department set up a meeting "to discuss a plan to "abate the public nuisance" and "to resolve the situation before a hearing".

At or near the same time Roberto Alveraz was dispatched to the building to assess the situation and to be prepared to immediately began construction to repair whatever defects the City identified. Upon arriving at the building Roberto Alveraz discovered that the building had been vandalized extensively inside and

that entry to the building had been gained through a front door that had been broken free from the large chains that held it firmly shut. Roberto Alverez was directed to immediately get the necessary supplies and secure all access to the building. Robert Alverez was further directed to inspect the building inside and out and to try to identify the problems that might cause the City the greatest concern and to make materials lists and labor estimates so that he would be prepared put together plan to repair the building when the City provided us with sufficient details to work from.

14. Richard Livdahl then reported back from his meeting with the Code Enforcement Department. Richard Livdahl stated that upon informing those present that Convent Corporation Inc. wanted to repair the building he was inform that the building had "been Red Tagged" and that no building permit to restore the building could or would be issued to allow any repair work to be done. Richard Livdahl had been shown pictures that the City had taken inside the building showing the extensive vandalism that had occurred. Richard Livdahl informed those present that Convent Corporation, Inc. wanted permission to clean up the vandalism and further secure the building. Richard Livdahl was told that it was permissible to clean up but absolutely no repair work was to be done until after the City Council Hearing on February 25, 2013. With this information Roberto Alveraz was directed to begin clean up. A large dumpster was ordered and delivered to the premises and the entire inside of the building was cleaned to the extent possible trying to following very closely the City's directive that no repair work could be done.

15. In addition to the cleanup, Roberto Alveraz got material quotes for shingles and siding and other materials necessary to repair all the anticipated defects in the building. Roberto Alveraz was on the site and ready willing and able to put together a plan and repair the building, which at the time would have cost a very

reasonable amount to bring the core of the building back to a good and highly useful condition.

16. While following the option of contacting the City Code Enforcement Department had provided some previously unknown details, since the building was in their terminology "Red Tagged' so that no building permit would be issued until after the City Council I Hearing, it did not provide Convent Corporation, Inc. with an opportunity to repair the property and satisfy the City. Here again, the Notice that was sent to Convent Corporation, Inc. was inadequate and defective because contrary to what the Notice stated it was not possible to "resolve the situation before the public hearing" and this was a condition that the staff of the Code enforcement Department had to know before the Notice was sent, because they had "Red Tagged" the building themselves.

17. Since the City stated that it refused to issue a building permit, to repair the building, Richard Livdahl then inquired of the Code Enforcement Division if there were any other steps that Convent Corporation Inc. could take to get the property repaired and in good standing. At this time the Code Enforcement Department informed Richard Livdahl that the Corporation could go and personally contact the Mayor and the Aldermen to persuade them to allow the Corporation to have a building permit to repair the building. Trying to follow this suggested plan from Code Enforcement Richard Livdahl arranged a meeting with Joe Smith of the City Staff and Alderman Maurice Taylor but neither meeting was successful in obtaining the required building permit.

18. As President and representing the controlling stockholders and having taken the actions set forth above, the only option remaining for Convent Corporation, Inc. to protect its rights and preserve its property was to prepare for the hearing to be held before the North Little Rock City Council on February 25, 2013.

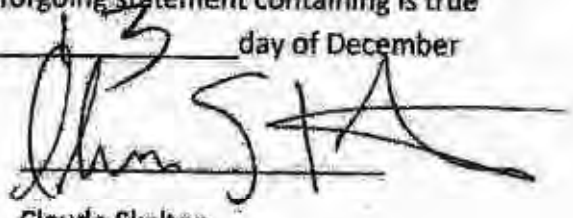
Contesting the condemnation at the hearing was the only option left because even if the Notice had contained sufficient detail to allow restoration to go forward, which it did not, the Code Enforcement Department had firmly stated that since the building was "Red Tagged" no building permit would be issued under any conditions until the matter had been considered by the City Council. Such being the case, attempts were begun to prepare for the hearing.

19. Convent Corporation was unable to adequately prepare for the hearing for several reasons. First, the Notice, as set forth in detail above, was defective as it contained no specific details as to what action needed to be taken to repair the building. Without such detail, the Corporation could only guess as to what type of proposed repairs would need to be made. The Corporation could not appear at the hearing with signed contracts in hand to show that whatever repair work needed to be done would be done promptly and properly as bids could not be taken without details. Due to the lack of details, the Corporation would be forced to try to prove general and broad negatives, i.e. that the building was not "a public nuisance" or "unfit for human habitation", a near impossible burden.

20. Secondly, during the meeting with the Code Enforcement Department and Joe Smith and Alderman Maurice Taylor, it had been repeatedly stated that only three minutes (3) minutes would be provided for the Corporation's representative to speak at the hearing. Considering such an arbitrary limitation on time, it was quickly concluded that regardless of the work or planning put into preparing for the hearing or the frugality practiced in a presentation, no reasonable defense or explanation of the building circumstances could be mounted in such a short period of time. To do so would simple exceed any reasonable expectation of even the most skilled person and was in the Corporations consideration for all practical purposes impossible.

considering the experience detailed hereinabove it appeared almost to a certainty that such a process would have required more than 30 days which would be beyond the 30 days allowed for appealing the City decision. Had the application process failed and the appeal period expired, the Corporation would have been left with the property condemned and having received no meaningful hearing of any kind in any forum.

I declare under penalty of perjury that the forgoing statement containing is true and correct. 28 U.S.C. 1746.Executed this 13 day of December 2013



Claude Skelton

19 Lorian Drive, Little Rock, Ar.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

CONVENT CORPORATION,
INDIVIDUALLY, AND BEHALF ALL
OTHER SIMILARLY SITUATED. PLAINTIFF

V. NO: 4-13-CV-00259

CITY OF NORTH LITTLE ROCK,
ARKANSAS, A MUNICIPAL CORPORATION,
JOE SMITH, MAYOR, INDIVIDUALLY AND IN
HIS OFFICIAL CAPACITY, CITY COUNCIL MEMEBERS,
DEBI ROSS, BETH WHITE, LINDA
ROBINSON, MAURICE TAYLOR,
STEVE BAXTOR, BRUCE FOUTCH,
MURRY WITCHER, AND CHARLIE HIGHT,
EACH INDIVIDUALLY AND IN HIS OR HER OFFICIAL
CAPACITY, TOM WADLEY, DIRECTOR, CODE
ENFORCEMENT DIVISION, INDIVIDUALLY AND IN
HIS OFFICIAL CAPACITY, AND FELECIA MCHENRY,
CODE ENFORCEMENT OFFICER, INDIVIDUALLY AND
IN HER OFFICIAL CAPACITY DEFENDANTS

DECLARATION OF ROBERTO ALVERAZ

I, Roberto Alveraz, make the following statement in lieu of an affidavit, as permitted by Section 1746 of Title 28 of the United States Code. I am aware that this Declaration will be filed with the United States District Court, Eastern District of Arkansas and that it is the legal equivalent of a statement under oath.

I am an adult resident of the State of Arkansas an presently reside in Pulaski County, Arkansas.

I have direct and personal knowledge of the facts set forth below in each of the following statements, and each is true and correct to my personal knowledge.

EXHIBIT N

1 : 00386

1. In December of 2012 I received a call from Claude Skelton who indicated to me that he had some work to be done on a building in North Little Rock, Arkansas. Claude stated to me that he had just learned that the City of North Little Rock had posted a condemnation notice on the building and he wanted me to go and see what was wrong with the building and prepare to fix whatever the problem was.
2. Within a day or so of meeting with Claude Skelton I went to the address of the building at 6615 Hwy 70 in North Little Rock to inspect the property. Claude Skelton had given me the key to the property but when I arrived I found that the security chain that secured the front door and prevented entry into the building had been cut or torn loose and the building was open. When I entered the building I found that a great deal of vandalism had taken place and that all sorts of debris was scattered over the entire building. Upon inspection I observed that the vandals had pulled panels from the ceiling and ripped out plumbing and wiring and had damaged or destroyed almost all the furniture and fixtures in the building.
3. Upon discovering that the building had been vandalized I called Claude Skelton and advised him of the conditions I had found. Claude Skelton directed me to immediately secure all access to the building. I immediately purchased sheets of plywood and screws and began to board up the front doors to prevent any further access to the building. As soon as the building was secure I asked Claude Skelton what he wanted me to do next and he said that Richard Livsdahl was contacting the City of North Little Rock to get permission to clean up and repair the building. Claude Skelton instructed me to review the building and determine what repairs appeared to be necessary but not to do anything until he had permission from the City of North Little Rock.
4. In a few days Claude Skelton informed me that the City had granted permission for the property to be cleaned up but had stated that we were to do absolutely nothing in the way of repairs. Claude Skelton then had a large dumpster delivered to the front of the premises and I began the task of cleaning out all the debris that had been created by the extensive vandalism. Over the course of several days I filled the large dumpster

EXHIBIT N

completely full of the vandalism debris and swept and cleaned the interior of the building, and cleaned in and around the exterior of the building, to the best level possible using a generator for power as the power was off at the building.

5. When I finished all the cleaning all I could do Claude Skelton stated that the City had stated that the building was "Red Tagged' and that no building permit would be issued and that no repair work could be done on the building until the City Council approved. During this entire period I was ready willing and able to do any and all of the repairs needed by the building.
6. On the day I first arrived at the building I arrived to do the repair work on the building to get it back in shape. I inspected the exterior and observed that around the middle of the east side of the building some portion of the shingles on the roof had been blown back and there appeared to be water leaks into the building. Also, at this location I found that the gutter had broken free from the building and needed repair. Because part of the shingles on the roof had to be replaced I inspected the whole of the roof and noted that while the remainder of the roof might last a while longer it would be best to simply replace all the shingles on the roof. I then measured the whole roof for shingles and contacted the local building supply to get a per square price for replacement all the shingles. I intended to replace the broken gutter and the decking under the shingles where they were blow up and causing leaks.
7. In addition to the roof the main other thing that appeared to need repairs was the siding on the front and rear of the two story part of the building and especially the facia and sofit. This part of the building was covered with white aluminum siding that is readily available and not significantly expensive. Consequently, in conjunction with repairing the roof it appeared to me that the only real repairs indicated that might be upsetting the City of North Little Rock was the loose and missing siding.
8. Because I never got word that I was going to be able to go forward with the repairs I never complete a formal list of the work to be done or a price.

EXHIBIT N

However, a rough estimate would put the work I knew about in the $10,000 range and certainly no more than $15,000.

9. Several times during my work at the building I asked Claude Skelton for list of what the City of North Little Rock wanted done and he told me that no one would give us a list even though one had been requested and every effort was being made to get a list from the City and to get permission to start the repairs.
10. I have remained ready, willing and able to undertake repairs at the 6615 Hwy 70 since the first day I looked at it. I have returned to the property several times to mow the grass and to remove debris that has been dumped in and around the premises. This is an old building but it remains solid and easily repairable.

I declare under penalty of perjury that the foregoing statement is true and correct 28 U.S.C. 1746

Executed this 10 day of December 2013

Roberto Alveraz

Roberto Alveraz

5117 West 10 Street

Little Rock Arkansas

EXHIBIT N

March 25, 2013
Six-thirty o'clock P.M.
North Little Rock City Hall Council Chambers
300 Main Street
North Little Rock, Arkansas

The regular meeting of the North Little Rock City Council scheduled for Monday, March 25, 2013, was called to order at 6:30 p.m. by the honorable Mayor JOE A. SMITH. The roll having been called and the following Aldermen answered to their names: DEBI ROSS, BETH WHITE, LINDA ROBINSON, STEVE BAXTER, BRUCE FOUTCH, CHARLIE HIGHT and MURRY WITCHER (7/0), a quorum was declared. Alderman MAURICE TAYLOR was out town. City Clerk Diane Whitbey and Assistant City Attorney Matt Fleming were also present.

The invocation was given by Alderwoman Robinson, followed by the pledge of allegiance to the flag which was also led by Alderwoman Robinson.

On the motion of Alderman Witcher and seconded by Alderman Hight and by consent of all members present, the minutes of a regular council meeting and Special meeting held on Thursday, March 14, 2013, were approved, accepted and filed as prepared by the City Clerk (7/0).

On the blanket motion of Alderman Witcher and seconded by Alderman Baxter, and by consent of all members present, communications #1, 2, 3, and 4 were accepted and filed (7/0).

1. John Riley, letter to Mayor Kim, Uiwang City, South Korea.
2. Jim McKenzie, Metroplan letter to Mayor Smith re: City of North Little Rock Application for Transportation Alternatives Program FY2013.
3. Charley Baxter, Patrick Henry Hays Senior Citizens Director letter to City Clerk Diane Whitbey re: Annual Report.
4. Charlotte Thomas, Mayor's Office memorandum re: *application for Small Farm Wine – NEW* for Rockwater Marina, 1700 River Road, by James R. Jackson.

On the motion Alderwoman White and seconded by Alderwoman Ross, and by consent of all members present, communication #5 was read, accepted and filed (7/0).

5. Billy Grace, North Little Rock Animal Control Director letter to Mayor Smith and City Council members re: HB 2160 (Statewide Spay and Neuter – Mixed Breeds Dogs and Cats).

On the motion of Alderman Baxter and seconded by Alderman Foutch, and by consent of all members present, communication #6 was read, accepted and filed (7/0).

6. Paul Myrick – email re: support of R-13-50 Auxiliary Law Enforcement Officer to provide Security at City Hall.

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On the motion of Alderman Witcher and seconded by Alderman Hight, and by consent of all members present, communication #7 was read, accepted and filed (7/0).

7. Bobby Ward, Public Works Director letter to Mayor Smith re: Retirement effective April 5, 2013.

Mayor Smith convened a scheduled public hearing regarding O-13-26 – reclassifying property located at 2500 Lakeview Road from R-4 to C-1 Classification by amending Ordinance No. 7697; adopting an amended Land Use Plan. Mr. Charles Deville spoke against the legislation. Residents are opposed to spot changing and are concerned about future businesses at the location. The residents are being penalized to take care of the property owners wishes. There being no one else wishing to be heard, the public hearing was adjourned.

O-13-26 (ORDINANCE NO. 8518 – ALDERWOMAN ROSS)
AN ORDINANCE RECLASSIFYING CERTAIN PROPERTY LOCATED AT 2500 LAKEVIEW ROAD IN THE CITY OF NORTH LITTLE ROCK, ARKANSAS FROM R-4 TO C-1 CLASSIFICATION BY AMENDING ORDINANCE NO. 7697 OF THE CITY OF NORTH LITTLE ROCK, ARKANSAS; ADOPTING AN AMENDED LAND USE PLAN FOR THE SUBJECT PROPERTY; DECLARING AN EMERGENCY; AND FOR OTHER PURPOSES, was read one time March 14, 2013, was read a second time this date. A public hearing was held this date (*see above*). Alderwoman Ross said she understood the concerns of residents. She mentioned what can go into an R-4 zone. Alderman Hight asked if the council could grant zoning for a Chiropractors Office only. On the motion of Alderwoman Ross and seconded by Alderwoman Robinson, and by consent of all members present, the rules were suspended and the ordinance was placed on its third and final reading (7/0). On the motion of Alderman Witcher and seconded by Alderwoman Ross, and the roll having been called and all members present having voted in the affirmative, the ordinance was adopted (7/0). Emergency clause adopted (7/0). (*applicant: Scott Yielding*)

UNFINISHED BUSINESS
O-13-26 *called during public hearings – see above.*

CONSENT AGENDA
On the motion of Alderwoman Robinson and seconded by Alderman Baxter, and by consent of all members present, consent items R-13-50, R-13-51, R-13-52, and R-13-53 were adopted (7/0).

R-13-50 (RESOLUTION NO. 8287 – MAYOR SMITH)
A RESOLUTION AUTHORIZING THE MAYOR TO APPOINT AUXILIARY LAW ENFORCEMENT OFFICERS TO PROVIDE SECURITY AT CITY HALL; AND FOR OTHER PURPOSES.

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1 : 0039 ADD 329

R-13-51 (RESOLUTION NO. 8288 – MAYOR SMITH)
A RESOLUTION EXPRESSING THE WILLINGNESS OF THE CITY OF NORTH LITTLE ROCK, ARKANSAS TO UTILIZE FEDERAL AID FUNDS FOR REPLACEMENT OF THE SHILCUTT BAYOU BRIDGE ON THE ARKANSAS RIVER TRAIL; AND FOR OTHER PURPOSES.

R-13-52 (RESOLUTION NO. 8289 – MAYOR SMITH)
A RESOLUTION APPROPRIATING $7,209.55 FROM ACT 833 FUNDS FOR AN I.A.F.F. RESCUE RANDY, PROMOTIONAL ITEMS AND REGISTRATION FEES FOR AN INSTRUCTORS COURSE FOR THE NORTH LITTLE ROCK FIRE DEPARTMENT; AND FOR OTHER PURPOSES.

R-13-53 (RESOLUTION NO. 8290 – MAYOR SMITH)
A RESOLUTION AUTHORIZING THE MAYOR AND CITY CLERK TO PURCHASE CERTAIN REAL PROPERTY LOCATED SOUTH OF HYW. 165 AND EAST OF I-440 IN PULASKI COUNTY, ARKANSAS; APPROPRIATING FUNDS; AND FOR OTHER PURPOSES. (*$11,700.00 – General Fund*)

Consent item R-13-54 was pulled and called under new business.

NEW BUSINESS

R-13-54 (RESOLUTION NO. 8291 – MAYOR SMITH)
A RESOLUTION GRANTING A FRANCHISE TO THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ARKANSAS FOR USE OF PUBLIC STREETS AND RIGHTS-OF-WAY FOR THE ARKANSAS RESEARCH AND EDUCATION OPTICAL NETWORK TO PROVIDE NON-EXCLUSIVE FIBER OPTICS FOR UNIVERSITY CAMPUSES; AND FOR OTHER PURPOSES, was read. Mr. David Merrifield, Chief Technology Officer, Arkansas Research and Education Optical Network said this will include prefabricated concrete structures. On the motion of Alderman Witcher and seconded by Alderman Hight, and by consent of all members present, the resolution was adopted (7/0).

R-13-55 (RESOLUTION NO. 8292 – MAYOR SMITH)
A RESOLUTION DECLARING CERTAIN BUILDINGS, HOUSES AND OTHER STRUCTURES LOCATED AT 2013 MOSS STREET IN THE CITY OF NORTH LITTLE ROCK TO CONSTITUTE A PUBLIC NUISANCE AND CONDEMNING SAID STRUCTURES; PROVIDING A PERIOD OF TIME FOR PROPERTY OWNER TO ABATE SAID NUISANCE; AND FOR OTHER PURPOSES, was read. A motion to adopt was made by Alderman Hight and seconded by Alderman Witcher. Mayor Smith convened a public hearing. There being no one present wishing to be heard, the public hearing was adjourned. On the previous motion, and by consent of all members present, the resolution was adopted (7/0). (*owner: Joel Payne*)

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1 : 00392

R-13-56 (RESOLUTION NO. 8293 – MAYOR SMITH)
A RESOLUTION DECLARING CERTAIN BUILDINGS, HOUSES AND OTHER STRUCTURES LOCATED AT 4908 ATKINS STREET IN THE CITY OF NORTH LITTLE ROCK TO CONSTITUTE A PUBLIC NUISANCE AND CONDEMNING SAID STRCUTRES; PROVIDING A PERIOD OF TIME FOR PROPERTY OWNER TO ABATE SAID NUSIANCE; AND FOR OTHER PURPOSES, was read. A motion to adopt was made by Alderwoman Robinson and seconded by Alderwoman Ross. Mayor Smith convened a public hearing. There being no one present wishing to be heard, the public hearing was adjourned. On the previous motion, and by consent of all members present, the resolution was adopted (7/0). (*owner: Easy Street Properties, LLC*)

R-13-57 (RESOLUTION NO. 8294 – MAYOR SMITH)
A RESOLUTION DECLARING CERTAIN BUILDINGS, HOUSES AND OTHER STRUCTURES LOCATED AT 1302 EAST 16TH IN THE CITY OF NORTH LITTLE ROCK TO CONSTITUTE A PUBLIC NUISANCE AND CONDEMNING SAID STRUCTURES; PROVIDING A PERIOD OF TIME FOR PROPERTY OWNER TO ABATE SAID NUISANCE; AND FOR OTHER PURPOSES, was read. A motion to adopt was made by Alderman Hight and seconded by Alderman Baxter. Mayor Smith convened a public hearing. There being no one present wishing to be heard, the public hearing was adjourned. On the previous motion, and by consent of all members present, the resolution was adopted (7/0). (*owner: Sam Meeks*)

R-13-58 (RESOLUTION NO. 8295 – MAYOR SMITH)
A RESOLUTION DECLARING CERTAIN BUILDINGS, HOUSES AND OTHER STRUCTURES LOCATED AT 3310 EAST BROADWAY IN THE CITY OF NORTH LITTLE ROCK TO CONSTITUTE A PUBLIC NUISANCE AND CONDEMNING SAID STRUCTURES; PROVIDING A PERIOD OF TIME FOR PROPERTY OWNER TO ABATE SAID NUISANCE; AND FOR OTHER PURPOSES, was read. A motion to adopt was made by Alderman Witcher and seconded by Alderman Baxter. Mayor Smith convened a public hearing. There being no one present wishing to be heard, the public hearing was adjourned. On the previous motion, and by consent of all members present, the resolution was adopted (7/0). (*owner: Paul M. Dvorak*)

R-13-59 (RESOLUTION NO. 8296 – MAYOR SMITH)
A RESOLUTION DECLARING CERTAIN BUILDINGS, HOUSES AND OTHER STRUCTURES LOCATED AT 1423 WEST 12TH STREET IN THE CITY OF NORTH LITTLE ROCK TO CONSTITUTE A PUBLIC NUISANCE AND CONDEMNING SAID STRUCTURES; PROVIDING A PERIOD OF TIME FOR PROPERTY OWNER TO ABATE SAID NUISANCE; AND FOR OTHER PURPOSES, was read. A motion to adopt was made by Alderman Baxter and seconded by Alderwoman Ross. Mayor Smith convened a public hearing. There being no one present wishing to be heard, the public hearing was adjourned. On the previous motion, and by consent of all members present, the resolution was adopted (7/0). (*owner: Wayne and Minnie Bennett Trust*)

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1 : 00393

R-13-60 (RESOLUTION NO. 8297 – MAYOR SMITH)
A RESOLUTION DECLARING CERTAIN BUILDINGS, HOUSES AND OTHER STRUCTURES LOCATED AT LOCATED AT 3709 WILLOW STREET IN THE CITY OF NORTH LITTLE ROCK TO CONSTITUTE A PUBLIC NUISANCE AND CONDEMNING SAID STRUCTURES; PROVIDING A PERIOD OF TIME FOR PROPERTY OWNER TO ABATE SAID NUISANCE; AND FOR OTHER PURPOSES, was read. A motion to adopt was made by Alderman Witcher and seconded by Alderman Baxter. Mayor Smith convened a public hearing. Ms. Wendy Armstrong spoke for James Gilbert, son of the owner. They need more time. The intent is to tear down the building behind the main building. There is roof damage to the back of the main house. Mr. Gilbert still has items in the building. Ms. Armstrong said two guns were missing after Code Enforcement searched the home. Mr. Gilbert's granddaughter and Mr. Bryant Armstrong also spoke and asked the council to consider the family does not have a lot of money. There being no one else wishing to be heard, the public hearing was adjourned. On the previous motion, and by consent of all members present, the resolution was adopted (7/0). (*owner: Marvin E. Gilbert*)

R-13-61 (RESOLUTION NO. 8298 – MAYOR SMITH)
A RESOLUTION CERTIFYING THE AMOUNT OF A CLEAN UP LIEN TO BE FILED WITH THE PULASKI COUNTY TAX COLLECTOR AGAINST CERTAIN REAL PROPERTY LOCATED AT 1620 W. LONG 17TH STREET IN THE CITY OF NORTH LITTLE ROCK, ARKANSAS; AND FOR OTHER PURPOSES, was read. A motion to adopt was made by Alderwoman Robinson and seconded by Alderman Baxter. Mayor Smith convened a public hearing. There being no one present wishing to be heard, the public hearing was adjourned. On the previous motion, and by consent of all members present, the resolution was adopted (7/0). (*amount - $5,380.00*)

O-13-27 (ORDINANCE NO. 8519 – MAYOR SMITH)
AN ORDINANCE WAIVING FORMAL BIDDING REQUIREMENTS TO UPGRADE NORTH LITTLE ROCK UTILITIES BILLING AND COLLECTION "eCARE" SOFTWARE TO THE NEW "CUSTOMER CONNECT" VERSION; APPROPRIATING FUNDS (*$34,600.00 – UAD and $19,900.00 – Electric Department*); DECLARING AN EMERGENCY; AND FOR OTHER PURPOSES, was read. On the motion of Alderman Witcher and seconded by Alderwoman Ross, and by consent of all members present, all readings were suspended (7/0). On the motion of Alderman Hight and seconded by Alderman Witcher, and the roll having been called, and all members present having voted in the affirmative, the ordinance was adopted (7/0). Emergency clause adopted (7/0).

O-13-28
AN ORDINANCE ESTABLISHING RATES AND PROCEDURES FOR THE INTERCONNECTION OF DISTRIBUTED GENERATION FACILITIES TO THE NORTH LITTLE ROCK ELECTRIC DISTRIBUTION SYSTEM; DECLARING AN EMERGENCY; AND FOR OTHER PURPOSES, was read. On the motion of Alderwoman Ross and seconded by Alderwoman Robinson, and by consent of all members present, the rules were suspended and the ordinance was

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1 : 00394 ADD 332

placed on its second reading (7/0). On the motion of Alderwoman Ross and seconded by Alderwoman White, and by consent of all members present, the ordinance was placed on its third and final reading (7/0). The ordinance was read a third and final time. City Attorney C. Jason Carter and Acting General Manager North Little Rock Electric Department advised the VA is constructing a 1.2 megawatt solar facility at Fort Roots. This is the first time something of this size has been constructed in the North Little Rock area. A public hearing was scheduled for April 8, 2013 at 6:30 p.m. The legislation was then held by the sponsor, Mayor Smith.

O-13-29 (ORDINANCE NO. 8520 – ALDERMAN TAYLOR)
AN ORDINANCE AMENDING THE MASTER STREET PLAN (ORDINANCE NO. 7932) TO ADD POPLAR STREET AS A COLLECTOR STREET; DECLARING AN EMERNGECY; AND FOR OTHER PURPOSES, was read. On the motion of Alderwoman Robinson and seconded by Alderwoman Ross, and by consent of all members present, the rules were suspended and the ordinance was placed on its second reading (7/0). On the motion of Alderwoman Robinson and seconded by Alderman Baxter, and by consent of all members present, the rules were again suspended and the ordinance was placed on its third and final reading (7/0). The ordinance was read a third and final time. Alderwoman Ross asked if adding this street to the Master Street Plan would make it eligible for state funds and if sidewalks would be required. Mr. Robert Voyles, Planning Director said yes. Alderman Hight asked about bike lanes. Mr. Voyles said it is not on the Bike Plan for lanes currently. It will be a bike route though. Alderman Baxter asked about vegetation and said consideration should be given to the type of trees allowed in areas of power lines. Mr. Voyles said the power lines would likely be underground. Zoning was briefly discussed. On the motion of Alderman Hight and seconded by Alderman Baxter, and the roll having been called, and all members present having voted in the affirmative, the ordinance was adopted (7/0). Emergency clause adopted (7/0).

O-13-30 (ORDINANCE NO. 8521 – ALDERMAN WITCHER)
AN ORDINANCE GRANTING A CONDITIONAL USE TO ALLOW A DAYCARE CENTER IN A C-4 ZONE FOR CERTAIN REAL PROPERTY LOCATED AT 4810 WEST COMMERCIAL DRIVE IN THE CITY OF NORTH LITTLE ROCK, ARKANSAS; DECLARING AN EMERGENCY; AND FOR OTHER PURPOSES, was read. On the motion of Alderman Witcher and seconded by Alderman Baxter, and by consent of all members present, the rules were suspended and the ordinance was placed on its second reading (7/0). On the motion of Alderman Witcher and seconded by Alderman Baxter, and by consent of all members present, the rules were again suspended and the ordinance was placed on its third and final reading (7/0). The ordinance was read a third and final time. Alderman Hight asked about the location and safety for the children. Mr. Voyles said the Department of Human Services will require a fence (see Section 1: c). Alderwoman Robinson said the day care will operate 24/7. The applicant, Mrs. Tanya Ward said the day care will be available to first responders (police, fire, medical personnel, etc.), their family members and people in the community who work odd hours or shift work. Alderwoman Ross asked about security. Mrs. Ward said they have cameras, an alarm system and codes for entry. The building is 4,000 square feet and the maximum

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1 : 00395

number of children allowed is 200. On the motion of Alderman Witcher and seconded by Alderman Baxter, and the roll having been called, and all members present having voted in the affirmative, the ordinance was adopted (7/0). Emergency clause adopted (7/0). (*applicant: Mrs. Tanya Ward*)

O-13-31 (ORDINANCE NO. 8522 – ALDERMAN HIGHT)
AN ORDINANCE RECLASSIFYING CERTAIN PROPERTY LOCATED AT 5308 JFK (JOHN F. KENNEDY) BOULEVARD IN THE CITY OF NORTH LITTLE ROCK, ARKANSAS, FROM C-1 TO C-2, TO ALLOW FOR RETAIL AND A PHARMACY, BY AMENDING ORDINANCE NO. 7697; DECLARING AN EMERGENCY; AND FOR OTHER PURPOSES, was read. On the motion of Alderman Hight and seconded by Alderman Witcher, and by consent of all members present, the rules were suspended and the ordinance was placed on its second reading (7/0). On the motion of Alderman Hight and seconded by Alderman Witcher, and by consent of all members present, the rules were again suspended and the ordinance was placed on its third and final reading (7/0). The ordinance was read a third and final time. Alderman Hight advised this is the site of the former Good Year Tire Store. The new businesses will include a Pharmacy, Hog Man's Game Day Razorback Apparel Store and Hair Salon. Alderman Baxter asked about businesses that have opened under previous zoning and had to be corrected. Mr. Voyles said John F. Kennedy needs to be reviewed and zoning corrected/updated. On the motion of Alderman Hight and seconded by Alderman Witcher, and the roll having been called, and all members present having voted in the affirmative, the ordinance was adopted (7/0). Emergency clause adopted (7/0). (*applicant: Steve Jenkins*)

O-13-32 (ORDINANCE NO. 8523 – ALDERMEN BAXTER AND FOUTCH)
AN ORDINANCE GRANTING A SPECIAL USE TO ALLOW OUTDOOR STORAGE OF PIPES, VALVES AND FITTINGS IN A C-4 ZONE FOR CERTAIN REAL PROPERTY LOCATED AT 10504 MAUMELLE BOULEVARD IN THE CITY OF NORTH LITTLE ROCK, ARKANSAS; DECLARING AN EMERGENCY; AND FOR OTHER PURPOSES, was read. On the motion of Alderman Foutch and seconded by Alderman Baxter, and by consent of all members present, the rules were suspended and the ordinance was placed on its second reading (7/0). On the motion of Alderman Foutch and seconded by Alderman Baxter, and by consent of all members present, the rules were again suspended and the ordinance was placed on its third and final reading (7/0). The ordinance was read a third and final time. A motion to adopt was made by Alderman Baxter and seconded by Alderman Foutch. Alderman Witcher asked about vegetation. Mr. Voyles said the Planning Commission required vegetation along the front and side of the property. Fencing was not included in the conditions. Alderwoman Ross asked if underground irrigation was needed. Mr. Voyles said Planning will check the site in two (2) years. If any vegetation has died, they will require it to be replanted. Alderman Baxter expressed concern about trees under the power line. Mr. Flowers said appropriate trees will be planted and managed. On the previous motion, and the roll having been called, and all members present having voted in the affirmative, the ordinance was adopted (7/0). Emergency clause adopted (7/0). (*applicant: Mr. Pat Flowers*)

EXHIBIT O

O-13-33

AN ORDINANCE APPROVING WAIVER FOR AN EXISTING ~~OFF~~ *ON*-PREMISE, FREESTANDING, POLE SIGN ON CERTAIN REAL PROPERTY LOCATED AT 6820 CRYSTAL HILL ROAD IN THE CITY OF NORTH LITTLE ROCK, ARKANSAS; DECLARING AN EMERGENCY; AND FOR OTHER PURPOSES, was read. On the motion of Alderman Baxter and seconded by Alderman Foutch, and by consent of all members present, with the exception of Alderman Witcher, who voted no, the rules were suspended and the ordinance was placed on its second reading (6/1). On the motion of Alderman Baxter and seconded by Alderman Foutch, and by consent of all members present, with the exception of Alderman Witcher, who voted no, the rules were again suspended and the ordinance was placed on its third and final reading (6/1). The ordinance was read a third and final time. Alderman Witcher said this appears to be an on-premise sign. The applicant, Chris Shillcut said the electronic portion of the sign would be under the existing sign. Alderman Baxter said the sign would only change once a day at 01:00 hours (1:00 a.m.). There are numerous convenience stores that change their signs as well, up to three (3) times a day. Alderwoman Ross said if this is allowed for one, it will have to be allowed for every request. Several council members referenced existing requests for Electronic Changeable Copy Signs. Alderman Foutch asked if this sign request met the criteria for an Electronic Changeable Copy Sign. Alderwoman Ross said it does not. On the motion of Alderman Baxter and seconded by Alderman Foutch, and by consent of all members present, the ordinance was amended as follows:: *change off-premise to* ON-PREMISE (7/0). Alderman Witcher said the sign is in an area not designated for Changeable Copy Signs. A motion to adopt as amended was made by Alderman Foutch and seconded by Alderman Baxter, and the roll having been called, and the following members having voted no: Ross, White, Robinson, and Witcher; and the following members have voted yes: Baxter, Foutch and Hight, the motion failed (3/4). (*applicant: Chris Shillcutt*)

O-13-34

AN ORDINANCE AMENDING CHAPTER 74 OF THE NORTH LITTLE ROCK MUNICIPAL CODE TO ADD REGULATIONS FOR "MOBILE VENDORS"; DECLARING AN EMERGENCY; AND FOR OTHER PURPOSES, was called and held by the sponsor, Alderwoman White.

PUBLIC COMMENT

Alderman Witcher asked if Mr. Shillcutt could come back before the council to request a different type of sign. Mr. Voyles said he could. Alderwoman Robinson reminded the council that since 1998 or 1999 the City of North Little Rock has funded School Resource Officers in the North Little Rock School District. She is not opposed to the School Resource Officers, however North Little Rock is the only city in the state to fund 100%. She would like to see the District fund some of the costs and requested a resolution be prepared regarding the same. City funds would stay within the police department and could be used for training, etc. Alderwoman Ross proposed a Resolution to create a Task Force to review the ongoing issue of people storing household items outside. Mayor Smith said the city can fight crime with Code Enforcement. Alderman Hight said the Vision Benefit through

EXHIBIT O

QualChoice is poor and suggested getting quotes from stand-alone Vision Plans. Mayor Smith advised JFK Week is underway. Previously unseen photographs of John F. Kennedy are on display in the downtown area. Alderwoman Ross said Architects for the West Campus Reconstruction Project will be at the North Heights Community Center at 6:00 p.m. Thursday, March 28, 2013, to meet with residents of the Military Heights neighborhood. Alderman Baxter referenced Batesville Pike not being included in the Master Street Plan. He said Chief Bradley advised it was Federal Roadway and asked about getting funding. Mayor Smith will look into this and get back to Alderman Baxter. Alderwoman Robinson said Meadowpark School has put up privacy fences. Neighbors were concerned about access. Ms. Whitbey advised the North Little Rock Woman's Club Carousel Ball will be Saturday, April 6, 2013, at the Patrick Henry Hays Senior Citizens Center. Ms. Whitbey introduced Deputy City Clerk and Collector Katelyn (Able) Thomas. Mrs. Cheryl Ripper lives at 120 Parkview Drive off of West Scenic. She said she called the Sanitation Department in November to see when the Leaf Vacuum would be on her street. The next week, the truck was on the street, went to end and vacuumed up leaves on city property then left the street, without vacuuming her leaves. She has continued to call Sanitation every month to no avail. She has left messages and has not gotten a call back. Her husband called and talked to a secretary who spoke with a supervisor who said the truck could not be backed down the street. She was also advised cars were blocking the leaves. She said she pays taxes and is entitled to all benefits provided to the city. Mayor Smith will have someone check on this. Alderman Hight acknowledged Mr. Charlie Ball who was present. Mr. Ball said in 1948 Sherwood wanted to be incorporated. The city has gone for 40 years without things being completed. He said Mayor Smith had a good idea by putting city employees in Civic Clubs in the city. Mr. Ball has 63 years of perfect attendance at his club.

There being no further business to come before the Council, and on the motion of Alderwoman Robinson and seconded by Alderman Witcher, and by consent of all members present, the meeting was adjourned at 7:54 p.m. (7/0), until the next regularly scheduled meeting scheduled for Monday, April 8, 2013, at six thirty o'clock p.m. in the City Council Chambers in City Hall, located at 300 Main Street, North Little Rock, Arkansas.

APPROVED:_____
MAYOR JOE A. SMITH

ATTEST:_____
DIANE WHITBEY, CITY CLERK

EXHIBIT O

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

CONVENT COPRORATION,
Individually and on Behalf of all
Others Similarly Situated **PLAINTIFF**

v. **CASE NO. 4:13-CV-0259**

CITY OF NORTH LITTLE ROCK, ARKANSAS, a Municipal Corporation, JOE SMITH, Mayor, Individually and in his Official Capacity, City Council Members DEBI ROSS, BETH WHITE, LINDA ROBINSON, MAURICE TAYLOR, STEVE BAXTER, BRUCE FOUTCH, MURRY WITCHER, and CHARLIE HIGHT each Individually and in his or her Official Capacity, TOM WADLEY, Director, Code Enforcement Division, Individually and in his Official Capacity, and FELECIA MCHENRY, Code Enforcement Officer, Individually and in her Official Capacity **DEFENDANTS**

SEPARATE DEFENDANT'S RESPONSES TO PLAINTIFF'S INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS

Comes Separate Defendant, Tom Wadley, by and through his attorney, Assistant City Attorney Daniel L. McFadden, and for his Responses to Plaintiff's Interrogatories and Requests for Production of Documents, states as follows:

INTERROGATORY NO. 1: Regarding your employment with the City, please state the following:

(a) Date of hire

(b) All positions held

(c) Current position

(d) Date of current position

EXHIBIT P

(e) Description of duties

RESPONSE:

(a) I was hired in 1978 with the North Little Rock Police Department, retired in 2000, and was rehired later that year by the Code Enforcement Department.

(b) I was a patrolman, sergeant, and lieutenant with the Police Department. I was a rental inspector with Code Enforcement before I became Director of Code Enforcement.

(c) Director of Code Enforcement.

(d) I became Code Enforcement Director in either 2003 or 2004.

(e) I primarily direct the general activities of the Code Enforcement Department Officers, including coordinating work assignments, verifying field work, coordinating with other staff department heads, etc. I also supervise Department employees, and serve as a liaison to the citizens of the City.

INTERROGATORY NO. 2: Please provide the following information regarding your qualifications and experience:

(a) List all formal classroom, practical, experiential, or other educational programs you have attended that are related to your qualification for your current position;

(b) List all prior work experience that is related to your qualifications for your current position;

(c) List any other training or experience that is related to your qualifications for your current position;

(d) List any professional licenses you now hold or have held in the past related to your current position.

EXHIBIT P

(e) Have you ever been subject to formal or informal disciplinary action by any licensing board, certification board, or any other regulatory entity relating to any professional license or certification? If so, please explain in detail.

(f) Have you ever been denied a professional license or certification? If so, please explain in detail.

RESPONSE: Defendant objects to the preceding Interrogatory to the extent Plaintiff seeks all relevant classroom and training experience in my time as Director of the Code Enforcement Department. The request is overbroad, over burdensome, and not reasonably calculated to the discovery of admissible evidence. To the extent Plaintiff seeks all relevant training and classroom experience, Defendant submits Plaintiff may at its own time and expense, and in coordination with the City Attorney's Office, examine the information itself at the Code Enforcement Department and/or Human Resources Department. Without waiving this objection as it pertains to all relevant classroom and training experience, Defendant submits the following experience from the previous five (5) years:

(a) 2008 NEHA Conference, 2009 I.C.C Conference, 2010 and 2011 A.A.C.E. Conference, 2013 Educational Code Conference

(b) Prior work experience includes my time as a police officer and as a rental inspector for Code Enforcement.

(c) See (a) above.

(d) None.

(e) No.

(f) No.

EXHIBIT P

INTERROGATORY NO. 3: Do you determine which properties will be inspected by Code Enforcement officers or are you told by anyone else which properties should be inspected?

(a) If you determine which properties should be inspected, please explain in detail the procedure by which you determine which properties should be inspected.

(b) If someone else determines what properties are inspected, please describe in detail the process by which the City determines which properties should be inspected.

RESPONSE: Inspection is done on a case-by-case basis. It is a combination of self-initiated activity and complaints from the general public, elected officials, police officers, fire fighters, et al. Primarily, it is officer-initiated activity.

(a) If I personally saw property with current code and/or housing maintenance violations, I would direct a code enforcement officer to investigate. Code enforcement officers investigate all complaints.

(b) The Department investigates all complaints. If a possible violation comes to my attention, the appropriate officer is directed to investigate.

INTERROGATORY NO. 4: What is the City's policy regarding obtaining or attempting to obtain the owner's permission before inspecting a property? If the City does not have a formal policy regarding this, what is the typical practice?

RESPONSE: The City does not have a policy. The typical practice is for the relevant Code Enforcement officer to attempt to contact the person responsible for the property, normally the tenant, the owner of record, the representative of the property, and/or the agent of service, to attempt inspect the property before obtaining a search warrant.

INTERROGATORY NO. 5: Please explain, in detail, the process by which the Code Enforcement Division conducts property inspections.

EXHIBIT P

(a) Please explain, in detail, what an officer should look for during an inspection;

(b) What are the standards, policies, rules, or other guidelines that determine whether a particular condition is a violation?

(c) What does an officer do when a violation is discovered?

(d) How are inspections documented?

(e) What is the procedure for reinspecting a property after a violation has been corrected?

RESPONSE: The officer drives up to look at the exterior of the property to determine if there are any obvious violations, investigates ownership, and attempts to contact the responsible party by notice to owner of record. The responsible party will normally allow entrance for inspection. If they are unavailable or refuse entry, the Code Enforcement officer will attempt to obtain a search warrant. If this is for a condemnation scheduled for City Council, current photographs of the structure are taken for Council's review with permission of the property owner or through a search warrant.

(a) Officers look for any violations of the City's property maintenance code or criminal violations they may have observed.

(b) Violations are determined by city ordinance and/or state law.

(c) When a violation is discovered, the officer will either issue a citation for North Little Rock District Court and/or serve a notice of violation to the responsible party.

(d) For inspections, the individual officer may maintain notes, daily work sheets, photographs, and/or case files, if applicable, depending on the action that is taken. This is all done on a case-by-case basis.

(e) The property will be reinspected to determine if the violation has been corrected. Once the correction is confirmed by Code Enforcement, normally no further action is

INTERROGATORY NO. 6: Have you or the officers you supervise ever recommend a particular contractor(s) or vendor(s) who may be utilized to correct violations? If so, please

(a) I do not recall personally receiving any complaints from citizens.

(b) N/A. See (a) above.

(c) No.

(d) N/A.

(e) N/A.

REQUEST FOR PRODUCTION NO. 1: Please provide all documents of which you are aware that have any bearing on the factual questions at issue in the present litigation, including, but not limited to, the claims addressed in the Complaint.

RESPONSE: See City of North Little Rock's Response to Requests for Production of Documents.

INTERROGATORY NO. 8: Please list the name of each officer or other person who has inspected the property, the dates of inspection, purpose of inspection, scope and results of the inspection.

RESPONSE: Defendant objects to the preceding Interrogatory because it is overbroad, does not provide a timeframe, and not reasonably calculated to the discovery of admissible evidence. Requiring Defendant to respond to the preceding Interrogatory would place him at an undue burden. Without waiving this objection, Plaintiff may, at its own time and expense, visit the Code Enforcement Department to personally inspect each document that may remain on file subject to applicable record retention statutes, in coordination with the City Attorney's Office. See also City's Response to Request for Production No. 1.

INTERROGATORY NO. 9: Who made the decision to obtain a search warrant for the property? Did you or anyone else make any effort to obtain permission from the property owner to inspect the property?

RESPONSE: Felecia McHenry made the determination to obtain a search warrant for the property. I personally did not attempt to obtain permission to inspect the property, but I know Felecia McHenry attempted to obtain permission from the property owner. I do not have personal knowledge if any other officer attempted to.

INTERROGATORY NO. 10: Did you review the "Notice of Public Nuisance" sent to the Property owners? If so, please explain, in detail the factual basis of the allegations that "structure is deemed to be a public nuisance ..." and that it is "unsafe" and "not fit for human habitation."

RESPONSE: To the best of my knowledge, I do not recall reviewing the "Notice of Public Nuisance."

INTERROGATORY NO. 11: Does the City's Code, policies, or procedures in any differentiate between occupied properties and vacant properties? If so, please explain in what ways the requirements for properties differ. How is "occupancy" defined by the City's Code? At the time of the City's inspection, was the Property occupied? Was the building being "utilized" or occupied at the time of any of the City's inspections?

RESPONSE: Defendant objects to the preceding Interrogatory because it is confusing, does not provide a timeframe, and is not reasonably calculated to the discovery of admissible evidence. Without waiving this objection, to the best of my knowledge the Code does not specifically require different procedures to which I am aware. The definition under the City's housing maintenance code for occupancy is "the purpose for which a building or portion thereof is utilized or occupied." At the time of inspection for the facts giving rise to this action, to the best of my knowledge the structure was not occupied. At the time of the City's previous inspections, it had been occupied in part as a business.

REQUEST FOR PRODUCTION NO. 2: Please provide copies of all notes or documents that you reviewed in regards to the City's inspections of the Property.

RESPONSE: See Response to Request for Production No. 1.

INTERROGATORY NO. 12: For each search warrant obtained for this Property, please describe the process by which the warrant was obtained. Specifically, who made the decision to seek the warrant, who approved the decision to seek the warrant and who applied for the warrant. Also, please describe in detail, how the warrant was presented to the judge, who presented the warrant, the specific information disclosed to the judge, and the substance of any of and all discussions with the judge regarding the issuance of the warrant(s).

RESPONSE: Defendant objects to the preceding Interrogatory to the extent it seeks and requires speculation. Without waiving this objection, to the best of my knowledge for the search warrant for this property, Officer Felecia McHenry requested David Schalchin, another Code Enforcement officer, to prepare an affidavit to present to a North Little Rock District Court judge to inspect the property. Felecia McHenry decided to seek the warrant, no one approved or denied her decision in my Department, and she personally applied for the warrant. I do not have knowledge of how the warrant was presented to the judge, who presented the warrant, the specific information disclosed to the judge, and/or the substance of any and all discussions with the judge regarding the issuance of the warrant.

INTERROGATORY NO. 13: Did you consider the property to be an immediate threat to health and safety? If so, please explain how you arrived at that conclusion and list each and every fact that supports your conclusion. Specifically, please address each and every fact that led you to conclude the property posed an **immediate** threat as all as the nature of the **immediate** threat.

RESPONSE: Yes. Any vacant or unsecured building has the potential to be a threat to the public health and safety of the City. From my history with the Police Department and Code Enforcement, this property is an attractive nuisance and a haven for people to commit criminal activity. The following facts led me to the conclusion that the structure was a threat to the public health and safety of the City: Electrical violations, open circuit boxes, clipped electrical wiring, the building was open for entry, part of the siding of the building was removed which indicated to me it was open for water damages which would allow water into the interior to cause wood to rot and/or water to enter into the electrical systems of the building which would be an immediate hazard to the building to allow electricity before repairs are made, and rotten and/or deteriorated wood which would indicate further damage existed that was not visible from outside the structure without a more detailed inspection.

INTERROGATORY NO. 14: When the City determines that a property poses an **immediate** threat to health and safety, what is the City's policy or typical practice for removing the **immediate** threat? If an **immediate** threat is not **immediately** removed, what actions does the City take to prevent the **immediate** harm that may result?

RESPONSE: I am not aware of any policy. The typical practice of the City is to require the property owner(s) to abide by the provisions of the current property maintenance code. If the threat to health and safety is not immediately removed, officials may issue the responsible person a citation to appear in North Little Rock District Court and request the North Little Rock District Court judge to order the abatement of the nuisance and/or the City may take action and abate the nuisance itself. The City may also seek abatement or seek abatement and condemnation. The City may also issue a citation.

EXHIBIT P

INTERROGATORY NO. 15: Please list each and every person with whom you have discussed this property, including but not limited to, elected officials, city employees, and citizens, and summarize the substance of these communications.

RESPONSE: Defendant objects to the extent the preceding Interrogatory seeks information protected by attorney-client privilege. Without waiving this objection, to the best of my knowledge, I have spoken with Assistant City Attorney Bill Brown about abatement when Richard Livdahl visited my office earlier this year, Felecia McHenry regarding status updates of the structure and this lawsuit over the course of the past year or so, Officer Russ Elrod about attempting to try to locate the registered agent for Convent Corporation earlier this year, and Officer David Schalchin regarding status updates and photographs of the property for the search warrant this year.

REQUEST FOR PRODUCTION NO. 3: If any of the communications listed in your response to the previous interrogatory were written or electronic, please provide the documents, records, emails, text messages, or other documentation regardless of how stored.

RESPONSE: None known.

INTERROGATORY NO. 16: Has the City reinspected the property since it was cleaned out? Did the City reinspect the property prior to the City Council meeting on February 25, 2013? Did the City Council member or any other City employee or official inquire as to the condition of the property after it was cleaned? Did any City Council member or any other City employee or official inquire as to the condition of the property on February 25, 2013? Did you or anyone else provide any update to any City Council member, employee or official as to the condition of the property prior to the City Council meeting on February 25, 2013.

RESPONSE: Defendant objects to the preceding Interrogatory to the extent it requires and seeks speculation. Without waiving this objection, I have no knowledge if the City reinspected the property, nor do I have knowledge if it was cleaned out at the time of the February 25 Council meeting or any time afterward. I have no personal knowledge that the property was ever cleaned and no one inquired to me as to the condition after it was cleaned out, if it ever was. To the best of my knowledge, no one inquired to me as to the condition of the property on February 25, 2013. To the best of my knowledge, I did not personally provide updates to the condition of the property prior to the meeting and I do not have personal knowledge if anyone else provided updates.

INTERROGATORY NO. 17: What was the date of your first contact with Richard Livdahl regarding this property? What was the nature and substance of that contact? Did Mr. Livdahl inform you that he was a representative or agent of the property owner?

RESPONSE: I do not recall the specific date I first came into contact with Richard Livdahl, but it was before the condemnation hearing on February 25, 2013. That would have been in a meeting with Assistant City Attorney Bill Brown and Felecia McHenry. Felecia McHenry had told me a representative of the Gentlemen's Club contacted her, indicated that he was the attorney for them, and because of that we contacted Bill Brown to come to our office to participate in the meeting. The nature and substance of the meeting was to discuss the condemnation hearing and what actions the owners were going to take for rehabilitation, if any, or demolition of the structure. To the best of my knowledge, I recall Richard Livdahl represented to all those at the meeting that he was a partial owner and representative of the property and that he and/or his partners had just come into possession of the property and that would supply paperwork indicated their new ownership of the property.

INTERROGATORY NO. 18: When a property is owned by a corporation, does the City require that an officer, director, or shareholder be present for discussions or be a signatory or party to a rehabilitation agreement? Have you ever dealt with a representative, agent, or employee of a corporate property owner? If so, what documentation or proof of ownership did you require? Do you require that a person representing a corporate owner to produce paperwork showing that he or she personally as the "invested owner" of the property?

RESPONSE: Defendant objects to the preceding Interrogatory to the extent it seeks Defendant to use and/or refer to the term "invested owner" because the term "invested owner" is vague and confusing. Without waiving this objection, I have no knowledge if the City requires that an officer, director, or shareholder be present for discussions or be a signatory or party to a rehabilitation agreement. I have dealt with a representative, agent, or employee of a corporate property owner. If ownership is in question, I request any and all documents that indicate their ownership, which includes warranty deeds, corporate papers, anything filed at a court house or in court proceedings, business cards, anything filed with the Secretary of State, and/or any other legal documents. This is done if my Department does not already have proof of ownership.

INTERROGATORY NO. 19: Did you have any reason to suspect that Mr. Livdahl was not acting as a representative or agent of the corporate owner of the property?

RESPONSE: I had reason to question his involvement in ownership of the property because his name had not surfaced in previous conversations or ownership records. But, he assured all of us present in the meeting that he would provide paperwork indicating the new ownership of the property.

INTERROGATORY NO. 20: Please describe, in detail, the substance of the meeting in which you participated with Mr. Livdahl, Felecia McHenry, and Bill Brown. Please explain, in detail, exactly what repairs were discussed.

RESPONSE: See Response to Interrogatory No. 17. To the best of my knowledge, Richard Livdahl indicated the owners of the property were not in position or willing to make immediate repairs to the building to bring it into compliance. Richard Livdahl indicated the owners wanted to clean out the building and secure it, but I do not recall the specific repairs or what Richard Livdahl meant by stating the owners would secure the building.

INTERROGATORY NO. 21: Please list all violations and conditions that must be repaired or corrected to bring the Property in compliance with all applicable City codes, laws, and regulations and so that the property would no longer deemed to be a nuisance.

RESPONSE: Defendant objects to the preceding Interrogatory because it seeks and requires speculation. Without waiving said objection, I do not have knowledge as to all violations and conditions that must be repaired or corrected because that is determined by City building inspectors who are not employed in my Department and I do not have access to any building inspector report or recommendation or have direct knowledge that any such report or recommendation exists.

INTERROGATORY NO. 22: Please explain the City's policy regarding the "red-tagging" of a property. Specifically, please explain what a "red-tag" means, the procedure and criteria used to determine when a property should be "red-tagged," the issuance of a building permit for a property that has been "red-tagged," and what a property owner is permitted to do with a property that has been "red-tagged."

RESPONSE: It is the practice of the City to red-tag a property when it is deemed to have violations that would lead it to be deemed uninhabitable for human habitation. The property is inspected by a Code Enforcement officer to determine if there are any life safety violations or other violations that would affect or impact the health or safety of the occupant(s) of the building. To determine un-inhabitability, the premise must be unsanitary or unsafe and not in compliance with the building maintenance code. For red-tagged structures that have violations where the owner indicates he or she would make immediate repairs to, they are directed to Community Planning Department for issuance of a building permit. If they do not make or indicate any intent to make immediate repairs, the owner(s) are instructed that the red-tagging will be addressed at a City Council meeting. A property owner is permitted to obtain a building permit from Community Planning if they state they are willing to bring the building into compliance. The owner(s) may still enter their property at any time and enjoy the use of their property in all instances other than by occupying it or making repairs that would otherwise require a permit.

INTERROGATORY NO. 23: Did you instruct that the Property be "red-tagged" or did you approve the "red-tagging" of the property? If so, please explain, in detail, why the property was "red-tagged."

RESPONSE: I did not instruct red-tagging for or approve the red-tagging of the property.

REQUEST FOR PRODUCTION NO. 4: Please provide copies of any written policies regarding the practice and procedure of "red-tagging" a property.

RESPONSE: None known. Code Enforcement adheres to the City's code requirements for red-tagging, which are a matter of public record and available online and in print. They are just as available to the Plaintiff as they are to the Defendant.

INTERROGATORY NO. 24: Please list and describe each condition, fact, or circumstance on which the allegation that the Property is a nuisance or a threat to public health or safety is based. Also, please provide the applicable reference to the City's Code or other law or regulation pertaining to each condition.

RESPONSE: Defendant objects to the preceding Interrogatory to the extent it requests Defendant to "list and describe each condition, fact, or circumstance that the Property is a nuisance or a threat to public health or safety is based" because it seeks and requires speculation from the Defendant. Defendant did not make the determination that the property is a nuisance and cannot speculate as to each condition, fact, or circumstance led to this conclusion made by other individual and/or entities, but not himself. Without waiving this objection, see Response to Interrogatory No. 13. Defendant submits the following applicable reference to the City's Code pertaining to the conditions that may have lead others to their own conclusion the property is a nuisance: 3.1.3, 3.2.1, 3.2.5, 3.4.2, 3.4.4, 3.4.5, 3.4.6, 3.4.7, 3.4.9, 3.4.13, 3.4.15, 3.5.1, 3.5.2, 3.5.3, 3.7.1, 5.1.2, 5.4.1, 5.5.1, 6.1.2, 6.2.1, 6.3.1, 6.3.4, 6.4.1, 6.4.3, 6.5.1, 7.1.2, 7.2.1, 7.4.1, 7.4.2, 8.1.3.

INTERROGATORY NO. 25: In the policy and practice of the City's Code Enforcement Department, how is the term "nuisance" defined and what criteria are considered in determining whether a property is a nuisance?

RESPONSE: The Department does not have a policy for defining "nuisance" or for what criteria constitute a nuisance. The Department defines "nuisance" as it is defined in Article

8, Sections 1, 2, and 3 of the Nuisance Abatement Code. The criteria used to determine whether a property is a nuisance are whether the property is in violation of municipal code, including the Nuisance Abatement and Property Abatement sections, and/or state or federal civil and criminal law.

Separate Defendant retains the right to supplement any and all responses as discovery progresses.

Respectfully Submitted,

Daniel L. McFadden (2011035)
Assistant City Attorney
300 Main Street
PO Box 5757
North Little Rock, Arkansas 72119
Voice: (501) 975-3755
Fax: (501) 340-5341
Email: dmcfadden@northlittlerock.ar.gov

EXHIBIT P

CERTIFICATE OF SERVICE

I, Daniel L. McFadden, do hereby certify that a copy of the foregoing pleading was deposited into the U.S. mail, postage prepaid on this 4th day of November, 2013, addressed to:

Mickey Stevens
Attorney for Plaintiff
P.O. Box 2165
Benton, AR 72018

Daniel L. McFadden

EXHIBIT P

Mayor Joe A. Smith

City Clerk Diane Whitbey

City Attorney C. Jason Carter

City Council Members

Ward 1	**Debi Ross** **Beth White**
Ward 2	**Linda Robinson** **Maurice Taylor**
Ward 3	**Steve Baxter** **Bruce Foutch**
Ward 4	**Murry Witcher** **Charlie Hight**

"We welcome you!"

The City Council meetings the 2nd and 4th Monday of each month at 6:30 p.m.
in the City Council Chambers in City Hall, 300 Main Street
(unless the meeting falls on a State Holiday)
For more information call 501-340-5317 or visit our website at www.northlittlerock.ar.gov

Municipal Institutions Constitute the Strength of Free Nations. *By A. de Tocqueville*

2013

JANUARY

SUN	MON	TUE	WED	THU	FRI	SAT
		1	2	3	4	5
6	7	8	9	10	11	12
13	●	15	16	17	●	19
20	21	22	23	24	25	26
27	●	29	30	31		

FEBRUARY

SUN	MON	TUE	WED	THU	FRI	SAT
					1	2
3	4	5	6	7	8	9
10	●	12	13	14	15	16
17	18	19	20	21	22	23
24	●	26	27	28		

MARCH

SUN	MON	TUE	WED	THU	FRI	SAT
					1	2
3	4	5	6	7	8	9
10	(11)	12	13	(14)	15	16
17	18	19	20	21	22	23
24	(25)	26	27	28	29	30
31						

APRIL

SUN	MON	TUE	WED	THU	FRI	SAT
	1	2	3	4	5	6
7	(8)	9	10	11	12	13
14	15	16	17	18	19	20
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28	29	30				

MAY

SUN	MON	TUE	WED	THU	FRI	SAT
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19	20	21	22	23	24	25
26	(27)	28	29	30	31	

JUNE

SUN	MON	TUE	WED	THU	FRI	SAT
						1
2	3	4	5	6	7	8
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16	17	18	19	20	21	22
23	(24)	25	26	27	28	29
30						

JULY

SUN	MON	TUE	WED	THU	FRI	SAT
	1	2	3	4	5	6
7	(8)	9	10	11	12	13
14	15	16	17	18	19	20
21	(22)	23	24	25	26	27
28	29	30	31			

AUGUST

SUN	MON	TUE	WED	THU	FRI	SAT
				1	2	3
4	5	6	7	8	9	10
11	(12)	13	14	15	16	17
18	19	20	21	22	23	24
25	(26)	27	28	29	30	31

SEPTEMBER

SUN	MON	TUE	WED	THU	FRI	SAT
1	2	3	4	5	6	7
8	(9)	10	11	12	13	14
15	16	17	18	19	20	21
22	(23)	24	25	26	27	28
29	30					

OCTOBER

SUN	MON	TUE	WED	THU	FRI	SAT
		1	2	3	4	5
6	7	8	9	10	11	12
13	(14)	15	16	17	18	19
20	21	22	23	24	25	26
27	(28)	29	30	31		

NOVEMBER

SUN	MON	TUE	WED	THU	FRI	SAT
					1	2
3	4	5	6	7	8	9
10	11	12	13	14	15	16
17	18	19	20	21	22	23
24	(25)	26	27	28	29	30

DECEMBER

SUN	MON	TUE	WED	THU	FRI	SAT
1	2	3	4	5	6	7
8	(9)	10	11	12	13	14
15	16	17	18	19	20	21
22	(23)	24	(25)	26	27	28
29	30	31	1			

EXHIBIT Q

"The City of North Little Rock welcomes people of diverse cultures and beliefs. Any religious viewpoint expressed during invocation, or at any other time during the meeting, reflects only the personal opinion of the speaker. It is not intended to proselytize, advance, or disparage any religious belief."

COMMUNICATIONS

None as of filing deadline.

PRESENTATIONS

Alderman Charlie Hight – presentation thanking the Charlie Hart and Mello Velo Cycling Club for donation of Bike Fixit Station.

Crews and Associates presentation to Mayor Smith.

SCHEDULED PUBLIC HEARING(S) *3 minutes*

Please sign in with the City Clerk before the meeting convenes at 6:30 p.m.

Convene a public hearing re: O-13-18 – amending Ordinance No. 7946 (regulations to control development and subdivision of land), Chapters 18 and 46 of the NLRMC and Ordinance No. 7697 (the Zoning Ordinance) re: Hillside Cut Regulations

CITIZENS PUBLIC COMMENT ON NUMBERED LEGISLATION *3 minutes*

Please sign in with the City Clerk before the meeting convenes at 6:30 p.m.

INCLUDES ALL PUBLIC HEARINGS

EXHIBIT Q

UNFINISHED BUSINESS

RESOLUTIONS

R-13-23 Mayor Smith

Appropriating $500,000.00 from the General Fund for the Street Overlay Program (*$125,000.00 per Ward for Street Overlay Program*)

Held _____

R-13-28 Mayor Smith

Expressing the willingness of the City of North Little Rock to utilize state aid street monies for city street projects

Held _____

ORDINANCES

O-13-12 Mayor Smith

Establishing procedures to be followed in the absence of the Mayor

Read 2 times and held _____

O-13-18 Alderman Ross

Amending Ordinance No. 7946 (Regulations to Control Development and Subdivision of Land), Chapters 18 and 46 of the North Little Rock Municipal Code, and Ordinance No. 7697 (the Zoning Ordinance) regarding hillside cut regulations

Read 1 time and held _____ *Convene public hearing this date*

CONSENT AGENDA

No items

EXHIBIT Q

NEW BUSINESS

RESOLUTIONS

R-13-29 Mayor Smith

Authorizing the Mayor to submit an application on behalf of the City of North Little Rock to obtain Grant Funds from the Arkansas Highway and Transportation Department's "Safe Routes to School Program"

R-13-30 Alderman Robinson

Directing the City Attorney to take the required action and/or steps necessary on behalf of the City of North Little Rock to apply to the United States District Court for dissolution of the Consent Decree entered April 21, 1983

R-13-31 Mayor Smith

Authorizing the Mayor and City Clerk to sell property located at 1023 Parker Street (*to Amber Pye - $94,500.00*)

R-13-32 Mayor Smith

Declaring certain buildings, houses and other structures located at 704 West 18th Street to constitute a public nuisance and condemning said structures (*owner: JNYLECO, Inc. c/o Jocelyn Dokes*)

Convene a public hearing this date

R-13-33 Mayor Smith

Declaring certain buildings, houses and other structures located at 2713 Gribble Street to constitute a public nuisance and condemning said structures (*owners: Jessie and Lewis Ford c/o Robert Jerrod, Sr.*)

Convene a public hearing this date

EXHIBIT Q

R-13-34 Mayor Smith

Declaring certain buildings, houses and other structures located at 704 Graham Avenue to constitute a public nuisance and condemning said structures (*owner: Cheteer Farrar c/o Bank of America Home Loans*)

_____ *Convene a public hearing this date*

R-13-35 Mayor Smith

Declaring certain buildings, houses and other structures located at 4004 Rogers Street to constitute a public nuisance and condemning said structures (*owners: Robert J. and Barbara Hoyle*)

_____ *Convene a public hearing this date*

R-13-36 Mayor Smith

Declaring certain buildings, houses and other structures located at 1304 East 16th Street to constitute a public nuisance and condemning said structures (*owner: Mary E. Smith*)

_____ *Convene a public hearing this date*

R-13-37 Mayor Smith

Declaring certain buildings, houses and other structures located at 6615 Hwy 70 to constitute a public nuisance and condemning said structures (*owner: Convent Corp, Drugstore Cowboys, Inc., Gentlemen's Club 70 c/o Craig Snyder*)

_____ *Convene a public hearing this date*

R-13-38 Mayor Smith

Certifying the amount of a Clean Up Lien to be filed with the Pulaski County Tax Collector against property located at 2119 Moss Street (*amount - $3,407.90*)

_____ *Convene a public hearing this date*

EXHIBIT Q

ORDINANCES

O-13-19 Mayor Smith

Amending Section 20.12 of Ordinance No. 7697 (the Zoning Ordinance) to clarify the existing notice policy for the Planning Commission

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O-13-20 Mayor Smith

Waiving formal bidding requirements for Insurance for the Murray Hydroelectric Plant; authorizing the Mayor and City Clerk to enter into an agreement with the Holmes Organization, Inc. (*$284,488.00 – Electric Department*)

O-13-21 Mayor Smith *for consideration only*

Granting a Conditional Use to allow a Self-Serve Ice Vending Unit in a C-3 zone for property located at 4032 John F. Kennedy Boulevard (*applicant: Clint Davis*)

O-13-22 Alderman Taylor

Reclassifying property located at 4816 East Broadway from C-3 to Planned Use Development (PUD) to allow a Liquor Store by amending Ordinance No. 7697 (*applicant: James Duncan*)

O-13-23 Aldermen Baxter and Foutch

Allowing and approving variances for an off-premise, freestanding Pole Sign on property located at 10307 Maumelle Boulevard (*applicant: Phil Dively*)

EXHIBIT Q

PUBLIC COMMENT *ON NON-AGENDA ITEMS*

All persons wishing to speak must have completed a public comment card and return it to the City Clerk before this meeting is convened. Speakers have 3 minutes to address their topic.

Respectfully submitted,

Diane Whitbey, CMC / CAMC
City Clerk and Collector

Words to live by

Before humans die, they write their last Will and Testament,
give their home and all they have, to those they leave behind.
If, with my paws, I could do the same, this is what I'd ask...
To a poor and lonely stray I'd give:
My happy home.
My bowl and cozy bed, soft pillows and all my toys.
The lap, which I loved so much,
The hand that stroked my fur and the sweet voice which spoke my name.
I'd Will to the sad, scared shelter dog (or cat), the place I had in my
Human's loving heart, of which there seemed no bounds.
So when I die, please do not say, "I will never have a pet again,
for the loss and pain is more than I can stand."
Instead, go find and unloved dog (or cat)
one whose life has held no joy or hope and give MY place to HIM (or her).
This is the only thing I can give...The love I left behind.

Author unknown

February is Spay and Neuter Month

EXHIBIT Q

North Little Rock Woman's Club Annual Carousel Ball

Saturday, April 6, 2013 – at the Patrick Henry Hays Senior Citizens Center
Dinner – Dancing and Entertainment – Live and Silent Auctions
For tickets or more information call Helen Greenfield at 835-5019 or
NLR Woman's Club President Joan Weese at 791-2991

Note: the next City Council meeting scheduled for Monday, March 11, 2013, has been rescheduled to Thursday, March 14, 2013.

For more information, visit our website at www.northlittlerock.ar.gov.
To view council legislation, exhibits, etc., go the link above, then click on the Government Tab, then select Council Agenda and look for the Adobe PDF Agenda file.

If you would like to receive a copy of the Agenda (only),
Please call 501-340-5317 or email Dwhitbey@northlittlerock.ar.gov.

EXHIBIT Q

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

CONVENT CORPORATION, INDIVIDUALLY, AND BEHALF ALL OTHER SIMILARLY SITUATED. — PLAINTIFF

V. — NO: 4-13-CV-00259

CITY OF NORTH LITTLE ROCK, ARKANSAS, A MUNICIPAL CORPORATION, JOE SMITH, MAYOR, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY, CITY COUNCIL MEMEBERS, DEBI ROSS, BETH WHITE, LINDA ROBINSON, MAURICE TAYLOR, STEVE BAXTOR, BRUCE FOUTCH, MURRY WITCHER, AND CHARLIE HIGHT, EACH INDIVIDUALLY AND IN HIS OR HER OFFICIAL CAPACITY, TOM WADLEY, DIRECTOR, CODE ENFORCEMENT DIVISION, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY, AND FELECIA MCHENRY, CODE ENFORCEMENT OFFICER, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY — DEFENDANTS

DECLARATION OF CRAIG SNYDER

I, Craig Snyder, make the following statement in lieu of an affidavit, as permitted by Section 1746 of Title 28 of the United States Code. I am aware that this Declaration will be filed with the United States District Court, Eastern District of Arkansas and that it is the legal equivalent of a statement under oath.

I am an adult resident of 410 Waters Street North Little Rock, Arkansas.

I have direct and personal knowledge of the facts set forth below in each of the following statements, and each is true and correct to my personal knowledge.

EXHIBIT R

1 : 00424

1. Gentlemen's Club 70 opened in the building which is the subject of this litigation at 6615 Highway 70 in North Little Rock Arkansas in 1993. Soon after the Club opened at this location I became its General Manager and I continued in that position until the Club closed on August 1 2011
2. As the General Manager of the Club I was responsible for maintaining the building and the utilities and other services necessary to keep the Nightclub operating properly. From the time the Club opened to my personal knowledge the following major repairs were made to the building:
   (a) Around the time the Club opened a new composite roof was installed on all the north south part of the building which comprises most of the structure. Consequently, the roof of the structure was and has been in good shape until the roof started to edge toward 20 years old and suffered some minor wind damage. The only problem with the roof is it is just getting close to the normal replacement cycle for a composite shingle roof and has some minor wind damage on the east side which was easily repairable. Consequently, even though the building may be in around 70 years old the roof remains within normal replacement parameters. The wind damage caused some minor leaks and water damage in the building which were easily repairable at the time this condemnation action was commenced.
   (b) Approximately 10 years ago all of the plumbing in the building and the exterior plumbing fixtures and piping were replaced at substantial expense. Consequently, while the building may be at or around 70 years old the plumbing servicing the building was replaced around 10 years ago and is much fresher and newer than would be expected this building or those nearby.

(c)The electric service and wiring for the building was upgraded on several occasions over the twenty years to add circuits and replace old equipment.

(3) As General Manager of the Night Club operating in the building at 6615 Highway 70 I worked in the building more than 40 hours a week for the Club's entire existence of around 18 years. By spending 40 hours per week for 18 years

EXHIBIT R

in the building I am very familiar with its total physical condition. The building is concrete with a wood superstructure and even though the construction may be in some areas more functional than attractive the core of the building is in my opinion is very sound.

(4)The façade of the building facing Highway 70 and the facia and sofit are covered by aluminum siding. This aluminum siding periodically becomes loose in areas and over time some of the siding pieces have recently gotten loose and fallen off. This loose siding on the façade of the building and the loose and missing siding on the facia and sofit is very cosmetically unattractive but does not affect the structural integrity of building and is very easily and inexpensively repairable.

(5) I have been in and inspected the interior of the building since the City of North Little Rock began this condemnation action. The interior of the building has been extensively cosmetically damaged by vandals. Sheet rock has been torn from the walls, the ceiling has been damaged in a number of places, and business, plumbing, and electrical fixtures have been damaged or destroyed.

(6) Having been the General Manager of Gentlemen's Club 70 which operated in the building which is the subject of this action I am very familiar with the fact that the City of North Little Rock wanted this Club gone with sufficient intensity to file two lawsuits seeking its permanent closure. The last of these lawsuits was settled in a fashion that required the Club to close permanently

(7). It is my opinion having worked in the Club in the subject building for 18 years and having lived in a nearby neighborhood on Waters Street for a substantial period of that time, that this condemnation action by the City was taken in an effort to punish this building and get it destroyed to be sure that no other Night Club of any kind operated in this building. If the City had granted a hearing of any kind on the condemnation I would have appeared to testify concerning the soundness of the building on which issue I am well qualified having spent much of the past 18 years in and around it. Further, I would have offered testimony the most of the needed repairs were simply, cosmetic, and relatively inexpensive and that the building has other good and useful purposes in addition to being a Night

EXHIBIT R

Club which is evidenced by the fact that soon after the closure of Gentlemen's Club 70 I was contacted by a local businessman who wanted to discuss acquiring the building for us a Convenience Store and gas Station.

(8) This building is old but it is on par with or in significantly better condition structurally and cosmetically than other nearby structures in the neighborhood.

I declare under penalty of perjury that the foregoing statement is true and correct .28 U.S.C. 1746

Executed this 10 day of December 2013.

Craig Snyder

410 Water Street

North Little Rock, Arkansas

EXHIBIT R

BEFORE THE CITY COUNCIL OF NORTH LITTLE ROCK, ARKANSAS

IN RE CONDEMNATION OF
6615 HWY 70

RESOLUTION: R-13-37

MEMORANDUM IN SUPPORT OF CONVENT CORPORATION'S REQUEST FOR A FULL DUE PROCESS HEARING

INTRODUCTION

Both the United States Constitution and the Arkansas Constitution require due process of law before any significant taking of property by the government. U.S. Const. amend. V;. Ark. Const. Art. 2, § 22. Additionally, the Fourth Amendment of the U.S. Constitution provides protection against unreasonable seizures of private property. The U.S. Supreme Court has ruled that if regulation by a local government in accordance with its police power is done impermissibly, a resulting order amounting to the diminution of property "will be recognized as a taking." *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). The Arkansas Constitution provides that "[t]he right of property is before and higher than any constitutional sanction." Ark. Const. Art. 2, § 22. Thus, a property owner in Arkansas is entitled to substantial due process protections prior to a condemnation.

I. Procedural due process requires that Convent Corporation be afforded a full hearing before its property is condemned.

The extent to which due process rights are required in administrative proceedings is determined by a balancing approach. *Mathews v. Eldridge*. 424 U.S. 319 (1976). The Eldridge standard balances three factors: (1) the extent that private interests are affected in the proceeding; (2) the risk of wrongfully depriving a party of its interest under the current procedures along with the utility of additional procedures that could lessen this risk; and (3) the government's interest at

EXHIBIT S

1 : 00428

stake, such as the administrative and financial burdens imposed upon a public actor if additional procedures are incorporated. *Id. at 334-35.*

Prior to a governmental decision which deprives individuals of a property interest procedural due process requires that a hearing before an impartial decision maker be provided at a meaningful time and in a meaningful manner, including the right to submit evidence and testimony, to examine witnesses, and an opportunity to present evidence or testimony in rebuttal to adverse positions. *Ingram v. City of Pine Bluff*, 355 Ark. 129, 135-136 (Ark. 2003) (citing *Samuels v. Meriwether*, 94 F.3d 1163, 1166 (8th Cir. 1996)); *Harness v. Arkansas PSC*, 60 Ark. App. 265, 271 (1998) (citing *Arkansas Elec. Energy Consumers v. Arkansas Pub. Serv. Comm'n*, 35 Ark. App. 47 (1991)).

Real property ownership has substantial value to an individual under the first Eldridge factor. *U.S. v. James Daniel Good Real Prop.*, 510 U.S. 43, 53-54 (1993). In *Connecticut v. Doehr*, 501 U.S. 1, 11 (1991), the Supreme Court described attachment interests on property to be "significant" in regards to how they affect private interests under Eldridge because attachments can result in great economic hardship to a property owner. In *Doehr*, the Court held that even where a decision does not amount to a complete, physical, or permanent deprivation of real property, due process concerns still exist. *Id.* at 12.

Property nuisance cases require increased caution because destroyed property cannot be restored and the best evidence of whether the seizure was justified will have been demolished. *See* Alex Cameron, *Due Process and Local Administrative Hearings Regulating Public Nuisances: Analysis and Reform*, 43 St. Mary's L.J. 619. The demolition of one's property is a substantial private interest under the first Eldridge factor and, thus, determine that it warrants substantial protection for due process purposes.

EXHIBIT S

Crucial due process components in light of the second Eldridge factor include affording property owners multiple opportunities to confront the issues charged against them for the condition of their properties and providing property owners with the opportunity to present their case. *See, e.g., James Daniel Good Real Prop.*, 510 U.S. at 48, 53-56. The right to cross-examine witnesses is regarded as substantial in connection with examining the entire scope of evidence and making a complete inquiry into the truth. Where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses. *See, e.g. Goldberg v. Kelly*, 397 U.S 254, 269 (1970). Rulings based on expedited summary hearings that offer scant evidence of their respective decisions fall short of due process requirements. *See Freeman v. City of Dallas*, 242 F.3d 642, 653-54 (5th Cir. 2001).

Furthermore, the Supreme Court's precedents establish the general rule that Due Process requires that, absent an extraordinary situation, a party cannot invoke the power of the state to seize a person's property without a prior judicial determination that the seizure is justified. *United States v. $ 8,850*, 461 U.S. 555, 562 n.12 143 (1983) (citing *Boddie v. Connecticut*, 401 U.S. 371, 378-379 (1971)); *see also North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975); *Fuentes v. Shevin*, 407 U.S. 67(1972); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1974); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974).

The Supreme Court has further made clear that a party must be afforded a hearing before their property is seized by the government. *See, e.g., Fuentes v. Shevin*, 407 U.S. 67, 81-82 (1972). In *Fuentes*, the Court struck down a replevin statute that provided a hearing to property owners after property was repossessed. *Id.*

Convent Corporation is entitled to substantial due process protections before its property is condemned. The City should afford Convent Corporation a full hearing with the opportunity

to present evidence and cross examine witnesses. The three minutes that Convent has been allowed is insufficient to satisfy the requirements of due process.

II. The City must order that the property be repaired where possible before condemning and destroying the property.

If the condition causing the property to be a nuisance can be remedied through "cleaning, disinfection, alteration, or repair," then these alternatives must be ordered before an order for demolition is made. *See e.g., City of Safford v. Seale*, No. 2 CA-CV 2008-0185, 2009 WL 3390172, 3 (Ariz. Ct. App. 2009); *Nazworthy v. City of Sullivan*, 55 Ill. App. 48, 52 (1893); *Polsgrove v. Moss*, 157 S.W. 1133, 1136 (Ky. 1913); *Welch v. Stowell*, 2 Doug. 332, 341-42 (Mich. 1846). *Newton v. Highland Park*, 282 S.W.2d 266 (Tex.App. 1955) If a local government contends that remediation is not possible and that the structure as it exists cannot be remedied in such a way to prevent it from becoming a nuisance, then the local government must establish by a preponderance of the evidence that the structure should be demolished. *West v. City of Borger*, 309 S.W.2d 250, 253 (Tex.App. 1958). Courts, have disfavored decisions that issue an order for demolition without any kind of relief afforded to a property owner prior to the order. *See Houston v. Lurie*, 148 Tex. 391 (1949). This treatment is in congruity with the first Eldridge factor, which considers the gravity of potential loss to an individual. *Matthews*, 424 U.S. at 334-35. Thus, ordering demolition without any kind of relief prior to the order is a harsh remedy and has due process implications associated with it.

III. The City has failed to provide Convent Corporation with a list of code violations as required by the City's ordinance, thus, proper notice has not been provided.

Notice is a fundamental part of due process in all kinds of administrative proceedings, and the regulation of public nuisances is no different. Notice must be executed in a reasonable manner to adequately inform the parties of proceedings that may affect their legal rights.

Armstrong v. Manzo, 380 U.S. 545, 550 (1965). Additionally, a City must comply with its ordinances. *See generally Tyrer v. Ryan*, 2003 Ark.App. LEXIS 901 (2003). *City of Fordyce v. Vaughn, supra*; *Mings v. City of Fort Smith*, 288 Ark. 42 (1986); *Potocki v. City of Fort Smith*, 279 Ark. 19 (1983); *Taggart & Taggart Seed Co. v. City of Augusta*, 278 Ark. 570 (1983).

Article VIII, Section 18-472 of the City's Municipal Code requires that a property owner be provided with a list of each individual code violation for which a property is being condemned. Convent Corporation has not been provided with this list. The lack of such list has hampered Convent Corporations ability to prepare to present its case. Convent Corporation is entitled to this list prior to any condemnation of its property.

IV. The City's ordinance is invalid because it fails to provide adequate procedural due process as required by both the U.S. and Arkansas Constitutions.

First, the City's ordinance does not provide for a full hearing either before or after condemnation. The ordinance appears to short-circuit due process because the City is able to condemn a property prior to affording the owner a full hearing and without providing the owner a chance to remedy the problems prior to condemnation.

Convent Corporation was informed that a permit to make repairs would not be issued until after the property is condemned. Not only does this deny the property owner the right to make repairs prior to condemnation, but it significantly limits the ability to appeal the condemnation decision. District Court Rule 9 requires that an appeal from a decision of a city council must be filed within thirty days of the decision. Therefore, if the property is condemned and Convent then agrees to a plan to rehabilitate the property and after the passage of thirty days a dispute arises as to whether the property has been sufficiently rehabilitated, Convent would not be able to appeal the condemnation decision.

EXHIBIT S

Additionally, while the City's ordinance states that a $5,000 bond is required when an agreement to rehabilitate a property has been reached, Convent has been informed that it will be required to post a bond that is equal to the cost of demolition. Requirements of local ordinances must be "reasonably necessary" and not "unduly oppressive" on any person. *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594-95 (1962). Requiring such a sizeable bond without providing the property owner a chance to rehabilitate the property or a full hearing prior to the condemnation is unduly oppressive.

The ordinance also does not provide a clear procedure and is vague in several areas. Many important terms are not defined and it is difficult for a person to know what their rights and remedies are when faced with a condemnation of his property. The constitution requires that an ordinance regulating a public nuisance must be sufficiently clear so that it provides "reasonable certainty" inherent in the language of an ordinance so that "persons of common intelligence are [not] compelled to guess at a law's meaning and applicability." *J.B. Advertising v. Sign Bd. of Appeals*, 883 S.W.2d 443 (Tex. App. 1994).

When an ordinance is declared to be unconstitutional insofar as it does not comply with due process requirements, and property is demolished or taken pursuant to this authority, a property owner may rightfully bring a takings claim. *Pa. Coal Co.*, 206 U.S. at 415-16.

V. Due process requires a neutral decision maker.

The United States Supreme Court has declared that in an administrative hearing, the right to a hearing before a neutral decision maker is essential. *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970). The Supreme Court has also noted that local governments have a direct pecuniary interest in the outcome of a condemnation proceeding and this requires an increased level of scrutiny is warranted with regards to an individual's deprivation of due process rights, especially

when post-order relief is to no avail of a property owner. *James Daniel Good Real Prop.*, 510 U.S. at 56-57. Other courts have said that because certain procedural safeguards are commonly absent from administrative proceedings, the bias requirement should be applied with greater force. *Ventura v. Shalala*, 55 F.3d 900, 902 (3d Cir. 1995).

In the present case the proposed resolution is sponsored by and signed by the Mayor. The Mayor also presides over the proceeding. Thus, the requirement of an impartial decision maker is not met. Convent Corporation should be provided with a full hearing before an impartial decision maker before the City acts to deprive it of its property.

VI. The City is engaging in selective prosecution.

The City has singled out some properties for condemnation while there are many other properties in the surrounding area which also present a nuisance. For example, there is a large recycling facility near the property at issue which causes a significant amount of dust and pollutants to enter the air and may be discharging hazardous substances into the ground. The City must justify why it is going after some properties and not others.

VII. The City entered and inspected the property in violation of the Fourth Amendment of the U.S. Constitution.

Instead of contacting the owners for permission to inspect the property, the City obtained a search warrant and broke the locks to enter the building. The City left the building unsecured on two occasions without contacting the owners. The property has been vandalized and sustained significant damage and loss of property. Had the City contacted the owners, the owners would have allowed the access to the building with no need to break locks or expose the property to potential vandalism. The City's actions in inspecting the property in this manner were unreasonable and in violation of the Fourth Amendment of the U.S. Constitution. The property owners have been damaged by the City's actions.

VIII. The City's seizure of Convent's property without sufficient due process is unreasonable per se and in violation of the Fourth Amendment to the U.S. Constitution.

Fourth Amendment protections are triggered when a government entity seizes a building to enforce compliance with building regulations. *Camara v. Municipal Court of San Francisco*, 387 U.S. 523, 530 (1967). Seizures conducted outside the judicial process, without prior approval by a judge or magistrate, have been held to be per se unreasonable under the Fourth Amendment-subject only to a few specifically established and well delineated exceptions.'" *U.S. v. Paige*, 136 F.3d 1012, 1022 (quoting *Minnesota v. Dickerson*, 508 U.S. 366, 372 (1993))

CONCLUSION

The City should postpone condemnation of Convent's property, develop an agreement with Convent for the rehabilitation of the property and issue appropriate permits. The City should not condemn the property without providing a full hearing that allows Convent to fully present its case.

Respectfully submitted,

Mickey Stevens, Ark. Bar No. 2012141
Attorney for Convent Corporation
P.O. Box 2165
Benton, AR 72018
Phone: 501-303-6668
Fax: 877-338-6063
Stevens_mickey@yahoo.com

EXHIBIT S

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Exhibit I
1 : 00436

IN THE CIRCUIT COURT OF PULASKI COUNTY
TWELFTH DIVISION

CONVENT COPRORATION,
Individually and on Behalf of all
Others Similarly Situated **PLAINTIFF**

v. **CASE NO. 60CV-13-1398**

CITY OF NORTH LITTLE ROCK,
ARKANSAS, a Municipal Corporation,
JOE SMITH, Mayor, Individually and in
his Official Capacity, City Council Members
DEBI ROSS, BETH WHITE, LINDA
ROBINSON, MAURICE TAYLOR,
STEVE BAXTER, BRUCE FOUTCH,
MURRY WITCHER, and CHARLIE HIGHT
each Individually and in his or her Official
Capacity, TOM WADLEY, Director, Code
Enforcement Division, Individually and in
his Official Capacity, and FELECIA MCHENRY,
Code Enforcement Officer, Individually and
in her Official Capacity **DEFENDANTS**

RESPONSE TO MOTION FOR JUDGMENT ON THE PLEADINGS OR, IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT

COME now the Defendants, the City of North Little Rock, Arkansas, Mayor Joe Smith, Aldermen Debi Ross, Beth White, Linda Robinson, Maurice Taylor, Steve Baxter, Bruce Foutch, Murry Witcher, and Charlie Hight, Tom Wadley, and Felecia McHenry, all in their official and individual capacities, by and through their attorney, Assistant City Attorney Daniel L. McFadden, and for their Response to Motion for Judgment on the Pleadings, or in the Alternative, Motion for Summary Judgment, state:

Defendants deny they initially seized Plaintiff's property, located at 6615 Hwy. 70, North Little Rock, AR (the Property) by "red-tagging" the Property on November 14, 2012.

1. Defendants deny they refused to issue a permit to allow Plaintiff to make repairs after red-tagging the property.

2. Defendants admit the North Little Rock City Council voted to condemn the Property on February 25, 2013.

3. Defendants deny permitting Plaintiff to speak for only three (3) minutes prior to voting to condemn the property. Defendants deny not considering any evidence of specific code violations or hearing testimony from any witnesses. Defendants affirmatively plead Plaintiff's counsel spoke for over eight (8) minutes prior to voting to condemn the property.

4. Defendants admit Paragraph 4 of Plaintiff's Motion.

5. Defendants deny they were required to file an Answer or Rule 12 Motion within 30 days of receiving the Notice that the federal court's Order was filed. Defendants deny the only documents filed in this Court are the Notice of Removal and accompanying exhibit. Defendants deny the time for filing a responsive pleading has passed, and/or that they have failed to file an Answer or any other response. Defendants affirmatively plead pursuant to Ark. R. Civ. P. 55 that an Answer and accompanying Rule 12 motion in the United States District Court for the Eastern District of Arkansas have been filed in this case and, as such, they are not required to respond again to Plaintiff's premature complaint and renewed motion for summary judgment and/or judgment on the pleadings. Regardless, Defendants attach and reincorporate their Answer and Motion to Dismiss as *Exhibits A, B, & C*. Furthermore, Defendants affirmatively plead Plaintiff still has not exhausted its statutorily mandated administrative remedies and affirmatively plead Plaintiff has yet to request a date for its Rule 9 hearing and/or obtain a ruling for final adjudication; thus this court does not have subject matter jurisdiction of the contents of its complaint to issue a ruling at this juncture and should summarily deny Plaintiff's request for relief.

6. Defendants deny Paragraph 6 of Plaintiff's Motion. After satisfying Ark. R. Civ. P. 55 for the purposes of these motions, Defendants were not required to *again* file a responsive pleading. Regardless, see attached *Exhibits A, B, C*. Plaintiff has not exhausted its statutorily mandated administrative remedies. Plaintiff's facts stand controverted. *Exhibit A*. Furthermore, Plaintiff states facts sufficient to defeat its own allegations. *Exhibit B*. Judgment in favor of Plaintiff is not appropriate for any of its claims.

7. Defendants deny seizing and condemning the property without providing adequate notice, an opportunity to repair, or a meaningful opportunity to be heard. Defendants deny violating Plaintiff's rights to procedural due process under the Fifth and Fourteenth Amendments to the United States Constitution and Article 2, sections 2 and 22 of the Arkansas Constitution.

8. Defendants provided Plaintiff with sufficient notice of the alleged violations or rights of appeal.

9. Plaintiff has been provided opportunity to make repairs before seizing and condemning the Property. Defendants affirmatively plead Plaintiff still has the ability to make repairs, yet it refuses to do so.

10. Defendants deny condemning the property in a summary proceeding and deny refusing to provide Plaintiff with a pre-deprivation hearing with an opportunity to present evidence and witnesses and cross-examine witnesses.

11. Defendants deny refusing to provide Plaintiff with a pre-deprivation hearing before an impartial decision-maker.

12. Defendants deny the alleged actions resulted in violations of Plaintiff's rights to substantive due process under the Fifth and Fourteenth Amendments to the United States

Constitution and Article 2, sections 2 and 22 of the Arkansas Constitution. Defendants admit filing a Notice removing the case to this Court.

13. Defendants deny seizing Plaintiff's property without proper notice or without permitting an opportunity to make repairs. Defendants deny violating Plaintiff's rights under the Fourteenth Amendment to the United States Constitution and Article 2, section 15 of the Arkansas Constitution. Defendants note Plaintiff accurately recites Local Federal Rule 6.2(a) of the Eastern District of Arkansas and submit the rule speaks for itself.

14. Defendants deny conspiring and deny committing acts in furtherance of a conspiracy to violate the aforementioned constitutional acts.

15. Defendants deny the City Council's decision was an administrative decision not protected by absolute legislative immunity in the context of its premature allegations of violations of its federal civil rights. Defendants acknowledge state jurisprudence concerning legislative immunity for claims brought under Arkansas state law and submit it speaks for itself. Defendants affirmatively plead they are entitled to absolute legislative immunity for Plaintiff's state allegations, and/or qualified immunity.

16. Defendants deny intentionally and deliberately violating Plaintiff's clearly established constitutional rights. Defendants deny they are not entitled to qualified immunity. Defendants affirmatively plead they are entitled to qualified immunity.

17. There are numerous issues of material fact in dispute relating to the claims Plaintiff addresses herein. Defendants deny Plaintiff is entitled to summary judgment on these claims.

18. Therefore, for the reasons more fully discussed in the accompanying brief, the Plaintiff is not entitled to summary judgment and the Defendants, all or in part, are entitled to

absolute legislative immunity and qualified immunity. And, the Plaintiff has not exhausted its administrative remedies.

19. In support of this Motion, Defendants rely upon:

a. The pleadings of the parties;

b. Plaintiff's exhibits; and

c. Defendants' Exhibits in Opposition to the Motion, including:

i. Exhibit A, Answer.

ii. Exhibit B, Motion to Dismiss.

iii. Exhibit C, Brief in Support of Motion to Dismiss.

iv. Exhibit D, Plaintiff's Response to Defendants' Motion to Dismiss.

v. Exhibit E, Reply to Plaintiff's Response to Motion to Dismiss.

20. Defendants have simultaneously filed herewith their Brief in Opposition and a separate Statement of Relevant Facts.

21. Defendants respectfully request this Court to dismiss Plaintiff's premature complaint with prejudice, or in the alternative postpone judgment of Plaintiff's premature motion pending exhaustion of its statutorily mandated administrative remedies that it refuses to exhaust.

22. Defendants deny all allegations not specifically admitted herein.

WHEREFORE, Defendants pray that this Court deny Plaintiff's motion and dismiss its complaint, or in the alternative postpone judgment of Plaintiff's motion. Defendants pray this Court dismiss Plaintiff's claims for failure to exhaust its administrative remedies, and for all other just and proper relief.

Respectfully submitted,

CITY OF NORTH LITTLE ROCK, ARKANSAS, a Municipal Corporation, JOE

SMITH, Mayor, Individually and in his Official Capacity, City Council Members DEBI ROSS, BETH WHITE, LINDA ROBINSON, MAURICE TAYLOR, STEVE BAXTER, BRUCE FOUTCH, MURRY WITCHER, and CHARLIE HIGHT, each Individually and in his or her Official Capacity, TOM WADLEY, Director, Code Enforcement Division, Individually and in his Official Capacity, and FELECIA MCHENRY, Code Enforcement Officer, Individually and in her Official Capacity
Defendants

By: /s/ Daniel L. McFadden, ABA #2011035
Assistant City Attorney
300 Main Street
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North Little Rock, Arkansas 72119
Tel: (501) 975-3755
Fax: (501) 340-5341
Email: dmcfadden@northlittlerock.ar.gov

CERTIFICATE OF SERVICE

I, Daniel L. McFadden, hereby certify that on this 9th day of June, 2014, I have mailed a true and correct copy of the document to all counsel of record listed below, via U.S. Mail, postage prepaid:

Mr. Mickey Stevens
Attorney for Plaintiff
P.O. Box 1295
Benton, AR 72018

/s/ Daniel L. McFadden, ABA #2011035

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

CONVENT COPRORATION,
Individually and on Behalf of all
Others Similarly Situated **PLAINTIFF**

v. **CASE NO. 4:13-CV-0259**

CITY OF NORTH LITTLE ROCK, ARKANSAS, a Municipal Corporation, JOE SMITH, Mayor, Individually and in his Official Capacity, City Council Members DEBI ROSS, BETH WHITE, LINDA ROBINSON, MAURICE TAYLOR, STEVE BAXTER, BRUCE FOUTCH, MURRY WITCHER, and CHARLIE HIGHT each Individually and in his or her Official Capacity, TOM WADLEY, Director, Code Enforcement Division, Individually and in his Official Capacity, and FELECIA MCHENRY, Code Enforcement Officer, Individually and in her Official Capacity **DEFENDANTS**

ANSWER

COMES NOW Defendants, by and through their attorney, Assistant City Attorney Daniel L. McFadden, and for their Answer, state:

1. Defendants admit Plaintiff states it appeals the North Little Rock City Council's decision to condemn certain property located at 6615 Highway 70 in North Little Rock, Pulaski County, Arkansas, in Paragraph 1 of Plaintiff's Complaint.

2. Defendants admit Plaintiff states his causes of action in Paragraph 2 of Plaintiff Complaint, and deny any and all allegations of wrongdoing.

3. Defendants admit Plaintiff states it seeks declaratory judgment in Paragraph 3 of Plaintiff's Complaint, and deny any and all allegations of wrongdoing.

4. Defendants admit Plaintiff states it seeks injunction in Paragraph 4 of Plaintiff's Complaint, and deny any and all allegations of wrongdoing.

5. Defendants admit Plaintiff states it seeks injunction in Paragraph 5 of Plaintiff's Complaint, and deny any and all allegations of wrongdoing.

6. Defendants admit Paragraph 6 of Plaintiff's Complaint.

7. Defendants admit Paragraph 7 of Plaintiff's Complaint.

8. Defendants admit Paragraph 8 of Plaintiff's Complaint.[1]

9. Defendants admit Paragraph 9 of Plaintiff's Complaint.

10. Defendants admit Felecia McHenry is a Code Enforcement Officer employed in the City's Code Enforcement Division. Defendants deny the remaining allegations contained in Paragraph 10 of Plaintiff's Complaint.

11. Defendants admit Plaintiff seeks class action status in Paragraph 11 of Plaintiff's Complaint and deny that a class should be certified.

12. Defendants deny the allegations contained in Paragraph 12 of Plaintiff's Complaint and deny that a class should be certified.

13. Defendants deny the allegations contained in Paragraph 13 of Plaintiff's Complaint and deny that a class should be certified.

14. Defendants deny the allegations contained in Paragraph 14 of Plaintiff's Complaint and deny that a class should be certified.

15. Defendants deny the allegations contained in Paragraph 15 of Plaintiff's Complaint and deny that a class should be certified.

[1] Defendants acknowledge Mayor Joe Smith has been listed as a party in the heading to this Complaint, but is absent as a party listed under the heading "THE PARTIES" beginning on Page 2 of Plaintiff's Complaint, starting on Paragraph 6, and ending on Paragraph 10.

16. Defendants deny the allegations contained in Paragraph 16 of Plaintiff's Complaint and deny that a class should be certified.

17. Defendants deny the allegations contained in Paragraph 17 of Plaintiff's Complaint.

18. Defendants admit Paragraph 18 of Plaintiff's Complaint.

19. Defendants maintain that Paragraph 19 of Plaintiff's Complaint states a conclusion of law not requiring a response. To the extent a response is required, Defendants deny same.

20. Defendants admit Paragraph 20 of Plaintiff's Complaint.

21. Defendants admit Paragraph 21 of Plaintiff's Complaint.

22. Defendants are without sufficient information or knowledge to admit or deny the allegations contained in Paragraph 22 of Plaintiff's Complaint and therefore deny same.

23. Defendants deny the allegations contained in Paragraph 23 of Plaintiff's Complaint.

24. Defendants deny the allegations contained in Paragraph 24 of Plaintiff's Complaint.

25. Defendants deny the allegations contained in Paragraph 25 of Plaintiff's Complaint.

26. Defendants deny the allegations contained in Paragraph 26 of Plaintiff's Complaint.

27. Defendants deny the allegations contained in Paragraph 27 of Plaintiff's Complaint.

28. Defendants deny the allegations contained in Paragraph 28 of Plaintiff's Complaint.

29. Defendants deny the characterization of the allegations contained in Paragraph 29 of Plaintiff's Complaint, and therefore deny same and deny any and all allegations of wrongdoing in Paragraph 29 of Plaintiff's Complaint.

30. With respect to the allegations contained in Paragraph 30 of Plaintiff's Complaint, Defendants maintain Arkansas District Court Rule 9 speaks for itself and respectfully refer this Court to Arkansas District Court Rule 9 for the contents thereof. Defendants deny the remaining allegations contained in Paragraph 30 of Plaintiff's Complaint and deny any and allegations of wrongdoing in Paragraph 30 of Plaintiff's Complaint.

31. Defendants deny the allegations contained in Paragraph 31 of Plaintiff's Complaint.

32. Defendants admit the City entered into an agreement with the business owner in 2011. Defendants deny the characterization of the remaining allegations contained in Paragraph 32 of Plaintiff's Complaint and therefore deny same.

33. Defendants are without sufficient knowledge to admit or deny the allegations contained in Paragraph 33 of Plaintiff's Complaint and therefore deny same.

34. Defendants are without sufficient knowledge to admit or deny the allegations contained in Paragraph 34 of Plaintiff's Complaint and therefore deny same.

35. Defendants are without sufficient knowledge to admit or deny the allegations contained in Paragraph 35 of Plaintiff's Complaint and therefore deny same.

36. Defendants maintain Chapter 8, Article 1, section 3, paragraph 1 (1.3.1) of the City's Code speaks for itself and respectfully refer this Court to Chapter 8, Article 1, section 3,

paragraph 1 (1.3.1), attached as Plaintiff Exhibit C, for the contents thereof. Defendants deny any and all allegations of wrongdoing in Paragraph 36 of Plaintiff's Complaint.

37. Defendants admit Paragraph 37 of Plaintiff's Complaint.

38. Defendants maintain Plaintiff's interpretation of municipal code states a conclusion of law not requiring a response. To the extent a response is required, Defendants deny same. Defendants deny the characterization of the allegations contained in Paragraph 38 of Plaintiff's Complaint and therefore deny same. Defendants deny any and all allegations of wrongdoing in Paragraph 38 of Plaintiff's Complaint.

39. Defendants are without sufficient knowledge to admit or deny the allegations contained in Paragraph 39 of Plaintiff's Complaint and therefore deny same. Defendants deny any and all allegations of wrongdoing in Paragraph 39 of Plaintiff's Complaint.

40. Defendants admit Mr. Livdahl met with Mr. Wadley and Mr. Brown. Defendants are without sufficient knowledge to admit or deny the remaining allegations contained in Paragraph 40 of Plaintiff's Complaint and therefore deny same.

41. Defendants submit the contents of the letter from William Brown to R.C. Livdahl speak for themselves and respectfully refer the Court to the letter, attached as Plaintiff Exhibit E, for the contents thereof. Defendants deny the characterization of the remaining allegations contained in Paragraph 41 of Plaintiff's Complaint and therefore deny same. Defendants deny any and all allegations of wrongdoing in Paragraph 41 of Plaintiff's Complaint.

42. Defendants are without sufficient knowledge to admit or deny the allegations contained in Paragraph 42 of Plaintiff's Complaint and therefore deny same.

43. Defendants admit Paragraph 43 of Plaintiff's Complaint.

44. Defendants are without sufficient knowledge to admit or deny the allegations contained in Paragraph 44 of Plaintiff's Complaint and therefore deny same. Defendants deny any and all allegations of wrongdoing in Paragraph 44 of Plaintiff's Complaint.

45. Defendants admit Paragraph 45 of Plaintiff's Complaint.

46. Defendants admit an alderman asked counsel for Convent about plans for future use of the property. Defendants are without sufficient knowledge to admit or deny the remaining allegations contained in Paragraph 46 of Plaintiff's Complaint and therefore deny same. Defendants deny any and all allegations of wrongdoing in Paragraph 46 of Plaintiff's Complaint.

47. Defendants admit Paragraph 47 of Plaintiff's Complaint.

48. Defendants deny the characterization of the allegations contained in Paragraph 48 of Plaintiff's Complaint and therefore deny same. Defendants deny any and all allegations of wrongdoing in Paragraph 48 of Plaintiff's Complaint.

49. Defendants maintain Chapter 8, Article 1, section 6, paragraph 1 of the City's Code speaks for itself and respectfully refer the Court to Chapter 8, Article 1, section 6, paragraph 1 of the City's Code, attached as Plaintiff Exhibit D, for the contents thereof. Defendants are without sufficient knowledge to admit or deny the remaining allegations contained in Paragraph 49 of Plaintiff's Complaint and therefore deny same. Defendants deny any and all allegations of wrongdoing in Paragraph 49 of Plaintiff's Complaint.

50. Defendants admit Mayor Smith sponsored and signed the resolution condemning the property subject to this suit. Defendants admit Mayor Smith, as the duly elected Mayor of the City of North Little Rock, presided over the three-minute proceeding. Defendants maintain the remaining allegations contained in Paragraph 50 of Plaintiff's Complaint state conclusions of

law not requiring a response. To the extent a response is required, Defendants deny same. Defendants deny any and all allegations of wrongdoing in Paragraph 50 of Plaintiff's Complaint.

51. Defendants are without sufficient knowledge to admit or deny the allegations contained in Paragraph 51 of Plaintiff's Complaint and therefore deny same. Defendants deny any and all allegations of wrongdoing in Paragraph 51 of Plaintiff's Complaint.

52. Defendants deny Plaintiff has been treated differently than other similarly situated property owners. Defendants deny Plaintiff's alleged treatment was motivated by Defendant's exercise of free expression. Defendants are without sufficient knowledge to admit or deny the remaining allegations contained in Paragraph 52 of Plaintiff's Complaint and therefore deny same. Defendants deny any and all allegations of wrongdoing in Paragraph 52 of Plaintiff's Complaint.

53. With respect to the allegations of Paragraph 53, Defendants incorporate by reference herein their responses to Paragraphs 1 through 52 of Plaintiff's Complaint, as if set forth word-for-word.

54. Defendants maintain Paragraph 54 of Plaintiff's Complaint states a conclusion of law not requiring a response. To the extent a response is required, Defendants deny same. Defendants deny any allegation of wrongdoing in Paragraph 54 of Plaintiff's Complaint.

55. Defendants maintain that Ark. Const. Art. 2, §§ 2, 22, speak for themselves and respectfully refer the Court to Ark Const. Art. 2, §§ 2, 22, for the contents thereof. Defendants deny any and all allegations of wrongdoing in Paragraph 55 of Plaintiff's Complaint.

56. Defendants maintain Paragraph 56 of Plaintiff's Complaint states a conclusion of law not requiring a response. To the extent a response is required, Defendants deny same. Defendants deny any and all allegations of wrongdoing in Paragraph 56 of Plaintiff's Complaint.

57. Defendants maintain Paragraph 57 of Plaintiff's Complaint states a conclusion of law not requiring a response. To the extent a response is required, Defendants deny same. Defendants deny any and all allegations of wrongdoing in Paragraph 57 of Plaintiff's Complaint.

58. Defendants deny the allegations contained in Paragraph 58 of Plaintiff's Complaint.

59. Defendants are without sufficient knowledge to admit or deny the allegations contained in Paragraph 59 of Plaintiff's Complaint and therefore deny same. Defendants deny any and all allegations of wrongdoing in Paragraph 59 of Plaintiff's Complaint.

60. Defendants are without sufficient knowledge to admit or deny the allegations contained in Paragraph 60 of Plaintiff's Complaint and therefore deny same. Defendants deny any and all allegations of wrongdoing in Paragraph 60 of Plaintiff's Complaint.

61. Defendants maintain Paragraph 61 of Plaintiff's Complaint states a conclusion of law not requiring a response. To the extent a response is required, Defendants deny same. Defendants deny any and all allegations of wrongdoing in Paragraph 61 of Plaintiff's Complaint.

62. Defendants deny the characterization of the allegations contained in Paragraph 62 of Plaintiff's Complaint and therefore deny same. Defendants deny any and all allegations of wrongdoing in Paragraph 62 of Plaintiff's Complaint.

63. Defendants admit the City Council voted to approve the resolution condemning Plaintiff's property after a three minute hearing. Defendants are without sufficient knowledge to admit or deny the remaining allegations contained in Paragraph 63 of Plaintiff's Complaint and therefore deny same. Defendants deny any and all allegations of wrongdoing in Paragraph 63 of Plaintiff's Complaint.

64. Defendants admit the Mayor sponsored the proposed resolution and presided over the proceedings. Defendants deny the remaining allegations contained in Paragraph 64 of Plaintiff's Complaint.

65. Defendants deny Paragraph 65 of Plaintiff's Complaint.

66. Defendants maintain Paragraph 66 of Plaintiff's Complaint states a legal conclusion not requiring a response. To the extent a response is required, Defendants deny same. Defendants deny any and all allegations of wrongdoing in Paragraph 66 of Plaintiff's Complaint.

67. Defendants deny Paragraph 67 of Plaintiff's Complaint.

68. Defendants deny Paragraph 68 of Plaintiff's Complaint.

69. Defendants deny Paragraph 69 of Plaintiff's Complaint.

70. Defendants deny Paragraph 70 of Plaintiff's Complaint.

71. Defendants deny Paragraph 71 of Plaintiff's Complaint.

72. Defendants deny Paragraph 72 of Plaintiff's Complaint.

73. With respect to the allegations of Paragraph 73, Defendants incorporate by reference herein their responses to Paragraphs 1 through 72 of Plaintiff's Complaint, as if set forth word-for-word.

74. Defendants maintain the Fifth and Fourteenth Amendments to the U.S. Constitution and Article 2, §§ 2, 22, of the Arkansas Constitution speak for themselves and respectfully refer the Court to said Amendments and sections for the contents thereof. Defendants deny any and all allegations of wrongdoing in Paragraph 74 of Plaintiff's Complaint.

75. Defendants maintain that Ark. Const. Art. 2, §§ 2, 22, speak for themselves and respectfully refer the Court to Ark Const. Art. 2, §§ 2, 22, for the contents thereof. Defendants deny any and all allegations of wrongdoing in Paragraph 55 of Plaintiff's Complaint.

76. Defendants maintain Paragraph 76 of Plaintiff's Complaint states a legal conclusion not requiring a response. To the extent a response is required, Defendants deny same. Defendants deny any and all allegations of wrongdoing in Paragraph 76 of Plaintiff's Complaint.

77. Defendants deny Paragraph 77 of Plaintiff's Complaint.

78. Defendants deny Paragraph 78 of Plaintiff's Complaint.

79. Defendants deny Paragraph 79 of Plaintiff's Complaint.

80. Defendants maintain Paragraph 80 of Plaintiff's Complaint states a legal conclusion not requiring a response. To the extent a response is required, Defendants deny same. Defendants deny any and all allegations of wrongdoing in Paragraph 80 of Plaintiff's Complaint.

81. Defendants deny Paragraph 81 of Plaintiff's Complaint.

82. Defendants deny Paragraph 82 of Plaintiff's Complaint.

83. Defendants deny Paragraph 83 of Plaintiff's Complaint.

84. Defendants deny Paragraph 84 of Plaintiff's Complaint.

85. Defendants deny Paragraph 85 of Plaintiff's Complaint.

86. With respect to the allegations of Paragraph 86, Defendants incorporate by reference herein their responses to Paragraphs 1 through 85 of Plaintiff's Complaint, as if set forth word-for-word.

87. Defendants maintain that the Fourth Amendment to the U.S. Constitution and Article 2, Section 15 of the Arkansas Constitution speak for themselves and respectfully refer this Court to said law for the contents thereof. Defendants deny any and all allegations of wrongdoing in Paragraph 87 of Plaintiff's Complaint.

88. Defendants deny Paragraph 88 of Plaintiff's Complaint.

89. Defendants deny Paragraph 89 of Plaintiff's Complaint.

90. Defendants deny Paragraph 90 of Plaintiff's Complaint.

91. Defendants deny Paragraph 91 of Plaintiff's Complaint.

92. Defendants deny Paragraph 92 of Plaintiff's Complaint.

93. Defendants deny Paragraph 93 of Plaintiff's Complaint.

94. Defendants deny Paragraph 94 of Plaintiff's Complaint.

95. Defendants deny Paragraph 95 of Plaintiff's Complaint.

96. With respect to the allegations of Paragraph 96, Defendants incorporate by reference herein their responses to Paragraphs 1 through 95 of Plaintiff's Complaint, as if set forth word-for-word.

97. Defendants maintain that the Fourth Amendment to the U.S. Constitution and Article 2, Section 15 of the Arkansas Constitution speak for themselves and respectfully refer this Court to said law for the contents thereof. Defendants deny any and all allegations of wrongdoing in Paragraph 97 of Plaintiff's Complaint.

98. Defendants maintain Paragraph 98 of Plaintiff's Complaint states a conclusion of law that does not require a response. To the extent a response is required, Defendants deny same. Defendants deny any and all allegations of wrongdoing.

99. Defendants deny Paragraph 99 of Plaintiff's Complaint.

100. Defendants deny Paragraph 100 of Plaintiff's Complaint.

101. Defendants deny Paragraph 101 of Plaintiff's Complaint.

102. Defendants deny Paragraph 102 of Plaintiff's Complaint.

103. Defendants deny Paragraph 103 of Plaintiff's Complaint.

104. With respect to the allegations of Paragraph 104, Defendants incorporate by reference herein their responses to Paragraphs 1 through 103 of Plaintiff's Complaint, as if set forth word-for-word.

105. Defendants deny the characterization of the allegations contained in Paragraph 105 of Plaintiff's Complaint and therefore deny same. Defendants deny any and all allegations of wrongdoing in Paragraph 105 of Plaintiff's Complaint.

106. Defendants deny Paragraph 106 of Plaintiff's Complaint.

107. Defendants maintain that the affidavit for the administrative search warrant speaks for itself and respectfully refer the Court for the contents thereof, attached as Plaintiff Exhibit F. Defendants maintain the remaining allegation in Paragraph 107 of Plaintiff's Complaint states a conclusion of law that does not require a response. To the extent a response is required, Defendants deny same. Defendants deny any and all allegations of wrongdoing in Paragraph 107 of Plaintiff's Complaint.

108. Defendants deny Paragraph 108 of Plaintiff's Complaint.

109. Defendants are without sufficient information or knowledge to admit or deny Plaintiff has been damaged and therefore deny same. Defendants deny the remaining allegations contained in Paragraph 109 of Plaintiff's Complaint.

110. With respect to the allegations of Paragraph 110, Defendants incorporate by reference herein their responses to Paragraphs 1 through 109 of Plaintiff's Complaint, as if set forth word-for-word.

111. Defendants maintain that the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution speaks for itself and respectfully refer the Court to the

Equal Protection Clause for the contents thereof. Defendants deny any and all allegations of wrongdoing in Paragraph 111 in Plaintiff's Complaint.

112. Defendants are without sufficient information or knowledge to admit or deny the contents of the allegations contained in Paragraph 112 of Plaintiff's Complaint and therefore deny same.

113. Defendants are without sufficient information or knowledge to admit or deny the contents of the allegations contained in Paragraph 113 of Plaintiff's Complaint and therefore deny same.

114. Defendants admit Paragraph 114 of Plaintiff's Complaint.

115. Defendants maintain Paragraph 115 of Plaintiff's Complaint states a legal conclusion that does not require a response. To the extent a response is required, Defendants deny same. Defendants deny any and all allegations of wrongdoing in Paragraph 115 of Plaintiff's Complaint.

116. Defendants are without sufficient knowledge to admit or deny the contents of the allegations contained in Paragraph 116 and therefore deny same.

117. Defendants admit an alderman asked about plans for potentially placing another business in the structure. Defendants are without sufficient information or knowledge to admit or deny the contents of the remaining allegations contained in Paragraph 117 of Plaintiff's Complaint and therefore deny same.

118. Defendants deny Paragraph 118 of Plaintiff's Complaint.

119. Defendants admit the existence of an agreement between the City and the property owner. Defendants deny the remaining allegations contained in Paragraph 119 of Plaintiff's Complaint.

120. Defendants deny Paragraph 120 of Plaintiff's Complaint.

121. With respect to the allegations of Paragraph 121, Defendants incorporate by reference herein their responses to Paragraphs 1 through 120 of Plaintiff's Complaint, as if set forth word-for-word.

122. Defendants deny Paragraph 122 of Plaintiff's Complaint.

123. Defendants deny Paragraph 123 of Plaintiff's Complaint.

124. Defendants deny Paragraph 124 of Plaintiff's Complaint.

125. Defendants deny Paragraph 125 of Plaintiff's Complaint and deny a class should be certified.

126. Defendants deny Paragraph 126 of Plaintiff's Complaint. Defendants deny a class should be certified. Defendants deny Plaintiff or any putative class member is entitled to any relief whatsoever.

127. Defendants deny Paragraph 127 of Plaintiff's Complaint.

128. Defendants deny Paragraph 128 of Plaintiff's Complaint.

129. Defendants deny Paragraph 129 of Plaintiff's Complaint.

130. Defendants deny Paragraph 130 of Plaintiff's Complaint.

131. Defendants deny Paragraph 131 of Plaintiff's Complaint.

132. Defendants maintain Paragraph 132 does not require a response. To the extent a response is necessary, Defendants deny same.

133. Defendants deny the allegations contained under the heading "Prayer for Relief" on page 21 of Plaintiff's Complaint, including its subparts (a) through (i). Defendants deny Plaintiff or any putative class member is entitled to any relief whatsoever.

134. Defendants deny any and all allegations not specifically admitted herein.

AFFIRMATIVE DEFENSES

1. Defendants assert that Plaintiff's rights were not violated.

2. Defendants assert Plaintiff failed to state facts or a claim upon which relief can be granted.

3. Defendants assert Plaintiff does not have standing.

4. Defendants are entitled to all applicable immunities, including, but not limited to, absolute legislative immunity, tort immunity, qualified immunity, statutory immunity, absolute immunity, sovereign immunity, judicial immunity, and quasi-judicial immunity.

5. Defendants assert Plaintiff has not exhausted its administrative remedies.

6. Defendants assert Plaintiff's allegations are not ripe for adjudication.

7. Defendants assert Plaintiff's allegations are moot.

8. Defendants assert that punitive damages are not recoverable against a municipality.

9. Defendants assert Plaintiff is barred from recovery in its Complaint, in whole or in part, by the doctrine of laches, waiver, estoppel, and the voluntary payment doctrine/rule. Separate Defendants also assert any defense listed in Rule 8(c) of the Federal Rules of Civil Procedure that is applicable.

10. Defendants assert Plaintiff lacks a private right of action to bring the instant suit. Defendants also assert a class should not be certified as requested.

11. Defendants assert the affirmative defenses of res judicata, collateral estoppel, justification, and *Heck v. Humphrey*, as deemed applicable.

12. Defendants assert lack of subject matter jurisdiction.

13. Defendants assert venue is improper.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

CONVENT COPRORATION,
Individually and on Behalf of all
Others Similarly Situated **PLAINTIFF**

v. **CASE NO. 4:13-CV-0259**

CITY OF NORTH LITTLE ROCK, ARKANSAS, a Municipal Corporation, JOE SMITH, Mayor, Individually and in his Official Capacity, City Council Members DEBI ROSS, BETH WHITE, LINDA ROBINSON, MAURICE TAYLOR, STEVE BAXTER, BRUCE FOUTCH, MURRY WITCHER, and CHARLIE HIGHT each Individually and in his or her Official Capacity, TOM WADLEY, Director, Code Enforcement Division, Individually and in his Official Capacity, and FELECIA MCHENRY, Code Enforcement Officer, Individually and in her Official Capacity **DEFENDANTS**

DEFENDANTS' MOTION TO DISMISS

COMES NOW Defendants, by and through their attorney, Assistant City Attorney Daniel L. McFadden, and for their Motion for to Dismiss, state:

1. Pursuant to Fed. R. Civ. P. 12(b)(6), Plaintiff has failed to state a claim upon which relief may be granted.

2. This action against Defendants arises from the North Little Rock City Council's vote to condemn a structure Plaintiff allegedly owns.

3. Plaintiff has appealed the decision of the North Little Rock City Council while simultaneously filing suit against the Defendants alleging numerous federal constitutional and Arkansas state tort claims.

4. However, each member of the City Council, as well as the Mayor, is entitled to absolute legislative immunity from Plaintiff's allegations.

5. Further, at this time, Plaintiff's prescribed statutory remedy is its appeal of the City Council's decision.

6. There has been no final determination of Plaintiff's appeal of the North Little Rock City Council's decision.

7. Therefore, Plaintiff has failed to exhaust its administrative remedies as mandated by Ark. Code Ann. § 14-56-425 and Ark. Dist. Ct. R. 9.

8. Plaintiff is not permitted to collaterally attack the Council's decision with a complaint citing numerous federal civil rights violations while its appeal has yet to be adjudicated.

9. Additionally, dispositive issues of law demonstrate Plaintiff has failed to state facts upon which relief may be granted concerning its allegations of federal constitutional violations, as well as state tort claims.

10. A brief in support is incorporated herein and attached hereto.

Wherefore, Defendants respectfully request this Court dismiss this complaint and collateral attack against them, deny the relief sought by Plaintiff in its complaint, and for all other just and proper relief to which there is entitlement.

Respectfully submitted,

CITY OF NORTH LITTLE ROCK, ARKANSAS, a Municipal Corporation, JOE SMITH, Mayor, Individually and in his Official Capacity, City Council Members DEBI ROSS, BETH WHITE, LINDA ROBINSON, MAURICE TAYLOR, STEVE BAXTER, BRUCE FOUTCH, MURRY WITCHER, and CHARLIE

HIGHT, each Individually and in his or her Official Capacity, TOM WADLEY, Director, Code Enforcement Division, Individually and in his Official Capacity, and FELECIA MCHENRY, Code Enforcement Officer, Individually and in her Official Capacity
Defendants

By: /s/ Daniel L. McFadden, ABA #2011035
Assistant City Attorney
300 Main Street
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North Little Rock, Arkansas 72119
Tel: (501) 975-3755
Fax: (501) 340-5341
Email: dmcfadden@northlittlerock.ar.gov

CERTIFICATE OF SERVICE

I, Daniel L. McFadden, hereby certify that on this 1st day of May, 2013, I have mailed a true and correct copy of the document to all counsel of record listed below, via U.S. Mail, postage prepaid:

Mr. Mickey Stevens
Attorney for Plaintiff
P.O. Box 1295
Benton, AR 72018

/s/ Daniel L. McFadden, ABA #2011035

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

CONVENT COPRORATION,
Individually and on Behalf of all
Others Similarly Situated **PLAINTIFF**

v. **CASE NO. 4:13-CV-0259**

CITY OF NORTH LITTLE ROCK, ARKANSAS, a Municipal Corporation, JOE SMITH, Mayor, Individually and in his Official Capacity, City Council Members DEBI ROSS, BETH WHITE, LINDA ROBINSON, MAURICE TAYLOR, STEVE BAXTER, BRUCE FOUTCH, MURRY WITCHER, and CHARLIE HIGHT each Individually and in his or her Official Capacity, TOM WADLEY, Director, Code Enforcement Division, Individually and in his Official Capacity, and FELECIA MCHENRY, Code Enforcement Officer, Individually and in her Official Capacity **DEFENDANTS**

DEFENDANTS' BRIEF IN SUPPORT OF MOTION TO DISMISS

COMES NOW Defendants, by and through their attorney, Assistant City Attorney Daniel L. McFadden, and for their Brief in Support of Motion to Dismiss, state:

I. INTRODUCTION

The Plaintiff has sued the City of North Little Rock, Arkansas, the Mayor of the City of North Little Rock, each council member ("alderman" or "aldermen") of the City of North Little Rock, the Director of North Little Rock Code Enforcement and a North Little Rock Code Enforcement officer, all in their individual and official capacities. The Plaintiff's complaint contains seven (7) "counts" or legal claims. The allegations of the complaint describe the situation in which the City Council voted to condemn a building allegedly owned by the Plaintiff. The Plaintiff claims violations of its constitutional civil rights to procedural and

substantive due process, and protection from unreasonable search and seizure. The complaint also makes claims for trespass, selective prosecution, and civil conspiracy. Plaintiff's complaint also seeks injunction, a temporary restraining order, and declaratory judgment. However, the Plaintiff's claims are completely unsubstantiated. For reasons explained in more detail below, the allegations of the complaint fail to state facts upon which relief may be granted, and the Defendants are in part entitled to absolute legislative immunity, as well as dismissal of Plaintiff's complaint as a matter of law.

II. STANDARDS FOR DISMISSAL

Under Fed. R. Civ. P. 12(b)(6), complaints should be dismissed "[w]here the allegations show on the face of the complaint there is some insuperable bar to relief..." *Benton v. Merrill Lynch & Co., Inc.*, 524 F.3d 866, 870 (8th Cir. 2008) (citing *Parnes v. Gateway 2000, Inc.*, 122 F.3d 539, 546 (8th Cir. 1970)). When ruling on a motion to dismiss, the district court must accept the allegations contained in the complaint as true and all reasonable inferences from the complaint must be drawn in favor of the nonmoving party. *Young v. City of St. Charles, Missouri*, 244 F.3d 623, 627 (8th Cir. 2001). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). More specifically, when the alleged facts in the complaint are taken as true, the complaint must raise more than a speculative right to relief. *Benton*, 524 F.3d at 870.

Furthermore, this rule authorizes a court to dismiss a claim on the basis of a dispositive issue of law. *Neitzke v. Williams*, 490 U.S. 319 (1989); *Hishon v. King and Spaulding*, 467 U.S.

69 (1984); *Conlee v. Gibson*, 355 U.S. 41 (1957). This procedure operates on the assumption that the factual allegations in the complaint are true, and thus streamlines litigation by dispensing with needless discovery and fact-finding. *Neitzke*, 490 U.S. 319. If, as a matter of law, construing the allegations in the complaint favorably to the pleader, it is clear that no relief could be granted under any set of facts, then the complaint must be dismissed pursuant to Fed. R. Civ. P. 12(b)(6). *Id.*; *County of St. Charles, Mo., v. Missouri Family Health Council*, 107 F.3d 682 (8th Cir. 1997). Moreover, Plaintiff must show at least the prima facie elements of its claim. *Lucas v. Brown & Root, Inc.*, 736 F.2d 1202, 1205 (8th Cir. 1984); *Hungate v. United States*, 626 F.2d 60, 62 (8th Cir. 1980). Although this court should remain sensitive to the liberal rules of federal pleading, "[m]eritless claims should be disposed of at the first appropriate opportunity." *Id.*; *accord, Orlando v. Alamo*, 646 F.2d 12878, 1289 (8th Cir. 1981).

Assuming, without conceding, that only the facts pled by Plaintiff are true under the above-mentioned standard, the Plaintiff has failed to state facts upon which relief can be granted. However, the Defendants in no way concede Plaintiff's factual allegations. Further, as stated, the Plaintiff's conclusions, legal and otherwise, are immaterial to consideration of this motion and are, therefore, properly disregarded.

III. ARGUMENT

Plaintiff does not have a basis for its claims against the Defendants, thus Defendants are entitled to dismissal as a matter of law. First and foremost, the Aldermen and Mayor of North Little Rock are entitled to absolute legislative immunity from all of Plaintiff's allegations and should be dismissed from this complaint with prejudice. Additionally, Plaintiff has not exhausted its administrative remedies and, thus, is not permitted at this time to collaterally attack the Council's decision to condemn the property Plaintiff allegedly owns. Such claims are not

ripe for adjudication at this time. For this additional reason, Plaintiff's complaint should be dismissed with prejudice.

Furthermore, should the Court be inclined to examine the merits of the allegations at this time, the Plaintiff still fails to allege facts to support a violation of procedural or substantive due process, or equal protection. Nor does Plaintiff state facts sufficient to demonstrate a violation of the Fourth Amendment. Similarly, Plaintiff fails to state facts to support the existence of its state claims of trespass or civil conspiracy. Nor is Plaintiff's claim for an injunction with any merit.

For the purposes of clarity and convenience, this brief addresses each of these issues separately and individually below.

A. <u>The Mayor and all aldermen are entitled to absolute legislative immunity</u>.

The Complaint makes it clear that Mayor Smith and all Aldermen are sued due to their acts as Mayor or Aldermen. As such, they are entitled to absolute legislative immunity. Absolute immunity defeats a suit at the outset if the official's actions are within the scope of the immunity. *Imbler v. Pachtman*, 424 U.S. 409, 419 fn. 13 (1976). Legislators are protected by absolute immunity for actions taken in their legislative capacity. *Lake County Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 406 (1979). This immunity does not flow from the particular title of the governmental actor, but rather from the nature of the responsibilities of the official. *Cleavinger v. Saxner*, 474 U.S. 193, 201 (1985). "A local legislator is entitled to absolute legislative immunity for acts undertaken within the 'sphere of legitimate legislative activity.'" *Leapheart v. Williamson*, 705 F.3d 310, 313 (8th Cir. 2013) (quoting *Bogan v. Scott-Harris*, 523 U.S. 44, 54 (1998)). "[P]assing an ordinance is a legislative act." *Id.*

Similarly, executive officials outside the legislative branch, including municipal officials, are entitled to legislative immunity when they perform legislative functions. *Supreme Court of*

Va. v. Consumers Union of United States, Inc., 446 U.S. 719, 731-34 (1980); *Gorman Towers Inc. v. Bogoslavsky*, 626 F.2d 607, 613-14 (8th Cir. 1980). The exercise of legislative discretion should not be inhibited by judicial interference or distorted by the fear of personal liability. *Spallone v. United States*, 493 U.S. 265, 279 (1990) (noting, in the context of addressing local legislative action, that "any restriction on a legislator's freedom undermines the 'public good' by interfering with the rights of the people to representation in the democratic process"). Furthermore, the time and energy required to defend against a lawsuit are of particular concern at the local level, where the part-time citizen-legislator remains commonplace. *See Tenney v. Brandhove*, 341 U.S. 367, 376 (1951).

This instant case arises as a result of the North Little Rock City Council's vote to condemn property that the Plaintiff allegedly owns, and for the Mayor's sponsorship of and signature approving such legislation. *See Complaint*, ¶ 50. Yet, "[t]he regulation of land use is traditionally a function performed by local governments" and, accordingly, such decisions are protected by absolute immunity. *Brown v. Crawford County*, 960 F.2d 1002, 1011 (11th Cir. 1992) (quoting *Lake County Estates*, 440 U.S. 391, 402)). And, absolute legislative immunity applies even when the decision at issue relates to a single parcel of land. *Acierno v. Cloutier*, 40 F.2d 597, 613 (3rd Cir. 1994) (en banc). Moreover, and as stated, the Mayor is protected by absolute immunity as well where his actions, if any, were legislative in nature. *See, e.g., Shoultes v. Laidlaw*, 886 F.2d 114, 117 (6th Cir. 1989). Certainly, sponsoring and then signing legislation upon Council approval are functions that can only be considered legislative in nature. Thus, as each and every Alderman for the City of North Little Rock, as well as the Mayor, are entitled to absolute legislative immunity, the complaint in its entirety should be dismissed as against them with prejudice. Further, they are entitled to qualified immunity even assuming,

arguendo, that the remaining Defendants did somehow violate Plaintiff's constitutional rights, which Defendants expressly deny. *See Heartland Academy Comm. Church v. Waddle*, 595 F.3d 798, 805 (8th Cir. 2010) ("Authorities not involved in the allegedly unconstitutional acts of their fellow public servants have not violated constitutional rights and are entitled to qualified immunity.")).

B. Plaintiff has not exhausted its administrative remedies.

The Plaintiff has not fully appealed the North Little Rock City Council's decision to condemn its property; thus, Plaintiff has not exhausted its administrative remedies. Consequently, this civil rights complaint is not even ripe for adjudication. Case law is sufficiently clear that claims are not ripe for adjudication until *after* the claimant seeks, and then exhausts, all remedies available under state law. *See Collier v. City of Springdale*, 733 F.2d 1311, 1316 (8th Cir. 1984).

1. The City is statutorily authorized to condemn Plaintiff's property.

The City's authority to condemn a structure is found at Ark. Code Ann. § 14-56-203, which states:

> Cities of the first and second class shall have the power to order the removal or razing of, or to remove or raze, any buildings or houses that in the opinion of the council have become dilapidated, unsightly, unsafe, unsanitary, obnoxious, or detrimental to the public welfare and shall provide, by ordinance, the manner of removing and making these removals.

Ark. Code Ann. § 14-56-203. This authority was first examined by the Arkansas Supreme Court in *Springfield v. City of Little Rock*, 226 Ark. 462, 290 S.W2d 620 (1956). *Springfield* held that municipalities were constitutionally authorized to remove structures without compensation based upon fire, health, or structural hazards as part of the City of Little Rock's plenary duty to exercise its police power in the interest of the public health and safety of its inhabitants.

Springfield, 226 Ark. 462, 463. Thus, the City is authorized to condemn such structures, and has long been granted this authority.

2. *Arkansas State Statute and Arkansas District Court Rules govern Plaintiff's remedies at this time.*

An appeal of a condemnation must be followed by the prescribed procedures of Arkansas state statute and the Arkansas District Court Rules. The procedure to appeal an action by City Council condemning a piece of property is found at Ark. Code Ann. § 14-56-425, which states that:

> In addition to any remedy provided by law, appeals from final action taken by the administrative and quasi-judicial agencies concerned in the administration of this subchapter may be taken to the circuit court of the appropriate county where they shall be tried de novo *according to the same procedure which applies to appeals in civil actions from decisions of inferior courts*, including the right of trial by jury.

Ark. Code Ann. § 14-56-425 (emphasis added). The Arkansas Supreme Court has applied this rule to condemnation actions. *See e.g. Ingram v. City of Pine Bluff*, 355 Ark. 129, 133 S.W.3d 382 (2003). *Cf. Ingram v. City of Pine Bluff*, 2000 U.S. App. LEXIS 29595 (8th Cir. 2000) (per curiam).

Therefore, it follows from Ark. Code Ann. § 14-56-425 that the prescribed statutory remedy for appealing a final decision of a governing body, such as a condemnation by city council, is to appeal that decision to Circuit Court. Indeed, Arkansas District Court Rule 9 states in part that "[a] party may appeal any final administrative decision by filing a notice of appeal with the clerk of the circuit court having jurisdiction of the matter within thirty (30) days from the date of that decision." Ark. Dist. Ct. R. 9(f)(2)(A). And, Ark. Dist. Ct. R. 9 applies to the final decisions made by city councils through Ark. Code Ann. § 14-56-425. *Talley v. City of North Little Rock*, 2009 Ark. 601, 2009 Ark. LEXIS 786, at *7, **10. The Arkansas Supreme

Court has been certain to make it known that "the requirements of *section 14-56-425 ... include compliance with Inferior Ct. R. 9.*" *Douglas v. City of Cabot*, 347 Ark. 1, 5, 59 S.W.3d 430, 432 (citing *Board of Zoning Adjustment v. Cheek*, 328 Ark. 18, 942 S.W.2d 821 (1977); *Night Clubs, Inc. v. Fort Sith Plann. Comm'n*, 336 Ark. 130, 984 S.W.2d 418 (1999)) (emphasis added). These provisions "are mandatory and jurisdictional." *Green v. City of Jacksonville*, 357 Ark. 517, 521, 182 S.W.3d 124, 126 (2004).

3. Plaintiff has not exhausted its prescribed administrative remedies.

Here, the complaint plainly states Plaintiff has just now initiated its appeal of the City's condemnation action; thus, it has not exhausted its administrative remedies. *See Complaint*, ¶¶ 1-2. Yet, "[t]he doctrine of exhaustion of administrative remedies provides that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed statutory administrative remedy has been exhausted." *McGhee v. Arkansas State Board of Collection Agencies*, 368 Ark. 60, 67, 243 S.W.3d 278, 284 (2006) (citing *Old Republic Sur. Co. v. McGhee*, 360 Ark. 562, 203 S.W.3d 94 (2005); *Arkansas Prof'l Bail Bondsman Licensing Bd. v. Frawley*, 350 Ark. 444, 88 S.W.3d 418 (2002); *Cummings v. Big Mac Mobile Homes, Inc.*, 335 Ark. 216, 980 S.W.2d 550 (1998)). "[I]t is better to pursue administrative remedies to conclusion before resorting to the court system." *Ward v. Priest*, 350 Ark. 345, 357, 86 S.W.3d 884, 890 (2002) (citing *Myers v. Bethlehem Bldg. Corp.*, 303 U.S. 41, 82 L. Ed. 638, 58 S.Ct. 459 (1938)). "Such logic is based on jurisprudential reasoning that supports applying for relief to the proper place first." *Id.* (citing *Ragon v. Great Am. Indem., Co.*, 224 Ark. 387, 273 S.W.2d 524 (1954)). If a party fails to exhaust his or her administrative remedies and/or to properly perfect an appeal of a final administrative decision, his or her complaint will be dismissed because the Court would not have subject matter jurisdiction over the contents of the allegations

in the complaint. *Green v. City of Jacksonville*, 357 Ark. 517, 521, 182 S.W.3d 124, 126 (2004); *Douglas v. City of Cabot*, 347 Ark. 1, 5, 59 S.W.3d 430, 432 (2001); *Talley v. City of North Little Rock*, 2009 Ark. 601, 2009 Ark. LEXIS 786, at *7, **10 (2009).

Plaintiff's Complaint is devoid of any allegation regarding Plaintiff's exhaustion of any state remedies available to it for the relief from the condemnation. Indeed, the Court need not look any farther than Paragraphs 1 and 2 of Plaintiff's complaint to determine that Plaintiff only just initiated its appeal of the disputed condemnation. Consequently, as there is no allegation illustrating that a "takings" action, or due process violation, in state court would be futile, it must be concluded that the claim, for which this entire federal civil rights lawsuit is predicated, is not ripe for adjudication before this Court, or any court, at this time. *Collier v. City of Springdale*, 733 F.2d 1311, 1316 (8th Cir. 1984); *see also McKenzie v. City of White Hall*, 112 F.3d 313, 317 (8th Cir. 1997); *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 195 (1985). Accordingly, because Plaintiff has not exhausted its administrative remedies, this complaint should be dismissed as premature.

Clearly, Plaintiff has failed to exhaust its administrative remedies, which are prescribed by Ark. Code Ann. § 14-56-425, Ark. Dist. Ct. R. 9, and Arkansas state and federal jurisprudence. The Plaintiff already has a prescribed statutory remedy to address its grievances regarding the North Little Rock City Council's decision: its appeal of the decision to Pulaski County Circuit Court pursuant to Ark. Code Ann. § 14-56-425 and Arkansas District Court Rule 9. However, Plaintiff has no further or additional cause of action against the Defendants regarding the condemnation procedure because Plaintiff has not exhausted its administrative remedies. Nor may it bypass the governing statute and law that states its remedy is its appeal of the decision to Pulaski County Circuit Court.

4. *Plaintiff may not collaterally attack the Council's decision by simultaneously filing a civil rights complaint.*

Plaintiff's simultaneous constitutional allegations, filed in addition to yet as a part of its Ark. Code Ann. § 14-56-425 and Ark. Dist. Ct. R. 9 appeal, amount to an impermissible collateral attack. The United States Supreme Court has stated that "a collateral challenge may not do service for an appeal." *United States v. Frady*, 456 U.S. 152, 165 (1982). "[N]ormally, a collateral attack should not be entertained if defendant failed, for no good reason, to use another available avenue of relief." *Poor Thunder v. United States*, 810 F.2d 817, 823 (8th Cir. 1987) (citing *Kaufman v. United States*, 394 U.S. 217 (1969)); *Reid v. U.S.*, 976 F.2d 446, 447-48 (8th Cir. 1992). Thus, a party may not collaterally attack a governmental body's decision, such as the one in the present case, by simultaneously filing a complaint in addition to the pending administrative appeal, much less an appeal that was never properly perfected or even filed in the first place. *City of Paragould v. Leath*, 266 Ark. 390, 393, 583 S.W.2d 76, 77 (1979); *Talley*, 2009 Ark. 601, 2009 Ark. LEXIS 786, at *8-9, **11-12. This goes both ways; even cities may not collaterally attack final administrative decisions by filing a separate and independent complaint in addition to appealing the decision. *Id.* Certainly, an appealing party "cannot bypass the provision of the [governing] statute which provides that *the remedy is by appeal.*" *Id.* (citing Davis, Administrative Law Treatise, § 18.10) (emphasis added)).

As stated, and demonstrated in the facts Plaintiff alleges in its complaint, the Plaintiff's appeal has yet to be adjudicated. Thus, Plaintiff's complaint alleging the numerous constitutional violations amounts to a collateral attack of the Council's decision while Plaintiff's appeal already awaits adjudication. This is not permissible. *See generally Talley v. City of North Little Rock* 2009 Ark. 601, 2009 Ark. LEXIS 786 (2009); *City of Paragould v. Leath*, 266 Ark. 390, 583 S.W.2d 76 (1979); *Poor Thunder v. United States*, 810 F.2d 817, 823.

Consequently, Plaintiff's complaint should be dismissed with prejudice for this additional reason.

C. **The complaint fails to state a claim for violation of procedural due process.**

Fatal to the Plaintiff's claim of a procedural due process violation are the facts Plaintiff provides in its own complaint. First and foremost, Plaintiff establishes it has not exhausted its own administrative remedies. *See supra*; *Keating v. Nebraska Pub. Power Dist.*, 562 F.3d 923, 929 (8th Cir. 2009) ("Under federal law, a litigant asserting a deprivation of procedural due process must exhaust state remedies before such an allegation states a claim under § 1983.").

Second, Plaintiff concedes it was given notice of the condemnation proceeding and it appeared before the North Little Rock City Council to oppose the condemnation and present its case. *Complaint*, ¶¶ 35, 43, 45. However, the Eighth Circuit has determined that where a property owner is given notice to abate a hazard on his or her property and has been given an opportunity to appear before the municipal body considering condemnation of the property, no due process violation occurs when the municipality determines it is proper to abate the nuisance pursuant to the condemnation notice. *Samuels v. Meriweather*, 94 F.3d 1163, 1167 (8th Cir. 1996); *Hagan v. Traill County*, 708 F.2d 347, 348 (8th Cir. 1983) (upholding legality of destruction of building for failure to abate nuisance after notice and hearing)).

Third, even assuming without conceding that the multiple communications regarding notice of the condemnation proceeding were somehow defective, Plaintiff's concession that opposing counsel appeared on Plaintiff's behalf to oppose the condemnation and present the Plaintiff's case waived any defects. Indeed, "[n]otice ... can be waived without doing violence to the due process clause." *Strick Lease, Inc. v. Juels*, 30 Ark. App. 15, 19, 780 S.W.2d 594, 596 (Ark. App. 1989). Appearance waives notice. *Lancaster v. West*, 319 Ark. 293, 300, 891

S.W.2d 357, 361 (1995). *See also Clark v. State*, 287 Ark. 221, 225, 697 S.W.2d 895, 897 (1985); *Pulaski County v. Commercial National Bank*, 210 Ark. 124, 136-37, 194 S.W.2d 883, 890 (1946) (McFadin, Ed. F. dissenting).

Therefore, for all of these reasons, the facts and tacit admissions alleged in Plaintiff's complaint demonstrate no violation of procedural due process occurred. As such, Plaintiff's procedural due process allegation should be dismissed with prejudice.

D. **The complaint fails to state a claim for violation of substantive due process.**

A substantive due process violation will be found only in "truly egregious and extraordinary cases." *Chesterfield Development Corp. v. City of Chesterfield*, 963 F.2d 1102, 1105 (8th Cir. 1992); *Brown v. Nix*, 33 F.3d 951, 953 (8th Cir. 1994). The Courts have:

> always been reluctant to expand the concept of substantive due process because guideposts for responsible decision making in this unchartered area are scarce and open-ended. The doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field.

Collins v. City of Harker Heights, 112 S. Ct. 1061, 1068 (1992); *Brown*, 33 F.3d at 953.

The claim raised by Plaintiff is not the sort that has come under the protection of substantive due process. Substantive due process protection has been extended mostly in the areas of "marriage, family, procreation, and the right to bodily integrity." *Albright v. Oliver*, 114 S.Ct. 807, 812 (1994) (plurality opinion). One wishing to extend substantive due process into new arenas bears "a heavy burden." *Brown*, 33 F.3d at 954. In order to establish such a claim, the plaintiff must show that the government action is "truly irrational, that is, something more than arbitrary, capricious or in violation of state law." *Anderson v. Douglas County*, 4 F.3d 574, 577 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 1059 (1994). An example of such irrationality

would be to apply an ordinance only to people whose names begin with a letter in the first half of the alphabet. *Id.*

In *Reese v. Kennedy*, 865 F.2d 186, 187 (8th Cir. 1989), the court held that an allegation of eviction in violation of state law did not "offend[] human dignity" or "shock[] the conscience." Similarly, in *Chesterfield*, the court held that not even the knowing, bad-faith enforcement of an invalid zoning ordinance would suffice to state a claim of a substantive due process violation. Moreover, and as the Sixth Circuit has stated,

> So far as we know, or have been informed, no court has held that it shocks the conscience for municipal authorities, acting pursuant to an unchallenged ordinance, to order the destruction of a building found by responsible officers to be a nuisance or threat to public health or safety.

Harris v. City of Akron, 20 F.3d 1396, 1405 (6th Cir. 1994), *cert. denied*, 115 S. Ct. 512 (1994).

In the complaint at bar, there is no allegation of anything approaching conscience-shocking conduct or an interference with fundamental rights. The application of the preceding legal principles to this case should result in a finding that no substantive due process violation occurred. Thus, Plaintiff's substantive due process claim should, likewise, be dismissed with prejudice.[1]

E. <u>There are no federal actors to this action</u>.

In addition to the reasons provided above, the Plaintiff's Fifth Amendment allegations are inappropriate as the Fifth Amendment cannot serve as the basis for § 1983 liability against a defendant unless the Plaintiff was subject to federal action. *See Warren v. Government Mortgage Ass'n.*, 611 F.2d 1229, 1232 (8th Cir.), *cert. denied*, 449 U.S. 847 (1980). However, Plaintiff claims violations of its rights at the hands of state actors. Consequently, a Fifth Amendment

[1] Because Plaintiff has not exhausted its administrative remedies and its complaint demonstrates the absence of a violation of procedural or substantive due process, Defendants assert no equal protection violation has occurred. In any event, the Aldermen and Mayor are entitled to absolute legislative immunity from any such allegation.

claim is not applicable to this action. Therefore, Plaintiff's Fifth Amendment allegations should be dismissed with prejudice.

F. The facts alleged and exhibits provided demonstrate probable cause existed to search the premises.

1. Plaintiff's Fourth Amendment unreasonable search allegation is based on a misinterpretation of North Little Rock municipal ordinance.

This allegation against Officer McHenry[2] is based on Plaintiff's misinterpretation of North Little Rock municipal ordinance. Plaintiff states the requirements for obtaining an administrative search warrant include the code enforcement officer seeking permission from a property owner to search the premises prior to obtaining an administrative search warrant from a judge. *See Complaint*, ¶¶ 38, 89, 90. However, the information Plaintiff provides in Exhibit C in support of its complaint reveals that Plaintiff's interpretation of the pertinent City ordinance is misguided. The pertinent ordinance, Section 1.3.1, states in full:

> Code Enforcement Officers are authorized to enter structures or premises at reasonable times to inspect subject to constitutional restrictions on unreasonable searches and seizures. If entry is refused *or not obtained*, the officers may pursue such search authorizations as are provided by law.

Plaintiff Exhibit C (emphasis added).

Reading the above section in its entirety reveals that there is no language specifically requiring North Little Rock Code Enforcement Officers to obtain prior permission from a property owner to search the premises before seeking an administrative search warrant. Rather, "if entry is refused" or is simply *"not obtained,"* the officers are entitled to seek other avenues to lawfully conduct a search, including but not limited to obtaining an administrative search warrant. Thus, based on this information provided in Plaintiff's complaint, it suffices to say that

[2] Plaintiff's Complaint is vague as to whom the Fourth Amendment unreasonable search allegation is based against. Defendants in good faith interpret this allegation, based upon the facts provided by Plaintiff, as against Officer McHenry only.

Officer McHenry was not required to obtain the property owner's prior permission to search the structure before resorting to obtaining an administrative search warrant, as alleged by Plaintiff. Therefore, Officer McHenry's obtainment of an administrative search warrant did not, and could not, amount to a Fourth Amendment unreasonable search violation. Even assuming, without conceding, she did violate the ordinance, such a violation cannot and does not amount to a violation of the Fourth Amendment, as there was probable cause to search the premises.

2. *Probable cause existed to search the structure.*

Regardless of Plaintiff's misinterpretation of North Little Rock municipal code, or if the Court disagrees with Defendants' own interpretation of its code, the complaint and its supporting evidence still illustrate a neutral and detached magistrate signed an administrative search warrant to search the premises, thus there was probable to conduct the search. Consequently, no Fourth Amendment violation occurred.

For a warrant to satisfy the Fourth Amendment, a neutrally detached magistrate must determine probable cause exists and sign the warrant. U.S. Const., amend. IV; *see generally Missouri v. McNeely*, 133 S.Ct. 1552 (2013). Generally, municipal code and building inspectors are required to obtain administrative search warrants prior to conducting a search. *Camara v. Municipal Court of San Francisco*, 387 U.S. 523 (1967). Indeed, "[i]n the administrative search context, we formally require that administrative warrants be supported by 'probable cause,' because in that context we use that term as referring not to a quantum of evidence, but merely to a requirement of reasonableness." *Griffin v. Wisconsin*, 483 U.S. 868, 878 fn. 4 (1987).

Here, the facts of Plaintiff's complaint and its supporting evidence demonstrate probable cause existed to search the premises. Exhibit F to Plaintiff's complaint reveals that Officer McHenry submitted an affidavit for an administrative search warrant to a neutral and detached

magistrate. *Plaintiff Exhibit F*. The affidavit reveals a judge signed it.[3] Thus, the neutral and detached magistrate issuing the warrant determined probable cause existed to search the structure. Consequently, Plaintiff fails to demonstrate an unlawful search, because probable cause existed and Plaintiff's complaint does not dispute the existence of such; rather, Plaintiff disputes the procedure for obtaining one. Nor does Plaintiff state in its complaint that the scope of the administrative search warrant was exceeded. *Berry v. City of Little Rock*, 904 F.Supp. 940, 947 (E.D. Ark. 1995). Therefore, for these reasons, Plaintiff's allegation of an unlawful search should be dismissed with prejudice.

G. The stated facts demonstrate any alleged seizure occurred only after the City Council voted to condemn the structure.

Plaintiff provides facts sufficient to demonstrate any alleged seizure occurred only after the City Council voted to condemn the structure. "[T]he Fourth Amendment protects property as well as privacy interests." *Hroch v. City of Omaha*, 4 F.3d 693, 696 (8th Cir. 1993) (citing *Soldal v. Cook County*, 121 L. Ed. 2d 450, 113 S. Ct. 538 (1992)). However, "a seizure pursuant to a court order is reasonable under the Fourth Amendment." *Samuels v. Meriweather*, 94 F.3d 1163, 1168 (8th Cir. 1996) (citing *Coleman v. Watt*, 40 F.3d 255, 263 (8th Cir. 1994)). "Similarly, we have held that seizure pursuant to a City board condemnation hearing is reasonable." *Id.* (citing *Hroch*, 4 F.3d at 696-97) (demolition of a building pursuant to City board condemnation)). Thus, acting "pursuant to a noticed hearing and a resolution effectuating municipal ordinances" does not violate the Fourth Amendment, or procedural due process. *Id.*

[3] Defendants acknowledge Plaintiff has only attached a copy of the affidavit for an administrative search warrant, and not the search warrant itself, with its exhibits. However, Defendants submit Plaintiff's concession in its stated facts that an administrative search warrant was authorized by a judge (*Complaint*, ¶¶ 38, 89) and that the affidavit was approved by a neutral and detached magistrate (*Plaintiff Exhibit F*) are sufficient at this stage to demonstrate probable cause existed to search the premises.

In *Samuels*, a factually similar case, a property owner attended the Hope City Council meeting in Hope, Arkansas, in response to a proposed condemnation action as to his property. *Id.* at 1165. The owner was told to bring his property into compliance by a certain date or it would be torn down. *Id.* The condemnation resolution passed and, after the City Manager determined the property had not been sufficiently repaired, the structure was razed. *Id.* The owner then brought suit in federal court alleging that they received no notice of the condemnation and no sign was posted on the property. *Id.* at 1166.

However, the Eighth Circuit stated that these arguments had no effect. *Id.* The Court explained, "[i]n general, procedural due process requires that a hearing before an impartial decision maker be provided at a meaningful time, and in a meaningful manner, prior to a governmental decision which deprives individuals of a liberty or property interest." *Id.* (citing *Matthews v. Eldridge*, 424 U.S. 319, 332-33 (1976)). Because the owner was aware of the condemnation and had an opportunity to be heard, the Court upheld the City's decision. Further, and more relevant to Plaintiff's Fourth Amendment allegation, the Eighth Circuit recognized that "[m]any seizures carried out in accordance with procedural due process will undoubtedly survive Fourth Amendment review" and held that the City of Hope was merely acting pursuant to a hearing and a resolution based upon municipal ordinance and approved by the Hope City Council. *Id.* at 1168. Therefore, the property owner failed to raise any factual issues that the City and/or its agents acted unreasonably. *Id.* Thus, no seizure in violation of the Fourth Amendment occurred. *Id.*

Here, the complaint demonstrates any possible seizure occurred only after the City's condemnation hearing and proceeding. Notwithstanding Plaintiff's facts establish it was provided procedural due process, the complaint fails to provide facts sufficient to establish a

Fourth Amendment violation for unreasonable seizure. In the complaint, Plaintiff admits it (1) received notice; (2) was provided a hearing; and (3) the Council voted to condemn the structure *after* the conclusion of the notice and hearing. Thus, Plaintiff tacitly demonstrates the City, and any employees or agents thereafter, were acting upon a resolution effectuating North Little Rock City ordinance, much like the Hope City Council in *Samuels*, in allegedly seizing Plaintiff's structure. And, unlike *Samuels*, Plaintiff states the property has neither been repaired nor razed. Thus, in reality, no seizure occurred at the time Plaintiff initiated suit, as Plaintiff was still provided time and opportunities for abatement.

In any event, based on the facts Plaintiff provides in its complaint, as well as applicable law, the Defendants did not violate Plaintiff's Fourth Amendment rights to be from unreasonable or unlawful seizure of its property. Consequently, Plaintiff's allegation of a Fourth Amendment seizure should be dismissed with prejudice.

H. <u>The complaint fails to allege facts demonstrating trespass.</u>

Defendants assert that because Plaintiff fails to state facts to demonstrate any federal constitutional violation, it is unnecessary for the Court to address Plaintiff's state tort allegations. However, should the Court invoke supplemental jurisdiction over Plaintiff's state claims at this moment, then Defendants submit that the Plaintiff still fails to state facts to demonstrate a cause of action for trespass. Plaintiff's allegation of trespass is only addressed towards Officer McHenry. As Plaintiff states, Officer McHenry was on the premises pursuant to a signed administrative search warrant to investigate and search the premises for municipal code violations; thus, no trespass occurred because Officer McHenry was present for a lawful purpose. Indeed, Officer McHenry's presence was privileged. Restatement (Second) of Torts, § 210; *see also Tensley v. City of Spokane*, 267 Fed. Appx. 558, 560 (9th Cir. 2008); *Adams v. City of*

Chicago Heights, 2011 U.S. Dist. LEXIS 16833, *19 (N.D. Ill. Feb. 18, 2011); *Kay v. County of Cook*, 2006 U.S. Dist. LEXIS 61394, *7 (N.D. Ill. Aug. 29, 2006). As such, there was no trespass by Officer McHenry and this claim should be dismissed with prejudice.

I. **The complaint fails to allege facts demonstrating conspiracy.**

The facts alleged by Plaintiff illustrate that Defendants did not and could not conspire against the Plaintiff. A civil conspiracy occurs when two or more persons combine with each other to accomplish an unlawful or oppressive purpose so as to cause injury or harm to another. *Mason v. Funderburk*, 247 Ark. 521, 529 (1969) (citing *Southwestern Publishing Co. v. Ney*, 227 Ark. 852 1957)). However, it is well settled law that a "corporation cannot conspire with itself." *Faulkner v. Arkansas Children's Hosp.*, 347 Ark. 941, 962, 69 S.W.3d 393, 407 (2002). Indeed, a corporation conspiring with itself "defeats the requirement of a combination of two or more persons acting to accomplish some unlawful or oppressive purpose." *Id.* (citing *Dodson v. Allstate Ins. Co.*, 345 Ark. 430, 445, 47 S.W.3d 866, 876 (2001)). The Arkansas Supreme Court further noted that, in *Dodson v. Allstate Ins. Co.*, it had said that corporate agents could "not be held liable for civil conspiracy in the absence of evidence showing that they were acting for their own personal benefit rather than for the benefit of the corporation." *Id.* (citing *Dodson*, 345 Ark. at 445, 47 S.W.3d at 876 (citations omitted)).

Here, the Plaintiff has sued all Defendants in their official and individual capacities, as well as the City itself. A suit against a governmental employee in his official capacity is treated as a suit against the municipality in which he serves. *Dornheim v. Sholes*, 430 F.3d 919, 925 (8th Cir. 2005) (citing *Audio Odyssey, Ltd. v. Brenton First Nat. Bank*, 245 F.3d 721, 741 (8th Cir. 2001)). Yet, reading Plaintiff's complaint liberally reveals the Plaintiff broadly alleges a conspiracy for each of its allegations, as well as making a separate allegation of conspiracy

entirely on its own; however, the Plaintiff's claims are barred as the Plaintiff has essentially alleged that the City Council and Mayor, acting for and through the City of North Little Rock, has conspired with itself. This is not a proper claim per *Dodson* and *Faulkner*.

Moreover, and in addition to these reasons, the Mayor and all of the Aldermen are entitled to absolute legislative immunity in their individual capacities, which includes immunity from any and all allegations of civil conspiracy. *Runs After v. United States*, 766 F.2d 347, 354-55 (8th Cir. 1985). Furthermore, the complaint is devoid of any specific allegations that the two remaining Defendants for this claim, Mr. Wadley and Officer McHenry, conspired with each other. As such, the facts as alleged by Plaintiff fail on their face to demonstrate any conspiracy, and the City cannot conspire with itself. Therefore, for all of these reasons, any and all allegations of conspiracy should be dismissed with prejudice.

J. Plaintiff's claim for an injunction is without merit.

The Defendants first contend, as explained as to the claims addressed above, and for additional reasons set forth below, that the complaint fails to state any claim upon which relief can be granted, therefore there is no deprivation for the Court to enjoin. Further, the Plaintiff's claim for an injunction, made on Page 20 of its complaint, is based upon allegations which fail to state any constitutional violation. Thus, it suffices to say the complaint is far from containing allegations sufficient to meet the elements for entitlement to a preliminary injunction. *See Dataphase Systems, Inc. v. C.L. Systems, Inc.*, 640 F.2d 109 (8th Cir. 1981). Therefore, Plaintiff's claim for an injunction does not have merit and should be dismissed.

IV. CONCLUSION

For the foregoing reasons, Plaintiff's complaint is ripe for dismissal. Mayor Smith and all of the Aldermen are entitled to absolute legislative immunity from Plaintiff's allegations

against them and Plaintiff has failed to exhaust its administrative remedies. Further, Plaintiff fails to state facts to demonstrate any violation of due process or the Fourth Amendment. Furthermore, Plaintiff fails to state facts sufficient to demonstrate a violation of Arkansas tort law. Therefore, this case should be dismissed with prejudice.

Respectfully submitted,

CITY OF NORTH LITTLE ROCK, ARKANSAS, a Municipal Corporation, JOE SMITH, Mayor, Individually and in his Official Capacity, City Council Members DEBI ROSS, BETH WHITE, LINDA ROBINSON, MAURICE TAYLOR, STEVE BAXTER, BRUCE FOUTCH, MURRY WITCHER, and CHARLIE HIGHT, each Individually and in his or her Official Capacity, TOM WADLEY, Director, Code Enforcement Division, Individually and in his Official Capacity, and FELECIA MCHENRY, Code Enforcement Officer, Individually and in her Official Capacity
Defendants

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CERTIFICATE OF SERVICE

I, Daniel L. McFadden, hereby certify that on this 1st day of May, 2013, I have mailed a true and correct copy of the document to all counsel of record listed below, via U.S. Mail, postage prepaid:

Mr. Mickey Stevens
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Benton, AR 72018

/s/ Daniel L. McFadden, ABA #2011035

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

CONVENT CORPORATION, Individually and on Behalf of all Others Similarly Situated — **PLAINTIFF**

v. **NO. 4:13-CV-0259**

CITY OF NORTH LITTLE ROCK, ARKANSAS, a Municipal Corporation, JOE SMITH, Mayor, Individually and in his Official Capacity, City Council Members DEBI ROSS, BETH WHITE, LINDA ROBINSON, MAURICE TAYLOR, STEVE BAXTER, BRUCE FOUTCH, MURRY WITCHER, and CHARLIE HIGHT, each Individually and in his or her Official Capacity, TOM WADLEY, Director, Code Enforcement Division, Individually and in his Official Capacity, and FELECIA MCHENRY, Code Enforcement Officer, Individually and in her Official Capacity — **DEFENDANTS**

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS

COMES NOW Plaintiff Convent Corporation, by and through its attorney, Mickey Stevens, and for its Response to Defendants' Motion to Dismiss, states as follows:

INTRODUCTION

The City Council of the City of North Little Rock voted to condemn Plaintiff's property as a nuisance in a summary procedure without providing proper notice as to the specific violations alleged, the opportunity to repair the property, and without providing Plaintiff with any meaningful opportunity to be heard. The Council condemned the property without considering any evidence beyond pictures of clutter in the building and damage to the interior caused by vandalism of which the owner was previously unaware. Plaintiff cleaned the interior

of the building but the City refused to issue a permit to allow Plaintiff to make repairs to the building. The record in this case does not contain any evidence of specific violations or any evidence demonstrating that the structure is a threat to public health or safety.

The City does not provide any administrative remedies or appeals in condemnation actions by the City Council. In compliance with Arkansas District Court Rule 9, Plaintiff filed and perfected its appeal in state Circuit Court and filed a Complaint asserting violations of Plaintiffs rights guaranteed by both the state and federal constitutions. Before filing an Answer, Defendants' removed to federal court and filed a Motion to Dismiss arguing, among other things, that Plaintiff failed to pursue its remedies in state court.

In their Motion to Dismiss, Defendants attempt to make this case more complicated than it really is. The issue here is simple and basic—denial of due process. The City has seized Plaintiff's property through a summary proceeding without providing any due process, whatsoever. The City failed to provide notice of the alleged violations. The City refused to issue a permit to allow the owner to repair the property prior to condemnation. Plaintiff requested a full hearing and the ability to present evidence but the City steadfastly refused. The City's code does not contain any provisions for a hearing, at any level, and the only avenue for appeal requires that the property owner initiate an action in state court after the property has been condemned. The complete lack of any *predeprivation* due process protection is a clear and deliberate violation of both the United States and the Arkansas Constitutions. In the removal of this case to federal court and in its Motion to Dismiss, Defendants are still attempting to deny due process to Plaintiff.

Defendants argue that the City is permitted to take property in willful violation of the Constitution and, as long as the owner can appeal to state court, the City has no obligation to

provide due process. The Constitutional violations complained of were complete ouce the City condemned the property. Defendants now seek to deny Plaintiff any opportunity to present their constitutional claims to either state or federal court.

Rule 12(b)6 Standard

When ruling on a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim, the Court must take as true the facts alleged and determine whether they are sufficient to raise more than a speculative right to relief. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 1965, 167 L. Ed. 2d 929 (2007). The complaint need only contain "'a short and plain statement of the claim showing that the plaintiff is entitled to relief,' in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Id.* at 1964 (quoting Fed. R. Civ. P. 8(a)(2) and then *Conley v. Gibson*, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)). Detailed factual allegations are not necessary. The complaint need only set forth "enough facts to state a claim to relief that is plausible on its face." *Id.* at 1974.

To state a claim for relief under § 1983, a Plaintiff must only allege "that they were deprived of a right secured by the Constitution or laws of the United States, and that the alleged deprivation was committed under color of state law." *American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 49-50, 119 S. Ct. 977, 143 L. Ed. 2d 130 (1999). To satisfy the color of state law element of a § 1983 claim, a private party's conduct allegedly causing the deprivation of a federal right must be "fairly attributable to the state." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937, 102 S. Ct. 2744, 73 L. Ed. 2d 482 (1982). "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may be sufficient because on a motion to dismiss the Court presumes that general allegations embrace the specific facts that would prove the claim." *Mt. Pure LLC v. Bank of Am.*, 2008 U.S. Dist. LEXIS 115227, 7-8 (E.D. Ark. 2008)

(citing *Lugar*, 457 U.S. at 397).

DISCUSSION

I. The decision to condemn Plaintiff's property was an administrative decision, therefore, the Mayor and council members are not entitled to legislative immunity.

Defendants attempt to mischaracterize the City's condemnation of Plaintiff's property as a legislative act to support their assertion of legislative immunity but then seek to hold Plaintiff to the provisions of Arkansas District Court Rule 9 and Arkansas Code Annotated § 14-56-425 that apply only to administrative decisions. The act of condemning Plaintiff's property was a Resolution seeking to apply the City's condemnation ordinance and was not an ordinance itself. Therefore, this was an administrative decision and legislative immunity is not applicable.

A. Because the City Council's decision was the enforcement of an existing ordinance it was an administrative decision which is not protected by legislative immunity.

Under federal law, legislative immunity attaches only to actions taken in the sphere of legitimate legislative activity. *Leaphart v. Williamson*, 705 F.3d 310, 313 (8th Cir. 2013); *Maitland v. Univ. Minn.*, 260 F.3d 959, 963 (8th Cir. 2001)(citing *Bogan v. Scott-Harris*, 523 U.S. 44, 46, 54, 118 S.Ct. 966, 140 L.Ed. 2d 79 (1998)). The scope of absolute immunity extends no further than its justification warrants. *Stone's Auto Mart, Inc. v. St. Paul*, 721 F. Supp. 206, 208-209 (D. Minn. 1989)(citing *Harlow v. Fitzgerald*, 457 U.S. 800, 810-11, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982)). Whether an act is legislative turns on the nature of the act. *Bogan*, 523 U.S. at 54. The Supreme Court has developed a functional test to determine whether an act is legislative. *Leaphart*, 705 F.3d at 313 (citing *Redwood Village Partnership v. Graham*, 26 F.3d 839, 840 (8th Cir. 1994)(citing *Harlow v. Fitzgerald*, 457 U.S. 800, 810, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982)). "Legislation . . . looks to the future and changes existing conditions by

making a new rule to be applied thereafter to all or some part of those subject to its power." *Id.* (quoting *Prentis v. Atl. Coast Line Co.*, 211 U.S. 210, 226, 29 S. Ct. 67, 53 L. Ed. 150 (1908)(quoted in *Brown v. Griesenauer*, 970 F.2d 431, 437 (8th Cir. 1992)). Legislation involves the "formulation of policy governing future conduct for all or a class of the citizenry." *Brown*, 970 F.2d at 437 (quoting *O'Brien v. City of Greers Ferry*, 873 F.2d 1115, 1119 (8th Cir. 1989)).

The status of the Defendants as local legislators is not dispositive of the question as to whether an act is legislative. *Id.* at 436. Municipal corporations possess both legislative and executive powers. *PH, LLC v. City of Conway*, 344 S.W.3d 660, 665 (Ark. 2009)(quoting *Camden Cmty. Dev. Corp. v. Sutton*, 339 Ark. 368, 373 (1999)). "[N]ot all governmental acts by a local legislator, or even a local legislature, are necessarily legislative in nature." *Id.* (citing *Cinevision Corp. v. City of Burbank*, 745 F.2d 560, 580 (9th Cir. 1984), *cert. denied*, 471 U.S. 1054, 85 L. Ed. 2d 480, 105 S. Ct. 2115 (1985)).

> The critical inquiry is the nature of the official's function in a particular proceeding, not the identity of the actor who performed the function. *See Forrester v. White*, 484 U.S. 219, 229, 98 L. Ed. 2d 555, 108 S. Ct. 538 (1988); *Brown*, 970 F.2d at 436. The nature of a proceeding, in turn, "depends not upon the character of the body but upon the character of the proceedings." *Brown*, 970 F.2d at 436 (quoting *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 477, 75 L. Ed. 2d 206, 103 S. Ct. 1303 (1983) (citation omitted)).

Redwood Village Partnership, 26 F.3d at 840-41. The fact that local legislators vote on an issue does not necessarily determine whether he or she is acting in a legislative capacity. *Brown*, 970 F.3d at 437 (citing *Cinevision Corp.*, 745 F.2d at 580; *O'Brien*, 873 F.2d at 1119-20 (city council vote on special appropriation was an executive act)). **The crucial test for determining what is legislative and what is administrative is whether the ordinance is one making a new law, or one executing a law already in existence.** *See Kearny v. City of Little Rock*, 2009 Ark.App. 125, 10-11 (2009)(citing *City of North Little Rock v. Gorman*, 264 Ark. 150 (1978));

PH, LLC v. 344 S.W.3d 660, 665 (quoting *Cambden*, 339 Ark. at 373). Where a City Council applies facts to an existing ordinance to make a decision, the act is administrative. *See King's Ranch of Jonesboro, Inc. v. City of Jonesboro*, 2011 Ark. 123, 6 (2011).

Administrative decisions are not protected by legislative immunity. *See, e.g. Leaphart*, 705 F.3d at 314; *Maitland*, 260 F.3d 962. In particular, legislative immunity does not protect city council members from claims based on ordering specific tasks related to the implementation of an ordinance. *Hoekstra v. City of Arnold*, 2009 U.S.Dist. LEXIS 7465 , 28-29 (E.D. Mo. 2009)(citing *Percefull v. Claybaker*, 211 Fed.Appx. 521, 523 (8th Cir. 2006)(vacated and remanded on other grounds)). In *Hoekstra*, the court held that while a mayor and city council members had absolute legislative immunity for the enactment and signing of a Red Light Camera Ordinance, the defendants were not immune from claims based on their actions in implementing the ordinance. *Id.*

Defendants cite an 11th Circuit case, *Brown v. Crawford County*, 960 F.2d 1002, 1011 (11th Cir. 1992), involving a zoning issue in support of their contention that the regulation of land use is protected by absolute legislative immunity. In *Brown v. Crawford County*, the county planning and zoning commission placed a moratorium on issuing permits for mobile homes in order to study residential county development. 960 F.2d at 1004. "[A] legislative act is characterized by having a policymaking function and general application." *Id.* at 1011. This was a "formulation of policy governing future conduct for all or a class of the citizenry." *See Brown v. Griesenauer*, 970 F.2d at 437. While it is true that decisions enacting zoning ordinances are legislative actions, applying those ordinance to specific properties, such as the issuance or denial of permits, are clearly administrative actions. *See, e.g., Acierno v. Cloutier*, 40 F.3d 597, 613 (3rd Cir. 1994); *Scott v. Greenville Cnty.*, 716 F.2d 1409, 1423 (4th Cir. 1983) (holding that a

county council's actions in a dispute over a building permit were not "part and parcel of legislative deliberations on a zoning policy issue," but rather involved non-legislative, enforcement responsibilities to which absolute legislative immunity did not attach); *Roman Catholic Diocese of Rockville Ctr. v. Inc. Vill. Of Old Westbury*, 2012 U.S. Dist. LEXIS 56694, 50 (E.D.N.Y. 2012); *Schubert v. City of Rye*, 775 F.Supp. 2d 689, 701 (S.D.N.Y 2011); *cf. S. Lyme Prop. Owners Assoc.*, 539 F. Supp. 2d 547, 558-59 (D.Conn. 2008)(distinguishing between *adopting* land-use regulations and policies governing their enforcement, which is legislative, and *enforcing* land-use regulations, which is not legislative); *see also Supreme Court v. Consumers Union of the U.S.*, 446 U.S 719, 736, 100 S.CT. 1967, 64 L.Ed. 2d 341 (1980) (holding that the doctrine of legislative immunity did not bar prospective injunctive relief against the chief justice of the Virginia Supreme Court insofar as he was acting to enforce, rather than legislate, disciplinary rules)(vacated and remanded on other grounds). Where council members are acting in the context of already-existing land-use policies, they are not protected by legislative immunity. *Id.* "When local zoning officials do more than adopt prospective, legislative-type rules and take the next step into the area of enforcement, they can claim only the executive qualified immunity appropriate to that activity." *Scott*, 716 F.2d at 1423.[1]

The Defendants also cite to *Acierno v. Cloutier*, 40 F.3d 597 (3rd Cir. 1994) for the proposition that legislative immunity applies to a decision relating to a single parcel of land. While this case does say that legislative immunity may apply to such a decision, a closer look at the court's analysis supports Plaintiff's position that the City Council's decision in the present case was not legislative. In *Acierno*, the court noted that courts frequently have found that rezoning decisions are legislative in nature but cases involving the application of zoning

[1] It is important to note that all the cases cited by Plaintiff refer to the passage of zoning ordinances. Defendants have not cited a single case holding that a resolution to condemn a property as a nuisance is a legislative decision.

ordinances such as approving or denying applications for variance or special use permits are administrative decisions. *Id.* at 613. Actions affecting a single property are legislative in nature only when they involve broad-based policy decisions. *Id.* at 612-13.

The *Acierno* case actually involved two decisions by the County Council. *Id.* at 612. The first decision, not discussed in Defendant's Motion, voided the plaintiff's approved record development plan. *Id.* The court held that this was an administrative decision to which legislative immunity did not apply.

> We thus conclude that the County Council's enactment of Ordinance 91-190 on April 14, 1992, which voided the approved record development plan and related subdivision plans for the property, was an administrative, not legislative, action. The members of the County Council are not entitled to legislative immunity with respect to this action.

Id. The first decision was "an effort to facilitate enforcement of existing zoning laws, not to facilitate enactment or amendment of new zoning laws involving broad-based policy or line-drawing determinations." *Id.* The court cited the following standard for determining whether an action is legislative or administrative:

> [In order to distinguish] legislative from non-legislative functions, . . . the appropriate inquiry [is] whether the conduct of the defendant zoning officials involved either the enactment or amendment of zoning legislation or simply the enforcement of already existing zoning laws. Acts performed pursuant to the former are legislative in character and the officials performing them are entitled to absolute immunity, while acts performed pursuant to the latter are administrative, executive, or ministerial and the officials performing them may only receive the protection of qualified immunity. Factored into this equation should be the impact that such official conduct has on the citizens of the municipality. Official acts affecting the community at-large might tip the balance in favor of a finding of legislative conduct, while acts directed at one or a few individuals might be dispositive of executive or administrative conduct.

Id. (quoting *Jodeco, Inc. v. Hann*, 674 F.Supp. 488, 495 (D.N.J. 1987)). **Note that this case, cited by Defendants, unequivocally states that where the action in question is an enforcement of an already existing law, it is administrative.**

Thus, even cases cited by Defendants hold that the standard for determining whether the City Council's decision in the present case was legislative or administrative is whether the action involved the enactment or amendment of an ordinance or simply the enforcement of an already existing ordinance. The resolution condemning Plaintiffs' property was not a broad-based policy decision. Those broad-based policy decisions were made when the condemnation ordinance was enacted. Clearly, this was an enforcement action of the City's existing condemnation ordinance and, thus, the Council members and city officials are not entitled to legislative immunity. Therefore, Defendants' Motion to Dismiss should be denied.

B. Defendants' contention that Plaintiff is required to comply with the provisions of Rule 9 is an admission that the decision at issue is an administrative and not a legislative decision and Defendants' assertion of legislative immunity is without merit.

The Defendants' attempt to characterize the decision as a legislative decision undermines their Rule 9 arguments. Rule 9 provides for appeal of a "final administrative decision." (f)(2)(A). Rule 9 does not provide for an appeal of a legislative decision. If this action was a legislative action, there is no requirement for Plaintiff to comply with Rule 9. If Plaintiff has no obligation to comply with Rule 9, Defendants' argument that Plaintiff has failed to exhaust state remedies fails and Defendant cannot argue that Plaintiff's claims under the federal Constitution are not ripe for review. On the other hand, if Plaintiff is required to comply with Rule 9, the decision must be administrative and Defendants are not entitled to legislative immunity. Defendants can't have it both ways.

C. Defendants' contention that Arkansas Code Annotated § 14-56-425 applies to this matter is another admission that the Council's decision was an administrative decision and Defendants' assertion of legislative immunity is without merit

As quoted in Defendants' Brief, Arkansas Code Annotated § 14-56-425 states:

> In addition to any remedy provided by law,[2] appeals from final action taken by the **administrative** and quasi-judicial agencies concerned in the administration of this subchapter may be taken to the circuit court of the appropriate county where they **shall be tried de novo** according to the same procedure which applies to appeals in civil actions from decisions of inferior courts, including the right of trial by jury.

(emphasis added). The fact that the City Council's decision is afforded *de novo* review pursuant to this statute is further evidence that the decision is non-legislative. The Arkansas Supreme Court has held that Arkansas courts may apply *de novo* review only to "administrative and quasi-judicial" decisions of city councils. *PH, LLC v.* 344 S.W. at 663 (quoting *Wenderoth v. City of Fort Smith*, 251 Ark. 342, 345 (1971)). Legislative decisions may only be reviewed to determine if they are arbitrary or capricious. *Id.* Allowing the courts to apply *de novo* review to legislative action would violate the separation of powers by allowing the courts to enact legislation on behalf of a municipality. *See Id.* at 663-64 ("[N]either do the courts have power to review such legislative action by the cities in a de novo manner. In fact, . . . we held such actions unconstitutional."); *Jonesboro v. Vuncannon*, 310 Ark. 366, 371 (1992)("*de novo*" review of a legislative act is unconstitutional); *City of Conway v. Housing Authority of Conway*, 266 Ark. 404 (1979). In fact, in *Summit Mall v. Lemond*, 355 Ark. 190 (2003), the Arkansas Supreme Court expressly held that Arkansas Code Annotated § 14-56-425 does not apply to challenges to legislative action by city councils.

Again, Defendants can't have it both ways. If the Council's action was legislative, Plaintiff is not required to comply with either Rule 9 or § 14-56-425. If the Council's action was administrative, the individual Defendants are not protected by legislative immunity. The preceding analysis clearly demonstrates that the Council's decision was an administrative

[2] Defendants ignore the first words of this statute: "In addition to any remedy provided by law . . . ." This language clearly permits other remedies to be exercised in conjunction with an appeal to circuit court. Defendants have cited no authority to the contrary.

decision. Therefore, the individual Defendants are not entitled to legislative immunity and their Motion to Dismiss should be denied.

D. Legislative immunity does not apply to claims against the City itself or claims against City officials acting in their official capacity.

Municipalities are not entitled to immunity from suits brought under § 1983. *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 113 S.Ct. 1160, 1162 (1993). If the individual Defendants were entitled to legislative immunity, which they clearly are not, this immunity would not extend to the City itself.

> In *Monell v. Dept. of Social Services*, 436 U.S. 658, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978), the United States Supreme Court ruled that municipalities are not entitled to immunity in actions brought pursuant to section 1983. The Court held that "local governing bodies . . . can be sued directly under section 1983 for monetary, declaratory, or injunctive relief where . . . the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." 436 U.S. at 690. The city council's decision to deny plaintiffs' rezoning request is an official decision of the city's governing body. The city council can therefore be held liable if that decision is found to constitute a violation of the plaintiff's civil rights. *See Rollins v. Farmer*, 731 F.2d 533, 535 (8th Cir. 1984) (local governing unit may not assert the immunity of its officials as a defense to liability under section 1983); *McKay v. Hammock*, 730 F.2d 1367, 1374 (10th Cir. 1984) (same); *Westborough Mall, Inc. v. City of Cape Girardeau*, 693 F.2d 733, 740-41 (8th Cir. 1982) (municipality may be liable for "erroneous reversion" of plaintiff's zoning classification), *cert. denied*, 461 U.S. 945, 77 L. Ed. 2d 1303, 103 S. Ct. 2122 (1983); *International Broadcasting Corp. v. City of Bismarck*, 697 F. Supp. 1094, 1095-96 (D.N.D. 1987) (absolute legislative immunity does not extend to local governing bodies).

Stone's Auto Mart, Inc. v. St. Paul, 721 F. Supp. 206, 208 (D.Minn. 1989).

Additionally, legislative immunity does not apply to official capacity claims.

> [I]mmunity, either absolute or qualified, is a *personal* defense that is available only when officials are sued in their individual capacities; the immunities officials enjoy when sued personally do not extend to instances where they are sued in their official capacities." *Almonte v. City of Long Beach*, 478 F.3d 100, 106 (2d Cir. 2007) (internal quotation and alterations omitted); *see also Kentucky v. Graham*, 473 U.S. 159, 167, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985) ("The only immunities that can be claimed in an official-capacity action are forms of

sovereign immunity that the entity, *qua* entity, may possess . . . .").

Roach v. Stouffer, 560 F.3d 860, 870 (8th Cir. 2009). Thus, legislative immunity cannot apply to the official capacity claims against Defendants.

Therefore, if Defendants' Motion to Dismiss were granted as to the individual Defendants, Plaintiffs claims against the City itself and Plaintiff's official capacity claims should not be dismissed.

E. Plaintiff's claims for declaratory and injunctive relief are not barred by legislative immunity.

Legislative immunity does not apply to claims for declaratory or injunctive relief. *See, e.g., Supreme Court v. Consumers Union of the U.S.*, 446 U.S. 719, 735-37, 100 S.Ct. 1967, 64 L.Ed. 2d 641 (1980)(vacated on other grounds).

> Legislative immunity does not . . . bar all judicial review of legislative acts. That issue was settled by implication as early as 1803, see *Marbury* v. *Madison*, 1 Cranch 137, and expressly in *Kilbourn* v. *Thompson*, the first of this Court's cases interpreting the reach of the Speech or Debate Clause. Challenged in *Kilbourn* was the constitutionality of a House Resolution ordering the arrest and imprisonment of a recalcitrant witness who had refused to respond to a subpoena issued by a House investigating committee. While holding that the Speech or Debate Clause barred Kilbourn's action for false imprisonment brought against several members of the House, the Court nevertheless reached the merits of Kilbourn's attack and decided that, since the House had no power to punish for contempt, Kilbourn's imprisonment pursuant to the resolution was unconstitutional. It therefore allowed Kilbourn to bring his false imprisonment action against Thompson, the House's Sergeant at Arms, who had executed the warrant for Kilbourn's arrest.
>
> The Court first articulated in *Kilbourn* and followed in *Dombrowski* v. *Eastland* 23 the doctrine that, although an action against a Congressman may be barred by the Speech or Debate Clause, legislative employees who participated in the unconstitutional activity are responsible for their acts.

Powell v. McCormack, 395 U.S. 486, 503, 89 S. Ct. 1944, 23 L. Ed. 2d 491 (U.S. 1969).

Regardless of whether the individual Defendants are entitled to immunity, the Court should still evaluate the constitutionality of the Council's action.

> Especially is it competent and proper for this court to consider whether its [the legislature's] proceedings are in conformity with the Constitution and laws, because, living under a written constitution, no branch or department of the government is supreme; and it is the province and duty of the judicial department to determine in cases regularly brought before them, whether the powers of any branch of the government, and even those of the legislature in the enactment of laws, have been exercised in conformity to the Constitution; and if they have not, to treat their acts as null and void." 103 U.S., at 199.

Id. at 506.

II. Arkansas law does not recognize the doctrine of absolute legislative immunity for local legislative bodies, thus this doctrine does not apply to Plaintiff's claims brought under state law.

The Arkansas Court of Appeals recently held that absolute legislative immunity for local legislative bodies does not exist under Arkansas law.

> Arkansas has no constitutional provision or statute extending absolute immunity to local legislative bodies. The Arkansas Constitution does grant absolute immunity to the members of the General Assembly for "any speech or debate in either house." Ark. Const. art. 5, § 15. **There is no statutory absolute immunity for any other legislative bodies, nor has the Arkansas Supreme Court chosen to extend absolute immunity to local legislative bodies.**

Robertson v. Daniel, 2013 Ark. App. 160, 4-5 (2013) (emphasis added). Therefore, the doctrine of legislative immunity has no applicability to Plaintiff's state law claims.

III. Because Plaintiff's Complaint contains factual allegations supporting that Defendants have violated Plaintiff's clearly established constitutional rights and that Defendants acted with deliberate indifference, Defendants' Motion to Dismiss should be denied.

Actions taken by government officials to implement or administer legislation are evaluated under a qualified immunity standard. *Hoekstra v. City of Arnold*, 2009 U.S. Dist. LEXIS 7465, 59, 2009 WL 259857 (E.D. Mo. Feb. 3, 2009)(citing *Torres-Rivera v. Calderon-Serra*, 412 F.3d 205, 214 (1st Cir. 2005); *Morris v. Lindau*, 196 F.3d 102, 111 (2nd Cir. 1999)). However, qualified immunity protects government officials from liability for civil damages only insofar as their conduct does not violate clearly established constitutional rights of which a

reasonable person would have known. *Brown v. Griesenauer*, 970 F.2d 431, 436 (8th Cir. 1992) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982)). Therefore, to survive a Motion to Dismiss based on failure to state a claim, a plaintiff must only allege facts sufficient to show that the defendants violated clearly established constitutional rights of which a reasonable person would have known.

Plaintiff's Complaint sets forth specific rights which have been violated by Defendants and specific factual allegations to support each claim. Plaintiff's Complaint specifically alleges violations of the right to Procedural Due Process under the Fifth and Fourteenth Amendments and Articles 2 §§ 2 & 22 of the Arkansas Constitution. The right to due process when the government is seeking to take property is clearly established and well known. Plaintiff has alleged violations of the right to Substantive Due Process under the Fifth and Fourteenth Amendments and Articles 2 §§ 2 & 22 of the Arkansas Constitution. These rights are also clearly established and well-known. Plaintiff alleged violations of the Fourth Amendment and Article 2, § 15 of the Arkansas Constitution for unreasonable search and seizure. These rights are also clearly established and well-known. Plaintiff alleged a violation of the Fourteenth Amendment's Equal Protection clause. This right is clearly established and well-known. Plaintiff's Complaint states facts that support each and every constitutional claim.

If there were any doubt as to whether the Defendants were aware of these Constitutional rights, Plaintiff's counsel provided the Council with a brief discussing these issues just prior the Council's vote. Any reasonable council member, city official, or employee would be well aware of these rights. These facts also support Plaintiff's allegation that the Defendants acted with deliberate indifference to Plaintiff's Constitutional rights. Plaintiff has submitted a well-plead Complaint that contains sufficient facts to support each count alleged and to survive a challenge

based on qualified immunity.

Additionally, qualified immunity may be defeated by a showing that government actors conspired to deprive a person of his civil rights. *Paradis v. Brady*, 2006 U.S. Dist. LEXIS 28047, 21-22 (D. Idaho 2006). Plaintiff's Complaint states allegations sufficient to support each element of a civil conspiracy.

Plaintiff's Complaint states factual allegations that are more than sufficient to overcome a defense of qualified immunity and Defendants' Motion to Dismiss should be denied.

IV. Plaintiff fully complied with District Court Rule 9.

Approximately three pages of Defendants brief are spent discussing Rule 9 and the requirement to follow its procedures. Plaintiffs find Defendants' attempted reliance on Rule 9 puzzling for two reasons. First, Defendants' removal from state court prevented Plaintiff from pursuing its Rule 9 appeal to its conclusion. Second, Plaintiff finds Defendants argument on this point puzzling because Plaintiffs fully complied with the requirements of Rule 9. Defendants removed this case to federal court but now argue that Plaintiffs failed to pursue its appeal in state court. Plaintiff simply fails to see the logic in this position and must assume that this is yet another attempt by the City to deny Plaintiff the due process required by the Constitution by preventing it from presenting its constitutional claims in any forum.[3]

The relevant portions of Rule 9 state:

(f) Administrative Appeals.

> (1) If an applicable statute provides a method for filing an appeal from a final decision of any governmental body or agency and a method for preparing the record on appeal, then the statutory procedures shall apply.

[3] The cases cited by Defendants in support of their contention that Plaintiff must comply with Rule 9 are cases in which plaintiffs failed to file their appeal timely or otherwise failed to comply with the provisions of Rule 9. None of them hold that a plaintiff cannot include other claims with a Rule 9 appeal.

> (2) If no statute addresses how a party may take such an appeal or how the record shall be prepared, then the following procedures apply.
>
> > **(A) Notice of Appeal.** -- A party may appeal any final administrative decision by filing a notice of appeal with the clerk of the circuit court having jurisdiction of the matter within thirty (30) days from the date of that decision. The notice of appeal shall describe the final administrative decision being appealed and specify the date of that decision. The date of decision shall be either the date of the vote, if any, or the date that a written record of the vote is made. The party shall serve the notice of appeal on all other parties, including the governmental body or agency, by serving any person described in Arkansas Rule of Civil Procedure 4(d)(7), by any form of mail that requires a return receipt.
> >
> > **(B) The Record on Appeal.** -- Within thirty (30) days after filing its notice of appeal, the party shall file certified copies of all the materials the party has or can obtain that document the administrative proceeding. Within thirty (30) days after these materials are filed, any opposing party may supplement the record with certified copies of any additional documents that it believes are necessary to complete the administrative record on appeal. At any time during the appeal, any party may supplement the record with a certified copy of any document from the administrative proceeding that is not in the record but the party believes the circuit court needs to resolve the appeal.
> >
> > **(C) Procedure on Appeal.** -- As soon as practicable after all the parties have made their initial filing of record materials, the court shall establish a schedule for briefing, hearings, and any other matters needed to resolve the appeal.

The City Council's vote approving the resolution condemning Plaintiff's property was on February 25, 2013. Plaintiff filed its Notice of Appeal and Complaint on March 27, 2013 in the Pulaski County Circuit Court. Plaintiff's appeal was timely filed in compliance with section (f)(2)((A) of Rule 9. A copy of the Notice was served to Defendants with the Complaint. Plaintiff requested a certified copy of the record from the City Clerk and the record was filed on April 26, 2013 in compliance with section (f)(2)(B). The City Clerk failed to include the Brief that was submitted to the Council by Plaintiff's counsel during the meeting on February 25,

2013. Plaintiff filed this brief with a verifying affidavit on April 26, 2013. Defendants removed to federal court on April 29, 2013.

The record demonstrates that Plaintiff fully complied with all applicable provisions of Rule 9 and Defendants have failed to provide any facts to the contrary. Plaintiff timely filed and perfected its appeal. Defendants removed to federal court preventing Plaintiff from pursuing its appeal in state court.

V. The City provides no administrative remedies for a condemnation by the City Council and Plaintiff fully complied with District Court Rule 9 in filing an appeal with the state circuit court. Defendants prevented Plaintiff from pursuing its appeal in state court by removing to federal court.

Defendants' contention that Plaintiff failed to exhaust administrative remedies is puzzling, to say the least. First, the City Council condemned Plaintiff's property in a summary proceeding that was completely devoid of any "administrative remedies." The City's code and policies do not provide for any "administrative remedies." The City does not provide any opportunity for a meaningful opportunity to be heard or any avenue of appeal or any other administrative remedies. "[A] party 'cannot properly be required to exhaust a remedy which [does] not exist.'" *Farm-to-Consumer Legal Def. Fund v. Sebelius*, 734 F.Supp. 2d 668, 700 (N.D. Iowa 2010)(quoting *Parisi v. Davidson*, 405 u.S. 34, 37, 92 S.Ct. 815, 31 L.Ed. 2d 17 (1972)). Furthermore, the City Council's condemnation vote was a "**final** administrative decision." A taking of private property is final when the entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Dakota, Minn. & R.R. Corp. v. South Dakota*, 362 F.3d 512, 520 (8th Cir. 2004)(citing *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985)). The fact that the decision is considered "final" indicates the absence of further remedies.

Plaintiff assumes that Defendants are also asserting that Plaintiff has failed to exhaust state judicial remedies by referring to these as "administrative remedies." This argument is particularly mystifying considering the fact that Plaintiff followed the procedures required by Arkansas District Court Rule 9 to the letter. Plaintiff timely filed a Notice of Appeal, filed the record, and fully complied with all requirements of Rule 9. Defendants' Motion to Dismiss does not contain any specific facts to indicate how Plaintiff failed to comply with Rule 9. Plaintiff was attempting to exhaust state judicial remedies when Defendants removed this matter to federal court. While it was Defendants who removed this matter to federal court, in their Motion to Dismiss, Defendants now argue that the correct forum is state court. This strikes Plaintiff as an especially strange argument.

Defendants appear to argue that Plaintiffs should not have included their federal constitutional claims in their appeal to state circuit court. However, Defendants failed to cite to a single case or other authority in support of their contention that other claims may not be brought in conjunction with a Rule 9 appeal. All of the cases cited by Defendants involved either plaintiffs who failed to comply with the filing requirements of Rule 9 or who filed a direct action in federal court. Indeed, Defendants have framed their arguments as if Plaintiff had filed a direct action in this Court. Defendants seem to argue that the Court should simply ignore the fact that it was they who removed this action to federal court.

The lack of a cite to a single case supporting Defendants' argument is telling. The argument is completely without merit and there is absolutely nothing that bars a plaintiff from filing additional claims with a Rule 9 appeal. In fact, had Plaintiff not included its constitutional claims, it may have been barred from raising those same claims in front of the court of appeals.[4]

[4] Plaintiff has no doubt that Defendants are aware that it could be problematic for Plaintiff to raise its constitutional claims in a later proceeding and their Motion is an attempt to prevent Plaintiff from bringing these claims in any

See, e.g., Green v. State, 365 Ark. 478, 485 (2006); *Technical Servs. V. Pledger*, 320 Ark. 333 (1995)(arguments raised for the first time on appeal will not be decided); *Technical Servs. v. Pledger*, 320 Ark. 333, 341, 896 S.W.2d 433 (Ark. 1995) ("Failure to obtain a ruling, even with respect to a constitutional question, precludes the issue on appeal.") (citing *Bonds v. State*, 310 Ark. 541, 837 S.W.2d 881 (1992); *Smith v. Leonard*, 317 Ark. 182, 876 S.W.2d 266 (1994)). *See also Mt. Pure LLC v. Bank of Am.*, 2008 U.S. Dist. LEXIS 44884, 5 (E.D. Ark. 2008)("The general rule is that it is inappropriate to consider an argument on a second appeal that could have been raised on the first appeal but was not.")(citing *Kessler v. National Enters., Inc.*, 203 F.3d 1058, 1059 (8th Cir. 2000)).

Additionally, the doctrine of claim preclusion could be raised to prevent Plaintiff from raising claims in a subsequent action that could have been raised in the present action. *Linn v. Nationsbank*, 341 Ark. 57 (2000). If Plaintiff is barred from bringing its constitutional claims in conjunction with its appeal, it could have no forum in which to present these claims. Defendants' argument is specifically designed to prevent Plaintiffs from ever being able to bring these claims at any time or in any forum. If the Court were to accept Defendants argument, it would be impossible for any property owner to ever challenge the constitutionality of the City's ordinance. In fact, the reason that Plaintiff is asserting a class action is that this is a situation that is "capable of repetition but evading review." Without court intervention, the City will continue to condemn and demolish properties without providing any due process protections to property owners, many of whom lack the knowledge or resources to initiate court action.

As Plaintiff noted in the introduction to this brief, this case is simply about denial of due process. No matter how complicated Defendants attempt to make the issues, the facts are simple—Plaintiff was never afforded an opportunity to repair the property, a meaningful

forum.

opportunity to be heard, or any due process protections. Defendants' Motion to Dismiss fails to assert a single argument that would support dismissal of Plaintiffs' claims. Therefore, Defendants' Motion should be denied.

A. By removing this case to federal court, Defendants' waived and should be estopped from asserting the defense of failure to exhaust state court remedies.

Defendants' argue that Plaintiff's claims are not "ripe" because Plaintiff has failed to exhaust "administrative remedies." Plaintiff clearly has exhausted all administrative remedies and has complied with District Court Rule 9 in full. It was Defendants who removed this case to federal court and prevented Plaintiff from pursuing its Rule 9 appeal to conclusion in state court. While Plaintiff maintains it has exhausted all administrative remedies, Plaintiff will provide additional reasons why Defendants' argument fails.

A challenge based on the "ripeness" of a claim because a party has failed to exhaust administrative remedies is a challenge to the Court's jurisdiction to bear the claim. *See, e.g., Dahlen v. Shelter House*, 598 F.3d 1007, 1010 (8th Cir. 2010); *Dakota, Minn. & R.R. Corp. v. South Dakota*, 362 F.3d 512 (8th Cir. 2004); *United Transp. Union v. Foster*, 205 F.3d 851, 857 (5th Cir. 2000); *West v. N.M. Taxation & Revenue Dep't*, 757 F.Supp. 2d 1065, 1088 (D.N.M. 2010); *Shields v. Norton*, 289 F.3d 832 (5th Cir. 2002). By removing this matter to federal court, Defendants consented to the jurisdiction of the Court over these claims. Yet, now, Defendants challenge the jurisdiction of the Court to hear these claims. By removing to federal court, Defendants' have waived any right to contest jurisdiction and should be estopped from asserting a defense of failure to exhaust administrative (or state) remedies. *See Heckler v. Day*, 467 U.S. 104, n. 14, 104 S.Ct. 2249, 81 L.Ed. 2d 88 (1984) (jurisdictional requirement that administrative remedies be exhausted is waivable); *Chorosevic v. MetLife Choices*, 600 F.3d

934, 943 (8th Cir. 2009)(estoppel may preclude an affirmative defense of failure to exhaust administrative remedies); *Scamardo v. Scott County*, 12 F. Supp. 2d 939, 942 (W.D.Ark. 1998)(where County participated in EEOC investigation, court held that the County effectively waived the exhaustion of administrative remedies argument)(vacated and remanded on other grounds); *Bell v. Donley*, 724 F.Supp. 2d 1 (D.D.C. 2010)(exhaustion of administrative remedies, like a statute of limitations, is subject to waiver, estoppels, and equitable tolling).

By removing to federal court before Defendant could conclude its Rule 9 appeal in state court, Defendants have waived the right to assert the defense of failure to exhaust administrative remedies. Therefore, Defendants' Motion to Dismiss should be denied.

B. A Plaintiff is not required to exhaust administrative or state judicial remedies prior to bringing a § 1983 action.

Again, Plaintiff asserts that it has sufficiently attempted to exhaust all state remedies by complying with the provisions of Rule 9 in filing its appeal in state circuit court. However, in general, exhaustion of administrative remedies is not required prior to bringing an action under § 1983.

> When federal claims are premised on [§ 1983] -- as they are here -- we have not required exhaustion of state judicial or administrative remedies, recognizing the paramount role Congress has assigned to the federal courts to protect constitutional rights"). Respondent may be correct in arguing that several of these decisions could have been based on traditional exceptions to the exhaustion doctrine. Nevertheless, this Court has stated categorically that exhaustion is not a prerequisite to an action under § 1983, and we have not deviated from that position in the 19 years since *McNeese*.

Patsy v. Bd. of Regents, 457 U.S. 496, 500-501, 102 S. Ct. 2557, 73 L. Ed. 2d 172 (1982); *see also Bennett v. Planning Comm'n*, 2010 US DIST LEXIS 43633, 15-20 (E.D.Ark. 2010).

In *Williamson County*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed. 2d 126 (1985), the Supreme Court held that a property owner is required to pursue just compensation through

available state procedures prior to bringing a takings claim in federal court unless the available state procedures are inadequate. The Court's reasoning was based on the fact that until the state has denied compensation, no Fifth Amendment violation has occurred. *Id.* at 195. The requirement to pursue administrative remedies applies where a party can seek just compensation through administrative or state judicial remedies. *McKenzie v. City of White Hall*, 112 F.3d 313, 317 (8th Cir. 1997)(This is another case cited in Defendants' Brief which actually supports Plaintiff's position.). However, where there are constitutional violations that cannot be cured by just compensation proceedings in state court, it is appropriate for a plaintiff to bring these claims in federal court without pursuing administrative or state remedies first. *Id.* In *McKenzie*, the court held that, where there was a constitutional violation whether just compensation was paid or not, a plaintiff's failure to seek compensation for the alleged taking does not render a claim unripe. *Id.*

> Because the City's decisions to deny zoning and building permits absent surrender of the privacy buffer were final, the McKenzies' due process and equal protection claims based on those decisions are ripe. *See Sinaloa Lake Owners Ass'n*, 882 F.2d at 1404; *Executive 100, Inc.*, 922 F.2d at 1540-41; *see also Christopher Lake Dev. Co.*, 35 F.3d at 1274-75. Although most of the claims are based on facts giving rise to the McKenzies' takings claims, the McKenzies need not seek relief in state court before bringing their federal due process and equal protection claims. *See Sinaloa Lake Owners Ass'n*, 882 F.2d at 1404.

Id. In the present case, Plaintiff's constitutional claims are not dependent on the payment of just compensation and are, therefore, ripe for adjudication.[5]

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[5] In *Collier v. City of Springdale*, 733 F.2d 1311, (8th Cir. 1984), cited by Defendants, the plaintiff failed to avail himself of state mechanisms for obtaining compensation. As in *Williamson County*, because the plaintiff could seek just compensation, his due process rights had not yet been violated. A significant issue in Collier was the court's finding that the state court remedies would "fully preserve all the constitutional protections due Collier for the public taking, injury or destruction of his property, real or personal." *Id.* at 1316. In the present case, Defendants are attempting to have Plaintiff's Constitutional claims dismissed and proceed in state court with only the appeal. If this were to occur, it is likely that Plaintiff would be barred from raising its Constitutional claims later. *See discussion supra.* Therefore, Collier is clearly distinguishable from the present case. In the present case the property has already been condemned with absolutely no due process. Assuming *arguendo*, that defendants are correct and Plaintiffs cannot bring federal constitutional claims with its appeal, the state remedy is inadequate. Any

In the present case, the Constitutional violations Plaintiff asserts have already occurred, and as in *McKenzie*, Plaintiff's § 1983 claims are ripe for adjudication. The City's decision is final and the Constitutional violations complained of are complete. Furthermore, it is, at the least, unclear whether Plaintiff would be allowed to bring its Constitutional claims in a later proceeding. Therefore, Plaintiff is not required to exhaust administrative remedies and Defendants' Motion to Dismiss should be denied.

Plaintiff's constitutional claims are an integral part of its appeal and must be included. Defendants quote from *McGhee v. Ark. State Bd. of Collection Agencies*, 368 Ark. 60, 637, 243 S.W.3d 278, 284 (2006) to say that "no one is entitled to judicial relief . . . until the prescribed statutory administrative remedy has been exhausted." However, as before, if one looks at the context of that sentence, it clearly support Plaintiff's position. The very next sentence states: "A basic rule of administrative procedure requires that an agency be given the opportunity to address a question before a complainant resorts to the courts." *Id.* The "agency" in this instance is the City. The City fails to provide any administrative remedies and thus, has waived the opportunity to address the question. The only avenue of relief available to Plaintiff was to resort to the courts which Plaintiff did by filing his appeal as required by Rule 9. The statutory remedy in this case is a judicial remedy.

Interestingly, the *McGhee* case cited by Defendants states that constitutional issues

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state remedy that completely denies the opportunity to raise constitutional claims is inadequate. Furthermore, none of the cases cited by Defendants stand for the proposition that federal claims cannot be brought in state court along with state claims.

A case that is more analogous to the present case was cited in Collier—*Edwards v. Ark. Power & Light Co.*, 683 F.2d 1149 (8th Cir. 1982). In *Edwards*, because it was unclear whether plaintiff would be allowed to bring a compulsory bad faith claim in a condemnation action, he was not required to pursue remedies in state court prior to filing a § 1983 action. *Id.* at 1154-55. Where there was uncertainty regarding the ability to bring this claim in state court, state remedies were inadequate. *Id.*

should be raised at the administrative level. *Id.* at 68 (quoting *AT&T Communications of the Southwest, Inc. v. Ark. Public Service Comm.*, 344 Ark. 188, 40 S.W.3d 273 (2001)). Thus, this case indicates that, in order to exhaust "administrative" remedies, Plaintiff must raise its constitutional claims in conjunction with its appeal. Yet, Defendants argue that these claims cannot be brought with the appeal. Defendants' arguments are inconsistent with the case law they cite.[6]

Plaintiff maintains that the City did not provide any administrative remedies and that it filed its appeal in circuit court in compliance with District Court Rule 9 but was prohibited from pursuing its appeal to conclusion by Defendants' removal to federal court. However, based on the above arguments, Plaintiff is not required to exhaust administrative remedies. Defendants' Motion to Dismiss should be denied.

VI. Arkansas Code Annotated § 14-56-203 does not permit the City to deprive property owners of due process of law.

Defendants refer to and quote Arkansas Code Annotated § 14-56-203 which grants authority to cities to raze certain buildings in their Motion to Dismiss. Plaintiffs have not challenged the authority of the city to remove or raze buildings pursuant to this statute. Plaintiffs are challenging the City's policies and procedures which allow them to take property without due process of law. Defendants' seem to feel that this statute overrides the constitutional guarantees that protect private property rights. It can be safely assumed that the intent of the legislature was to authorize cities to condemn and raze buildings in a manner that complies with both the state and federal constitutions. To interpret the statue otherwise would

[6]Ultimately, in *McGhee*, the court held that the doctrine of exhaustion was not applicable because McGhee did not have a pending action before the administrative agency. 368 Ark. at 68. Defendants also cite to *Ingram v. City of Pine Bluff*, 355 Ark. 129 (2003). In *Ingram*, the plaintiff failed to file a timely Rule 9 appeal. *Id.* at 134. However, the court held that claims of fraud and breach of contract against individual defendants did not require the filing of a Rule 9 appeal and these claims could be heard even in the absence of a timely filed Rule 9 appeal. *Id.* at 137.

render it unconstitutional. Courts should interpret statutes to avoid serious constitutional problems, so long as the statutory language is fairly susceptible to a constitutional construction. *Planned Parenthood of Mid-Missouri & E. Kan., inc. v. Dempsey*, 167 F.3d 458 (8th Cir. 1998). There is nothing in the language of Arkansas Code Annotated § 14-56-203 that permits a City to take property in violation of a property owner's constitutional rights. This statute must be interpreted in a manner that does not permit cities to take property without due process in violation of the state and federal constitutions.

VII. Defendants' contention that Plaintiff is making a collateral attack are without merit.

A collateral attack is the filing of a direct action as a substitute for an appeal. *See Poor Thunder v. United States*, 810 F.2d 817, 823 (8th Cir. 1987).[7] A collateral attack occurs after a party has had an opportunity to present its claims or has waived or failed to exhaust their avenues of appeal. *Id.* While, in this case, Plaintiff has exhausted administrative appeals (which did not exist), a court has not rendered a final judgment on Plaintiff's claims. In fact, Plaintiff has not yet been permitted to fully present its claims to any court and Defendants seek to deny Plaintiff the opportunity to do so. Thus, this cannot be properly characterized as a collateral attack on a final judgment. Here, Plaintiff has not attempted to substitute for its appeal which it filed pursuant to Rule. The claims which Defendants seek to bar are an integral part of its appeal.[8]

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[7] *Poor Thunder* is another case cited by Defendants. The court held that, where an appeal was not filed and a party has instead filed a direct action, the court must assess the adequacy of the asserted reason or excuse for failing to file an appeal. 810 F.2d at 823. In the present case, Plaintiff has filed its appeal. The reason that the appeal has not been pursued to finality is that Defendants removed the case to federal court. Certainly Plaintiff should not be held responsible for failing to pursue its appeal when Defendants have deliberately attempted to block Plaintiff from doing so. Once again, in quoting *Poor Thunder*, Defendants failed to consider the context of their quote.

[8] Defendants also cite to *City of Paragould v. Leath*, 266 Ark. 390, 583 S.W.2d 76 (1979). In *Paragould*, the plaintiff could have appealed to the board of adjustment but instead filed a court action. *Id.* at 393-94. In the present case, no appeal to any administrative body was available. Thus, Plaintiff has pursued the only avenue of appeal available—the Rule 9 appeal to the circuit court. Defendants quote a treatise stating that a party cannot bypass the provision of a statute providing a remedy by appeal. Yet, Plaintiffs have not attempted to bypass Rule 9. It was Defendants who removed and have attempted to deny Plaintiff the opportunity to pursue its appeal.

Other cases cited by Defendants to support their contention that a collateral attack may not be made where a plaintiff has failed to pursue other avenues for relief are simply inapplicable because, in this case, Plaintiff has pursued his only avenue of relief by filing his Rule 9 appeal in state court. It was Defendants who removed to federal court in an attempt to deny Plaintiff from pursuing its appeal. Again, none of the cases cited by Defendants supports their contention that other claims cannot be brought with the appeal.

VIII. Plaintiff's Complaint alleges facts that are more than sufficient to state a claim of violation of procedural due process.

A. Due Process requires a pre-deprivation hearing prior to condemnation.

Plaintiff has clearly alleged that it was not provided with adequate notice, was not permitted to repair the property prior to condemnation, and was not afforded a meaningful opportunity to be heard prior to the condemnation. This is sufficient to state a procedural due process claim. Defendants assert that an "appearance" before the City Council is sufficient to satisfy the requirements of due process. However, to satisfy the requirements of due process, a party must be afforded a "meaningful opportunity to be heard" and this opportunity is generally required prior to a deprivation of property. *See, e.g., United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 53, 114 S.Ct. 492, 126 L.Ed. 2d 490 (1993); *Fuentes v. Shevin*, 407 U.S. 67, 80, 92 S.Ct. 1983, 32 L.Ed. 2d 556 (1972); *Boddie v. Connecticut*, 401 U.S. 371, 379, 28 L. Ed. 2d 113, 91 S. Ct. 780 (1971). Post-deprivation process is only justified in "extraordinary situations." *James Daniel Good*, 510 U.S. at 53.

> The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decisionmaking when it acts to deprive a person of his possessions. The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment – to minimize substantively unfair or mistaken deprivations of property . . . . So viewed, the prohibition against the deprivation of property without due process of law reflects the high

> value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference. See *Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 552. The requirement of notice and an opportunity to be heard raises no impenetrable barrier to the taking of a person's possessions. But the fair process of decision-making that it guarantees works, by itself, to protect against arbitrary deprivation of property. For when a person has an opportunity to speak up in his own defense, and when the State must listen to what he has to say, substantively unfair and simply mistaken deprivations of property interests can be prevented. It has long been recognized that "fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights. . . . [And n]o better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it." *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 170-172 (Frankfurter, J., concurring). If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented. At a later hearing, an individual's possessions can be returned to him if they were unfairly or mistakenly taken in the first place. Damages may even be awarded to him for the wrongful deprivation. But **no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred. "This Court has not . . . embraced the general proposition that a wrong may be done if it can be undone."** *Stanley* **v.** ***Illinois*****, 405 U.S. 645, 647. This is no new principle of constitutional law. The right to a prior hearing has long been recognized by this Court under the Fourteenth and Fifth Amendments.**

Fuentes, 407 U.S. at 80-82 (emphasis added).

B. Due process requires a *predeprivation* hearing conducted in a "meaningful manner."

A hearing "must be granted at a meaningful time and in a meaningful manner." *Fuentes*, 407 U.S. at 80 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 14 L.Ed. 2d 62 (1965)). The extent to which due process rights are required in administrative proceedings is determined by a balancing approach. *Mathews v. Eldridge*. 424 U.S. 319, 96 S.Ct. 893, 47 L.ed. 2d 18 (1976). The Eldridge standard balances three factors: (1) the extent that private interests are affected in the proceeding; (2) the risk of wrongfully depriving a party of its interest under the current procedures along with the utility of additional procedures that could lessen this risk; and (3) the government's interest at stake, such as the administrative and financial burdens imposed upon a public actor if additional procedures are incorporated. *Id.* at 334-35.

Prior to a governmental decision which deprives individuals of a property interest procedural due process requires that a hearing before an impartial decision maker be provided at a meaningful time and in a meaningful manner. *Matthews*, 424 U.S. at 333. Arkansas courts have held that due process requires "a full and fair hearing, including the right to submit evidence and testimony, to examine witnesses, and an opportunity to present evidence or testimony in rebuttal to adverse positions." *Harness v. Arkansas PSC*, 60 Ark. App. 265, 271 (1998) (citing *Arkansas Elec. Energy Consumers v. Arkansas Pub. Serv. Comm'n*, 35 Ark. App. 47 (1991)). The purpose of an adversary hearing is to ensure the requisite neutrality that must inform all governmental decision-making. *James Daniel Good*, 510 U.S. at 55.

Real property ownership has substantial value to an individual under the first Eldridge factor. *James Daniel Good*, 510 U.S. at 53-54. In *Connecticut v. Doehr*, 501 U.S. 1, 11, 111 S.Ct. 2105, 115 L.Ed. 2d 1 (1991), the Supreme Court described attachment interests on property to be "significant" in regards to how they affect private interests under Eldridge because attachments can result in great economic hardship to a property owner. In *Doehr*, the Court held that even where a decision does not amount to a complete, physical, or permanent deprivation of real property, due process concerns still exist. *Id.* at 12. Property nuisance cases require increased caution because destroyed property cannot be restored and the best evidence of whether the seizure was justified will have been demolished. *See* Alex Cameron, *Due Process and Local Administrative Hearings Regulating Public Nuisances: Analysis and Reform*, 43 St. Mary's L.J. 619. The demolition of one's property is a substantial private interest under the first Eldridge factor and, thus, determine that it warrants substantial protection for due process purposes.

Crucial due process components in light of the second Eldridge factor include affording

property owners multiple opportunities to confront the issues charged against them for the condition of their properties and providing property owners with the opportunity to present their case. *See, e.g., James Daniel Good*, 510 U.S. at 48, 53-56. The right to cross-examine witnesses is regarded as substantial in connection with examining the entire scope of evidence and making a complete inquiry into the truth. Where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses. *See, e.g. Goldberg v. Kelly*, 397 U.S. 254, 269, 90 S.Ct. 1011, 25 L.Ed. 287 (1970). Rulings based on expedited summary hearings that offer scant evidence of their respective decisions fall short of due process requirements. *See Freeman v. City of Dallas*, 242 F.3d 642, 653-54 (5th Cir. 2001).

It is interesting to note that, in their Brief, Defendants did not provide an analysis of the *Matthews* factors. An analysis of these factors is essential to any assessment of the adequacy of due process. As one court has noted, these factors require a factual analysis and, thus, a case like this is not susceptible to a motion to dismiss.

> Moreover, it is telling that the City Defendants have made no attempt to explain why process was adequate as a matter of law based on the three *Eldridge* factors above. The three factors require factual analysis and is not susceptible to a 12(b)(6) motion. *See Pavelich v. Natural Gas Pipeline Co. of Am.*, No. 02 C 3374, 2002 U.S. Dist. LEXIS 23946, at *15 (N.D. Ill. Dec. 12, 2002) ("Whether post-deprivation remedies are adequate is principally a question of fact, not appropriate for determination on a motion to dismiss."); *see also Sonnleitner v. York*, 304 F.3d 704, 713 (7th Cir. 2002) ("[M]inimum procedural due process requirements ultimately turn on a highly fact-specific inquiry."). For example, the second factor requires an assessment of the risk of erroneous deprivation and the probable value of additional procedural safeguards. In their administrative appeal, the Abends argued, *inter alia*, that the majority of nuisance activity occurred on public property and not their own property. In view of this fact-based issue, whether additional procedural safeguards such as a live hearing, discovery, subpoenaing of witnesses, cross-examination of witnesses, etc., would materially advance the reliability of the City's determination cannot be assessed in the abstract or in a vacuum. *See, e.g., Robledo v. City of Chicago*, 444 F. Supp. 2d 895, 902 n.2 (N.D. Ill. 2006) ("[T]his matter is not appropriately decided on a motion to dismiss. For example, defendants argue that an additional hearing on these issues would be unnecessary because these issues 'can be brought to City's attention without

> requiring a hearing.' The record before the court does not however, explain what informal procedures currently exist, why these procedures would be adequate to avoid erroneous deprivations, or that these procedures were made available to plaintiffs in this case. Furthermore, it would be inappropriate to decide plaintiffs' claims on facts that go well beyond the allegations of the complaint."). Likewise, the third factor -- *i.e.*, the burdens imposed by the additional procedural safeguards -- requires factual analysis.

City of Oakland v. Abend, 2007 U.S. Dist. LEXIS 53186, 24-25, 2007 WL 2023506 (N.D. Cal. 2007). Likewise, in the present case, Defendants have failed to present any analysis of the *Matthews* factors to show that the procedures afforded property owners are adequate to prevent the risk of erroneous deprivation or whether additional procedures would pose a substantial burden on the City.

Indeed, Plaintiff submits that the City's policy of condemning properties without considering any evidence poses a substantial and unacceptable risk of erroneous deprivation. Furthermore, the burden on the City to conduct a hearing would be minimal. In the absence of any factual analysis pursuant to the *Matthews* factors demonstrating that the City's procedures provide sufficient due process, Defendants' Motion to Dismiss should be denied.

C. The City refused to afford Plaintiff a hearing prior to the seizure of its property and, thus it failed to provide adequate *predeprivation* process.

In condemnation cases, a *predeprivation* hearing does not impose an unreasonable burden upon a municipality.[9]

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[9] The Supreme Court's precedents establish the general rule that Due Process requires that, absent an extraordinary situation, a party cannot invoke the power of the state to seize a person's property without a prior judicial determination that the seizure is justified. *United States v. $ 8,850*, 461 U.S. 555, 562 n.12 143 (1983) (citing *Boddie v. Connecticut*, 401 U.S. 371, 378-379 (1971)); *see also North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975); *Fuentes v. Shevin*, 407 U.S. 67(1972); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1974); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974). Defendants failed to address most of Plaintiff's state law claims. The Arkansas Constitution provides that "[t]he right of property is before and higher than any constitutional sanction." Ark. Const. Art. 2, § 22. Thus, a property owner in Arkansas is entitled to substantial due process protections prior to a condemnation The highest constitutional sanction is strict scrutiny. Plaintiff asserts that, pursuant to the Arkansas Constitution, private property cannot be taken in the absence of a compelling government interest and a *predeprivation* judicial determination should be required.

> The burden of conducting a hearing, of course, is likely greater than the cost of adding another sentence to the City's standard notice-to-vacate form. But this cost is hardly daunting, and there is no doubt in our minds that the tenants are entitled to a meaningful hearing at some point in time to contest the condemnation decision. The fiscal and administrative burden of conducting a *pre-deprivation* hearing, however, could be more pronounced, particularly if the hearing must be convened on short notice independent of any regularly-scheduled meeting.

Grayden v. Rhodes, 345 F.3d 1225, 1236 (11th Cir. 2003).

Defendants quote *Keating v. Nebraska Pub. Power Dist.*, 562 F.3d 923, 929 (8th Cir. 2009) asserting, again, that Plaintiff must exhaust state remedies. However, the very next sentences in *Keating* state:

> However, it is not necessary for a litigant to have exhausted available *postdeprivation* remedies when the litigant contends that he was entitled to *predeprivation* process. See Zinermon v. Burch, 494 U.S. 113, 132, 110 S. Ct. 975, 108 L. Ed. 2d 100 (1990) ("In situations where the State feasibly can provide a predeprivation hearing before taking property, it generally must do so regardless of the adequacy of a postdeprivation tort remedy to compensate for the taking."); Westborough Mall, Inc. v. City of Cape Girardeau, 794 F.2d 330, 337 (8th Cir. 1986) (concluding that "[t]he availability of post-deprivation remedies is not a defense to the denial of procedural due process where predeprivation process is practicable" and district court erred in instructing jury otherwise). Accordingly, appellants' failure to exhaust postdeprivation remedies does not affect their entitlement to predeprivation process, and the district court should not have considered this failure in dismissing the claim.

Id. at 929. Plaintiff maintains that the City provides no *predeprivation* remedies. That is the essence of Plaintiff's due process claim.

D. Plaintiff was entitled to a *predeprivation* hearing before an impartial decision maker.

The United States Supreme Court has declared that in an administrative hearing, the right to a hearing before a neutral decision maker is essential. *Goldberg*, 397 U.S. at 271. The Supreme Court has also noted that local governments have a direct pecuniary interest in the outcome of a condemnation proceeding and this requires an increased level of scrutiny with regard to an individual's deprivation of due process rights. *James Daniel Good Real Prop.*, 510

U.S. at 56-57. Other courts have said that because certain procedural safeguards are commonly absent from administrative proceedings, the bias requirement should be applied with greater force. *Ventura v. Shalala*, 55 F.3d 900, 902 (3d Cir. 1995).

In the present case the proposed resolution is sponsored by and signed by the Mayor. The Mayor also presides over the proceeding. The Mayor and Council members are all elected officials and are subject to political pressures and influences. During the Council meeting at which the property was condemned, it was apparent that none of the Council members were interested in hearing any evidence. It was apparent that their minds were made up and nothing was going to change them. Thus, while Plaintiff contends that the appearance of counsel for three minutes does not constitute a hearing, even if it did, Plaintiff was not afforded a hearing before an impartial decision maker. A property owner must be provided with a full hearing before an impartial decision maker before the City acts to deprive it of its property.

E. The City never provided notice of the alleged violations.

First, Defendants assert that a simple "appearance" by Plaintiff's counsel is sufficient to cure the lack of adequate notice. Plaintiff's counsel did not, as alleged in Defendant's brief, have an opportunity to present Plaintiffs case to the counsel. Indeed, it was obvious that the Council had no interest in hearing Plaintiff's case. Plaintiff had been told that it would be permitted to speak for three minutes before the City Council. Plaintiff's counsel appeared for the limited purpose of asking for a full and fair hearing or the issuance of a permit to repair the property. Because, Plaintiff had not been provided with a list of specific violations, as required by the City Code, Plaintiff could not adequately prepare to present its case. The three-minute "appearance" of Plaintiff's counsel does not cure the fact that the Notice provided to Plaintiff failed to specify the alleged violations.

The City's Code requires notice of violations.

> **1.6.1 Notice of Violations.** "Notice of Violations" shall be written on standardized or letter form approved by the Senior Code Enforcement Officer that shall include the following information:
>
> (A) The name of the owner, if known;
> (B) An address or description of the real estate sufficient for identification;
> (C) **A description of the violation or violations;**
> (D) **Rights of Appeal under subsection 1.9;**
> (E) A statement that citations may be issued and fines assessed in addition to any administrative remedy imposed by the City.
> (F) Include a statement that the City has a right to cause repairs or demolition to be made and that the costs may be assessed against the owner and the property of the owner; and
> (G) The information required by Ark. Code Ann. 14-54-903, if applicable.

(emphasis added)

"[W]hen notice is a person's due, process which is a mere gesture is not due process." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 315, 70 S. Ct. 652, 94 L. Ed. 865 (1950). To satisfy the requirements of due process, notice must convey the required information.

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Milliken* v. *Meyer*, 311 U.S. 457;*Grannis* v. *Ordean*, 234 U.S. 385;*Priest* v. *Las Vegas*, 232 U.S. 604;*Roller* v. *Holly*, 176 U.S. 398.The notice must be of such nature as reasonably to convey the required information, *Grannis* v. *Ordean, supra*, and it must afford a reasonable time for those interested to make their appearance, *Roller* v. *Holly, supra*, and *cf. Goodrich* v. *Ferris*, 214 U.S. 71.

Id. at 314.

Notice must provide a party with sufficient information to make informed decisions as to how to proceed in order to protect his property interest. *See Grayden v. Rhodes*, 345 F.3d 1225, 1242 (11th Cir. Fla. 2003) (citing *Mullane*, 393 U.S. at 314, 70 S. Ct. at 657. "The right to be heard has little reality or worth unless one . . . can choose for himself whether to appear or default, acquiesce or contest." *Id.; see also West Covina*, 525 U.S. at 240, 119 S. Ct. at 681

(citing *Mullane* for this proposition). Notice must "set forth the alleged misconduct with particularity." *In re Gault*, 387 U.S. 1, 33; 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967). Notice must "apprise the affected individual of, and permit adequate preparation for, an impending hearing." *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 14, 56 L. Ed. 2d 30, 98 S. Ct. 1554 (1978) (internal quotations omitted); *see also Bliek v. Palmer*, 102 F.3d 1472, 1475 (8th Cir. 1997). Where Notice fails to advice of the specific violations so that a party may prepare for a hearing, appearance does not cure inadequate notice. *In re Gault*, 387 U.S. at 33. To be adequate, notice should also advise the party of procedures to appeal an adverse decision. *See Memphis Light, Gas & Water Div.*, 436 U.S. at 14-16.

> Because of the failure to provide notice reasonably calculated to apprise respondents of the availability of an administrative procedure to consider their complaint of erroneous billing, and the failure to afford them an opportunity to present their complaint to a designated employee empowered to review disputed bills and rectify error, petitioners deprived respondents of an interest in property without due process of law.

Id. at 22. The Eleventh Circuit has also addressed this requirement specifically in the context of condemnation proceedings:

> To include a one-sentence statement of a tenant's right to appeal the condemnation order in this notice to vacate would not be burdensome. In fact, Rhodes testified that the City amended its standard eviction notice to include a statement regarding the tenants' right to appeal the condemnation order, which suggests that the fiscal and administrative burden of such notice is not prohibitive.

Grayden v. Rhodes, 345 F.3d at 1236.

Notice is a fundamental part of due process in all kinds of administrative proceedings, and the regulation of public nuisances is no different. Notice must be executed in a reasonable manner to adequately inform the parties of proceedings that may affect their legal rights. *Armstrong v. Manzo*, 380 U.S. at 550. Additionally, a City must comply with its ordinances. *See generally Tyrer v. Ryan*, 2003 Ark.App. LEXIS 901 (2003). *City of Fordyce v. Vaughn*,

supra; *Mings v. City of Fort Smith*, 288 Ark. 42 (1986); *Potocki v. City of Fort Smith*, 279 Ark. 19 (1983); *Taggart & Taggart Seed Co. v. City of Augusta*, 278 Ark. 570 (1983).

Considering the City's condemnation procedure, notice of the right to appeal is especially important. Many of the property owners whose properties are condemned lack the knowledge or resources to initiate court action. Most are unlikely to be aware of the requirements of District Court Rule 9, including the provision that an appeal must be filed within thirty days. Additionally, the requirement of the submission and approval of a plan means that some property owners may not even consider their options for filing an appeal until a submitted plan has been denied. It is likely this process would take more than thirty days. Plaintiff wonders if the failure to include rights of appeal in the notice is part of Defendants' intent to prevent the filing of an appeal.

The City's Code requires both a list of specific violations and notice of rights to appeal. The Notice provided in this case contains neither. Without knowing what violations had been alleged, Plaintiff could not adequately prepare for a hearing, had one been provided. Notice was inadequate and these inadequacies could not be cured by appearance.

F. The City must order that the property be repaired where possible before condemning and destroying the property.

If the condition causing the property to be a nuisance can be remedied through "cleaning, disinfection, alteration, or repair," then these alternatives must be ordered before an order for demolition is made. *See e.g., City of Safford v. Seale*, No. 2 CA-CV 2008-0185, 2009 WL 3390172, 3 (Ariz. Ct. App. 2009); *Nazworthy v. City of Sullivan*, 55 Ill. App. 48, 52 (1893); *Polsgrove v. Moss*, 157 S.W. 1133, 1136 (Ky. 1913); *Welch v. Stowell*, 2 Doug. 332, 341-42 (Mich. 1846); *Newton v. Highland Park*, 282 S.W.2d 266 (Tex.App. 1955). If a local government contends that remediation is not possible and that the structure as it exists cannot be

remedied in such a way to prevent it from becoming a nuisance, then the local government must establish by a preponderance of the evidence that the structure should be demolished. *West v. City of Borger*, 309 S.W.2d 250, 253 (Tex.App. 1958). Courts, have disfavored decisions that issue an order for demolition without any kind of relief afforded to a property owner prior to the order. *See Houston v. Lurie*, 148 Tex. 391 (1949). This treatment is in congruity with the first Eldridge factor, which considers the gravity of potential loss to an individual. *Matthews*, 424 U.S. at 334-35. Thus, ordering demolition without any kind of relief prior to the order is a harsh remedy and has due process implications associated with it.

G. *Samuels v. Meriweather* and *Hagen v. Traill County*[10]

Defendants cite to two Eighth Circuit cases involving nuisance abatement in an attempt to argue that the minimal (really nonexistent) procedures provided by the City in this case were sufficient. However, it is important to note that these cases differ from the present in significant ways. In *Samuels v. Meriweather*, 94 F.3d 1163, 1165 (8th Cir. 1996), the city provided the owner with "a letter outlining twenty conditions found to be in violation of city ordinances. Three days later, the City sent another letter listing additional violations . . . ." In the present case, despite a requirement in the City's Code, to date, the City has failed and refused to provide Plaintiff with a list of alleged violations. Also, in *Samuels*, the property owner was provided with an opportunity to repair the property both before and after condemnation. *Id.* In the present case, the City refused to issue a permit to allow the property to be repaired prior to the condemnation. Next, while the opinion in *Samuels* does not describe the hearing provided, one can assume it was more than a three minute appearance. Furthermore, the resolution adopted by

[10] Defendants cite to these cases in support of their contention that simple notice and an appearance before the City Council satisfies the requirements of due process. If Defendants are correct and these cases represent that a mere "appearance," regardless of the meaningfulness of the "appearance," is sufficient, these cases are in conflict with the United State, Supreme Court decisions, cited herein, holding that a hearing must be provided at a meaningful time and in a meaningful manner.

the City directed the property owner to "clean and repair the exterior of the building and to start work on the interior within thirty days . . . ." In the present case, Plaintiff cannot repair the building without submitting a plan to the City, which may or may not be approved, and posting an oppressive bond.

In *Hagen v. Traill County*, 708 F.2d 347, 348 (8th Cir. 1983), the property owner was also given an opportunity to repair the property prior to condemnation. Additionally, the property owner was allowed to discuss the condition with the township supervisors on two occasions and, on another occasion, with the State's Attorney. *Id.* The court noted a significant fact—the property owner did not request further proceedings. *Id.* Whereas, in the present case, Plaintiff's counsel submitted a written motion requesting a full hearing and appeared at the Council meeting for the purpose of requesting a hearing.

H. The City failed to provide any due process protections and Defendants' Motion to Dismiss should be denied.

The City refused to permit Plaintiff to repair the property owner prior to condemnation. The City refused to provide a list of violations. The City refused to provide a hearing at a meaningful time and in a meaningful manner. The City failed to provide a hearing before an impartial decision maker. The City's condemnation process is completely devoid of any due process protections and is completely unconstitutional. Plaintiff's Complaint contains factual allegations which are more than sufficient to support its Procedural Due Process claim. Defendants' Motion to Dismiss should be denied.

IX. Private property rights are fundamental rights and property owners are entitled to the protection of substantive due process rights.

Private property rights are fundamental rights and are specifically guaranteed by the Due

Process Clause of the Fourteenth Amendment.[11] The Due Process Clause specifically prohibits state governments from depriving "any person of life, liberty, or property without due process of law." U.S. Const. amend V (emphasis added). A claim that the government has invaded a protected property interest is sufficient to state a violation of substantive due process. *See Austell v. Sprenger*, 690 F.3d 929, 935 (8th Cir. 2012); *Bituminous Materials v. Rice County*, 126 F.3d 1068, 1070 (8th Cir. 1997). While courts have recognized protected fundamental rights in addition to those specifically included in the Bill of Rights, substantive due process protections also include those specifically mentioned in the Constitution. "[A]n 'interest protected by the text of the Constitution' is sufficient to support substantive due process analysis." *Moran v. Clarke*, 296 F.3d 638, 646 (8th Cir. 2002) (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 856, 118 S.Ct. 1708, 140 L.Ed 2d 1043 (1998) (plurality opinion of Kennedy, J.)). Additionally, the right to maintain control over one's property, free from governmental interference, is a private interest of historic and continuing importance. *James Daniel Good Real Prop.*, 510 U.S. at 53-54 (1993). Property rights are specifically mentioned in the Due Process Clause and are, therefore, entitled to substantive due process protections.

Contrary to Defendants' contention, property deprivation claims are frequently analyzed under a substantive due process analysis.

> [I]n the context of land use regulation, that is, in situations where the governmental decision in question impinges upon a landowner's use and enjoyment of property, a land-owning plaintiff states a substantive due process claim where he or she alleges that the decision limiting the intended land use was arbitrarily or irrationally reached.

DeBlasio v. Zoning Bd. of Adjustment, 53 F.3d 592, 601 (3d Cir. 1995)(overruled on other

[11] The Arkansas Constitution provides that "[t]he right of property is before and higher than any constitutional sanction." Ark. Const. Art. 2, § 22. Thus, a property owner in Arkansas is entitled to substantial due process protections. Certainly, considering the importance afforded property rights by the Arkansas Constitution, a substantive due process analysis is required in regards to Plaintiff's claims under the Arkansas Constitution.

grounds by *UA Theatre Circuit v. Twp. of Warrington*, 316 F.3d 392, 400 (3d Cir. 2003)); *see also Austell*, 690 F.3d 929 (license renewal); *Omni Behavioral Health v. Miller*, 285 F.3d 646 (8th Cir. 2002)(contract with a state entity); *Coleman v. Watt*, 40 F.3d 255 (8th Cir. 1994)(use of an automobile). Courts have evaluated nuisance determinations by the standards of both procedural and substantive due process. *See, e.g., Freeman v. City of Dallas*, 242 F.3d 642, 648-649, 2001 U.S. App. LEXIS 2594 (5th Cir. Tex. 2001); *City of Oakland v. Abend*, 2007 U.S. Dist. LEXIS 53186, 15-16, 2007 WL 2023506 (N.D. Cal. 2007)("Substantive due process concerns the *legitimacy* of the government's actions . . . .").

To prevail in a claim for a substantive due process violation, a plaintiff must show that the conduct complained of was either arbitrary or "conscience shocking."

> The "core of the concept [of substantive due process is] protection against arbitrary action" by the government. *County of Sacramento v. Lewis*, 523 U.S. 833, 845, 140 L. Ed. 2d 1043, 118 S. Ct. 1708 (1998). "While due process protection in the substantive sense limits what the government may do in both its legislative, and its executive capacities, criteria to identify what is fatally arbitrary differ depending on whether it is legislation or a specific act of a governmental officer that is at issue." *Id.* at 846 (internal citations omitted). In this case, we must assess whether a "specific act of a governmental officer" is arbitrary.
>
> . . .
>
> We may also consider conduct that evinces a "deliberate indifference" to protected rights of Putnam, if the College officials had an opportunity to consider other alternatives before choosing a course of action. *Neal v. St. Louis County Bd. of Police Comm'rs*, 217 F.3d 955, 958 (8th Cir. 2000) (providing that "where a state actor is afforded a reasonable opportunity to deliberate various alternatives prior to electing a course of action, **the chosen action will be deemed 'conscience shocking' if the action was taken with 'deliberate indifference'**") (citing *Lewis*, 523 U.S. at 850-51).

Putnam v. Keller, 332 F.3d 541, 547-548 (8th Cir. 2003) (emphasis added).

Note that all that is required to show that an action is "conscience shocking" is to show that the action was taken with deliberate indifference. *Id.* (citing *Lewis*, 523 U.S. at 850-51).

Plaintiff's Complaint clearly states facts sufficient to show that the City Council intentionally and deliberately in taking actions that violated Plaintiff's clearly established property rights. Plaintiff requested either a hearing or a permit to repair the property. Members of the City Council had an opportunity to consider these alternatives but chose, instead, to proceed to condemn Plaintiff's property without affording any due process. The City Council acted with informed deliberate indifference to Plaintiff's constitutional rights. Plaintiff has stated a claim for violations of the right to substantive due process and Defendants' Motion to Dismiss should be denied.

X. Plaintiff's Fifth Amendment claims do not require federal actors.

Defendants' argument regarding the requirement of federal actors for a Fifth Amendment claim is entirely frivolous. The single case cited by Defendants involved a foreclosure by GNMA which is owned by the government. *Warren v. Government Mortgage Ass'n.*, 611 F.2d 1229 (8th Cir. 1980). The deciding issue was a contract provision that allowed a foreclosure through the power of sale. *Id.* at 1233-34. The court's decision was based on the fact that the exercise of a contractual power of sale did not involve the exercise of powers of a "governmental nature." *Id.* at 1234.

It has been well established that the Takings Clause of the Fifth Amendment, made applicable to the States through the Fourteenth Amendment. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 536, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005)(citing *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 41 L. Ed. 979, 17 S. Ct. 581 (1897)). Defendants are, no doubt, well aware that claims regarding taking by state and local governments are frequently brought under the Fifth Amendment to the US Constitution. *See, e.g., Williamson County Reg'g Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed. 2d 126 (1985); *First English*

Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed. 2d 250 (1987); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 95 S.Ct. 2646, 57 L.Ed. 631 (1978);

Defendants have put forth an argument here that they know or should know to be frivolous. Defendants' Motion to Dismiss should be denied.

XI. Plaintiff's Complaint contains factual allegations that are more than sufficient to support Plaintiff's Fourth Amendment Unreasonable Search claim.

A. The City has not provided any evidence that it obtained a valid warrant to search Plaintiff's property.

Plaintiff submitted two open records request to the City. The first was for all information regarding this matter. The second was for information relating to properties in the area of Plaintiff's property. Pursuant to both requests, the City provided documents from its file relating to Plaintiff's property. In both cases, the warrant included pertains to another property (2013 Moss Street). The affidavit submitted by Defendant McHenry contains the address for Plaintiff's property, but no warrant with this address has been provided.

The Fourth Amendment requires that a warrant particularly describe the things to be seized. *E.g. Groh v. Ramirez*, 540 U.S. 551, 557, 124 S.Ct. 1284, 157 L.Ed. 2d 1068 (2004). Particularity is required in the warrant itself and is not cured by supporting documents. *Id.*; *Mass v. Sheppard*, 468 U.S. 981, 988, n. 5, 82 L.Ed. 2d 737, 104 S.Ct. 3424. The warrant in this case is facially invalid. It is incumbent on the officer executing a search warrant to ensure the search is lawfully authorized and lawfully conducted. *Groh*, 540 U.S. at 563. A search conducted without a valid warrant is per se unreasonable subject to narrowly defined exceptions. *E.g. Camara v. Municipal Court of San Francisco*, 387 U.S. 523, 528-29, 87 S.Ct. 1727, 18 L.Ed. 2d

930 (1967); *Groh*, 540 U.S. at 559 (quoting *Mass. v. Sheppard*, 468 U.S. at 988, n. 5 ("a search of private property without proper consent is 'unreasonable' unless it has been authorized by a **valid** search warrant.")(emphasis added)). The existence of probable[12] cause does not exempt a search from the presumption of unreasonableness. *See, e.g., Groh*, 540 U.S. at 558-60.

B. The City's Code requires that permission from a property owner be sought prior to an application for a search warrant.

If the City did obtain a warrant for the correct property, the warrant is still invalid and the search is per se unreasonable because Defendant McHenry failed to attempt to obtain the property owner's permission, as required by the City's Code, prior to obtaining the warrant.

A statute must be construed so that no word is left void, superfluous, or insignificant, and meaning and effect are given to every word in the statute if possible. *McLane Southern, Inc. v. Ark. Tobacco Control Bd.*, 2010 Ark. 498, 24-25, 375 S.W.3d 628 (2010)(citing *Ark. Beverage Retailers Ass'n, Inc. v Moore*, 369 ark. 498, 256 S.W.3d 488 (2007)). Courts should reconcile statutory provisions to make them consistent, harmonious, and sensible. *Id.* Additionally, laws infringing on private property rights must be strictly construed in favor of the property owner. *See, e.g., Rolling Pines Ltd. Pshp. V. City of Little Rock*, 73 Ark. App. 97, 102 (2001).

The Cities Code states:

> **1.3.1 Right of entry.** Code Enforcement Officers are authorized to enter structures or premises at reasonable times to inspect subject to constitutional restrictions on unreasonable searches and seizures. If entry is refused or not obtained, the officers may pursue such search authorizations as are provided by law.

Defendants emphasis the phrase "or not obtained" and seek to persuade the Court to ignore the preceding language. The Code states that "[i]f entry is refused" officers may pursue a

[12] Plaintiff does not concede the existence of probable cause. Defendant McHenry's affidavit cites missing soffit, fascia and loose and missing siding. There had been a recent windstorm which accounts for most of these conditions. These conditions and the other minor exterior defects alleged do not support a finding of probable cause to believe violations would be found inside the structure.

search warrant. Interpreting the statute in a way that permits officers to obtain a search warrant without entry being refused would render the language—"if entry is refuse"—superfluous and insignificant. Clearly, the intent of the Council in including this language was for the officers to seek permission prior to obtaining a search warrant. The "or not obtained" language relied upon by Defendants most likely was intended for situations where a property owner can't be contacted for some reason. Therefore, the warrant obtained by Officer McHenry was obtained in violation of the City's Code.

A warrant obtained in violation of a statute is void. *See, e.g., Grimmett v. State*, 251 Ark. 270-A (1972); *Morris v. State*, 252 Ark. 487 (1972); *Bosteder v. City of Renton*, 155 Wn.2d 18, 29, 117 P.3d 316 (Wash. 2005). As discussed *supra*, a search conducted in the absence of a valid warrant is per se unreasonable and this presumption of unreasonableness is not cured by the existence of probable cause. Furthermore, the manner in which the search was conducted—breaking into the property and then leaving it unsecured without notifying the owner—was unreasonable. Plaintiff's Complaint states sufficient facts to demonstrate that the search warrant was invalid, therefore, Defendants' Motion to Dismiss should be denied.

XII. Plaintiff's Complaint states sufficient factual allegations to support its Fourth Amendment claim of Unreasonable Seizure.

In their Brief, Defendants return to the *Samuels* case to argue that the seizure in this case was reasonable. Pg. 16. As previously discussed, this case is factually distinguishable from the present case because Samuels was provided with notice of specific violations, an opportunity to repair the property, and a hearing. In their Brief, Defendants even point to facts that show the difference in these cases. Pg. 17. Defendants note that the owner was provided an opportunity to repair the property prior to condemnation. Defendants quote that the plaintiff was provided with a hearing. In the present case the City barred Plaintiff from repairing the property and

refused to provide a hearing.

Significantly, Defendants quote *Samuels*: "many seizures **carried out with procedural due process** will undoubtedly survive Fourth Amendment review." Pg. 17 (emphasis added). In the present case, the condemnation was not carried out in accordance with procedural due process. Again, this is the heart of Plaintiff's case—the complete denial of any due process. Defendants cite to cases where the courts found that due process was afforded to attempt to justify their complete denial of due process in this case. And again, Plaintiff asserts that, if these cases stand for the proposition that a three minute appearance before the city council with no opportunity to repair is sufficient due process, these cases conflict with the holdings of the United States Supreme Court in cases cited herein which require adequate notice, a meaningful opportunity to be heard, and an impartial decision maker, all of which were denied in this case. Defendants' contention that the seizure of Plaintiff's property occurred only after notice and hearing is simply wrong. Plaintiff was never provided with notice of the specific violations alleged, the Council steadfastly refused to provide a hearing, and the Council was clearly not even attempting to act as an impartial decision maker. The City's complete and deliberate denial of due process resulted in the unreasonable seizure of Plaintiff's property.

"A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). Fourth Amendment protections are triggered when a government entity seizes a building to enforce compliance with building regulations. *Camara*, 387 U.S. at 530.

> Seizures conducted outside the judicial process, without prior approval by a judge or magistrate, have been held to be per se unreasonable under the Fourth Amendment-subject only to a few specifically established and well delineated exceptions.

U.S. v. Paige, 136 F.3d 1012, 1022 (quoting *Minnesota v. Dickerson*, 508 U.S. 366, 372 (1993)).

Demolition of a building by a municipality is a Fourth Amendment seizure. *Heidorf v. Town of Northumberland*, 985 F. Supp. 250, 255 (N.D.N.Y. 1997); *DeBari v. Town of Middleton*, 9 F. Supp. 2d 156 (N.D.N.Y. 1998); *Suss v. American Soc. for Prevention of Cruelty to Animals*, 823 F. Supp. 181 (S.D. N.Y. 1993); *Freeman v. City of Dallas*, 242 F.3d 642 (2001).

The City has seized Plaintiff's property by condemning it without hearing or considering any evidence. Once the city red-tagged the structure, Plaintiff was barred from using or repairing the structure. The property was effectively seized at that time. It was completely unreasonable for the City to refuse to allow the property to be repaired. It was also unreasonable for the City to condemn the property without considering any evidence beyond pictures of clutter which had already been cleaned up prior to the condemnation vote. Plaintiff's Complaint alleges factual allegations that are sufficient to support its Fourth Amendment claims and Defendants' Motion to Dismiss should be denied.

XIII. Plaintiff's Complaint states factual allegations sufficient to maintain a claim for Trespass.

> [P]ossessory rights to real property include as distinct interests the right to exclude and the right to enjoy, violations of which give rise to the distinct causes of action respectively of trespass and nuisance. Prosser & Keeton, Torts (5th ed), § 87, p 622.

Adams v. Cleveland-Cliffs Iron Co., 237 Mich. App. 51, 58-59, 602 N.W.2d 215 (Mich. Ct. App. 1999).

As discussed *supra*, the City has not produced a warrant permitting it to search Plaintiff's property. Therefore, Defendant McHenry broke into Plaintiff's property without permission of the owner. A trespass results if an actor acts intending to personally enter the land of another without permission of the owner. *See* Arthur Best & David W. Barnes, *Basic Tort Law*, 729 (2nd ed. 2007).

As also discussed *supra*, if Defendant McHenry obtained a warrant, the warrant was invalid because it was obtained in violation of the City's Code. Contrary to Defendants' assertion, a search executed under a void or invalid warrant is a trespass. *See, e.g., Modrell v. Hayden*, 2007 US DIST LEXIS 56980 (W.D.Ky. 2007); *Dockery v. Tucker*, 2006 US Dist. LEXIS 97826 (E.D.N.Y. 2006); *Voskerchian v. United States*, 1999 U.S. Dist. LEXIS 1439 (W.D.N.Y. 1999); *Levine v. City of Bothell*, 2012 U.S. Dist. LEXIS 152947 (W.D.Wash. 2012); *Ingraham v. Blevins*, 236 Ky. 505, 33 S.W.2d 357 (Ky. 1930); *Jericho Corp. v. Elias*, 164 A.D.2d 852, 559 N.Y.S.2d 358, 361 (2d Dept. N.Y.App. 1990)(affirming the denial of law enforcement officers motion to dismiss trespass claim premised upon a search executed pursuant to an allegedly invalid warrant); *Bosteder v. City of Renton*, 155 Wn.2d 18, 117 P.3d 316 (Wash. 2005).

> Every unwarranted entry is a trespass and every trespass causes damage.
>
> Again we refer to Book III, chapter 12, Blackstone Comm. 209, 2 Lewis' Blackstone 1195: "Every unwarrantable entry on another's soil the law entitles a trespass by breaking his close; the words of the writ of trespass commanding the defendant to show cause *quare clausum querentis fregit*. For every man's land is, in the eye of the law, enclosed and set apart from his neighbor's; and that either by a visible and material fence, as one field is divided from another by a hedge, or by an ideal, invisible boundary, existing only in the contemplation of law, as when one man's land adjoins to another's in the same field. And every such entry or breach of a man's close carries necessarily along with it some damage or other; for, if no other special loss can be assigned, yet still the words of the writ itself specify one general damage, viz: the treading down and bruising his herbage.

Western Union Tel. Co. v. Bush, 191 Ark. 1085, 1092 (1935). Beyond the inherent damage that flows from any Trespass, the City's negligence in leaving the building unsecured without notifying the owner has resulted in additional damage to the building.

Plaintiff's Complaint alleges that Defendant McHenry broke into Plaintiff's property without a valid warrant and without permission from the owner. Plaintiff has, therefore, alleged

facts sufficient to state a claim for common-law trespass and Defendants' Motion to Dismiss should be denied.

XIV. Plaintiff's Complaint states sufficient facts to support its claim of Civil Conspiracy.

Defendants cite to a couple of Arkansas cases attempting to persuade the Court that a civil conspiracy claim cannot be maintained against the Defendants. First, civil conspiracy is not just a state law claim. Claims of Civil Conspiracy based on state law and federal law may be brought in the same action. *See Sastry v. City of Crestwood*, 2011 U.S. Dist. LEXIS 78326 (E.D.Mo. 2011). Second, the Arkansas cases cited by Defendants are inapposite. In *Faulkner v. Ark. Children's Hosp.*, 347 Ark. 941, 947 (2002), the individual defendants were doctors and nurses of a hospital. They were **employees** of the hospital defendant and the court said it was necessary to show that they were acting outside the scope of their employment in order to render them separate persons for the purposes of a conspiracy claim. This point is made even clearer in *Dodson v. Allstate Ins. Co.*, 345 Ark. 430, 445, 47 S.W.3d 866 (2001).

> [A] civil conspiracy is not legally possible where a corporation and its alleged coconspirators are not separate entities, but, rather, stand in either a **principal-agent or employer-employee** relationship with the corporation. *Id.* at § 56.

Id. (emphasis added).

In the present case, the City Council Members are neither employees nor agents of the City. The individual Defendants' are elected policy makers, each making independent decisions regarding his or her actions, not acting as an agent or employee of the City. Thus, a conspiracy claim is maintainable under Arkansas law. Plaintiff's Complaint has alleged that all Defendants' conspired to intentionally deprive Plaintiff of its Constitutional rights and thus has stated a state law claim for Civil Conspiracy.

As noted above, a claim of civil conspiracy is also actionable under federal law. "A

claim of civil conspiracy to violate a person's constitutional rights is actionable under § 1983." *Duckworth v. Ford*, 1992 U.S. Dist. LEXIS 21676, 11, 1992 WL 515340 (W.D. Mo. 1992)(citing *Putman v. Gerloff*, 701 F.2d 63, 65 (8th Cir. 1983); *Simpson v. Weeks*, 570 F.2d 240, 242-43 (8th Cir. 1978), *cert. denied*, 443 U.S. 911, 61 L. Ed. 2d 876, 99 S. Ct. 3101 (1979)).

> The doctrine of civil conspiracy extends liability for a tort, here the deprivation of constitutional rights, to persons other than the actual wrongdoer. . . . The charge of conspiracy in a civil action is . . . the string whereby the plaintiff seeks to tie together those who, acting in concert, may be held responsible for any overt act or acts.

Id. (quoting *Putnam v. Gerloff*, 701 F.2d 63, 65 (8th Cir. 1983)(quoting *Hostrop v. Board of Junior College Dist. No. 515*, 523 F.2d 569, 576 (7th Cir. 1975)).

To prove a § 1983 conspiracy claim, a plaintiff must show: (1) that the defendant conspired with others to deprive him of constitutional rights; (2) that at least one of the alleged co-conspirators engaged in an overt act in furtherance of the conspiracy; and (3) that the overt act injured the plaintiff. *White v. McKinley*, 514 F.3d 807, 816 (8th Cir. Mo. 2008)(citing *Askew v. Millerd*, 191 F.3d 953, 957 (8th Cir. 1999)). The plaintiff is additionally required to prove a deprivation of a constitutional right or privilege in order to prevail on a § 1983 civil conspiracy claim. *Id.*

> To prevail on a claim of conspiracy under §1983 a plaintiff
>
> need not show that each participant knew 'the exact limits of the illegal plan . . . .' 'The question of the existence of a conspiracy to deprive the plaintiffs of their constitutional rights should not be taken from the jury if there is a possibility the jury could infer from the circumstances a 'meeting of the minds' or understanding among the conspirators to achieve the conspiracy's aims.' **Because 'the elements of a conspiracy are rarely established through means other than circumstantial evidence, and summary judgment is only warranted when the evidence is so one-sided as to leave no room for any reasonable difference of opinion as to how the case should be decided. The court must be convinced that the evidence presented is insufficient to support any reasonable inference of a conspiracy.**

Sastry v. City of Crestwood, 2011 U.S. Dist. LEXIS 78326, 51-53 (E.D.Mo. 2011)(emphasis added).

The issue of the inability of employees or agents of a corporation or other entities to conspire with one another is referred to under federal law as the "intracorporate conspiracy doctrine." *See, e.g., Kinkus v. Vill. of Yorkville*, 476 F. Supp. 2d 829, 839-840 (S.D. Ohio 2007). This doctrine does not apply to claims brought pursuant to § 1983.

> The intracorporate conspiracy doctrine, however, is not applicable in this case. This doctrine has only be applied in antitrust cases and civil rights conspiracy cases. Neither is present before this Court. Plaintiff is asserting a civil conspiracy claim under 42 U.S.C. § 1983, not a civil rights conspiracy claim under 42 U.S.C. § 1985. Defendants do not cite any precedent that supports Defendants' position that the intracorporate conspiracy doctrine can be applied to a civil conspiracy claim under § 1983.

Id. Additionally, the fact that Plaintiff has alleged that the individual Council members conspired with each other and with individual city employees and not the City itself, and because it is likely that the alleged conspirators are motivated by personal (i.e. political) considerations, further renders the intracorporate conspiracy doctrine inapplicable in this case. *See Id.* at 841 (citing *Buschi v. Kirven*, 775 F.2d 1240, 1252 (4th Cir. 1985)).

Plaintiff's Complaint states facts sufficient to allege that all individual Defendants conspired to deprive Plaintiff of its constitutional rights. These claims are actionable under both state and federal law. Defendants' Motion to Dismiss should be denied.

XV. Defendants failed to address Plaintiff's Equal Protection / Selective Prosecution claim.

Plaintiff notes that Defendant does not address Plaintiff's selective prosecution / equal protection claim in it's brief. Therefore, Plaintiff assumes that Defendants concede that Plaintiff has stated facts sufficient to support this claim.

XVI. Defendants failed to address Plaintiff's claims made pursuant to the Arkansas Constitution.

Plaintiff has alleged facts that support claims under the Arkansas Constitution similar to Plaintiff's federal claims. Defendants have not addressed these claims in their Brief. These claims should be analyzed under Arkansas law. While these claims mirror, in a sense, Plaintiff's federal claims, Arkansas courts have held that the Arkansas Constitution provides more protection in some cases than the federal Constitution and any assessment of these claims must be made pursuant to the holdings of the Arkansas courts. *See Jegley v. Picado*, 349 Ark. 600, 631 (2002); *Griffin v. State*, 347 Ark. 788, 791 (2002). The Arkansas Supreme Court has held "the police power [of the state] can only be exercised to suppress, restrain, or regulate the liberty of individual action, when such action is injurious to the public welfare." *Jegley*, 349 Ark. at 635 (quoting *Hand v. H& R Block, Inc.*, 258 Ark. 774, 781 (1975)). Taking these holdings into consideration with the provision of the Arkansas Constitution which requires that property rights be afforded the highest constitutional sanction, it can be reasonably inferred that private property rights are afforded even greater protections under Arkansas law than under federal law. Because Defendants have not addressed these claims, Plaintiff assumes they are not seeking to have these claims dismissed.

XVII. The Court should enjoin the City from demolishing property in the absence of any due process protections for property owners.

Plaintiff has alleged facts sufficient to show the risk of irreparable harm if its property is destroyed and that it is likely that other property owners will also suffer irreparable harm if the City is allowed to continue the condemnation of property without affording owners any due process protections. Plaintiff's Complaint contains factual allegations that support its request for injunctive relief.

XVIII. All claims should be adjudicated in this Court to prevent multiple piece-meal proceedings.

Defendants seek to force Plaintiff to engage in multiple piece-meal litigation that would be wasteful of judicial resources and place unnecessary burden on the parties. Defendants would have Plaintiff pursue its Rule 9 appeal to conclusion before bringing other claims. As discussed previously, herein, Defendants have cited no case law holding that constitutional claims may not be brought in conjunction with a Rule 9 appeal and Plaintiff believes that Defendants strategy is to bar Plaintiff from bringing its claims in any forum. However, even if Plaintiff could bring its constitutional claims in a subsequent proceeding (which is unlikely), the result would be multiple proceedings relitigating the same facts and would likely eventually be returned to this Court as some point. This Court is the most appropriate forum to adjudicate Plaintiff's claims because if Plaintiff prevails on its constitutional claims, the Rule 9 appeal will be moot.

CONCLUSION

While Defendants' Motion to Dismiss has compelled Plaintiff to present the above discussion of some complex legal issues, the heart of this case is really simple—the complete denial of due process prior to the City's condemnation of Plaintiff's property. This comes down to four simple points: 1. The City never provided with notice of the specific violations alleged; 2. The City barred Plaintiff from repairing the property prior to condemnation; 3. The City never provided a meaningful opportunity to be heard; and 4. The City never provided a hearing before an impartial decision maker. Plaintiff's Complaint contains factual allegations that are more than sufficient to support all of its claims and Defendants' Motion to Dismiss should be denied.

Respectfully submitted,

/s/ Mickey Stevens

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CERTIFICATE OF SERVICE

I do hereby certify by my signature hereinabove, I have on this 28th day of May, 2013 served a copy of the foregoing pleading on the following persons by mailing same through the AOC efiling system, email or United States mail, properly addressed, and first class postage paid.

Daniel McFadden
City of North Little Rock
300 Main Street
North Little Rock, AR 72114

/s/ Mickey Stevens
Mickey Stevens

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

CONVENT COPRORATION,
Individually and on Behalf of all
Others Similarly Situated **PLAINTIFF**

v. **CASE NO. 4:13-CV-0259**

CITY OF NORTH LITTLE ROCK, ARKANSAS, a Municipal Corporation, JOE SMITH, Mayor, Individually and in his Official Capacity, City Council Members DEBI ROSS, BETH WHITE, LINDA ROBINSON, MAURICE TAYLOR, STEVE BAXTER, BRUCE FOUTCH, MURRY WITCHER, and CHARLIE HIGHT each Individually and in his or her Official Capacity, TOM WADLEY, Director, Code Enforcement Division, Individually and in his Official Capacity, and FELECIA MCHENRY, Code Enforcement Officer, Individually and in her Official Capacity **DEFENDANTS**

DEFENDANTS' REPLY TO
PLAINTIFF'S RESPONSE TO MOTION TO DISMISS

COMES NOW Defendants, by and through their attorney, Assistant City Attorney Daniel L. McFadden, and for their Reply to Plaintiff's Response to Motion to Dismiss, state:

I. INTRODUCTION

The Defendants removed Plaintiff's Arkansas District Court Rule 9 appeal and simultaneous civil rights lawsuit from state court to federal court. Additionally, the Defendants moved to dismiss the majority of Plaintiff's federal allegations in an attempt to aid the Court and all named parties in clarifying that the Plaintiff's remedy is, and always has been, its appeal of the North Little Rock City Council's decision to condemn the property Plaintiff allegedly owns, as opposed to collaterally attacking the Council's decision with a simultaneous civil rights suit.

before exhausting any administrative remedy. Plaintiff has since responded. However, Plaintiff has failed to successfully controvert Defendants' Motion to Dismiss and all members of the City Council and Mayor Smith are still entitled to absolute legislative immunity.

II. ARGUMENT

The Defendants adopt and reincorporate their previous arguments from their Brief in Support of Motion to Dismiss and submit those arguments speak for themselves. Alternatively, Defendants acknowledge the Court retains the discretion to dismiss the Plaintiff's constitutional and tort allegations without prejudice, or stay them, and remand this case to Pulaski County Circuit Court so the Plaintiff may proceed with its appropriate administrative remedy of appeal. Regardless, all members of the North Little Rock City Council and the Mayor are still entitled to absolute legislative immunity in their individual capacities; thus, Plaintiff's allegations against them in their individual capacities should still be dismissed with prejudice. Further, Plaintiff introduces several arguments for which Defendants accordingly provide a brief reply.

A. Absolute legislative immunity.

The Defendants submit all of the Aldermen and Mayor Smith are entitled to absolute legislative immunity for their actions in voting on an issue that came before them during a Council meeting, consistent with the powers granted them by the Arkansas General Assembly. The Plaintiff goes to great lengths to claim they are not. *Plaintiff's Response*, pp. 4-13. As demonstrated *infra*, absolute legislative immunity applies to local legislators and municipal officials who exercise their authority to vote in favor of, or against, a condemnation procedure.

1. All North Little Rock Aldermen are entitled to absolute legislative immunity.

The doctrine absolute legislative immunity is broad. *See National Ass'n of Workers v. Harwood*, 69 F.3d 622, 634 (1st Cir. 1995) (observing the absolute legislative immunity doctrine

has a "broad sweep."); *Sable v. Myers*, 563 F.3d 1120, 1125 (10th Cir. 2009) ("This circuit has has followed the Supreme Court's broad view of legislative immunity."). "Most evidently ... the act of voting for an ordinance [is], in form, quintessentially legislative." *Bogan v. Scott-Harris*, 523 U.S. 44, 55 (1998). Thus, "passing an ordinance is a legislative act." *Leapheart v. Williamson*, 705 F.3d 310, 313 (8th Cir. 2013).

Ordinarily, because municipal corporations have been delegated legislative authority only within strictly defined limits, "[i]t is only with respect to the legislative powers delegated to them by the state legislatures that the members of governing boards of municipal corporations enjoy [absolute] legislative immunity." *Abraham v. Pekarski*, 728 F.2d 167, 174 (3d Cir. 1984). "[C]ondemnation is a constitutional concession, to be exercised under appropriate legislative sanction." *Nahay v. Arkansas Irr. Co.*, 209 Ark. 247, 252 (1945). The power of condemnation is a power inherently invested with the State of Arkansas. And, the Arkansas General Assembly has expressly delegated this power to the City of North Little Rock. Ark. Code Ann. § 14-56-203. Certainly, a vote of a city councilman constitutes "an exercise of legislative decision-making." *Hernandez v. City of Lafayette*, 643 F.2d 1188, 1194 (5th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982). Put simply, a legislative act is one on which a governmental body votes. *Espanola Way Corp. v. Mayerson*, 690 F.2d 827, 829 (11th Cir. 1982), *cert. denied*, 460 U.S. 1039 (1983).

As such, it suffices to say that the individual conscious decisions of the North Little Rock Aldermen to vote on whether or not to exercise this power is clearly a legislative activity to which absolute legislative immunity attaches. *See Sable*, 563 F.3d at 1126-27 (holding that City Council members are entitled to absolute legislative immunity as to their decision to proceed with condemnation action, despite landowner's § 1983 condemnation action alleging the

condemnation proceeding violated his constitutional rights); *Kickapoo Tribe of Indians of the Kickapoo Reservation in Kan. v. Black*, 2012 U.S. Dist. LEXIS 72076, *10-11 (D. Kan. 2012). A local legislator voting to exercise this discretion is protected by legislative immunity because it is "undoubtedly an exercise of discretion regarding a matter of public policy," and otherwise involves the formalities of legislative action–namely, "formal votes." *Sable*, F.3d at 1126; *Russell v. Town of Buena Vista*, 2011 U.S. Dist. LEXIS 156912, *13 (D. Colo. 2011). *Cf. Plaintiff's Response*, p. 7 fn. 1.

The individual aldermen of the North Little Rock City Council acted in a legislative capacity in exercising their own individual discretion to proceed with the condemnation action against the property Plaintiff allegedly owns. Thus, they are entitled to absolute legislative immunity. Therefore, Plaintiff's allegations against them in their individual capacities should be dismissed with prejudice.

2. Mayor Smith is entitled to absolute legislative immunity.

Furthermore, Mayor Smith's actions in introducing legislation, and subsequently signing it upon City Council approval, entitle him to absolute legislative immunity. Executive officials outside the legislative branch, including municipal officials, are entitled to legislative immunity when they perform legislative functions. *Supreme Court of Va. v. Consumers Union of United States, Inc.*, 446 U.S. 719, 731-34 (1980); *Gorman Towers Inc. v. Bogoslavsky*, 626 F.2d 607, 613-14 (8th Cir. 1980). And, "[i]ntroducing a bill is 'quintessentially legislative'" and entitles the official to absolute legislative immunity. *Hinshaw v. Smith*, 436 F.3d 997, 1008 (8th Cir. 2006) (quoting *Bogan*, 523 U.S. at 55)). Additionally, any actions taken related to the introduction of a bill, or ordinance, entitle that official to absolute legislative immunity. *Id.* Further, the United States Court of Appeals for the Eighth Circuit has outright recognized the

United States Supreme Court's holding that actions taken in exercising the discretion to vote on an ordinance entitles an official to absolute legislative immunity. *Id.*

Therefore, Mayor Smith is likewise entitled to absolute legislative immunity as to Plaintiff's allegations. Alternatively, since he had no vote on the actual legislation, he is also entitled to qualified immunity and dismissal. *See Heartland Academy Comm. Church v. Waddle*, 595 F.3d 798, 805 (8th Cir. 2010) ("Authorities not involved in the allegedly unconstitutional acts of their fellow public servants have not violated constitutional rights and are entitled to qualified immunity.")).

B. Exhaustion of administrative remedies.

Plaintiff did not exhaust any remedy when it simultaneously filed its federal and state claims against the Defendants along with its Arkansas District Court Rule 9 appeal. Ark. Code Ann. § 14-56-425 permits a party aggrieved by a decision of the City Council to seek judicial relief by means of appeal pursuant to Ark. Dist. Ct. R. 9. If the Pulaski County Circuit Court were to affirm, or overrule, the decision of the City Council, the exhaustion requirement would be met, and Plaintiff could then pursue its numerous federal and state claims. *Talley v. City of North Little Rock*, 2009 Ark. 601, 381 S.W.3d 753 (2009); *Iowa Coal Mining Co. v. Monroe County*, 257 F.3d 846, 849 (8th Cir. 2001). *See also Reiter v. Cooper*, 507 U.S. 258, 269-70 (1993); *Calico Trailer Mfg. Co. v. Insurance Co. of N. Am.*, 155 F.3d 976, 978 (8th Cir. 1998). Plaintiff's complaint and response demonstrate it did not exhaust any remedy because it unequivocally states it filed its allegations to coincide with its appeal. Thus, dismissal is proper.

C. Due process.

The Plaintiff has the same administrative remedies as any other party – its appeal pursuant to Ark. Code Ann. § 14-56-425 and Ark. Dist. Ct. R. 9. Put simply, that is the process.

The City of North Little Rock provides this process. *See e.g. Talley v. City of North Little Rock*, 2009 Ark. 601, 381 S.W.3d 753 (2009). And, while Plaintiff cites to several cases regarding inclusion of its constitutional allegations to aid its belief that now is the time to make those claims, it must be noted those cases concern introducing new issues for the first time on appeal. Because Plaintiff may still bring its claims after it exhausting its administrative remedies, those cases are anomalous. *See e.g. Plaintiff's Response*, pp. 17-20, 23.

D. Unconstitutional taking.

Plaintiff's Complaint makes no clear or explicit claim or count of an unconstitutional taking, nor has it been amended to reflect such a claim. *See Plaintiff's Complaint*. Thus, as stated in the Brief in Support of Motion to Dismiss, Plaintiff's Fifth Amendment allegation should be dismissed, as there are no federal actors or explicit claims for an unconstitutional taking.

E. Civil conspiracy.

Should the court elect to exercise supplemental jurisdiction at this time, Defendants maintain Plaintiff has failed to state a claim for civil conspiracy. *Leaphart v. Williamson*, 850 F.Supp. 2d 956, 960-61 (E.D. Ark. 2012). Plaintiff's allegations of civil conspiracy mirror those in *Leaphart* precisely. Thus, Plaintiff's arguments are contrary to Judge Holmes' previous ruling on civil conspiracy charges against municipal officials, even elected officials. Defendants submit any other holding would be inconsistent with that already adopted by the Eastern District of Arkansas.

IV. CONCLUSION

Arkansas District Court Rule 9 governs Plaintiff's proper course of action; yet, Plaintiff has not exhausted any administrative remedy. Indeed, Plaintiff failed to obtain any ruling from

the Pulaski County Circuit Court on the City Council's decision before it prematurely filed its numerous constitutional and state tort allegations against the Defendants. As such, despite Plaintiff's perceived concern that it has not been permitted to exhaust its administrative remedies due to Defendants' removal of its case to this Court, Plaintiff has not, and did not, fully comply with Ark. Dist. Ct. R. 9 to exhaust its mandatory and jurisdictional administrative remedies *before* it voluntarily and simultaneously filed its numerous constitutional and tort allegations. Therefore, Defendants submit Plaintiff's separate allegations, which are made in addition to its administrative appeal, should be dismissed with prejudice.

Respectfully submitted,

CITY OF NORTH LITTLE ROCK, ARKANSAS, a Municipal Corporation, JOE SMITH, Mayor, Individually and in his Official Capacity, City Council Members DEBI ROSS, BETH WHITE, LINDA ROBINSON, MAURICE TAYLOR, STEVE BAXTER, BRUCE FOUTCH, MURRY WITCHER, and CHARLIE HIGHT, each Individually and in his or her Official Capacity, TOM WADLEY, Director, Code Enforcement Division, Individually and in his Official Capacity, and FELECIA MCHENRY, Code Enforcement Officer, Individually and in her Official Capacity
Defendants

By: /s/ Daniel L. McFadden, ABA #2011035
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CERTIFICATE OF SERVICE

I, Daniel L. McFadden, hereby certify that on this 3rd day of June, 2013, I have mailed a true and correct copy of the document to all counsel of record listed below, via U.S. Mail, postage prepaid:

Mr. Mickey Stevens
Attorney for Plaintiff
P.O. Box 1295
Benton, AR 72018

/s/ Daniel L. McFadden, ABA #2011035

IN THE CIRCUIT COURT OF PULASKI COUNTY
TWELFTH DIVISION

CONVENT COPRORATION,
Individually and on Behalf of all
Others Similarly Situated **PLAINTIFF**

v. **CASE NO. 60CV-13-1398**

CITY OF NORTH LITTLE ROCK, ARKANSAS, a Municipal Corporation, JOE SMITH, Mayor, Individually and in his Official Capacity, City Council Members DEBI ROSS, BETH WHITE, LINDA ROBINSON, MAURICE TAYLOR, STEVE BAXTER, BRUCE FOUTCH, MURRY WITCHER, and CHARLIE HIGHT each Individually and in his or her Official Capacity, TOM WADLEY, Director, Code Enforcement Division, Individually and in his Official Capacity, and FELECIA MCHENRY, Code Enforcement Officer, Individually and in her Official Capacity **DEFENDANTS**

BRIEF IN SUPPORT OF RESPONSE TO MOTION FOR JUDGMENT ON THE PLEADINGS OR, IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT

COMES NOW Defendants, by and through their attorney, Assistant City Attorney Daniel L. McFadden, and for their Brief in Support of Response to Motion for Judgment on the Pleadings or, in the alternative, Motion for Summary Judgment, state:

I. INTRODUCTION

Plaintiff continues to collaterally attack a decision of the North Little Rock City Council with its premature complaint with full knowledge that it has not exhausted its statutorily mandated administrative remedies. This case was remanded from the United States District Court for the Eastern District of Arkansas for this reason, and yet Plaintiff continues to litigate its premature allegations of violations of its federal and state rights to coincide with the administrative appeal it apparently has no interest in pursuing and exhausting. It has argued that

its rights were violated by the City of North Little Rock when its property was condemned as a nuisance by the North Little Rock City Council. As the facts alleged and exhibits provided by Plaintiff itself show, efforts were made by the City to accommodate Plaintiff's alleged desire to rehabilitate its structure. Yet, Plaintiff failed to take the corrective action necessary to bring its structure into compliance, and still refuses to do so as of this date unless on its own terms.

It is undisputed that the Plaintiff has not exhausted its statutorily mandated administrative remedies. Rather, the Plaintiff, by and through its counsel, continues to litigate its claims in what appears to be an effort to intimidate and coerce the duly elected officials of the City of North Little Rock in retaliation for a decision they lawfully exercised in conjunction with the powers expressly granted to them by the Arkansas General Assembly. Defendants question whether Plaintiff has any interest whatsoever in pursuing, much less exhausting, its statutorily mandated administrative remedies. This Court should hold the Plaintiff accountable for these actions and dismiss its premature complaint.

Indeed, this Court does not have subject matter jurisdiction over the contents of the Plaintiff's allegations, as Plaintiff makes its abundantly clear it is not going to exhaust its statutorily mandated administrative remedies. Even if Defendants have defaulted in failing to file an answer and/or corresponding motion to dismiss, which Defendants expressly deny, this Court still may not grant the Plaintiff the relief sought because it is undisputed Plaintiff never exhausted its statutorily mandated administrative remedies, and clearly has no interest whatsoever in doing so; its premature motion for judgment on the pleadings and request for summary judgment, including the time and effort spent drafting and filing them, as opposed to simply obtaining a hearing date for its Rule 9 appeal, speak for themselves on this issue.

As stated in its brief in support of its premature motion, Plaintiff raises one essential issue for the Court at this time: due process. Was there legal authority for the City of North Little Rock to vote to condemn Plaintiff's structure? Based on the foregoing information and citation of authority, it is clear that the City of North Little Rock followed the appropriate procedure in condemning Plaintiff's structure, and that the City gave it notice of all such action sufficiently in advance for it to abate the nuisances; yet, Plaintiff steadfastly refuses to follow the rehabilitation process and to appropriately exhaust its administrative remedies, thus barring its claims against the Defendants. Additionally, all of the Aldermen of the North Little Rock City Council and Mayor Smith are entitled to absolute legislative immunity and/or qualified immunity, and the remaining Separate Defendants are entitled to qualified immunity, and thus all Defendants are entitled to dismissal.

II. STATEMENT OF RELEVANT FACTS

On or about March 27, 2013, Plaintiff initiated this lawsuit to coincide with its Ark. Dist. Ct. 9 appeal. *Plaintiff's Complaint.* Plaintiff never exhausted its administrative remedies prior to filing and pursuing its complaint. *Plaintiff's Complaint.* Defendants removed Plaintiff's federal complaint to federal court. *Defendants' Notice of Removal.* There, Defendants filed an Answer and moved to dismiss Plaintiff's premature complaint, arguing Plaintiff failed to exhaust its administrative remedies, and because its separate allegations still failed to state a claim upon which relief may be granted. *Defendants Exhibits A, B, & C.* The federal court acknowledged that Plaintiff failed to exhaust its administrative remedies, thus denying that court of subject matter jurisdiction. *Order from Federal District Court Transferring Case Back to Circuit Court.* It then remanded to this Court. *Id.* As of this date, Plaintiff still has not exhausted its administrative remedies because it has not requested a hearing and there has been no final

determination of the challenged decision. Lastly, at all times relevant, Separate Defendant Alderman Murry Witcher was not present at, and did not participate in, the challenged condemnation procedure that is the subject of this matter. *Plaintiff's Exhibit F, Responses to Interrogatories No. 1 & 9.*

III. STANDARDS OF REVIEW

A. Judgment on the Pleadings and Default Judgment.

Plaintiff veils a request for default judgment by seeking judgment on the pleadings. Here, Plaintiff's request defies the obvious: Defendants have filed an answer, motion to dismiss, and corresponding brief in support upon timely removal of Plaintiff's premature complaint to the United States District Court for the Eastern District of Arkansas. *Defendants' Exhibits A, B, C.* Plaintiff tacitly concedes it received notice of such filings by filing a response in federal court, and by demonstrating it has access to the electronic filing services of the Eastern District of Arkansas. *Defendants' Exhibit D.* Obviously, Plaintiff received notice. Thus, for the purposes of answering and filing any corresponding motions, Defendants are not in default. *See* Ark. R. Civ. P. 55(f). Nor are they explicitly required to re-file that which has already been filed in the first place. Ark. R. Civ. P. 55(f); *JurisDctionUSA, Inc. v. Loislaw.com, Inc.*, 357 Ark. 403, 183 S.W.3d 560 (2004). Indeed, Defendants may rely on their federal pleadings. *JurisDctionUSA, Inc. v. Loislaw.com. Inc.*, 357 Ark. 403, 183 S.W.3d 560 (2004). Further, as the 2004 notes to Ark. R. Civ P. 55 state, if a defendant responds to a complaint in federal court while the case was pending there, Rule 55(f) prohibits entry of judgment by default upon remand and a defendant need not respond *again* in Circuit Court within the grace period contemplated by Ark. R. Civ. P. 12(a)(3) to avoid such a judgment. *See Laguna Village, Inc. v. Laborers International Union,*

672 P.2d 882 (Cal. 1983); *Banks v. Allstate Indemnity Co.*, 757 N.E.2d 776 (Ohio App. 2001) (supporting citations).

While Plaintiff also relies upon Ark. R. Civ. P. 12(a)(3) to supports its proposition of Ark. R. Civ. P. 55(f) default and judgment on the pleadings, it bears noting that prior to the 2004 amendment to Ark. R. Civ. P. 12, the Plaintiff admittedly could obtain default judgment upon remand pursuant to Ark. R. Civ. P. 55. However, Defendants are not required to respond *again* within the grace period provided in Ark. R. Civ. P. 12(a)(3). Indeed, the notes to the 2011 amendment to Ark. R. Civ. P. 12 contemplate an extension of 30 days upon remand in which to file a responsive pleading or answer if no answer or Rule 12 pleading has already been filed. *See* Ark. R. Civ. P. 12. It is undisputed Defendants already filed their Answer, Motion to Dismiss, and Brief in Support. *Defendants' Exhibits A, B, C.* Thus, reading Ark. R. Civ. P. 55(f) and Ark. R. Civ. P. 12 in conjunction with one another, the Defendants are not in default because they filed their Answer and Rule 12 motion in federal court where this case was then pending upon Defendants' removal. Therefore, the only logical conclusion is that Defendants are not in default, nor are they required pursuant to Ark. R. Civ. P. 12(a)(3) to re-file that which they've already filed in the first place. Regardless, this Court now has notice that such pleadings have been filed and should dismiss Plaintiff's premature complaint and deny the relief sought. And, regardless, Plaintiff has not exhausted its statutorily mandated administrative remedies, thus denying this Court of subject matter jurisdiction, should it *arguendo* render an adverse determination against the Defendants.

Consequently, for these reasons, Plaintiff is not entitled to its veiled request for default judgment, or even judgment on the pleadings; Defendants are in compliance with Ark. R. Civ. P. 55(f) and Ark. R. Civ. P. 12(a)(3). *JurisDctionUSA, Inc. v. Loislaw.com, Inc.*, 357 Ark. 403, 183

S.W.3d 560 (2004); *City of Fort Smith v. Didicom Towers, Inc.*, 362 Ark. 469, 209 S.W.3d 344 (2005)[1]. Nor is Plaintiff entitled to its request for relief because this Court lacks subject matter jurisdiction as a result of Plaintiff's failure, and outright refusal, to exhaust its statutorily mandated administrative remedies.

B. Summary Judgment.[2]

A motion for summary judgment will be granted if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Ark. R. Civ. P. 56(c). Where the facts are undisputed, summary judgment is a proper remedy, as it saves the court and the parties from both formal trial time and expenses. *Neel v. Citizens First State Bank*, 28 Ark. App. 116, 120, 771 S.W.2d 303, 305 (1989).

The party moving for summary judgment bears the initial burden of showing the *absence* of any genuine issue of material fact. *See Mara v. Dykema*, 328 Ark. 310, 315, 942 S.W.2d 854, 857 (1997) (citing *Gleghorn. v. Ford Motor Credit Co.*, 293 Ark. 289, 737 S.W.2d 451 (1987) (emphasis added)). The non-moving party must then offer evidence beyond the allegations set forth in the pleadings and "specifically show that there is a genuinely disputed issue of material fact." *Mara*, 328 Ark. at 315, 942 S.W.2d at 857 (citing *Guthrie v. Kemp*, 303 Ark. 74, 793 S.W.2d 782 (1990)); *See also* Ark. R. Civ. P. 56(e).

Furthermore, a Court may dismiss a complaint for "lack of jurisdiction over the subject matter." Ark. R. Civ. P. 12(b)(1). "Subject matter jurisdiction is the power of the court to hear

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[1] These two later cases overrule Plaintiff's reliance upon *NCS of Ark. V. W.P. Malone*, 350 Ark. 520 (2002) for its proposition of judgment on the pleadings by alleged default. Notably, the City of Fort Smith specifically attempted to make the same arguments Plaintiff makes before the Court, but the Arkansas Supreme Court determined such arguments held no weight.

[2] While not required pursuant to Ark. R. Civ. P 56(c), Defendants note Plaintiff fails to include a separate statement of uncontested material facts. *Davis v. Little Rock Sch. Dist.*, 92 Ark. App. 174 (2005).

and determine the subject matter in controversy between parties." *Allen v. Circuit Court of Pulaski County*, 2009 Ark. 167, 303 S.W.3d 70, 76 (2009) (citing *Ulmer v. Circuit Court of Polk County*, 366 Ark. 212, 234 S.W.3d 290 (2006)). "[I]f an appeal [pursuant to Ark. Dist. Ct. R. 9] is not properly perfected ... the circuit court *never acquires jurisdiction*." *J&M Mobile Homes, Inc. v. Hampton*, 347 Ark. 126, 131, 60 S.W.3d 481, 484 (2001) (citing *Pike Avenue Development Co. v. Pulaski County*, 343 Ark. 338, 37 S.W.3d 177 (2001)) (emphasis added).

The prescribed statutory remedy for appealing a final administrative or quasi-judicial decision of a governing body is to appeal that decision to Circuit Court. Arkansas District Court Rule 9 states in part that "[a] party may appeal any final administrative decision by filing a notice of appeal with the clerk of the circuit court having jurisdiction of the matter within thirty (30) days from the date of that decision." Ark. Dist. Ct. R. 9(f)(2)(A). An appealing party must strictly comply with the requirements of this rule when perfecting its appeal. *Mt. Pure, LLC v. Little Rock Wastewater Util.*, 2011 Ark. 258, 383 S.W.3d 347, 353 (2011). Substantial compliance will not suffice and failure to strictly comply will result in dismissal with prejudice for lack of subject matter jurisdiction. *Johnson v. Dawson*, 2010 Ark. 308, 365 S.W.3d 913, 917-18 (2010); *Brock v. Townsell*, 2009 Ark. 224, 309 S.W.3d 179, 184 (2009).

Ark. Dist. Ct. R. 9 applies to final administrative or quasi-judicial decisions made by city councils through Ark. Code Ann. § 14-56-425, in particular those by the City North Little Rock and its duly elected aldermen. *Talley v. City of North Little Rock*, 2009 Ark. 601, 381 S.W.3d 753, 756-57 (2009). Ark. Code Ann. § 14-56-425 states that:

> Appeals from the final administrative or quasi-judicial decision by the municipal body administering this subchapter shall be taken to the circuit court of the appropriate county using the same procedure as for administrative appeals of the District Court Rules of the Supreme Court.

Ark. Code Ann. § 14-56-425(a)(1). This shall be tried *de novo* with a right to a trial by jury. Ark. Code Ann. § 14-56-425(a)(2). And, the Arkansas Supreme Court applies this rule to condemnation actions. *See e.g. Ingram v. City of Pine Bluff*, 355 Ark. 129, 133 S.W.3d 382 (2003). Indeed, "the requirements of *section 14-56-425* ... include compliance with Inferior Ct. R. 9." *Douglas v. City of Cabot*, 347 Ark. 1, 5, 59 S.W.3d 430, 432 (2001) (citing *Board of Zoning Adjustment v. Cheek*, 328 Ark. 18, 942 S.W.2d 821 (1977); *Night Clubs, Inc. v. Fort Smith Plann. Comm'n*, 336 Ark. 130, 984 S.W.2d 418 (1999)). These provisions "are mandatory and jurisdictional." *Green v. City of Jacksonville*, 357 Ark. 517, 521, 182 S.W.3d 124, 126 (2004).

Therefore, it reasonably follows that, "**a court is without subject-matter jurisdiction to hear a claim until administrative action is final and one has exhausted his or her administrative remedies**." *Helena-West Helena Sch. Dist. #2 v. Circuit Court*, 247 S.W.3d 823, 833, 2007 Ark. LEXIS 209, at ** 12 (2007) (citing *Staton v. American Mfrs. Mut. Ins. Co.*, 362 Ark. 96, 207 S.W.3d 456 (2005)) (emphasis added). "The doctrine of exhaustion of administrative remedies provides that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed statutory administrative remedy has been exhausted." *McGhee v. Arkansas State Board of Collection Agencies*, 368 Ark. 60, 67, 243 S.W.3d 278, 284 (2006) (citing *Old Republic Sur. Co. v. McGhee*, 360 Ark. 562, 203 S.W.3d 94 (2005); *Arkansas Prof'l Bail Bondsman Licensing Bd. v. Frawley*, 350 Ark. 444, 88 S.W.3d 418 (2002); *Cummings v. Big Mac Mobile Homes, Inc.*, 335 Ark. 216, 980 S.W.2d 550 (1998)). "[I]t is better to pursue administrative remedies to conclusion before resorting to the court system." *Ward v. Priest*, 350 Ark. 345, 357, 86 S.W.3d 884, 890 (2002) (citing *Myers v. Bethlehem Bldg. Corp.*, 303 U.S. 41, 82 L. Ed. 638, 58 S.Ct. 459 (1938)). "Such logic is based on jurisprudential

reasoning that supports applying for relief to the proper place first." *Id.* (citing *Ragon v. Great Am. Indem., Co.*, 224 Ark. 387, 273 S.W.2d 524 (1954)).

Assuming, without conceding, that only the facts pled by Plaintiff are true under the above-mentioned standard and/or that Defendants have failed to comply with Ark. R. Civ. P. 55 and Ark. R. Civ. P. 12, which they expressly deny, it is undisputed that the Plaintiff still has not exhausted its administrative remedies, or that it truly ever had interest in doing so. Thus, Plaintiff fails to demonstrate to this Court how it has subject matter jurisdiction over its appeal of the City Council's decision, as well as its complaint against the Defendants collectively. However, Defendants in no way concede Plaintiff's factual allegations, as noted in their Answer in *Defendants' Exhibit A*. Further, the Plaintiff's conclusions, legal and otherwise, are immaterial to consideration of this motion and are, therefore, properly disregarded.

III. ARGUMENT

Plaintiff litigates that which is it statutorily mandated to appeal, but outright refuses to follow the proper procedure. By law, Plaintiff is limited to its Ark. Dist. Ct. R. 9 appeal of the condemnation action to this Court at this time. That is what the Arkansas General Assembly has determined to be proper. Ark. Code Ann. § 14-56-425; Ark. Dist. Ct. R. 9. The Supreme Court of the State of Arkansas agrees, particularly to condemnation actions of the City of North Little Rock itself. *Talley v. City of North Little Rock*, 2009 Ark. 601, 381 S.W.3d 753 (2009). But, Plaintiff argues by action and in words that this long-standing statutory mechanism created by the Arkansas General Assembly for Plaintiff to pursue and exhaust, approved and accepted by the Arkansas Supreme Court, and adhered to by the City of North Little Rock does not apply to it. Indeed, the Plaintiff has proceeded to include its civil rights complaint to collaterally and simultaneously coincide with its appeal (the heading and first two paragraphs of its complaint

speak for themselves. *See Plaintiff's Complaint*, ¶¶ 1-2). All of which are premature pending the outcome its direct appeal to this Court that it has not exhausted.

Rather than seek its Ark. Dist. Ct. R. 9 appeal in this Court as required by state law in the time since the United States District Court recognized Plaintiff failed to exhaust its administrative remedies upon remand, Plaintiff continues to litigate. It is undisputed that this Court does not have subject matter jurisdiction over the contents of Plaintiff's complaint, as the United States District Court likewise acknowledged upon remand. By and through Plaintiff's premature motion, Defendants question if Plaintiff has any interest whatsoever in pursuing its statutorily mandated administrative remedies and/or rehabilitation agreement, or that it in good faith ever has. Defendants assert these actions and ongoing behavior of the Plaintiff, and those acting on its behalf, before this Court and the United States District Court speak for themselves. *See generally Convent Corporation v. City of North Little Rock, et al.*, 4:13-CV-0259-JMM (E.D. Ark. 2013).

Because it is undisputed Plaintiff has not exhausted its administrative remedies, this Court does not have subject matter jurisdiction over the contents of its allegations. As such, it is not in a position to rule in its favor, even assuming *arguendo* it desires to do so. Furthermore, Plaintiff creates enough issues of fact on its own to preclude the judgment it seeks, and, in reality, states enough facts on the face of its complaint to defeat its own complaint. Altogether, this complaint must be dismissed.

A. <u>Plaintiff has not exhausted its statutorily mandated administrative remedies</u>.

The Plaintiff has not fully appealed the North Little Rock City Council's decision to condemn its property; thus, Plaintiff has not exhausted its administrative remedies. Consequently, this civil rights complaint is not even ripe for adjudication. Case law is

sufficiently clear that claims are not ripe for adjudication until *after* the claimant seeks, and then exhausts, all remedies available under state law. *See Collier v. City of Springdale*, 733 F.2d 1311, 1316 (8th Cir. 1984).

1. The City is statutorily authorized to condemn Plaintiff's property.

The City's authority to condemn a structure is found at Ark. Code Ann. § 14-56-203, which states:

> Cities of the first and second class shall have the power to order the removal or razing of, or to remove or raze, any buildings or houses that in the opinion of the council have become dilapidated, unsightly, unsafe, unsanitary, obnoxious, or detrimental to the public welfare and shall provide, by ordinance, the manner of removing and making these removals.

Ark. Code Ann. § 14-56-203. This authority was first examined by the Arkansas Supreme Court in *Springfield v. City of Little Rock*, 226 Ark. 462, 290 S.W2d 620 (1956). *Springfield* held that municipalities were constitutionally authorized to remove structures without compensation based upon fire, health, or structural hazards as part of the City of Little Rock's plenary duty to exercise its police power in the interest of the public health and safety of its inhabitants. *Springfield*, 226 Ark. 462, 463. Thus, the City is authorized to condemn such structures, and has long been granted this authority.

2. Arkansas State Statute and Arkansas District Court Rules govern Plaintiff's remedies at this time.

As stated, an appeal of a condemnation must be followed by the prescribed procedures of Arkansas state statute and the Arkansas District Court Rules. The procedure to appeal an action by City Council condemning a piece of property is found at Ark. Code Ann. § 14-56-425, and the Arkansas Supreme Court has applied this rule to condemnation actions. *See e.g. Ingram v.*

City of Pine Bluff, 355 Ark. 129, 133 S.W.3d 382 (2003). *Cf. Ingram v. City of Pine Bluff*, 2000 U.S. App. LEXIS 29595 (8th Cir. 2000) (per curiam).

Therefore, it follows from Ark. Code Ann. § 14-56-425 that the prescribed statutory remedy for appealing a final decision of a governing body, such as a condemnation by city council, is to appeal that decision to Circuit Court. Indeed, Arkansas District Court Rule 9 states in part that "[a] party may appeal any final administrative decision by filing a notice of appeal with the clerk of the circuit court having jurisdiction of the matter within thirty (30) days from the date of that decision." Ark. Dist. Ct. R. 9(f)(2)(A). And, Ark. Dist. Ct. R. 9 applies to the final decisions made by city councils through Ark. Code Ann. § 14-56-425. *Talley v. City of North Little Rock*, 2009 Ark. 601, 2009 Ark. LEXIS 786, at *7, **10. The Arkansas Supreme Court has been certain to make it known that "the requirements of *section 14-56-425 ... include compliance with Inferior Ct. R. 9.*" *Douglas v. City of Cabot*, 347 Ark. 1, 5, 59 S.W.3d 430, 432 (citing *Board of Zoning Adjustment v. Cheek*, 328 Ark. 18, 942 S.W.2d 821 (1977); *Night Clubs, Inc. v. Fort Sith Plann. Comm'n*, 336 Ark. 130, 984 S.W.2d 418 (1999)) (emphasis added). These provisions "are mandatory and jurisdictional." *Green v. City of Jacksonville*, 357 Ark. 517, 521, 182 S.W.3d 124, 126 (2004).

3. Plaintiff has not exhausted its prescribed administrative remedies.

Here, the complaint plainly states Plaintiff has not fully appealed the City's condemnation action; thus, it has not exhausted its administrative remedies. *See Complaint*, ¶¶ 1-2. Yet, "[t]he doctrine of exhaustion of administrative remedies provides that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed statutory administrative remedy has been exhausted." *McGhee v. Arkansas State Board of Collection Agencies*, 368 Ark. 60, 67, 243 S.W.3d 278, 284 (2006) (citing *Old Republic Sur. Co. v.*

McGhee, 360 Ark. 562, 203 S.W.3d 94 (2005); *Arkansas Prof'l Bail Bondsman Licensing Bd. v. Frawley*, 350 Ark. 444, 88 S.W.3d 418 (2002); *Cummings v. Big Mac Mobile Homes, Inc.*, 335 Ark. 216, 980 S.W.2d 550 (1998)). "[I]t is better to pursue administrative remedies to conclusion before resorting to the court system." *Ward v. Priest*, 350 Ark. 345, 357, 86 S.W.3d 884, 890 (2002) (citing *Myers v. Bethlehem Bldg. Corp.*, 303 U.S. 41, 82 L. Ed. 638, 58 S.Ct. 459 (1938)). "Such logic is based on jurisprudential reasoning that supports applying for relief to the proper place first." *Id.* (citing *Ragon v. Great Am. Indem., Co.*, 224 Ark. 387, 273 S.W.2d 524 (1954)). If a party fails to exhaust his or her administrative remedies and/or to properly perfect an appeal of a final administrative decision, his or her complaint will be dismissed because the Court would not have subject matter jurisdiction over the contents of the allegations in the complaint. *Green v. City of Jacksonville*, 357 Ark. 517, 521, 182 S.W.3d 124, 126 (2004); *Douglas v. City of Cabot*, 347 Ark. 1, 5, 59 S.W.3d 430, 432 (2001); *Talley v. City of North Little Rock*, 2009 Ark. 601, 2009 Ark. LEXIS 786, at *7, **10 (2009).

Plaintiff's complaint is devoid of any allegation regarding Plaintiff's exhaustion of any state remedies available to it for the relief from the condemnation. Indeed, the Court need not look any farther than Paragraphs 1 and 2 of Plaintiff's complaint to determine that Plaintiff only just initiated its appeal of the disputed condemnation. Further, this Court should take judicial notice of the fact that Plaintiff failed to request, much less conduct, its Rule 9 hearing prior to the initiation of this lawsuit, or that it ever has made such requests or taken such actions since remand. Consequently, it must be concluded that the complaint is not ripe for adjudication before this Court, or any court, at this time. *Collier v. City of Springdale*, 733 F.2d 1311, 1316 (8th Cir. 1984); *see also McKenzie v. City of White Hall*, 112 F.3d 313, 317 (8th Cir. 1997); *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S.

172, 195 (1985). Accordingly, because Plaintiff has not exhausted its administrative remedies, this complaint should be dismissed as premature.

Clearly, Plaintiff has failed to exhaust its administrative remedies, which are prescribed by Ark. Code Ann. § 14-56-425, Ark. Dist. Ct. R. 9, and Arkansas state and federal jurisprudence. The Plaintiff has a prescribed statutory remedy to address its grievances regarding the North Little Rock City Council's decision: its appeal of the decision to Pulaski County Circuit Court pursuant to Ark. Code Ann. § 14-56-425 and Arkansas District Court Rule 9. However, Plaintiff has no further or additional cause of action against the Defendants regarding the condemnation procedure because Plaintiff has not exhausted its administrative remedies. Nor may it bypass the governing statute and law that states its remedy is its appeal of the decision to Pulaski County Circuit Court.

4. *Plaintiff may not collaterally attack the Council's decision by simultaneously filing its civil rights complaint.*

Plaintiff's simultaneous constitutional allegations, filed in addition to yet as a part of its Ark. Code Ann. § 14-56-425 and Ark. Dist. Ct. R. 9 appeal, amount to an impermissible collateral attack. The United States Supreme Court has stated that "a collateral challenge may not do service for an appeal." *United States v. Frady*, 456 U.S. 152, 165 (1982). "[N]ormally, a collateral attack should not be entertained if defendant failed, for no good reason, to use another available avenue of relief." *Poor Thunder v. United States*, 810 F.2d 817, 823 (8th Cir. 1987) (citing *Kaufman v. United States*, 394 U.S. 217 (1969)); *Reid v. U.S.*, 976 F.2d 446, 447-48 (8th Cir. 1992). Thus, a party may not collaterally attack a governmental body's decision, such as the one in the present case, by simultaneously filing a complaint in addition to the pending administrative appeal, much less an appeal that was never properly perfected or even filed in the first place. *City of Paragould v. Leath*, 266 Ark. 390, 393, 583 S.W.2d 76, 77 (1979); *Talley*,

2009 Ark. 601, 2009 Ark. LEXIS 786, at *8-9, **11-12. This goes both ways; even cities may not collaterally attack final administrative decisions by filing a separate and independent complaint in addition to appealing the decision. *Id.* Certainly, an appealing party "cannot bypass the provision of the [governing] statute which provides that *the remedy is by appeal.*" *Id.* (citing Davis, Administrative Law Treatise, § 18.10) (emphasis added)).

As stated, and demonstrated in the facts Plaintiff alleges in its complaint, the Plaintiff's appeal has yet to be adjudicated. If the Court were to affirm, or overrule, the decision of the City Council, the exhaustion requirement would be met, and Plaintiff could then pursue its numerous federal and state claims. *Talley v. City of North Little Rock*, 2009 Ark. 601, 381 S.W.3d 753 (2009); *Iowa Coal Mining Co. v. Monroe County*, 257 F.3d 846, 849 (8th Cir. 2001). *See also Reiter v. Cooper*, 507 U.S. 258, 269-70 (1993); *Calico Trailer Mfg. Co. v. Insurance Co. of N. Am.*, 155 F.3d 976, 978 (8th Cir. 1998). Thus, Plaintiff's complaint alleging the numerous constitutional violations amounts to a collateral attack of the Council's decision while Plaintiff's appeal already awaits adjudication, and Plaintiff has not sought a hearing for its appeal or obtained a final determination. This is not permissible for the Plaintiff, or even the Defendants, in this case. *See generally Talley v. City of North Little Rock* 2009 Ark. 601, 2009 Ark. LEXIS 786 (2009); *City of Paragould v. Leath*, 266 Ark. 390, 583 S.W.2d 76 (1979); *Poor Thunder v. United States*, 810 F.2d 817, 823. Consequently, Plaintiff's complaint should be dismissed with prejudice for this additional reason.

5. Plaintiff's contention that the record is insufficient is without merit.

Notwithstanding Plaintiff never exhausted its statutorily mandated administrative remedies, Plaintiff's contention that the record is insufficient amounts to a red herring. As stated, the Arkansas Supreme Court applies the rules of Ark. Dist. Ct. R. 9 to condemnation

actions. *See e.g. Ingram v. City of Pine Bluff*, 355 Ark. 129, 133 S.W.3d 382 (2003). Therefore, pursuant to Ark. Dist. Ct. R. 9, either side of an appeal of a condemnation decision of a City Council may supplement the record with additional documents it believes may be necessary to complete the record. Ark. Dist. Ct. R. 9(f)(2)(B). This includes any document that was not included in the record below and that party believes it is necessary to aid a judge or jury in rendering a final determination upon appeal. *Id.* If, in fact, the record is insufficient, either party may supplement accordingly. Additionally, such an appeal is still tried *de novo*. Ark. Code Ann. § 14-56-425(a)(2). Certainly, either side is free at any time to supplement the record prior to final adjudication. *Id.*

Plaintiff's allegation that it is being denied due process by virtue of an incomplete record is misguided. In summary, Plaintiff claims it is being denied due process while receiving due process by virtue of the remedy of *de novo* appeal and the ability to supplement the record at any time. Strangely, Plaintiff refuses to exercise its due process rights to supplement its own record or even exhaust its Ark. Dist. Ct. R. 9 rights by not pursuing its appeal as required by law. And, it bears reiteration that the the City of North Little Rock provides this process. *See e.g. Talley v. City of North Little Rock*, 2009 Ark. 601, 381 S.W.3d 753 (2009). Read altogether, Plaintiff's contention bears no merit.

Therefore, for all of these reasons, it cannot be disputed Plaintiff has exhausted its statutorily mandated administrative remedies. As such, Plaintiff's complaint must be dismissed. Consequently, Plaintiff's remaining allegations are immaterial and by law do not require a response. Nevertheless, to the extent the Court disagrees, Defendants respond in kind to Plaintiff's premature complaint and motion accordingly.

B. The Defendants did not violate Plaintiff's rights.

The Plaintiff's due process rights have not been violated. At all times relevant, the City provided Plaintiff the necessary due process protections. "It is elementary that the due process clause does not prevent a city from taking legal steps to require the correction or, failing that, the elimination of housing which constitute[s] such sanitary or fire hazards as to endanger the health or lives of occupants or persons living in the vicinity." *English v. Town of Huntington*, 448 F.2d 319, 323 (2d Cir. 1971); *see also Traylor v. City of Amarillo*, 492 F.2d 1156 (5th Cir. 1974); *cf. Flatford v. City of Monroe*, 17 F.3d 162 (6th Cir. 1994).

Furthermore, the United State Supreme Court has upheld an ordinance providing for the destruction of an unlawful structure in *Maguire v. Reardon*, 255 U.S. 271, 272-73 (1921). In that case, the plaintiff had erected a structure in violation of the City of San Francisco's fire code. In a model of concise opinion writing, the Court stated that "[t]he challenged ordinance must therefore be treated as affecting an unlawful structure, and as so applied we can find no plausible ground for holding it in conflict with the federal constitution." *Id.* at 273.

1. Plaintiff 's procedural due process allegation should be denied.

The Plaintiff claims that it was denied procedural due process because it was allegedly not given proper notice of the Defendants' actions for the February 23, 2013, City Council meeting. The Plaintiff also claims it was denied the opportunity to be heard. The Fourteenth Amendment of the United States Constitution states that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV. The key to the due process clause is the deprivation of life, liberty, or property without due process of law. Without some type of deprivation, there is no due process violation. Nonetheless, a plaintiff must be given adequate notice and an opportunity to be heard before the deprivation occurs. The two

fundamental elements of due process are notice and the opportunity to be heard, both of which must be granted "at a meaningful time and in a meaningful manner." *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976). The Supreme Court has stated that notice and a pre-deprivation hearing are required of the Due Process Clause before the state may deprive a citizen of their property. *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972).

The opportunity for a hearing must be before the individual has been deprived of their property by the state. Specifically the Eighth Circuit has stated that a notification and an opportunity to be heard after a piece of property has been condemned for safety and health concerns but *before the property is demolished* is all that is required of due process. *Hagen v. Traill County*, 708 F.2d 347 (8th Cir. 1983). Condemning property is not a deprivation of property; razing or removing is. *Pitchford v. City of Earle*, 2007 U.S. Dist. LEXIS 81462, *7-8 (E.D. Ark. 2007), *aff'd*, 320 Fed. Appx. 477 (8th Cir. 2009)); *Heidorf v. Town of Northumberland*, 985 F.Supp. 250, 257 (N.D.N.Y. 1997).[3] Indeed, "[c]ondemning a dilapidated building does not deprive a citizen of property rights – but destroying the building does." *Id.* Therefore, a "city council is not required to give Plaintiff a hearing before concluding that his property is a nuisance – but Plaintiff is entitled to notice and an opportunity to be heard before the city dispatches bulldozers to his property." *Id.* It is undisputed that the City has neither razed nor removed Plaintiff's property; no bulldozers have been dispatched. It is undisputed that the only action taken has been that the North Little Rock City Council, consistent with the powers expressly granted to them by the Arkansas General Assembly, voted to condemn Plaintiff's property as a nuisance because the Council determined in light of the evidence presented that the Plaintiff's property composes a threat to the public health and welfare of the citizens of the City of North Little Rock.

[3] Defendants affirmatively plead for this reason alone, Plaintiff's complaint must be dismissed.

Further, where a plaintiff had notice that "the City intended to condemn the building, there [is] no procedural due process violation." *Samuels v. Meriwether*, 94 F.3d 1163, 1167 (8th Cir. 1996); *see also Mennonite Board of Missions v. Adams*, 462 U.S. 791, 800 (1983) & *Hroch v. City of Omaha* 4 F.3d 693, 696 (8th Cir. 1993). In *Samuels*, the court encountered a similar situation where a City's Board of Directors sought to enforce City ordinances against the plaintiff's property and the City eventually tore down the structures on the Plaintiffs' property. *Id.* There, the Plaintiffs claimed that they did not receive adequate notice of the City's actions or intentions nor was there any communication between them and the City until after the structures had been torn down. *Id.* at 1167. In *Samuels*, the City sent the Samuels notices informing them of their violations of City ordinances, their property was posted with a notice and they attended a hearing in front of the City Board of Directors. The Court concluded that the City acted reasonably because the plaintiffs had actual notice of the Board's intentions from the Board meetings the plaintiffs attended. *Id.* Therefore, because the Samuels had actual notice of the Boards intentions at the Board meetings there was no due process violation. *Id. See also Demming v. Housing and Redevelopment Auth.*, 66 F.3d 950, 954 (8th Cir. 1995) (plaintiff given notice and hearing on termination of employment); *Littlefield v. City of Afton*, 785 F.2d 596 (8th Cir. 1986) (applicants for building permit were given due process as they received notice of and attended hearing at which application was denied); *Marrero-Garcia v. Irizarry*, 33 F.3d 117, 124 (1st Cir. 1994) (prior to termination of water service for nonpayment, condominium residents attended meetings with officials where alternatives were discussed, were informed of how to resolve the situation and given opportunities to be heard).

Fatal to the Plaintiff's claim of a procedural due process violation are the facts Plaintiff provides in its own complaint. First and foremost, Plaintiff establishes it has not exhausted its

own administrative remedies. *See supra*; *Keating v. Nebraska Pub. Power Dist.*, 562 F.3d 923, 929 (8th Cir. 2009) ("Under federal law, a litigant asserting a deprivation of procedural due process must exhaust state remedies before such an allegation states a claim under § 1983.").

Second, Plaintiff concedes it was given notice of the condemnation proceeding and it appeared before the North Little Rock City Council to oppose the condemnation and present its case. *Complaint*, ¶¶ 35, 43, 45. However, the Eighth Circuit has determined that where a property owner is given notice to abate a hazard on his or her property and has been given an opportunity to appear before the municipal body considering condemnation of the property, no due process violation occurs when the municipality determines it is proper to abate the nuisance pursuant to the condemnation notice. *Samuels v. Meriweather*, 94 F.3d 1163, 1167 (8th Cir. 1996); *Hagan v. Traill County*, 708 F.2d 347, 348 (8th Cir. 1983) (upholding legality of destruction of building for failure to abate nuisance after notice and hearing)).

Third, even assuming without conceding that the multiple communications regarding notice of the condemnation proceeding were somehow defective, Plaintiff's concession that opposing counsel appeared on Plaintiff's behalf to oppose the condemnation and present the Plaintiff's case waived any defects. Indeed, "[n]otice ... can be waived without doing violence to the due process clause." *Strick Lease, Inc. v. Juels*, 30 Ark. App. 15, 19, 780 S.W.2d 594, 596 (Ark. App. 1989). Appearance waives notice. *Lancaster v. West*, 319 Ark. 293, 300, 891 S.W.2d 357, 361 (1995). *See also Clark v. State*, 287 Ark. 221, 225, 697 S.W.2d 895, 897 (1985); *Pulaski County v. Commercial National Bank*, 210 Ark. 124, 136-37, 194 S.W.2d 883, 890 (1946) (McFadin, Ed. F. dissenting).

Regardless, the Plaintiff was put on notice that its property is in violation of City ordinances. It was sent notice on November 14, 2012, that the City requested that it clean up its

property. *Brief in Support of Plaintiff's Mtion for Judgment on the Pleadings or, in the alternative, Motion for Summary Judgment*, p. 2, ¶ 1; *Exhibit I, Responses to Interrogatories No. 5, 8, & 19.* It was provided additional notice in January 2013 after Separate Defendant Officer McHenry conducted the lawful search of the structure. *Plaintiff's Exhibit I.* Plaintiff's attorney prepared several pleadings prior to the City Council meeting and presented them to the Council. Further, Plaintiff's attorney during the February 2013 City Council meeting conceded that his client was aware that the City Council was discussing its property at their meeting, giving it ample opportunities to address the City Council about its property at that meeting and every other meeting preceding it since his client was on notice in November 2012. The February 25, 2013, City Council meeting agenda listed Plaintiff's property as business that would be addressed. *Plaintiff's Exhibit Q.* Therefore, in this case, the Plaintiff has had ample time for compliance. Likewise, Plaintiff has had ample notice of the City's intent to enforce its ordinances against its property up to and including demolishing the unsafe structures.

Even more compelling is the fact that Plaintiff has had many opportunities to plead its case before the City Council. The City Council meetings are public, held twice a month and any one may get on the agenda. *Plaintiff's Exhibit Q.* Since November 2012, the Plaintiff's agents failed to personally attend any City Council meetings even though it was aware that the property at issue would ultimately be on the agenda. Plaintiff sent its attorney to speak on its behalf, yet claims it has not had the opportunity to be heard. At the February 2013 City Council meeting, the Plaintiff's attorney made requests of the council on behalf of the Plaintiff. In light of all of this information, the Plaintiff has obviously disregarded the abundant opportunities to be heard.

Indeed, although the Plaintiff claims the City would not give it a building permit to fix the dilapidated property, which Defendants expressly deny, Plaintiff concedes that counsel

appeared on its behalf before the Council refusing to obtain a rehabilitation and building permit absent the City rescinding the condemnation procedure. Plaintiff had multiple opportunities to be heard and was given ample notice the City of North Little Rock was going to, and did, vote to take action against its property, which it did and notwithstanding its property has not been demolished. Based on the above mentioned facts, the Plaintiff has clearly been given notice of the City of North Little Rock's actions, been given ample time to comply with the order to repair the property or raze and remove it, and been given many opportunities to be heard. Therefore, having been given notice of the City's action, time to comply and an opportunity to be heard at a meaningful time and in a meaningful manner before the structure on the property was ordered to be razed and removed, the Plaintiff's claim that it was deprived of its right to procedural due process must fail.

2. Plaintiff's Substantive Due Process Claim Should Be Denied.

The Plaintiff further claims its federal and state rights to substantive due process for the protection of its property were violated through the City of North Little Rock's alleged denial of repair permits. The Plaintiff's attorney conceded at the February 2013 North Little Rock City Council meeting that the Plaintiff refused to enter into a rehabilitation agreement, which includes any repair or building permits, absent the City rescinding its condemnation procedure ever since the Plaintiff was sent notice of code violations on November 14, 2012. Such is an admission by an authorized agent of a party opponent.[4] Further, while Plaintiff states a letter from Mr. Brown in the North Little Rock City Attorney's Office served as the City's denial of a building permit, it is abundantly clear from the plain language of the letter that Mr. Brown was providing his

[4] Likewise, the in-depth discussion of opposing counsel's knowledge of Plaintiff's right to appeal pursuant to Ark. Dist. Ct. R. 9 is also an admission by an authorized agent of a party opponent that Plaintiff was well aware of its right to appeal. Further, the City of North Little Rock provides notice of appeals of condemnation actions. *Plaintiff's Exhibit L*, Sec. 1.9.1; Ark. Code Ann. § 14-56-425; *Talley v. City of North Little Rock, supra.*

interpretation of North Little Rock Municipal Code that obtaining a building permit would require City Council approval because the property had been red-tagged. *Plaintiff's Exhibit E.* That is not a denial of anything. The Plaintiff simply failed to apply for a building permit, and also refused to do so unless City Council rescinded the condemnation action. Plaintiff cannot hold the City hostage and then complain that the City won't cooperate. Consequently, because there can be no denial of a permit without an application or attempt to apply for a permit, the Plaintiff's claim of the denial of substantive due process due to the City's alleged denial of repair permits is without merit.

Furthermore, a city has a duty under its police power to enact regulations in order to protect the city's citizens from public health and safety hazards. *Springfield v. City of Little Rock*, 226 Ark. 462, 464-465, 290 S.W.2d 620, 622 (1956). The Arkansas Supreme Court specifically stated that "[g]enerally there is a duty upon duly constituted municipal authorities to exercise the police power where there is a public need for it, but it is within their sound discretion to determine both the need and the measure to meet it. Courts will not interfere except for abuse of their discretion..." *Id.* at 465. The Court further goes on to state that "[o]ne of the most important fields of legislation that may be enacted under the police power is that of regulations in the interest of public health." *Id.* The challenged condemnation clearly fits within a municipal regulation aimed at protecting the health and safety of the City's citizens; the United States Supreme Court outright recognizes this state-delegated power for cities in the State of Arkansas to exercise in furtherance of the public health and welfare. *See Reinman v. City of Little Rock*, 237 U.S. 171 (1915).

Here, notwithstanding Plaintiff has yet to exhaust its administrative remedies to obtain a verdict from a trial *de novo* so as to constitute a final adjudication, Plaintiff concedes its property

was damaged and states it was vandalized. The neighboring community, represented by the Meadow Park Neighborhood Association, had complained to at least one alderman, Alderman Robinson, about the structure, how it had been neglected and in disrepair for a period of time, and indicated that it was concerned that vagrants and homeless people had been using it. *Plaintiff's Exhibit F, Response to Interrogatory No. 2.* And, as Officer McHenry noted as she lawfully conducted a search of the structure:

> Upon entering the premises, we announced our presence as Code Enforcement Officers in the event that there were vagrants inside because we suspected they may be present due to the substantial holes in and on top of the building and because of complaints from the Neighborhood Association. We then posted the search warrant at the front of the premises at the front entrance area and took a photograph of it. We documented the violations by photograph. We noted collapsing ceilings as we entered the premises. We noted the structure was full of water from defective roof material and from multiple holes in the roof. We noted the ceiling was damaged throughout the structure. We noted mold and mildew throughout the structure. We noticed collapsing ceiling joints. As we progressed, it appeared the structure had been vandalized because sinks had been taken from the wall and broken apart, debris had been thrown around the interior of the premises, and desks had been overturned and papers scattered in the office area. The structure appeared to have sustained fire damage because of charred rooms, wood, and sheet rock. When we went upstairs, the floors were extremely weak and failing. There were also holes in the floors. The ceiling, walls, and floors were all collapsing throughout the second floor. There was also mold and mildew on the second floor. We noted a rodent infestation throughout the building. After we finished the interior inspection, we exited the structure and secured the building by placing the loose board back in front of the front door and nailing both sides of it to ensure it would stay secure. Then we left the premises.

Plaintiff's Exhibit I, Response to Interrogatory No. 8. The status of the property was not limited to merely "clutter." This was a danger to the community and people could be hurt. It suffices to say the property was an unsanitary building injurious to the public health and welfare of the citizens of the City of North Little Rock and City Council exercised the state-delegated authority

to exercise condemnation in favor of protection the public health and welfare from the nuisance Plaintiff created. Passing the resolution was a legitimate legislative exercise of the City's police power that was rationally related to the City's goal of nuisance abatement and its inherent duty to protect and promote the public health and welfare. Further, this demonstrates the existence of a material fact in dispute and precludes judgment in favor of Plaintiff in regards to this allegation.

C. Plaintiff's civil conspiracy allegation has no merit.

The Separate City Defendants did not conspire against the Plaintiff. A civil conspiracy occurs when two or more persons combine with each other to accomplish an unlawful or oppressive purpose so as to cause injury or harm to another. *Mason v. Funderburk*, 247 Ark. 521, 529 (1969) (citing *Southwestern Publishing Co. v. Ney*, 227 Ark. 852 (1957)). Similarly, a conspiracy may also occur when parties use unlawful, oppressive, and/or immoral means to accomplish a legitimate purpose. *Id.* Because civil conspiracies are intentional torts, there *must* be specific intent in order to accomplish the contemplated wrong. *Faulkner v. Arkansas Children's Hosp.*, 347 Ark. 941, 961 (2002) (citing *Chambers v. Stern*, 347 Ark. 395 (2002); *Dodson v. Allstate Ins. Co.*, 345 Ark. 430 (2001)). Further, a "corporation cannot conspire with itself." *Faulkner v. Arkansas Children's Hosp.*, 347 Ark. 941, 962, 69 S.W.3d 393, 407 (2002). This effecitvely "defeats the requirement of a combination of two or more persons acting to accomplish some unlawful or oppressive purpose." *Id.* (citing *Dodson v. Allstate Ins. Co.*, 345 Ark. 430, 445, 47 S.W.3d 866, 876 (2001)). And corporate agents may "not be held liable for civil conspiracy in the absence of evidence showing that they were acting for their own personal benefit rather than for the benefit of the corporation." *Id.*

Plaintiff is unable to provide any direct or indirect evidence to prove its allegation of a civil conspiracy. No undisputed material facts are presented that show the existence of any

conspiracy or meeting of the minds. It was recommended that the property be condemned based on an interior and exterior inspection of the building. The red-tagging procedure permitted Plaintiff to clean up the building of its own accord. Plaintiff was not prevented from utilizing the building that clearly wasn't being utilized. Neither Officer McHenry nor Mr. Wadley refused to permit Plaintiff to make repairs. Nor did either fail or refuse to provide a list of violations. Plaintiff was provided with a list of exterior violations and has refused to meet with City officials to create a rehabilitation plan to determine a list of interior violations. The Mayor sponsored the resolution because that is simply how the legislative process works, and does not exercise a vote except in special circumstances such as a tiebreaker or in the event quorum may be lacking. As demonstrated, each aldermen exercised their independent judgment in determining whether or not to exercise their state-delegated authority to condemn the property. And, Plaintiff was provided a hearing with sufficient notice and ample opportunity to be heard. Taken as a whole, this is entirely insufficient to prove the existence of a civil conspiracy, and such logic would seemingly indicate every single piece of legislation in the history of the legislative process for the City of North Little Rock, or any other city in this regard, would amount to a conspiracy.

Furthermore, as established above, the Separate City Defendants rightfully voted to condemn the property to attempt to defend the City and its inhabitants from the nuisance Plaintiff created. Therefore, Plaintiff cannot establish that the Separate City Defendants caused it harm or that they were engaged in unlawful, oppressive, and/or immoral means for a legitimate purpose. Nor can the City conspire with itself. Plaintiff's arguments are contrary to Judge Holmes' previous ruling on civil conspiracy charges against municipal officials, even elected officials. *Leaphart v. Williamson*, 850 F.Supp. 2d 956, 960-61 (E.D. Ark. 2012). Moreover, the Mayor and all of the Aldermen are entitled to absolute legislative immunity in their individual

capacities, which includes immunity from any and all allegations of civil conspiracy. *Runs After v. United States*, 766 F.2d 347, 354-55 (8th Cir. 1985). Or, in the alternative, they are entitled to qualified immunity. And the remaining Separate City Defendants Officer McHenry and Mr. Wadley are entitled to qualified immunity. Summary judgment should be denied as to Plaintiff's allegation of a civil conspiracy.

D. <u>All Aldermen and Mayor Smith are entitled to absolute legislative immunity from Plaintiff's federal allegations</u>.

The Defendants maintain all of the Aldermen and Mayor Smith are entitled to absolute legislative immunity for their actions in voting on an issue that came before them during a Council meeting, consistent with the powers granted them by the Arkansas General Assembly. Absolute legislative immunity applies to local legislators and municipal officials who exercise their authority to vote on, and act pursuant to, a condemnation procedure in regards to federal allegations filed against them.

1. All North Little Rock Aldermen are entitled to absolute legislative immunity.

"The doctrine of absolute legislative immunity recognizes that when acting collectively to pursue a view of the public good through legislation, legislators must be free to represent their constituents 'without fear of outside interference' that would result in private lawsuits." *Biblia Abierta v. Banks*, 129 F.3d 899, 903 (7th Cir. 1997) (citation omitted). In furtherance of this goal, the doctrine of absolute legislative immunity is broad. *See National Ass'n of Workers v. Harwood*, 69 F.3d 622, 634 (1st Cir. 1995) (observing the absolute legislative immunity doctrine has a "broad sweep."); *Sable v. Myers*, 563 F.3d 1120, 1125 (10th Cir. 2009) ("This circuit has has followed the Supreme Court's broad view of legislative immunity."). This defense should be determined as early as possible. *Cf. Saucier v. Katz*, 533 U.S. 194, 200-01 (2001).

"Most evidently ... the act of voting for an ordinance [is], in form, quintessentially legislative." *Bogan v. Scott-Harris*, 523 U.S. 44, 55 (1998). This constitutes "an exercise of legislative decision-making." *Hernandez v. City of Lafayette*, 643 F.2d 1188, 1194 (5th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982). Thus, "passing an ordinance is a legislative act." *Leapheart v. Williamson*, 705 F.3d 310, 313 (8th Cir. 2013). Or, in other words, a legislative act is one on which a governmental body votes. *Espanola Way Corp. v. Mayerson*, 690 F.2d 827, 829 (11th Cir. 1982), *cert. denied*, 460 U.S. 1039 (1983). Indeed, acts such as voting for an ordinance, introducing a budget, and signing into law an ordinance, even by an executive official, are legislative in nature. *Bogan*, 523 U.S. at 55. Certainly, "*legislative acts include, among other things, voting on legislation, resolutions, and ordinances.*" *Borde v. Board of County Commissioners*, 423 Fed. Appx. 798, 801 (10th Cir. 2011) (citing *Bogan* and *Sable, supra*) (emphasis added).

Further, "*Bogan* ... holds that state and local officials may not be mulcted under § 1983 on account of introducing, voting for, or signing legislation." *Nisenbaum v. Milwaukee County*, 333 F.3d 804, 808 (7th Cir. 2003). Therefore, local legislators are entitled to absolute legislative immunity for numerous activities, including but not limited to "(1) core legislative acts such as introducing, debating, and voting on legislation; (2) activities that could not give rise to liability without inquiry into legislative act and the motives behind them; and (3) activities essential to facilitating or preventing the core legislative process." *Biblia Abierta v. Banks*, 129 F.3d 899, 903. This is essential to the legislative process and a democratic society because "a private civil action, *whether for an injunction or damages*, creates a distraction and forces legislators to divert their time, energy, and attention from their legislative tasks to defend the litigation." *Sup. Ct. of*

Va. v. Consumers Union of the U.S., Inc., 446 U.S. 719, 733 (1980) (quoting *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 503 (1975)) (emphasis added).

Indeed, "[i]mmunity from civil liability encourages legislators to act independently in the interest of the public good without fear of outside interference from those who may be adversely affected by the legislation." *W. Birkenfeld Trust v. Bailey*, 827 F.Supp. 651, 661 (E.D. Wash. 1993). The exercise of legislative discretion should not be inhibited by judicial interference or distorted by the fear of personal liability. *Spallone v. United States*, 493 U.S. 265, 279 (1990) (noting, in the context of addressing local legislative action, that "any restriction on a legislator's freedom undermines the 'public good' by interfering with the rights of the people to representation in the democratic process"). Furthermore, the time and energy required to defend against a lawsuit are of particular concern at the local level, where the part-time citizen-legislator remains commonplace. *See Tenney v. Brandhove*, 341 U.S. 367, 376 (1951).

And, ordinarily, because municipal corporations have been delegated legislative authority only within strictly defined limits, "[i]t is only with respect to the legislative powers delegated to them by the state legislatures that the members of governing boards of municipal corporations enjoy [absolute] legislative immunity." *Abraham v. Pekarski*, 728 F.2d 167, 174 (3d Cir. 1984). "[C]ondemnation is a constitutional concession, to be exercised under appropriate *legislative* sanction." *Nahay v. Arkansas Irr. Co.*, 209 Ark. 247, 252 (1945) (emphasis added). The power of condemnation is a power inherently invested with the State of Arkansas. And, the Arkansas General Assembly has expressly delegated this authority to the City of North Little Rock. Ark. Code Ann. § 14-56-203.

Therefore, it reasonably follows that local legislators who exercise their state-delegated power to condemn property entitles them to absolute legislative immunity. *Sable v. Myers*, 563

F.3d 1120, 1126-27 (10th Cir. 2009); *Kickapoo Tribe of Indians of the Kickapoo Reservation in Kan. v. Black*, 2012 U.S. Dist. LEXIS 72076, *10-11 (D. Kan. 2012); *Russell v. Town of Buena Vista*, 2011 U.S. Dist. LEXIS 156912, *13 (D. Colo. 2011). *See also Price v. Town of Atlantic Beach*, 2013 U.S. Dist. LEXIS 158856, *12-18 (D.S.C. 2013) (Town councilmen's conduct passing ordinance and convening property maintenance board to determine whether or not to condemn property "is legislative in its scope and action."); *cf. Gand Canyon Skywalk Dev't, LLC, v. The Hualapai Indian Tribe of Arizona*, 2013 U.S. Dist. LEXIS 117857, *25-26 (D. Ariz. 2013). Indeed, a local legislator voting to exercise the discretion to exercise the state-delegated authority of condemnation is protected by legislative immunity because it is "undoubtedly an exercise of discretion regarding a matter of public policy," and otherwise involves the formalities of legislative action–namely, "formal votes." *Sable*, F.3d at 1126; *Russell v. Town of Buena Vista*, 2011 U.S. Dist. LEXIS 156912, *13 (D. Colo. 2011).

The individual aldermen of the North Little Rock City Council acted in a legislative capacity in exercising their individual discretion to proceed with the state-delegated condemnation action against the property. Thus, they are entitled to absolute legislative immunity and dismissal in their individual capacities.

2. Mayor Smith is entitled to absolute legislative immunity.

Furthermore, Mayor Smith's actions in introducing legislation, and subsequently signing it upon City Council approval, entitle him to absolute legislative immunity as well. Executive officials outside the legislative branch, including municipal officials, are entitled to legislative immunity when they perform legislative functions. *Supreme Court of Va. v. Consumers Union of United States, Inc.*, 446 U.S. 719, 731-34 (1980); *Gorman Towers Inc. v. Bogoslavsky*, 626 F.2d 607, 613-14 (8th Cir. 1980). "Introducing a bill is 'quintessentially legislative'" and entitles

Slagle, 240 F.Supp.2d at 934 (quoting *Greiner v. City of Camplin*, 27 F.3d 1346, 1351-52 (8th Cir. 1994) (quoting *Hunter v. Bryant*, 502 U.S. 224, 228 (1991)). "[Q]ualified immunity provides immunity from suit rather than a mere defense to liability, and ... is effectively lost if a case is erroneously permitted to go to trial." *Brown v. Nix*, 33 F.3d 951, 953 (8th Cir. 1994) (citations and internal quotations omitted). This is designed to "protect officials from the disruptions of going to trial as well as from liability for money damages ... [i]t is important for public officials to be shielded from the burden of trial on insubstantial claims." *Wright v. South Arkansas Regional Health Center, Inc.*, 800 F.2d 199, 202-03 (8th Cir. 1986). The Court should rule on this defense "at the earliest possible time." *Id.*

"[T]he purpose of the qualified immunity doctrine is to provide ample room for mistaken judgments and to protect all but the plainly incompetent or those who knowingly violate the law." *Frye v. Kansas City Missouri Police Dept.*, 375 F.3d 785, 789 (8th Cir. 2004) (quoting *Habiger v. City of Fargo*, 80 F.3d 289, 297 (8th Cir. 1996)). "Officials are not liable for bad guesses in gray areas; they are liable for transgressing bright lines." *Davis v. Hall*, 375 F.3d 703, 711 (8th Cir. 2004). Public officials are entitled to qualified immunity, even assuming a constitutional violation occurred, if their conduct does not violate clearly established statutory or constitutional rights that a reasonable officer would have known. *McCaslin v. Wilkins*, 183 F.3d 775, 778 (8th Cir. 1998) (quoting *Harlow v. Fitzgeral*, 457 U.S. 800, 818 (1982)). In order to withstand the assertion of qualified immunity as a defense, "a plaintiff must (1) assert a violation of a constitutional right; (2) demonstrate that the alleged right is clearly established; and (3) raise a genuine issue of fact as to whether the government official knew or should have known that his alleged conduct violated this clearly established right." *Radloff v. City of Oelwein, Iowa*, 380 F.3d 344, 347 (8th Cir. 2004) (quoting *Habinger v. City of Fargo*, 80 F.3d 289, 295 (8th Cir.

Respectfully submitted,

CITY OF NORTH LITTLE ROCK, ARKANSAS, a Municipal Corporation, JOE SMITH, Mayor, Individually and in his Official Capacity, City Council Members DEBI ROSS, BETH WHITE, LINDA ROBINSON, MAURICE TAYLOR, STEVE BAXTER, BRUCE FOUTCH, MURRY WITCHER, and CHARLIE HIGHT, each Individually and in his or her Official Capacity, TOM WADLEY, Director, Code Enforcement Division, Individually and in his Official Capacity, and FELECIA MCHENRY, Code Enforcement Officer, Individually and in her Official Capacity
Defendants

By: /s/ Daniel L. McFadden, ABA #2011035
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CERTIFICATE OF SERVICE

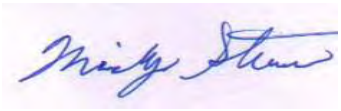
I, Daniel L. McFadden, do hereby certify that a copy of the foregoing pleading was served upon all interested parties by means of electronically filing through AOC/eflex, and/or by U.S. mail, postage prepaid, on this 9th day of June, 2014, addressed to:

Mr. Mickey Stevens
Attorney for Plaintiff
P.O. Box 1295
Benton, AR 72018

/s/ Daniel L. McFadden, ABA #2011035

CERTIFICATE OF SERVICES

I hereby certify that I served a copy of Appellant's Addendum by personal delivery to Marie Bernarde Miller, Deputy City Attorney, North Little Rock, Arkansas on this _____dayof _____, 2020. A copy has also been delivered to the Circuit Court on the same date.



Mickey Stevens

IN THE
SUPREME COURT OF ARKANSAS

CONVENT CORPORATION, Individually and on Behalf of all Others Similarly Situated	**APPELLANT**
v.	**NO. CV-20-216**
CITY OF NORTH LITTLE ROCK ARKANSAS, a Municipal Corporation, JOE SMITH, Mayor, Individually and in his Official Capacity, City Council Members DEBI ROSS, BETH WHITE, LINDA ROBINSON, MAURICE TAYLOR, STEVE BAXTER, BRUCE FOUTCH, MURRY WITCHER, and CHARLIE HIGHT, each Individually and in his or her Official Capacity, TOM WADLEY, Director, Code Enforcement Division, Individually and in his Official Capacity, and FELECIA MCHENRY, Code Enforcement Officer, Individually and in her Official Capacity	**APPELLEES**

ON APPEAL FROM THE CIRCUIT COURT
OF PULASKI COUNTY

THE HONORABLE ALICE GRAY, CIRCUIT JUDGE

APPELLANT'S ADDENDUM

Vol. 3 of 5

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Volume II

Volume III

**Note: The record prior to this point was initially prepared for a prior appeal. The record page references from this point forward are from the additional record prepared for the second appeal (pt. 2).*

Volume IV

**Note: The record page references from this point forward are from the additional record prepared for this appeal (pt. 3).*

Volume V

The following are from the first part of the record.

The following is from the third part of the record.

IN THE CIRCUIT COURT OF PULASKI COUNTY
TWELFTH DIVISION

CONVENT COPRORATION,
Individually and on Behalf of all
Others Similarly Situated **PLAINTIFF**

v. **CASE NO. 60CV-13-1398**

CITY OF NORTH LITTLE ROCK, ARKANSAS, a Municipal Corporation, JOE SMITH, Mayor, Individually and in his Official Capacity, City Council Members DEBI ROSS, BETH WHITE, LINDA ROBINSON, MAURICE TAYLOR, STEVE BAXTER, BRUCE FOUTCH, MURRY WITCHER, and CHARLIE HIGHT each Individually and in his or her Official Capacity, TOM WADLEY, Director, Code Enforcement Division, Individually and in his Official Capacity, and FELECIA MCHENRY, Code Enforcement Officer, Individually and in her Official Capacity **DEFENDANTS**

AMENDED ANSWER

COMES NOW Defendants, by and through their attorney, Assistant City Attorney Daniel L. McFadden, and for their Amended Answer, state:

1. Defendants admit Plaintiff states it appeals the North Little Rock City Council's decision to condemn certain property located at 6615 Highway 70 in North Little Rock, Pulaski County, Arkansas, in Paragraph 1 of Plaintiff's Complaint.

2. Defendants admit Plaintiff states his causes of action in Paragraph 2 of Plaintiff Complaint, and deny any and all allegations of wrongdoing.

3. Defendants admit Plaintiff states it seeks declaratory judgment in Paragraph 3 of Plaintiff's Complaint, and deny any and all allegations of wrongdoing.

4. Defendants admit Plaintiff states it seeks injunction in Paragraph 4 of Plaintiff's Complaint, and deny any and all allegations of wrongdoing.

5. Defendants admit Plaintiff states it seeks injunction in Paragraph 5 of Plaintiff's Complaint, and deny any and all allegations of wrongdoing.

6. Defendants admit Paragraph 6 of Plaintiff's Complaint.

7. Defendants admit Paragraph 7 of Plaintiff's Complaint.

8. Defendants admit Paragraph 8 of Plaintiff's Complaint.[1]

9. Defendants admit Paragraph 9 of Plaintiff's Complaint.

10. Defendants admit Felecia McHenry is a Code Enforcement Officer employed in the City's Code Enforcement Division. Defendants deny the remaining allegations contained in Paragraph 10 of Plaintiff's Complaint.

11. Defendants admit Plaintiff seeks class action status in Paragraph 11 of Plaintiff's Complaint and deny that a class should be certified.

12. Defendants deny the allegations contained in Paragraph 12 of Plaintiff's Complaint and deny that a class should be certified.

13. Defendants deny the allegations contained in Paragraph 13 of Plaintiff's Complaint and deny that a class should be certified.

14. Defendants deny the allegations contained in Paragraph 14 of Plaintiff's Complaint and deny that a class should be certified.

15. Defendants deny the allegations contained in Paragraph 15 of Plaintiff's Complaint and deny that a class should be certified.

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[1] Defendants acknowledge Mayor Joe Smith has been listed as a party in the heading to this Complaint, but is absent as a party listed under the heading "THE PARTIES" beginning on Page 2 of Plaintiff's Complaint, starting on Paragraph 6, and ending on Paragraph 10.

16. Defendants deny the allegations contained in Paragraph 16 of Plaintiff's Complaint and deny that a class should be certified.

17. Defendants deny the allegations contained in Paragraph 17 of Plaintiff's Complaint.

18. Defendants deny Paragraph 18 of Plaintiff's Complaint.

19. Defendants deny Paragraph 19 of Plaintiff's Complaint.

20. Defendants admit Paragraph 20 of Plaintiff's Complaint.

21. Defendants admit Paragraph 21 of Plaintiff's Complaint.

22. Defendants are without sufficient information or knowledge to admit or deny the allegations contained in Paragraph 22 of Plaintiff's Complaint and therefore deny same.

23. Defendants deny the allegations contained in Paragraph 23 of Plaintiff's Complaint.

24. Defendants deny the allegations contained in Paragraph 24 of Plaintiff's Complaint.

25. Defendants deny the allegations contained in Paragraph 25 of Plaintiff's Complaint.

26. Defendants deny the allegations contained in Paragraph 26 of Plaintiff's Complaint.

27. Defendants deny the allegations contained in Paragraph 27 of Plaintiff's Complaint.

28. Defendants deny the allegations contained in Paragraph 28 of Plaintiff's Complaint.

29. Defendants deny the characterization of the allegations contained in Paragraph 29 of Plaintiff's Complaint, and therefore deny same and deny any and all allegations of wrongdoing in Paragraph 29 of Plaintiff's Complaint.

30. With respect to the allegations contained in Paragraph 30 of Plaintiff's Complaint, Defendants maintain Arkansas District Court Rule 9 speaks for itself and respectfully refer this Court to Arkansas District Court Rule 9 for the contents thereof. Defendants deny the remaining allegations contained in Paragraph 30 of Plaintiff's Complaint and deny any and allegations of wrongdoing in Paragraph 30 of Plaintiff's Complaint.

31. Defendants deny the allegations contained in Paragraph 31 of Plaintiff's Complaint.

32. Defendants admit the City entered into an agreement with the business owner in 2011. Defendants deny the characterization of the remaining allegations contained in Paragraph 32 of Plaintiff's Complaint and therefore deny same.

33. Defendants are without sufficient knowledge to admit or deny the allegations contained in Paragraph 33 of Plaintiff's Complaint and therefore deny same.

34. Defendants are without sufficient knowledge to admit or deny the allegations contained in Paragraph 34 of Plaintiff's Complaint and therefore deny same.

35. Defendants are without sufficient knowledge to admit or deny the allegations contained in Paragraph 35 of Plaintiff's Complaint and therefore deny same.

36. Defendants maintain Chapter 8, Article 1, section 3, paragraph 1 (1.3.1) of the City's Code speaks for itself and respectfully refer this Court to Chapter 8, Article 1, section 3, paragraph 1 (1.3.1), attached as Plaintiff Exhibit C, for the contents thereof. Defendants deny any and all allegations of wrongdoing in Paragraph 36 of Plaintiff's Complaint.

37. Defendants admit Richard Livdahl contacted the City and scheduled a meeting. Defendants are without sufficient knowledge to admit or deny the remaining allegations in Paragraph 37 of Plaintiff's Complaint and therefore deny same.

38. Defendants maintain Plaintiff's interpretation of municipal code states a conclusion of law not requiring a response. To the extent a response is required, Defendants deny same. Defendants deny the characterization of the allegations contained in Paragraph 38 of Plaintiff's Complaint and therefore deny same. Defendants deny any and all allegations of wrongdoing in Paragraph 38 of Plaintiff's Complaint. Defendants affirmatively plead Officer McHenry contacted Richard Livdahl prior to requesting an administrative search warrant.

39. Defendants admit the property was red-tagged pursuant to code violations. Defendants deny the remaining allegations contained in Paragraph 39 of Plaintiff's Complaint. Defendants deny any and all allegations of wrongdoing in Paragraph 39 of Plaintiff's Complaint.

40. Defendants admit Mr. Livdahl met with Mr. Wadley and Mr. Brown. Defendants deny the remaining allegations contained in Paragraph 40 of Plaintiff's Complaint.

41. Defendants submit the contents of the letter from William Brown to R.C. Livdahl speak for themselves and respectfully refer the Court to the letter, attached as Plaintiff Exhibit E, for the contents thereof. Defendants deny the characterization of the remaining allegations contained in Paragraph 41 of Plaintiff's Complaint and therefore deny same. Defendants deny any and all allegations of wrongdoing in Paragraph 41 of Plaintiff's Complaint.

42. Defendants are without sufficient knowledge to admit or deny the allegations contained in Paragraph 42 of Plaintiff's Complaint and therefore deny same.

43. Defendants admit Plaintiff was notified of the proposed resolution to condemn the property and that it would be placed for a vote of the North Little Rock City Council on February

25, 2013. Defendants deny the remaining allegations contained in Paragraph 43 of Plaintiff's Complaint.

44. Defendants are without sufficient knowledge to admit or deny the allegations contained in Paragraph 44 of Plaintiff's Complaint and therefore deny same. Defendants deny any and all allegations of wrongdoing in Paragraph 44 of Plaintiff's Complaint.

45. Defendants admit Plaintiff's counsel appeared before the North Little Rock City Council. Defendants admit Mayor Smith stated the City Council is not a judicial body. Defendants deny the remaining allegations contained in Paragraph 45 of Plaintiff's Complaint. Defendants affirmatively plead Mayor Smith's statement was made pursuant to the advice of counsel from the North Little Rock City Attorney's Office. Defendants affirmatively plead Plaintiff's counsel was provided a hearing that lased substantially longer than three minutes.

46. Defendants admit an alderman asked counsel for Convent about plans for future use of the property. Defendants are without sufficient knowledge to admit or deny the remaining allegations contained in Paragraph 46 of Plaintiff's Complaint and therefore deny same. Defendants deny any and all allegations of wrongdoing in Paragraph 46 of Plaintiff's Complaint.

47. Defendants deny the characterization of the allegations contained in Paragraph 47 of Plaintiff's Complaint and therefore deny same.

48. Defendants deny the characterization of the allegations contained in Paragraph 48 of Plaintiff's Complaint and therefore deny same. Defendants deny any and all allegations of wrongdoing in Paragraph 48 of Plaintiff's Complaint.

49. Defendants maintain Chapter 8, Article 1, section 6, paragraph 1 of the City's Code speaks for itself and respectfully refer the Court to Chapter 8, Article 1, section 6, paragraph 1 of the City's Code, attached as Plaintiff Exhibit D, for the contents thereof.

Defendants are without sufficient knowledge to admit or deny the remaining allegations contained in Paragraph 49 of Plaintiff's Complaint and therefore deny same. Defendants deny any and all allegations of wrongdoing in Paragraph 49 of Plaintiff's Complaint.

50. Defendants admit Mayor Smith sponsored and signed the resolution condemning the property subject to this suit, and presided over the proceeding. Defendants maintain the remaining allegations contained in Paragraph 50 of Plaintiff's Complaint state conclusions of law not requiring a response. To the extent a response is required, Defendants deny same. Defendants deny any and all allegations of wrongdoing in Paragraph 50 of Plaintiff's Complaint. Defendants affirmatively plead Plaintiff's counsel was provided a hearing that lasted substantially longer than three minutes.

51. Defendants deny Paragraph 51 of Plaintiff's Complaint.

52. Defendants deny Plaintiff has been treated differently than other similarly situated property owners. Defendants deny Plaintiff's alleged treatment was motivated by Defendant's exercise of free expression. Defendants are without sufficient knowledge to admit or deny the remaining allegations contained in Paragraph 52 of Plaintiff's Complaint and therefore deny same. Defendants deny any and all allegations of wrongdoing in Paragraph 52 of Plaintiff's Complaint.

53. With respect to the allegations of Paragraph 53, Defendants incorporate by reference herein their responses to Paragraphs 1 through 52 of Plaintiff's Complaint, as if set forth word-for-word.

54. Defendants maintain Paragraph 54 of Plaintiff's Complaint states a conclusion of law not requiring a response. To the extent a response is required, Defendants deny same. Defendants deny any allegation of wrongdoing in Paragraph 54 of Plaintiff's Complaint.

55. Defendants maintain that Ark. Const. Art. 2, §§ 2, 22, speak for themselves and respectfully refer the Court to Ark Const. Art. 2, §§ 2, 22, for the contents thereof. Defendants deny any and all allegations of wrongdoing in Paragraph 55 of Plaintiff's Complaint.

56. Defendants maintain Paragraph 56 of Plaintiff's Complaint states a conclusion of law not requiring a response. To the extent a response is required, Defendants deny same. Defendants deny any and all allegations of wrongdoing in Paragraph 56 of Plaintiff's Complaint.

57. Defendants maintain Paragraph 57 of Plaintiff's Complaint states a conclusion of law not requiring a response. To the extent a response is required, Defendants deny same. Defendants deny any and all allegations of wrongdoing in Paragraph 57 of Plaintiff's Complaint.

58. Defendants deny the allegations contained in Paragraph 58 of Plaintiff's Complaint.

59. Defendants are without sufficient knowledge to admit or deny the allegations contained in Paragraph 59 of Plaintiff's Complaint and therefore deny same. Defendants deny any and all allegations of wrongdoing in Paragraph 59 of Plaintiff's Complaint.

60. Defendants deny Paragraph 60 of Plaintiff's Complaint. Defendants deny any and all allegations of wrongdoing in Paragraph 60 of Plaintiff's Complaint.

61. Defendants maintain Paragraph 61 of Plaintiff's Complaint states a conclusion of law not requiring a response. To the extent a response is required, Defendants deny same. Defendants deny any and all allegations of wrongdoing in Paragraph 61 of Plaintiff's Complaint.

62. Defendants deny the characterization of the allegations contained in Paragraph 62 of Plaintiff's Complaint and therefore deny same. Defendants deny any and all allegations of wrongdoing in Paragraph 62 of Plaintiff's Complaint.

63. Defendants admit the City Council voted to approve the resolution condemning Plaintiff's property. Defendants are without sufficient knowledge to admit or deny the remaining allegations contained in Paragraph 63 of Plaintiff's Complaint and therefore deny same. Defendants deny any and all allegations of wrongdoing in Paragraph 63 of Plaintiff's Complaint. Defendants affirmatively plead Plaintiff was afforded a hearing where its counsel presented its case for substantially longer than three minutes.

64. Defendants admit the Mayor sponsored the proposed resolution and presided over the proceedings. Defendants deny the remaining allegations contained in Paragraph 64 of Plaintiff's Complaint.

65. Defendants deny Paragraph 65 of Plaintiff's Complaint.

66. Defendants maintain Paragraph 66 of Plaintiff's Complaint states a legal conclusion not requiring a response. To the extent a response is required, Defendants deny same. Defendants deny any and all allegations of wrongdoing in Paragraph 66 of Plaintiff's Complaint.

67. Defendants deny Paragraph 67 of Plaintiff's Complaint.

68. Defendants deny Paragraph 68 of Plaintiff's Complaint.

69. Defendants deny Paragraph 69 of Plaintiff's Complaint.

70. Defendants deny Paragraph 70 of Plaintiff's Complaint.

71. Defendants deny Paragraph 71 of Plaintiff's Complaint.

72. Defendants deny Paragraph 72 of Plaintiff's Complaint.

73. With respect to the allegations of Paragraph 73, Defendants incorporate by reference herein their responses to Paragraphs 1 through 72 of Plaintiff's Complaint, as if set forth word-for-word.

74. Defendants maintain the Fifth and Fourteenth Amendments to the U.S. Constitution and Article 2, §§ 2, 22, of the Arkansas Constitution speak for themselves and respectfully refer the Court to said Amendments and sections for the contents thereof. Defendants deny any and all allegations of wrongdoing in Paragraph 74 of Plaintiff's Complaint.

75. Defendants maintain that Ark. Const. Art. 2, §§ 2, 22, speak for themselves and respectfully refer the Court to Ark Const. Art. 2, §§ 2, 22, for the contents thereof. Defendants deny any and all allegations of wrongdoing in Paragraph 55 of Plaintiff's Complaint.

76. Defendants maintain Paragraph 76 of Plaintiff's Complaint states a legal conclusion not requiring a response. To the extent a response is required, Defendants deny same. Defendants deny any and all allegations of wrongdoing in Paragraph 76 of Plaintiff's Complaint.

77. Defendants deny Paragraph 77 of Plaintiff's Complaint.

78. Defendants deny Paragraph 78 of Plaintiff's Complaint.

79. Defendants deny Paragraph 79 of Plaintiff's Complaint.

80. Defendants maintain Paragraph 80 of Plaintiff's Complaint states a legal conclusion not requiring a response. To the extent a response is required, Defendants deny same. Defendants deny any and all allegations of wrongdoing in Paragraph 80 of Plaintiff's Complaint.

81. Defendants deny Paragraph 81 of Plaintiff's Complaint.

82. Defendants deny Paragraph 82 of Plaintiff's Complaint.

83. Defendants deny Paragraph 83 of Plaintiff's Complaint.

84. Defendants deny Paragraph 84 of Plaintiff's Complaint.

85. Defendants deny Paragraph 85 of Plaintiff's Complaint.

86. With respect to the allegations of Paragraph 86, Defendants incorporate by reference herein their responses to Paragraphs 1 through 85 of Plaintiff's Complaint, as if set forth word-for-word.

87. Defendants maintain that the Fourth Amendment to the U.S. Constitution and Article 2, Section 15 of the Arkansas Constitution speak for themselves and respectfully refer this Court to said law for the contents thereof. Defendants deny any and all allegations of wrongdoing in Paragraph 87 of Plaintiff's Complaint.

88. Defendants deny Paragraph 88 of Plaintiff's Complaint. Defendants affirmatively plead Separate Defendant Officer McHenry contacted Richard Livdahl prior to seeking and obtaining an administrative search warrant. Separate Defendants affirmatively plead Richard Livdahl informed Officer McHenry he had no means for her to access the structure. Defendants affirmatively plead Plaintiff's prior permission was not required prior to requesting an administrative search warrant from a neutral and detached magistrate.

89. Defendants deny Paragraph 89 of Plaintiff's Complaint. Defendants affirmatively plead Separate Defendant Officer McHenry contacted Richard Livdahl prior to seeking and obtaining an administrative search warrant. Separate Defendants affirmatively plead Richard Livdahl informed Officer McHenry he had no means for her to access the structure. Defendants affirmatively plead Plaintiff's prior permission was not required prior to requesting an administrative search warrant from a neutral and detached magistrate.

90. Defendants deny Paragraph 90 of Plaintiff's Complaint. Defendants affirmatively plead Separate Defendant Officer McHenry contacted Richard Livdahl prior to seeking and obtaining an administrative search warrant. Separate Defendants affirmatively plead Richard Livdahl informed Officer McHenry he had no means for her to access the structure. Defendants

affirmatively plead Plaintiff's prior permission was not required prior to requesting an administrative search warrant from a neutral and detached magistrate.

91. Defendants deny Paragraph 91 of Plaintiff's Complaint.

92. Defendants deny Paragraph 92 of Plaintiff's Complaint.

93. Defendants deny Paragraph 93 of Plaintiff's Complaint.

94. Defendants deny Paragraph 94 of Plaintiff's Complaint.

95. Defendants deny Paragraph 95 of Plaintiff's Complaint.

96. With respect to the allegations of Paragraph 96, Defendants incorporate by reference herein their responses to Paragraphs 1 through 95 of Plaintiff's Complaint, as if set forth word-for-word.

97. Defendants maintain that the Fourth Amendment to the U.S. Constitution and Article 2, Section 15 of the Arkansas Constitution speak for themselves and respectfully refer this Court to said law for the contents thereof. Defendants deny any and all allegations of wrongdoing in Paragraph 97 of Plaintiff's Complaint.

98. Defendants maintain Paragraph 98 of Plaintiff's Complaint states a conclusion of law that does not require a response. To the extent a response is required, Defendants deny same. Defendants deny any and all allegations of wrongdoing.

99. Defendants deny Paragraph 99 of Plaintiff's Complaint.

100. Defendants deny Paragraph 100 of Plaintiff's Complaint.

101. Defendants deny Paragraph 101 of Plaintiff's Complaint.

102. Defendants deny Paragraph 102 of Plaintiff's Complaint.

103. Defendants deny Paragraph 103 of Plaintiff's Complaint.

104. With respect to the allegations of Paragraph 104, Defendants incorporate by reference herein their responses to Paragraphs 1 through 103 of Plaintiff's Complaint, as if set forth word-for-word.

105. Defendants deny the characterization of the allegations contained in Paragraph 105 of Plaintiff's Complaint and therefore deny same. Defendants deny any and all allegations of wrongdoing in Paragraph 105 of Plaintiff's Complaint.

106. Defendants deny Paragraph 106 of Plaintiff's Complaint. Defendants affirmatively plead Separate Defendant Officer McHenry contacted Richard Livdahl prior to seeking and obtaining an administrative search warrant. Separate Defendants affirmatively plead Richard Livdahl informed Officer McHenry he had no means for her to access the structure. Defendants affirmatively plead Plaintiff's prior permission was not required prior to requesting an administrative search warrant from a neutral and detached magistrate.

107. Defendants maintain that the affidavit for the administrative search warrant speaks for itself and respectfully refer the Court for the contents thereof, attached as Plaintiff Exhibit F. Defendants maintain the remaining allegation in Paragraph 107 of Plaintiff's Complaint states a conclusion of law that does not require a response. To the extent a response is required, Defendants deny same. Defendants deny any and all allegations of wrongdoing in Paragraph 107 of Plaintiff's Complaint.

108. Defendants deny Paragraph 108 of Plaintiff's Complaint. Defendants affirmatively plead Separate Defendant Officer McHenry contacted Richard Livdahl prior to seeking and obtaining an administrative search warrant. Separate Defendants affirmatively plead Richard Livdahl informed Officer McHenry he had no means for her to access the structure.

STEVE BAXTER, BRUCE FOUTCH, MURRY WITCHER, and CHARLIE HIGHT, each Individually and in his or her Official Capacity, TOM WADLEY, Director, Code Enforcement Division, Individually and in his Official Capacity, and FELECIA MCHENRY, Code Enforcement Officer, Individually and in her Official Capacity
Defendants

By: /s/ Daniel L. McFadden, ABA #2011035
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CERTIFICATE OF SERVICE

I, Daniel L. McFadden, do hereby certify that a copy of the foregoing pleading was served upon all interested parties by means of electronically filing through AOC/eflex, or by U.S. mail, postage prepaid, on this 18th day of June, 2014, addressed to:

Mr. Mickey Stevens
Attorney for Plaintiff
P.O. Box 1295
Benton, AR 72018

/s/ Daniel L. McFadden, ABA #2011035

**IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS,
TWELFTH DIVISION**

**CONVENT CORPORATION,
Individually and on Behalf of all
Others Similarly Situated** — **PLAINTIFF**

v. — **NO. 60CV-13-1398**

**CITY OF NORTH LITTLE ROCK,
ARKANSAS, a Municipal Corporation,
JOE SMITH, Mayor, Individually and in
his Official Capacity, City Council Members
DEBI ROSS, BETH WHITE, LINDA
ROBINSON, MAURICE TAYLOR,
STEVE BAXTER, BRUCE FOUTCH,
MURRY WITCHER, and CHARLIE HIGHT,
each Individually and in his or her Official
Capacity, TOM WADLEY, Director, Code
Enforcement Division, Individually and in
his Official Capacity, and FELECIA MCHENRY,
Code Enforcement Officer, Individually and
in her Official Capacity** — **DEFENDANTS**

REPLY TO DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS, OR, IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT

COMES NOW Plaintiff Convent Corporation, by and through its attorney, Mickey Stevens, and for its Reply states as follows:

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INTRODUCTION

Reading Defendants' Response to Plaintiff's Motion is like watching someone try to carry water in a bucket full of holes. Once Defendants' arguments are analyzed, it is clear that they do not hold water and there is absolutely no justification for the City's complete failure and refusal to provide any due process protections prior to seizing and condemning Plaintiff's property.

To begin with, Defendants completely failed to file an Answer or responsive pleading within the time frame required by Rule 12(a)(3) and the allegations contained in Plaintiff's Complaint stand uncontroverted and should be deemed admitted. Therefore, Plaintiff is entitled to judgment on the pleadings.

Alternatively, Defendants have completely failed to demonstrate the existence of any genuinely disputed material fact by which the City could show that it provided adequate due process prior to seizing and condemning Plaintiff's property. Plaintiff's property was seized in November of 2012 when Defendant McHenry red-tagged the property. *Exhibit A to Plaintiff's Motion,*[1] *par. 12; Exhibit E; Exhibit H, Interrogatory No. 8; Exhibit P, Interrogatory No. 22.* At that time, Plaintiff was barred from using or repairing the property. The City did not provide any notice or hearing prior to red-tagging the property. The undisputed evidence shows that City refused to provide notice of the specific violations, refused to provide a hearing, and refused to

[1] Plaintiff refers to Exhibits attached to its Motion which are designated by letters. Exhibits attached to this document are designated by numbers.

permit Plaintiff to repair the property prior to condemnation. The Defendants acted willfully and with deliberate indifference when they seized and condemned Plaintiff's property in violation of both the state and federal constitutions.

Defendants' argument regarding exhaustion of **administrative** remedies is completely without merit. The City refused to provide any **administrative** remedies, even though Plaintiff specifically requested notice of the specific alleged violations and a hearing. The City Council's condemnation was a final **administrative** decision. Plaintiff's constitutional claims are an integral and inseparable part of its appeal. And, even if the City provided any **administrative** remedies, Plaintiff is not required to exhaust administrative remedies prior to bringing an action pursuant to 42 U.S.C. § 1983.

DISCUSSION

I. Plaintiff is entitled to Judgment on the Pleadings.

A. Plaintiff's appeal pursuant to District Court Rule 9, including its constitutional claims is a "direct attack" on the City Council's condemnation action and Defendants' argument regarding a "collateral attack" is without merit.

Defendants begin their Brief in Support of their Response by claiming that Plaintiff is "collaterally" attacking the City Council's condemnation decision. This represents a failure on the part of Defendants' counsel to recognize the difference in a "collateral attack" as opposed to a "direct attack." In pleadings filed in federal court, Defendants' counsel repeatedly failed to do basic research to determine whether his arguments were well-founded and also repeatedly misrepresented facts and law. In his Response to Plaintiff's Motion, Defendants counsel still fails to make a reasonable inquiry to insure that his arguments are well-grounded in fact and law. Indeed, had Defendants' counsel bothered to spend a few minutes researching the question of what

constitutes a "collateral attack" he would have quickly realized his argument was completely with merit.

The Arkansas Supreme Court has explained the difference in a "collateral attack" and a "direct attack."

> A direct attack on a judgment is an attempt to amend it, correct it, reaffirm it, vacate it, or enjoin its execution in a proceeding instituted for that purpose. *Sewell* v. *Reed*, 189 Ark. 50, 71 S.W. 2d 191; *Woods* v. *Quarles*, 178 Ark. 1158, 13 S.W. 2d 617. An attack is direct where the proceeding in which it is made is brought for the purpose of impeaching or overturning the judgment, and collateral if made in any manner other than by a proceeding the very purpose of which is to impeach or overturn the judgment. *Brooks* v. *Baker*, 208 Ark. 654, 187 S.W. 2d 169; *Wilder* v. *Harris*, 205 Ark. 341, 168 S.W. 2d 804. An action which contemplates some other relief or result is a collateral attack. *Sewell* v. *Reed*, supra; *Brooks* v. *Baker*, supra.

Purser v. Corpus Christi State Nat'l Bank, 256 Ark. 452, 459-460, 508 S.W.2d 549, 553 (1974). Additionally, "suits seeking a declaration that a prior judgment or decree is void is a direct challenge to the prior judgment or decree." *Cumpton v. Alexander*, 2006 Ark. App. LEXIS 523, 13, 2006 WL 2556401 (2006)(citing *Ingram v. Luther*, 244 Ark. 260, 424 S.W.2d 546 (1968)).

Because Plaintiff initiated this action for the purpose of vacating, enjoining, impeaching and overturning the condemnation action, the present action constitutes a "direct attack" on the City Council's decision. *See, e.g., Nationwide Ins. Enter. v. Ibanez*, 368 Ark. 432, 437, 246 S.W.3d 883 (2007). Thus, Defendants arguments regarding a "collateral attack" are completely without merit and, had Defendants' counsel made a reasonable inquiry into the law regarding "collateral" versus "direct" attacks, he would have realized this argument was without merit. This is merely one example of a disturbing and pervasive pattern displayed in virtually every pleading Defendants have filed in this matter of failing to make reasonable inquiry into legal arguments and misrepresenting both facts and law.[2]

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[2] Continuing this pattern, in the second sentence in the Introduction to their Brief, Defendants fail to note the full reason that this case was remanded from the federal district court. As the Court noted in its Remand Order, the case

B. An appeal pursuant to District Court Rule 9 is a judicial remedy and does not permit the City to refuse to provide procedural due process as required by both the state and federal constitutions.

Defendants argue that the City of North Little Rock is not bound to provide any constitutional due process protections when it seizes and condemns property in a nuisance abatement action. The basis of this absurd argument is the City's contention that, because a property owner has a potential judicial remedy through Arkansas District Court Rule 9, the City itself is under no obligation to provide proper notice or a meaningful opportunity to be heard.

Undoubtedly, Defendants' counsel has not considered the implications of his argument. If the courts were to adopt Defendants' reasoning, because almost any decision of an administrative government agency or governing body can, at some point, be challenged in a court, administrative agencies and governing bodies would be completely exempt from the obligation to provide constitutional due process. Thus, if Defendants reasoning were accepted by the courts, the extensive administrative hearings and appeal procedures of both federal and state agencies would be completely unnecessary and the entire field of administrative law would no longer be relevant. While this may save elected and bureaucratic officials a lot of time and the government and taxpayers a lot of money, Defendants' argument that the City Council is not bound by either the state or federal constitutions is simply absurd and cannot be given any credence. The undeniable truth is that the City is required by both the state and federal constitutions to provide adequate procedural due process protections prior to seizing and condemning property.

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was remanded because the actions of the Defendants in removing the case to federal court prevented Plaintiff from exhausting its remedies in state court. By removing the case to federal court, Defendants invoked the jurisdiction of the federal court and then argued that the court lacked jurisdiction to hear the removed claims. These actions delayed the case for more than ten months and wasted significant judicial resources and needlessly increased the inconvenience and expense of this litigation. The Court clearly noted that it would not issue an advisory opinion as to whether Plaintiff may bring its constitutional claims in state court.

Another basic concept that appears to be misunderstood by Defendants' counsel is the distinction between an "**administrative remedy**" and a "**judicial remedy.**" Black's Law Dictionary defines an "**administrative remedy**" as "a **nonjudicial** remedy provided by an **administrative agency.**" *Black's Law Dictionary* 1296 (7th ed. 1999)(emphasis added). Other sources define an **administrative remedy** as "the **non judicial** remedy provided by an **agency, board, commission or any other like organization,**" (*Administrative Remedy Law & Legal Definition*, USLegal.com, http://definitions.uslegal.com/a/administrative-remedy/ (emphasis added)), or "[o]btaining the redress or the enforcing of your rights by putting a matter before an **administrative agency.**" *What is Administrative Remedy?*, The Law Dictionary, http://thelawdictionary.org/administrative-remedy/ (emphasis added). Thus, an "**administrative remedy**" is one that is both "**nonjudicial**" and is before "**an administrative agency.**" District Court Rule 9 requires that a property owner initiate a lawsuit in Circuit Court and, therefore, Rule 9 provides for a **judicial remedy**, not an **administrative remedy**.

Defendant's contention that the City "provides" the Rule 9 appeal is absurd on its face. The City does not provide the funding for the Circuit Court and does not exercise any control over the Circuit Court. The City did not enact District Court Rule 9. District Court Rule 9 is a procedural rule established by the courts to govern the procedure for appealing decisions of District Courts, administrative agencies, and local governing bodies. This is in no way a remedy provided by the City.

Indeed, if, as Defendants contend, the City "provides" the Rule 9 appeal, why has the City failed for more than nineteen months to "provide" a hearing?[3] Obviously, Defendants do not

[3] While there is no provision in Rule 9 that provides for a de novo hearing under the present circumstances, the City contends such a hearing should be granted then disingenuously asserts that Plaintiff has no interest in such a hearing. Defendants counsel is well aware that Plaintiff's counsel requested a full hearing prior to the February 25, 2013 council

"provide" the Rule 9 appeal process and the evidence is undisputed that the City steadfastly refused to provide a hearing as requested by Plaintiff. It is also absurd that, after refusing to provide a hearing prior to condemnation, now, some fifteen months later, the City feels it is entitled to a de novo hearing. Plaintiff has been deprived of the use of or permission to repair its property since the property was seized in November of 2012. *Exhibit A, par. 12; Exhibit E; Exhibit H, Interrogatory No. 8; Exhibit P, Interrogatory No. 22.* So, the City has effectively held Plaintiff's property for more than nineteen months without providing a hearing. Therefore, even if, as the City contends, it "provides" the Rule 9 appeal process, a hearing some nineteen months after seizing property can, in no way, be said to comply with constitutional due process. The City steadfastly refused to provide any due process prior to seizure and condemnation and this failure cannot be corrected by a judicial hearing nineteen months later.

C. While Plaintiff maintains that it has exhausted administrative remedies, exhaustion of administrative remedies is not required prior to bringing claims pursuant to 42 U.S.C. § 1983.

In their Response, Defendants completely ignore the fact that, in general, exhaustion of administrative remedies is not required prior to bringing an action under § 1983.[4]

> When federal claims are premised on [§ 1983] -- as they are here -- we have not required exhaustion of state judicial or administrative remedies, recognizing the paramount role Congress has assigned to the federal courts to protect constitutional rights"). Respondent may be correct in arguing that several of these decisions could have been based on traditional exceptions to the exhaustion doctrine. Nevertheless, **this Court has stated categorically that exhaustion is not a prerequisite to an**

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meeting at which the property was condemned by the filing of a written motion. Further, Plaintiff made an oral request for a hearing at the council meeting. Obviously, it was the City that had no interest in conducting a hearing and Defendants attempt to put the blame for the lack of a hearing being held on Plaintiff is simply dishonest.

[4] Defendants cite to *Collier v. Springdale*, 733 F.2d 1311 (8th Cir. 1984) as supporting their argument that Plaintiff's claims are not "ripe for adjudication" until remedies available under state law are exhausted. Again, Defendants counsel attempts to stretch a case beyond what it actually says. This case does not, anywhere, use the phrase "ripe for adjudication." This is a case involving eminent domain and the court said that the Plaintiff must exhaust state remedies for seeking compensation before bringing claims to the federal court. First, in the present case, Plaintiff appropriately filed its Rule 9 appeal attempting to exhaust state court remedies. It was Defendants who removed to federal court. Because Plaintiff did not file in federal court, the *Collier* case has no relevance. Second, there are no remedies available by which Plaintiff can seek compensation for the taking of its property other than the action Plaintiff has taken in filing its Rule 9 appeal and raising the accompanying constitutional violations which are inseparable from the appeal.

> **action under § 1983,**[5] and we have not deviated from that position in the 19 years since *McNeese*.

Patsy v. Bd. of Regents, 457 U.S. 496, 500-501, 102 S. Ct. 2557 (1982)(emphasis added); *see also* *Bennett v. Planning Comm'n*, 2010 US DIST LEXIS 43633, 15-20 (E.D.Ark. 2010).

> The United States Supreme Court has held that a litigant is not required to exhaust his or her administrative remedies before filing a civil rights action in federal courts. *Patsy v. Florida Bd. of Regents*, 457 U.S. 496, 73 L. Ed. 2d 172, 102 S. Ct. 2557 (1982); *McNeese v. Board of Educ.*, 373 U.S. 668, 10 L. Ed. 2d 622, 83 S. Ct. 1433 (1963). In *Felder v. Casey*, 487 U.S. 131, 101 L. Ed. 2d 123, 108 S. Ct. 2302 (1988), the United States Supreme Court extended this holding to civil rights actions that are filed in state courts.

Ford v. Arkansas Game & Fish Comm'n, 335 Ark. 245, 252, 979 S.W.2d 897 (1998).

Where there are constitutional violations that cannot be cured by just compensation proceedings in state court, it is appropriate for a plaintiff to bring these claims in federal court without pursuing administrative or state remedies first. *McKenzie v. City of White Hall*, 112 F.3d 313 (8th Cir. 1997).[6] In *McKenzie*, the court held that, where there was a constitutional violation whether just compensation was paid or not, a plaintiff's failure to seek compensation for the alleged taking does not render a claim unripe. *Id.* at 317.

> Because the City's decisions to deny zoning and building permits absent surrender of the privacy buffer were final, the McKenzies' due process and equal protection claims based on those decisions are ripe. *See Sinaloa Lake Owners Ass'n*, 882 F.2d at 1404; *Executive 100, Inc.*, 922 F.2d at 1540-41; *see also Christopher Lake Dev. Co.*, 35 F.3d at 1274-75. Although most of the claims are based on facts giving rise to the McKenzies' takings claims, the McKenzies need not seek relief in state court before bringing their federal due process and equal protection claims. *Seet Sinaloa Lake Owners Ass'n*, 882 F.2d at 1404.

Id. In the present case, Plaintiff's constitutional claims are not dependent on the payment of just

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[5] This quote was also included in Plaintiff's Response to Defendant's initial Motion to Dismiss. This should conclusively settle the matter regarding the exhaustion requirement. Yet, in spite of this clear pronouncement from both the state and federal Supreme Courts, Defendants have repeated this argument here after being put on notice that the argument was without merit.

[6] Interestingly, Defendants cited to *McKenzie*, in support of their argument that Plaintiff's claims are not "ripe for adjudication." Brief, pg. 13. This is yet another example where Defendants' counsel cited a case that actually supports Plaintiff's position.

compensation and are, therefore, ripe for adjudication. [7]

In the present case, the Constitutional violations Plaintiff asserts have already occurred, and as in *McKenzie*, Plaintiff's § 1983 claims are ripe for adjudication. The City's decision is final and the Constitutional violations complained of are complete. Furthermore, Plaintiff is required to bring its constitutional claims or it risks losing the ability to bring these claims in a later proceeding. *See McGhee v. Ark. State Bd. of Collection Agencies*, 368 Ark. 60, 69, 243 S.W.3d 278, 285, 2006 Ark. LEXIS 568, 17 (Ark. 2006); *Ford v. Arkansas Game & Fish Comm'n*, 335 Ark. 245, 979 S.W.2d 897 (1998); *Regional Care Facilities, Inc. v. Rose Care, Inc.*, 322 Ark. 780, 912 S.W.2d 406 (1995). Indeed, if Plaintiff did not present these claims at this time and tried to bring them in a subsequent action, Defendants would undoubtedly argue that these claims should have been raised in the earlier proceeding.

Defendants cite to several cases in support of their bizarre argument that, although Plaintiff was required to raise its constitutional claims before the City Council, it was somehow improper

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[7] In *Collier v. City of Springdale*, 733 F.2d 1311, (8th Cir. 1984), cited by Defendants, the plaintiff failed to avail himself of state mechanisms for obtaining compensation. As in *Williamson County v. Hamilton Bank*, 473 U.S. 172, 195 (1985), because the plaintiff could seek just compensation, his due process rights had not yet been violated. A significant issue in Collier was the court's finding that the state court remedies would "fully preserve all the constitutional protections due Collier for the public taking, injury or destruction of his property, real or personal." *Id.* at 1316. In the present case, Defendants are attempting to have Plaintiff's Constitutional claims dismissed and proceed in state court with only the appeal. If this were to occur, it is likely that Plaintiff would be barred from raising its Constitutional claims later. *See discussion infra.* Therefore, Collier is clearly distinguishable from the present case. In the present case the property has already been condemned with absolutely no due process. Assuming *arguendo*, that defendants are correct and Plaintiffs cannot bring federal constitutional claims with its appeal, the state remedy is inadequate. Any state remedy that completely denies the opportunity to raise constitutional claims is inadequate. Furthermore, none of the cases cited by Defendants stand for the proposition that federal claims cannot be brought in state court along with state claims.

A case that is more analogous to the present case was cited in Collier—*Edwards v. Ark. Power & Light Co.*, 683 F.2d 1149 (8th Cir. 1982). In *Edwards*, because it was unclear whether plaintiff would be allowed to bring a compulsory bad faith claim in a condemnation action, he was not required to pursue remedies in state court prior to filing a § 1983 action. *Id.* at 1154-55. Where there is uncertainty regarding the ability to bring this claim in state court, state remedies are inadequate. *Id.*

to include them with its Rule 9 appeal.[8] However, none of these support this bizarre argument. The *Talley* case on which Defendants rely heavily was dismissed because the Plaintiff failed to properly appeal a "stop work order" to the board of adjustment. *Talley v. City of N. Little Rock*, 2009 Ark. 601, 9 (2009). No such administrative remedy was available to Plaintiff in this case. Thus, the *Talley* case does not provide any support for Defendants' position. Indeed, the only relevant holding of the *Talley* case concerns the importance of appealing a condemnation action pursuant to District Court Rule 9. Had Plaintiff in this case submitted a rehabilitation plan instead of filing its Rule 9 appeal, it would likely have found itself in the same place as the plaintiff in *Talley*—having the City move to demolish the structure in spite of efforts to repair the structure. *Id.* at 3. The *Talley* case supports Plaintiff's contention that it would be foolhardy to enter into a rehabilitation agreement under a condemnation order which permits the City to demolish the structure at any time.

Iowa Coal Mining Co. v. Monroe County, 257 F.3d 846, 853 (8th Cir. 2001), also cited by Defendants, was decided on the question of whether the County's actions were irrational. The federal district court held that the mining company had abandoned its constitutional claims because it did not present evidence at a board of adjustment hearing (an administrative remedy that was not available to plaintiff in this case). *Id.* at 851. Apparently, Defendants' counsel failed to notice that **the Eighth Circuit held that the mining company was not precluded from bringing these constitutional claims in court with its appeal of the board of adjustments' decision. *Id.* at 852.** Thus, this case actually supports Plaintiff's right to bring its constitutional claims in conjunction

[8] Defendants appear to believe that an appeal is not "perfected" until a decision is rendered by the Court. On page 13 of their Brief, Defendants argue that the Court lacks subject matter jurisdiction because the appeal has not been "perfected." This is another misunderstanding of a basic concept. An appeal pursuant to District Court Rule 9 is "perfected" once the appealing party complies with the filing requirements of Rule 9. *See, e.g., Ark. Game & Fish Comm'n v. Eddings*, 2009 Ark. 359, 324 S.W.3d 328 (2009).

with its Rule 9 appeal.

Indeed, none of the cases cited by Defendants support their position that Plaintiff was prohibited from bringing its constitutional claims with its Rule 9 appeal. In *Reiter v. Cooper*, 507 U.S. 258, 269, 113 S. Ct. 1213 (1993) the court stated:

> Where relief is available **from an administrative agency**, the plaintiff is ordinarily required to pursue that avenue of redress **before proceeding to the courts**; and until that recourse is exhausted, suit is premature and must be dismissed. See *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51, 82 L. Ed. 638, 58 S. Ct. 459 (1938); *Heckler* v. *Ringer*, 466 U.S. 602, 617, 619, and n. 12, 80 L. Ed. 2d 622, 104 S. Ct. 2013 (1984).

(emphasis added). Once the City condemned Plaintiff's property, no relief was available before any City board, commission, or administrative agency and, thus, once the Plaintiff appeared before the City Council, its administrative remedies had been exhausted and it was forced to resort to the courts. Again, this case does not provide any support for Defendants' position that constitutional claims cannot be brought in state court with a Rule 9 appeal.

In *Calico Trailer Mfg. Co. v. Insurance Co. of N. Am.*, 155 F.3d 976, 978 (8th Cir. 1998), the court repeated the quote from *Reiter* again stating that administrative remedies must be exhausted before a party resorts to the courts. This case also provides no support to Defendant's position. Thus, Defendants have not provided a single authority that supports the bizarre argument that constitutional claims cannot be brought in state court with a Rule 9 appeal. Furthermore, the *Iowa Coal Mining* case, cited by Defendants, clearly supports Plaintiff's right to bring its constitutional claims in conjunction with its Rule 9 appeal. 257 F.3d at 852.[9]

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[9] *Poor Thunder v. U.S.*, 810 F.2d 817 (8th Cir. 1987) is another case cited by Defendants. The court held that, where an appeal was not filed and a party has instead filed a direct action, the court must assess the adequacy of the asserted reason or excuse for failing to file an appeal. *Id.* at 823. In the present case, Plaintiff has filed its appeal. Once again, in quoting *Poor Thunder*, Defendants cite a case which does not support their position.

Defendants also cite to *City of Paragould v. Leath*, 266 Ark. 390, 583 S.W.2d 76 (1979). In *Paragould*, the plaintiff could have appealed to the board of adjustment but instead filed a court action. *Id.* at 393-94. In the present case, no appeal to any administrative body was available. Thus, Plaintiff has pursued the only avenue of appeal available—

Plaintiff's constitutional claims are an integral part of its appeal and must be included. Defendants quoted from *McGhee v. Ark. State Bd. of Collection Agencies*, 368 Ark. 60, 637, 243 S.W.3d 278, 284 (2006) to say that "no one is entitled to judicial relief . . . until the prescribed statutory administrative remedy has been exhausted." However, as before, if one looks at the context of that sentence, it clearly supports Plaintiff's position. The very next sentence states: "A basic rule of administrative procedure requires that an agency be given the opportunity to address a question before a complainant resorts to the courts." *Id.* The "agency" in this instance is the City. The City fails to provide any administrative remedies and thus, has waived the opportunity to address the question. The only avenue of relief available to Plaintiff was to resort to the courts which Plaintiff did by filing his appeal as required by Rule 9. The statutory remedy in this case is a judicial remedy.

Interestingly, the *McGhee* case cited by Defendants states that constitutional issues should be raised at the administrative level. *Id.* at 68 (quoting *AT&T Communications of the Southwest, Inc. v. Ark. Public Service Comm.*, 344 Ark. 188, 40 S.W.3d 273 (2001)). Thus, this case indicates that, in order to exhaust "administrative" remedies, Plaintiff must raise its constitutional claims in conjunction with its appeal. Yet, Defendants argue that these claims cannot be brought with the appeal. Defendants' arguments are inconsistent with the case law they cited.[10]

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the Rule 9 appeal to the circuit court. Defendants quote a treatise stating that a party cannot bypass the provision of a statute providing a remedy by appeal. Yet, Plaintiffs have not attempted to bypass Rule 9. So, again, this case does not support Defendants' argument.

[10] Ultimately, in *McGhee*, the court held that the doctrine of exhaustion was not applicable because McGhee did not have a pending action before the administrative agency. 368 Ark. at 68. Defendants also cite to *Ingram v. City of Pine Bluff*, 355 Ark. 129 (2003). In *Ingram*, the plaintiff failed to file a timely Rule 9 appeal. *Id.* at 134. However, the court held that claims of fraud and breach of contract against individual defendants did not require the filing of a Rule 9 appeal and these claims could be heard even in the absence of a timely filed Rule 9 appeal. *Id.* at 137.

D. Because Defendants failed to file an Answer or Responsive pleading within the time period required by Rule 12(a)(3), Plaintiff's allegations stand completely uncontroverted and Plaintiff is entitled to Judgment on the Pleadings.

Defendant's present their arguments as if Plaintiff had requested a default judgment pursuant to Rule 55. However, Plaintiff's Motion is for judgment on the pleadings pursuant to Rule 12(c), not for default judgment pursuant to Rule 55. Rule 12(a)(3) requires that, upon remand from federal court, a defendant must file an Answer or responsive pleading within 30 days of receipt of notice that the remand order has been filed. Rule 12(c) further provides for judgment on the pleadings. Defendants argue that the 2004 revision to Rule 55 negated the obligation under Rule 12(a)(3) to file a responsive pleading. However, Defendants have not cited to a single authority that supports their contention that Rule 12(a)(3) was abrogated by the revision to Rule 55. Indeed, had the Rules committee and the Supreme Court intended to abrogate Rule 12(a)(3), it would undoubtedly had been revised also. Actually, Rule 12(a)(3) was revised again in 2011. In 2011, the time allowed for filing an Answer was expanded to 30 days. Had the Rules Committee and Supreme Court intended that the 2004 revision to Rule 55 relieve a defendant from the obligation to file an Answer as required by Rule 12(a)(3), why some seven years later was the time for filing an Answer expanded instead of this requirement being completely removed from the Rule? Obviously, the intent of the Rules Committee and court in amending Rule 12(a)(3) in 2011 was to continue the requirement that a defendant file an Answer or responsive pleading but to allow the defendant 30 days to do so.

Continuing their pervasive pattern of misrepresenting case law, in an attempt to convince the Court that Rule 12(a)(3) does not require defendants to file an Answer or responsive pleadings, Defendants attempt to stretch cases beyond what the courts actually said in the cited cases. For example, the case cited by Defendants, *JurisDictionUSA, Inc. v. Loislaw.com, Inc.*, 357 Ark. 403,

183 S.W.3d 560 (2004), does not hold, as Defendants contend, that Defendants are not required to re-file pleadings filed in federal court. This case merely addresses the retroactive application of the revision to Rule 55 barring a default judgment. The holding of this case cannot be logically extended any further than to say the revision to Rule 55 should have been given retroactive application. Defendants contention that this case nullifies the requirement of Rule 12(a)(3) is a misrepresentation of the case.

Indeed, the case law cited in Plaintiff's Motion holds explicitly that a defendant may not rely on an Answer filed in federal court. [11]

> [C]ourts cannot take judicial notice of proceedings of other courts." *White v. Minyard*, 8 Ark. App. 269, 271, 650 S.W.2d 599, 600 (Ark. Ct. App. 1983); *see also Southern Farmers Assn., Inc. v. Wyatt*, 234 Ark. 649, 353 S.W.2d 531 (1962). A pleading filed in another court ordinarily cannot be adopted, even by agreement of the parties unless it is copied into a pleading or otherwise admitted into evidence. *Reid*, 229 Ark. at 93, 313 S.W.2d 381; *White*, 8 Ark. App. at 271, 650 S.W.2d at 600. A defendant may not rely on an Answer filed in federal court and Rule 55(f) is intended to provide a defendant "an opportunity to plead as it 'might have done had the case not been removed.'" *Ncs Healthcare of Ark. v. W.P. Malone*, 350 Ark. 520, 526, 88 S.W.3d 852, 856 (2002)(quoting Ark. R. Civ. P. 55(f)).
>
> > This court has long held that after remand from federal court, a case stands as if it had never been removed from state court, and what happened in federal court has no bearing on the proceeding in state court. *Steve Standridge Ins., Inc. v. Langston*, 321 Ark. 331, 900 S.W.2d 955 (1995) (relying on *Allstate Ins. Co. v. Bourland*, 296 Ark. 488, 758 S.W.2d 700 (1988), *cert. denied*, 490 U.S. 1006, 104 L. Ed. 2d 156, 109 S. Ct. 1640 (1989)); *B-W Acceptance Corp. v. Colvin*, 252 Ark. 306, 478 S.W.2d 755 (1972); *Trinity Universal Ins.*

[11] In Footnote 1, Defendants counsel contends that *JurisDictionUSA, Inc. v. Loislaw.com*, 357 Ark. 403, 183 S.W.3d 560 (2004) and *City of Fort Smith v. Didicom Towers, Inc.*, 362 Ark. 469, 209 S.W.3d 344 (2005) "overrule" *NCS of Ark. v. W.P. Malone*, 350 Ark. 520 (2002). These case do not, as Defendants contend, "overrule" *NCS*. These cases merely hold that, due to the revision of Rule 55, a Plaintiff cannot obtain a default judgment when a defendant has filed an Answer in federal court. Again, Plaintiff's motion is not seeking a default judgment. Indeed, the notes regarding the 2004 amendment to Rule 55 cite to *NCS* for the proposition that the "bulk filing" in state court of federal pleadings is not sufficient. Thus, the notes regarding the amendment demonstrate that the amendment was not intended to "overrule" *NCS*. Also, in Footnote 1, Defendants' counsel falsely states that in *Didicom Towers* the same arguments were made. *Didicom Towers* dealt with the retroactive application of the revised Rule 55(f). The plaintiff in that case sought a default judgment. This case did not deal with a request for judgment on the pleadings and neither of these case supports Defendants argument that it is no longer required to comply with Rule 12(a)(3).

> *Co. v. Robinson*, 227 Ark. 482, 299 S.W.2d 833 (1957)). Moreover, this line of authority has been expressly reiterated in Rule 55(f) that provides an opportunity for the defendant to plead as it "might have done had the case not been removed." Ark. R. Civ. P. 55(f).
>
> NCS's reliance upon its federal pleadings in the state court proceeding is simply contrary to the policy consistently adopted by this court, as reflected in our case law and Rule 55(f) of the Arkansas Rules of Civil Procedure: trial courts are instructed to proceed on remand as though the case had never been removed and defendants are instructed to plead as though the case had not been removed. A ruling in NCS's favor on this point would not only require this court to overrule the above-cited precedent, but it would also contravene the plain language of Rule 55(f).
>
> Furthermore, the federal pleadings at issue here had no bearing on the case after remand because federal pleadings do not necessarily conform with our rules of civil procedure.

Id.

Plaintiff's Brief in Support of Plaintiff's Motion for Judgment on the Pleadings or, in the Alternative, Motion for Summary Judgment.

Defendants do not cite a single authority for their contention that filing an Answer in federal court excuses defendants from the requirement of Rule 12(a)(3). Defendants' counsel also blatantly misrepresents the notes regarding the 2011 amendment to Rule 12, attempting to mislead the Court to believe that the Rule requires a responsive pleading or answer "if no answer or Rule 12 pleading has already been filed." Indeed the notes regarding the 2011 amendment contain no such language. Regarding section (a)(3), the note merely states:

> The amendment to subdivision (a)(3) extends to 30 days from the date of receipt of the remand notice the time within which a defendant must respond to a complaint when a case is remanded from federal court.

Indeed, to the contrary of the characterization by Defendants' counsel, this comment reinforces the requirement that a defendant must respond in state court. As previously noted, had the Rules Committee and the Supreme Court intended that the 2004 amendment to Rule 55 abrogate this

requirement, why did this requirement remain in the 2011 amendment to Rule 12(a)(3)? Indeed, the notes regarding the 2011 amendment to Rule 12 conclusively demonstrate that "a defendant **must** respond to a complaint when a case is remanded from federal court." (emphasis added).

Defendants have not offered any excuse, justification, or authority that allows or excuses its failure to comply with Rule 12(a)(3). Because Defendants failed to file a timely Answer or responsive pleading in this Court, the allegations in Plaintiff's Complaint stand uncontroverted and judgment on the pleadings is appropriate.

As a last ditch effort, Defendants' counsel apparently hoped the Court would simply overlook its failure to file an Answer or responsive pleading as required by Rule 12(a)(3) simply because Defendants have now attached their federal court pleadings as exhibits to their Response. However, Defendants attempt to introduce its federal court pleadings in this manner is both untimely and insufficient and cannot overcome Defendants previous disregard for the Arkansas Rules of Civil Procedure. First, Plaintiff contends that these documents should be stricken from the record as they are untimely. Second, the pleadings do not comply with the Arkansas Rules of Civil Procedure. As in the *NCS* case, the federal pleadings attached to Defendants' Response are not "addressed to the state court, [do] not bear a state court case number, and [are] not certified under Ark. R. Civ. 11 (2002)." 350 Ark. at 527. In *NCS*, the court held that the defendant could not rely on federal pleadings because, among other reasons, these pleadings did not conform to the Arkansas Rules of Civil Procedure. *Id.* Third, in the absence of an Answer or responsive pleading as required by Rule 12(a)(3), Defendants should not be able to raise new defenses in a Response to Plaintiff's Motion. Ark. R. Civ. P. 8(c).

Defendants received notice of the filing of the remand order on April 2, 2014. As of May 2, 2014, the pleadings in this matter were closed. Defendants did not file a motion for leave to

file an Answer or responsive pleading out of time and did not ask the Court to adopt the federal court pleadings. Interestingly, more than a week after filing their Response to Plaintiff's Motion, Defendants filed an "Amended Answer." Apparently, Defendants counsel realized that he could not rely on the pleadings filed in federal court. The Court should note that Defendants did not file a motion for leave to file their Answer out of time. As previously established, Defendant cannot rely on their Answer in filed in federal court and were still required to comply with Rule 12(a)(3). The "Amended Answer" was filed well after the time permitted by Rule 12(a)(3) and Defendants have not offered any valid explanation or excuse for their failure to file an Answer in this Court as required by the Rules of Civil Procedure. Therefore, Defendants' "Amended Answer" should be stricken as untimely.

This proceeding was initiated pursuant to District Court Rule 9 and the Arkansas courts have required strict compliance with the filing requirements of the Rule. Many cases have been dismissed because plaintiffs failed to file or perfect their appeal within the thirty day time period required by Rule 9. *E.g. Johnson v. Dawson*, 2010 Ark. 308, 365 S.W.3d 913 (2010); *Talley v. City of N. Little Rock*, 2009 Ark. 601, 381 S.W.3d 753 (2009); *Ark. State Univ. v. Prof's Credit Mgmt., Inc.*, 2009 Ark. 153, 299 S.W.3d 535 (2009); *Combs v. City of Springdale*, 366 Ark. 31, 233 S.W.3d 130 (2006); *Franks v. Mountain View*, 99 Ark.App. 205, 258 S.W.3d 799 (2007). Had Plaintiff in this case failed to comply with the requirements of Rule 9, Defendants undoubtedly would have moved for and been granted dismissal. Many plaintiffs in these types of cases are not aware of the strict requirements of Rule 9 and lack the resources to obtain legal counsel. Still, parties who have legitimate grievances have their cases dismissed for failure to strictly comply with the Rule. In contrast, Defendants in this case have a staff of attorneys and have access to the legal services of the Arkansas Municipal League. Therefore, there is simply no excuse for

Defendants' failure to comply with Rule 12(a)(3). It would be patently unjust to hold plaintiffs to strict compliance with Rule 9 while permitting the defendants to ignore the Rules of Civil Procedure without consequence. The Court should hold Defendants in this case to the same standard that would apply to Plaintiff had Plaintiff failed to timely file its appeal.

Because Defendants failed to file an Answer or responsive pleading within the time period required by Rule 12(a)(3), the allegations in Plaintiff's Complaint stand completely uncontroverted. Thus, pursuant to Rule 8(d), the allegations should be deemed admitted and, pursuant to Rule 12(c), Plaintiff is entitled to judgment on the pleadings.

E. Arkansas Code Annotated § 14-56-425 does not apply to Subchapter 2, Building Regulations, of code chapter 56.

In their Response, Defendants failed to explain their contention, that Arkansas Code Annotated § 14-56-425, contrary to the plain language of the statute, applies to Plaintiff's appeal. The language of the statute is clear and unambiguous.

> Appeals from the final administrative or quasi-judicial decision by the municipal body **administering this subchapter** shall be taken to the circuit court of the appropriate county using the same procedure as for administrative appeals of the District Court Rules of the Supreme Court.

(emphasis added). When the language of a statute is plain and unambiguous, there is no need to resort to rules of statutory construction and the analysis need go no further. *Moon v. City*, 344 Ark. 500, 42 S.W.3d 459 (2001). As noted in Plaintiff's Brief in Support of its Motion, the Arkansas Supreme Court clearly held that § 14-56-425 only applies to subchapter 4 of code chapter 56. *Clark v. Pine Bluff Civ. Serv. Comm'n*, 353 Ark. 810, 813, 120 S.W3d 541 (2003). The authority relied on by the City to condemn Plaintiff's property, Arkansas Code Annotated § 14-56-203 is found in subchapter 2, Building Regulations. Therefore, section 14-56-425 is irrelevant to the case at bar and there is no provision for a de novo hearing pursuant to District Court Rule

9.[12] Additionally, in *Wayne Alexander Trust v. City of Bentonville*, 2002 Ark. App. LEXIS 334, 2002 WL 1204338 (2002), the court held that **circuit courts may not conduct a de novo review of nuisance abatement actions by City Councils. "[T]he courts are deemed to have appellate power only over such acts of inferior bodies as are judicial in nature."** *Id.* at 6 (emphasis added). The Court should review this matter on the record developed in the City Council proceeding and Defendants should not be permitted to supplement the record at this extremely late date.

F. After refusing to provide a hearing or any other administrative remedy, the City should not be permitted to supplement the record.[13]

Reluctantly, Plaintiff must continue to point out additional misrepresentations contained in Defendants' Response. In their Response, Defendants misrepresent the contents of District Court Rule 9(f)(2)(B). In his discussion of District Court Rule 9(f)(2)(B), Defendants' counsel attempts to mislead the Court to believe that the Rule allows a party to supplement the record with "any document that was not included in the record below." This statement is directly contradicted by the language of the Rule.

> **(B) The Record on Appeal. –** Within thirty (30) days after filing its notice of appeal, the party shall file certified copies of all the materials the party has or can obtain that document the administrative proceeding. Within thirty (30) days after these materials are filed, any opposing party may supplement the record with certified copies of any additional documents that it believes are necessary to complete the administrative record on appeal. At any time during the appeal, any party may supplement the record with **a certified copy of any document from the**

[12] Defendants contention that Plaintiff "outright refuses to follow" the procedure required by District Court Rule 9 has no basis in fact. Contrary to Defendants contentions, Plaintiff has meticulously complied with the requirements of Arkansas District Court Rule 9 and Plaintiff's constitutional claims must be included with its appeal.

[13] In its Response (Pg 24), Defendants include an excerpt from Defendant McHenry's responses to interrogatories which describes alleged defects in the property. Defendant McHenry did not testify or otherwise present this information to the City Council in the administrative proceeding and Plaintiff never had the opportunity to cross-examine McHenry or any other witness . Therefore, this evidence should not be considered in regards to Plaintiff's appeal of the condemnation decision. This is an improper attempt to supplement the record and Plaintiff asks that these comments be stricken from Defendants' Response.

> **administrative proceeding** that is not in the record but the party believes the circuit court needs to resolve the appeal.

(emphasis added). The language of the Rule clearly limits supplementary material to documents "from the administrative proceeding." Plaintiff is not aware of any documents from the administrative proceeding which are not currently in the record. Thus, Defendants must defend this appeal based only on the record developed in the condemnation proceeding before the City Council.

Again, adopting Defendants argument would lead to an absurd result. This would leave the City free to condemn property in a summary proceeding without considering any evidence (as the City did in this case) and then simply present its case if and when a property owner initiates court action. This obviously does not satisfy the requirements of constitutional due process and is another example of the City's belief that neither the state nor federal constitution applies to its actions. The City cannot be permitted to ignore the constitution at the administrative level and then demand a "do-over" in circuit court some nineteen months after seizing property.

The City has a duty to develop an adequate record prior to seizing and condemning property.

> The threshold question governing our review of an agency determination is whether the agency has provided concise and explicit findings of fact and conclusions of law separately stated in the order. *Olsten Health Servs., Inc. v. Arkansas Health Servs. Comm'n*, 69 Ark. App. 313, 12 S.W.3d 656 (2000). These findings should be sufficient to resolve material issues or those raised by evidence relevant to the decision. *Bryant v. Ark. Public Serv. Comm'n*, 54 Ark. App. 157, 924 S.W.2d 472 (1996). The agency must make findings of fact in sufficient detail that the reviewing court may perform its function to determine whether the agency's findings as to the existence (or nonexistence) of essential facts are supported by the evidence. *Mosley v. McGehee School Dist.*, 30 Ark. App. 131, 783 S.W.2d 871 (1990).

Arkansas Appraiser Licensing v. Quast, 2010 Ark. App. 511, 6 (2010). The Resolution condemning Plaintiff's property does not contain any findings of fact but merely labels the

property as a nuisance. Where "conclusions of law are without adequate corresponding factual support, they lack substantial evidence and are arbitrary and capricious." *Ark. State Bd. Of Chiropractic Examiners v. Currie*, 2013 Ark.App. 612 (2013)(citing *Quast*, 2010 Ark.App. 511 at 7).

The record in this case does not contain any evidence supporting the Council's labeling of the property as a nuisance. In their Response to Plaintiff's Motion, Defendants did not point to any evidence in the record that supports the condemnation decision. If the City had provided adequate procedural due process, an adequate record would exist. The lack of an adequate record is further evidence that the City failed to provide adequate due process in its condemnation action. The City's position is that it can forego its constitutional responsibilities and later demand that the Court fulfill the City's responsibility to provide a meaningful opportunity to be heard.

II. Plaintiff is entitled to Summary Judgment.

To put the circumstances surrounding the seizure and condemnation of Plaintiff's property in context, it should be noted that the City seeks to have this structure demolished because of its prior use and never had any intent to permit the property to be repaired. Defendant Wadley has acknowledged that the reason the property is before the City Council is the prior use of the property. *Exhibit 1, attached hereto: Defendant Wadley's Responses to Requests for Admissions, No. 5.* Defendant Wadley has acknowledged the Council's desire to demolish the structure was based on the prior use of the property. During the meeting in which the property was condemned, the council member who represents the district in which the property is located inquired about Plaintiff's future plans for the property. This same council member emphatically stated that the Meadowpark Neighborhood Association wants the structure "torn down" (not repaired, but "torn down"). *Exhibit 2 attached hereto: Transcript of City Council Meeting.* The City's intent was not

to remove a nuisance or hazard but to demolish the structure so that it could never again house a business that the Council and the Neighborhood Association found undesirable. Thus, Defendants' attempts to make it appear as if the City would have issued a permit or would have allowed the property to be repaired are simply disingenuous and are disproven by the undisputed evidence in the record.

Defendants are attempting to deny Plaintiff the right to bring its constitutional claims so that they can continue to willfully ignore the constitutional requirements of due process and continue to condemn properties in summary proceedings where most property owners are unaware of their legal rights to notice, a hearing, an opportunity to repair their property, or of their right to appeal. This action threatens to throw a wrench into Defendants express-drive-through condemnation machine. The fact that the previous mayor sought, on at least two occasions (*See Docs. 25-5 – Doc. 31: Exhibit K to Plaintiff's Motion for Class Certification filed in Federal Court*), to streamline the process even more demonstrates the City's lack of respect for private property rights and its assumption that it's powers to condemn properties are without limit. This represents a dangerous potential for abuse of power.

A. Defendants have failed to demonstrate that there are genuine issues of material fact in dispute by which the City can show that it provided adequate procedural or substantive due process prior to the seizing and condemnation of Plaintiff's property.

Summary judgment is proper when a claiming party fails to show that there is a genuine issue as to a material fact and when the moving party is entitled to a summary judgment as a matter of law. Ark. R. Civ. P. 56(c); *Short v. Little Rock Dodge, Inc.*, 297 Ark. 104, 759 S.W.2d 553 (1988); *see also Celotex Corp. v. Catrett*, 477 U.S. 3167 (1986).

> When a motion for summary judgment is made and supported as provided in this rule, **an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response**, by affidavits or as otherwise provided in this rule,

> **must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, *shall* be entered against him.**

Ark. R. Civ. P. 56(e)(emphasis added). When a movant makes a prima facie showing of entitlement to summary judgment, the burden shifts to the other party which must meet **proof with proof** to show the existence of a genuine issue of material fact. *Wyatt v. St. Paul Fire & Marine Ins. Co.*, 315 Ark. 547, 868 S.W.2d 505 (1994).[14]

Defendants' conclusory statements and contentions which are contradicted by undisputed evidence are insufficient to defeat a motion for summary judgment.[15] *Id.; See also Dillard v. Resolution Trust Corp.*, 308 Ark. 357, 359, 824 S.W.2d 387 (1992); *Old Republic Insured Fin. Accceptance Corp. v. Williams*, 2002 Ark. App. LEXIS 528, 2002 WL 31133187 (2002); *See also Celotex Corp. v Catrett*, 477 U.S. 317, 323-324 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348 (1986). In their Response, Defendants failed to meet their burden which requires that they identify specific evidence in the record that raises a genuine issue of material fact. Once the moving party has demonstrated a prima facie case for summary judgment, the burden then shifts to the nonmoving party, who must, by submitting or referring to evidence, set out specific facts showing that a genuine issue exists. *E.g. Wyatt*, 315 Ark. at 551; *Dillard*, 308 Ark. 359-60; *Old Republic*, 2002 Ark. App. LEXIS 528 at 6; *Celotex*, 477 U.S. at 325. The nonmovant may not rest upon the pleadings, but must identify specific facts

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[14] *See also Hughes W. World, Inc. v. Westmoor Mfg. Co.*, 269 Ark. 300, 601 S.W.2d 826 (1980); *Cummings, Inc. v. Beardsley*, 271 Ark. 596, 609 S.W.2d 66 (1980); *Storthz v. Commercial Nat'l Bank*, 276 Ark. 10, 631 S.W.2d 613 (1982); *Chick v. Rebsamen Insurance – Springdale*, 8 Ark. App. 157, 649 S.W.2d 196 (1983); *Johnson v. Stuckey & Speer, Inc.*, 11 Ark. App. 33, 665 S.W.2d 904 (1984); *Pruitt v. Cargill, Inc.*, 284 Ark. 474, 683 S.W.2d 906 (1985); *McMullan v. Molnaird*, 24 Ark. App. 126, 749 S.W.2d 352 (1988); *Mathews v. Garner*, 25 Ark. App. 27, 751 S.W.2d 359 (1988); *Dillard v. Resolution Trust Corp.*, 308 Ark. 357, 824 S.W.2d 387 (1992).

[15] Defendants appear to argue that, simply because the parties disagree on issues, summary judgment is improper. However, Defendants have an obligation to present evidence, not just mere unsupported statements, to defeat Plaintiff's Motion. A defendant cannot avoid summary judgment by simply saying a fact is disputed. Defendants must present some evidence to establish the existence of a disputed factual issue.

that establish a genuine issue for trial. *Id.*; *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1996). Although a court is obligated to draw all inferences most favorable to the party opposing the motion for summary judgment when reviewing the facts, **the party opposing a motion for summary judgment must meet the moving parties' evidence with competent evidence setting forth specific facts to show that there is a genuine issue of material fact for trial.** *See* Ark. R. Civ. P. 56(e); *E.g. Wyatt* supra; *Dillard* supra; *Old Republic*, supra; *Matsushita* 475 U. S. at 587, 106 S.Ct. at 1356. The burden of demonstrating the existence of a genuine issue is not met by "metaphysical doubt" or "unsubstantiated assertions." *Hahn v. City of Kenner*, 984 F.Supp. 436, 439 (E.D. La. 1997); *Little*, 37 F.3d at 1075; *Matsushita*, 475 U.S. at 586, 106 S. Ct. 1348. If vital evidence regarding a material fact is too weak or tenuous to support a judgment in favor of the non-movant, then summary judgment should be granted. *See Armstrong v. City of Dallas*, 997 F.2d 62, 67 (5th Cir. 1993). **Mere conclusory allegations are not competent summary judgment evidence, and thus are insufficient to defeat a motion for summary judgment.** *Turner v. Baylor Richardson Med. Ctr.*, 476 F.3d 337, 343 (5th Cir. 2007).

The party opposing summary judgment is required to identify specific evidence in the record and to articulate the precise manner in which that evidence supports his claim. *Adams v. Travelers Indem. Co. of Conn.*, 465 F.3d 156, 164 (5th Cir. 2006). The Court must "resolve factual controversies in favor of the nonmoving party, but only when there is an actual controversy, that is, when both parties have submitted evidence of contradictory facts." *Little*, 37 F.3d at 1075 (*quoting Matsushita*, 475 U.S. at 586, 106 S.Ct. 1348). **The Court does not, "in the absence of proof, assume that the nonmoving party could or would prove the necessary facts."** *Id.* If the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, no genuine issue exists for trial. *Hahn*, 984 F.Supp. at 439; *Matsushita*, 475 U.S. at 588.

Defendants did not attach or submit any evidence in support of their Response to Plaintiff's Motion.[16] Defendants did not attach any evidence to their Response nor point to any evidence in the record to show that the City provided any notice or opportunity to be heard prior to red-tagging the property in November of 2012. Defendants did not attach any evidence to their Response nor point to any evidence in the record to show that the City ever provided Plaintiff with notice of the specific violations alleged or conditions to be corrected. Defendants did not attach any evidence to their Response nor point to any evidence in the record to show that the City's standard notice provides any information regarding rights of appeal.[17] Defendants did not attach any evidence to their Response nor point to any evidence in the record to refute the admission contained in the letter from Assistant City Attorney Bill Brown that clearly states Plaintiff would not be permitted to repair its property prior to condemnation. Defendants did not attach any evidence to their Response nor point to any evidence in the record to show that the City provided a meaningful opportunity to be heard. The evidence in the record does clearly prove that Plaintiff asked for a hearing or a permit to the repair the property prior to condemnation and the City steadfastly refused. In response to Plaintiff's Motion, Defendants have failed to provide any evidence by which they can demonstrate that the City provided constitutionally required due process prior to seizing and condemning Plaintiff's property.

[16] All of the exhibits attached to Defendants' Response were pleadings filed in federal court.

[17] Defendants argue that, because Plaintiff hired counsel who was aware of the procedures for appealing a city council decision, the City's failure to include appeal information in its Notice should be excused. However, the fact that a property owner hires counsel does not excuse the City from the constitutional requirement to provide notice of rights of appeal. Indeed, most of the property owners who are subjected to the City's condemnation procedure do not hire attorneys and have no knowledge of District Court Rule 9.

B. The undisputed evidence shows that Defendants seized Plaintiff's property without providing any notice or hearing, refused to permit Plaintiff to repair its property, refused to afford a meaningful opportunity to be heard, and failed to provide adequate notice prior to the condemnation of Plaintiff's property.[18]

As Plaintiff reviewed Defendants' Response, Plaintiff was reminded of the words of a former senator[19] who said that "[e]veryone is entitled to his own opinion, but not to his own facts." In their Response, Defendants make assertions which are belied by evidence in the record in a desperate attempt to generate some issue of fact by which they may avoid summary judgment. Defendants' Response is an attempt to muddy the waters and make it appear that disputed issues of material fact exist where, in reality, the evidence stands undisputed. The fact is, the evidence in the record unequivocally establishes that the City failed to provide adequate notice, refused to permit Plaintiff to repair the property, and refused to afford Plaintiff with a meaningful opportunity to be heard. While Defendants provide a Response with disingenuous assertions purporting to establish factual disputes, in reality, there is absolutely no evidence in the record by which Defendants can refute Defendants' contention that its property was condemned in a summary proceeding completely lacking due process protections.

Initially, the City seized Plaintiffs property in November of 2012 when Defendant McHenry red-tagged the property. It is undisputed that the City did not provide any notice, hearing, or opportunity to repair the property prior to this seizure. The red-tagging of Plaintiff's property was a seizure under the Fourth Amendment and the Court need look no further to find that Defendants violated Plaintiff's constitutional rights. This issue is discussed in detail *infra*,

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[18] Defendants cite to *Springfield v. City of Little Rock*, 226 Ark. 462, 290 S.W.2d 620 (1956) in support of the City's authority to condemn structures. It should be noted that, in *Springfield*, the condemnation resolution directed the City attorney to file a lawsuit. It did not order the destruction of the property without a judicial hearing, as the Resolution in this case does.

[19] Daniel Patrick Moynihan, *See http://www.goodreads.com/quotes/1745-everyone-is-entitled-to-his-own-opinion-but-not-to.*

section III. Following the seizure by red-tagging, Defendants continued to deny Plaintiff due process at every turn.

1. The undisputed evidence proves that Defendants refused to issue a permit to Plaintiff so that the Property could be repaired prior to condemnation.

First, despite their attempts, Defendants cannot dispute that they refused to allow Plaintiff to repair the property prior to the condemnation vote. Defendants argue that the letter from Assistant City Attorney Bill Brown (*Exhibit E*) doesn't mean what it actually says. The letter states that "since the structure has been Red Tagged **no construction or remodeling permits should be issued at this time** without approval of City Council." (emphasis added). The letter speaks for itself and therefore it stands as undisputed evidence. Furthermore, the evidence (*Exhibit 2 attached hereto, Transcript*) clearly proves that Plaintiff informed the City that it wanted to rehab the property but its request to do so was summarily denied.[20] *Exhibit D: Minutes of City Council Meeting, Pg 7 of 9 ("They are requesting a postponement and **want to present a plan to the city.**") (emphasis added); See also Exhibit 1, attached hereto, RFAs Nos. 10 & 13; Exhibit 3, attached hereto, RFAs No. 27 & 35; Exhibit 4, attached hereto, RFAs Nos. 9 & 12.* Thus, while Defendants may dispute the substance of other conversations in which Plaintiff sought a permit to make repairs, the letter from Bill Brown (*Exhibit E*),the recording of the City Council meeting (*Exhibit 2*), and the minutes from the Council meeting (*Exhibit D*) stand as undisputed evidence that the City refused to permit Plaintiff to repair the property. These items of undisputed evidence further establish that the City wanted the structure demolished and were unwilling to consider permitting repairs to be made.[21] Thus, there are no genuine issues of material fact in dispute by

[20] Minutes of past City Council meetings show that even when a property owner appears and informs the Council that he is willing to repair the property and, in some cases, even when repairs are already underway, the City still proceeds to condemn the propertyThis belies Defendants contention that they were willing to issue a permit to Plaintiff.

[21] Lending additional support to the fact that the City had no intention to permit the property to be repaired is the

which Defendants can show that they provided an opportunity to repair the property prior to condemnation.

2. The undisputed evidence proves that the City refused to provide Plaintiff with a hearing.

Next, the undisputed evidence clearly establishes that the City refused to afford Plaintiff with a meaningful opportunity to be heard. While Defendants note that the discussion at the City Council meeting at which the property was condemned lasted more than three minutes, the fact is that Plaintiff was informed that it would only be permitted to speak for three minutes.[22]

Because Plaintiff was informed it would only be permitted to speak for three minutes, Plaintiff had no reason to believe it would be permitted any additional time. Indeed, Plaintiff submitted a Motion (*Exhibit K*) prior to the City Council meeting requesting a full hearing and the City did not respond.[23] Even if Plaintiff had adequate notice of the alleged violations, it had no reason to believe it would be permitted to fully present its case to the Council.

Additionally, the evidence (*Exhibit 2*) unequivocally shows that Plaintiff was denied a full and fair hearing. Specifically, Plaintiff requested a full hearing and the Mayor responded that the

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statement of council member Linda Robinson that the Neighborhood Association wanted the property demolished.

[22] In federal court, Defendants attempted to disingenuously claim that it is not the policy of the Council to limit comments to three minutes. This exemplifies the pattern in Defendants' Response in which they attempt to alter the facts, despite clear evidence to the contrary. The City Council agenda stands as undisputed evidence and it clearly shows that "scheduled public hearing(s)" and "citizens public comment on numbered legislation" are limited to "*3 minutes.*" *Exhibit 5: City Council Agenda.* Additionally, during the meeting, (*Exhibit 2*), the Mayor says "quickly counselor," indicating he was growing impatient with the length of the discussion and was ready to move on. Additionally, and perhaps even more significantly, in their Answer filed in federal court, Defendants admitted that "Plaintiff was informed it would only be permitted to speak for three minutes." *Doc. 2, par. 43; Doc. 3 par. 43.* Clearly, had the Council's policy been to provide more than three minutes, Defendants would have denied Plaintiff's allegation that it was informed it would only be permitted to speak for three minutes. Defendants' argument to the contrary contradicted their own admission in their Answer and contradicts the information provided on the Agenda.

[23] Plaintiff's counsel emailed the Motion for Full Hearing prior to the Council meeting. Plaintiff's counsel submitted a Brief in Support of the Motion at the Council meeting. In the record, the clerk made a notation on the bottom of the Motion indicating that it was submitted at the hearing and the clerk failed to include the Brief that was actually submitted during the Council meeting in the record.

Council was a "legislative body, not a judicial body" and that the Council does not "hear cases; that is what the court system is for." *Exhibit 2.* **The Mayor's statement that the Council does not "hear cases" is properly taken as an admission that Plaintiff was not afforded with a meaningful due process hearing.** The Mayor's statement, documented on videotape, clearly shows the Council refused to afford Plaintiff a hearing at which it could present evidence and cross-examine witnesses.[24] Despite the fact that this evidence is documented on videotape, Defendants still attempted to argue that this evidence doesn't mean what it says. Despite Defendants' attempt to muddy the waters, the undisputed evidence shows that the City Council refused to provide Plaintiff with a meaningful opportunity to be heard.[25]

3. The undisputed evidence proves that the City failed to provide adequate notice of the alleged violations or rights to appeal.

Defendants also attempt to argue that the City provided notice of the alleged violations, despite the fact that the evidence in the record plainly shows otherwise. Defendants argue that the list of alleged defects in the affidavit for the search warrant provides a list of violations. First, this affidavit was only obtained by Plaintiff through a Freedom of Information Act request and, otherwise, would not have been provided to a property owner. Thus, this is not actual "notice" of anything. Second, the affidavit only lists exterior conditions which were the result of weather damage and were entirely cosmetic in nature. These conditions are far from sufficient to declare the structure unsafe or unfit for habitation.

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[24] For example, Plaintiff did not have the opportunity to cross-examine Defendant McHenry regarding her recommendation. Plaintiff does not even know if McHenry was present at the meeting as she did not testify or respond to any of the council members' questions. Additionally, Defendants argument that Plaintiff should have appeared at other City Council meetings where the property was not on the agenda to plead its case is three minute increments is simply ridiculous. The only time the property was placed on the agenda was for the February 25, 2013 council meeting and this is the only time Plaintiff had reason to believe the Council would consider the matter.

[25] Defendants assert that, because Plaintiff's counsel submitted a brief to the counsel, that Plaintiff presented "evidence." The brief contained legal arguments in support of Plaintiff's Motion for Full Hearing and was not "evidence." Indeed, the Brief was a plea to the City Council to provide Plaintiff with the opportunity to repair the property or a full and fair hearing.

The "Notice of Public Nuisance" speaks for itself and is undisputed evidence. *Exhibit J.* The Notice does not contain a list of violations as required both by the City's Code and by the due process requirements of both the federal and state constitutions. Furthermore, it is undisputed that the Notice does not contain information about rights of appeal. Defendants argue that, based on statements of counsel at the City Council meeting, Plaintiff was aware of its right to appeal. Thus, Defendants argue that because a party hires an attorney who is aware of District Court Rule 9, the City does not have an obligation to notify property owners of their right to appeal. This is a problematic position for multiple reasons. First, the fact that a party obtains legal counsel does not cure the defect in the Notice itself. Second, most property owners will not hire an attorney for, among other reasons, lack of resources to do so, and many of those who do may not do so within the short time frame which Rule 9 provides for the filing of an appeal. Thus, the fact that one property owner obtained legal counsel who was aware of District Court Rule 9 does not relieve the City of its obligation to provide notice of rights to appeal to property owners.

Defendants assert that a simple "appearance" by Plaintiff's counsel is sufficient to cure the lack of adequate notice. Plaintiff's counsel did not, as alleged in Defendant's brief, have an opportunity to present Plaintiffs case to the counsel. Indeed, it was obvious that the Council had no interest in hearing Plaintiff's case. Plaintiff had been told that it would be permitted to speak for three minutes before the City Council. Plaintiff's counsel appeared for the limited purpose of asking for a full and fair hearing or the issuance of a permit to repair the property. Because, Plaintiff had not been provided with a list of specific violations, as required by the City Code, Plaintiff could not adequately prepare to present its case. The "appearance" of Plaintiff's counsel does not cure the fact that the Notice provided to Plaintiff failed to specify the alleged violations or the lack of information about rights to appeal.

The Notice speaks for itself and there are no genuinely disputed material facts by which the City can show that it provided constitutionally sufficient notice prior to seizing and condemning Plaintiff's property.

4. Plaintiff attempted to enter into an agreement with the City to repair the Property on at least four occasions.

Defendants further falsely contend that Plaintiff never attempted to enter into an agreement with the City to repair the property and refused to submit a plan. Initially, Mr. Livdahl met with members of the Code Enforcement Department and asked that Plaintiff be permitted to repair the property. *Exhibit A, par. 12.* Having been informed by the Code Enforcement staff that Plaintiff would not be permitted to repair the Property, Mr. Livdahl contacted both the Mayor (who was previously the Director of Community and Governmental Affairs) and council member Maurice Taylor attempting to secure a permit to repair the property. *Id., par. 13.* Plaintiff's counsel appeared at the Council meeting on February 25, 2013 and asked that Plaintiff be permitted to repair the property.[26] *Exhibit 2.* Following the condemnation vote and prior to filing this action, Plaintiff's counsel had a telephone conversation with two assistant city attorneys in which counsel asked that the condemnation be set aside and that a permit be issued to repair the property. The City's attorneys indicated that the City would not consider setting aside the condemnation and a permit would only be issued if a rehabilitation plan was approved and a bond equal to the cost of demolition and a letter of credit were provided. Thus, the undisputed evidence shows that

[26] Plaintiff's counsel clearly and unequivocally communicated Plaintiff's desire to repair the property at the Council meeting and later to the City Attorney's office. Defendants' contention to the contrary is not only belied by the transcript of the meeting (*Exhibit 2*) and the City's own Minutes from the meeting (*Exhibit O*). Plaintiff's counsel made a sincere effort to resolve this situation and the City stubbornly refused indicating its desire to demolish the structure to prevent it from ever again being used as a nightclub. While the City was excessively stubborn prior to the initiation of this suit, they now falsely attempt to make it appear that they were willing to work with Plaintiff. Based on counsel's own dealings with the City in this matter, absolutely nothing could be further from the truth. Plaintiff's counsel finds it very unsettling that Defendants have mischaracterized his position as presented to the Council and which is documented on video and in the minutes of the Council meeting. Again, Defendants' counsel attempts to argue that the facts are contrary to what is clearly represented by undisputed evidence.

Plaintiffs requested a permit to repair the property on at least four separate occasions and Defendants contention that Plaintiff never indicated a desire to repair the property, sought a permit, or attempted to take corrective action are completely disingenuous.[27] The undisputed evidence in the record clearly demonstrates these statements to be false.

Defendants' arguments that Plaintiff refused to enter into a rehabilitation agreement is, at best, a half-truth. Indeed, Plaintiff sought a permit to repair the property on more than four occasions and the City stubbornly refused to negotiate. Defendants attempt to argue that the letter from Assistant City Attorney Bill Brown (*Exhibit E*) is not a denial of a permit is simply absurd. Defendants' comment indicating that Plaintiff was holding the City hostage (pg. 23) is an attempt to spin the facts in a way that is untruthful. Indeed, it was the Plaintiff's property that was and is still held hostage by the City. Plaintiff was not permitted to utilize or repair its property prior to the condemnation and, after the condemnation, could only submit a proposed plan which may or may not have been approved,[28] post an oppressive bond, and, if the plan were approved, invest its resources in repairing the building with no assurance that the City would still not proceed with the condemnation. Given the reality of the situation, for Defendants to say that Plaintiff held the City hostage is incredulous.

Defendants acknowledge that the issue involved in this matter is "due process." However, their statement of the issue following this acknowledgement clearly indicates that Defendants fail to understand "due process." Defendants contend that the due process issue is, "Was there legal

[27] Defendants' statements indicating that the City made attempts to enter into a rehabilitation agreement with Plaintiff are completely disingenuous. Defendants repeatedly and steadfastly refused to negotiate any type of agreement with Plaintiff and demonstrated their intent to summarily condemn and demolish the structure so that it could not be used again as a nightclub.

[28] Based on the statement by council member Robinson that the Neighborhood Association wanted the Property demolished (*Exhibit 2*), Plaintiff had no reason to believe that a rehabilitation plan would be approved.

authority for the City of North Little Rock to vote to condemn Plaintiff's structure?"[29] Plaintiff has not alleged that the City cannot condemn property. Plaintiff has maintained that the City's procedures for condemning property fail to provide adequate notice, an opportunity to repair the property, or a meaningful opportunity to be heard. Thus, the question is not whether the City has legal authority to condemn property but whether the City's process satisfies the constitutional requirements of due process.

Plaintiff attempted on at least four occasions to enter into an agreement with the City to repair the property. It was apparent that the City had no interest in allowing the property to be repaired. Given the City's obstinance towards permitting the property to be repaired, Plaintiff is extremely reluctant to invest resources into making repairs only to have the City declare the repairs insufficient and proceed to demolish the property. It is important to note that submitting a rehabilitation plan does not guarantee that a permit for repairs will ever be issued. Without any notice of the conditions to be corrected, a property owner is left to guess at what the City would require in a rehabilitation plan. Once the property has been condemned, the City may proceed to demolish the property at its whim. Considering that the City has a particular animosity to this property and, as acknowledged by Defendant Wadley (*Exhibit 1*), the Council wants this property destroyed (*See comments of L. Robinson, Exhibit 2*), as well as the steadfast refusal of the City to allow the property to be repaired prior to condemnation, for Plaintiff to now enter into a rehabilitation agreement would be foolhardy. It is very possible, even likely, that the City Council would reject any rehabilitation plan submitted by Plaintiff and proceed to demolish the property.

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[29] Defendants quote from *English v. Town of Huntington*, 448 F.2d 319 (2d Cir. 1971) in support of a city's ability to remove dangerous structures. Plaintiff has not argued that the City does not have this authority. However, the *English* case also states that such authority must be exercised in a constitutional manner. *Id.* at 323. It is not the authority to raze dangerous structures that Plaintiff is challenging but it is the lack of constitutionally required due process protections. However, because the City cannot show that it provided the required due process protections, its counsel must attempt to muddy the waters with irrelevant arguments.

It is also possible that the City could approve a rehabilitation plan and permit Plaintiff to invest its resources in making repairs only to have the City deem the repairs to be inadequate and demolish the property. If a rehabilitation plan were rejected or if repairs were deemed insufficient, Plaintiff would have absolutely no recourse as the time to file a Rule 9 appeal to challenge the condemnation action would have been exhausted. Additionally, the City's procedures require that, to obtain approval of a rehabilitation plan, the property owner must post an oppressive bond and provide a letter of credit. The City made it very clear that it would not consider waiving these requirements.

Thus, the undisputed evidence shows that while Plaintiff made multiple efforts to negotiate with the City so that repairs could be made, the City repeatedly demonstrated that it had no interest in seeing this property repaired and was intent on seeing the structure demolished.

III. The seizure and condemnation of Plaintiff's property resulted in a deprivation of property and Plaintiff is entitled to *predeprivation* due process.

Plaintiff's counsel wishes to express his appreciation to Defendants' counsel for citing to *Abraham v. Pekarski*, 728 F.2d 167 (3d Cir. 1984) on page 29 of Defendants' Brief. This case makes a point that goes to the heart of this matter: A post-deprivation judicial finding is not a substitute for a pre-deprivation due process hearing.[30]

> The defendants urge somewhat half-heartedly that no evidence adduced at trial supported Abraham's due process claim. That contention is frivolous. It was conceded in the trial court that Abraham was discharged without any hearing whatsoever. If Abraham had a property interest in not being discharged except for good cause, the conceded fact that he was discharged without a hearing is alone enough to support the verdict in his favor. The trial court, in a ruling that was more favorable to the defendants than that to which they were entitled, required that the jury also find that Abraham's discharge was not for just cause. That ruling was erroneous. **A post-termination judicial finding . . . is not a substitute for a pre-termination due process hearing.** *See Perri v. Aytch*, 724 F.2d 362, slip op. at 9-11 (3d Cir. Dec. 22, 1983).

[30] Plaintiff is grateful to Defendants for pointing out this case. Defendants seem to feel that the fact that a judicial remedy is available, the City is relieved of any obligation to provide predeprivation due process. This case absolutely refutes the City's position.

Abraham, 728 F.2d at 170 (emphasis added).

Defendants argue that, because the structure has not yet been demolished, there has been no due process violation. First, Plaintiff was denied the ability to repair or utilize its property when the structure was red-tagged. *Exhibit 1, RFA No. 4; Exhibit 3, attached hereto, RFA No. 18; Exhibit 6, RFA No. 12; Exhibit 3, RFAs Nos. 23, 24, 30, 31, & 33; Exhibit 4, RFA No. 11; Doc. 18-12: Exhibit L, section 8.3.4.2.* This was clearly a meaningful interference with Plaintiff's property rights. Second, because Plaintiff is prohibited from repairing the property, the property has sustained additional weather related damage and has decreased in value. Third, the condemnation Resolution authorizes the City to raze the property at any time. Thus, Plaintiff was forced to bring suit in state court or risk imminent destruction of the property. As previously noted herein, there is no guarantee that a rehabilitation plan would be approved and, if denied, the City could proceed to demolish the structure and Plaintiff would have absolutely no recourse. Thus, Plaintiff has been denied the ability to repair or utilize its property and, due to the actions of Defendants, have sustained an economic loss in the decrease of the value of the property.

The undisputed evidence shows that once the Property was red-tagged, Plaintiff could not repair or utilize the Property. The only action Plaintiff was permitted to take, and clearly that the City ever intended to allow, was to demolish the Property. This was clearly a meaningful interference with Plaintiff's possessory interest. *See, e.g., Soldal v. Cook County, Illinois*, 506 U.S. 56, 60, 113 S. Ct. 538 (1992) (quoting *United States v. Jacobsen*, 466 U.S. 109, 104 S. Ct. 1652 (1984)). The condemnation order permits the City to demolish the property at any time.[31]

[31] On page 18 of their Brief, Defendants cite to *Hagen v. Traill County*, 708 F.2d 347 (8th Cir. 1983) in support of their contention that the condemnation has not deprived Plaintiff of its property. However, in *Hagen*, while it is not clear, it appears that the property had been demolished prior to the plaintiff initiating the lawsuit. *Hagen* does not provide support for Defendant's contention. Similarly, in the next sentence of their Brief, Defendants cite to *Heidorf v. Town of Northumberland*, 985 F.Supp. 250, (N.D.N.Y. 1997) in support of their contention that condemning a building is not depriving a property owner of his property." However, as in *Hagen*, in *Heidorf*, the structure in question had already been demolished. There is no support in *Heidorf*, for Defendants contention that a condemnation is not a

Simply because the City has chosen to delay the demolition because Plaintiff filed this action does not make its procedure constitutional. Additionally, because Plaintiff has been denied a permit to make repairs, the property has sustained significant additional damage and its value has significantly decreased.

To say that the condemnation of property does not result in a deprivation of property is an untenable position. First, as noted in Plaintiff's Brief, once a City interferes with a property owners ability to utilize his property, a deprivation has occurred. *Franklin v. State*, 267 Ark. 311, 590 S.W.2d 28 (1979). The "red-tagging" of Plaintiff's property is analogous to the order which was nailed to the door of the dance hall in *Franklin* and was essentially a temporary injunction barring use or repair of the property. As in *Franklin*, in this case, the City's interference with Plaintiff's ability to use or repair the property without prior notice or opportunity to be heard was an unconstitutional deprivation of property.

Indeed, the case law cited by Defendants allegedly in support of their argument, simply do not support the argument. While Plaintiff has attempted to give Defendants' counsel the benefit of the doubt where cases and facts are repeatedly misrepresented, in their cite to *Hagen v. Traill County*, 708 F.2d 347 (8th Cir. 1983) on page 18 of their Brief, it appears that Defendants' counsel intentionally attempts to misrepresent the *Hagen* case. Defendants state, "Specifically the Eighth Circuit has stated that notification and an opportunity to be heard after a piece of property has been condemned for safety and health concerns but *before the property is demolished* is all that is required of due process." Defs' Brief Pg. 18. This is an inaccurate statement of the *Hagen* case whereby Defendants' counsel is attempting to add more to the case than is there. *Hagen* is a relatively short opinion and the facts indicate that the City abated a nuisance after the owner was

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deprivation of property. Thus, Defendants have failed to cite to a single authority in support of their argument.

provided with oral and written notice and the owner was given opportunity to abate the nuisance himself. The opinion does not say that the property was condemned prior to the owner being given an opportunity to be heard. Indeed, while the opinion is somewhat short on the facts, it can be safely assumed that the property owner was not only given oral and written notice but was given an opportunity to make repairs prior to any condemnation action. Regardless, the short opinion does not support the contention in Defendants' Brief that a post-condemnation judicial hearing satisfies the requirements of due process.

Also misleading, Defendants' counsel cites to *Heidorf v. Town of Northumberland*, 985 F.Supp. 250 (N.D.N.Y. 1997) stating that "Condemning a building is not depriving a property owner of his property . . . ." *Defs' Brief Pg. 18.* Again, Defendants' counsel attempts to stretch this case to mislead the Court into believing that the case says something more than it actually does. As in *Hagen*, the *Heidorf* case does not address any distinction in the condemning of a structure and its actual demolition and Defendants' counsel's assertion that it does appears to be an intentional attempt to mislead the Court.

The *Heidorf* case does state that the "gravity [of a property deprivation] is irrelevant to the question of whether account must be taken of the due process clause." 985 F.Supp. at 256. Defendants' seizure by red-tagging Plaintiff's property was certainly more than a *de minimis* interference with Plaintiff's property rights and, therefore, absent exigent circumstances, Plaintiff is entitled to predeprivation due process. *Heidorf* holds that where neither "the necessity of quick action" nor "the impracticality of providing any meaningful predeprivation process" are present, predeprivation due process is required. *Id.*; *See also Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 298-300, 101 S. Ct. 2352 (1981); *Parratt v. Taylor*, 451 U.S.

527, 539, 101 S. Ct. 1908 (1981).[32]

The Supreme Court has noted that private property rights are of "historic and continuing importance." *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 53-54 (1993). When the government deprives a property owner of "valuable rights of ownership, including . . . the right of occupancy [and] the right to unrestricted use and enjoyment . . ." a Fourth Amendment seizure has occurred. *Id* at 54. In *James Daniel Good*, the Supreme Court noted that it had previously held that the "prejudgment attachment of real estate without prior notice or hearing was unconstitutional . . . even though the attachment did not interfere with the owner's use or possession and did not affect . . . rentals from existing leaseholds." 510 U.S. at 54 (citing *Connecticut v. Doehr*, 501 U.S. 1, 111 S. Ct. 2105 (1991)). The City's seizure of Plaintiff's property in the present case resulted in more severe restrictions of Plaintiff's "valuable rights of ownership" than did the seizure in *Doehr*. In the present case, once the property was red-tagged, Plaintiff was barred from occupying, utilizing, or repairing the property. Furthermore, the pending condemnation action would have made it extremely unlikely that the property could be sold or rented. Additionally, forbidding Plaintiff from making repairs has resulted in further deterioration and devaluation of the Property. Clearly, under the aforementioned Supreme Court precedents, the red-tagging and certainly condemnation vote were both Fourth Amendment seizures and, absent exigent circumstances, Plaintiff is entitled to predeprivation due process.

It is further interesting to note that, in their Brief, Defendants claim the property was a danger to the community. However, Defendants have attempted to stall this litigation and the

[32] *Heidorf* also indicates that more than a cursory inspection of a property is required prior to condemnation to support a finding of imminent danger. 985 F. Supp. at 258. Considering the fact that Defendant McHenry did not take any notes (*Exhibit I*) or make any list of specific violations, her inspection was cursory at best.

property has remained standing for more than fifteen months since the condemnation vote. The carnage allegedly feared by the Council that would surely befall the citizens of North Little Rock as a result of this structure has not occurred. Thus, it is undisputed that no emergency existed that necessitated condemnation in the absence of any due process protections.

Surely, the City could have taken the time to do this process right—provide a list of conditions to be corrected, issue a permit for repairs to be made, and provide a full hearing. Indeed, had the City provided appropriate due process, the structure would now be repaired and neither the City nor Plaintiff would be burdened with this litigation. It is undisputed that the property did not pose an imminent danger to the community and, therefore, Plaintiff was entitled to predeprivation due process.

In asserting that *Samuels v. Meriwether*, 94 F.3d 1163 (8th Cir. 1996) is controlling, Defendants ignore the significant differences in the *Samuels* case and the present. Indeed, the North Little Rock City Council proceeded in a significantly different manner than the municipal defendant in the *Samuels* case. To begin with, Samuels was given notice of specific violations to be corrected and the city permitted Samuels to make repairs prior to condemantion:

> the City sent a letter outlining twenty conditions found to be in violation of City ordinances. Three days later, the City sent another letter listing additional violations including rubbish and burnt furniture on the property. Finally, three weeks later, on December 6, the City notified the Samuels by letter that the property was in violation of City Ordinance No. 1203,

Samuels, 94 F.3d at 1165.

Next, while the facts of exactly what type of hearing was provided to Samuels are not discussed in the opinion, it is clear that a "hearing" was provided. In the present case, a "hearing" was not provided despite Plaintiff's request. *Id.* at 1167. Most importantly, in *Samuels*, the city specifically directed that the property be cleaned and repaired **prior to condemnation**. *Id.* at 1165.

Indeed, it is apparent that the city did not condemn the property at the "hearing" but instructed that repair work begin by a certain date—February 18. *Id.* It was not until the owner had an opportunity to begin repairs and failed to do so that the property was condemned. *Id.* Thus, in *Samuels*, the property owner was provided notice of specific violations and was not only permitted to make repairs but was directed to do so prior to condemnation. The City only condemned the property after giving the owner 30 days to begin repairs. *Id.* In the present case, Plaintiff has never been provided with a specific list of violations to be corrected and was barred from making repairs *prior to the condemnation* action. In the *Samuels* case, the Plaintiff was provided with a list of specific conditions to be corrected, provided with an opportunity to repair the property *before condemnation*, and afforded a hearing. In the present case, the City refused to provide these basic due process protections *prior to condemnation*, and thus, defendants' reliance on Samuels is misplaced.[33]

Looking closely at the *Samuels* case, two words in the opinion—"We disagree"—actually refute Defendants' argument that only minimal—really non-existent—procedural due process will suffice in condemnation cases.

> Defendants argue that if the government provides procedural due process of law, nothing more must be done to satisfy the reasonableness requirement of the Fourth Amendment. *Flatford v. City of Monroe*, 17 F.3d 162, 170 (6th Cir. 1994) (interpreting *Soldal*) (eviction from apartment). **We disagree.**
>
> We think that the Supreme Court's ruling in *Soldal* requires more. To collapse the Fourth Amendment reasonableness standard into the Fourteenth Amendment notice and hearing requirements in all cases is to ignore *Soldal*. When a Fourth Amendment claim is brought, we need to conduct an independent review of the

[33] Plaintiff is further puzzled by Defendants citation to *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 800, 103 S.Ct. 2706 (1983) purportedly in support of a statement regarding notice and condemnations. This case concerns a statute that permitted a property to be sold for delinquent taxes without notice. Interestingly, the Court held that the lack of notice was a due process violation. This case, and particularly the pinpoint page reference, does not provide any support for Defendants argument.

> seizure for reasonableness in addition to any analysis regarding procedural due process.

Samuels, 94 F.3d at 1167-1168 (emphasis added). Thus, *Samuels* requires that the Court go beyond an analysis of procedural due process and review the reasonableness of the seizure. Because "[a] 'seizure' of property . . . occurs when 'there is some meaningful interference with an individual's possessory interests in that property, '" *Soldal v. Cook County*, 506 U.S. 56, 61, 113 S. Ct. 538 (1992)(quoting *United States v. Jacobsen*, 466 U.S. 109, 113, 104 S. Ct. 1652 (1984)), the red-tagging of Plaintiff's property was undoubtedly a Fourth Amendment seizure. Whether the City acted reasonably is the ultimate standard and a "careful balancing of governmental and private interests is required." *Id.* at 7. Thus, the question is, was it reasonable for the City to seize Plaintiff's property through a summary procedure which was completely devoid of due process protections and deny Plaintiff the opportunity to repair the property prior to condemnation? Answering this question will undoubtedly lead to the conclusion that a property owner should be permitted to repair its property prior to a condemnation proceeding and that, at a minimum, adequate notice and a meaningful opportunity to be heard prior to condemnation should be provided. These things are reasonable to expect in any situation where the government is attempting to seize private property. *See, e.g., Manganaro v. Reap*, 29 Fed.Appx. 859 (3rd Cir. 2002); *Freeman v. City of Dallas*, 242 F.3d 642 (5th Cir. 2001); *Santana v. City of Tulsa*, 359 F.3d 1241 (10th Cir. 2004); *Tribue v. Hough*, 2006 U.S. Dist. LEXIS 837 (N.D.Fla. 2006).

Furthermore, as part of its Fourth Amendment reasonableness analysis, the Court should consider whether complete destruction of a structure is necessary. *Tribue*, 2006 U.S. Dist. LEXIS 837, 21. "The absolute destruction of property is an extreme exercise of the police power and is justified only within the narrowest limits of actual necessity, unless the state chooses to pay compensation." *Id.* at 21-22 (quoting *Corneal v. State Plant Board*, 95 So.2d 1, 4 (Fla. 1957)).

Thus, if it is reasonable to permit or even order that the property be repaired, this option should be exercised instead of demolition.

Interestingly, in their Brief, Defendants state that "the City requested that [Plaintiff] clean up its property." Pg. 20. This is interesting because Plaintiff did clean up the property and the City was aware but the City failed to reinspect the property. Instead, the Council proceeded to condemn the property on the basis of conditions which no longer existed. Further, Defendants state that "Plaintiff has done nothing to comply." This statement is completely disingenuous. First, Plaintiff was barred by the City's refusal to issue a permit from making any repairs. Second, Plaintiff did clean up the property and the City was aware that Plaintiff was doing so. Third, Richard Livdahl and Plaintiff's counsel attempted to negotiate for a permit to the repair the property. Fourth, Plaintiff sought either permission to repair the property or a full hearing, both of which were summarily denied.[34] With the City's refusal to issue a permit for repairs, what more could Plaintiff have done?[35] Defendants attempt to make much of their assertion, which is really another half-truth, the Plaintiff refused to enter into a rehabilitation agreement unless the City rescinded the condemnation procedure. First, Plaintiff was entitled to due process prior to condemnation, therefore, Plaintiff's willingness to enter into an agreement post-condemnation is not relevant as

[34] Defendants absurdly state that Plaintiff should have come to every council meeting to plead its case. Since Plaintiff had been informed that it would only be permitted to speak for three minutes at the scheduled meeting, why would it believe it would be given an opportunity to speak at meetings where the property was not on the agenda? Clearly, any effort to raise the issue at a council meeting for which the property was not on the agenda would have been futile. This is another example of Defendants willingness to make absurd assertions in a desperate attempt to show that it provided some due process when, in actuality, the City never had any intention of permitting this property to be repaired.

[35] Plaintiff is somewhat miffed by Defendants' propensity to make statements which contain only half-truths and appear to be intentionally misleading. For example, Defendants state that "Plaintiff concedes that counsel appeared on its behalf before the Council refusing to obtain a rehabilitation and building permit absent the City rescinding the condemnation procedure." First, Plaintiff has not conceded any such thing. Second, Plaintiff's counsel asked that the Council allow it to make repairs which was a reasonable request. The Council made it clear that it wanted the building demolished (see L. Robinson's comments, *Exhibit 2*). Defendants counsel argues that, because Plaintiff was given notice that its property was to be destroyed and that counsel appeared at the Council meeting, the fact that the fate of the property was predetermined and that the City never intended to permit repairs to be made are irrelevant. What good is notice when the outcome of the proceeding is predetermined?

to whether the City's predeprivation process was adequate. Second, Plaintiff's counsel attempted to negotiate a post-condemnation agreement but the City's attorney's office flatly refused to even meet with Plaintiff's counsel, let alone negotiate any resolution which would avoid litigation.

In their Response, Defendants failed to point to any evidence in the record which shows that they provided due process prior to red-tagging Plaintiff's property. In their Response, Defendants failed to point to any evidence in the record that shows that they provided adequate notice of the alleged violations, the opportunity to repair the property prior to condemnation, or a meaningful opportunity to be heard prior to condemnation. In the absence of any genuinely disputed issue of material fact on these issues, Plaintiff is entitled to summary judgment.

IV. Defendants are not entitled to legislative immunity.[36]

Because Defendants failed to file an Answer or responsive pleading within the timeframe required by Rule 12(a)(3), they should not now be permitted to raise affirmative defenses, such as legislative or qualified immunity, in their Response. *See* Ark. R. Civ. P. 8(c). Plaintiff submits that all affirmative defenses Defendants have attempted to raise in their Response should be stricken.

Even if Defendants are permitted to raise the defense of legislative immunity at this time, this defense is without merit in this case. Plaintiff finds Defendants reassertion of legislative immunity as perplexing as their repetition of the failure to exhaust argument. **The decision to condemn Plaintiff's property was an administrative decision, therefore, the Mayor and council members are not entitled to legislative immunity.**

Defendants attempt to mischaracterize the City's condemnation of Plaintiff's property as a

[36] As noted in Plaintiff's Brief in Support of its Motion, legislative immunity for local legislative bodies does not exist under Arkansas law. Therefore, Defendants cannot claim entitlement to legislative immunity for Plaintiff's state law claims.

legislative act to support their assertion of legislative immunity but then seek to hold Plaintiff to the provisions of Arkansas District Court Rule 9 and Arkansas Code Annotated § 14-56-425[37] that apply only to administrative decisions. The act of condemning Plaintiff's property was a Resolution seeking to apply the City's condemnation ordinance and was not an ordinance itself. Therefore, this was an administrative decision and legislative immunity is not applicable.

A. Because the City Council's decision was the enforcement of an existing ordinance it was an administrative decision which is not protected by legislative immunity.

In their Response, Defendants do not even attempt to argue the distinction between a legislative versus administrative action and simply attempt to persuade the Court that everything the Council votes on is automatically to be deemed "legislative." The failure to even attempt to address the administrative nature of the action is telling. It is simply undeniable that the condemnation action in question was an administrative act that is not covered by legislative immunity.

Under federal law, legislative immunity attaches only to actions taken in the sphere of legitimate legislative activity. *Leaphart v. Williamson*, 705 F.3d 310, 313 (8th Cir. 2013); *Maitland v. Univ. Minn.*, 260 F.3d 959, 963 (8th Cir. 2001)(citing *Bogan v. Scott-Harris*, 523 U.S. 44, 46, 54, 118 S.Ct. 966, 140 L.Ed. 2d 79 (1998)). The scope of absolute immunity extends no further than its justification warrants. *Stone's Auto Mart, Inc. v. St. Paul*, 721 F. Supp. 206, 208-209 (D. Minn. 1989)(citing *Harlow v. Fitzgerald*, 457 U.S. 800, 810-11, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982)). Whether an act is legislative turns on the nature of the act. *Bogan*, 523 U.S. at 54. The Supreme Court has developed a functional test to determine whether an act is legislative. *Leaphart*, 705 F.3d at 313 (citing *Redwood Village Partnership v. Graham*, 26 F.3d 839, 840 (8th

[37] As previously discussed herein, this statute does not apply in this matter.

Cir. 1994)(citing *Harlow v. Fitzgerald*, 457 U.S. 800, 810, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982)). "Legislation . . . looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power." *Id.* (quoting *Prentis v. Atl. Coast Line Co.*, 211 U.S. 210, 226, 29 S. Ct. 67, 53 L. Ed. 150 (1908)(quoted in *Brown v. Griesenauer*, 970 F.2d 431, 437 (8th Cir. 1992)). Legislation involves the "formulation of policy governing future conduct for all or a class of the citizenry." *Brown*, 970 F.2d at 437 (quoting *O'Brien v. City of Greers Ferry*, 873 F.2d 1115, 1119 (8th Cir. 1989)).

The status of the Defendants as local legislators is not dispositive of the question as to whether an act is legislative. *Id.* at 436. Municipal corporations possess both legislative and executive powers. *PH, LLC v. City of Conway*, 344 S.W.3d 660, 665 (Ark. 2009)(quoting *Cambden Cmty. Dev. Corp. v. Sutton*, 339 Ark. 368, 373 (1999)). "[N]ot all governmental acts by a local legislator, or even a local legislature, are necessarily legislative in nature." *Id.* (citing *Cinevision Corp. v. City of Burbank*, 745 F.2d 560, 580 (9th Cir. 1984), *cert. denied*, 471 U.S. 1054, 85 L. Ed. 2d 480, 105 S. Ct. 2115 (1985)).

> The critical inquiry is the nature of the official's function in a particular proceeding, not the identity of the actor who performed the function. *See Forrester v. White*, 484 U.S. 219, 229, 98 L. Ed. 2d 555, 108 S. Ct. 538 (1988); *Brown*, 970 F.2d at 436. The nature of a proceeding, in turn, "depends not upon the character of the body but upon the character of the proceedings." *Brown*, 970 F.2d at 436 (quoting *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 477, 75 L. Ed. 2d 206, 103 S. Ct. 1303 (1983) (citation omitted)).

Redwood Village Partnership, 26 F.3d at 840-41. The fact that local legislators vote on an issue does not necessarily determine whether he or she is acting in a legislative capacity. *Brown*, 970 F.3d at 437 (citing *Cinevision Corp.*, 745 F.2d at 580; *O'Brien*, 873 F.2d at 1119-20 (city council vote on special appropriation was an executive act)). **The crucial test for determining what is legislative and what is administrative is whether the ordinance is one making a new law, or**

one executing a law already in existence. *See Kearny v. City of Little Rock*, 2009 Ark.App. 125, 10-11 (2009)(citing *City of North Little Rock v. Gorman*, 264 Ark. 150 (1978)); *PH, LLC v.* 344 S.W.3d 660, 665 (quoting *Cambden*, 339 Ark. at 373). Where a City Council applies facts to an existing ordinance to make a decision, the act is administrative. *See King's Ranch of Jonesboro, Inc.* v. *City of Jonesboro*, 2011 Ark. 123, 6 (2011).

Administrative decisions are not protected by legislative immunity. *See, e.g. Leaphart*, 705 F.3d at 314; *Maitland*, 260 F.3d 962. In particular, legislative immunity does not protect city council members from claims based on ordering specific tasks related to the implementation of an ordinance. *Hoekstra v. City of Arnold*, 2009 U.S.Dist. LEXIS 7465 , 28-29 (E.D. Mo. 2009)(citing *Percefull v. Claybaker*, 211 Fed.Appx. 521, 523 (8th Cir. 2006)(vacated and remanded on other grounds)). In *Hoekstra*, the court held that while a mayor and city council members had absolute legislative immunity for the enactment and signing of a Red Light Camera Ordinance, the defendants were not immune from claims based on their actions in implementing the ordinance. *Id.*

"[A] legislative act is characterized by having a policymaking function and general application." *Brown v. Crawford County*, 960 F.2d 1002, 1011 (11th Cir. 1992).[38] This was a "formulation of policy governing future conduct for all or a class of the citizenry." *See Brown v. Griesenauer*, 970 F.2d at 437; *Brown v. Crawford County*, 960 F.2d at 1011. While it is true that decisions enacting zoning ordinances are legislative actions, applying those ordinances to specific properties, such as the issuance or denial of permits, are clearly administrative actions. *See, e.g., Acierno v. Cloutier*, 40 F.3d 597, 613 (3rd Cir. 1994); *Scott v. Greenville Cnty.*, 716 F.2d 1409, 1423 (4th Cir. 1983) (holding that a county council's actions in a dispute over a building permit

[38] This case was cited in Defendants pleadings in federal court but it actually supports Plaintiff's position.

were not "part and parcel of legislative deliberations on a zoning policy issue," but rather involved non-legislative, enforcement responsibilities to which absolute legislative immunity did not attach); *Roman Catholic Diocese of Rockville Ctr. v. Inc. Vill. Of Old Westbury*, 2012 U.S. Dist. LEXIS 56694, 50 (E.D.N.Y. 2012); *Schubert v. City of Rye*, 775 F.Supp. 2d 689, 701 (S.D.N.Y 2011); *cf. S. Lyme Prop. Owners Assoc.*, 539 F. Supp. 2d 547, 558-59 (D.Conn. 2008)(distinguishing between *adopting* land-use regulations and policies governing their enforcement, which is legislative, and *enforcing* land-use regulations, which is not legislative); *see also Supreme Court v. Consumers Union of the U.S.*, 446 U.S 719, 736, 100 S.CT. 1967, 64 L.Ed. 2d 341 (1980) (holding that the doctrine of legislative immunity did not bar prospective injunctive relief against the chief justice of the Virginia Supreme Court insofar as he was acting to enforce, rather than legislate, disciplinary rules)(vacated and remanded on other grounds). Where council members are acting in the context of already-existing land-use policies, they are not protected by legislative immunity. *Id.* "When local zoning officials do more than adopt prospective, legislative-type rules and take the next step into the area of enforcement, they can claim only the executive qualified immunity appropriate to that activity." *Scott*, 716 F.2d at 1423.[39]

In *Acierno v. Cloutier*, 40 F.3d 597 (3rd Cir. 1994),[40] the court noted that courts frequently have found that rezoning decisions are legislative in nature but cases involving the application of zoning ordinances such as approving or denying applications for variance or special use permits are administrative decisions. *Id.* at 613. Actions affecting a single property are legislative in nature only when they involve broad-based policy decisions. *Id.* at 612-13. The *Acierno* case

[39] It is important to note that all the cases cited by Plaintiff, both in federal and state court, refer to the passage of zoning ordinances. Defendants have not cited a single case holding that a resolution to condemn a property as a nuisance is a legislative decision.

[40] This case was cited by Defendants in their pleadings in federal court. Apparently, Defendants' counsel has now realized it support Plaintiff's position and did not include this case in their Response.

actually involved two decisions by the County Council. *Id.* at 612. The first decision, voided the plaintiff's approved record development plan. *Id.* The court held that this was an administrative decision to which legislative immunity did not apply.

> We thus conclude that the County Council's enactment of Ordinance 91-190 on April 14, 1992, which voided the approved record development plan and related subdivision plans for the property, was an administrative, not legislative, action. The members of the County Council are not entitled to legislative immunity with respect to this action.

Id. The first decision was "an effort to facilitate enforcement of existing zoning laws, not to facilitate enactment or amendment of new zoning laws involving broad-based policy or line-drawing determinations." *Id.* The court cited the following standard for determining whether an action is legislative or administrative:

> [In order to distinguish] legislative from non-legislative functions, . . . the appropriate inquiry [is] whether the conduct of the defendant zoning officials involved either the enactment or amendment of zoning legislation or simply the enforcement of already existing zoning laws. Acts performed pursuant to the former are legislative in character and the officials performing them are entitled to absolute immunity, while acts performed pursuant to the latter are administrative, executive, or ministerial and the officials performing them may only receive the protection of qualified immunity. Factored into this equation should be the impact that such official conduct has on the citizens of the municipality. Official acts affecting the community at-large might tip the balance in favor of a finding of legislative conduct, while acts directed at one or a few individuals might be dispositive of executive or administrative conduct.

Id. (quoting *Jodeco, Inc. v. Hann*, 674 F.Supp. 488, 495 (D.N.J. 1987)). Note that this case was cited by Defendants in their federal court pleadings and it unequivocally states that where the action in question is an enforcement of an already existing law, it is administrative.

Thus, even cases cited by Defendants in their federal court pleadings hold that the standard for determining whether the City Council's decision in the present case was legislative or administrative is whether the action involved the enactment or amendment of an ordinance or

simply the enforcement of an already existing ordinance. The resolution condemning Plaintiffs' property was not a broad-based policy decision. Those broad-based policy decisions were made when the condemnation ordinance was enacted. Clearly, this was an enforcement action of the City's existing condemnation ordinance and, thus, the Council members and city officials are not entitled to legislative immunity. Therefore, Defendants are not entitle to legislative immunity and judgment on the pleadings, or, in the alternative, summary judgment are appropriate.

B. Defendants' contention that Plaintiff is required to comply with the provisions of Rule 9 is an admission that the decision at issue is an administrative and not a legislative decision and Defendants' assertion of legislative immunity is without merit.

The Defendants' attempt to characterize the condemnation action as a legislative decision undermines their Rule 9 arguments. Rule 9 provides for appeal of a "final **administrative** decision." (f)(2)(A)(emphasis added). Rule 9 does not provide for an appeal of a legislative decision. If this action was a legislative action, there is no requirement for Plaintiff to comply with Rule 9. If Plaintiff has no obligation to comply with Rule 9, Defendants' argument that Plaintiff has failed to exhaust state remedies fails and Defendant cannot argue that Plaintiff's claims under the federal Constitution are not ripe for review. On the other hand, if Plaintiff is required to comply with Rule 9, the decision must be administrative and Defendants are not entitled to legislative immunity. Defendants can't have it both ways.

Further, Defendants argue that, pursuant to Arkansas Code Annotated § 14-56-425, they are entitled to a de novo hearing in this Court. While as discussed *supra*, this statute does not apply to this matter, the fact that Defendants argue it is applicable should also be taken as an admission that the challenged action was an administrative action. The Arkansas Supreme Court has held that Arkansas courts may apply *de novo* review only to "administrative and quasi-judicial" decisions of city councils. *PH, LLC* v. 344 S.W. at 663 (quoting *Wenderoth v. City of Fort Smith*,

251 Ark. 342, 345 (1971)). Legislative decisions may only be reviewed to determine if they are arbitrary or capricious. *Id.* Allowing the courts to apply *de novo* review to legislative action would violate the separation of powers by allowing the courts to enact legislation on behalf of a municipality. *See Id.* at 663-64 ("[N]either do the courts have power to review such legislative action by the cities in a de novo manner. In fact, . . . we held such actions unconstitutional."); *Jonesboro v. Vuncannon*, 310 Ark. 366, 371 (1992)("*de novo*" review of a legislative act is unconstitutional); *City of Conway v. Housing Authority of Conway*, 266 Ark. 404 (1979). In fact, in *Summit Mall v. Lemond*, 355 Ark. 190 (2003), the Arkansas Supreme Court expressly held that Arkansas Code Annotated § 14-56-425 does not apply to challenges to legislative action by city councils.

Again, Defendants can't have it both ways. If the Council's action was legislative, Plaintiff is not required to comply with either Rule 9 or § 14-56-425. If the Council's action was administrative, the individual Defendants are not protected by legislative immunity. The preceding analysis clearly demonstrates that the Council's decision was an administrative decision. Therefore, the individual Defendants are not entitled to legislative immunity.

C. Simply labeling an action as an "ordinance" does not make it a legislative action.

Defendants attempt to relabel the "resolution" by which the property was condemned as an "ordinance" and as "legislation." Simply labeling something as an "ordinance" or "legislation" does not change the character of the action.

In their Brief, Defendants cite to *Leaphart* saying that "passing an ordinance is a legislative act." Defendants' reliance on this is puzzling because, the action in question in this matter was the enforcement of an existing ordinance, not the enactment of a new ordinance. If this were an "ordinance," it would be invalid because the procedures for enacting an ordinance were not

followed. First, Arkansas law requires that ordinances be published in a newspaper or in five public places. Ark. Code Ann. § 14-55-206. In fact, the City's failure to comply with the publication requirement is a defense to any penalty or forfeiture. Ark. Code Ann. § 14-55-206(a)(2). Therefore, since the City contends that the Resolution condemning Plaintiff's property was an "ordinance," failure to publish the "ordinance" as required by law negates the City's ability to seize and destroy the Property—case closed!

Arkansas law also requires that an ordinance be read fully and distinctly on three different days (Ark. Code Ann. § 14-55-202) and an ordinance is not effective for a period of ninety days. Ark. Code Ann. § 14-55-203. "Failure to comply with mandatory procedural requirements of the enabling statute renders a[n] . . . ordinance invalid." *Brooks v. Benton*, 308 Ark. 571, 576 (1992). Defendants cannot have it both ways. If they wish to insist that the Resolution was an "ordinance," they must concede the "ordinance" was not properly enacted and is not valid. Of course, the reality is, this was not an ordinance but was an action enforcing an existing ordinance and, as such, is not protected by legislative immunity.

D. The fact that council members vote on something does not make the action "legislative."

Defendants argue that, simply because the Council members voted, they are entitled to legislative immunity. In their Response, Defendants simply ignore the significant body of law which clearly indicates that the decision to condemn Plaintiff's property was an administrative decision that is not protected by legislative immunity. In fact, in their Response, Defendants do not make any attempt to address the distinction between a legislative decision and an administrative decisions.

A case cited by Defendants directly and conclusively refutes Defendants' contention that anything on which council members vote is protected by legislative immunity. **"The fact that the**

action complained of resulted from a vote of the members of the governing body is not dispositive, for in the exercise of non-legislative powers all corporate bodies require a vote of their governing bodies."[41] *Abraham v. Pekarski*, 728 F.2d 167, 174 (3d Cir 1984)(emphasis added); *See also Sable v. Myers*, 563 F.3d 1120, 1125 (10th Cir. 2009)("[n]ot all actions taken at a legislative meeting by a local legislator are legislative for the purposes of immunity.")(quoting *Kamplain v. Curry County Bd. of Comm.*, 159 F.3d 1248, 1251 (10th Cir. 1998)). Thus, even authority cited by Defendants dispels their assertion that simply because council members vote an action is considered to be "legislative."

E. Defendants fail to understand the difference in eminent domain and nuisance abatement actions.

Defendants' citation to *Nahay v. Arkansas Irr. Co.*, 209 Ark. 247 (1945) in support of their contention that "condemnation" is a "legislative" action indicates that Defendants fail to understand the difference in the taking of property for public use or eminent domain and the enforcement of a nuisance abatement ordinance.[42] *Nahay* concerns the taking of land that would be flooded by the construction of a dam. *Id.* at 248. This is a different type of decision from the one at issue in this matter. However, if Defendants wish to continue to argue it is the same type of "condemnation," Plaintiff demands just compensation, as it would be entitled to in that type of "legislative condemnation."

Defendants next cited a string of cases on pages 29-30 of their Brief which they allege add additional support to Defendants' contention that "condemnation" is a legislative act. Unfortunately, all but one[43] of these cases concern eminent domain proceedings. Reluctantly,

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[41] Once again, Defendants have failed to make a reasonable inquiry into the law and made an argument that is refuted by the case law to which they cite.

[42] Plaintiff gives Defendants' counsel the benefit of the doubt and assumes that this evidences a lack of understanding and is not a deliberate use of a quote which could be misleading without context.

[43] *Price v. Town of Atlantic Beach*, 2013 U.S. Dist. LEXIS 158856 (D.S.C. 2013) is the only case in Defendants' string cite which involves the condition of a property. In *Price*, the action complained of actually involved the passing of

Plaintiff will continue to give Defendants' counsel the benefit of the doubt and assume that these cases are presented based on a lack of understanding that eminent domain is different from the enforcement of a nuisance abatement ordinance. None of the cited cases support Defendants' claim of legislative immunity in this case.

F. Legislative immunity does not apply to claims against the City itself or claims against City officials acting in their official capacity.

Municipalities are not entitled to immunity from suits brought under § 1983. *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 113 S.Ct. 1160, 1162 (1993). If the individual Defendants were entitled to legislative immunity, which they clearly are not, this immunity would not extend to the City itself.

> In *Monell v. Dept. of Social Services*, 436 U.S. 658, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978), the United States Supreme Court ruled that municipalities are not entitled to immunity in actions brought pursuant to section 1983. The Court held that "local governing bodies . . . can be sued directly under section 1983 for monetary, declaratory, or injunctive relief where . . . the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." 436 U.S. at 690. The city council's decision to deny plaintiffs' rezoning request is an official decision of the city's governing body. The city council can therefore be held liable if that decision is found to constitute a violation of the plaintiff's civil rights. *See Rollins v. Farmer*, 731 F.2d 533, 535 (8th Cir. 1984) (local governing unit may not assert the immunity of its officials as a defense to liability under section 1983); *McKay v. Hammock*, 730 F.2d 1367, 1374 (10th Cir. 1984) (same); *Westborough Mall, Inc. v. City of Cape Girardeau*, 693 F.2d 733, 740-41 (8th Cir. 1982) (municipality may be liable for "erroneous reversion" of plaintiff's zoning classification), *cert. denied*, 461 U.S. 945, 77 L. Ed. 2d 1303, 103 S. Ct. 2122 (1983); *International Broadcasting Corp. v. City of Bismarck*, 697 F. Supp. 1094, 1095-96 (D.N.D. 1987) (absolute legislative immunity does not extend to local governing bodies).

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an ordinance which required the Town's approval before utility services could be connected to a property. The quote taken from this case should be put in context with the overall facts of the case. *Id.* at 3. Further, it should be noted that the very next sentence of the case states, "The Councilmember Defendants, however, put too much stock in their absolute immunity argument." *Id.* at 12. The opinion also states, "Thus, at most, the Councilmember Defendants would only be able to assert absolute immunity for acts performed in their **legislative capacity** and to defend claims asserted against them in their individual or personal capacities." *Id.* at 13 (emphasis added).

Stone's Auto Mart, Inc. v. St. Paul, 721 F. Supp. 206, 208 (D.Minn. 1989).

Additionally, legislative immunity does not apply to official capacity claims.

> [I]mmunity, either absolute or qualified, is a *personal* defense that is available only when officials are sued in their individual capacities; the immunities officials enjoy when sued personally do not extend to instances where they are sued in their official capacities." *Almonte v. City of Long Beach*, 478 F.3d 100, 106 (2d Cir. 2007) (internal quotation and alterations omitted); *see also Kentucky v. Graham*, 473 U.S. 159, 167, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985) ("The only immunities that can be claimed in an official-capacity action are forms of sovereign immuity that the entity, *qua* entity, may possess . . . .").

Roach v. Stouffer, 560 F.3d 860, 870 (8th Cir. 2009). Thus, legislative immunity cannot apply to the official capacity claims against Defendants.

Therefore, if Defendants' Motion to Dismiss were granted as to the individual Defendants, Plaintiffs claims against the City itself and Plaintiff's official capacity claims should not be dismissed.[44]

G. Plaintiff's claims for declaratory and injunctive relief are not barred by legislative immunity.

Legislative immunity does not apply to claims for declaratory or injunctive relief. *See, e.g., Supreme Court v. Consumers Union of the U.S.*, 446 U.S. 719, 735-37, 100 S.Ct. 1967, 64 L.Ed. 2d 641 (1980)(vacated on other grounds).

> Legislative immunity does not . . . bar all judicial review of legislative acts. That issue was settled by implication as early as 1803, see *Marbury* v. *Madison*, 1 Cranch 137, and expressly in *Kilbourn* v. *Thompson*, the first of this Court's cases interpreting the reach of the Speech or Debate Clause. Challenged in *Kilbourn* was

[44] Defendants also argue that the official capacity claims should be dismissed because they are "redundant." However, the claims are not necessarily redundant. First, the Mayor and council members are elected officials who hold specific offices and exercise independent judgment in acting on behalf of the City. Plaintiff asserts that each official is liable for his own actions taken in his or her capacity as an elected official. This liability may be separate and distinct from the liability of the City as a whole. Second, redundancy alone "is not a persuasive basis for dismissal . . . ." *Capresecco v. Jenkinton Borough*, 261 F.Supp.2d 319, 322 (E.D.Pa. 2003); *See also Brown v. City of Pittsburgh*, 2008 U.S. Dist. LEXIS 13446 (W.D.Pa. 2008). Furthermore, the immunities available to an official sued personally are not available in official capacity suits. *See Roach v. Stouffer*, 560 F.3d 860 (8th Cir. 2008)(citing *Kentucy v. Graham*, 473 U.S. 159, 167, 105 S.Ct. 3099 (1985)("The only immunities that can be claimed in an official-capacity action are forms of sovereign immunity that the entity, *qua* entity, may possess . . . .")). Thus, the differing availability of defenses means that the claims are not necessarily redundant.

> the constitutionality of a House Resolution ordering the arrest and imprisonment of a recalcitrant witness who had refused to respond to a subpoena issued by a House investigating committee. While holding that the Speech or Debate Clause barred Kilbourn's action for false imprisonment brought against several members of the House, the Court nevertheless reached the merits of Kilbourn's attack and decided that, since the House had no power to punish for contempt, Kilbourn's imprisonment pursuant to the resolution was unconstitutional. It therefore allowed Kilbourn to bring his false imprisonment action against Thompson, the House's Sergeant at Arms, who had executed the warrant for Kilbourn's arrest.
>
> The Court first articulated in *Kilbourn* and followed in *Dombrowski* v. *Eastland* 23 the doctrine that, although an action against a Congressman may be barred by the Speech or Debate Clause, legislative employees who participated in the unconstitutional activity are responsible for their acts.

Powell v. McCormack, 395 U.S. 486, 503, 89 S. Ct. 1944, 23 L. Ed. 2d 491 (U.S. 1969).

Regardless of whether the individual Defendants are entitled to immunity, the Court should still evaluate the constitutionality of the Council's action.

> Especially is it competent and proper for this court to consider whether its [the legislature's] proceedings are in conformity with the Constitution and laws, because, living under a written constitution, no branch or department of the government is supreme; and it is the province and duty of the judicial department to determine in cases regularly brought before them, whether the powers of any branch of the government, and even those of the legislature in the enactment of laws, have been exercised in conformity to the Constitution; and if they have not, to treat their acts as null and void." 103 U.S., at 199.

Id. at 506.

V. Defendants intentionally and deliberately violated Plaintiff's clearly established constitutional rights and, therefore, are not entitled to Qualified Immunity.

Again, because Defendants failed to file an Answer or responsive pleading within the timeframe required by Rule 12(a)(3), they should not now be permitted to raise affirmative defenses, such as legislative or qualified immunity, in their Response. *See* Ark. R. Civ. P. 8(c). Plaintiff submits that all affirmative defenses Defendants have attempted to raise in their Response should be stricken.

Defendants argue that they are entitled to qualified immunity. In making this argument, Defendants essentially contend that no reasonable government official would know that seizing and condemning property without providing adequate notice, an opportunity to repair the property, or a hearing is a violation of the property owner's constitutional rights. This argument simply does not hold water. First, any reasonable government official should be aware that the Constitution requires that a property owner be provided with due process prior to the seizure of property. Second, if Defendants were not aware of the requirements of due process, Plaintiff's counsel provided the council members with a brief discussing these rights. Thus, any claim that Defendants did not know their conduct fell short of constitutional requirements is completely without credibility.

In their Brief, Defendants correctly state that qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." In this case, Defendants knowingly condemned Plaintiff's property in a summary procedure that was completely devoid of even minimal due process protections. Indeed, the arguments put forth in Defendants' pleadings in this matter illustrate that the City believes that it has absolutely no obligation to provide due process because a property owner can initiate court action. The Defendants have demonstrated that they believe they can arrogantly shirk their responsibilities to provide constitutional due process because a remedy may be available in state court. These deliberate and intentional actions are not merely errors committed by officials who do not realize their obligations, but these are arrogant abuses of power by which Defendants thumb their noses at the Constitution's protection of private property rights.

Plaintiff has cited herein and in Plaintiff's Response to Defendants' initial Motion to

Dismiss numerous authorities, many of them decisions of the Supreme Court,[45] which discuss the requirements of both procedural and substantive due process and protections from unreasonable seizure of private property. Many of these are well-known and longstanding opinions such as *Matthews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893 (1976).[46] There is simply no excuse for Defendants conduct which results in clear violations of the constitutional rights discussed in so many cases. Any attempt to assert that these rights are not clearly established is simply ridiculous.

It is well-known and clearly established that adequate notice which is specific enough to allow the party to properly prepare for a hearing and that provides information about rights to appeal is required prior to the seizure of property. It is well-known and clearly established that a deprivation of property requires a hearing with the opportunity to confront and cross-examine witnesses and to present evidence. It is well-known and clearly established that a property owner should be permitted an opportunity to repair its property prior to condemnation of the property. It is well-known and clearly established that a governmental agency or body cannot shirk its responsibility to provide due process protections simply because a party can resort to the courts in search of a remedy.

Additionally, Defendants assertion in their Brief that Arkansas Code Annotated § 14-56-203 somehow misled Defendants to believe their actions were acceptable is patently absurd. Nothing in the statute states or implies that the City may take the actions allowed by the statute

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[45] *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 53, 114 S.Ct. 492 (1993); *Connecticut* v. *Doehr*, 501 U.S. 1, 115 L. Ed. 2d 1, 111 S. Ct. 2105 (1991); *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 14, 56 L. Ed. 2d 30, 98 S. Ct. 1554 (1978); *Matthews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893 (1976)*Fuentes v. Shevin*, 407 U.S. 67, 80, 92 S.Ct. 1983, 32 L.Ed. 2d 556 (1972); *Boddie* v. *Connecticut*, 401 U.S. 371, 379, 28 L. Ed. 2d 113, 91 S. Ct. 780 (1971)*Goldberg v. Kelly*, 397 U.S. 254, 269, 90 S.Ct. 1011, 25 L.Ed. 287 (1970); *In re Gault*, 387 U.S. 1, 33, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967); *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 315, 70 S. Ct. 652, 94 L. Ed. 865 (1950).

[46] This case is probably the foundation case for determining the extent of procedural due process required in administrative determinations. Yet, Defendants mention this case only once in their Brief and have yet, in any pleading, to address the factors established by this case. This should be taken as an indication that any reasonable analysis of these factors demonstrates the City's procedure to fall significantly short of constitutional due process.

while ignoring the Constitution. Indeed any reasonable official should realize that any power delegated by the legislature must be exercised in accordance with the Constitution. To assert otherwise is simply not reasonable.

Defendants attempted reliance on the *Samuels* case to support a claim to qualified immunity is again misplaced. As discussed *supra*, in the *Samuels* case, the city gave the property owner notice of specific conditions to be corrected, afforded a hearing, and not only permitted but directed that the property be repaired, all **before condemnation.** 94 F.3d at 1165. Thus, contrary to Defendants assertions, this case does not provide any support for the Defendants' express drive through condemnation procedure while fails to provide notice of conditions to be corrected, fails to provide a sufficient hearing, and fails to permit a property owner to make repairs prior to condemnation. Any attempted reliance on the *Samuels* case by Defendants is entirely misplaced. Even if this case provided some support to Defendants' scheme, no reasonable official would simply ignore the overwhelming case law from the Supreme Court (*see supra* note 45) requiring predeprivation due process.

VI. The undisputed evidence demonstrates that Defendants engaged in a civil conspiracy which resulted in violations of Plaintiff's Constitutional rights.

Claims of Civil Conspiracy based on state law and federal law may be brought in the same action. *See Sastry v. City of Crestwood*, 2011 U.S. Dist. LEXIS 78326 (E.D.Mo. 2011). Defendants cite to *Faulkner v. Ark. Children's Hosp.*, 347 Ark. 941, 947 (2002), allegedly in support of their contention regarding the inability of a corporation to conspire with itself. However, Defendants fail to note a significant difference in this case and the case at bar. In *Faulkner*, the individual defendants were doctors and nurses of a hospital. They were **employees** of the hospital defendant and the court said it was necessary to show that they were acting outside the scope of their employment in order to render them separate persons for the purposes of a

conspiracy claim. This point is made even clearer in *Dodson v. Allstate Ins. Co.*, 345 Ark. 430, 445, 47 S.W.3d 866 (2001).

> [A] civil conspiracy is not legally possible where a corporation and its alleged coconspirators are not separate entities, but, rather, stand in either a **principal-agent or employer-employee** relationship with the corporation. *Id.* at § 56.

Id. (emphasis added).

The cruicial difference in these case and the present case is that the City Council Members are neither employees nor agents of the City. The individual Defendants' are elected policy makers, each making independent decisions regarding his or her actions, not acting as an agent or employee of the City. Thus, a conspiracy claim is maintainable under Arkansas law.

As noted above, a claim of civil conspiracy is also actionable under federal law. "A claim of civil conspiracy to violate a person's constitutional rights is actionable under § 1983." *Duckworth v. Ford*, 1992 U.S. Dist. LEXIS 21676, 11, 1992 WL 515340 (W.D. Mo. 1992)(citing *Putman v. Gerloff*, 701 F.2d 63, 65 (8th Cir. 1983); *Simpson v. Weeks*, 570 F.2d 240, 242-43 (8th Cir. 1978), *cert. denied*, 443 U.S. 911, 61 L. Ed. 2d 876, 99 S. Ct. 3101 (1979)).

> The doctrine of civil conspiracy extends liability for a tort, here the deprivation of constitutional rights, to persons other than the actual wrongdoer. . . . The charge of conspiracy in a civil action is . . . the string whereby the plaintiff seeks to tie together those who, acting in concert, may be held responsible for any overt act or acts.

Id. (quoting *Putnam v. Gerloff*, 701 F.2d 63, 65 (8th Cir. 1983)(quoting *Hostrop v. Board of Junior College Dist. No. 515*, 523 F.2d 569, 576 (7th Cir. 1975)).

To prove a § 1983 conspiracy claim, a plaintiff must show: (1) that the defendant conspired with others to deprive him of constitutional rights; (2) that at least one of the alleged co-conspirators engaged in an overt act in furtherance of the conspiracy; and (3) that the overt act injured the plaintiff. *White v. McKinley*, 514 F.3d 807, 816 (8th Cir. Mo. 2008)(citing *Askew v. Millerd*, 191 F.3d 953, 957 (8th Cir. 1999)). The plaintiff is additionally required to prove a

deprivation of a constitutional right or privilege in order to prevail on a § 1983 civil conspiracy claim. *Id.*

> To prevail on a claim of conspiracy under §1983 a plaintiff
>
> need not show that each participant knew 'the exact limits of the illegal plan . . . .' 'The question of the existence of a conspiracy to deprive the plaintiffs of their constitutional rights should not be taken from the jury if there is a possibility the jury could infer from the circumstances a 'meeting of the minds' or understanding among the conspirators to achieve the conspiracy's aims.' . . . '**[T]he elements of a conspiracy are rarely established through means other than circumstantial evidence . . . .**

Sastry v. City of Crestwood, 2011 U.S. Dist. LEXIS 78326, 51-53 (E.D.Mo. 2011)(emphasis added).

The issue of the inability of employees or agents of a corporation or other entities to conspire with one another is referred to under federal law as the "intracorporate conspiracy doctrine."[47] *See, e.g., Kinkus v. Vill. of Yorkville*, 476 F. Supp. 2d 829, 839-840 (S.D. Ohio 2007). This doctrine does not apply to claims brought pursuant to § 1983.

> The intracorporate conspiracy doctrine, however, is not applicable in this case. This doctrine has only be applied in antitrust cases and civil rights conspiracy cases. Neither is present before this Court. Plaintiff is asserting a civil conspiracy claim under 42 U.S.C. § 1983, not a civil rights conspiracy claim under 42 U.S.C. § 1985. Defendants do not cite any precedent that supports Defendants' position that the intracorporate conspiracy doctrine can be applied to a civil conspiracy claim under § 1983.

Id. Additionally, the fact that Plaintiff has alleged that the individual Council members conspired with each other and with individual city employees and not the City itself, and because it is likely that the alleged conspirators are motivated by personal (i.e. political) considerations, further

[47] The "intracorporate conspiracy doctrine" is an affirmative defense and, again, because Defendants failed to file an Answer or responsive pleading within the timeframe required by Rule 12(a)(3), Defendants have waived all affirmative defenses and they should be stricken from their Response.

renders the intracorporate conspiracy doctrine inapplicable in this case. *See Id.* at 841 (citing *Buschi v. Kirven*, 775 F.2d 1240, 1252 (4th Cir. 1985)).

The facts that support Plaintiff's conspiracy allegation are somewhat obvious. The Council members, the Mayor, and Defendant Wadley all play a role in establishing the City's policies and practices in regards to condemnations. Defendant McHenry carries out these unconstitutional practices. The establishment and carrying out of policies and practices requires a meeting of the minds. The Council members have acted in concert many, many times to condemn properties in this unconstitutional manner. Thus, there has clearly been a meeting of the minds among the Council members regarding the policies and procedures involved in a condemnation action. Finally, the vote to condemn the property not only represents an overt act in furtherance of the conspiracy but also demonstrates a meeting of the minds.[48]

VII. Defendants' summary condemnation scheme improperly shifts the burden of proof to the property owner.

Defendants simply declared Plaintiff's property to be a nuisance and then improperly placed the burden on Plaintiff to prove otherwise. "Where the thing complained of is not a nuisance *per se*, the burden is upon the complaining party to show that it is a nuisance in fact by clear and satisfactory evidence." *Flippin v. McCabe*, 228 Ark. 495, 499, 308 S.W.2d 824 (1958); *see also Milligan v. General Oil Co.*, 293 Ark. 401, 405, 738 S.W.2d 404 (Ark. 1987); *Lonoke* v. *Chicago R. I. and P. Ry. Co.*, 92 Ark. 546, 123 S. W. 395 (1909); *Adelsberger v. Adineh-Kharat*, 1991 Ark. App. LEXIS 14, 1991 WL 3965 (Ark. Ct. App. 1991). The clear and satisfactory

[48] In their Brief, Defendants state that "such logic would seemingly indicate every single piece of legislation in the history of the legislative process for the City of North Little Rock would amount to a conspiracy." Certainly, every vote represents a meeting of the minds of a majority of the council members either for or against something. However, Defendants' counsel apparently forgets that a conspiracy requires some illegal purpose such as depriving someone of a constitutional right. Thus, every vote of the Council that deprives someone of a constitutional right does amount to a conspiracy.

evidence standard means that the evidence leaves no room for reasonable controversy on the subject. *See Welch v. Welch*, 132 Ark. 227, 200 S.W. 139 (1918).

The City's express-drive-through condemnation machine improperly shifts the burden of proof to the property owner to prove that his property is not a nuisance. The City simply declares a property to be a nuisance without any listing of specific violations. Indeed, in the case at bar, Defendant McHenry admits that she didn't even take notes during her inspection which could be labeled, at best cursory. The only proof presented prior to the condemnation vote was the recommendation of Defendant McHenry and pictures of the clutter within the building which had been removed by the time the Council voted. Defendants have admitted that no list of violations or conditions to be repaired was ever compiled and the Council members were not provided with an inspection report prior to their vote to condemn the property. Thus, Defendants never met their burden of proving by clear and satisfactory evidence that the building was a nuisance. Instead, Defendants simply declared the property to be a nuisance and then, had Plaintiff not filed suit in state court, would have simply demolished the structure without ever proving it to be a nuisance.

The City's express-drive-through condemnation machine not only fails to provide due process protections required by both the state and federal constitutions but improperly shifts the burden of proof to the property owner to prove that his property is not a nuisance which is in clear contradiction to the holding of the Arkansas Supreme Court.

CONCLUSION

There are many cases where a plaintiff has attempted to challenge the decision of an agency, board, commission, or local governing body but has failed to file their appeal in circuit court within the time frame required by Arkansas District Court Rule 9. Indeed, the City of North Little Rock has obtained dismissal of potentially valid claims based simply on the failure of the

plaintiff to strictly comply with this procedural rule. Interestingly, in this case, the City itself has failed to comply with a procedural rule which required it to file an Answer in this Court within thirty days of receiving notification that the remand order had been filed. Despite the fact that the City has a staff of attorneys, it failed to comply with this simple procedural rule. Now, the City expects the Court simply to overlook its failure to timely file an Answer. It would be patently unjust to apply a more lenient standard to the City than is applied to those seeking to bring legitimate grievances before the Court under District Court Rule 9. Therefore, because Defendants failed to timely file their Answer, the allegations of Plaintiff's Complaint stand uncontroverted and Plaintiff is entitled to Judgment on the Pleadings on all claims.

Alternatively, Plaintiff is entitled to summary judgment. Defendants submitted a Brief accompanying its Response to Plaintiff's Motion which attempts to muddy the waters by denying the undisputed evidence in the record and misrepresenting facts and case law. However, once the smoke is blown away, all that remains is the undisputed evidence in the record which clearly proves that Defendants failed to provide adequate notice, refused to provide a meaningful opportunity to be heard, and refused to allow Plaintiff to repair its property prior to seizure and condemnation. Thus, Plaintiff is entitled to summary judgment on the claims addressed in its Motion.

Respectfully submitted,

/s/ Mickey Stevens
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CERTIFICATE OF SERVICE

I do hereby certify by my signature hereinabove, I have on this 23rd day of June 2014 served a copy of the foregoing pleading on the following persons by mailing same through the efiling system, email or United States mail, properly addressed, and first class postage paid.

Daniel McFadden
City of North Little Rock
300 Main Street
North Little Rock, AR 72114

/s/ Mickey Stevens
Mickey Stevens

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

CONVENT COPRORATION,
Individually and on Behalf of all
Others Similarly Situated **PLAINTIFF**

v. **CASE NO. 4:13-CV-0259**

CITY OF NORTH LITTLE ROCK, ARKANSAS, a Municipal Corporation, JOE SMITH, Mayor, Individually and in his Official Capacity, City Council Members DEBI ROSS, BETH WHITE, LINDA ROBINSON, MAURICE TAYLOR, STEVE BAXTER, BRUCE FOUTCH, MURRY WITCHER, and CHARLIE HIGHT each Individually and in his or her Official Capacity, TOM WADLEY, Director, Code Enforcement Division, Individually and in his Official Capacity, and FELECIA MCHENRY, Code Enforcement Officer, Individually and in her Official Capacity **DEFENDANTS**

SEPARATE DEFENDANT'S RESPONSES TO PLAINTIFF'S REQUESTS FOR ADMISSIONS

Comes Separate Defendant, Tom Wadley, by and through his attorney, Assistant City Attorney Daniel L. McFadden, and for his Responses to Plaintiff's Requests for Admissions, states as follows:

REQUEST FOR ADMISSION NO. 1: Admit that you never provided R.C. Livdahl, any other representative of the property owner, or any City Council member with a list of violations, or a report from a building code inspector as to the specific code violations that may have existed (See response to Interrogatory No. 24). If denied, please explain in detail.

RESPONSE: Admitted.

EXHIBIT 1

REQUEST FOR ADMISSION NO. 2: Admit that you informed Richard Livdahl that he was required to provide paperwork showing that he was an owner of the property before the City would allow the property to be repaired. If denied, please explain in detail.

RESPONSE: Denied. My office requested, but did not require, information from Mr. Livdahl to demonstrate he had some connection to the property. He stated he was the attorney for the Plaintiff, but upon inspection and review, it was determined he was not. His name did not appear on any property records or court records. The ownership of the property was in question. My office never required him to provide anything.

REQUEST FOR ADMISSION NO. 3: Admit that you have worked with representatives of other corporations in similar situations without requiring that they prove an ownership interest in the property. If denied, please explain in detail.

RESPONSE: Admitted. If my office is unable to verify ownership through property and/or court records, my office requests information demonstrating the representative has some connection to the particular property.

REQUEST FOR ADMISSION NO. 4: Admit that, once the Property was red-tagged, Plaintiff was barred from making any repairs without approval from the City Council of a rehabilitation plan which requires the posting of a bond and letter of credit. If denied, please explain in detail.

RESPONSE: Admit. To the best of my knowledge, repairs to the property would require City Council approval. However, Mr. Livdahl told me Convent Corporation was not interested in repairing the property and that it only wanted it cleaned out. See Response to Interrogatory No. 22.

REQUEST FOR ADMISSION NO. 5: Admit that, in a phone call with Plaintiff's counsel, you acknowledged that the City Council's actions regarding this property were motivated by the fact that the property was previously occupied by a gentleman's club. If denied, please explain in detail.

RESPONSE: Denied. I informed Plaintiff's counsel, Mickey Stevens, that the property had the attention of the North Little Rock City Council because of its history as a former gentlemen's club, prior litigation, because the neighborhood was raising concerns about the property, its prior use, and its deterioration. I stated to Mickey Stevens that I knew the property could not revert to being a gentlemen's club again because of a previous settlement agreement in another lawsuit. I did not state City Council was motivated to take actions because of its previous use. I cannot speak on behalf of City Council.

Separate Defendant retains the right to supplement any and all responses as discovery progresses.

Respectfully Submitted,

Daniel L. McFadden (2011035)
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CERTIFICATE OF SERVICE

I, Daniel L. McFadden, do hereby certify that a copy of the foregoing pleading was deposited into the U.S. mail, postage prepaid on this 9th day of January 2014, addressed to:

Mickey Stevens
Attorney for Plaintiff
P.O. Box 2165
Benton, AR 72018

Daniel L. McFadden

(Begin North Little Rock City Council meeting.)

COUNCIL MEMBER: Hi.

MAYOR SMITH: Yes?

COUNCIL MEMBER: On 1337, Mayor Smith.

MAYOR SMITH: Please call it.

COUNCIL MEMBER: A resolution declaring certain buildings, houses, and other structures located at 6615 Highway 70 in the City of North Little Rock to constitute a public nuisance and condemning said structures providing a period of time for the property owner to obey the said nuisance.

MAYOR SMITH: Have a motion?

COUNCIL MEMBER: To move.

COUNCIL MEMBER, MS. ROBINSON: Second.

MAYOR SMITH: Call to public hearing 6615 Highway 70 .

COUNCIL MEMBER: Yes, sir.

ATTORNEY, MICKEY STEVENS: Good evening. My name is Mickey Stevens. I'm a – the attorney for Convent Corporation. And I'd like to start by telling you how the power of – talking about how this property came to be in the condition it's in. It's my understanding that the – the damage is from vandalism and the owners didn't really know about this until the condemnation proceeding started, they weren't aware of the condition of the property.

I understand some people broke in; ripped out the wires in the ceiling for copper; they fell through the ceiling; they just really left it in a mess. But most of the problems were cosmetic. And the – the owners want to rehab the property, they want to fix it up. But they're afraid to do it under condemnation order, because they're afraid whatever they do won't be enough.

You know, they – the – the problem with the condemnation order from what I understand under District Court Rule 9, we only have 30 days to appeal that order. And that's a – so we would lose our right to appeal very quickly if the property is condemned. What the owners want to do is come up with a plan with the City, postpone the condemnation vote, come up with a plan to rehab the building in agreement.

They – they had talked – it's my understanding they had talked with Code Enforcement before about doing this but they had told – were told they couldn't get a permit until after condemnation.

EXHIBIT 2

[redacted]

1 : 00707

MAYOR SMITH: I believe, Counselor, if I may , I believe the rule is that your owners have 30 days to negotiate with our attorneys and Code Enforcement on your plan, and you'll be required to put up a bond. You don't have to do all of the work in the 30 days, you just have to negotiate the plan in 30 days.

ATTORNEY MICKEY STEVENS: Right, but my concern is after 30 days we have no basis to appeal to the Circuit Court. The rule – District Court Rule 9 says you have to appeal within 30 days or you lose it. So we don't want to be under that gun.

COUNCIL MEMBER: It's my understanding there's nothing to prohibit the -- should the Council go ahead and do the condemnation, there's nothing to prohibit them from filing their appeal and at the same time kind of twin-track it and work with Code Enforcement to abate it. So I don't see that -- where there's going to be any chance that they're going to lose their right to appeal should they go ahead and file that appeal with the Circuit Court, while at the same time pursuing a – an abatement agreement.

MAYOR SMITH: Good option. Ms. Ross, were you going to say something?

COUNCIL MEMBER, MS. ROSS: What – I'm just curious, you said they're wanting to "rehab" it, have they tried to do anything to it before now until they received their condemnation notice from the City Council that was going to come before the City Council?

ATTORNEY, MICKEY STEVENS: They went in and cleaned it out. There was a lot of clutter. The people that vandalized it stole as much as they could load apparently and piled everything else up by the door. And they were told – it's my understanding they were told by Code Enforcement that they couldn't do any kind of work because they wouldn't get a permit until after the condemnation.

COUNCIL MEMBER, MS. ROSS: Cleaning up, they couldn't clean it up?

ATTORNEY, MICKEY STEVENS: No, they cleaned it up but they couldn't do any repairs, you know, the wiring or any of that kind of stuff.

COUNCIL MEMBER, MS. ROSS: How long has this been empty?

ATTORNEY, MICKEY STEVENS: Quite a while, I'm not sure exactly.

COUNCIL MEMBER, MS. ROSS: So did somebody go out there and check on the property, I mean, no one –

ATTORNEY, MICKEY STEVENS: I'm sure.

COUNCIL MEMBER, MS. ROSS: – can just leave the property sitting there, I mean, it's – just wondering if anybody had been checking on it because this – this looks like a lot more than just vandal.

ATTORNEY, MICKEY STEVENS: Well, if you can – you can see right there those -- that's part of the ceiling that fell down. They climbed up in there, like I said, to get the copper out and fell through the ceiling. All the clutter's been cleaned out now from what I understand; I haven't seen it myself. But

[redacted]

there is some water damage; they're – they're willing to put a new roof on it. Like I said, they just don't want to spend the money under a condemnation order and the City tear it down any way.

COUNCIL MEMBER, MS. ROSS: But were they going to spend money before the condemn – before it came to the City Council?

ATTORNEY, MICKEY STEVENS: They weren't really aware of the condition before. And I'm not sure when the vandalism happened either. It's my understanding it was fairly recent as far as I know, I mean.

MAYOR SMITH: Ms. Robinson.

COUNCIL MEMBER, MS. ROBINSON: You mentioned them wanting to "rehab" it, what are they wanting to put in there once it's ...

ATTORNEY, MICKEY STEVENS: As far as I know, they don't have any plans right now for the building. I understand there's -- there's been some concern about the kind of business that was there before and something like that going in again, but from what I understand there was a settlement that – a covenant was put in place that a club couldn't go in there again of that sort. So as far as I know, nobody's got any plans for it right now. The -- the owners just don't want the building torn down because they feel like it adds value to the property.

COUNCIL MEMBER, MS. ROBINSON: The neighborhood association, the Meadowpark Neighborhood Association, wanting – is wanting that building torn down. They feel like that building is a nuisance and a distraction to their community. And they've asked that we vote to condemn it, to – to tear it down.

SPEAKER: (Inaudible) ... next to it.

ATTORNEY, MICKEY STEVENS: Well, I – I

COUNCIL MEMBER, MS. ROBINSON: That's just – just comment.

MAYOR SMITH: Quickly, Counselor.

ATTRORNEY, MICKEY STEVENS: We're concerned that the condemnation ordinance doesn't mean the constitutional due process requirements, there's no – three minutes isn't enough for us to – to put on witnesses and evidence. If the – the Council is going to go ahead with the condemnation, we'd ask that it be postponed until we can have a full hearing to be able to bring witnesses and present evidence.

MAYOR SMITH: Counselor, I appreciate your eagerness but remember we're a legislative body not a judicial body so we're not here to – to hear cases. That's what the court system is for so ...

ATTORNEY, MICKEY STEVENS: Yes, sir, I understand, but due process requires a meaningful opportunity to be heard and this ordinance just doesn't provide for that. I don't think it'll hold up to a constitutional challenge.

MAYOR SMITH: Ms. Ross.

[redacted]

COUNCIL MEMBER, MS. ROSS: Was there a fire at this building?

ATTORNEY, MICKEY STEVENS: I'm not sure. Somebody – the paperwork said something about the fire damage but --

COUNCIL MEMBER, MS. ROSS: It looks like --

ATTORNEY, MICKEY STEVENS: – the person I talked to said he didn't know, that maybe –

COUNCIL MEMBER, MS. ROSS: We still have the pictures up, because I know it – it looks like there's been a fire in here so I was just curious if there was any insurance money, you know, to repair this or ...

ATTORNEY, MICKEY STEVENS: Not that I'm aware of.

COUNCIL MEMBER, MS. ROSS: I'm sure that the building was insured?

ATTORNEY, MICKEY STEVENS: I'm not sure about that.

COUNCIL MEMBER, MS. ROSS: Okay.

MAYOR SMITH: Any other questions, Counselor, Mr. Taylor?

COUNCIL MEMBER, MR. TAYLOR: Well, now -- now how long has this building been vacant?

ATTORNEY, MICKEY STEVENS: I'm not sure, it's been a while.

COUNCIL MEMBER, MS. ROSS: (Background speaking.) See it's burnt.

ATTORNEY, MICKEY STEVENS: I'm not sure. I've just recently gotten involved in this so I don't know the history really.

COUNCIL MEMBER, MR. TAYLOR: It's always interesting to me that is – is, you know, nobody ever wants to do anything to -- to something we're getting ready to condemn until we're ready to condemn it then –

ATTORNEY, MICKEY STEVENS: I understand -- I understand what you're saying –

MR. TAYLOR: – well, wait a minute – and then all of a sudden there's a problem. I mean, this building, I drive by this building quite often, never been in it, but I've drove by it quite often. This --

this – this building it's been a mess for a while, for a while.

COUNCIL MEMBER, MS. ROSS: (Inaudible)

MAYOR SMITH: I agree. Any final comments, Counselor?

ATTORNEY, MICKEY STEVENS: I would like to – I have a brief I'd like to submit that's got some additional issues covered since we don't have more time. I believe I have enough copies here for everybody.

[redacted]

MAYOR SMITH: Sure. Just pass it to our city attorney and he'll pass it around.

I -- I would suggest--and I'm certainly not going to give a lawyer legal advice--but what our -- what our city attorney advised I think will probably be the best way to go.

So anybody else wanting to speak on this particular address?

Thank you, Counselor.

I'm going to close the public hearing on the motion.

COUNCIL MEMBER: Ross? Yes. White? Yes. Taylor? Yes. Robinson? Yes. Baxter? Yes. Foutch? Yes.

(End of City of North Little Rock Council meeting.)

[redacted]

This document attached hereunto was prepared in accordance and within good faith by Shawna Denise Gauntt-Hicks.

State of Texas County of Bowie

On this 30th day of January, 2014, I certify, pursuant to Tex. Gov't Code §406.014(c), that the preceding or attached document is a true, exact, complete, and unaltered copy made by me of (description of notarial record), the original of which is held in my custody as a notarial record.

SHAWNA DENISE GAUNTT-HICKS
Notary Public, State of Texas
My Commission Expires
June 21, 2017

Shawna Denise Gauntt-Hicks
Notary Public, State of Texas
My Commission Expires 06/21/2017
610 Cedar
Maud, Texas 75567
(903) 276-1090

[redacted]

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

CONVENT COPRORATION,
Individually and on Behalf of all
Others Similarly Situated **PLAINTIFF**

v. **CASE NO. 4:13-CV-0259**

CITY OF NORTH LITTLE ROCK, ARKANSAS, a Municipal Corporation, JOE SMITH, Mayor, Individually and in his Official Capacity, City Council Members DEBI ROSS, BETH WHITE, LINDA ROBINSON, MAURICE TAYLOR, STEVE BAXTER, BRUCE FOUTCH, MURRY WITCHER, and CHARLIE HIGHT each Individually and in his or her Official Capacity, TOM WADLEY, Director, Code Enforcement Division, Individually and in his Official Capacity, and FELECIA MCHENRY, Code Enforcement Officer, Individually and in her Official Capacity **DEFENDANTS**

SEPARATE DEFENDANT'S RESPONSES TO PLAINTIFF'S REQUESTS FOR ADMISSIONS

Comes Separate Defendant, City of North Little Rock, Arkansas, by and through it attorney, Assistant City Attorney Daniel L. McFadden, and for its Responses to Plaintiff's Requests for Admissions, states as follows:

REQUEST FOR ADMISSION NO. 1: Admit that Section 1.6.1 of the City's Code requires that a "Notice of Violations" shall include "[a] description of the violation or violations." If denied please explain in detail.

RESPONSE: Admitted.

EXHIBIT 3

REQUEST FOR ADMISSION NO.2: Admit that section 1.6.1 of the City's Code requires that a "Notice of Violations" shall include "Rights of Appeal under subsection 1.9." If denied, please explain in detail.

RESPONSE: Admitted.

REQUEST FOR ADMISSION NO.3: Admit that section 1.7.4.1 of the City's Code prohibits a property owner from repairing a condemned structure without an agreement approved by the City Council. If denied, please explain in detail.

RESPONSE: Admitted.

REQUEST FOR ADMISSION NO.4: Admit that section 1.7.4.1 of the City's Code requires that a property owner "obtain a sponsor for any legislation that would allow the repair or refurbishment of a condemned structure." If denied, please explain in detail.

RESPONSE: Admitted.

REQUEST FOR ADMISSION NO.5: Admit that section 1.9.1 of the City's Code provides that "Condemnations heard in City Council" are *not* subject to administrative appeal. If denied, please explain in detail.

RESPONSE: Denied. They are appealed to Pulaski County Circuit Court for an administrative appeal pursuant to Ark. Dist. Ct. R. 9 and Ark. Code Ann. § 14-56-425.

REQUEST FOR ADMISSION NO.6: Admit that the City does not provide any "administrative" appeal process or hearing before any City official, board or commission in condemnation actions. If denied, Please explain in full.

RESPONSE: Admitted. They are performed in front of a Pulaski County Circuit Court Judge.

REQUEST FOR ADMISSION NO.7: Admit that the City's Code, section 2.2.1, defines "imminent danger" as "[a] condition which could cause serious or life-threating injury or death at any time." If denied, please explain in detail.

RESPONSE: Admitted.

REQUEST FOR ADMISSION NO.8: Admit that Section 4 of the City's Code requires only that "occupied" buildings be provided with an electrical system in compliance with the requirements of the Code. If denied, please explain in detail.

RESPONSE: Denied. There are numerous Section 4's in the City's Code that do not encompass electrical systems of occupied buildings.

REQUEST FOR ADMISSION NO. 9: Admit that Exhibit A, attached hereto, is a true and correct copy of the letter from Assistant City Attorney Bill Brown to R.C. Livdahl on January31, 2013. If denied, please explain in detail.

RESPONSE: Denied. Plaintiff failed to attach any document labeled as "Exhibit A" in its requests to Separate Defendant. Separate Defendant has nothing to base an admission on for the purposes of this pleading.

REQUEST FOR ADMISSION NO.10: Admit that, as stated in Exhibit A attached hereto, the City informed R.C. Livhahl that, because the property had been "red-tagged," a permit to repair the property would not be issued without the approval of the City Council. If denied, please explain in detail.

RESPONSE: Denied. Plaintiff failed to attach any document labeled as "Exhibit A" in its requests to Separate Defendant. Separate Defendant has nothing to base an admission on for the purposes of this pleading.

REQUEST FOR ADMISSION NO.11: Admit that the document attached hereto as Exhibit B is a true and correct copy of the "City Council Agenda" for the meeting that occurred on February 25, 2013. If denied, please explain in detail.

RESPONSE: Denied. Plaintiff failed to attach any document labeled as "Exhibit B" in its requests to Separate Defendant. Separate Defendant has nothing to base an admission on for the purposes of this pleading.

REQUEST FOR ADMISSION NO.12: Admit that, as stated in Exhibit B attached hereto, the City permits a property owner to speak to the City Council for only three (3) minutes when it is considering a condemnation ant that this restriction "includes all public hearings." If denied, please explain in detail.

RESPONSE: Denied. Plaintiff failed to attach any document labeled as "Exhibit B" in its requests to Separate Defendant. Separate Defendant has nothing to base an admission on for the purposes of this pleading.

REQUEST FOR ADMISSION NO.13: Admit that Plaintiff's counsel submitted the Motion, attached hereto as Exhibit C, to the Mayor and the City Clerk prior to the City Council meeting on February 25, 2013, requesting a full hearing with the opportunity to present evidence and cross-examine witnesses. If denied, please explain in detail.

RESPONSE: Denied. Plaintiff failed to attach any document labeled as "Exhibit C" in its requests to Separate Defendant. Separate Defendant has nothing to base an admission on for the purposes of this pleading.

REQUEST FOR ADMISSION NO.14: Admit that Plaintiff's counsel submitted the Brief, attached hereto as Exhibit D, to the City Council during the City Council meeting on February 25, 2013. If denied, please explain in detail.

RESPONSE: Denied. Plaintiff failed to attach any document labeled as "Exhibit D" in its requests to Separate Defendant. Separate Defendant has nothing to base an admission on for the purposes of this pleading.

REQUEST FOR ADMISSION NO.15: Admit that the document attached hereto as Exhibit F is a true and correct copy of the official minutes of the meeting of the City Council that occurred on February 25,2013.

RESPONSE: Denied. Plaintiff failed to attach any document labeled as "Exhibit F" in its requests to Separate Defendant. Separate Defendant has nothing to base an admission on for the purposes of this pleading.

REQUEST FOR ADMISSION NO.16: Admit that, during the City Council meeting considering condemnation of Plaintiff's property, in response to Plaintiff's request for a hearing with the opportunity to present evidence and cross-examine witness, the Mayor responded that the City Council was not a judicial body and does not conduct those types of hearings (See Exhibit F, Minutes, pg.8). If denied, please explain in detail.

RESPONSE: Admitted that Mayor Smith stated the City Council is not a judicial body. Denied that Mayor Smith stated the Council does not conduct those types of hearings. Mayor Smith's comment was made pursuant to advice of counsel, Deputy City Attorney Matt Fleming.

REQUEST FOR ADMISSION NO.18: Admit that the City did not reinspect the property after January 13,2013. If denied, Please explain in detail.

RESPONSE: Denied. Officer McHenry reinspected the property on January 16, 2013.

REQUEST FOR ADMISSION NO.19: Admit that the pictures presented at the City Council meeting on February 25, 2013 were taken on or before January 13, 2013. If denied, please explain in detail.

RESPONSE: Denied. Pictures submitted were taken in November 2012 and after January 13, 2013.

REQUEST FOR ADMISSION NO.20: Admit that Plaintiff's counsel informed the City Council in the meeting on February 25, 2013 that the building clutter and debris in the building had been cleaned out. If denied, please explain in detail.

REQUEST FOR ADMISSION NO.21: Admitted that Plaintiff's counsel made this statement, but Plaintiff's counsel presented no evidence the building had been cleaned out.

REQUEST FOR ADMISSION NO.22: Admit that no evidence was presented to or considered by City Council as to whether the property's condition had changed since the inspection on January 13, 2013. If denied, please explain in detail.

RESPONSE: Denied. Separate Defendant cannot speak on behalf of its Council members. Pictures were shown of the condition of the property, interior and exterior, after January 13, 2013.

REQUEST FOR ADMISSION NO.23: Admit that section 8.3.4.2 of the City's Code requires that a property that is "red-tagged" be vacated and all utilities disconnected.

RESPONSE: Admitted.

REQUEST FOR ADMISSION NO.24: Admit that, pursuant to section 8.3.4.2 of the City's code, no utilities may be connected to a property that has been "red-tagged" until a rehabilitation permit is obtained. If denied, please explain in detail.

RESPONSE: Admitted. No utilities may be re-connected until a rehabilitation plan is obtained or the Director of Code Enforcement notifies utilities that services may resume.

REQUEST FOR ADMISSION NO.25: Admit that the City informed Richard Livdahl that a bond equal to the cost of demolition would be required prior to the approval of a rehabilitation plan. If denied, please explain in detail.

RESPONSE: Denied. For purposes of this pleading, and after reasonable inquiry, the information known or readily obtainable by Separate Defendant is not sufficient to enable Separate Defendant to admit or deny this request. Officials from the City Attorney's Office and the Code Enforcement Department do not specifically recall whether Mr. Livdahl was informed a bond equal to the cost of demolition would be required prior to the approval of a rehabilitation plan, but assert that obtaining such a bond in that amount is a standard part of the rehabilitation process.

REQUEST FOR ADMISSION NO.26: Admit that the City informed Richard Livdahl that a letter of credit would be required prior to the approval of a rehabilitation plan. If denied, please explain in detail.

RESPONSE: Denied. For purposes of this pleading, and after reasonable inquiry, the information known or readily obtainable by Separate Defendant is not sufficient to enable Separate Defendant to admit or deny this request. Officials from the City Attorney's Office and the Code Enforcement Department do not specifically recall whether Mr. Livdahl was informed that a letter of credit was required, but assert that providing some form of proof of the financial ability to carry out the rehabilitation is part of the rehabilitation process.

REQUEST FOR ADMISSION NO.27: Admit that at the meeting on February 25, 2013, Plaintiff's counsel asked City Council to either provide a hearing or issue a permit so that Plaintiff could repair the property. If denied, please explain in detail.

RESPONSE: Admitted.

REQUEST FOR ADMISSION NO.28: Admit that, to date, the city has not provided Plaintiff with a list of specific violations or conditions that must be repaired so that the City will no longer consider the property to be a nuisance. If denied, please explain in detail.

RESPONSE: Denied. Plaintiff was provided a list of exterior violations in the affidavit for administrative search warrant. Plaintiff refuses to enter into a rehabilitation agreement with the City to allow a contractor into the structure to rehabilitate it and allow City building inspectors to determine if the violations or conditions have been brought into compliance.

REQUEST FOR ADMISSION NO.29: Admit that, other than Plaintiff's counsel, the City Council did not hear or consider testimony from any other witness during the meeting on February 25, 2013 prior to it's vote to condemn the property. If denied, please explain in detail.

RESPONSE: Denied. Separate Defendant cannot speak on behalf of the individual aldermen. Other testimony was provided, including the report and recommendation of the Code Enforcement Department, as well as photographs and a brief submitted by Plaintiff's counsel.

REQUEST FOR ADMISSION NO.30: Admit that since the property was red-tagged on January 13, 2013 Plaintiff has been prohibited from repairing, utilizing, or occupying the property. If denied, please explain.

RESPONSE: Denied. The property was not red-tagged on January 13, 2013. Plaintiff has not been prohibited from utilizing the property for any purpose other than repairing and occupying it. Plaintiff can repair the structure at any time it wishes if it enters into a rehabilitation agreement with the City.

REQUEST FOR ADMISSION NO.31: Admit that since the property was condemned on February 25, 2013, Plaintiff has been prohibited from repairing, utilizing, or occupying the property. If denied, please explain.

RESPONSE: Admitted that Plaintiff has been prohibited from repairing or occupying the Property because Plaintiff refuses to enter into a rehabilitation agreement. Denied that Plaintiff has been prohibited from utilizing the property. Plaintiff is able to utilize the property for any other purpose other than repairing or occupying it, absent entering into a rehabilitation agreement with the City.

REQUEST FOR ADMISSION NO.32: Admit that, after inspection of the property on January 13, 2013, the City failed to notify Plaintiff that the property was left unsecured. If denied, please explain in detail.

RESPONSE: Denied. The structure was not inspected on January 13, 2013. Officer McHenry conducted a lawful search of the structure on January 16, 2013, and secured the property once she left it. She also contacted Richard Livdahl to inform him that it had been unsecure but that she secured it upon leaving.

REQUEST FOR ADMISSION NO.33: Admit that, once the property was red-tagged, Plaintiff was barred from repairing the property without obtaining sponsorship for and approval by the City Council of a rehabilitation plan which included the requirement to post a bond and provide a letter of credit. If denied, please explain in detail.

RESPONSE: Admitted.

REQUEST FOR ADMISSION NO.34: Admit that the City has not prepared any reports listing violations or conditions that must be repaired or corrected to bring the property in compliance with applicable codes, laws, and regulations and would no longer be deemed a nuisance (See response to Interrogatory NO.24). If denied, please explain in detail.

RESPONSE: Denied. There is a list of exterior violations in Officer McHenry's affidavit for administrative search warrant, which Plaintiff has in its possession. No other reports

have been produced at this time because Plaintiff refuses to enter into a rehabilitation agreement to allow a contractor and City building inspectors to determine the interior violations.

REQUEST FOR ADMISSION NO.35: Admit that, at the City Council meeting on February 25,2013, prior to condemnation vote, Plaintiff's counsel stated that the owner wanted to rehabilitate the property. (See Exhibit F, Minutes, page. 7). If denied, please explain in detail.

RESPONSE: Admitted, but the City did not have reason to believe the owner intended to rehabilitate the structure. Mr. Livdahl had previously stated Plaintiff was not interested in rehabilitating the property.

REQUEST FOR ADMISSION NO.36: Admit that, at the City Council meeting on February 25, 2013, prior to the condemnation vote, Plaintiff's counsel informed the Council that the property had been cleaned out. (See Exhibit F, Minutes, page.8.) If denied, please explain in detail.

RESPONSE: Admitted. Plaintiff's counsel made this statement, but did not provide any proof to demonstrate the truth in this statement.

REQUEST FOR ADMISSION NO.37: Admit that, once a property is red-tagged, it is the City's practice to deny a permit for repairs unless and until the City Council approves a rehabilitation plan that includes the posting of a bond and a letter of credit. If denied, please explain in detail.

RESPONSE: Denied. Once a property has been red-tagged, any rehabilitation plan, which includes issuance of building permits, must be approved only by City Council members. The City Council is the only party that makes this determination once a property has been red-tagged. Until City Council has made the determination, nothing has been denied.

REQUEST FOR ADMISSION NO.38: Admit that, when the Code Enforcement Department has referred a property to the City Council for a condemnation vote, the City's practice is to provide only a three (3) minute appearance before the City Council. If denied, please explain in detail. Counsel for Plaintiff addressed the City Council for nearly ten minutes.

RESPONSE: Denied. The three (3) minute requirement is for public comment on non-agenda items and citizens' public comment on numbered legislation. If an owner appears for a condemnation hearing, the hearing may last longer than three minutes, which happened in the instant case. Property owners are afforded time and may speak in a public forum.

REQUEST FOR ADMISSION NO.39: Admit that, when the Code Enforcement Department has referred a property to the City Council for a condemnation vote, other than a three (3) minute appearance before the City Council, the City does not provide any other hearings or other administrative process by which the property owner may present his case to any City official, board, or commission. If denied, please explain in detail.

RESPONSE: Denied. The City adheres to due process requirements, Ark. Code Ann. § 14-56-425, and Ark. Dist. Ct. R. 9. Property owners may also speak with Code Enforcement officials and attorneys from the City Attorneys Office concerning rehabilitation plans.

REQUEST FOR ADMISSION NO.40: Admit that, as a regular practice, the City does not provide a list of violations to property owners whose property has been referred to the City Council for a condemnation vote. If denied, please explain in detail.

RESPONSE: Denied. The City complies with its Nuisance Abatement Code. Plaintiff was notified it was in violation of Articles 1 and 8 of the City's Nuisance Abatement Code when Officer McHenry first issued notice in November 2012, and was provided a list of exterior violations in Officer McHenry's affidavit for administrative search warrant.

REQUEST FOR ADMISSION NO.41: Admit that the notices the City provides to property owners whose properties have been referred to the City Council for a condemnation vote do not contain any information regarding the property owner's rights to appeal. If denied, please explain in detail.

RESPONSE: Denied. The City complies with its Nuisance Abatement Codes. Further, an owner's rights to appeal a condemnation vote is provided in the City's Nuisance Abatement Code and accessible online and in print.

REQUEST FOR ADMISSION NO.42: Admit that the City had discussions concerning this property in 1993 with Richard Livdahl who was acting as a representative for Convent Corporation.

RESPONSE: Denied. For the purposes of this pleading, and after reasonable inquiry with the Mayor, the information known or readily obtainable by Separate Defendant is not sufficient to enable the Separate Defendant to admit or deny this request. The Mayor, who had been the Director of Commerce and Government Affairs at the time, recalls a conversation with Mr. Livdahl from the 1990s, but does not recall specifically what the conversation entailed and what date it occurred.

REQUEST FOR ADMISSION NO.43: Admit that the City did not request any credentials, documents or verification that Mr. Livdahl was authorized to speak for Convent Corporation or that he had an ownership interest in the corporation.

RESPONSE: Denied. Tom Wadley and Officer McHenry have requested Mr. Livdahl to provide information demonstrating he was authorized to speak on behalf of Convent Corporation once they determined that (1) he had misled them into believing he was the attorney acting on behalf of Convent Corporation; (2) when he provided a business card demonstrating he

was employed by another company; and (3) when his name did not surface on any property or court records related to the property itself.

REQUEST FOR ADMISSION NO.44: Admit that the City discussed issues regarding the relocation of Gentlemen's Club 70 with Mr. Livdahl and provided him with a map showing zoning of properties that would permit the operation of the business.

RESPONSE: Denied. After reasonable inquiry, and for the purposes of this pleading, the information known or readily obtainable by Separate Defendant is not sufficient to enable the Separate Defendant to admit or deny this request.

REQUEST FOR ADMISSION NO.45: Admit that, during the discussions reference in the preceding Request, the City did not ask for any credentials, documents, or verification that Mr. Livdahl was authorized to speak for the business or that he had an ownership interest in the business.

RESPONSE: Denied. After reasonable inquiry, and for the purposes of this pleading, the information known or readily obtainable by Separate Defendant is not sufficient to enable the Separate Defendant to admit or deny this request.

Separate Defendant retains the right to supplement any and all responses as discovery progresses.

Respectfully Submitted,

Daniel L. McFadden (2011035)
Assistant City Attorney
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PO Box 5757
North Little Rock, Arkansas 72119
Voice: (501) 975-3755
Fax: (501) 340-5341
Email: dmcfadden@northlittlerock.ar.gov

CERTIFICATE OF SERVICE

I, Daniel L. McFadden, do hereby certify that a copy of the foregoing pleading was deposited into the U.S. mail, postage prepaid on this 9th day of January 2014, addressed to:

Mickey Stevens
Attorney for Plaintiff
P.O. Box 2165
Benton, AR 72018

Daniel L. McFadden

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

CONVENT COPRORATION,
Individually and on Behalf of all
Others Similarly Situated **PLAINTIFF**

v. **CASE NO. 4:13-CV-0259**

CITY OF NORTH LITTLE ROCK, ARKANSAS, a Municipal Corporation, JOE SMITH, Mayor, Individually and in his Official Capacity, City Council Members DEBI ROSS, BETH WHITE, LINDA ROBINSON, MAURICE TAYLOR, STEVE BAXTER, BRUCE FOUTCH, MURRY WITCHER, and CHARLIE HIGHT each Individually and in his or her Official Capacity, TOM WADLEY, Director, Code Enforcement Division, Individually and in his Official Capacity, and FELECIA MCHENRY, Code Enforcement Officer, Individually and in her Official Capacity **DEFENDANTS**

SEPARATE DEFENDANTS' RESPONSES TO PLAINTIFF'S REQUESTS FOR ADMISSIONS

Come Separate Defendants, Aldermen Debi Ross, Beth White, Linda Robinson, Maurice Taylor, Steve Baxter, Bruce Foutch, Murry Witcher, and Charlie Hight,, by and through their attorney, Assistant City Attorney Daniel L. McFadden, and for their Responses to Plaintiff's Requests for Admissions, states as follows:

REQUEST FOR ADMISSION NO.1: Admit that the City does not provide any "administrative" appeal process or hearing before and City official or board or commission in condemnation actions. If denied, please explain in full.

RESPONSE:

EXHIBIT 4

A. Debi Ross: Denied. The City provides an administrative appeal process whereby condemnations are appealed to Pulaski County Circuit Court for an administrative appeal pursuant to Ark. Dist. Ct. R. 9 and Ark. Code Ann. § 14-56-425.

B. Beth White: Denied. The City provides an administrative appeal process whereby condemnations are appealed to Pulaski County Circuit Court for an administrative appeal pursuant to Ark. Dist. Ct. R. 9 and Ark. Code Ann. § 14-56-425.

C. Linda Robinson: Denied. The City provides an administrative appeal process whereby condemnations are appealed to Pulaski County Circuit Court for an administrative appeal pursuant to Ark. Dist. Ct. R. 9 and Ark. Code Ann. § 14-56-425.

D. Maurice Taylor: Denied. The City provides an administrative appeal process whereby condemnations are appealed to Pulaski County Circuit Court for an administrative appeal pursuant to Ark. Dist. Ct. R. 9 and Ark. Code Ann. § 14-56-425.

E. Steve Baxter: Denied. The City provides an administrative appeal process whereby condemnations are appealed to Pulaski County Circuit Court for an administrative appeal pursuant to Ark. Dist. Ct. R. 9 and Ark. Code Ann. § 14-56-425.

F. Bruce Foutch: Denied. The City provides an administrative appeal process whereby condemnations are appealed to Pulaski County Circuit Court for an

administrative appeal pursuant to Ark. Dist. Ct. R. 9 and Ark. Code Ann. § 14-56-425.

G. Murry Witcher: Denied. The City provides an administrative appeal process whereby condemnations are appealed to Pulaski County Circuit Court for an administrative appeal pursuant to Ark. Dist. Ct. R. 9 and Ark. Code Ann. § 14-56-425.

H. Charlie Hight: Denied. The City provides an administrative appeal process whereby condemnations are appealed to Pulaski County Circuit Court for an administrative appeal pursuant to Ark. Dist. Ct. R. 9 and Ark. Code Ann. § 14-56-425.

REQUEST FOR ADMISSION NO.2: Admit that, as stated in Exhibit B attached hereto, the City permits property owners to speak to the City Council for only three (3) minutes when it is considering a condemnation and that this restriction "includes all public hearings." If denied, please explain in detail.

RESPONSE:

A. Debi Ross: Denied. Plaintiff's Exhibit B is a Memorandum in Support of Convent Corporation's Request for Full Due Process Hearing and does not contain any reference to a three minute requirement for condemnation actions. The three (3) minute requirement is for public comment on non-agenda items and citizens' public comment on numbered legislation. If an owner appears for a condemnation hearing, the hearing may last longer than three minutes, which happened in the instant case when Plaintiff's attorney spoke for nearly

ten minutes. Property owners are afforded time and may speak in a public forum.

B. Beth White: Denied. Plaintiff's Exhibit B is a Memorandum in Support of Convent Corporation's Request for Full Due Process Hearing and does not contain any reference to a three minute requirement for condemnation actions. The three (3) minute requirement is for public comment on non-agenda items and citizens' public comment on numbered legislation. If an owner appears for a condemnation hearing, the hearing may last longer than three minutes, which happened in the instant case when Plaintiff's attorney spoke for nearly ten minutes. Property owners are afforded time and may speak in a public forum.

C. Linda Robinson: Denied. Plaintiff's Exhibit B is a Memorandum in Support of Convent Corporation's Request for Full Due Process Hearing and does not contain any reference to a three minute requirement for condemnation actions. The three (3) minute requirement is for public comment on non-agenda items and citizens' public comment on numbered legislation. If an owner appears for a condemnation hearing, the hearing may last longer than three minutes, which happened in the instant case when Plaintiff's attorney spoke for nearly ten minutes. Property owners are afforded time and may speak in a public forum.

D. Maurice Taylor: Denied. Plaintiff's Exhibit B is a Memorandum in Support of Convent Corporation's Request for Full Due Process Hearing and does not contain any reference to a three minute requirement for condemnation actions.

The three (3) minute requirement is for public comment on non-agenda items and citizens' public comment on numbered legislation. If an owner appears for a condemnation hearing, the hearing may last longer than three minutes, which happened in the instant case when Plaintiff's attorney spoke for nearly ten minutes. Property owners are afforded time and may speak in a public forum.

E. Steve Baxter: Denied. Plaintiff's Exhibit B is a Memorandum in Support of Convent Corporation's Request for Full Due Process Hearing and does not contain any reference to a three minute requirement for condemnation actions. The three (3) minute requirement is for public comment on non-agenda items and citizens' public comment on numbered legislation. If an owner appears for a condemnation hearing, the hearing may last longer than three minutes, which happened in the instant case when Plaintiff's attorney spoke for nearly ten minutes. Property owners are afforded time and may speak in a public forum.

F. Bruce Foutch: Denied. Plaintiff's Exhibit B is a Memorandum in Support of Convent Corporation's Request for Full Due Process Hearing and does not contain any reference to a three minute requirement for condemnation actions. The three (3) minute requirement is for public comment on non-agenda items and citizens' public comment on numbered legislation. If an owner appears for a condemnation hearing, the hearing may last longer than three minutes, which happened in the instant case when Plaintiff's attorney spoke for nearly

ten minutes. Property owners are afforded time and may speak in a public forum.

G. Murry Witcher: Denied. Plaintiff's Exhibit B is a Memorandum in Support of Convent Corporation's Request for Full Due Process Hearing and does not contain any reference to a three minute requirement for condemnation actions. The three (3) minute requirement is for public comment on non-agenda items and citizens' public comment on numbered legislation. If an owner appears for a condemnation hearing, the hearing may last longer than three minutes. Property owners are afforded time and may speak in a public forum.

H. Charlie Hight: Denied. Plaintiff's Exhibit B is a Memorandum in Support of Convent Corporation's Request for Full Due Process Hearing and does not contain any reference to a three minute requirement for condemnation actions. The three (3) minute requirement is for public comment on non-agenda items and citizens' public comment on numbered legislation. If an owner appears for a condemnation hearing, the hearing may last longer than three minutes, which happened in the instant case when Plaintiff's attorney spoke for nearly ten minutes. Property owners are afforded time and may speak in a public forum.

REQUEST FOR ADMISSION NO.3: Admit that Plaintiff's counsel submitted the Brief, attached hereto as Exhibit D, to the City Council during the City Council meeting on February 25,2013. If denied, please explain in detail.

RESPONSE:

A. Debi Ross: Denied. Plaintiff failed to attach any document labeled "Exhibit D" in Plaintiffs request to Separate Defendant and Separate Defendant has nothing to base an admission on.

B. Beth White: Denied. Plaintiff failed to attach any document labeled "Exhibit D" in Plaintiffs request to Separate Defendant and Separate Defendant has nothing to base an admission on.

C. Linda Robinson: Denied. Plaintiff failed to attach any document labeled "Exhibit D" in Plaintiffs request to Separate Defendant and Separate Defendant has nothing to base an admission on.

D. Maurice Taylor: Denied. Plaintiff failed to attach any document labeled "Exhibit D" in Plaintiffs request to Separate Defendant and Separate Defendant has nothing to base an admission on.

E. Steve Baxter: Denied. Plaintiff failed to attach any document labeled "Exhibit D" in Plaintiffs request to Separate Defendant and Separate Defendant has nothing to base an admission on.

F. Bruce Foutch: Denied. Plaintiff failed to attach any document labeled "Exhibit D" in Plaintiffs request to Separate Defendant and Separate Defendant has nothing to base an admission on.

G. Murry Witcher: Denied. Plaintiff failed to attach any document labeled "Exhibit D" in Plaintiffs request to Separate Defendant and Separate Defendant has nothing to base an admission on. Nor was I present at the meeting.

H. Charlie Hight: Denied. Plaintiff failed to attach any document labeled "Exhibit D" in Plaintiffs request to Separate Defendant and Separate Defendant has nothing to base an admission on.

REQUEST FOR ADMISSION NO.4: Admit that, during the City Council meeting considering condemnation of Plaintiff's property, in response to Plaintiff's request for a hearing with the opportunity to present evidence and cross-examine witnesses, the Mayor responded that the City Council was not a judicial body and does not conduct those types of hearings (See Exhibit F, Minutes, pg.18)

RESPONSE:

A. Debi Ross: Admitted that Mayor Smith stated the City Council is not a judicial body and that is what the Court system is for, pursuant to the legal advice of counsel, Deputy City Attorney Matt Fleming. Denied that Separate Defendant stated the Council does not conduct those types of hearings; Separate Defendant does not specifically recall Mayor Smith making this statement.

B. Beth White: Admitted that Mayor Smith stated the City Council is not a judicial body and that is what the Court system is for, pursuant to the legal advice of counsel, Deputy City Attorney Matt Fleming. Denied that Separate Defendant stated the Council does not conduct those types of hearings; Separate Defendant does not specifically recall Mayor Smith making this statement.

C. Linda Robinson: Admitted that Mayor Smith stated the City Council is not a judicial body and that is what the Court system is for, pursuant to the legal

advice of counsel, Deputy City Attorney Matt Fleming. Denied that Separate Defendant stated the Council does not conduct those types of hearings; Separate Defendant does not specifically recall Mayor Smith making this statement.

D. Maurice Taylor: Admitted that Mayor Smith stated the City Council is not a judicial body and that is what the Court system is for, pursuant to the legal advice of counsel, Deputy City Attorney Matt Fleming. Denied that Separate Defendant stated the Council does not conduct those types of hearings; Separate Defendant does not specifically recall Mayor Smith making this statement.

E. Steve Baxter: Admitted that Mayor Smith stated the City Council is not a judicial body and that is what the Court system is for, pursuant to the legal advice of counsel, Deputy City Attorney Matt Fleming. Denied that Separate Defendant stated the Council does not conduct those types of hearings; Separate Defendant does not specifically recall Mayor Smith making this statement.

F. Bruce Foutch: Admitted that Mayor Smith stated the City Council is not a judicial body and that is what the Court system is for, pursuant to the legal advice of counsel, Deputy City Attorney Matt Fleming. Denied that Separate Defendant stated the Council does not conduct those types of hearings; Separate Defendant does not specifically recall Mayor Smith making this statement.

G. Murry Witcher: Denied. I was not present at this meeting and have no knowledge as to what the Mayor did or did not say.

H. Charlie Hight: Admitted that Mayor Smith stated the City Council is not a judicial body and that is what the Court system is for, pursuant to the legal advice of counsel, Deputy City Attorney Matt Fleming. Denied that Separate Defendant stated the Council does not conduct those types of hearings; Separate Defendant does not specifically recall Mayor Smith making this statement.

REQUEST FOR ADMISSION NO.6: Admit that Plaintiff's counsel informed the City Council in the meeting on February 25, 2013 that the building clutter and debris in the building had been cleaned out. If denied, please explain in detail.

RESPONSE:

A. Debi Ross: Admitted Plaintiff's counsel made this statement, but not the truth of Plaintiff's counsel's statement.

B. Beth White: Admitted Plaintiff's counsel made this statement, but not the truth of Plaintiff's counsel's statement.

C. Linda Robinson: Admitted Plaintiff's counsel made this statement, but not the truth of Plaintiff's counsel's statement.

D. Maurice Taylor: Admitted Plaintiff's counsel made this statement, but not the truth of Plaintiff's counsel's statement.

E. Steve Baxter: Admitted Plaintiff's counsel made this statement, but not the truth of Plaintiff's counsel's statement.

F. Bruce Foutch: Admitted Plaintiff's counsel made this statement, but not the truth of Plaintiff's counsel's statement.

G. Murry Witcher: Denied. I was not present and have no knowledge as to what Plaintiff's counsel said or didn't say.

H. Charlie Hight: Admitted Plaintiff's counsel made this statement, but not the truth of Plaintiff's counsel's statement.

REQUEST FOR ADMISSION NO.7: Admit that Plaintiff's counsel informed the Council in the meeting on February 25,2013 that much of the damage to the building was a result of vandalism of which the owner was unaware until the City initiated condemnation proceedings. If denied, please explain in detail.

RESPONSE:

A. Debi Ross: Admitted.

B. Beth White: Admitted.

C. Linda Robinson: Admitted.

D. Maurice Taylor: Admitted.

E. Steve Baxter: Admitted.

F. Bruce Foutch: Admitted.

G. Murry Witcher: Denied. I was not present and have no knowledge as to what Plaintiff's counsel said or didn't say.

H. Charlie Hight: Admitted.

REQUEST FOR ADMISSION NO.8: Admit that no evidence was presented to or considered by the City Council as to whether the property's condition had changed since the insspection on January 13, 2013. If denied please explain in detail.

RESPONSE:

A. Debi Ross: Denied. I cannot speak on behalf of what my fellow aldermen considered. Evidence, including photographs Officer McHenry took on January 16, 2013, and her report and recommendation, was presented. I also listened to the statements of Plaintiff's counsel.

B. Beth White: Denied. I cannot speak on behalf of what my fellow aldermen considered. Evidence, including photographs Officer McHenry took on January 16, 2013, and her report and recommendation, was presented. I also listened to the statements of Plaintiff's counsel.

C. Linda Robinson: Denied. I cannot speak on behalf of what my fellow aldermen considered. Evidence, including photographs Officer McHenry took on January 16, 2013, and her report and recommendation, was presented. I also listened to the statements of Plaintiff's counsel.

D. Maurice Taylor: Denied. I cannot speak on behalf of what my fellow aldermen considered. Evidence, including photographs Officer McHenry took on January 16, 2013, and her report and recommendation, was presented. I also listened to the statements of Plaintiff's counsel.

E. Steve Baxter: Denied. I cannot speak on behalf of what my fellow aldermen considered. Evidence, including photographs Officer McHenry took on January 16, 2013, and her report and recommendation, was presented. I also listened to the statements of Plaintiff's counsel.

F. Bruce Foutch: Denied. I cannot speak on behalf of what my fellow aldermen considered. Evidence, including photographs Officer McHenry took on

January 16, 2013, and her report and recommendation, was presented. I also listened to the statements of Plaintiff's counsel.

G. Murry Witcher: Denied. I was not present and cannot speculate as to what evidence was or was not presented at this Council meeting.

H. Charlie Hight: Denied. I cannot speak on behalf of what my fellow aldermen considered. Evidence, including photographs Officer McHenry took on January 16, 2013, and her report and recommendation, was presented. I also listened to the statements of Plaintiff's counsel and visited the structure twice the week before the condemnation vote.

REQUEST FOR ADMISSION NO.9: Admit that at the meeting on February 25, 2013, Plaintiff's counsel asked the City Council to either provide a hearing or issue a permit so that Plaintiff could repair the property. If denied, please explain in detail.

RESPONSE:

A. Debi Ross: Admitted.

B. Beth White: Admitted.

C. Linda Robinson: Admitted.

D. Maurice Taylor: Admitted.

E. Steve Baxter: Admitted.

F. Bruce Foutch: Admitted.

G. Murry Witcher: Denied. I was not present and cannot speculate as to what Plaintiff's counsel said or didn't say.

H. Charlie Hight: Admitted.

REQUEST FOR ADMISSION NO.10: Admit that, other than Plaintiff's counsel, the City Council did not hear or consider testimony from any other witnesses during the meeting on February 25, 2013 prior to its vote condemn the property. If denied, please explain in detail.

RESPONSE:

A. Debi Ross: Denied. I cannot speak on behalf of the other aldermen considered. Testimony from Officer McHenry, in her report and recommendation and her pictures, was considered.

B. Beth White: Denied. I cannot speak on behalf of the other aldermen considered. Testimony from Officer McHenry, in her report and recommendation and her pictures, was considered.

C. Linda Robinson: Denied. I cannot speak on behalf of the other aldermen considered. Testimony from Officer McHenry, in her report and recommendation and her pictures, was considered. I also stated the concerns of the Meadow Park Neighborhood Association that they had expressed to me about the property.

D. Maurice Taylor: Denied. I cannot speak on behalf of the other aldermen considered. Testimony from Officer McHenry, in her report and recommendation and her pictures, was considered.

E. Steve Baxter: Denied. I cannot speak on behalf of the other aldermen considered. Testimony from Officer McHenry, in her report and recommendation and her pictures, was considered.

F. Bruce Foutch: Denied. I cannot speak on behalf of the other aldermen considered. Testimony from Officer McHenry, in her report and recommendation and her pictures, was considered.

G. Murry Witcher: Denied. I was not present and cannot speculate as to what was or wasn't considered or heard.

H. Charlie Hight: Denied. I cannot speak on behalf of the other aldermen considered. Testimony from Officer McHenry, in her report and recommendation and her pictures, was considered.

REQUEST FOR ADMISSION NO.11: Admit that, once the property was red tagged, Plaintiff was barred from repairing the property without obtaining sponsorship for and approval by the City Council of a rehabilitation plan which included the requirement to post a bond and provide a letter of credit. If denied, please explain in detail.

RESPONSE:

A. Debi Ross: Admitted.

B. Beth White: Admitted.

C. Linda Robinson: Admitted.

D. Maurice Taylor: Admitted.

E. Steve Baxter: Admitted.

F. Bruce Foutch: Admitted.

G. Murry Witcher: Admitted.

H. Charlie Hight: Admitted.

REQUEST FOR ADMISSION NO.12: Admit that, at the City Council meeting on February 25,2013, prior to the condemnation vote, Plaintiff's counsel stated that the owner

wanted to rehabilitate the property. (see Exhibit F, Minutes, page. 7). If denied, please explain in detail.

RESPONSE:

A. Debi Ross: Admit Plaintiff's counsel made this statement, but not the truth of Plaintiff's counsel's statement.

B. Beth White: Admit Plaintiff's counsel made this statement, but not the truth of Plaintiff's counsel's statement.

C. Linda Robinson: Admit Plaintiff's counsel made this statement, but not the truth of Plaintiff's counsel's statement.

D. Maurice Taylor: Admit Plaintiff's counsel made this statement, but not the truth of Plaintiff's counsel's statement.

E. Steve Baxter: Admit Plaintiff's counsel made this statement, but not the truth of Plaintiff's counsel's statement.

F. Bruce Foutch: Admit Plaintiff's counsel made this statement, but not the truth of Plaintiff's counsel's statement.

G. Murry Witcher: Denied. I was not there and cannot speculate as to what Plaintiff's counsel said or did not say.

H. Charlie Hight: Admit Plaintiff's counsel made this statement, but not the truth of Plaintiff's counsel's statement.

REQUEST FOR ADMISSION NO.13: Admit that, at the City Council meeting on February 25, 2013, prior to the condemnation vote, Plaintiff's counsel informed the Council that the property had been cleaned out. (See Exhibit F, Minutes, page8.) If denied, Please explain in detail.

RESPONSE:

A. Debi Ross: Admit Plaintiff's counsel made this statement, but not the truth of Plaintiff's counsel's statement. Counsel for Plaintiff did not present any evidence that the property had been cleaned out.

B. Beth White: Admit Plaintiff's counsel made this statement, but not the truth of Plaintiff's counsel's statement. Counsel for Plaintiff did not present any evidence that the property had been cleaned out.

C. Linda Robinson: Admit Plaintiff's counsel made this statement, but not the truth of Plaintiff's counsel's statement. Counsel for Plaintiff did not present any evidence that the property had been cleaned out.

D. Maurice Taylor: Admit Plaintiff's counsel made this statement, but not the truth of Plaintiff's counsel's statement. Counsel for Plaintiff did not present any evidence that the property had been cleaned out.

E. Steve Baxter: Admit Plaintiff's counsel made this statement, but not the truth of Plaintiff's counsel's statement. Counsel for Plaintiff did not present any evidence that the property had been cleaned out.

F. Bruce Foutch: Admit Plaintiff's counsel made this statement, but not the truth of Plaintiff's counsel's statement. Counsel for Plaintiff did not present any evidence that the property had been cleaned out.

G. Murry Witcher: Denied. I was not present and cannot speculate as to what the Plaintiff's counsel said or did not say.

H. Charlie Hight: Admit Plaintiff's counsel made this statement, but not the truth of Plaintiff's counsel's statement. Counsel for Plaintiff did not present any evidence that the property had been cleaned out.

REQUEST FOR ADMISSION NO.14: Admit that, once a property is red-tagged, it is the City's practice to deny a permit for repairs unless and until the City Council approves a rehabilitation plan that includes the posting of a bond and letter of credit. If denied, please explain in detail.

RESPONSE:

A. Debi Ross: Denied. An application is made pursuant to the rehabilitation plan and it is then submitted to City Council for its approval. Nothing is denied until the City Council has made its decision to approve or deny the rehabilitation plan.

B. Beth White: Denied. An application is made pursuant to the rehabilitation plan and it is then submitted to City Council for its approval. Nothing is denied until the City Council has made its decision to approve or deny the rehabilitation plan.

C. Linda Robinson: Denied. An application is made pursuant to the rehabilitation plan and it is then submitted to City Council for its approval. Nothing is denied until the City Council has made its decision to approve or deny the rehabilitation plan.

D. Maurice Taylor: Denied. An application is made pursuant to the rehabilitation plan and it is then submitted to City Council for its approval.

Nothing is denied until the City Council has made its decision to approve or deny the rehabilitation plan.

E. Steve Baxter: Denied. An application is made pursuant to the rehabilitation plan and it is then submitted to City Council for its approval. Nothing is denied until the City Council has made its decision to approve or deny the rehabilitation plan.

F. Bruce Foutch: Denied. An application is made pursuant to the rehabilitation plan and it is then submitted to City Council for its approval. Nothing is denied until the City Council has made its decision to approve or deny the rehabilitation plan.

G. Murry Witcher: Denied. An application is made pursuant to the rehabilitation plan and it is then submitted to City Council for its approval. Nothing is denied until the City Council has made its decision to approve or deny the rehabilitation plan.

H. Charlie Hight: Denied. An application is made pursuant to the rehabilitation plan and it is then submitted to City Council for its approval. Nothing is denied until the City Council has made its decision to approve or deny the rehabilitation plan.

REQUEST FOR ADMISSION NO.15: Admit that, when the Code Enforcement Department has referred a property to the City Council for a condemnation vote, the City's practice is to provide only a three (3) minute appearance before the City Council. If denied please explain in detail.

RESPONSE:

A. Debi Ross: Denied. The three (3) minute requirement is for public comment on non-agenda items and citizens' public comment on numbered legislation. If an owner appears for a condemnation hearing, the hearing may last longer than three minutes, which happened in the instant case. Property owners are afforded time and may speak in a public forum.

B. Beth White: Denied. The three (3) minute requirement is for public comment on non-agenda items and citizens' public comment on numbered legislation. If an owner appears for a condemnation hearing, the hearing may last longer than three minutes, which happened in the instant case. Property owners are afforded time and may speak in a public forum.

C. Linda Robinson: Denied. The three (3) minute requirement is for public comment on non-agenda items and citizens' public comment on numbered legislation. If an owner appears for a condemnation hearing, the hearing may last longer than three minutes, which happened in the instant case. Property owners are afforded time and may speak in a public forum.

D. Maurice Taylor: Denied. The three (3) minute requirement is for public comment on non-agenda items and citizens' public comment on numbered legislation. If an owner appears for a condemnation hearing, the hearing may last longer than three minutes, which happened in the instant case. Property owners are afforded time and may speak in a public forum.

E. Steve Baxter: Denied. The three (3) minute requirement is for public comment on non-agenda items and citizens' public comment on numbered legislation. If an owner appears for a condemnation hearing, the hearing may last longer

than three minutes, which happened in the instant case. Property owners are afforded time and may speak in a public forum.

F. Bruce Foutch: Denied. The three (3) minute requirement is for public comment on non-agenda items and citizens' public comment on numbered legislation. If an owner appears for a condemnation hearing, the hearing may last longer than three minutes, which happened in the instant case. Property owners are afforded time and may speak in a public forum.

G. Murry Witcher: Denied. The three (3) minute requirement is for public comment on non-agenda items and citizens' public comment on numbered legislation. If an owner appears for a condemnation hearing, the hearing may last longer than three minutes, which happened in the instant case. Property owners are afforded time and may speak in a public forum.

H. Charlie Hight: Denied. The three (3) minute requirement is for public comment on non-agenda items and citizens' public comment on numbered legislation. If an owner appears for a condemnation hearing, the hearing may last longer than three minutes, which happened in the instant case. Property owners are afforded time and may speak in a public forum.

REQUEST FOR ADMISSION NO.16: Admit that, when the Code Enforcement Department has referred a property to the City Council for a condemnation vote, other than a three (3) minute appearance before the City Council, the City does not provide any other hearings or other administrative process by which the property owner may present his case to any City official, board, or commission. If denied please explain in detail.

RESPONSE:

A. Debi Ross: Denied. The City adheres to due process requirements, Ark. Code Ann. § 14-56-425, and Ark. Dist. Ct. R. 9. Property owners may also speak with Code Enforcement officials and attorneys from the City Attorney's Office concerning rehabilitation plans.

B. Beth White: Denied. The City adheres to due process requirements, Ark. Code Ann. § 14-56-425, and Ark. Dist. Ct. R. 9. Property owners may also speak with Code Enforcement officials and attorneys from the City Attorney's Office concerning rehabilitation plans.

C. Linda Robinson: Denied. The City adheres to due process requirements, Ark. Code Ann. § 14-56-425, and Ark. Dist. Ct. R. 9. Property owners may also speak with Code Enforcement officials and attorneys from the City Attorney's Office concerning rehabilitation plans.

D. Maurice Taylor: Denied. The City adheres to due process requirements, Ark. Code Ann. § 14-56-425, and Ark. Dist. Ct. R. 9. Property owners may also speak with Code Enforcement officials and attorneys from the City Attorney's Office concerning rehabilitation plans.

E. Steve Baxter: Denied. The City adheres to due process requirements, Ark. Code Ann. § 14-56-425, and Ark. Dist. Ct. R. 9. Property owners may also speak with Code Enforcement officials and attorneys from the City Attorney's Office concerning rehabilitation plans.

F. Bruce Foutch: Denied. The City adheres to due process requirements, Ark. Code Ann. § 14-56-425, and Ark. Dist. Ct. R. 9. Property owners may also

speak with Code Enforcement officials and attorneys from the City Attorney's Office concerning rehabilitation plans.

G. Murry Witcher: Denied. The City adheres to due process requirements, Ark. Code Ann. § 14-56-425, and Ark. Dist. Ct. R. 9. Property owners may also speak with Code Enforcement officials and attorneys from the City Attorney's Office concerning rehabilitation plans.

H. Charlie Hight: Denied. The City adheres to due process requirements, Ark. Code Ann. § 14-56-425, and Ark. Dist. Ct. R. 9. Property owners may also speak with Code Enforcement officials and attorneys from the City Attorney's Office concerning rehabilitation plans.

REQUEST FOR ADMISSION NO.17: Admit that, as a regular practice, the City does not provide a list of violations to property owners whose property has been referred to the City Council for a condemnation vote. If denied, please explain in detail.

RESPONSE:

A. Debi Ross: Denied. The City complies with its Nuisance Abatement Code. Plaintiff was notified it was in violation of Articles 1 and 8 of the City's Nuisance Abatement Code when Officer McHenry first issued notice in November 2012, and was provided a list of exterior violations in Officer McHenry's affidavit for administrative search warrant.

B. Beth White: Denied. The City complies with its Nuisance Abatement Code. Plaintiff was notified it was in violation of Articles 1 and 8 of the City's Nuisance Abatement Code when Officer McHenry first issued notice in

November 2012, and was provided a list of exterior violations in Officer McHenry's affidavit for administrative search warrant.

C. Linda Robinson: Denied. The City complies with its Nuisance Abatement Code. Plaintiff was notified it was in violation of Articles 1 and 8 of the City's Nuisance Abatement Code when Officer McHenry first issued notice in November 2012, and was provided a list of exterior violations in Officer McHenry's affidavit for administrative search warrant.

D. Maurice Taylor: Denied. The City complies with its Nuisance Abatement Code. Plaintiff was notified it was in violation of Articles 1 and 8 of the City's Nuisance Abatement Code when Officer McHenry first issued notice in November 2012, and was provided a list of exterior violations in Officer McHenry's affidavit for administrative search warrant.

E. Steve Baxter: Denied. The City complies with its Nuisance Abatement Code. Plaintiff was notified it was in violation of Articles 1 and 8 of the City's Nuisance Abatement Code when Officer McHenry first issued notice in November 2012, and was provided a list of exterior violations in Officer McHenry's affidavit for administrative search warrant.

F. Bruce Foutch: Denied. The City complies with its Nuisance Abatement Code. Plaintiff was notified it was in violation of Articles 1 and 8 of the City's Nuisance Abatement Code when Officer McHenry first issued notice in November 2012, and was provided a list of exterior violations in Officer McHenry's affidavit for administrative search warrant.

G. Murry Witcher: Denied. The City complies with its Nuisance Abatement Code.

H. Charlie Hight: Denied. The City complies with its Nuisance Abatement Code. Plaintiff was notified it was in violation of Articles 1 and 8 of the City's Nuisance Abatement Code when Officer McHenry first issued notice in November 2012, and was provided a list of exterior violations in Officer McHenry's affidavit for administrative search warrant.

REQUEST FOR ADMISSION NO.18: Admit that the notices City provides to the property owners whose properties have been referred to the City Council for a condemnation vote do not contain any information regarding the property owner's rights to appeal. If denied, please explain in detail.

RESPONSE:

A. Debi Ross: Denied. The City complies with its Nuisance Abatement Codes. Further, an owner's rights to appeal a condemnation vote is provided in the City's Nuisance Abatement Code and accessible online and in print. Nothing has been adjudicated at this time.

B. Beth White: Denied. The City complies with its Nuisance Abatement Codes. Further, an owner's rights to appeal a condemnation vote is provided in the City's Nuisance Abatement Code and accessible online and in print. Nothing has been adjudicated at this time.

C. Linda Robinson: Denied. The City complies with its Nuisance Abatement Codes. Further, an owner's rights to appeal a condemnation vote is provided

in the City's Nuisance Abatement Code and accessible online and in print. Nothing has been adjudicated at this time.

D. Maurice Taylor: Denied. The City complies with its Nuisance Abatement Codes. Further, an owner's rights to appeal a condemnation vote is provided in the City's Nuisance Abatement Code and accessible online and in print. Nothing has been adjudicated at this time.

E. Steve Baxter: Denied. The City complies with its Nuisance Abatement Codes. Further, an owner's rights to appeal a condemnation vote is provided in the City's Nuisance Abatement Code and accessible online and in print. Nothing has been adjudicated at this time.

F. Bruce Foutch: Denied. The City complies with its Nuisance Abatement Codes. Further, an owner's rights to appeal a condemnation vote is provided in the City's Nuisance Abatement Code and accessible online and in print. Nothing has been adjudicated at this time.

G. Murry Witcher: Denied. The City complies with its Nuisance Abatement Codes. Further, an owner's rights to appeal a condemnation vote is provided in the City's Nuisance Abatement Code and accessible online and in print. Nothing has been adjudicated at this time.

H. Charlie Hight: Denied. The City complies with its Nuisance Abatement Codes. Further, an owner's rights to appeal a condemnation vote is provided in the City's Nuisance Abatement Code and accessible online and in print. Nothing has been adjudicated at this time.

REQUEST FOR ADMISSION NO.19: Admit that, neither prior to or during the City Council meeting on February 25, 2013, were you provided with a list of violations, or a report from a building code inspector as to the specific code violations that may have existed (See response to Interrogatory No.20)

RESPONSE:

A. Debi Ross: Denied. There was a letter and recommendation from Officer McHenry and numerous photographs of the interior and exterior structure. These all spoke for themselves on the numerous code violations.

B. Beth White: Denied. There was a letter and recommendation from Officer McHenry and numerous photographs of the interior and exterior structure. These all spoke for themselves on the numerous code violations.

C. Linda Robinson: Denied. There was a letter and recommendation from Officer McHenry and numerous photographs of the interior and exterior structure. These all spoke for themselves on the numerous code violations.

D. Maurice Taylor: Denied. There was a letter and recommendation from Officer McHenry and numerous photographs of the interior and exterior structure. These all spoke for themselves on the numerous code violations.

E. Steve Baxter: Denied. There was a letter and recommendation from Officer McHenry and numerous photographs of the interior and exterior structure. These all spoke for themselves on the numerous code violations.

F. Bruce Foutch: Denied. There was a letter and recommendation from Officer McHenry and numerous photographs of the interior and exterior structure. These all spoke for themselves on the numerous code violations.

G. Murry Witcher: Denied. I was not present at the meeting and cannot speculate as to what the other aldermen reviewed and were provided.

H. Charlie Hight: Denied. There was a letter and recommendation from Officer McHenry and numerous photographs of the interior and exterior structure. These all spoke for themselves on the numerous code violations.

Respectfully Submitted,

Daniel L. McFadden (2011035)
Assistant City Attorney
300 Main Street
PO Box 5757
North Little Rock, Arkansas 72119
Voice: (501) 975-3755
Fax: (501) 340-5341
Email: dmcfadden@northlittlerock.ar.gov

CERTIFICATE OF SERVICE

I, Daniel L. McFadden, do hereby certify that a copy of the foregoing pleading was deposited into the U.S. mail, postage prepaid on this 9th day of January 2014, addressed to:

Mickey Stevens
Attorney for Plaintiff
P.O. Box 2165
Benton, AR 72018

Daniel L. McFadden

Mayor Joe A. Smith

City Clerk Diane Whitbey

City Attorney C. Jason Carter

City Council Members

Ward 1	**Debi Ross** **Beth White**
Ward 2	**Linda Robinson** **Maurice Taylor**
Ward 3	**Steve Baxter** **Bruce Foutch**
Ward 4	**Murry Witcher** **Charlie Hight**

"We welcome you!"

The City Council meetings the 2nd and 4th Monday of each month at 6:30 p.m.
in the City Council Chambers in City Hall, 300 Main Street
(unless the meeting falls on a State Holiday)
For more information call 501-340-5317 or visit our website at www.northlittlerock.ar.gov

Municipal Institutions Constitute the Strength of Free Nations. *By A. de Tocqueville*

2013

JANUARY

SUN	MON	TUE	WED	THU	FRI	SAT
		1	2	3	4	5
6	7	8	9	10	11	12
13	●	15	16	17	●	19
20	21	22	23	24	25	26
27	●	29	30	31		

FEBRUARY

SUN	MON	TUE	WED	THU	FRI	SAT
					1	2
3	4	5	6	7	8	9
10	●	12	13	14	15	16
17	18	19	20	21	22	23
24	●	26	27	28		

MARCH

SUN	MON	TUE	WED	THU	FRI	SAT
					1	2
3	4	5	6	7	8	9
10	(11)	12	13	(14)	15	16
17	18	19	20	21	22	23
24	(25)	26	27	28	29	30
31						

APRIL

SUN	MON	TUE	WED	THU	FRI	SAT
	1	2	3	4	5	6
7	(8)	9	10	11	12	13
14	15	16	17	18	19	20
21	(22)	23	24	25	26	27
28	29	30				

MAY

SUN	MON	TUE	WED	THU	FRI	SAT
			1	2	3	4
5	6	7	8	9	10	11
12	(13)	14	15	16	17	18
19	20	21	22	23	24	25
26	(27)	28	29	30	31	

JUNE

SUN	MON	TUE	WED	THU	FRI	SAT
						1
2	3	4	5	6	7	8
9	(10)	11	12	13	14	15
16	17	18	19	20	21	22
23	(24)	25	26	27	28	29
30						

JULY

SUN	MON	TUE	WED	THU	FRI	SAT
	1	2	3	(4)	5	6
7	(8)	9	10	11	12	13
14	15	16	17	18	19	20
21	(22)	23	24	25	26	27
28	29	30	31			

AUGUST

SUN	MON	TUE	WED	THU	FRI	SAT
				1	2	3
4	5	6	7	8	9	10
11	(12)	13	14	15	16	17
18	19	20	21	22	23	24
25	(26)	27	28	29	30	31

SEPTEMBER

SUN	MON	TUE	WED	THU	FRI	SAT
1	(2)	3	4	5	6	7
8	(9)	10	11	12	13	14
15	16	17	18	19	20	21
22	(23)	24	25	26	27	28
29	30					

OCTOBER

SUN	MON	TUE	WED	THU	FRI	SAT
		1	2	3	4	5
6	7	8	9	10	11	12
13	(14)	15	16	17	18	19
20	21	22	23	24	25	26
27	(28)	29	30	31		

NOVEMBER

SUN	MON	TUE	WED	THU	FRI	SAT
					1	2
3	4	5	6	7	8	9
10	(11)	12	13	14	15	16
17	18	19	20	21	22	23
24	(25)	26	27	(28)	(29)	30

DECEMBER

SUN	MON	TUE	WED	THU	FRI	SAT
1	2	3	4	5	6	7
8	(9)	10	11	12	13	14
15	16	17	18	19	20	21
22	(23)	(24)	(25)	26	27	28
29	30	31	(1)			

EXHIBIT 5

"The City of North Little Rock welcomes people of diverse cultures and beliefs. Any religious viewpoint expressed during invocation, or at any other time during the meeting, reflects only the personal opinion of the speaker. It is not intended to proselytize, advance, or disparage any religious belief."

COMMUNICATIONS

None as of filing deadline.

PRESENTATIONS

Alderman Charlie Hight – presentation thanking the Charlie Hart and Mello Velo Cycling Club for donation of Bike Fixit Station.

Crews and Associates presentation to Mayor Smith.

SCHEDULED PUBLIC HEARING(S) *3 minutes*

Please sign in with the City Clerk before the meeting convenes at 6:30 p.m.

Convene a public hearing re: O-13-18 – amending Ordinance No. 7946 (regulations to control development and subdivision of land), Chapters 18 and 46 of the NLRMC and Ordinance No. 7697 (the Zoning Ordinance) re: Hillside Cut Regulations

CITIZENS PUBLIC COMMENT ON NUMBERED LEGISLATION *3 minutes*

Please sign in with the City Clerk before the meeting convenes at 6:30 p.m.

INCLUDES ALL PUBLIC HEARINGS

UNFINISHED BUSINESS

RESOLUTIONS

R-13-23 Mayor Smith

Appropriating $500,000.00 from the General Fund for the Street Overlay Program (*$125,000.00 per Ward for Street Overlay Program*)

Held

R-13-28 Mayor Smith

Expressing the willingness of the City of North Little Rock to utilize state aid street monies for city street projects

Held

ORDINANCES

O-13-12 Mayor Smith

Establishing procedures to be followed in the absence of the Mayor

Read 2 times and held

O-13-18 Alderman Ross

Amending Ordinance No. 7946 (Regulations to Control Development and Subdivision of Land), Chapters 18 and 46 of the North Little Rock Municipal Code, and Ordinance No. 7697 (the Zoning Ordinance) regarding hillside cut regulations

Read 1 time and held *Convene public hearing this date*

CONSENT AGENDA

No items

NEW BUSINESS

RESOLUTIONS

R-13-29 Mayor Smith

Authorizing the Mayor to submit an application on behalf of the City of North Little Rock to obtain Grant Funds from the Arkansas Highway and Transportation Department's "Safe Routes to School Program"

R-13-30 Alderman Robinson

Directing the City Attorney to take the required action and/or steps necessary on behalf of the City of North Little Rock to apply to the United States District Court for dissolution of the Consent Decree entered April 21, 1983

R-13-31 Mayor Smith

Authorizing the Mayor and City Clerk to sell property located at 1023 Parker Street (*to Amber Pye - $94,500.00*)

R-13-32 Mayor Smith

Declaring certain buildings, houses and other structures located at 704 West 18th Street to constitute a public nuisance and condemning said structures (*owner: JNYLECO, Inc. c/o Jocelyn Dokes*)

Convene a public hearing this date

R-13-33 Mayor Smith

Declaring certain buildings, houses and other structures located at 2713 Gribble Street to constitute a public nuisance and condemning said structures (*owners: Jessie and Lewis Ford c/o Robert Jerrod, Sr.*)

Convene a public hearing this date

R-13-34 Mayor Smith

Declaring certain buildings, houses and other structures located at 704 Graham Avenue to constitute a public nuisance and condemning said structures (*owner: Cheteer Farrar c/o Bank of America Home Loans*)

_____ *Convene a public hearing this date*

R-13-35 Mayor Smith

Declaring certain buildings, houses and other structures located at 4004 Rogers Street to constitute a public nuisance and condemning said structures (*owners: Robert J. and Barbara Hoyle*)

_____ *Convene a public hearing this date*

R-13-36 Mayor Smith

Declaring certain buildings, houses and other structures located at 1304 East 16th Street to constitute a public nuisance and condemning said structures (*owner: Mary E. Smith*)

_____ *Convene a public hearing this date*

R-13-37 Mayor Smith

Declaring certain buildings, houses and other structures located at 6615 Hwy 70 to constitute a public nuisance and condemning said structures (*owner: Convent Corp, Drugstore Cowboys, Inc., Gentlemen's Club 70 c/o Craig Snyder*)

_____ *Convene a public hearing this date*

R-13-38 Mayor Smith

Certifying the amount of a Clean Up Lien to be filed with the Pulaski County Tax Collector against property located at 2119 Moss Street (*amount - $3,407.90*)

_____ *Convene a public hearing this date*

ORDINANCES

O-13-19 Mayor Smith

Amending Section 20.12 of Ordinance No. 7697 (the Zoning Ordinance) to clarify the existing notice policy for the Planning Commission

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O-13-20 Mayor Smith

Waiving formal bidding requirements for Insurance for the Murray Hydroelectric Plant; authorizing the Mayor and City Clerk to enter into an agreement with the Holmes Organization, Inc. (*$284,488.00 – Electric Department*)

O-13-21 Mayor Smith *for consideration only*

Granting a Conditional Use to allow a Self-Serve Ice Vending Unit in a C-3 zone for property located at 4032 John F. Kennedy Boulevard (*applicant: Clint Davis*)

O-13-22 Alderman Taylor

Reclassifying property located at 4816 East Broadway from C-3 to Planned Use Development (PUD) to allow a Liquor Store by amending Ordinance No. 7697 (*applicant: James Duncan*)

O-13-23 Aldermen Baxter and Foutch

Allowing and approving variances for an off-premise, freestanding Pole Sign on property located at 10307 Maumelle Boulevard (*applicant: Phil Dively*)

PUBLIC COMMENT *ON NON-AGENDA ITEMS*

All persons wishing to speak must have completed a public comment card and return it to the City Clerk before this meeting is convened. Speakers have 3 minutes to address their topic.

Respectfully submitted,

Diane Whitbey, CMC / CAMC
City Clerk and Collector

Words to live by

Before humans die, they write their last Will and Testament,
give their home and all they have, to those they leave behind.
If, with my paws, I could do the same, this is what I'd ask...
To a poor and lonely stray I'd give:
My happy home.
My bowl and cozy bed, soft pillows and all my toys,
The lap, which I loved so much,
The hand that stroked my fur and the sweet voice which spoke my name.
I'd Will to the sad, scared shelter dog (or cat), the place I had in my
Human's loving heart, of which there seemed no bounds.
So when I die, please do not say, "I will never have a pet again,
for the loss and pain is more than I can stand."
Instead, go find and unloved dog (or cat)
one whose life has held no joy or hope and give MY place to HIM (or her).
This is the only thing I can give...The love I left behind.

Author unknown.

February is Spay and Neuter Month

North Little Rock Woman's Club Annual Carousel Ball

Saturday, April 6, 2013 – at the Patrick Henry Hays Senior Citizens Center
Dinner – Dancing and Entertainment – Live and Silent Auctions
For tickets or more information call Helen Greenfield at 835-5019 or
NLR Woman's Club President Joan Weese at 791-2991

Note: the next City Council meeting scheduled for Monday, March 11, 2013, has been rescheduled to Thursday, March 14, 2013

For more information, visit our website at www.northlittlerock.ar.gov.
To view council legislation, exhibits, etc., go the link above, then click on the Government Tab, then select Council Agenda and look for the Adobe PDF Agenda file.

If you would like to receive a copy of the Agenda (only),
Please call 501-340-5317 or email Dwhitley@northlittlerock.ar.gov.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

CONVENT COPRORATION,
Individually and on Behalf of all
Others Similarly Situated **PLAINTIFF**

v. **CASE NO. 4:13-CV-0259**

CITY OF NORTH LITTLE ROCK, ARKANSAS, a Municipal Corporation, JOE SMITH, Mayor, Individually and in his Official Capacity, City Council Members DEBI ROSS, BETH WHITE, LINDA ROBINSON, MAURICE TAYLOR, STEVE BAXTER, BRUCE FOUTCH, MURRY WITCHER, and CHARLIE HIGHT each Individually and in his or her Official Capacity, TOM WADLEY, Director, Code Enforcement Division, Individually and in his Official Capacity, and FELECIA MCHENRY, Code Enforcement Officer, Individually and in her Official Capacity **DEFENDANTS**

SEPARATE DEFENDANT'S RESPONSES TO PLAINTIFF'S REQUESTS FOR ADMISSIONS

Comes Separate Defendant, Felecia McHenry, by and through her attorney, Assistant City Attorney Daniel L. McFadden, and for her Responses to Plaintiff's Requests for Admissions, states as follows:

REQUEST FOR ADMISSION NO. 1: Admit that the pictures submitted to and considered by the City Council on February 25, 2013, were taken on or before January 13, 2013. If denied, please explain in detail.

RESPONSE: Denied. To the best of my knowledge, the pictures submitted and considered included pictures taken after January 13, 2013, in addition to those taken in November 2012.

EXHIBIT 6

REQUEST FOR ADMISSION NO. 2: Admit that you did not reinspect the property after January 13, 2013. If denied, please explain in detail.

RESPONSE: Denied. I reinspected as part of my inspection on January 16, 2013.

REQUEST FOR ADMISSION NO. 3: Admit that you never provided R.C. Livdahl, any other representative of the property owner, or any City Council member with a list of violations, or a report from a building code inspector as to the specific code violations that may have existed (See response to Interrogatory No. 24). If denied, please explain in detail.

RESPONSE: Denied. I submitted photographs showing violations so Mr. Livdahl or other representatives of Convent Corporation would submit to a contractor to determine for rehabilitation. I also submitted my affidavit for administrative search warrant, which listed exterior violations. Mickey Stevens received copies of these from me as well.

REQUEST FOR ADMISSION NO. 4: Admit that you did not prepare a report after your inspection of the property on January 13, 2013 listing specific code violations. If denied, please explain in detail..

RESPONSE: Admitted. I did not inspect the property on January 13, 2013. Because I did not inspect on this date, there was no report to be made.

REQUEST FOR ADMISSION NO. 5: Admit that you informed Richard Livdahl that he was required to provide paperwork showing that he was an owner of the property before the City would allow the property to be repaired. If denied, please explain in detail.

RESPONSE: Denied. I only requested that Mr. Livdahl provide paperwork demonstrating that he had some connection to the property. Mr. Livdahl misrepresented himself to me as the attorney for the Plaintiff and provided me a business card showing he worked for another corporation. I did not require him to provide anything.

REQUEST FOR ADMISSION NO. 6: Admit that you have worked with representatives of other corporations in similar situations without requiring that they prove an ownership interest in the property. If denied, please explain in detail.

RESPONSE: Denied. I request the information from other representatives if there is reason to question ownership when their names do not appear on property and/or court records.

REQUEST FOR ADMISSION NO. 7: Admit that, prior to red-tagging the property, you did not provide any notice of the alleged violations to the property owner. If denied, please explain in detail.

RESPONSE: Denied. I contacted Mary Rose Bekkela beforehand.

REQUEST FOR ADMISSION NO. 8: Admit that you did not attempt to obtain permission from the property owner prior to entering and inspecting the property on January 16, 2013. If denied, please explain in detail.

RESPONSE: Denied. Before entering and inspecting, I contacted Mr. Livdahl and requested he meet me at the structure so I may conduct the search, but he informed me he had no means to access the structure.

REQUEST FOR ADMISSION NO. 9: Admit that you did not make any attempt to notify the property owner that the building was unsecured following your exterior inspection on November 14, 2012. If denied, please explain in detail.

RESPONSE: Denied. Part of the purpose of the notice that I sent out to the owners at interest was because it was not secured. I notified the agent of service, the current occupant, Drugstore Cowboy, and Mary Rose Bekkela.

REQUEST FOR ADMISSION NO. 13: Admit that the document attached hereto as Exhibit B is a true and correct copy of the "Original Violation Report" concerning the property. If denied, please explain in detail.

RESPONSE: Separate Defendant cannot admit or deny this request, as there is no Exhibit B attached to Plaintiff's requests to Separate Defendant.

REQUEST FOR ADMISSION NO. 14: Admit that, as indicated on the "Original Violation Report," attached hereto as Exhibit B, you requested a search warrant for an interior inspection of the property on December 5, 2012. If denied, please explain in detail.

RESPONSE: Denied. Plaintiff failed to attach any exhibit labeled "Exhibit B" in its requests to Separate Defendant. Separate Defendant has no basis to admit or deny any admission for the purposes of this pleading.

REQUEST FOR ADMISSION NO. 15: Admit that the document attached hereto as Exhibit C is a true and correct copy of the letter you provide to Mayor Smith and the City Council Members dated January 11, 2013. If denied, please explain in detail.

RESPONSE: Denied. Plaintiff failed to attach any exhibit labeled "Exhibit C" in its requests to Separate Defendant. Separate Defendant has no basis to admit or deny any admission for the purposes of this pleading.

REQUEST FOR ADMISSION NO. 16: Admit that, as indicated in the letter you provided to Mayor Smith and the City Council Members dated January 11, 2013, attached hereto as Exhibit C, Richard Livdahl was informed that the City was "not obligated to work with him" because he was "not listed as ownership of record." If denied, please explain in detail.

RESPONSE: Denied. Plaintiff failed to attach any exhibit labeled "Exhibit C" in its requests to Separate Defendant. Separate Defendant has no basis to admit or deny any admission for the purposes of this pleading.

REQUEST FOR ADMISSION NO. 17: Admit that, as indicated in the letter you provided to Mayor Smith and the Cty Council Members dated January 11, 2013, attached hereto as Exhibit C, Richard Livdahl informed you that the building would be cleaned out. If denied, please explain in detail.

RESPONSE: Denied. Plaintiff failed to attach any exhibit labeled "Exhibit C" in its requests to Separate Defendant. Separate Defendant has no basis to admit or deny any admission for the purposes of this pleading.

REQUEST FOR ADMISSION NO. 18: Admit that, once you red-tagged the Property, Plaintiff was barred from making any repairs without approval from the City Council of a rehabilitation plan which requires the posting of a bond and letter of credit. If denied, please explain in detail.

RESPONSE: Admit. To the best of my knowledge, repairs to the property would require City Council approval. However, Mr. Livdahl told me Convent Corporation was not interested in repairing the property and that it only wanted it cleaned out.

REQUEST FOR ADMISSION NO. 19: Admit that you red-tagged the property in question prior to contacting or attempting to contact the owner. If denied, please explain in detail.

RESPONSE: Denied. I sent notice to the agent of service, Craig Snyder, and sent notice to Mary Bekkela.

REQUEST FOR ADMISSION NO. 20: Admit that you red-tagged the property prior to conducting an interior inspection of the structure. If denied, please explain in detail.

RESPONSE: Admitted, to the best of my knowledge.

Separate Defendant retains the right to supplement any and all responses as discovery progresses.

Respectfully Submitted,

Daniel L. McFadden (2011035)
Assistant City Attorney
300 Main Street
PO Box 5757
North Little Rock, Arkansas 72119
Voice: (501) 975-3755
Fax: (501) 340-5341
Email: dmcfadden@northlittlerock.ar.gov

CERTIFICATE OF SERVICE

I, Daniel L. McFadden, do hereby certify that a copy of the foregoing pleading was deposited into the U.S. mail, postage prepaid on this 9th day of January 2014, addressed to:

Mickey Stevens
Attorney for Plaintiff
P.O. Box 2165
Benton, AR 72018

Daniel L. McFadden

**IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS,
TWELFTH DIVISION**

**CONVENT CORPORATION,
Individually and on Behalf of all
Others Similarly Situated** — **PLAINTIFF**

v. **NO. 60CV-13-1398**

CITY OF NORTH LITTLE ROCK, ARKANSAS, a Municipal Corporation, JOE SMITH, Mayor, Individually and in his Official Capacity, City Council Members DEBI ROSS, BETH WHITE, LINDA ROBINSON, MAURICE TAYLOR, STEVE BAXTER, BRUCE FOUTCH, MURRY WITCHER, and CHARLIE HIGHT, each Individually and in his or her Official Capacity, TOM WADLEY, Director, Code Enforcement Division, Individually and in his Official Capacity, and FELECIA MCHENRY, Code Enforcement Officer, Individually and in her Official Capacity — **DEFENDANTS**

PLAINTIFF'S SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Plaintiff submits this supplemental brief to provide the court with case law and argument regarding the separation of powers problem which would arise if the Court were to adopt Defendants' position that the Rule 9 appeal is an extension of the City's administrative procedures and to provide additional case law regarding administrative versus judicial remedies and exhaustion requirements.

The Defendants have asked the Court to accept certain contentions which are essential to their position but which are based on flawed reasoning. First, Defendants contend that an appeal of the City Council's condemnation decision to the Circuit Court pursuant to District Court Rule 9 is an "administrative remedy." If this appeal is not an "administrative remedy," Defendants'

argument regarding exhaustion of administrative remedies fails. If, as Defendants' argument implies, this appeal requires that the Circuit Court hold an "administrative" hearing on behalf of the City and make a final "administrative" decision for the City, the Rule would violate the separation of powers doctrine contained in Article 4, Section 2 of the Arkansas Constitution.

Second, Defendants contend that the City is entitled to a *de novo* administrative hearing in Circuit Court. This argument also fails as the Arkansas Supreme Court has held that has held *de novo* review by Circuit Court is not appropriate for decisions which fall within the government's police powers to protect the health, safety, and general welfare of the citizens.

The failure of both of these arguments leaves the Court to perform a review on the record of the administrative proceeding before the City Council and to adjudicate Plaintiff's Constitutional claims which are an integral part of its appeal. As discussed in other pleadings, the City failed to develop an adequate record to support its decision. And, as thoroughly discussed in other pleadings, the City's express drive-thru condemnation procedures fall far short of providing due process as required by both the state and federal constitutions.

I. Defendants' contention that a Rule 9 appeal is merely an extension of the City's administrative procedure violates the separation of powers doctrine in Article 4, Section 2 of the Arkansas Constitution.

Article 4, Section 1 of the Arkansas Constitution provides for three distinct branches of government:

> The powers of the government of the State of Arkansas shall be divided into three distinct departments, each of them to be confided to a separate body of magistracy, to-wit: Those which are legislative, to one, those which are executive, to another, and those which are judicial, to another.

Article 4, Section 2 explicitly requires a separation of powers:

> No person or collection of persons, being of one of these departments, shall exercise any power belonging to either of the others, except in the instances hereinafter expressly directed or permit.

Therefore, powers that belong to the executive branch of government cannot be delegated or shifted to the judicial branch, even where the executive branch chooses to forego its constitutional responsibility to provide due process. *See, e.g., Harvey v. Clinton*, 308 Ark. 546, 826 S.W.2d 236 (1992) (The judicial branch cannot take away the discretion to make a decision which is reposed in the executive branch.); *Ball v. Roberts*,291 Ark. 84, 86,722 S.W.2d 829, 830 (1987) ("According to the separation of powers doctrine '. . . one department cannot interfere with, or encroach on, or exercise the powers of, either of the other departments, . . .'")(quoting16 C.J.S. *Constitutional Law* § 111 (1984)).

In *Oates v. Rogers*, 201 Ark. 335, 337-339,144 S.W.2d 457, 458 (1940), the Arkansas Supreme Court discussed the importance of maintaining the separation of powers in governmental functions:

> Between adoption of the federal constitution by the convention of 1787 and ratification by eleven states in 1788, much was written regarding separation of the three governmental divisions; and principles so discussed, although not as aptly expressed as they subsequently were in state pronouncements, have, nevertheless, been construed to mean exactly what appellant here contends our constitution directs--that the functions *belonging* to one department cannot be usurped by the other, **nor may the right to exercise such authority be delegated.**
>
> In *Springer* v. *Philippine Islands*, 277 U.S. 189, 48 S. Ct. 480, 72 L. Ed. 845, the court construed an act of the Philippine legislature, which created a coal company and a bank, the stock of which was largely owned by the Philippine government. It was provided that power to vote the stock should vest in a "committee," in the one case, and in a "board of control" in the other, each consisting of the governor general, the president of the senate, and the speaker of the house of representatives. The court found that in the Philippine organic act, which divides the government into legislative, executive, and judicial departments, the principle is implicit, as it is in state and federal constitutions, that these three powers shall be forever separate and distinct from each other. It was held that voting of the stock in the election of directors and managing agents of the corporations was an executive function, and that the attempt to repose it in the legislative officers named in the acts violated the organic law. In the majority opinion, written by Mr. Justice SUTHERLAND, there is the following language:

> "Thus the organic law [of the Philippines], following the rule established by the American constitutions, both state and federal, divides the government into three separate departments--the legislative, executive, and judicial. Some of our state constitutions expressly provide in one form or another that the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other. Other constitutions, including that of the United States, do not contain such an express provision. But it is implicit in all, as a conclusion logically following from the separation of the several departments. . . . **And this separation and the consequent exclusive character of the powers conferred upon each of the three departments is basic and vital--not merely a matter of governmental mechanism.** . . . Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such enforcement. The latter are executive functions. . . . Not having the power of appointment, unless expressly granted or incidental to its powers, the legislature cannot engraft executive duties upon a legislative office, since that would be to usurp the power of appointment by indirection. . . ."
>
> . . . .
>
> An interesting opinion by the Nebraska Supreme Court-- *Searle* v. *Yensen,* 118 Neb. 835, 226 N.W. 464, is printed and annotated in 69 A. L. R., p. 257. At page 261 there is this statement: "The power of the legislature to delegate a part of its legislative functions to municipal corporations or other governmental subdivisions, boards, commissions, and tribunals, to be exercised within their respective jurisdictions, cannot be denied; but **the recipient[s] of such powers must be members of the same governmental department as that of the grantor.** Otherwise a confusion and duplication of powers would result. . . . The legislature may not impose upon the judiciary or the executive the performance of acts or duties not properly belonging to those departments respectively."

(emphasis added.) Ultimately, in *Oates*, the Arkansas Supreme Court held that a statute delegating to circuit and chancery judges appointment of county collector was unconstitutional. *Id.* at 347. Even more directly to the point in this case, the Eighth Circuit has specifically held that the legislature cannot confer **administrative** powers upon the Circuit Courts. *Dove v. Parham, 181* F. Supp. 504, 512 (E.D. Ark. 1960), aff'd, 282 F.2d 256 (8th Cir. Ark. 1960).

Thus, if, as Defendants' contend, the Rule 9 appeal is merely an extension of the City's administrative procedure, the conferring of such administrative powers on the circuit court is a violation of the separation of powers doctrine contained within the Arkansas Constitution. Therefore, the Court should not adopt Defendants' position.

II. A Rule 9 appeal is a judicial remedy and exhaustion of judicial remedies is not required prior to bringing constitutional claims.

The *Dove* case involved a statute that provided that a student who was affected by the findings and actions of a local school board with respect to assignment to a particular school could appeal the decision to Circuit Court. 181 F. Supp. 504, 512 (E.D. Ark. 1960). The school district in *Dove*, made the same argument Defendants assert in this case.

> The prayer for a dismissal was based upon the contention that the State court procedures set up by the statute were a continuation of the administrative process, and that since the plaintiffs had failed to appeal to the Circuit Court of Jefferson County, they had not exhausted their administrative remedies and had no standing in this Court.

Id. at 511. The school district argued that the appeal to Circuit Court was an administrative remedy which must be exhausted prior to bringing an action in federal court. Thus, the school board's argument in *Dove* was identical to the argument regarding exhaustion of administrative remedies put forth by Defendants in this case. The federal court held that, while the plaintiffs were required to exhaust their administrative remedies before the school board, they were not required to "carry their contention into the State courts" prior to bringing their constitutional claims in federal court. *Id.* at 512. The holding in *Dove*, affirmed by the Eighth Circuit (282 F.2d. 256), clearly renders Defendants' argument in this case meritless. In this case, Plaintiff was required to exhaust administrative remedies before the City, which it did, but is not required to exhaust state judicial remedies prior to bringing its constitutional claims.

In *Dove*, the court went on to discuss why the appeal to Circuit Court was not an administrative remedy.

> The difficulty with defendants' position on this phase of the case is that the review available in the State courts appears to have all of the characteristics of a conventional judicial proceeding. The filing of the petition for appeal apparently amounts to the institution of a lawsuit, with the furnishing of a copy of the petition to the president or secretary of the board serving the function of process.

Id. Furthermore, the court noted that the Arkansas legislature could not validly confer administrative powers on the circuit courts. *Id.*

Thus, a Rule 9 appeal to Circuit Court is a judicial remedy, exhaustion of which is not required prior to bringing constitutional claims. Additionally, in previous pleadings, Plaintiff has cited voluminous case law that states exhaustion of other remedies is not required prior to bringing constitutional claims.[1] Furthermore, as discussed in previous pleadings, because Defendant is seeking declaratory and injunctive relief, exhaustion of other remedies is not required. *Hotels.com, L.P. v. Pine Bluff Adver. & Promotion Comm'n*, 2013 Ark. 392,430 S.W.3d 56 (2013).

III. A *de novo* trial of a nuisance abatement decision is not permitted.

Defendants assert that a Rule 9 appeal relieves the City of any obligation to provide due process because it is an extension of the City's administrative process. As such, the City contends that a *de novo* trial in Circuit Court is required prior to a property owner being able to bring constitutional claims. However, a *de novo* review by a Circuit Court of this type of decision is not appropriate. First, Rule 9 does not provide for such review unless specifically provided for by

[1] *E.g.* Dove v. Parham,282 F.2d 256, 262,1960 U.S. App. LEXIS 3785, 16-18(8th Cir. Ark.1960) Lane v. Wilson, 307 U.S. 268, 274, 59 S.Ct. 872, 875, 83 L.Ed. 1281. See also City Bank Farmers' Trust Co. v. Schnader, 291 U.S. 24, 30, 54 S.Ct. 259, 78 L.Ed. 628; Carson v. Warlick, 4 Cir., 238 F.2d 724, 729. Lane v. Wilson, 307 U.S. 268, 59 S.Ct. 872, 83 L.Ed. 1281 (1939); Pacific Tel. & Tel. Co. v. Kuykendall, 265 U.S. 196, 44 S.Ct. 553, 68 L.Ed. 975 (1923); Bacon v. Rutland R. R., 232 U.S. 134, 34 S.Ct. 283, 58 L.Ed. 538 (1913); Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 29 S.Ct. 67, 53 L.Ed. 150 (1908); Heisler v. Parsons, 312 F.2d 172 (7 Cir. 1962); Dove v. Parham, 282 F.2d 256 (8 Cir. 1960); Baron v. O'Sullivan, 258 F.2d 336 (3 Cir. 1958); Carson v. Warlick, 238 F.2d 724 (4 Cir. 1956), cert. denied, 353 U.S. 910, 77 S.Ct. 665, 1 L.Ed.2d 664 (1957); Holt v. Raleigh City Bd. of Educ., 265 F.2d 95 (4 Cir.), cert. denied, 361 U.S. 818, 80 S.Ct. 59, 4 L.Ed.2d 63 (1959); Powell v. Workmen's Compensation Bd.,327 F.2d 131, 135,1964 U.S. App. LEXIS 6629, 8-9(2d Cir. N.Y.1964)citing McNeese v. Board of Educ. for Community Unit School Dist. 187, 373 U.S. 668, 83 S.Ct. 1433, 10 L.Ed.2d 622 (1963) (reversing 305 F.2d 783 (7 Cir. 1962)).

statute. Second, the Arkansas Supreme Court has held that decisions which fall within the government's proper police powers to protect the health, safety, and general welfare of the citizens of the state such as the suitability of a site for a landfill, the issuance of a liquor license, and zoning decisions are not decisions which are judicially cognizable and may not be subjected to *de novo* review by the courts. *Arkansas Com. on Pollution Control & Ecology v. Land Developers, Inc.*, 284 Ark. 179, 181-182, 680 S.W.2d 909, 910 (1984) (citing *Goodall* v. *Williams*, 271 Ark. 354, 609 S.W.2d 25 (1980)). Specifically, in *Wayne Alexander Trust v. City of Bentonville*, 2002 Ark. App. LEXIS 334 (2002), the court held that circuit courts **may not conduct a de novo review of nuisance abatement actions** by City Councils. "[T]he courts are deemed to have appellate power only over such acts of inferior bodies as are judicial in nature." *Id.* at 6.

In *Arkansas Commission on Pollution Control & Ecology v. Land Developers, Inc.*, the Arkansas Supreme Court held that the trial court erred in conducting a *de novo* trial and declared that the statute permitting *de novo* review was unconstitutional. 284 Ark. at 181-82, 680 S.W.2d 909. However, the court held that the Circuit Court could conduct a review based on substantive due process issues. *Id.* at 181. Interestingly, similar to the present case, the Court found that the Commission "had not adopted any procedure, rules, or regulations which afforded appellee due process." *Id.* at 182. This stands for the proposition that administrative agencies, such as the City Council, are required to adopt procedures which provide due process. *Arkansas Commission on Pollution Control & Ecology v. Land Developers, Inc.* clearly demonstrates that administrative entities may not defer their obligations to provide due process to the Circuit Courts. Such entities must provide "complete and constitutionally appropriate proceeding(s)." *Id.*

In the present case, the City refused to conduct a hearing, choosing to defer that responsibility to the Circuit Court. Now, the City expects the Court to conduct the hearing on

behalf of the City. The City had an obligation to conduct appropriate proceedings by which it could develop a factual record to support its decision. The City refused to do so and now should not expect a "do over" some two years later in Circuit Court.

CONCLUSION

In the case at bar, Defendants argue that Arkansas District Court Rule 9 and Arkansas Code Annotated § 14-56-425 delegates the obligation to provide an administrative hearing in nuisance abatement cases to the Circuit Courts. This position is untenable for multiple reasons. First and foremost, as previously argued by Plaintiff, the applicability of § 14-56-425, by its own language is limited to the subchapter on Municipal Planning (subchapter 4) and thus has no applicability to nuisance abatement actions taken pursuant to § 14-56-203 which is in subchapter 2. In the absence of a statute allowing for *de novo* review, Rule 9 merely provides for a review on the record. However, if the Court were to accept Defendants argument that Rule 9 and § 14-56-425 delegate the obligation for an administrative hearing to the Circuit Court, as the case law cited herein clearly demonstrates, the result would be a violation of the separation of powers doctrine of the Arkansas Constitution. Thus, the Court should adopt the application which is indicated by the clear language of § 14-56-425 (this section is not applicable to nuisance abatement) and which avoids an application that would be unconstitutional.

For the reasons discussed in this pleading and in others filed in this matter, Defendants' argument regarding failure to exhaust administrative remedies is completely without merit and there is nothing that bars Plaintiff from bringing both its claims under both the federal and state constitutions as an integral part of its appeal of the City Council's condemnation decision. Rule 9 provides for a review on the record developed in the administrative proceedings. As demonstrated in Plaintiff's Motion for Summary Judgment previously filed, the record is

inadequate for such review and the Court should rule on Plaintiff's constitutional claims. The undisputed evidence in the record demonstrates that the City failed and refused to provide due process prior to seizing and condemning Plaintiff's property.

Respectfully submitted,

/s/ Mickey Stevens
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Benton, AR 72018
T: 501-303-6668
F: 877-338-6063
Arkansas Bar # 2012141
Stevens_mickey@yahoo.com

CERTIFICATE OF SERVICE

I do hereby certify by my signature hereinabove, I have on this 19th day of October 2014 served a copy of the foregoing pleading on the following persons by mailing same through the ECF efiling system, email or United States mail, properly addressed, and first class postage paid.

Daniel McFadden
City of North Little Rock
300 Main Street
North Little Rock, AR 72114

/s/ Mickey Stevens
Mickey Stevens

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
TWELFTH DIVISION

CONVENT CORPORATION **PLAINTIFF**

VS. **NO. 60CV-13-1398**

CITY OF NORTH LITTLE ROCK, ARKANSAS, et al. **DEFENDANTS**

ORDER

On the 3rd day of February, 2015, this cause came on for a hearing on various pending motions. Plaintiff appeared by and through its representative Claude Skelton and its attorney, Mickey L. Stevens. Defendants appeared by and through their attorneys, Matthew W. Fleming and Daniel L. McFadden.

Plaintiff's Motion for Class Certification

1. In order to certify a class, the trial court must find that the plaintiff has met the requirements of Arkansas Rule of Civil Procedure 23. *Simpson Hous. Solutions, LLC v. Hernandez*, 2009 Ark. 480, 347 S.W.3d 1. In applying Rule 23, the Arkansas Supreme Court has held that the following six factors must be met for a class to be certified: (1) numerosity; (2) commonality; (3) predominance; (4) typicality; (5) superiority; and (6) adequacy. *Id.*

2. At the hearing, Plaintiff did not present any evidence in support of its Motion for Class Certification. Therefore, there is no basis upon which the Court could find that Plaintiff has met the requirements set forth by the Arkansas Supreme Court for certification of a class. Therefore, Plaintiff's Motion for Class Certification is hereby denied.

Exhaustion of Administrative Process

3. Until a litigant pursues the administrative process to its end, it cannot be said that it is

futile to exhaust those remedies before filing suit. *Old Republic Sur. Co. v. McGhee*, 360 Ark. 562, 203 S.W.3d 94 (2005). It is not enough for a litigant to begin the administrative process and then abandon it when he or she believes that the unfavorable decision reached by the agency will not be overturned on appeal. *Id.* The litigant must either follow through to the final conclusion of the administrative process or present facts demonstrating that it is certain that the relief sought will be denied on appeal. *Id.*

4. Plaintiff has initiated the administrative process, which has not concluded. Further, Plaintiff has failed to demonstrate through facts that it is certain that the relief it is requesting will be denied on appeal. Therefore, based upon the Arkansas Supreme Court's holding in *Old Republic Sur. Co. v. McGhee, supra.*, the Court hereby dismisses without prejudice Plaintiff's claims under 42 U.S.C. §§ 1983, 1985(3), 1986, and 1988; its claims under the Arkansas Civil Right Act, Ark. Code Ann. § 16-123-101, *et seq.*; its claims for violations of the Fifth, Fourth, and Fourteenth Amendments to the United States Constitution, Article 2, Sections 15 and 22; and its common law claim of trespass.

Standard of Review of Plaintiff's Appeal

5. Plaintiff argues that its appeal should be governed by Rule 9(f) of the Arkansas District Court Rules. The standard of review for such an appeal is whether there is substantial evidence to support an agency's findings. *Mt. Pure, LLC v. Little Rock Wastewater Util.*, 2011 Ark. 258, 383 S.W.3d 347. When reviewing such decisions, they are upheld if they are supported by substantial evidence and are not arbitrary, capricious, or characterized by an abuse of discretion. *Id.*

6. Defendants argue that this appeal should be governed by Ark. Code Ann. § 14-56-

425, which provides that "appeals from the final administrative or quasi-judicial decision by the municipal body administering this subchapter shall be taken to the circuit court of the appropriate county using the same procedure as for administrative appeals of the District Court Rules of the Supreme Court" and that "the final administrative or quasi-judicial decision shall be tried de novo with the right to a trial by jury."

7. Both parties agree that the Defendants' authority to remove or raze a building under which the City of North Little Rock was acting in this case is found in Ark. Code Ann. § 14-56-203. In *Clark v. Pine Bluff Civ. Serv. Comm'n*, 353 Ark. 810, 120 S.W.3d 541 (2003), the Arkansas Supreme Court found that Ark. Code Ann. § 14-56-425 only applies to administrative and quasi-judicial agencies concerned in the administration of subchapter 4, *Municipal Planning*, of code chapter 56, *Municipal Building and Zoning Regulations – Planning*. As the City of North Little Rock was acting in this case pursuant to its authority under subchapter 2 of code chapter 56, the Court finds that the provisions of Ark. Code Ann. § 14-56-425 do not apply.

8. The Arkansas Supreme Court has held that an appeal of a decision made by a municipal body is governed by Rule 9 of the Arkansas District Court Rules if the decision appealed is administrative in nature. *See Mt. Pure, LLC, supra*. Therefore, Plaintiff's appeal shall be governed by the standard of review applicable to appeals under Rule 9(f) of the Arkansas District Court Rules.

Plaintiff's Motion for Judgment on the Pleadings or, in the Alternative, Motion for Summary Judgment

9. The Court finds that genuine issues of material fact remain and hereby denies Plaintiff's Motion for Judgment on the Pleadings or, in the Alternative, Motion for Summary Judgment.

IT IS SO ORDERED.

CIRCUIT JUDGE

7/8/15
DATE

cc: Mickey L. Stevens
Matthew W. Fleming
Daniel L. McFadden

**IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS,
TWELFTH DIVISION**

**CONVENT CORPORATION,
Individually and on Behalf of all
Others Similarly Situated** — **PLAINTIFF**

v. — **NO. 60CV-13-1398**

**CITY OF NORTH LITTLE ROCK,
ARKANSAS, a Municipal Corporation,
JOE SMITH, Mayor, Individually and in
his Official Capacity, City Council Members
DEBI ROSS, BETH WHITE, LINDA
ROBINSON, MAURICE TAYLOR,
STEVE BAXTER, BRUCE FOUTCH,
MURRY WITCHER, and CHARLIE HIGHT,
each Individually and in his or her Official
Capacity, TOM WADLEY, Director, Code
Enforcement Division, Individually and in
his Official Capacity, and FELECIA MCHENRY,
Code Enforcement Officer, Individually and
in her Official Capacity** — **DEFENDANTS**

NOTICE OF APPEAL

COMES NOW Plaintiff Convent Corporation, by and through its attorney, Mickey Stevens, and for its Notice of Appeal states as follows:

Plaintiff, Convent Corporation, hereby appeals the Order of the Circuit Court entered July 9, 2015 denying Plaintiff's Motion for Class Certification and Motion for Judgment on the Pleadings, or in the Alternative, Motion for Summary Judgment and the Court's dismissal of Plaintiff's claims under 42 U.S.C. S$ 1983, 1985(3), 1986, and 1988; its claims under the Arkansas Civil Rights Act, Ark. Code Ann. $ 16-123-101, et seq.; its claims for violations of the Fifth, Fourth, and Fourteenth Amendments to the United States Constitution, Article 2, Sections 15 and 22 of the Arkansas Constitution; and its common law claim of trespass. Further, Plaintiff specifically appeals the Court's finding that the current proceeding in Circuit Court is an administrative remedy

that must be exhausted prior to pursuing other claims. Plaintiff maintains that the Circuit Court should be prohibited from proceeding as if it is conducting an administrative proceeding on behalf of the City as this violates the Separation of Powers Clause of the Arkansas Constitution.

The denial of Plaintiff's Motion for Class Certification is an interlocutory order which is appealable pursuant to Rule 2(a)(9) of the Arkansas Rules of Appellate Procedure—Civil. The denial of Plaintiff's Motion for Judgment on the Pleadings, or in the Alternative, Motion for Summary Judgment is a final order because it disposed of all of Plaintiff's claims leaving only a matter which the Court has deemed to be an administrative proceeding. Alternatively, the denial of Plaintiff's Motion for Summary Judgment is appealed pursuant to Rule 2(a)(6) of the Arkansas Rules of Appellate Procedure—Civil. In denying the Motion, the Court denied Plaintiff's request to enjoin the City from taking its property and the property of potential class members without providing constitutionally required due process. Alternatively, the denial of Plaintiff's Motion for Judgment on the Pleadings, or in the Alternative, Motion for Summary Judgment is appealed pursuant to Rule 2(a)(2) because, if Plaintiff prevails on its administrative appeal, Plaintiff may be prevented from obtaining a judgment from which an appeal may be taken leaving it no recourse for the serious constitutional violations and damages it has sustained.

Defendant designates the entire record, including all documents and exhibits filed with the Clerk of the Court and the transcript of the hearing that occurred on February 3, 2015. Defendant has attempted to order the transcript of the February 3, 2015 hearing and make financial arrangements with the court reporter pursuant to Ark. Code Ann. § 16-13-1510(c). However, Defendant has, as of yet, been unable to speak to the court reporter. Defendant will continue to make a diligent effort to contact the court reporter and make financial arrangements for the transcript as soon as possible.

Defendant appeals to the Arkansas Supreme Court which has jurisdiction pursuant to Rule 1-2(a)(1) as this matter involves interpretation of provisions of the Arkansas Constitution relating to due process, property rights, and separation of powers. This matter also involves issues of first impression, issues involving federal constitutional interpretation, issues of substantial public interest, significant issues needing clarification of the law, and substantial questions of law concerning the validity of a municipal ordinance.

Defendant is appealing the Court's Order pursuant to Rules 2(a)(2),(6)&(9) and, therefore, is not required to abandon any unresolved claims.

Respectfully submitted,

/s/ Mickey Stevens
Mickey Stevens
Attorney for Convent Corporation
P.O. Box 2165
Benton, AR 72018
T: 501-303-6668
F: 877-338-6063
Arkansas Bar # 2012141
Stevens_mickey@yahoo.com

CERTIFICATE OF SERVICE

I do hereby certify by my signature hereinabove, I have on this 10th day of August, 2015 served a copy of the foregoing pleading on the following persons by mailing same through the AOC eflex efiling system, email or United States mail, properly addressed, and first class postage paid.

Matthew Fleming
Daniel McFadden
City of North Little Rock
300 Main Street
North Little Rock, AR 72114

/s/ Mickey Stevens
Mickey Stevens

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS,
TWELFTH DIVISION

CONVENT CORPORATION,
Individually and on Behalf of all
Others Similarly Situated **PLAINTIFF**

v. **NO. 60CV-13-1398**

CITY OF NORTH LITTLE ROCK,
ARKANSAS, a Municipal Corporation,
JOE SMITH, Mayor, Individually and in
his Official Capacity, City Council Members
DEBI ROSS, BETH WHITE, LINDA
ROBINSON, MAURICE TAYLOR,
STEVE BAXTER, BRUCE FOUTCH,
MURRY WITCHER, and CHARLIE HIGHT,
each Individually and in his or her Official
Capacity, TOM WADLEY, Director, Code
Enforcement Division, Individually and in
his Official Capacity, and FELECIA MCHENRY,
Code Enforcement Officer, Individually and
in her Official Capacity **DEFENDANTS**

MOTION FOR EXTENSION OF TIME TO FILE RECORD ON APPEAL

COMES NOW Plaintiff Convent Corporation, by and through its attorney, Mickey Stevens, and for its Motion states as follows:

1. Plaintiff filed its Notice of Appeal on August 10, 2015 appealing the July 9, 2015 Order denying Plaintiff's Motion for Class Certification and Motion for Judgment on the Pleadings, or in the Alternative, Motion for Summary Judgment and the Court's dismissal of Plaintiff's claims under 42 U.S.C. $$ 1983, 1985(3), 1986, and 1988; its claims under the Arkansas Civil Rights Act, Ark. Code Ann. § 16-123-101, et seq.; its claims for violations of the Fifth, Fourth, and Fourteenth Amendments to the United States Constitution, Article 2, Sections 15 and 22 of the Arkansas Constitution; and its common law claim of trespass.

2. Plaintiff timely ordered a transcript of the only hearing in the case from the substitute court reporter and mailed payment in full on August 11, 2015.

3. Plaintiff's counsel contacted the Circuit Clerk's office to inquire about obtaining the record and was informed that the record would be complied by the court reporter.

4. The substitute court reporter completed and mailed the transcript on September 3, 2015.

5. The court reporter has indicated that additional time is needed to prepare the record.

6. Pursuant to Rule 5(a) of the Arkansas Rules of Appellate Procedure—Civil, when an appeal is taken from an interlocutory order under Rule 2(a)(6), the record is required to be filed within thirty (30) days.

7. In its Notice of Appeal, Plaintiff cited multiple jurisdictional bases including Rule 2(a)(6). Plaintiff cited other alternative bases for jurisdiction for which the rule allows ninety (90) days in which to file the record.

WHEREFORE, Plaintiff prays that this Court enter an Order granting it an additional thirty (30) days in which to file the record regarding the portion of its appeal that may be governed by Rule 2(a)(6).

Respectfully submitted,

/s/ Mickey Stevens
Mickey Stevens
Attorney for Convent Corporation
P.O. Box 2165
Benton, AR 72018
T: 501-303-6668
F: 877-338-6063
Arkansas Bar # 2012141
Stevens_mickey@yahoo.com

CERTIFICATE OF SERVICE

I do hereby certify by my signature hereinabove, I have on this 8th day of September, 2015 served a copy of the foregoing pleading on the following persons by mailing same through the AOC eflex efiling system, email or United States mail, properly addressed, and first class postage paid.

Daniel McFadden
City of North Little Rock
300 Main Street
North Little Rock, AR 72114

/s/ Mickey Stevens
Mickey Stevens

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS,
TWELFTH DIVISION

CONVENT CORPORATION,
Individually and on Behalf of all
Others Similarly Situated **PLAINTIFF**

v. **NO. 60CV-13-1398**

CITY OF NORTH LITTLE ROCK,
ARKANSAS, a Municipal Corporation,
JOE SMITH, Mayor, Individually and in
his Official Capacity, City Council Members
DEBI ROSS, BETH WHITE, LINDA
ROBINSON, MAURICE TAYLOR,
STEVE BAXTER, BRUCE FOUTCH,
MURRY WITCHER, and CHARLIE HIGHT,
each Individually and in his or her Official
Capacity, TOM WADLEY, Director, Code
Enforcement Division, Individually and in
his Official Capacity, and FELECIA MCHENRY,
Code Enforcement Officer, Individually and
in her Official Capacity **DEFENDANTS**

ORDER GRANTING EXTENSION OF TIME TO FILE RECORD ON APPEAL

On this, the 9th day of September, 2015, the Court considered Plaintiff's Motion for Extension of Time to File Record on Appeal. The Court hereby FINDS that:

1. The Plaintiff has filed a motion explaining the reasons for the requested extension and served the motion on all counsel of record;

2. The time to file the record on appeal has not yet expired;

3. All parties have had the opportunity to be heard on the motion by responding in writing;

4. The Plaintiff timely ordered the stenographically reported material and made financial arrangements for its preparation; and

5. An extension of time is necessary for the court reporter to compile the record.

IT IS HEREBY ORDERED that the Plaintiff's Motion for Extension of Time to File the Record on Appeal is granted. Plaintiff shall file the record no later than ~~October 9, 2015.~~ November 6, 2015.

Circuit Judge

9/9/15
Date

Prepared By:
Mickey Stevens
Attorney for Convent Corporation
P.O. Box 2165
Benton, AR 72018
T: 501-303-6668
F: 877-338-6063
Arkansas Bar # 2012141

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS,
TWELFTH DIVISION

CONVENT CORPORATION,
Individually and on Behalf of all
Others Similarly Situated — **PLAINTIFF**

v. — **NO. 60CV-13-1398**

CITY OF NORTH LITTLE ROCK,
ARKANSAS, a Municipal Corporation,
JOE SMITH, Mayor, Individually and in
his Official Capacity, City Council Members
DEBI ROSS, BETH WHITE, LINDA
ROBINSON, MAURICE TAYLOR,
STEVE BAXTER, BRUCE FOUTCH,
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each Individually and in his or her Official
Capacity, TOM WADLEY, Director, Code
Enforcement Division, Individually and in
his Official Capacity, and FELECIA MCHENRY,
Code Enforcement Officer, Individually and
in her Official Capacity — **DEFENDANTS**

OBJECTIONS TO RECORD

COMES NOW Plaintiff Convent Corporation, by and through its attorney, Mickey Stevens, and for its Reply, states as follows:

This Court has ruled that Plaintiff's appeal pursuant to District Court Rule 9 must be a review of the record developed in the administrative proceeding. Plaintiff asserts that the record of the administrative proceeding is insufficient, defective, was based on improper and constitutionally defective procedures. *See Brief in Support of Plaintiff's Motion for Judgment on the Pleadings or, in the Alternative, Motion for Summary Judgment*, pgs. 8-12.

I. The Notice provided by the City was inadequate in that it failed to provide any specific information regarding alleged violations. *See Brief in Support of Plaintiff's Motion for*

Judgment on the Pleadings or, in the Alternative, Motion for Summary Judgment, pgs. 13-18; Brief in Support of Plaintiff's Motion to Strike, pgs 4-6.

2. The City failed to complete a report of the inspection as required by the City's code. *See Exhibit B to Plaintiff's Motion to Strike, No. 8(g); Exhibit D to Plaintiff's Motion to Strike, Ch. 8, Sect. 3, 1.3.2; Exhibit H to Plaintiff's Motion for Judgment on the Pleadings or, in the Alternative, Motion for Summary Judgment, Response by City of NLR to Interrogatory No. 24.* There is nothing in the record addressing specific violations or required repairs.

3. Despite two requests (a written motion filed prior to the council meeting and an oral request during the council meeting) from Plaintiff, the City never provided a hearing at which witnesses could be cross-examined and evidence presented. *See Exhibits K to Plaintiff's Motion for Judgment on the Pleadings or, in the Alternative, Motion for Summary Judgment, Motion for Full Hearing; Exhibit 2 to Reply to Response to MFJP or MSJ, Transcript of Council Meeting.*

4. Despite the fact that the City has the burden of proof, the record does not contain any testimony from anyone with knowledge of the property condition at the time of the condemnation.

5. The pictures in the record are not identified or authenticated and do not reflect the condition of the property at the time of the condemnation.

6. The record does not contain any evidence supporting the conclusory allegations in the Resolution condemning the property.

7. The City Council failed to make any findings of fact supporting the conclusory allegations in the Resolution condemning the property.

8. The condemnation decision was based on proceedings which violate provisions of both the state and federal constitutions. *See Brief in Support of Plaintiff's Motion for Judgment on the Pleadings or, in the Alternative, pgs. 8-41*

9. The condemnation decision is not supported by substantial evidence in the record.

10. The condemnation decision is arbitrary, capricious, and characterized by an abuse of discretion.

Respectfully submitted,

Robinson & Zakrzewski, P.A.
Attorneys at Law
720 West Sixth Street
Pine Bluff, AR 71601
Telephone: (870) 850-6000
Facsimile: (870) 850-6002

By: */s/Mickey Stevens*
Mickey Stevens (2012141)

CERTIFICATE OF SERVICE

I do hereby certify by my signature hereinabove, I have on this 28th day of October, 2015 served a copy of the foregoing pleading on the following persons by mailing same through the AOC efiling system, email or United States mail, properly addressed, and first class postage paid.

Daniel McFadden
City of North Little Rock
300 Main Street
North Little Rock, AR 72114

/s/Mickey Stevens

IN THE CIRCUIT COURT OF PULASKI COUNTY
TWELFTH DIVISION

CONVENT COPRORATION **PLAINTIFF**

v. **CASE NO. 60CV-13-1398**

CITY OF NORTH LITTLE ROCK, ARKANSAS, et al. **DEFENDANTS**

SUPPLEMENT TO ADMINISTRATIVE RECORD

COMES NOW Defendants (hereinafter "the City"), by and through their attorney, Assistant City Attorney Daniel L. McFadden, hereby state:

1. Ark. Dist. Ct. R. 9(f)(2)(B) permits any party to supplement the record with a certified copy of any document from the administrative proceeding that is not in the record but the party believes the circuit court needs to resolve the appeal.

2. The minutes of the City Council's meeting do not capture all of the aspects of, or all of the comments made by Convent Corporation's counsel or the North Little Rock Mayor and/or Alderman at, the hearing.

3. Pursuant to Ark. Dist. Ct. R. 9(f)(2)(B), the City hereby submits a certified copy of the videotaped hearing challenged by Convent Corporation herein.

Respectfully submitted,

CITY OF NORTH LITTLE ROCK, ARKANSAS, a Municipal Corporation, JOE SMITH, Mayor, Individually and in his Official Capacity, City Council Members DEBI ROSS, BETH WHITE, LINDA ROBINSON, MAURICE TAYLOR, STEVE BAXTER, BRUCE FOUTCH, MURRY WITCHER, and CHARLIE HIGHT, each Individually and in his or her Official Capacity, TOM WADLEY, Director, Code Enforcement Division, Individually and in his Official Capacity,

and FELECIA MCHENRY, Code Enforcement Officer, Individually and in her Official Capacity
Defendants

By: 

Daniel L. McFadden, ABA #2011035
Assistant City Attorney
300 Main Street
P.O. Box 5757
North Little Rock, Arkansas 72119
Tel: (501) 975-3755
Fax: (501) 340-5341
Email: dmcfadden@northlittlerock.ar.gov

CERTIFICATE OF SERVICE

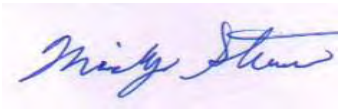
I, Daniel L. McFadden, hereby certify that on this 30th day of October, 2015, I filed the foregoing with the Clerk of the Court, which shall send notification of such filing to all counsel of record listed below, and/or mailed the foregoing to all counsel of record listed below:

Mickey Stevens
720 West Sixth Street
Pine Bluff, AR 71601

's/ Daniel L. McFadden, ABA #2011035

CERTIFICATE OF SERVICES

I hereby certify that I served a copy of Appellant's Addendum by personal delivery to Marie Bernarde Miller, Deputy City Attorney, North Little Rock, Arkansas on this _____dayof _____, 2020. A copy has also been delivered to the Circuit Court on the same date.



Mickey Stevens

IN THE
SUPREME COURT OF ARKANSAS

CONVENT CORPORATION, Individually and on Behalf of all Others Similarly Situated	**APPELLANT**
v.	**NO. CV-20-216**
CITY OF NORTH LITTLE ROCK ARKANSAS, a Municipal Corporation, JOE SMITH, Mayor, Individually and in his Official Capacity, City Council Members DEBI ROSS, BETH WHITE, LINDA ROBINSON, MAURICE TAYLOR, STEVE BAXTER, BRUCE FOUTCH, MURRY WITCHER, and CHARLIE HIGHT, each Individually and in his or her Official Capacity, TOM WADLEY, Director, Code Enforcement Division, Individually and in his Official Capacity, and FELECIA MCHENRY, Code Enforcement Officer, Individually and in her Official Capacity	**APPELLEES**

ON APPEAL FROM THE CIRCUIT COURT
OF PULASKI COUNTY

THE HONORABLE ALICE GRAY, CIRCUIT JUDGE

APPELLANT'S ADDENDUM

Vol. 4 of 5

Mickey Stevens (2012141)
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Volume I

Volume II

Volume III

**Note: The record prior to this point was initially prepared for a prior appeal. The record page references from this point forward are from the additional record prepared for the second appeal (pt. 2).*

Volume IV

**Note: The record page references from this point forward are from the additional record prepared for this appeal (pt. 3).*

Volume V

The following are from the first part of the record.

The following is from the third part of the record.

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS,
TWELFTH DIVISION

CONVENT CORPORATION,
Individually and on Behalf of all
Others Similarly Situated — **PLAINTIFF**

v.

NO. 60CV-13-1398

CITY OF NORTH LITTLE ROCK,
ARKANSAS, a Municipal Corporation,
JOE SMITH, Mayor, Individually and in
his Official Capacity, City Council Members
DEBI ROSS, BETH WHITE, LINDA
ROBINSON, MAURICE TAYLOR,
STEVE BAXTER, BRUCE FOUTCH,
MURRY WITCHER, and CHARLIE HIGHT,
each Individually and in his or her Official
Capacity, TOM WADLEY, Director, Code
Enforcement Division, Individually and in
his Official Capacity, and FELECIA MCHENRY,
Code Enforcement Officer, Individually and
in her Official Capacity — **DEFENDANTS**

AMENDED AND REINSTATED PETITION FOR DECLARATORY JUDGMENT

COMES NOW Convent Corporation ("Convent"), by and through its attorney, Mickey Stevens, and for its Amended and Reinstated Petition, states as follows:

1. Pursuant to Ark. Code Ann. § 16-111-101 and Rule 57 of the Arkansas Rules of Civil Procedure, Plaintiff seeks a declaratory judgment that the City's ordinance relating to condemnation proceedings (*Exhibit A: Chapter 8, Article 1, Section 7 of the City's Code*) is unconstitutional and is, therefore, invalid.

2. Plaintiff seeks an injunction pursuant to Ark. Code Ann., § 16-113-301, *et. seq.*, and Rule 65 of the Arkansas Rules of Civil Procedure to enjoin Defendants. from destroying any property that has been condemned pursuant to Chapter 8, Article 1, Section 7 of City's Code (Condemnation), from condemning any additional property or otherwise enforcing Article 1,

Section 7 of the City's Code, or taking any action to file or collect liens for the demolition of properties.

THE PARTIES

3. Convent Corporation is a corporation organized under the laws of the State of Arkansas with its principal place of business in Pulaski County, Arkansas.

4. The City Defendant is a municipal corporation organized under the laws of the State of Arkansas.

5. Debi Ross, Beth White, Linda Robinson, Maurice Taylor, Steve Baxter, Bruce Foutch, Murry Witcher, and Charlie Hight are all elected members of the North Little Rock City Council and, upon information and belief, are all residents of North Little Rock.

6. Tom Wadley is the Director of the City's Code Enforcement Division and, upon information and belief, is a resident of North Little Rock.

7. Felecia McHenry is a Code Enforcement Officer employed in the City's Code Enforcement Division and, upon information and belief, is a resident of North Little Rock.

JURISDICTION AND VENUE

8. Venue is proper pursuant to Ark. Code Ann. § 16-60-101 because the property that is the subject of this action is located in Pulaski County, Arkansas.

9. Subject-matter jurisdiction for arises under Ark. Code Ann. § 16-111-101.

10. All Defendants reside in Pulaski County, Arkansas and are subject to personal jurisdiction of this Court.

FACTUAL ALLEGATIONS

11. The City of North Little Rock routinely condemns property pursuant to its ordinance which is codified as Chapter 8, Article 1, Section 7 of the City's Code without providing

adequate notice to the property owner and without affording the owner a hearing in which he may present evidence and witnesses or cross-examine the City's witnesses.

12. The City Council routinely votes to condemn properties without considering any specific evidence of any building code violations or that the property actually constitutes a nuisance.

13. . Properties are condemned through a summary procedure in which due process is completely lacking. The City has condemned numerous properties in this manner.

14. The City's Code does not contain any provision for a hearing either before or after condemnation, nor does it provide for any appeal.

15. Additionally, pursuant to this policy and practice, the City refuses to issue a permit, thereby refusing to allow the property owner to repair the property prior to its condemnation.

16. A property owner is allowed to make repairs only **if** the City approves a plan that requires a letter of credit, a substantial and oppressive bond equal to the cost of demolition, and only under a condemnation order which the property owner cannot appeal after thirty (30) days. The City's Code allows the owner a mere thirty (30) days in which to develop a plan, secure City Council approval, post a bond, and repair the property. The City's Code provides that, after thirty (30) days the condemned structure may be destroyed and removed from the premises. A lien is then placed on the property for the cost of demolition. The City's Code allows these actions to be taken without ever providing the property owner with any opportunity to repair the property prior to condemnation and without posting a substantial and oppressive bond and without affording the property owner a meaningful opportunity to be heard.

17. District Court Rule 9 requires that an appeal from the decision of a City Council be filed within thirty (30) days. The City's condemnation procedure appears to be designed to deter

a party from filing a timely appeal. By the time a party submits a plan to the City and attempts to secure approval of the City Council, if the Council were to disapprove the plan, there likely would not be sufficient time left to appeal the condemnation. The City could then proceed to demolish the property and the owner would have no recourse. The City's policy is deliberately designed to circumvent due process. Under this procedure, a property may be condemned and demolished without the property owner ever being permitted to repair the property or being afforded a meaningful opportunity to be heard.

18. The fact that the City's process is completely lacking in due process protections is particularly disturbing considering the fact that some of the property owners subjected to these actions are too poor to hire legal counsel to appeal the condemnation.

19. The City's condemnation ordinance permits the City to seize, condemn and destroy property and levy substantial fines on property owners in violation of the Fifth, Fourth, and Fourteenth Amendments to the U.S. Constitution and Article 2, Sections 2, 15 & 22 of the Arkansas Constitution.

20. If the City continues to condemn properties pursuant to its current policies and practices, other property owners and class members will suffer irreparable harm by the loss of valuable structures and diminution in property values.

21. Article I, § 10 of the United States Constitution states that no state shall pass any "bill of attainder." Article 2 § 17 of the Arkansas Constitution also prohibits bills of attainder.

22. A bill of attainder is a law that legislatively determines guilt and inflicts punishment without provision of the protections of a judicial trial. *Selective Service System v. Minnesota Public Interest Research Group*, 468 U.S. 841, 846 (1984) (*citing Nixon v.Administrator of General Services,* 433 U.S. 425, 468 (1977); *see also United*

States v.*O'Brien,* 391 U. S. 367, 383, n. 30 (1968); *United States* v. *Lovett,* 328 U. S. 303, 315 (1946).

23. In addition to the seizure and demolition of property, the City's Code also permits the City to impose fines on property owners for "Keeping a Condemned Structure."

24. The City's code and condemnation procedures permit the City Council to declare that a property is a nuisance without providing adequate notice, an opportunity to repair the property, or a meaningful hearing. Once the property is condemned in this manner, the City may then impose a criminal sanction upon the property owner without ever affording them a judicial trial. This constitutes a "Bill of Attainder" and as such violates both the United States and Arkansas Constitutions.

REQUEST FOR DECLARATORY JUDGMENT AND INJUNCTION

25. Pursuant to Ark. Code Ann. § 16-111-101, Plaintiff asks that this Court enter a judgement finding that Chapter 8, Article 1, Section 7 of City's Code is unconstitutional and, therefore, invalid and that the City's condemnation procedures fail to provide constitutionally required due process prior to property condemnations.

26. In accordance with Ark. Code Ann. § 16-113-301, *et. seq.*, and Rule 65 of the Arkansas Rules of Civil Procedure, the Court should issue a permanent injunction directing that the Defendants are prohibited from destroying any property that has been condemned pursuant to Chapter 8, Article 1, Section 7 of City's Code (Condemnation), from condemning any additional property or otherwise enforcing Article 1, Section 7 of the City's Code, or taking any action to file or collect liens for the demolition of properties.

WHEREFORE, Plaintiff prays that this honorable Court enter judgement against Defendants as follows:

a. declaring that Chapter 8, Article 1, Section 7 of City's Code is unconstitutional and, therefore, invalid and that the City's condemnation procedures fail to provide constitutionally required due process prior to property condemnations;

b. issue a permanent injunction directing that the Defendants are prohibited from destroying any property that has been condemned pursuant to Chapter 8, Article 1, Section 7 of City's Code (Condemnation), from condemning any additional property or otherwise enforcing Article 1, Section 7 of the City's Code, or taking any action to file or collect liens for the demolition of properties;

c. award of attorney's fees; and

d. for all other and further relief as may be just and proper.

Respectfully submitted,

/s/Mickey Stevens
Mickey Stevens
AR 2012141
PO Box 2165
Benton, AR 72018
501-303-6668
mickeystevens@outlook.com

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
TWELFTH DIVISION

CONVENT COPRORATION, Individually and on Behalf of all Others Similarly Situated

PLAINTIFF

v.

CASE NO. 60CV-13-1398

CITY OF NORTH LITTLE ROCK, ARKANSAS, a Municipal Corporation, JOE SMITH, Mayor, Individually and in his Official Capacity, City Council Members DEBI ROSS, BETH WHITE, LINDA ROBINSON, MAURICE TAYLOR, STEVE BAXTER, BRUCE FOUTCH, MURRY WITCHER, and CHARLIE HIGHT each Individually and in his or her Official Capacity, TOM WADLEY, Director, Code Enforcement Division, Individually and in his Official Capacity, and FELECIA MCHENRY, Code Enforcement Officer, Individually and in her Official Capacity

DEFENDANTS

ANSWER TO PLAINTIFF'S AMENDED AND REINSTATED PETITION FOR DECLARATORY JUDGMENT

Defendants City of North Little Rock, Joe Smith, Mayor, City Council Members Debi Ross, Beth White, Linda Robinson, Maurice Taylor, Steve Baxter, Murray Witcher, and Charlie Hight, in their Individual and Official Capacities ("Defendants' or the "City"); Tom Wadley, Director, Code Enforcement Division, and Felicia McHenry, Code Enforcement Officer, Individually and in their Official Capacities ("Defendants"), by and through undersigned counsel, and for their Answer, state:

1. Defendants state that the allegation in paragraph 1 of the Petition speaks for itself, and denies any and all allegations of wrongdoing.

2. Defendants state that the allegation in paragraph 2 of the Petition speaks for itself, denies any and all allegations of wrongdoing, and affirmatively states that Plaintiff has no standing to seek injunctive relief related to any property other than its own.

3. Defendants admit the allegations in paragraph 3 of the Petition.

4. The City admits the allegations in paragraph 4 of the Petition.

5. Defendants admit that Debi Ross, Beth White, Linda Robinson, Maurice Taylor, Murry Witcher, Steve Baxter, and Charlie Hight are all elected members of the North Little Rock City Council, and are residents of the City of North Little Rock. The City affirmatively states that Bruce Foutch is deceased.

6. Defendants admit the allegation in paragraph 6 of the Petition.

7. Defendants admit the allegation in paragraph 7 of the Petition.

8. Defendants admit the allegation in paragraph 8 of the Petition.

9. Defendants deny that this court has subject-matter jurisdiction of this matter as alleged in paragraph 9 of the Petition.

10. Defendants admit the allegation in paragraph 10 of the Petition.

11. Defendants deny the allegation in paragraph 11 of the Petition.

12. Defendants deny the allegation in paragraph 12 of the Petition.

13. Defendants deny the allegation in paragraph 13 of the Petition.

14. Defendants deny the allegation in paragraph 14 of the Petition.

15. Defendants deny the allegation in paragraph 15 of the Petition.

16. Defendants deny the characterization of the allegations in paragraph 16 of the Petition, and therefore deny same and deny any and all allegations of wrongdoing therein.

17. With respect to the allegations in paragraph 17 of the Petition, Defendants maintain Arkansas District Court Rule 9 speaks for itself and respectfully refer this Court to Arkansas District Court Rule 9 for the contents thereof. Defendants deny the remaining allegations contained in paragraph 17 and deny any and all allegations of wrongdoing therein.

18. Defendants deny the allegations in paragraph 18 of the Petition, and affirmatively state that Plaintiff has no standing to seek redress for any property owners other than itself.

19. Defendants deny the allegations in paragraph 19 of the Petition.

20. Defendants deny the allegations in paragraph 20 of the Petition, and affirmatively state that Plaintiff has no standing to represent any putative class, and all references to "class members" are improper and should be stricken.

21. Defendants state that Article 1, § 10 and Article 2, § 17 of the United States Constitution say what they say.

22. Defendants state that the allegations in paragraph 22 say what they say.

23. Defendants deny the characterization of the allegations in paragraph 23 of the Petition, and therefore deny same and deny any and all allegations of wrongdoing therein.

24. Defendants deny the allegations in paragraph 24 of the Petition.

REQUEST FOR DECLARATORY JUDGMENT AND INJUNCTION

Defendants reassert their answers in paragraphs 1-24 as if fully set out herein.

25. Defendants deny that Plaintiff has provided any evidence for the Court to find that Chapter 8, Article 1, Section 7 of City's Code is unconstitutional and, therefore, invalid, and that the City's condemnation procedures fail to provide constitutionally required due process prior to property condemnations and, therefore, Plaintiff's request should be denied.

26. Defendants deny the allegations in paragraph 26, and affirmatively state that Plaintiff has provided no evidence of its likelihood of success on the merits or irreparable harm to support the issuance of a permanent injunction and, therefore, Plaintiff's request should be denied.

27. Defendants deny all allegations in Plaintiff's "WHEREFORE" paragraph.

28. Defendants deny all allegations in the Petition that are not specifically admitted.

AFFIRMATIVE DEFENSES

29. Defendants affirmatively state that Plaintiff's Petition should be dismissed for failure to re-file its Petition within the one-year statute of limitations provided in Ark. Code Ann. 16-56-126. *See* Order dated May 11, 2017, attached hereto as Exhibit 1, and incorporated herein.

30. Defendants affirmatively state that Plaintiff's Petition should be dismissed for failure to serve the Arkansas Attorney General with a copy of the complaint pursuant to Ark. Code Ann. § 16-11-106(b).

31. Defendants affirmatively state that Plaintiff's Petition should be dismissed based on the fact that Plaintiff's declaratory judgment action is improper because there is no justiciable controversy permitting a declaratory judgment action. The Order dated May 11, 2017, found that the decision by the City to condemn Plaintiff's property as a nuisance was based on substantial evidence and not arbitrary or capricious. *See* Order dated May 11, 2017.

32. Plaintiff's attorney should be disqualified pursuant to Rule 3.7 of the Arkansas Rules of Professional Conduct because if it is not dismissed, Defendants intend to call him as a witness in this matter due to him being the only person interacting with the City, and his filing an Affidavit attesting to conversations he had with the City's employees supporting the allegations in the Petition. *See* Affidavit, attached hereto as Exhibit 2, and incorporated herein.

33. Defendants reserve the right to amend their Answer.

WHEREFORE, FOR THE REASONS STATED HEREIN, Defendants pray this Court dismiss Plaintiff's Amended and Reinstated Petition for Declaratory Judgment, for attorney fees, and all other relief to which Defendants may be entitled.

CITY OF NORTH LITTLE ROCK, ARKANSAS

AMY BECKMAN FIELDS
CITY ATTORNEY
116 MAIN STREET, P.O. Box 5757
NORTH LITTLE ROCK, ARKANSAS 72114
501.975.3755

BY: /s/ Marie-Bernarde Miller
MARIE-BERNARDE MILLER ABN 84107
DEPUTY CITY ATTORNEY

CERTIFICATE OF SERVICE

I, Marie-Bernarde Miller, hereby, certify that on this 14th day of August, 2018, I electronically filed the foregoing with the Clerk of the Court using the AOC/eflex system, which shall send notification of such filing to all counsel of record listed below:

Mr. Mickey Stevens
Attorney for Plaintiff
P.O. Box 2165
Benton, AR 72018

/s/ Marie-Bernarde Miller
Marie-Bernarde Miller ABA No. 84107
116 Main Street
P.O. Box 5757
North Little Rock, Arkansas 72119

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
TWELFTH DIVISION

CONVENT COPRORATION,
Individually and on Behalf of all
Others Similarly Situated

PLAINTIFF

v. **CASE NO. 60CV-13-1398**

CITY OF NORTH LITTLE ROCK,
ARKANSAS, a Municipal Corporation,
JOE SMITH, Mayor, Individually and in
his Official Capacity, City Council Members
DEBI ROSS, BETH WHITE, LINDA
ROBINSON, MAURICE TAYLOR,
STEVE BAXTER, BRUCE FOUTCH,
MURRY WITCHER, and CHARLIE HIGHT
each Individually and in his or her Official
Capacity, TOM WADLEY, Director, Code
Enforcement Division, Individually and in
his Official Capacity, and FELECIA MCHENRY,
Code Enforcement Officer, Individually and
in her Official Capacity

DEFENDANTS

DEFENDANTS' MOTION TO DISMISS OR FOR SUMMARY JUDGMENT
PLAINTIFF'S AMENDED AND REINSTATED PETITION
FOR DECLARATORY JUDGMENT, AND INCORPORATED BRIEF

Plaintiff filed its Complaint on March 27, 2013 appealing the decision of the North Little Rock City Council (the "City") condemning Plaintiff's property located at 6615 Highway 70 (the "Property") in North Little Rock, Arkansas. Comp. ¶ 1. In addition, to its appeal, Plaintiff claimed that the City had violated certain civil rights laws. Comp. ¶ 2. Further, Plaintiff requested a declaratory judgment that the City's ordinance relating to condemnation proceedings was unconstitutional and therefore, invalid. Comp. ¶ 3. In its Order entered July 9, 2015, this Court found that Plaintiff's appeal of the North Little Rock City Council's decision to condemn its property had not concluded. *Op.* at paragraph 2. In so finding, the Court dismissed without

prejudice Plaintiff's civil rights claims. After four years, the appeal was heard on March 14, 2017, at which time this Court found the Property to be a nuisance. *Order* dated May 11, 2017 signed by the Honorable Ellen Brantley. Plaintiff non-suited its remaining declaratory judgment claim on April 30, 2017 in order to appeal the Court's decision, which this Court granted and entered on May 11, 2017. *See Order* dated May 11, 2017 signed by the Honorable Alice Gray. The Arkansas Supreme Court, however, dismissed the appeal on February 24, 2018 for lack of a Final Order. *See Mandate,* Case No. 17-707 dated March 13, 2018. On July 30, 2018, Plaintiff re-filed an Amended and Reinstated Petition for Declaratory Judgment ("Petition"), more than one-year after its non-suit was entered by the Court. Plaintiff's Petition is time-barred, and should be dismissed with prejudice.

Under Rule 41(a), a plaintiff has an absolute right to dismiss a claim without prejudice before final submission to the circuit court has occurred. Ark. R. Civ. P. 41(a) (2016); *Norell v. Giles*, 343 Ark.504, 506, 36 S.W.3d 342, 343 (2001). Once a voluntary nonsuit has been obtained, the plaintiff may refile the claim within one year. Ark. Code Ann. § 16–56–126(a) (Repl. 2005); *Norrell*, 343 Ark. at506, 36 S.W.3d at 343. In the present case, Plaintiff non-suited its remaining declaratory judgment claim on April 30, 2017 for the purpose of appealing this Court's decision, which the Court granted and entered on May 11, 2017. *See Order* entered May 11, 2017 signed by the Honorable Alice Gray. After the Arkansas Supreme Court dismissed the appeal on for lack of a Final Order, Plaintiff did not re-file its Petition until July 30, 2018, more than one year-after its non-suit was entered by the Court. *See Mandate,* Case No. 17-707 dated March 13, 2018. On July 30, 2018, Plaintiff re-filed its Petition, more than one-year after its non-suit was entered by the Court.

Arkansas Rule of Civil Procedure 12(b) establishes as an affirmative defense the failure to state facts upon which relief can be granted (12(b)(6)). Where a defendant moves to dismiss the Complaint pursuant to R. 12(b), the Court must "treat the facts alleged in the complaint as true and view them in a light most favorable to the plaintiff," resolve all reasonable inferences in favor of the complaint, and liberally construe all pleadings. Davenport v. Lee, 348 Ark. 148, 156 (2002). Dismissal is appropriate where a cause of action is barred by the statute of limitations. Id. at 165. Arkansas Rule of Civil Procedure 56 allows a defendant to move for Summary Judgment at any time. Such judgment "shall be rendered forthwith if . . . there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Ark. R. Civ. P. 56(c)(2). "A motion for summary judgment is appropriate when no issue of fact, properly pleaded, remains to be decided." Walker v. Hyde, 303 Ark. 615, 619 (1990).

Plaintiff's Amended and Reinstated Petition for Declaratory Judgment is time-barred, and should be either dismissed, with prejudice, or summary judgment entered as a matter of law.

WHEREFORE, FOR THE REASONS STATED HEREIN, Defendants pray this Court to grant their Motion to Dismiss, with prejudice, or for summary judgment as a matter of law, and for all other relief to which Defendants may be entitled.

Respectfully submitted,

AMY BECKMAN FIELDS
North Little Rock City Attorney

By: /s/ Marie-Bernarde Miller, ABA #84107
Deputy City Attorney
116 Main Street
P.O. Box 5757
North Little Rock, Arkansas 72119
Tel: (501) 975-3755
Email: mmiller@nlr.ar.gov

Attorney for Defendants

CERTIFICATE OF SERVICE

I, Marie-Bernarde Miller, do hereby certify that a copy of the foregoing pleading was served upon the following counsel of record by means of electronically filing through AOC/eflex, on this 16th day of January, 2019:

Mr. Mickey Stevens
Attorney for Plaintiff
P.O. Box 1295
Benton, AR 72018

/s/ Marie-Bernarde Miller
Deputy City Attorney

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS,
TWELFTH DIVISION

CONVENT CORPORATION,
Individually and on Behalf of all
Others Similarly Situated — **PLAINTIFF**

v. — **NO. 60CV-13-1398**

CITY OF NORTH LITTLE ROCK,
ARKANSAS, a Municipal Corporation,
JOE SMITH, Mayor, Individually and in
his Official Capacity, City Council Members
DEBI ROSS, BETH WHITE, LINDA
ROBINSON, MAURICE TAYLOR,
STEVE BAXTER, BRUCE FOUTCH,
MURRY WITCHER, and CHARLIE HIGHT,
each Individually and in his or her Official
Capacity, TOM WADLEY, Director, Code
Enforcement Division, Individually and in
his Official Capacity, and FELECIA MCHENRY,
Code Enforcement Officer, Individually and
in her Official Capacity — **DEFENDANTS**

PLAINTIFF'S RESPONSE TO DEFENDANTS'MOTION TO DISMISS OR FOR SUMMARY JUDGMENT AND INCORPORATED BRIEF

Comes now, Convent Corporation, by and through its attorney, Mickey Stevens, and for its Response to Defendants' Motion to Dismiss or for Summary Judgment, states as follows:

Arkansas Code Annotated § 16-56-126, otherwise known as "the savings statute" (*Tucker v. Sullivant*, 2010 Ark. 170, 370 S.W.3d 812 (Ark., 2012)), is only applicable when the original statute of limitations applicable to the action has expired.

> The savings statute reflects the General Assembly's "intent to protect those who, although having filed an action in good faith and in a timely manner, would suffer a complete loss of relief on the merits because of a procedural defect." "The savings statute extends the time for a plaintiff to correct a dismissal without prejudice when the statute of limitations would otherwise bar the suit." **It applies where "the original statute of limitations period expires in the interim between the filing of the complaint and the time at which either a nonsuit is entered or the**

> **judgment is reversed or arrested.**" *Rettig*, 2009 Ark. 629, at 3–4, 362 S.W.3d at 262 (citations omitted).

Tucker, 2010 Ark. 170, 9, 370 S.W.3d at 817 (2012)(rehearing denied)(emphasis added).

The first question to consider is, what is the applicable statute of limitations for a declaratory judgment action? To begin with, it is helpful to consider the nature of a declaratory judgment action.

> A declaratory judgment declares rights, status, and other legal relationships whether or not further relief is or could be claimed. Ark.Code Ann. § 16–111–103(a) (1997). However, declaratory-judgment actions are intended to supplement rather than supersede ordinary causes of action. *City of Cabot v. Morgan*, 228 Ark. 1084, 312 S.W.2d 333 (1958). "A declaratory-relief action is not a substitute for an ordinary cause of action. Rather it is dependent on and not available in the absence of a justiciable controversy." *Martin*, 344 Ark. at 180–82, 40 S.W.3d at 736–37 (quoting *Donovan v. Priest*, 326 Ark. 353, 931 S.W.2d 119 (1996)).

McDougal v. Sabine River Land Co., 2015 Ark.App. 281, 461 S.W.3d 359, 363 (2015). Because a declaratory judgment action is not a stand-alone cause of action,[1] the applicable statute of limitations is that which applies to the underlying cause of action. *Id.* The statute applicable in Arkansas to Plaintiff's cause of action under 42 U.S.C. § 1983 would be three (3) years. *Birmingham v. Omaha School District*, 220 F.3d 850 (8th Cir. 2000).

The next question to be answered is, when did the statute of limitations regarding Plaintiff's section 1983 claims begin to run? A statute of limitations beings to run when there is a "complete and present cause of action." *Dye v. Diamante*, 2017 Ark. 42, 9, 510 S.W.3d 759, 765 (Ark. 2017). "[A] cause of action accrues the moment the right to commence an action comes into existence,

---

[1] The fact that the Arkansas Supreme Court dismissed Plaintiff's appeal based, in part, on the fact that Plaintiff's declaratory judgment action could potentially be refiled does seem to contradict the Court's prior holdings regarding declaratory judgment actions. If a declaratory judgment action is not a stand-alone cause of action, it stands to reason that it would have ceased to be viable once the underlying claims were dismissed. Therefore, Plaintiff's voluntary non-suit would have been a nullity.

and the Statute of Limitations commences to run from that time." *Hunter v. Connelly*, 247 Ark. 486, 491 S.W.2d 654, 657 (1969).

Defendants argued forcefully, repeatedly, and successfully that Plaintiff could not bring its civil rights claims until its appeal in this Court had been exhausted. Defendants argued that because there was no final administrative order, Plaintiff had not been injured and that it could not bring other claims until this Court ruled on its appeal of the City Council's condemnation action. Therefore, according to Defendants' own contentions, Plaintiff's cause of action for civil rights violations was not complete and present until the Court ruled on Plaintiff's appeal of the condemnation action.[2] In dismissing Plaintiff's civil rights claims, this Court agreed with Defendants' position.

This Court did not rule on Plaintiff's appeal of the condemnation action until May 11, 2017. Therefore, according to Defendants' own arguments, the three (3) year statute of limitations did not begin to run until May 11, 2017. Plaintiff filed its Amended and Reinstated petition for Declaratory Judgment on July 30, 2018, well within the three (3) year statute of limitations. Therefore, Arkansas Code Annotated § 16-56-126 is not applicable and Plaintiff's Petition was timely filed.

Having established that the Petition was timely filed, one question remains. As noted herein, a declaratory judgment action is not a stand-alone cause of action. So, how can Plaintiff's declaratory judgment action survive now without the underlying civil rights claims? The answer

---

[2] Pursuant to the doctrines of Judicial Estoppel (*e.g. Nucor Corp. v. Rhine*, 366 Ark. 550, 237 S.W.3d 52, 58 (2006)) and the Doctrine Against Inconsistent Positions (*e.g. Dupwe v. Wallace*, 355 Ark. 521, 140 S.W.3d 464, 477 (2004)), Defendants' should be estopped from now taking a position which is inconsistent with prior positions it has taken during this litigation. However, since Defendants are now conceding that Plaintiff had the right to bring its constitutional claims with its appeal of the City Council's decision, perhaps Defendants would join in a motion asking the Court to reconsider its prior dismissal of those claims.

is twofold. First, in dismissing Plaintiff's appeal, the Arkansas Supreme Court indicated that the claim could be refiled as if it were a stand-alone claim. Apparently, the Supreme Court felt the claim could survive in the absence of the civil rights claims.

Second, there is an underlying action – the City's Motion to Enforce fines. The City's Motion gives Plaintiff a basis to assert, in its defense, that the City's code and procedures are unconstitutional. The declaratory judgment action supplements Plaintiff's defense. This is a proper use of a declaratory judgment action. Perhaps, the Arkansas Supreme Court realized this. This reasoning would reconcile the Supreme Court's holding in this matter with its prior holdings regarding the nature of declaratory judgment actions.

Respectfully submitted,

/s/Mickey Stevens
Mickey Stevens
AR 2012141
PO Box 2165
Benton, AR 72018
501-303-6668
mickeystevens@outlook.com

CERTIFICATE OF SERVICE

I do hereby certify that a copy of the foregoing pleading was served upon the following counsel of record by means of electronically filing through the AOC/eflex electronic filing system on this 29th day of January, 2019.

Marie-Bernarde Miller
116 Main Street
PO Box 5757
North Little Rock AR 72119

/s/ Mickey Stevens
Mickey Stevens

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS,
TWELFTH DIVISION

CONVENT CORPORATION,
Individually and on Behalf of all
Others Similarly Situated — **PLAINTIFF**

v. — **NO. 60CV-13-1398**

CITY OF NORTH LITTLE ROCK,
ARKANSAS, a Municipal Corporation,
JOE SMITH, Mayor, Individually and in
his Official Capacity, City Council Members
DEBI ROSS, BETH WHITE, LINDA
ROBINSON, MAURICE TAYLOR,
STEVE BAXTER, BRUCE FOUTCH,
MURRY WITCHER, and CHARLIE HIGHT,
each Individually and in his or her Official
Capacity, TOM WADLEY, Director, Code
Enforcement Division, Individually and in
his Official Capacity, and FELECIA MCHENRY,
Code Enforcement Officer, Individually and
in her Official Capacity — **DEFENDANTS**

PLAINTIFF'S RENEWED MOTION TO STRIKE AMENDED ANSWER

COMES NOW Plaintiff Convent Corporation, by and through it attorney, Mickey Stevens, and for its Renewed Motion to Strike Amended Answer and Motion for Default Judgment, states as follow:

1. Plaintiff filed its Complaint in this matter on March 27, 2013.

2. On April 29, 2013, prior to filing any type of Answer or response to Plaintiff's Complaint, Defendants filed their Notice of Removal, removing the case to federal court.

3. On February 11, 2014, the federal court issued an Order remanding the case to state court.

4. On February 20, 2014, the clerk filed a certified copy of the Order remanding the case to state court.

5. On April 1, 2014, in compliance with Rule 12(a)(3) of the Arkansas Rules of Civil Procedure, Plaintiff filed and mailed to Defendants' counsel a Notice that the certified copy of the Order remanding the case from federal court was filed in this Court on February 20, 2014. The Notice was delivered to Defendants' counsel on April 2, 2014. *Exhibit A.*

6. Pursuant to Rule 12(a)(3), Defendants were required to file an Answer or Rule 12 Motion within 30 days of receiving the Notice that the federal court's Order was filed.

7. Defendants' Answer was due by May 2, 2014.

8. Defendants failed to file an Answer, responsive pleading, or anything else in this Court after remand from federal court until they filed their Response to Plaintiff's Motion for Judgment on the Pleadings or, in the Alternative, for Summary Judgment on July 9, 2014.

9. Instead of seeking leave of the Court to file an untimely Answer, Defendants simply attached their Answer that was filed in federal court as an exhibit to their Response to Plaintiff's Motion.

10. More than a week later on June 18, 2014, again without seeking leave of the Court to file an untimely Answer, Defendants filed an "Amended Answer."

11. Because Defendants failed to file their Answer within the time frame required by Rule 12(a)(3), their Answer and included affirmative defenses should be stricken as untimely.

12. In the absence of a properly filed Answer, Defendants' Motion to Enforce Fines should be dismissed and Plaintiff should be granted a default judgment.

WHERFORE, Plaintiff, Convent Corporation, moves the Court to strike the Defendants' "Amended Answer" in its entirety, that Defendants' Motion to Enforce Fines be dismissed.

Respectfully submitted,

Mickey Stevens, Bar No. 2012141
Attorney for Plaintiff
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(501) 481-8923 Telephone
(877) 338-6063 Facsimile
E-Mail: mickeystevens@outlook.com

CERTIFICATE OF SERVICE

I do hereby certify that a copy of the foregoing pleading was served upon the following counsel of record by means of electronically filing through the AOC/eflex electronic filing system on this 29th day of January, 2019.

Marie-Bernarde Miller
116 Main Street
PO Box 5757
North Little Rock AR 72119

/s/ Mickey Stevens

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April 2, 2014 , 9:49 am		**NORTH LITTLE ROCK, AR 72114**

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April 2, 2014 , 3:12 am	Processed at USPS Origin Sort Facility	LITTLE ROCK, AR 72231
April 1, 2014 , 8:46 pm	Processed at USPS Origin Sort Facility	LITTLE ROCK, AR 72231
April 1, 2014 , 8:42 pm	Depart USPS Sort Facility	LITTLE ROCK, AR 72231
April 1, 2014 , 7:07 pm	Depart Post Office	PINE BLUFF, AR 71601
April 1, 2014 , 3:57 pm	Acceptance	PINE BLUFF, AR 71601

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Exhibit 1

EXHIBIT A

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS,
TWELFTH DIVISION

CONVENT CORPORATION,
Individually and on Behalf of all
Others Similarly Situated — **PLAINTIFF**

v. — **NO. 60CV-13-1398**

CITY OF NORTH LITTLE ROCK,
ARKANSAS, a Municipal Corporation,
JOE SMITH, Mayor, Individually and in
his Official Capacity, City Council Members
DEBI ROSS, BETH WHITE, LINDA
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STEVE BAXTER, BRUCE FOUTCH,
MURRY WITCHER, and CHARLIE HIGHT,
each Individually and in his or her Official
Capacity, TOM WADLEY, Director, Code
Enforcement Division, Individually and in
his Official Capacity, and FELECIA MCHENRY,
Code Enforcement Officer, Individually and
in her Official Capacity — **DEFENDANTS**

BRIEF IN SUPPORT OF PLAINTIFF'S RENEWED MOTION TO STRIKE AMENDED ANSWER

COMES NOW Plaintiff Convent Corporation, by and through it attorney, Mickey Stevens, and for its Brief in Support of Renewed Motion to Strike Amended Answer and Motion for Default Judgment, states as follow:

INTRODUCTION

Plaintiff filed its Complaint in this matter on March 27, 2013. On April 29, 2013, prior to filing any type of Answer or response to Plaintiff's Complaint, Defendants filed their Notice of Removal, removing the case to federal court. On February 11, 2014, the federal court issued an Order remanding the case to state court. On February 20, 2014, the clerk filed a certified copy of the Order remanding the case to state court. On April 1, 2014, in compliance with Rule 12(a)(3) of the Arkansas Rules of Civil Procedure, Plaintiff

filed and mailed to Defendants' counsel a Notice that the certified copy of the Order remanding the case from federal court was filed in this Court on February 20, 2014. The Notice was delivered to Defendants' counsel on April 2, 2014. *Exhibit A*. Pursuant to Rule 12(a)(3), Defendants were required to file an Answer or Rule 12 motion within 30 days of receiving the Notice that the federal court's Order was filed. Defendants' Answer was due by May 2, 2014. Defendants failed to file an Answer, responsive pleading, or anything else in this Court after remand from federal court until they filed their Response to Plaintiff's Motion for Judgment on the Pleadings or, in the Alternative, for Summary Judgment on July 9, 2014. On June 18, 2014, without seeking leave of the Court to file an untimely Answer, Defendants filed an "Amended Answer." Because Defendants failed to file their Answer within the time frame required by Rule 12(a)(3), their Answer and included affirmative defenses should be stricken as untimely.

DISCUSSION

I. Defendants failed to file an Answer within the timeframe required by Rule 12(a)(3), and therefore, their "Amended Answer" should be stricken.

Rule 12(a)(3) of the Arkansas Rules of Civil Procedure requires that, upon remand from federal court, a defendant must file an Answer or responsive pleading within 30 days of receipt of notice that the remand order has been filed. In their Response to Plaintiff's Motion for Judgment on the Pleadings or, in the Alternative, for Summary Judgment, Defendants argued that the 2004 revision to Rule 55 negated the obligation under Rule 12(a)(3) to file a responsive pleading.

However, Defendants did not cite to a single authority that supports their contention that Rule 12(a)(3) was abrogated by the revision to Rule 55. Indeed, had the Rules committee and the Supreme Court intended to abrogate Rule 12(a)(3), it would

undoubtedly had been revised also. Actually, Rule 12(a)(3) was revised in 2011 and the requirement that a defendant file an Answer or responsive pleading remained in the Rule. In 2011, the time allowed for filing an Answer was expanded to 30 days. Had the Rules Committee and Supreme Court intended that the 2004 revision to Rule 55 relieve a defendant from the obligation to file an Answer as required by Rule 12(a)(3), why some seven years later was the time for filing an Answer expanded instead of this requirement being completely removed from the Rule? Obviously, the intent of the Rules Committee and court in amending Rule 12(a)(3) in 2011 was to continue the requirement that a defendant file an Answer or responsive pleading but to allow the defendant 30 days to do so.

Arkansas courts have consistently and explicitly held that a defendant may not rely on an Answer filed in federal court. [1] "[C]ourts cannot take judicial notice of proceedings of other courts." *White v. Minyard*, 8 Ark. App. 269, 271, 650 S.W.2d 599, 600 (Ark. Ct. App. 1983); see also *Southern Farmers Assn., Inc. v. Wyatt*, 234 Ark. 649, 353 S.W.2d 531 (1962). A pleading filed in another court ordinarily cannot be adopted, even by agreement of the parties unless it is copied into a pleading or otherwise admitted into evidence. *Reid v. Karoley*, 229 Ark. 90, 93, 313 S.W.2d 381 (1958); *White*, 8 Ark. App. at 271, 650 S.W.2d

---

1 In their Response to Plaintiff's Motion for Judgment on the Pleadings, Defendants counsel contended that *JurisDctionUSA, Inc. v. Loislaw.com*, 357 Ark. 403, 183 S.W.3d 560 (2004) and *City of Fort Smith v. Didicom Towers, Inc.*, 362 Ark. 469, 209 S.W.3d 344 (2005) "overrule" *NCS of Ark. v. W.P. Malone*, 350 Ark. 520 (2002). These case do not, as Defendants contend, "overrule" *NCS*. These cases merely hold that, due to the revision of Rule 55, a Plaintiff cannot obtain a default judgment when a defendant has filed an Answer in federal court. Indeed, the notes regarding the 2004 amendment to Rule 55 cite to *NCS* for the proposition that the "bulk filing" in state court of federal pleadings is not sufficient. Thus, the notes regarding the amendment demonstrate that the amendment was not intended to "overrule" *NCS*.

at 600. A defendant may not rely on an Answer filed in federal court and Rule 55(f) is intended to provide a defendant "an opportunity to plead as it 'might have done had the case not been removed.'" *NCS Healthcare of Ark. v. W.P. Malone*, 350 Ark. 520, 526, 88 S.W.3d 852, 856 (2002)(quoting Ark. R. Civ. P. 55(f)).[2]

> This court has long held that after remand from federal court, a case stands as if it had never been removed from state court, and what happened in federal court has no bearing on the proceeding in state court. Steve Standridge Ins., Inc. v. Langston, 321 Ark. 331, 900 S.W.2d 955 (1995) (relying on Allstate Ins. Co. v. Bourland, 296 Ark. 488, 758 S.W.2d 700 (1988), cert. denied, 490 U.S. 1006, 104 L. Ed. 2d 156, 109 S. Ct. 1640 (1989)); B-W Acceptance Corp. v. Colvin, 252 Ark. 306, 478 S.W.2d 755 (1972); Trinity Universal Ins. Co. v. Robinson, 227 Ark. 482, 299 S.W.2d 833 (1957)). Moreover, this line of authority has been expressly reiterated in Rule 55(f) that provides an opportunity for the defendant to plead as it "might have done had the case not been removed." Ark. R. Civ. P. 55(f).
>
> NCS's reliance upon its federal pleadings in the state court proceeding is simply contrary to the policy consistently adopted by this court, as reflected in our case law and Rule 55(f) of the Arkansas Rules of Civil Procedure: trial courts are instructed to proceed on remand as though the case had never been removed and defendants are instructed to plead as though the case had not been removed. A ruling in NCS's favor on this point would not only require this court to overrule the above-cited precedent, but it would also contravene the plain language of Rule 55(f).
>
> Furthermore, the federal pleadings at issue here had no bearing on the case after remand because federal pleadings do not necessarily conform with our rules of civil procedure.

Id.

There is no authority which supports Defendants' contention that filing an Answer in federal court excuses defendants from the requirement of Rule 12(a)(3). The notes to section (a)(3) state:

---

[2] At that time Rule 55(f) permitted 10 days for a defendant to file an Answer. Rule 55(f) has since been amended to remove the 10 day limit. However, Rule 12 still requires that an Answer or Rule 12 Motion be filed within 30 days.

> The amendment to subdivision (a)(3) extends to 30 days from the date of receipt of the remand notice the time within which a defendant **must** respond to a complaint when a case is remanded from federal court.

(emphasis added). Indeed, to the contrary of the characterization by Defendants' in their Response to Plaintiff's Motion for Judgment on the Pleadings, this comment reinforces the requirement that a defendant **must** respond in state court. As previously noted, had the Rules Committee and the Supreme Court intended that the 2004 amendment to Rule 55 abrogate this requirement, why did this requirement remain in the 2011 amendment to Rule 12(a)(3)? Indeed, the notes regarding the 2011 amendment to Rule 12 conclusively demonstrate that "a defendant **must** respond to a complaint when a case is remanded from federal court." (emphasis added).

In their Response to Plaintiff's Motion for Judgment on the Pleadings, Defendants argued that they were not required to refile pleadings in state court that had been filed in federal court. However, the case cited by Defendants in support of this argument, *JurisDctionUSA, Inc. v. Loislaw.com, Inc.*, 357 Ark. 403, 183 S.W.3d 560 (2004), does not hold, as Defendants contend, that Defendants are not required to re-file pleadings filed in federal court. This case merely addresses the retroactive application of the revision to Rule 55 barring a default judgment. The holding of this case cannot be logically extended any further than to say the revision to Rule 55 should have been given retroactive application. Defendants contention that this case nullifies the requirement of Rule 12(a)(3) is not an accurate representation of the case.

Defendants have not offered any excuse, justification, or authority that allows or excuses its failure to comply with Rule 12(a)(3). Failure to attend to business is not excusable neglect. *Maple Leaf Canvas, Inc. v. Rogers*, 311 Ark. 171, 842 S.W.2d 22

(1992); *Adams v. Moody*, 2009 Ark.App. 474 (2009); *Israel v. Oskey*, 92 Ark. App. 192, 202, 212 S.W.3d 45, 51 (2005). Additionally, an attorney is expected to know the law. *Lewellen v. Sup. Ct. Comm. on Prof'l Conduct*, 353 Ark. 641, 110 S.W.3d 263 (2003); *Eusanio v. Tippin*, 2013 Ark. App. 38, 6, 425 S.W.3d 838, 842 (2013). Initially, even though the Arkansas courts have explicitly held that a defendant may not rely on pleadings filed in federal court, *Ncs Healthcare of Ark.*, 350 Ark. at 526, 88 S.W.3d at 856, and courts cannot take judicial notice of proceedings of other courts, *White v. Minyard*, 8 Ark. App. 269, 271, 650 S.W.2d 599, 600 (Ark. Ct. App. 1983), Defendants failed to take any action for more than two months after they received notice that the remand order had been filed in this Court to make this Court aware of its Answer filed in federal court. Apparently, Defendants expected this Court to research the federal court records to determine whether an Answer had been filed and then, contrary to the case law previously cited, take judicial notice of the Answer filed in federal court. Indeed, the Court has no obligation and should not search the federal court record. Pursuant to Rule 12(a)(3), it was the Defendants who were responsible for filing their Answer within thirty days of receiving notice that the remand order had been filed.

Defendants' counsel apparently hoped the Court would simply overlook its failure to file an Answer or responsive pleading as required by Rule 12(a)(3) simply because Defendants attached their federal court pleadings as exhibits to their Response. However, Defendants attempt to introduce its federal court pleadings in this manner was both untimely and insufficient and cannot overcome Defendants previous disregard for the Arkansas Rules of Civil Procedure. First, Plaintiff contends that these documents should be stricken from the record as they are untimely. Second, the pleadings do not comply

with the Arkansas Rules of Civil Procedure. As in the *NCS* case, the federal pleadings attached to Defendants' Response are not "addressed to the state court, [do] not bear a state court case number, and [are] not certified under Ark. R. Civ. 11 (2002)." 350 Ark. at 527. In *NCS*, the court held that the defendant could not rely on federal pleadings because, among other reasons, these pleadings did not conform to the Arkansas Rules of Civil Procedure. *Id.* Third, in the absence of an Answer or responsive pleading as required by Rule 12(a)(3), Defendants should not be able to raise new defenses in a Response to Plaintiff's Motion. Ark. R. Civ. P. 8(c).

Defendants received notice of the filing of the remand order on April 2, 2014. Defendants did not file a motion for leave to file an Answer or responsive pleading out of time and did not ask the Court to adopt the federal court pleadings. Interestingly, more than a week after filing their Response to Plaintiff's Motion for Judgment on the Pleadings, Defendants filed an "Amended Answer." Apparently, Defendants counsel realized that he could not rely on the pleadings filed in federal court. The Court should note that Defendants did not file a motion for leave to file their Answer out of time.

As previously established, Defendant cannot rely on their Answer in filed in federal court and were still required to comply with Rule 12(a)(3). The "Amended Answer" was filed well after the time permitted by Rule 12(a)(3) and Defendants have not offered any valid explanation or excuse for their failure to file an Answer in this Court as required by the Rules of Civil Procedure. Therefore, Defendants' "Amended Answer" and included affirmative defenses should be stricken as untimely.

II. **It would be patently unjust to excuse Defendants disregard for the Rules of Civil Procedure while holding those who are forced to resort to the Courts for redress of grievances against the City to strictly comply with the filing requirements of District Court Rule 9.**

This proceeding was initiated pursuant to District Court Rule 9 and the Arkansas courts have required strict compliance with the filing requirements of the Rule. Many cases have been dismissed because plaintiffs failed to file or perfect their appeal within the thirty day time period required by Rule 9. *E.g. Johnson v. Dawson*, 2010 Ark. 308, 365 S.W.3d 913 (2010); *Talley v. City of N. Little Rock*, 2009 Ark. 601, 381 S.W.3d 753 (2009); *Ark. State Univ. v. Prof's Credit Mgmt., Inc.*, 2009 Ark. 153, 299 S.W.3d 535 (2009); *Combs v. City of Springdale*, 366 Ark. 31, 233 S.W.3d 130 (2006); *Franks v. Mountain View*, 99 Ark.App. 205, 258 S.W.3d 799 (2007). Had Plaintiff in this case failed to comply with the requirements of Rule 9, Defendants undoubtedly would have moved for and been granted dismissal.

Many plaintiffs in these types of cases are not aware of the strict requirements of Rule 9 and lack the resources to obtain legal counsel. Still, parties who have legitimate grievances have their cases dismissed for failure to strictly comply with the Rule. In contrast, Defendants in this case have a staff of attorneys and have access to the legal services of the Arkansas Municipal League. Therefore, there is simply no excuse for Defendants' failure to comply with Rule 12(a)(3). It would be patently unjust to hold plaintiffs to strict compliance with Rule 9 while permitting the defendants to ignore the Rules of Civil Procedure without consequence. The Court should hold Defendants in this case to the same standard that would apply to Plaintiff had Plaintiff failed to timely file its appeal.

CONCLUSION

Based on the foregoing arguments and authorities, Defendants' "Amended Answer" should be stricken in its entirety and Defendants' Motion to Enforce Fines be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that a copy of the foregoing pleading was served upon the following counsel of record by means of electronically filing through the AOC/eflex electronic filing system on this 29th day of January, 2019.

Marie-Bernarde Miller
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/s/ Mickey Stevens

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
TWELFTH DIVISION

CONVENT COPRORATION,
Individually and on Behalf of all
Others Similarly Situated **PLAINTIFF**

v. **CASE NO. 60CV-13-1398**

CITY OF NORTH LITTLE ROCK, ARKANSAS, a Municipal Corporation, JOE SMITH, Mayor, Individually and in his Official Capacity, City Council Members DEBI ROSS, BETH WHITE, LINDA ROBINSON, MAURICE TAYLOR, STEVE BAXTER, BRUCE FOUTCH, MURRY WITCHER, and CHARLIE HIGHT each Individually and in his or her Official Capacity, TOM WADLEY, Director, Code Enforcement Division, Individually and in his Official Capacity, and FELECIA MCHENRY, Code Enforcement Officer, Individually and in her Official Capacity **DEFENDANTS**

DEFENDANTS' REPLY TO PLAINTIFF'S RESPONSE TO MOTION TO DISMISS OR FOR SUMMARY JUDGMENT AS TO PLAINTIFF'S AMENDED AND REINSTATED PETITION FOR DECLARATORY JUDGMENT, AND INCORPORATED BRIEF

In reply to Plaintiff's Response, Defendants state:

1. Assuming, *arguendo,* Plaintiff's interpretation of Ark. Code Ann. § 16-56-126 is correct, Plaintiff's declaratory judgment petition must still be dismissed for lack of subject matter jurisdiction. From Plaintiff's original filing of this matter on March 27, 2013, Plaintiff has been attempting to collaterally attack the City with constitutional claims in state court, federal district court, and the U.S. Court of Appeals for the Eighth Circuit before concluding its appeal of the City Council's decision to condemn its property located at 6615 Highway 70 in North Little Rock (the

"Property"). All resulting in the same decision – Plaintiff must exhaust its administrative remedies prior to proceeding with its constitutional claims. This court, in its Order dated July 9, 2015 dismissed Plaintiff's constitutional claims because it did not have subject matter jurisdiction to hear them because Plaintiff had not exhausted its administrative remedies. The very same constitutional claims on which Plaintiff seeks a declaratory judgment, the constitutionality of a City Code, and alleged lack of due process. Plaintiff's administrative remedies still have not been exhausted. No final order has been entered in this matter. After the final order has been entered, Plaintiff will still have thirty days in which to file an appeal, which it appears Plaintiff intends to pursue based on its unsuccessful attempt by non-suiting its declaratory judgment action, and filing an appeal of the Order dated May 11, 2017.

2. Plaintiff's declaratory judgment action is improper because it seeks to have the court do through a procedural device that which it cannot do through an ordinary cause of action. In Arkansas, exhaustion is generally required when a party is seeking a declaratory judgment or injunctive relief. *See Ahmad v. Beck*, 2016 Ark. 30, 480 S.W.3d 166 (declaratory-judgment actions are intended to supplement, rather than replace, ordinary actions and litigants must therefore exhaust their administrative remedies before seeking a declaratory judgment); *see also Hotels.com, L.P. v. Pine Bluff Advert. & Promotion Comm'n*, 2013 Ark. 392, 430 S.W.3d 56; *Prof'l Bail Bondsman Licensing Bd. v. Frawley*, 350 Ark. 444, 88 S.W.3d 418 (2002). If the court does not have subject matter jurisdiction to hear Plaintiff's cause of action for alleged constitutional violations, it stands to reason that it does not have subject matter jurisdiction to determine rights, status and other legal relationships related to that same cause of action. Plaintiff has not exhausted its administrative remedies because there is no final order in the appeal. Furthermore, there remains the issue of the civil penalty assessed by the City Council against

Plaintiff, which is set forth in Resolution 8272, the basis of Plaintiff's appeal. If this court did not have subject matter jurisdiction over Plaintiff's cause of action alleging constitutional violations by the City, it certainly does not have subject matter jurisdiction over "declaring rights, status, and other legal relationships." Even if, Plaintiff is correct that it did not have to comply with the one-year statute of limitations provided for causes of action non-suited under Arkansas Rules of Civil Procedure 41, this court does not have jurisdiction over the subject matter of Plaintiff's declaratory judgment action.

3. Not only does the court lack subject matter jurisdiction over Plaintiff's declaratory judgment action, but Plaintiff's declaratory judgment action's Prayer for Relief does not requests the court to declare its rights but, instead, asks the court "to enter a judgement (*sic)* finding that [the City Code] is unconstitutional and, therefore, invalid and that the City's condemnation procedures fail to provide constitutionally required due process prior to property condemnation." Amended and Reinstated Petition for Declaratory Judgment, ¶ 25. Plaintiff seeks to try its constitutional claims through the declaratory judgment action. The declaratory-judgment procedure is not a proper means of trying a case. *Martin v. Equitable Life Assurance Society of the United States,* 344 Ark. 177, 40 S.W.3d 733 (2001) *citing Boyett v. Boyett,* 269 Ark. 36, 598 S.W.2d 86 (1980); *see also, Flashner Med. Partnership v. Marketing Mgt.*, 189 Ill. App.3d 45, 545 N.E.2d 177, (1989); *Martinez v. Corpus Christi Area Teacher's Credit Union,* 758 S.W.2d 946 (Tex.App. 1988). A declaratory-relief action is not a substitute for an ordinary cause of action. Rather it is dependent on and not available in the absence of a justiciable controversy. *Donovan v. Priest,* 326 Ark. 353, 360, 931 S.W.2d 119, 122 (1996). The Arkansas Supreme Court has repeatedly held that a declaratory-judgment action is available only where the case involves a present justiciable controversy in which a claim of right is asserted against one who has an interest

in contesting it. *Martin*, 344 Ark. at 182, 40 S.W.3d at 737; *Andres v. First Ark. Dev. Fin. Corp.*, 230 Ark. 594, 605, 324 S.W.2d 97, 104 (1959). There is no present justiciable controversy related to constitutional issues in the matter before this court. It is an appeal of one issue – whether the Property is a nuisance. All other questions related to constitutional claims may not be addressed during the pendency of Plaintiff's appeal.

4. Finally, contrary to Plaintiff's footnote 2, the City is not taking an inconsistent position with prior positions. Plaintiff did not have a right to bring its constitutional claims with its appeal of the City Council's decision, *i.e.*, to mount a collateral attack against the City while appealing the City Council's decision. The U.S. District Court, the Eighth Circuit Court of Appeals, and this court came to the same conclusion, based on state and federal law.

5. Defendants' statute of limitation's argument is based solely on the fact that non-suiting a cause of action under Rule 41 provides for a one-year limitations period in which to re-file the same cause of action. Plaintiff did not re-file its declaratory judgment action within the requisite period of one-year. Defendants do not believe Plaintiff's "savings clause" reflects the General Assembly's "intent to protect those who, although having filed an action in good faith and in a timely manner, would suffer a complete loss of relief on the merits because of a procedural defect." There is no procedural defect in play, here. "The savings statute extends the time for a plaintiff to correct a dismissal without prejudice when the statute of limitations would otherwise bar the suit." Plaintiff took a non-suit pursuant to Rule 41, which Plaintiff had an absolute right to do. Without waiving Defendants' limitations defense, Plaintiff's constitutional claims may not be barred, but it is arguable that its re-filed declaratory judgment action would appear to be barred.

6. Because Plaintiff's remedy of appeal of the nuisance determination by the City Council has not been exhausted, and the court lacks subject matter jurisdiction to hear, not only,

Plaintiff's cause of action for alleged constitutional claims, but Plaintiff's declaratory judgment action seeking determination of rights related to those underlying claims, the statute of limitations defense appears to be moot. Plaintiff's declaratory judgment action must be dismissed.

WHEREFORE, FOR THE REASONS STATED HEREIN, Defendants pray this Court to grant their Motion to Dismiss, with prejudice, or for summary judgment as a matter of law, and for all other relief to which Defendants may be entitled.

Respectfully submitted,

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North Little Rock City Attorney

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Attorney for Defendants

CERTIFICATE OF SERVICE

I, Marie-Bernarde Miller, do hereby certify that a copy of the foregoing pleading was served upon the following counsel of record by means of electronic transmission and by regular mail on this 5th day of February, 2019:

Mr. Mickey Stevens
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2615 N. Prickett Rd., Ste 2
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Marie-Bernarde Miller
Deputy City Attorney

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
TWELFTH DIVISION

CONVENT COPRORATION,
Individually and on Behalf of all
Others Similarly Situated **PLAINTIFF**

v. **CASE NO. 60CV-13-1398**

CITY OF NORTH LITTLE ROCK,
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JOE SMITH, Mayor, Individually and in
his Official Capacity, City Council Members
DEBI ROSS, BETH WHITE, LINDA
ROBINSON, MAURICE TAYLOR,
STEVE BAXTER, BRUCE FOUTCH,
MURRY WITCHER, and CHARLIE HIGHT
each Individually and in his or her Official
Capacity, TOM WADLEY, Director, Code
Enforcement Division, Individually and in
his Official Capacity, and FELECIA MCHENRY,
Code Enforcement Officer, Individually and
in her Official Capacity **DEFENDANTS**

DEFENDANTS' RESPONSE TO PLAINTIFF'S RENEWED MOTION TO STRIKE AMENDED ANSWER

In reply to Plaintiff's Response, Defendants state:

Plaintiff's Motion to Strike Defendants' Amended Answer is without merit, and should be dismissed.

First. Plaintiff's interpretation of Rule 12(a)(3) and amended Rule 55(f) was wrong 4 years ago, and remains wrong in its latest renewed motion. As Defendants argued, four

years ago, Defendants were not required under Rule 12(a)(3) to file an Answer in state court after remand of the instant case by federal court. The Defendants are not required to re-file what they have already timely filed in the first place. Ark. R. Civ. P. 55(f); *JurisDctionUSA, Inc. v. Loislaw.com, Inc.*, 357 Ark. 403, 183 S.W.3d 560 (2004). Defendants may rely on their federal pleadings, if timely filed. *Id.* Further, the Reporter's Notes, 2004 Amendment clearly states:

> Amended Rule 12(a)(3) expands the grace period to 20 days, **during which time a defendant who filed neither an answer nor a Rule 12 motion** in the federal court must take such action in the state court. By contrast, **if the defendant responded to the complaint in federal court while the case was pending there,** Rule 55(f) **prohibits entry of judgment by default** upon remand. Consequently, the defendant **need not** respond again in circuit court, within the 20-day period. (*Citations omitted*) (*Emphasis added*)

It is undisputed Defendants had timely filed their Answer, thus they are not required to re-file their answer. Defendants' inclusion of their Answer as an exhibit placed this Court on notice that an Answer, as well as Motion to Dismiss, in response to Plaintiff's complaint has been filed in this case. *See e.g. White v. Minyard*, 8 Ark. App. 269, 270-71, 650 S.W.2d 599, 600 (Ark. App. 1983). If Plaintiff believed, as Plaintiff argues in its motion, that in order for this matter to proceed in state court, it was necessary that Defendants' answer conform to the Arkansas pleading rules, Rule 12(a)(3) and Rule 55(f) did not prohibit Plaintiff from seeking an order from the court directing Defendants to revise their pleading. According to the amended Rule 55(f), seeking a default judgment or moving

to strike Defendants' answer when it was timely filed in the federal case prior to remand would be wholly contrary to amended Rule 55(f), and if granted, would be error.

Second. Plaintiff's distorted reasoning that *JurisDctionUSA, Inc., supra* is not relevant to the present case because the issue in that case is whether the amended version of Rule 55(f) should be applied retroactively to a case that began in 2001 is curious. The decision in *JurisDctionUSA, Inc.* does address whether the amended version of Rule 55(f) is retroactive, but it also specifically states that: "JDUSA filed an answer in federal court on April 5, 2002. Therefore, pursuant to Amended Rule 55(f), JDUSA was not required to refile an answer in state court after the case was remanded from federal court." *JurisDctionUSA, Inc.* at 412. Plaintiff's reliance on *NCS Healthcare of Ark. v. W.P. Malone,* 350 Ark. 520, 88 S.W.3d 852 (2002) actually is not germane to the present case in light of the 2004 Amended Rule 55(f), *JurisDctionUSA, Inc., supra,* and *City of Fort Smith v. Didicom Towers, Inc.*, 362 Ark. 469, 209 S.W.3d 344 (2005). In *Didicom Towers*, the City of Fort Smith specifically attempted to make the same arguments Plaintiff continues to make before this court, but the Arkansas Supreme Court determined such a position has no weight. *Id.* at 477-78.

Third. Defendants are not required to seek leave from the Court to amend that which they have already filed. Indeed, Defendants may amend their pleadings at any time. Ark. R. Civ. P. 15(a). Additionally, even if challenged, "[t]his rule vests *broad discretion* in the trial court to permit amendment to pleadings" *Wingfield v.* Page, 278 Ark. 276, 282,

644 S.W.2d 940, 944 (1983) (emphasis added), which, under Arkansas law, would be favored over granting a default judgment or motion to strike. *See B & F Eng'g, Inc. v. Cotroneo,* 309 Ark. 175, 178, 830 S.W.d 835, 837 (1992). Furthermore, even assuming *arguendo* the Defendants are required to request leave of the Court to amend what they've already pled, the Plaintiff still fails to demonstrate any prejudice that resulted from their Amended Answer, as there has been no undue delay or prejudice by Defendants submitting their Amended Answer. *Id.; Turner v. Stewart*, 330 Ark. 134, 138-39, 952 S.W.2d 156, 158-59 (1997). And, as stated in their original Response to Plaintiff's judgment on the pleadings/motion for summary judgment, Plaintiff's reliance on *NCS of Ark. V. W.P. Malone*, 350 Ark. 520 (2002) for its proposition of judgment on the pleadings by alleged default has since been overruled by *JurisDctionUSA, Inc.* and *Didicom*.

In conclusion, as a matter of law, Plaintiff's renewed motion to strike Defendants' amended answer should be dismissed.

WHEREFORE, FOR THE REASONS STATED HEREIN, Defendants pray this Court to deny Plaintiff's Renewed Motion to Strike Amended Answer, and for all other relief to which Defendants may be entitled.

Respectfully submitted,

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North Little Rock City Attorney

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Attorney for Defendants

CERTIFICATE OF SERVICE

I, Marie-Bernarde Miller, do hereby certify that a copy of the foregoing pleading was served upon counsel of record all interested parties by means of electronically filing through AOC/eflex, on this 8th day of February, 2019, addressed to:

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Bryant, AR 72022

/s/ Marie-Bernarde Miller ABA #84107

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS,
TWELFTH DIVISION

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v. **NO. 60CV-13-1398**

CITY OF NORTH LITTLE ROCK,
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each Individually and in his or her Official
Capacity, TOM WADLEY, Director, Code
Enforcement Division, Individually and in
his Official Capacity, and FELECIA MCHENRY,
Code Enforcement Officer, Individually and
in her Official Capacity **DEFENDANTS**

REPLY TO RESPONSE TO PLAINTIFF'S RENEWED MOTION TO STRIKE AMENDED ANSWER

COMES NOW Plaintiff Convent Corporation, by and through its attorney, Mickey Stevens, and for its Reply, states as follow:

INTRODUCTION

Defendants rely on Rule 55(f) and a single sentence quoted from a case where the issue was the propriety of a default judgment to attempt to argue that they were not required to file an answer within the time frame required by Rule 12(a)(3) in this case. To begin with, because Plaintiff in this case is not seeking a default judgment, Rule 55 is irrelevant. Rule 55 only applies to the issue of whether a default judgment may be granted. The applicable rule is Rule 12(a)(3) which requires that an answer be file within 30 days of service of the notice of remand.

There are multiple possible consequences of a failure to file an answer timely. The change to Rule 55(f) merely eliminated a single consequence of failing to file an answer as required by Rule 12(a)(3) after a case is remanded from federal court. The consequence eliminated by the amended Rule 55(f) was the possibility of a default judgment. There are other consequences of the failure to file an answer as required by Rule 12 and Defendants have not and cannot cite to any authority that, when quoted completely and accurately and considered in context, supports their position that the amendment to Rule 55(f) abrogated the requirement under Rule 12(a)(3) that a defendant file an answer within 30 days after service of a notice of remand. Rule 12(a)(3) still requires that a defendant file an answer within 30 days and failure to do so subjects a defendant to all the possible consequences of failing to file an answer except for a default judgment. Other consequences of failing to file an answer as required by Rule 12 would prevent a defendant from asserting affirmative defenses or raising counterclaims. Nothing in the Rules of Civil Procedure or any other authority relieves a defendant of these other consequences when they fail to file an answer as required by Rule 12(a)(3).

DISCUSSION

In their Response, Defendants quoted a portion of the Reporter's notes to the 2004 amendment to Rule 55(f). Plaintiff reluctantly must point out that the way in which the language was quoted is misleading in that it omits a key phrase without any indication that any language was omitted.[1] The relevant sentence upon which Defendants' appear to rely is the last in the quoted section. Defendants response quotes the sentence as follows:

> Consequently, the defendant need not respond again in circuit court, within the 20-day period.

[1] The correct way to indicate omitted language is through the use of an ellipsis (three dots).

The complete sentence is as follows:

> Consequently, the defendant need not respond again in circuit court, within the 20-day period, **to avoid such judgment**.

(emphasis added). The omission of this language from the quote is significant as it significantly alters the meaning of the sentence. Without the modifying phrase, the quote could support Defendants' contention that they were not required to file an answer in circuit court. Of course, this would put Rule 55 in conflict with Rule 12. With the modifying language, the sentence simply means that the failure to file an answer within the 20-day period will not result in a default judgment. Rule 55 deals exclusively with default judgments. It does not, as Defendants contend, state that a defendant does not have to file an answer when a case is remanded from federal court. It merely states that a default judgment cannot be granted against a party who filed an answer in federal court.

The rule that deals the filing of an answer, and thus is more germane, is Rule 12. If we look to the Reporter's notes for Rule 12, it is undeniably clear that an answer is required when a case is remanded from federal court. The notes regarding the 2011 amendment state: "The amendment to subdivision (a)(3) extends to 30 days from the date of receipt of the remand notice the time within which a defendant **must respond to a complaint when a case is remanded from federal court.** (emphasis added)."

Also, in the last sentence that begins on page 2 and continues to page 3 of Defendants' Response, Defendants blatantly misstated the law. The sentence in Defendants' Response states that Rule 55(f) references the propriety of a motion to strike an answer and that such a motion "would be holly contrary to amended Rule 55(f). The

fact is Rule 55(f) contains absolutely no reference to a motion to strike.[2] This rule deals strictly with default judgments. Despite the Defendants' attempt to misrepresent what the rule says, Rule 55(f) only means that a plaintiff may not obtain a default judgment against a party who files an answer in federal court. It does not excuse a failure to comply with Rule 12(a)(3) which requires that an answer be filed within 30 days of services of the notice of remand.

Next, Defendants quote from *JurisDctionUSA, Inc. v. Loislaw.com*, 357 Ark. 403, 183 S.W.3d 560 (2004) in a manner, again, that fails to tell the whole story. The quoted language, if taken out of the context of the case, would support their contention that an answer was not required. The case dealt with the application of Rule 55(f) which strictly deals with default judgments. Taken in context, the language quoted in Defendants' Response simply means that the defendant in that case was not required to file an answer after remand to avoid a default judgment. The case did not address the requirement in Rule 12(a)(3) that an answer be filed within the prescribed time period or the other consequences of failing to do so. This case is strictly limited to the application of Rule 55(f).

Similarly, *City of Fort Smith v. Didicom Towers, Inc.*, 362 Ark. 469, 209 S.W.3d 344 (2005), only addressed the default judgment issue and does not abrogate the requirement under Rule 12(a)(3). Defendants statement about this case is also a misrepresentation of the case. In their Response, Defendants state that the City of Fort Smith attempted to make the same arguments Plaintiff continues to make before this court

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[2] When a party results to these types of misrepresentations, its likely they do not believe their own arguments. If authority which supports their position exists, a party would surely cite to such authority instead of resorting to omissions and misrepresentations to make something say that which it does not.

. . .." This is another blatant misrepresentation. The issue in *Didicom Towers* was the propriety of a default judgment under Rule 55. No where in *Didicom Towers*, did the plaintiff make the same argument as in this case and to say so is simply disingenuous. In the case at bar, Plaintiff if not asking for a default judgment and, therefore, neither Rule 55 nor the *Didicom Towers* case are relevant. The fact that, in order to make their argument, Defendants must omit important phrases from quotes, misrepresent case law and can only cite to cases involving default judgments is a clear indication that their argument lacks merit.

Next, Defendants argue that *NCS Healthcare of Ark. v. W.P. Malone*, 350 Ark. 520, 526, 88 S.W.3d 852, 856 (2002) is not "germane" to this case because it was decided prior to the 2004 amendment to Rule 55(f). Again, because Plaintiff is not seeking a default judgment, it is Rule 55(f) that is not "germane." The principles cited in Plaintiff's Brief from *NCS* were not affected by the change to Rule 55(f), are still good law, and are very relevant to the issues at hand. In fact, these principles have been reaffirmed since the 2004 amendment to Rule 55(f). *E.g., Merritt v. Thornton*, No. CA 08-1478 (Ark. App., 2009);[3] *National Enterprises, Inc. v. Kessler*, 213 S.W.3d 597, 363 Ark. 167 (Ark., 2005).[4]

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[3] "[C]ourts cannot take judicial notice of their own records in other causes, even between the same parties, **nor of the record and proceedings of other courts**." *Merritt* (citing *Braswell v. Gehl*, 263 Ark. 706, 567 S.W.2d 113 (1978)); *White v. Minyard*, 8 Ark. App. 269, 650 S.W.2d 599 (1983)(emphasis added).

[4] "[A]fter remand from federal court, a case stands as if it had never been removed from state court, and what happened in federal court has no bearing on the proceeding in state court." *National Enterprises* (citing *NCS Healthcare of Arkansas, Inc. v. W.P. Malone, Inc.*, 350 Ark. 520, 527, 88 S.W.3d 852, 856 (2002), accord *Steve Standridge Ins., Inc. v. Langston*, 321 Ark. 331, 335, 900 S.W.2d 955, 958 (1995)).

Finally, Defendants' contention that no prejudice will result in trying to defend a claim filed more than five years after the circumstances at issue is certainly unreasonable on its face. As argued in Plaintiff's Motion to Dismiss Counterclaim the Statute of Limitations has expired for prosecution of the alleged violation. The entire purpose behind statutes of limitation is that the prosecution of an offense years after the events results in "prejudice" to the defendant. If Convent is to face criminal sanctions, it is entitled to a full, judicial trial of the underlying issue and, in addition to the prejudice that results from staleness or unavailability of evidence and witnesses, trying the case now would be a violation of Covent's right to a speedy trial.[5] Trying someone after such a long delay certainly is would result in prejudice to Convent. To assert otherwise is to deny the obvious.

CONCLUSION

The arguments presented by Defendants are only applicable to the issue of whether a default judgment may be granted when a defendant fails to file an answer after remand from federal court. This is not the same question as whether a defendant is required to file an answer. Answering this question is simple. All one needs to do is look to the Reporter's note for the 2011 amendment to Rule 12 which states: "The amendment to subdivision (a)(3) extends to 30 days from the date of receipt of the remand notice the time within which a defendant **must respond to a complaint when a case is remanded from federal**

[5] Defendants attempted to put delay in this matter at Plaintiff's feet. However, Plaintiff asked for a hearing from the very beginning and the City's response was essentially, "go to court." Plaintiff filed this case in the correct forum and Defendants then removed the case to federal for the purpose of arguing that the federal court did not have jurisdiction. This frivolous removal resulted in a 10 month delay. Defendants never asked for a hearing in this matter until March of 2016, 3 years after the case began. So, Defendants repeated attempts to blame Plaintiff for delaying this matter are completely disingenuous.

court. (emphasis added)." If there were any ambiguity, all one needs to do is ask, why would the rules committee and the Court revise Rule 12(a)(3) in 2011 to extend the time for filing an answer if the need to file an answer had been abrogated by Rule 55(f). If there were no longer a need to file an answer after remand, it would be a pointless waste of time to extend the time to file a document that didn't need to be filed. The only way to validate Defendants' argument is to assume the rules committee and the Court engaged in such a pointless effort. The fact that Rule 12(a)(3) was amended in 2011 to extend the file to file an answer after remand along with the case law cited in Plaintiff's Brief regarding the inability of courts to recognize documents filed in other proceedings conclusively demonstrates that an answer is required. While Rule 55(f) prohibits the entry of a default judgment, it does not cure the absence of a timely filed answer pursuant to Rule 12(e)(3) and does not relieve the party of the other consequences of such absence.

The Reporter's note to the 2011 amendment to Rule 12(e)(3) provides the simple answer to the question at hand:

> The amendment to subdivision (a)(3) extends to 30 days from the date of receipt of the remand notice the time within which a defendant **must respond to a complaint when a case is remanded from federal court.**

(emphasis added).

Based on the foregoing arguments and authorities, Defendants' "Amended Answer" should be stricken in its entirety and Defendants' improperly filed Counterclaim titled as a Motion to Enforce Fines be dismissed.

Respectfully submitted,

Mickey Stevens, Bar No. 2012141
Attorney for Plaintiff
2615 N. Prickett Rd., Ste. 2
Bryant, AR 72022
(501) 481-8923 Telephone
(877) 338-6063 Facsimile
E-Mail: mickeystevens@outlook.com

CERTIFICATE OF SERVICE

I do hereby certify that a copy of the foregoing pleading was served upon the following counsel of record by means of electronically filing through the AOC/eflex electronic filing system on this 15th day of February, 2019.

Marie-Bernarde Miller
116 Main Street
PO Box 5757
North Little Rock AR 72119

/s/ Mickey Stevens

IN THE CIRCUIT COURT OF PULASKI COUNTY
TWELFTH DIVISION

CONVENT COPRORATION,
Individually and on Behalf of all
Others Similarly Situated **PLAINTIFF**

v. **CASE NO. 60CV-13-1398**

CITY OF NORTH LITTLE ROCK,
ARKANSAS, a Municipal Corporation,
JOE SMITH, Mayor, Individually and in
his Official Capacity, City Council Members
DEBI ROSS, BETH WHITE, LINDA
ROBINSON, MAURICE TAYLOR,
STEVE BAXTER, BRUCE FOUTCH,
MURRY WITCHER, and CHARLIE HIGHT
each Individually and in his or her Official
Capacity, TOM WADLEY, Director, Code
Enforcement Division, Individually and in
his Official Capacity, and FELECIA MCHENRY,
Code Enforcement Officer, Individually and
in her Official Capacity **DEFENDANTS**

ORDER

On the 4th day of June, 2017, Plaintiff's Renewed Motion to Strike Defendants' Amended Answer came before the Court for hearing. Plaintiff was present and represented by its attorney, Mickey Stevens, and Defendants were represented by their attorney, Deputy City Attorney Marie-Bernarde Miller. After hearing arguments of counsel and considering all things properly before it, the Court finds as follows:

1. An Order was entered on May 11, 2019 granting Plaintiff's Motion for Voluntary Non-Suit of its original action.

2. On July 30, 2018, Plaintiff re-filed an Amended and Reinstated Petition for Declaratory Judgment to which Defendants' filed an Answer on August 14, 2018. Thereafter, Plaintiff filed a Renewed Motion to Strike Amended Answer on January 29, 2019.

3. Defendants' timely Answer to Plaintiff's Amended and Reinstated Petition for Declaratory Judgment, renders Plaintiff's renewed Motion to Strike Amended Answer, moot.

IT IS SO ORDERED.

CIRCUIT JUDGE

APPROVED AS TO FORM:

Mr. Mickey Stevens Skelton & Stevens
Legal Group, PLLC
2615 N. Prickett Rd., Ste 2 Bryant, AR 72022

Marie-Bernarde Miller
Deputy City Attorney
City of North Little Rock, AR
116 Main Street
North Little Rock, AR 72114

IN THE CIRCUIT COURT OF PULASKI COUNTY
12th DIVISION

CONVENT COPRORATION **PLAINTIFF**

v. **CASE NO. 60CV-13-1398**

CITY OF NORTH LITTLE ROCK, ARKANSAS, et al. **DEFENDANTS**

MOTION FOR SUMMARY JUDGMENT

COMES NOW Defendants, by and through their attorneys, Deputy City Attorney Marie-Bernarde Miller and Assistant City Attorney Michael A. Mosley, and for their Brief in Support of Motion for Summary Judgment, state:

1. Plaintiff has filed a Reinstated Complaint for Declaratory Judgment asserting that the City's Municipal Code—specifically Chapter 8 regarding nuisance abatement—is facially unconstitutional as allegedly violative of due process. Plaintiff also claims the Code constitutes an unconstitutional bill of attainder.

2. The only proper Defendant is the City itself, and it hereby moves for summary judgment pursuant to Ark. R. Civ. P. 56 on all of Plaintiff's remaining claims.

3. The Court ruled orally that there are no genuine issues of material fact. That is correct. The only questions presented are issues of law for the Court to decide.

4. The City is entitled to judgment as a matter of law pursuant to Rule 56.

5. In support of the instant motion the City offers the following exhibits: **Exhibit A**, Affidavit of Talor Shinn, Deputy City Clerk and attached Chapter 8 of the North Little Rock Municipal Code; **Exhibit B**, Transcript of Proceedings before the North Little Rock City Council; **Exhibit C**, Opinion in *Hill v. El Dorado*, from the Western District of Arkansas United States District Court; and **Exhibit D**, Land Commissioner Records.

6. Additionally, the City files contemporaneously herewith a Brief in Support of the instant motion, detailing its legal arguments as to why it is entitled to summary judgment.

WHEREFORE, for the reasons set forth in the instant motion, exhibits, and brief in support, the City respectfully requests the Court enter summary judgment in the City's favor as to all remaining claims made by Plaintiff and for all other just and proper relief to which there has been shown entitlement.

Respectfully submitted,

CITY OF NORTH LITTLE ROCK, ARKANSAS, a Municipal Corporation, JOE SMITH, Mayor, Individually and in his Official Capacity, City Council Members DEBI ROSS, BETH WHITE, LINDA ROBINSON, MAURICE TAYLOR, STEVE BAXTER, BRUCE FOUTCH, MURRY WITCHER, and CHARLIE HIGHT, each Individually and in his or her Official Capacity, TOM WADLEY, Director, Code Enforcement Division, Individually and in his Official Capacity, and FELECIA MCHENRY, Code Enforcement Officer, Individually and in her Official Capacity
Defendants

Respectfully submitted,

Marie-Bernarde Miller
Deputy City Attorney
North Little Rock, AR

and

Michael A. Mosley
Assistant City Attorney
North Little Rock, AR

By: /s/ Michael A. Mosley, ABA #2002099
Assistant City Attorney

116 Main Street
P.O. Box 5757
North Little Rock, Arkansas 72114
Tel: (501) 975-3753
Fax: (501) 340-5341
Email: mmosley@nlr.ar.gov

Attorney for Defendants

CERTIFICATE OF SERVICE

I, Michael A. Mosley, do hereby certify that a copy of the foregoing pleading was served upon all interested parties by means of electronically filing through AOC/eflex, on this 26th day of June, 2019, addressed to:

Mr. Mickey Stevens
Attorney for Plaintiff

/s/ Michael A. Mosley

AFFIDAVIT OF TALOR SHINN

STATE OF ARKANSAS)
) **SS.**
COUNTY OF PULASKI)

I, Talor Shinn, the undersigned, being duly sworn, make the following statements under oath:

1. That I am a Deputy City Clerk with the City of North Little Rock, Arkansas.

2. That attached hereto, is a true and correct copy of Chapter 8 of the North Little Rock Municipal Code, entitled "Nuisance Abatement and Property Maintenance."

3. The above statements are based on my personal knowledge and are true and correct to the best of my knowledge and belief.

Further the affiant sayeth not.

EXECUTED UNDER OATH this 25th day of June, 2019.

Talor Shinn

STATE OF ARKANSAS)
) **SS.**
COUNTY OF PULASKI)

On this day personally appeared before me, a Notary Public duly qualified and acting within and for the State and County aforesaid, Talor Shinn, to me well known to be the affiant herein, who stated that the foregoing Affidavit is true and correct to the best of his knowledge, information and belief.

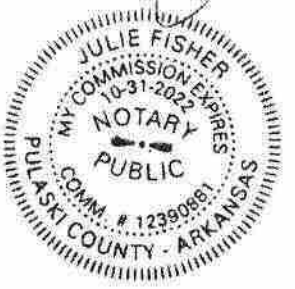
EXHIBIT
tabbies
A
ADD 834

WITNESS my hand and official seal this 25th day of June, 2019.

Notary Public

My Commission Expires:

10/31/22



CITY OF NORTH LITTLE ROCK, ARKANSAS MUNICIPAL CODE

Chapter 8

NUISANCE ABATEMENT AND PROPERTY MAINTENANCE

Adopted 10-22-07, Ordinance No. 8001
Amended 03-24-08, Ordinance 8065
Amended 07-27-09, Ordinance 8184
Amended 08-25-14, Ordinance 8668
Amended 10-13-14, Ordinance 8684
Amended 03-23-15, Ordinance 8720

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ARTICLE ONE
ADMINISTRATION

Section 1
INTRODUCTION

1.1.1 General. These regulations shall be known as the *North Little Rock Nuisance Abatement and Property Maintenance Code* and may be referred to herein as *"the Code"* or *"this Code"*. These regulations are intended to ensure public health, safety and welfare insofar as they are affected by the continued occupancy and maintenance of structures and premises within the City of North Little Rock, Arkansas. Code Enforcement Officers may refer to the commentary of similar provisions in the 2003 edition for International Property Maintenance Code and other property maintenance codes that are broadly accepted for interpretive guidance.

1.1.2 Applicability. The provisions of this Code shall apply to **all** residential and nonresidential structures and all premises within the City of North Little Rock, Arkansas and constitute minimum requirements and standards for premises, structures, equipment and facilities for light, ventilation, space, heating, sanitation, protection from the elements, life safety, safety from fire and other hazards, and for safe and sanitary maintenance; the responsibility of owners, operators and occupants; the occupancy of existing structures and premises, and for administration, enforcement and penalties. Structures and premises that do not comply with these provisions shall be altered or repaired to provide a minimum level of health and safety as required herein. Repairs, alterations, additions to and change of occupancy in existing buildings shall comply with the *Arkansas State Fire Prevention Code*. Where different standards or requirements are imposed by this Code and other competent authority or by different sections of this Code, the most restrictive standard or requirement shall govern.

1.1.3 Historic Buildings, Structures and Districts. Existing buildings or structures designated by the City of North Little Rock, the State of Arkansas, or the United States government to be historic or within a designated historic district shall be exempted from the literal requirements of such provisions of this Code that a proper body (such as an Historic Commission or the City Council) determines to infringe upon the historic nature of the building or structure. However, no exemption may be allowed unless the buildings or structures are judged by the Senior Code Enforcement Officer to be safe and in the public interest of health, safety and welfare.

1.1.4 Maintenance. Equipment, systems, devices and safeguards required by this Code or a previous regulation or code under which the structure or premises was constructed, altered or required shall be maintained in good working order. No occupant shall cause any required service, facility, equipment or utility to be removed from or shut off from or discontinued for any occupied dwelling, except for temporary interruptions necessitated by repairs or alterations. The requirements of this Code are not intended to provide the basis for removal

or abrogation of fire protection and safety systems and devices in existing structures. Except as otherwise specified herein, the owner shall be responsible for the maintenance of buildings, structures and premises.

1.1.5 Requirements not covered by code. Requirements necessary for the strength, stability or proper operation of an existing fixture, structure or equipment, or for the public safety, health and general welfare, not specifically covered by this Code, shall be determined by the Code Official. Such decisions are considered to be administrative determinations subject to appeal as provided by section 9. No citations may be issued based upon an administrative decision under this subsection until interested parties have been informed about the decision and been afforded an opportunity to appeal. The Senior Code Enforcement Officer shall maintain, or cause to be maintained, a file of all administrative rules made pursuant to this subsection which shall be available for copy and inspection by the public.

Section 2
CODE ENFORCEMENT OFFICERS

1.2.1 General. This Code shall be enforced by all Code Enforcement Officers of the City of North Little Rock. For the purposes of this Code, a Code Enforcement Officer shall be defined as any city employee who has been duly sworn and authorized to uphold the ordinances of the City and laws of the State of Arkansas related to property uses, maintenance, nuisances, inspections, issuances of building permits, certifications and licensing etc., within the municipal boundaries of the City. This Code may also be enforced by any and all duly sworn law enforcement officers of the North Little Rock Police Department.

1.2.2 Identification. All Code Enforcement Officers shall carry proper identification and present the same upon request when performing duties under this Code.

1.2.3 Rule-making authority. The Senior Code Enforcement Officer shall have authority as necessary in the interest of public health, safety and general welfare, to adopt and promulgate administrative and procedural rules and to interpret and implement the provisions of this Code in a manner consistent with the intent thereof. Such rules shall not have the effect of waiving structural or fire performance requirements specifically provided for in this Code, or of violating accepted engineering methods involving public safety. Rules and interpretations made pursuant to this subsection are considered to be administrative determinations subject to appeal as provided by section 9. No citations may be issued based upon a rule or interpretation under this subsection until interested parties have been informed about the decision and been afforded an opportunity to appeal. The Senior Code Enforcement Officer shall maintain, or cause to be maintained, a file of all administrative rules made pursuant to this subsection which shall be available for copy and inspection by the public.

1.2.4 Modifications. Whenever there are practical difficulties involved in carrying out the provisions of this Code, the Senior Code Enforcement Officer shall have the authority to grant modifications for individual cases, provided the Senior Code Enforcement Officer shall first make written findings that a special condition or circumstance exists such that the strict letter

of this Code is impractical and the modification is in compliance with the intent and purpose of this Code and that such modification does not lessen health, life and fire safety requirements. The details of action granting modifications shall be recorded and entered in the department files.

Section 3
INSPECTIONS

1.3.1 Right of entry. Code Enforcement Officers are authorized to enter structures or premises at reasonable times to inspect subject to constitutional restrictions on unreasonable searches and seizures. If entry is refused or not obtained, the officers may pursue such search authorizations as are provided by law.

1.3.2 Inspections. Code Enforcement Officers shall make all of the inspections required by this Code. All reports of such inspections shall be in writing and be certified by the responsible officer. Code Enforcement Officers are authorized to rely upon a responsible expert opinion as the officer deems necessary to report upon unusual technical issues that arise.

1.3.3 Required testing. Whenever there is insufficient evidence of compliance with the provisions of this Code, or evidence that a material or method does not conform to the requirements of this Code, or in order to substantiate claims for alternative materials or methods, the Senior Code Enforcement Officer shall have the authority to require tests to be made as evidence of compliance at no expense to the jurisdiction. Reports of tests shall be recorded and entered in the department files.

1.3.4 Material and equipment reuse. Materials, equipment and devices shall not be reused unless a Code Enforcement Officer finds that such elements are in good repair or have been reconditioned and tested when necessary, placed in good and proper working condition and approved.

Section 4
VIOLATIONS

1.4.1 Violations declared to be strict liability misdemeanors. It shall be unlawful for a person, firm or corporation to be in conflict with or in violation of any of the provisions of this Code. Any person who is convicted of a violation of this Code shall be guilty of a misdemeanor, and the violation shall be deemed a strict liability offense.

1.4.2 Fines. Except as otherwise provided, a person convicted of violating any provision of this Code shall be punished by a fine not to exceed $500.00, or double such sum for each repetition thereof. If the violation is continuous in nature, the penalty for allowing the continuance thereof is a fine not to exceed $250.00 for each day that the violation is unlawfully continued. The judge will determine the actual fine.

1.4.3 Citations. Code Enforcement Officers are hereby authorized to issue citations to any person, firm or corporation in conflict with or in violation of any of the provisions of this Code. Issuances of citations must comply with the Arkansas Rules of Criminal Procedures. North Little Rock District Court shall have exclusive jurisdiction over citations issued pursuant to this Code.

1.4.4 Appeals. Any person after being found guilty of a violation or after entering a plea of guilty or *nolo contendere* to a violation shall have those appellant rights granted under the Laws of the State of Arkansas, US Constitution and Arkansas Rules of Criminal Procedure. Appeals of convictions of a violation will be with Pulaski County Circuit Court.

1.4.5 Board of Adjustment and Appeals. The authority of the North Little Rock Board of Adjustment and Appeals (also referred to as "the Board of Adjustments") is specifically restricted to administrative matters. The Board of Adjustments is not authorized to adjudicate citations or the appeal of citations.

Section 5
REVOCATION OF CERTIFICATES, LICENSES AND PERMITS

1.5.1 General. The purpose of this section is to provide a procedure for the revocation of various certificates, licenses and permits issued by the City of North Little Rock to prevent the use of structures described in subsection 1.5.2. The certificates, licenses and permits subject to revocation under this Code are those relating to the particular or general use of property; including, without limitation and for the purpose of illustration only: certificates of occupancy, zoning variances, certification of appropriateness, business licenses, sign permits, building permits, electrical and pluming inspection approvals, conditional use permits, special use permits, and the like.

1.5.2 Administrative Revocation. Code Enforcement Officers shall have the authority to initiate administrative revocation of any such certificate, license or permit, if he or she has a reasonable belief that the use of the property or structure:

(A) Poses a danger to the health and welfare of the public;
(B) Threatens property or safety of any citizen;
(C) Violates the terms and or scope of the certificate, license, or permit; or
(D) Lacks compliance with applicable State licensing laws and requirements.

The non-emergency administrative revocation of a certificate, license, or permit shall follow the procedures of notice and determination provided in Section 1.6 below.

1.5.3 Temporary Emergency Orders. The Senior Code Enforcement Officer shall have the authority to issue a temporary emergency order in conjunction with notice of an administrative revocation as described in subsection 1.5.2. The Temporary Emergency Order shall have the effect of prohibiting all activity that may be harmful to the public or any person and suspending any certificate, license, or permit authorizing the same. The Senior Code

Enforcement Officer may issue a temporary emergency order when he or she has a reasonable belief that the use of the property or structure:

(A) Poses an *imminent* danger to the health, safety or welfare of the public; or
(B) Threatens the life or poses an imminent danger of serious injury to any citizen.

1.5.3.1 Service of Temporary Emergency Orders. Service of Temporary Emergency Orders may be made by any Code Enforcement Officer upon the owner, manager, employee, or occupant of a structure that is subject to the provisions of subsection 1.5.3. If no one is located at the structure, the Temporary Emergency Order shall be affixed to the structure and written notice shall proceed according to subsection 1.6.2. All notices for this subsection shall clearly state "Temporary Emergency Order" and conform to the requirements of subsection1.6.1.

1.5.4 Special Uses, Conditional Uses, and Other Authorizations Issued by City Council. The City Council for the City of North Little Rock may revoke a special use, conditional use, or any other authorization to use property or conduct business that violates the terms of the use or threatens the property or safety of any citizen, or is detrimental to the health, safety or welfare of the public. Such a revocation may be performed at any regular or special meeting of City Council. The revocation shall be based upon the report of a Code Enforcement Officer, complaint of a citizen, or *sua sponte* action by City Council.

Section 6
ADMINISTRATIVE PROCEDURES

1.6.1 Notice of Violations. "Notice of Violations" shall be written on standardized or letter form approved by the Senior Code Enforcement Officer that shall include the following information:

(A) The name of the owner, if known;
(B) An address or description of the real estate sufficient for identification;
(C) A description of the violation or violations;
(D) Rights of Appeal under subsection 1.9;
(E) A statement that citations may be issued and fines assessed in addition to any administrative remedy imposed by the City.
(F) Include a statement that the City has a right to cause repairs or demolition to be made and that the costs may be assessed against the owner and the property of the owner; and
(G) The information required by Ark. Code Ann. 14-54-903, if applicable.

1.6.2 Method of service. Administrative notices (such as a Notice of Violation) may be issued by any person authorized under Ark. Code Ann. § 14-54-903 by posting on the subject property and:

(A) By personal service;
(B) By regular mail or certified mail, return receipt requested; or

(C) When the identity or whereabouts of a person is unknown, by weekly publication in a newspaper having general circulation throughout the City for two (2) consecutive weeks.

1.6.2.1 Notice by Mail. Notice by mail shall be sent to the owner's address of record with the applicable county treasurer or collector. When sent to the proper address with proper postage, notice by mail shall be deemed properly served without regard as to whether the owner or occupant accepted the mail or the mail was otherwise returned.

1.6.3 Transfer of ownership. After receiving a notice of violation, it shall be unlawful for the owner of any property or structure to sell, transfer, mortgage, lease or otherwise alienate or dispose of the same until:

(A) The property or structure has been caused to conform with this code; or

(B) The owner shall provide the other party a true copy of any notice of violation issued by a Code Enforcement Officer and shall furnish to the Senior Code Enforcement Officer a signed and notarized statement from the other party accepting responsibility for the property or structure.

1.6.4 Exceptions. The Notice of Violation requirements of this section shall not apply to the issuances of citations. Issuance of citations must comply with the procedures described in subsection 4.3.

Section 7
CONDEMNATION

1.7.1 Authority. In addition to other penalties provided herein but not in lieu thereof, the City Council for the City of North Little Rock may condemn structures through the passage of a resolution, after a public hearing that shall include:

(A) A description of the structures;
(B) The owner or owners of the structures;
(C) Findings that the structures are unfit for human occupancy, or otherwise detrimental to the life, property or safety of the public.

1.7.2 Keeping condemned structures prohibited. It shall be unlawful for any person to own, keep or maintain any structure within the corporate limits of the city which is condemned by resolution of the City Council.

1.7.3 Notices. The Code Enforcement Department shall be responsible for publication, mailing or delivery of all notices required to condemn structures.

1.7.3.1 Prior Notice of Proposed Condemnation. The owner of the structure will be provided notice of any proposed condemnation action no less than ten (10) calendar days prior to consideration by City Council. If appropriate, any and all lien holders

will also be provided notice of any proposed condemnation action no less than ten (10) calendar days prior to consideration by City Council. Notice will be provided by the method described in subsection 1.6.2.

1.7.3.2 Notice of Condemnation. After a structure has been condemned by resolution as provided in this Code, a certified copy of such resolution will be mailed to the owners thereof, by the method described in subsection 1.6.2 and if appropriate, may be recorded in the property records of the Pulaski Circuit/County Clerk.

1.7.3.3 Notice of Certification of Costs. After a condemned structure has been removed at City expense, the owner will be provided no less than ten (10) calendar days' prior notice of any action to certify costs by City Council. If appropriate, any and all lien holders will also be provided no less than ten (10) calendar days' prior notice of any action to certify costs by City Council. Notice will be provided by the method described in subsection 1.6.2.

1.7.4 Destruction and Removal. Condemned structures shall be destroyed and removed from the premises.

1.7.4.1 Destruction and Removal by Owner. The owner of any structure that has been condemned by resolution of City Council is permitted to cause, at his or her own expense, to have the same destroyed and removed within thirty (30) days after the City has provided notice under subsection 1.7.3.2. No person is allowed to repair or refurbish a condemned structure without an agreement approved by City Council that guarantees repairs will be done in a proper and timely fashion. It is the owner's responsibility to obtain a sponsor for any legislation that would allow the repair or refurbishment of a condemned structure.

1.7.4.2 Destruction and Removal by City. If the condemned structure has not been torn down and removed, or otherwise abated, within 30 days after the notice requirements of subsection 1.7.3.2 have been met, then the Senior Code Enforcement Officer shall supervise the removal of any such structure in such a manner as deemed appropriate under existing circumstances. If the structure has a substantial value, it or any saleable materials thereof may be sold at public sale to the highest bidder for cash using procedures provided by law. The costs of removal will be presented to City Council for certification and collection from the owner.

1.7.5 Disposition of proceeds of sale or salvage of condemned structures. All the proceeds of the sale or salvage of any structure, and all fines collected from the provisions of this article shall be paid by the persons collecting the same to the city treasurer. If any such structure, or the saleable materials thereof, be sold for an amount which exceeds all costs incidental to the abatement of the nuisance, including the cleaning up of the premises by the city, plus any fines imposed, the balance thereof will be returned by the city treasurer to the former owners of such house, building and/or structure constituting the nuisance.

1.7.6 Lien on property for net costs. If the city has any net costs in the removal of any condemned house, building or structure, the city shall have a lien on the property as provided by A.C.A. §§ 14-54-903 and 14-54-904.

1.7.7 Penalty for violation of article. A penalty as provided by this Code is hereby imposed against the owners of any structure condemned by resolution of the City Council thirty (30) days after such structure has been condemned; and each day thereafter such nuisance be not abated constitutes a separate and distinct offense, provided the notice as provided in subsection 1.7.3.2 has been given within ten (10) calendar days after such structure has been condemned.

1.7.8 Transfer of ownership. After receiving a notice of condemnation, it shall be unlawful for the owner of any structure to sell, transfer, mortgage, lease, or otherwise alienate or dispose of the same until:

(A) The property or structure has been caused to conform with this code; or
(B) The owner shall provide the other party a true copy of any notice of violation issued by a Code Enforcement Officer and shall furnish to the Senior Code Enforcement Officer a signed and notarized statement from the other party accepting responsibility for the property or structure.

1.7.9 Restrictions on utility services to structures declared condemned.

(A) The City shall not provide or permit another to provide public or private utility services, such as water, gas or electricity, to any building or house that has been condemned by the city council pursuant to Ark. Code Ann. § 14-56-203.
(B) Subsection (1) of this section shall not preclude the temporary use of such utility services as may be deemed necessary during construction, repair or alteration. The Senior Code Enforcement Officer shall be responsible for making the determination as to when such temporary services may be necessary.

1.7.10 Court action authorized. If City Council determines that a particular structure be *judicially* condemned, the City Council shall direct the City Attorney to bring such action in the name of the city; and the only notice to be given to the owners and lien holders will be that as now provided for by law. When any such structure has been declared judicially to be a nuisance by a court of law, a penalty as provided by this Code is hereby imposed against the owners thereof from the date such finding is made by the court; and each day thereafter such nuisance is not abated constitutes a separate and distinct offense.

Section 8
EMERGENCY PROCEDURES

1.8.1 Temporary safeguards. Notwithstanding other provisions of this code, whenever, in the opinion of the Senior Code Enforcement Officer, there is imminent danger due to an unsafe condition, the code official shall order the necessary work to be done, including the boarding up of openings, to render such structure temporarily safe whether or not the legal

procedure herein described has been instituted; and shall cause such other action to be taken as the code official deems necessary to meet such emergency.

1.8.2 Closing streets. When necessary for public safety, the code official shall temporarily close structures and close, or order the authority having jurisdiction to close, sidewalks, streets, public ways and places adjacent to unsafe structures, and prohibit the same from being utilized.

1.8.3 Emergency repairs. For the purposes of this section, the Senior Code Enforcement Officer shall employ the necessary labor and materials to perform the required work as expeditiously as possible. Costs incurred in the performance of emergency work shall be paid by the City. The City Attorney shall institute appropriate action against the owner of the premises where the unsafe structure is or was located for the recovery of such costs.

Section 9
APPEALS

1.9.1 Administrative appeal. Administrative determinations may be appealed to the North Little Rock Board of Adjustment and Appeals. The following actions are ***not*** subject to administrative appeal and shall be appealed in the manner provided by law for those particular actions:

(A) Citations heard in North Little Rock District Court; and
(B) Condemnations heard in City Council or a court of law.

1.9.2 Timely Submission of Appeal. Unless otherwise provided in this Code, any person affected by a "Notice of Violation" or other administrative determination under this Code may appeal the determination by submitting a written application to the Community Planning Department or the Code Enforcement Department within five (5) days, excluding weekends and holidays, after notice of the determination has been made.

1.9.3 Contents of Appeal. A request for an administrative appeal must be made upon forms approved by the North Little Rock Board of Adjustment and Appeals or in any written form that contains the following information:

(A) The date the appeal is submitted;
(B) The name and address of the appellant;
(C) The address of affected property;
(D) A description of the administrative decision being appealed; and
(E) The desire that the administrative decision be overturned or reviewed.

1.9.4 Notice of Hearing. The North Little Rock Board of Adjustment and Appeals shall consider the appeal at the next available date. The appellant shall be provided notice of the hearing by first class mail sent to the address shown on the request for administrative appeal no less than five (5) days, excluding weekends and holidays, prior to the hearing.

1.9.5 Actions pending appeal. No Code Enforcement Officer may take action based upon an administrative decision while that decision is being appealed *except* those listed below:

(A) Citations issued under subsection 1.4.3;
(B) Condemnations under section 1.7; or
(C) Temporary Emergency Orders issued under subsection 1.5.3.

1.9.6 Conduct of Hearing. Hearings shall be conducted in an open forum according to such procedural rules as may be adopted by the North Little Rock Board of Adjustment and Appeals. No administrative decision of a Code Enforcement Officer may be overturned unless a determination is made that:

(A) The true intent of this Code or the rules legally adopted there under have been incorrectly interpreted;
(B) The provisions of this Code do not fully apply; or
(C) The requirements of this Code are adequately satisfied by other means.

1.9.7 Orders. Upon the conclusion of an appeal, the North Little Rock Board of Adjustments shall timely issue orders to guide the actions of the Code Enforcement Department regarding the appeal.

Article Two
DEFINITIONS

Section 1
PURPOSE

2.1.1 General. Unless otherwise expressly stated, the following terms shall, for the purposes of this Code, have the meanings shown in this chapter. Where terms are not defined through the methods authorized by this section, such terms shall have ordinarily accepted meanings such as the context implies. Whenever the words "dwelling unit," "dwelling," "premises," "building," "rooming house," "rooming unit," "housekeeping unit," or "story" are stated in this Code, they shall be construed as though they were followed by the words "or any part thereof."

Section 2
LIST OF DEFINITIONS

2.2.1 Definitions.

ABANDONED MOTOR VEHICLE. Any motor vehicle which is left on public or private property, as defined in this section, for a period of more than 72 hours, regardless of whether wrecked or inoperable.

APPROVED. Consented or agreed to in writing by the Senior Code Enforcement Officer, or his proper designee.

BASEMENT. That portion of a building which is partly or completely below grade.

BATHROOM. A room containing plumbing fixtures including a bathtub or shower.

BEDROOM. Any room or space used or intended to be used for sleeping purposes.

BOAT. Any vessel initially designed for the carrying of passengers or cargo upon the water, whether currently seaworthy or not, and regardless of size or design, including, without limitation, barges, motorboats whether inboard or outboard, canoes, rowboats, rafts and sailboats.

CARPORT. A roofed structure providing space for the parking of motor vehicles and enclosed on not more than two sides.

CODE ENFORCEMENT OFFICER. Any city employee who has been duly sworn and authorized to uphold the ordinances of the City and laws of the State of Arkansas related to property uses, maintenance, nuisances, inspections, issuances of building permits, certifications and licensing etc., within the municipal boundaries of the City. All duly sworn law enforcement officers of the North Little Rock Police Department are authorized to exercise authority as Code Enforcement Officers.

CONDEMN. To adjudge unfit for human occupancy.

DWELLING UNIT. Any room or group of rooms located within a structure forming a single habitable unit with facilities that are used or intended to be used for living, sleeping, cooking, eating, and sanitation by a household or family.

EASEMENT. That portion of land or property reserved for present or future use by a person or agency other than the legal fee owner(s) of the property. The easement shall be permitted to be for use under, on or above a said lot or lots.

EXTERIOR PROPERTY. The open space on the premises and on adjoining property under the control of owners or operators of such premises.

EXTERMINATION. The control and elimination of insects, rats or other pests by eliminating their harborage places; by removing or making inaccessible materials that serve as their food; by poison spraying, fumigating, trapping or by any other approved pest elimination methods.

GARBAGE. The animal or vegetable waste resulting from the handling, preparation, cooking and consumption of food.

GRAFFITI. Any inscription, word, figure, or design that is marked, etched, scratched, drawn, painted, pasted or otherwise affixed to or on any structural component of any building, structure, or other permanent facility regardless of the nature of the material of that structural component, or the nature of the inscription, to the extent that the same was not authorized in advance by the owner, or otherwise deemed to be a public nuisance.

GUARD. A building component or a system of building components located at or near the open sides of elevated walking surfaces that minimizes the possibility of a fall from the walking surface to a lower level.

HABITABLE SPACE. Space in a structure for living, sleeping, eating or cooking. Bathrooms, toilet rooms, closets, halls, storage or utility spaces, and similar areas are not considered habitable spaces.

HISTORIC. Any existing buildings or structures designated by the City of North Little Rock, the State of Arkansas, or the United States government to be historic or located within a North Little Rock historic district.

HOUSEKEEPING UNIT. A room or group of rooms forming a single habitable space equipped and intended to be used for living, sleeping, cooking and eating which does not contain, within such a unit, a toilet, lavatory and bathtub or shower.

IMMINENT DANGER. A condition which could cause serious or life-threatening injury or death at any time.

INFESTATION. The presence, within or contiguous to, a structure or premises of insects, rats, vermin or other pests.

INOPERABLE MOTOR VEHICLE. A vehicle which cannot be driven upon the public streets for reason including but not limited to being unlicensed, uninsured, wrecked, abandoned, in a state of disrepair, or incapable of being moved under its own power.

LABELED. Devices, equipment, appliances, or materials to which has been affixed a label, seal, symbol or other identifying mark of a nationally recognized testing laboratory, inspection agency or other organization concerned with product evaluation that maintains periodic inspection of the production of the above-labeled items and by whose label the manufacturer attests to compliance with applicable nationally recognized standards.

LET FOR OCCUPANCY OR LET. To permit, provide or offer possession or occupancy of a dwelling, dwelling unit, rooming unit, building, premise or structure by a person who is or is not the legal owner of record thereof, pursuant to a written or unwritten lease, agreement or license, or pursuant to a recorded or unrecorded agreement of contract for the sale of land.

MOTOR VEHICLE. A machine of conveyance which is self-propelled and designed to travel along the ground, and includes but is not limited to automobiles, buses, electric scooters, mopeds bicycles, motorcycles, trucks, tractors, go-carts, golf carts, campers, motor homes and trailers.

NUISANCE. This term is defined in Section 8 of this Code.

OCCUPANCY. The purpose for which a building or portion thereof is utilized or occupied.

OCCUPANT. Any individual living or sleeping in a building, or having possession of a space within a building.

OPENABLE AREA. That part of a window, skylight or door which is available for unobstructed ventilation and which opens directly to the outdoors.

OPERATOR. Any person who has charge, care or control of a structure or premises which is let or offered for occupancy.

OUTDOOR STORAGE. The keeping of items that are not fully enclosed within a structure allowed by other city ordinance or code. This definition does not include furniture *or other items* manufactured for outdoor use kept on a covered front porch, or a deck, patio or porch at the rear of the structure.

OWNER. Any person, agent, operator, firm or corporation having a legal or equitable interest in the property; or recorded in the official records of the state, county or municipality as holding title to the property; or otherwise having control of the property, including the guardian of the estate of any such person, and the executor or administrator of the estate of such person if ordered to take possession of real property by a court.

PERSON. An individual, corporation, partnership or any other group acting as a unit.

PREMISES. A lot, plot or parcel of land, easement or public way, including any structures thereon.

PRIVATE PROPERTY. Means any real property within the city which is privately owned and which is not defined as public property in this section.

PUBLIC PROPERTY. Means any real property in the city which is owned by a governmental body and includes buildings, parking lots, parks, streets, sidewalks, rights-of-way, easements and other similar property.

PUBLIC WAY. Any street, alley or similar parcel of land essentially unobstructed from the ground to the sky, which is deeded, dedicated or otherwise permanently appropriated to the public for public use.

REMOVAL. The act of clearing all material and debris whenever it becomes necessary to demolish any building that has been condemned and found to be a nuisance by resolution of the city council.

RESIDENCE. A structure serving as a dwelling or home. For the purposes of this Code, the term residence includes dwelling units and rooming houses.

ROOMING HOUSE. A building arranged or occupied for lodging, with or without meals, for compensation. Bed-and-breakfasts, boarding houses, half-way houses, and hotels, as those terms are defined under the North Little Rock Zoning Ordinance, are included within the definition of a Rooming House.

ROOMING UNIT. Any room or group of rooms forming a single habitable unit occupied or intended to be occupied for sleeping or living, but not for cooking purposes.

RUBBISH. Combustible and noncombustible waste materials, except garbage; the term shall include the residue from the burning of wood, coal, coke and other combustible materials, paper, rags, cartons, boxes, wood, excelsior, rubber, leather, tree branches, yard trimmings, tin cans, metals, mineral matter, glass, crockery and dust and other similar materials.

SCRAP OR WASTE TIRE. A tire or any portion thereof that can no longer be used for its original intended purpose or is being held, transported, or processed for disposal or recycling.

SENIOR CODE ENFORCEMENT OFFICER. The Head of the Code Enforcement Department or, in his or her absence, the person who is directed or appointed to temporarily assume the duties of the Head of the Code Enforcement Department.

STRUCTURE. That which is built or constructed or a portion thereof.

TENANT. A person, corporation, partnership or group, whether or not the legal owner of record, occupying a building or portion thereof as a unit.

TOILET ROOM. A room containing a water closet or urinal but not a bathtub or shower.

TRAILER. Means any freewheeling object designed or intended to be pulled or towed behind a motor vehicle, regardless of whether wrecked or inoperable, and regardless of whether currently inspected and/or registered, including without limitation the following: Boat trailers, camper trailers, cargo trailers, special trailers for items such as golf carts or motorcycles, utility trailers, and farm implements.

UNCUT WEEDS AND GRASS. See Section 3.2.4 for definition.

USED TIRE. A tire, including a recapped or retreaded tire, suitable for continued use for its original intended purpose.

VENTILATION. The natural or mechanical process of supplying conditioned or unconditioned air to, or removing such air from, any space.

WORKMANLIKE. Executed in a skilled manner; e.g., generally plumb, level, square, in line, undamaged and without marring adjacent work.

WRECKED MOTOR VEHICLE. Any motor vehicle which does not have lawfully affixed thereto an unexpired license plate and the condition of which is wrecked, dismantled, partially dismantled, incapable of operation by its own power on a public street, or from which the wheels, engine, transmission or any substantial part thereof has been removed.

YARD. An open space on the same lot with a structure.

ARTICLE THREE
GENERAL REQUIREMENTS

Section 1
GENERAL

3.1.1 Scope. The provisions of this chapter shall govern the minimum conditions and the responsibilities of persons for maintenance of structures, equipment and exterior property.

3.1.2 Responsibility. The owner of the premises shall maintain the structures and exterior property in compliance with these requirements, except as otherwise provided for in this Code. A person shall not occupy as owner-occupant or permit another person to occupy premises which are not in a sanitary and safe condition and which do not comply with the requirements of this chapter. Occupants of a dwelling unit, rooming unit or housekeeping unit are responsible for keeping in a clean, sanitary and safe condition that part of the dwelling unit, rooming unit, housekeeping unit or premises which they occupy and control.

3.1.3 Vacant structures and land. All vacant structures and premises thereof or vacant land shall be maintained in a clean, safe, secure and sanitary condition as provided herein so as not to cause a blighting problem or adversely affect the public health or safety.

Section 2
EXTERIOR PROPERTY AREAS

3.2.1 Sanitation. All exterior property and premises shall be maintained in a clean, safe and sanitary condition. The occupant shall keep that part of the exterior property which such occupant occupies or controls in a clean and sanitary condition.

3.2.2 Grading and drainage. All premises shall be graded and maintained to prevent the erosion of soil and to prevent the accumulation of stagnant water thereon, or within any structure located thereon.

Exception: Approved retention areas and reservoirs.

3.2.3 Sidewalks and driveways. All sidewalks, walkways, stairs, driveways, parking spaces and similar areas shall be kept in a proper state of repair, and maintained free from hazardous conditions.

3.2.4 Grass or Weeds. Exceed eight inches in height in all residential districts; or exceeds eight inches in height on lots in all commercial zone districts and industrial zone districts on which a structure is located; or exceed 24 inches in height on lots in all commercial zone districts and industrial zone districts on which a structure is not located; except that the restrictions noted above will not apply to areas specifically designated or recognized by the city, the state or the United States as agricultural, wetlands, open spaces, natural or wild flower areas, or other designated preservation areas.

Exception: Undeveloped land that has been continuously maintained in a natural vegetative state.

3.2.5 Rodent harborage. All structures and exterior property shall be kept free from rodent harborage and infestation. Where rodents are found, they shall be promptly exterminated by approved processes which will not be injurious to human health. After extermination, proper precautions shall be taken to eliminate rodent harborage and prevent reinfestation.

3.2.6 Exhaust vents. Pipes, ducts, conductors, fans or blowers shall not discharge gases, steam, vapor, hot air, grease, smoke, odors or other gaseous or particulate wastes directly upon abutting or adjacent public or private property or that of another tenant.

3.2.7 Accessory structures. All accessory structures, including detached garages, fences and walls, shall be maintained structurally sound and in good repair.

3.2.8 Motor vehicles. Except as provided for in other regulations, no inoperative or unlicensed motor vehicle shall be parked, kept or stored on any premises, and no motor vehicle shall at any time be in a state of major disassembly, disrepair, or in the process of being stripped or dismantled. Painting of motor vehicles is prohibited unless conducted inside an approved spray booth. For specific requirements related to the removal of wrecked or inoperable vehicles, refer to subsection 8.2.2.

***Exception*:** A motor vehicle of any type is permitted to undergo major overhaul, including body work, provided that such work is performed inside a structure or similarly enclosed area designed and approved for such purposes.

3.2.9 Defacement of property. No person shall willfully or wantonly damage, mutilate or deface any exterior surface of any structure or building on any private or public property by placing thereon any marking, carving or graffiti. It shall be the responsibility of the owner to restore said surface to an approved state of maintenance and repair.

Section 3
SWIMMING POOLS, SPAS AND HOT TUBS

3.3.1 Swimming pools. Swimming pools shall be maintained in a clean and sanitary condition, and in good repair.

3.3.2 Enclosures. Private swimming pools, hot tubs and spas, containing water more than 24 inches (610 mm) in depth shall be completely surrounded by a fence or barrier at least 48 inches (1219 mm) in height above the finished ground level measured on the side of the barrier away from the pool. Gates and doors in such barriers shall be self-closing and self-latching. Where the self-latching device is less than 54 inches (1372 mm) above the bottom of the gate, the release mechanism shall be located on the pool side of the gate. Self-closing and self-latching gates shall be maintained such that the gate will positively close and latch when released from an open position of 6 inches (152 mm) from the gatepost. No existing pool

enclosure shall be removed, replaced or changed in a manner that reduces its effectiveness as a safety barrier.

Section 4
EXTERIOR STRUCTURE

3.4.1 General. The exterior of a structure shall be maintained in good repair, structurally sound and sanitary so as not to pose a threat to the public health, safety or welfare.

3.4.2 Protective treatment. All exterior surfaces, including but not limited to, doors, door and window frames, cornices, porches, trim, balconies, decks and fences shall be maintained in good condition. Exterior wood surfaces, other than decay-resistant woods, shall be protected from the elements and decay by painting or other protective covering or treatment. Peeling, flaking and chipped paint shall be eliminated and surfaces repainted. All siding and masonry joints as well as those between the building envelope and the perimeter of windows, doors, and skylights shall be maintained weather resistant and water tight. All metal surfaces subject to rust or corrosion shall be coated to inhibit such rust and corrosion and all surfaces with rust or corrosion shall be stabilized and coated to inhibit future rust and corrosion. Oxidation stains shall be removed from exterior surfaces. Surfaces designed for stabilization by oxidation are exempt from this requirement.

3.4.3 Premises identification. Buildings shall have approved address numbers placed in a position to be plainly legible and visible from the street or road fronting the property. These numbers shall contrast with their background. Address numbers shall be Arabic numerals or alphabet letters. Numbers shall be a minimum of 3 inches (76.2 mm) high with a minimum stroke width of 0.5 inch (12.7 mm) on residential structures and shall be a minimum of 6 inches(152,4 mm) high with a minimum stroke width of 0.5 inch(12.7.mm) for commercial structures.

3.4.4 Structural members. All structural members shall be maintained free from deterioration, and shall be capable of safely supporting the imposed dead and live loads.

3.4.5 Foundation walls. All foundation walls shall be maintained plumb and free from open cracks and breaks and shall be kept in such condition so as to prevent the entry of rodents and other pests.

3.4.6 Exterior walls. All exterior walls shall be free from holes, breaks, and loose or rotting materials; and maintained weatherproof and properly surface coated where required to prevent deterioration.

3.4.7 Roofs and drainage. The roof and flashing shall be sound, tight and not have defects that admit rain. Roof drainage shall be adequate to prevent dampness or deterioration in the walls or interior portion of the structure. Roof drains, gutters and downspouts shall be maintained in good repair and free from obstructions. Roof water shall not be discharged in a manner that creates a public nuisance.

3.4.8 Decorative features. All cornices, belt courses, corbels, terra cotta trim, wall facings and similar decorative features shall be maintained in good repair with proper anchorage and in a safe condition.

3.4.9 Overhang extensions. All overhang extensions including, but not limited to canopies, marquees, signs, metal awnings, fire escapes, standpipes and exhaust ducts shall be maintained in good repair and be properly anchored so as to be kept in a sound condition. When required, all exposed surfaces of metal or wood shall be protected from the elements and against decay or rust by periodic application of weather-coating materials, such as paint or similar surface treatment.

3.4.10 Stairways, decks, porches and balconies. Every exterior stairway, deck, porch and balcony, and all appurtenances attached thereto, shall be maintained structurally sound, in good repair, with proper anchorage and capable of supporting the imposed loads.

3.4.11 Chimneys and towers. All chimneys, cooling towers, smoke stacks, and similar appurtenances shall be maintained structurally safe and sound, and in good repair. All exposed surfaces of metal or wood shall be protected from the elements and against decay or rust by periodic application of weather-coating materials, such as paint or similar surface treatment.

3.4.12 Handrails and guards. Every handrail and guard shall be firmly fastened and capable of supporting normally imposed loads and shall be maintained in good condition.

3.4.13 Window, skylight and door frames. Every window, skylight, door and frame shall be kept in sound condition, good repair and weather tight.

> **3.4.13.1 Glazing.** All glazing materials shall be maintained free from cracks and holes.
>
> **3.4.13.2 Operable windows.** Every window, other than a fixed window, shall be easily opened and capable of being held in position by window hardware.

3.4.14 Insect screens. Any and all residential property and residential apartments which are not serviced by a central heat and air conditioning unit or units shall be required to have a insect screens to provide for ventilation of habitable areas. Such insect screens shall be supplied with approved tightly fitting screens of not less than 16 mesh per inch (16 mesh per 25 mm) and every swinging door shall have a self-closing device in good working condition.

3.4.15 Doors. All exterior doors, door assemblies and hardware shall be maintained in good condition. Locks at all entrances to dwelling units, rooming units and guestrooms shall tightly secure the door. Locks on means of egress doors shall be in accordance with Section 702.3.

3.4.16 Basement hatchways. Every basement hatchway shall be maintained to prevent the entrance of rodents, rain and surface drainage water.

3.4.17 Guards for basement windows. Every basement window that is operable shall be supplied with rodent shields, storm windows or other approved protection against the entry of rodents.

3.4.18 Building security. Doors, windows or hatchways for dwelling units, room units or housekeeping units shall be provided with devices designed to provide security for the occupants and property within.

3.4.18.1 Doors. Doors providing access to a dwelling unit, rooming unit or housekeeping unit that is rented, leased or let shall be equipped with a single cylinder deadbolt lock meeting specifications set forth herein. Such deadbolt locks shall be operated only by the turning of a knob on the inside or a key on the outside and shall have a lock throw of not less than I-inch. For the purpose of this section, a sliding bolt shall not be considered an acceptable deadbolt lock. Such deadbolt locks shall be installed according to manufacturer's specifications and maintained in good working order. All deadbolt locks required by this section shall be designed and installed in such a manner so as to be operable inside of the dwelling unit, rooming unit or housekeeping unit without the use of a key, tool, combination thereof or any other special knowledge or effort.

3.4.18.2 Windows. Operable windows located in whole or in part within 6 feet (1828 mm) above ground level or a walking surface below that provide access to a dwelling unit, rooming unit or housekeeping unit that is rented, leased or let shall be equipped with a window sash locking devices.

3.4.18.3 Basement hatchways. Basement hatchways that provide access to a dwelling unit, rooming unit or housekeeping unit that is rented, leased or let shall be equipped with devices that secure the units from unauthorized entry.

Section 5
INTERIOR STRUCTURE

3.5.1 General. The interior of a structure and equipment therein shall be maintained in good repair, structurally sound and in a sanitary condition. Occupants shall keep that part of the structure which they occupy or control in a clean and sanitary condition. Every owner of a structure containing a rooming house, housekeeping units, a hotel, a dormitory, two or more dwelling units or two or more nonresidential occupancies, shall maintain, in a clean and sanitary condition, the shared or public areas of the structure and exterior property.

3.5.2 Structural members. All structural members shall be maintained structurally sound, and be capable of supporting the imposed loads.

3.5.3 Interior surfaces. All interior surfaces, including windows and doors, shall be maintained in good, clean and sanitary condition. Peeling, chipping, flaking or abraded paint

shall be repaired, removed or covered. Cracked or loose plaster, decayed wood and other defective surface conditions shall be corrected.

3.5.4 Stairs and walking surfaces. Every stair, ramp, landing, balcony, porch, deck or other walking surface shall be maintained in sound condition and good repair.

3.5.5 Handrails and guards. Every handrail and guard shall be firmly fastened and capable of supporting normally imposed loads and shall be maintained in good condition.

3.5.6 Interior doors. Every interior door shall fit reasonably well within its frame and shall be capable of being opened and closed by being properly and securely attached to jambs, headers or tracks as intended by the manufacturer of the attachment hardware.

Section 6
HANDRAILS AND GUARDRAILS

3.6.1 General. Every exterior and interior flight of stairs having more than four risers shall have a handrail on one side of the stair and every open portion of a stair, landing, balcony, porch, deck, ramp or other walking surface which is more than 30 inches (762 mm) above the floor or grade below shall have guards. Handrails shall not be less than 30 inches (762 mm) high or more than 42 inches (1067 mm) high measured vertically above the nosing of the tread or above the finished floor of the landing or walking surfaces. Guards shall not be less than 30 inches (762 mm) high above the floor of the landing, balcony, porch, deck, or ramp or other walking surface.

> ***Exception*:** Guards shall not be required where exempted by the adopted building code.

Section 7
RUBBISH AND GARBAGE

3.7.1 Accumulation of rubbish or garbage. All exterior property and premises, and the interior of every structure, shall be free from any accumulation of rubbish or garbage.

3.7.2 Disposal of rubbish. Every occupant of a structure shall dispose of all rubbish in a clean and sanitary manner by placing such rubbish in approved containers.

> **3.7.2.1 Rubbish storage facilities.** The occupant of every premises shall keep and maintain approved covered containers for rubbish and be responsible for the removal of rubbish.
>
> **3.7.2.2 Refrigerators.** Refrigerators and similar equipment not in operation shall not be discarded, abandoned or stored on premises without first removing the doors, securing the doors with locks, chain, wire, or rope, or using other reasonable methods to prevent opening.

3.7.3 Disposal of garbage. Every occupant of a structure shall dispose of garbage in a clean and sanitary manner by placing such garbage in an approved garbage disposal facility or an approved leak-proof garbage containers.

Section 8
EXTERMINATION

3.8.1 Infestation. All structures shall be kept free from insect and rodent infestation. All structures in which insects or rodents are found shall be promptly exterminated by approved processes that will not be injurious to human health. After extermination, proper precautions shall be taken to prevent reinfestation.

3.8.2 Owner. The owner of any structure shall be responsible for extermination within the structure prior to renting or leasing the structure.

3.8.3 Single occupant. The occupant of a one-family dwelling or of a single-tenant nonresidential structure shall be responsible for extermination on the premises.

3.8.4 Multiple occupancy. The owner of a structure containing two or more dwelling units, a multiple occupancy, a rooming house or a nonresidential structure shall be responsible for extermination in the public or shared areas of the structure and exterior property. If infestation is caused by failure of an occupant to prevent such infestation in the area occupied, the occupant shall be responsible for extermination.

3.8.5 Occupant. The occupant of any structure shall be responsible for the continued rodent and pest-free condition of the structure.

> ***Exception***: Where the infestations are caused by defects in the structure, the owner shall be responsible for extermination.

ARTICLE FOUR
LIGHT, VENTILATION AND OCCUPANCY LIMITATIONS

Section 1
GENERAL

4.1.1 Scope. The provisions of this chapter shall govern the minimum conditions and standards for light, ventilation and space for occupying a structure.

4.1.2 Responsibility. The owner of the structure shall provide and maintain light, ventilation and space conditions in compliance with these requirements. A person shall not occupy as owner-occupant, or permit another person to occupy, any premises that do not comply with the requirements of this chapter.

4.1.3 Alternative devices. In lieu of the means for natural light and ventilation herein prescribed, artificial light or mechanical ventilation complying with the International Building Code shall be permitted.

Section 2
LIGHT

4.2.1 Habitable spaces. Every habitable space shall have at least one window of approved size facing directly to the outdoors or to a court. The minimum total glazed area for every habitable space shall be 8 percent of the floor area of such room. Wherever walls or other portions of a structure face a window of any room and such obstructions are located less than 3 feet (914 mm) from the window and extend to a level above that of the ceiling of the room, such window shall not be deemed to face directly to the outdoors nor to a court and shall not be included as contributing to the required minimum total window area for the room.

> ***Exception*:** Where natural light for rooms or spaces without exterior glazing areas is provided through an adjoining room, the unobstructed opening to the adjoining room shall be at least 8 percent of the floor area of the interior room or space, but not less than 25 square feet (2.33 m2). The exterior glazing area shall be based on the total floor area being served.

4.2.2 Common halls and stairways. Every common hall and stairway in residential occupancies, other than in one- and two-family dwellings, shall be lighted at all times with at least a 60watt standard incandescent light bulb for each 200 square feet (19 m2) of floor area or equivalent illumination, provided that the spacing between lights shall not be greater than 30 feet (9144 mm). In other than residential occupancies, means of egress, including exterior means of egress stairways shall be illuminated at all times the building space served by the means of egress is occupied with a minimum of 1 footcandle (11 lux) at floors, landings and treads.

4.2.3 Other spaces. All other spaces shall be provided with natural or artificial light sufficient to permit the maintenance of sanitary conditions, and the safe occupancy of the space and utilization of the appliances, equipment and fixtures.

Section 3
VENTILATION

4.3.1 Habitable spaces. Every habitable space shall have at least one operable window. The total operable area of the window in every room shall be equal to at least 45 percent of the minimum glazed area required in Section 4.2.1.

> ***Exception***: Where rooms and spaces without openings to the outdoors are ventilated through an adjoining room, the unobstructed opening to the adjoining room shall be at least 8 percent of the floor area of the interior room or space, but not less than 25 square feet (2.33 m2). The ventilation openings to the outdoors shall be based on a total floor area being ventilated.

4.3.2 Bathrooms and toilet rooms. Every bathroom and toilet room shall comply with the ventilation requirements for habitable spaces as required by Section 4.3.1, except that a window shall not be required in such spaces equipped with a mechanical ventilation system. Air exhausted by a mechanical ventilation system from a bathroom or toilet room shall discharge to the outdoors or attic and shall not be recirculated.

4.3.3 Cooking facilities. Unless approved through the certificate of occupancy, cooking shall not be permitted in any rooming unit or dormitory unit, and a cooking facility or appliance shall not be permitted to be present in a rooming unit or dormitory unit.

> ***Exception***: Where specifically approved in writing by a Code Enforcement Officer.

4.3.4 Process ventilation. Where injurious, toxic, irritating or noxious fumes, gases, dusts or mists are generated, a local exhaust ventilation system shall be provided to remove the contaminating agent at the source. Air shall be exhausted to the exterior and not be recirculated to any space.

4.3.5 Clothes dryer exhaust. Clothes dryer exhaust systems shall be independent of all other systems and shall be exhausted in accordance with the manufacturer's instructions.

Section 4
OCCUPANCY LIMITATIONS

4.4.1 Privacy. Dwelling units, hotel units, housekeeping units, rooming units and dormitory units shall be arranged to provide privacy and be separate from other adjoining spaces.

4.4.2 Minimum room widths. A habitable room, other than a kitchen, shall not be less than 7 feet (2134 mm) in any plan dimension. Kitchens shall have a clear passageway of not less than 3 feet (914 mm) between counter fronts and appliances or counter fronts and walls.

4.4.3 Minimum ceiling heights. Habitable spaces, hallways, corridors, laundry areas, bathrooms, toilet rooms and habitable basement areas shall have a clear ceiling height of not less than 7 feet (2134 mm).

Exceptions:

(A) In one- and two-family dwellings, beams or girders spaced not less than 4 feet (1219 mm) on center and projecting not more than 6 inches (152 mm) below the required ceiling height.

(B) Basement rooms in one- and two-family dwellings occupied exclusively for laundry, study or recreation purposes, having a ceiling height of not less than 6 feet 8 inches (2033 mm) with not less than 6 feet 4 inches (1932 mm) of clear height under beams, girders, ducts and similar obstructions.

(C) Rooms occupied exclusively for sleeping, study or similar purposes and having, a sloped ceiling over all or part of the room, with a clear ceiling height of at least 7 feet (2134 mm) over not less than one-third of the required minimum floor area. In calculating the floor area of such rooms, only those portions of the floor area with a clear ceiling height of 5 feet (1524 mm) or more shall be included.

4.4.4 Bedroom requirements. Every bedroom shall comply with the requirements of Sections 4.4.4.1 through 4.4.4.5.

4.4.4.1 Area for sleeping purposes. Every bedroom occupied by one person shall contain at least 70 square feet (6.5 m2) of floor area, and every bedroom occupied by more than one person shall contain at least 50 square feet (4.6 m2) of floor area for each occupant thereof.

4.4.4.2 Access from bedrooms. Bedrooms shall not constitute the only means of access to other bedrooms or habitable spaces and shall not serve as the only means of egress from other habitable spaces.

Exception: Units that contain fewer than two bedrooms.

4.4.4.3 Water closet accessibility. Every bedroom shall have interior access to at least one water closet and one lavatory without passing through another bedroom. Additionally, every bedroom in a dwelling unit shall have access to at least one water closet and lavatory located in the same story as the bedroom or an adjacent story.

4.4.4.4 Prohibited occupancy. Kitchens and non-habitable spaces shall not be used for sleeping purposes.

4.4.4.5 Other requirements. Bedrooms shall comply with the applicable provisions of this Code including, but not limited to, the light, ventilation, room area, ceiling height and room width requirements of this chapter; the plumbing facilities and water-heating facilities requirements of Chapter 5; the heating facilities and electrical receptacle requirements of Chapter 6; and the smoke detector and emergency escape requirements of Chapter 7.

4.4.5 Overcrowding. Dwelling units shall not be occupied by more occupants than permitted by the minimum area requirements of Table 4.4.5.

TABLE 4.4.5
MINIMUM AREA REQUIREMENTS

SPACE	MINIMUM AREA IN SQUARE FEET		
	1-2 occupants	3-5 occupants	6 or more occupants
Living room [a,b]	No requirements	120	150
Dining room a,b	No requirements	80	100
Bedrooms	Shall comply with Section 4.4.4.		

For SI: 1 square foot = 0.093 m^2.

a. See Section 4.4.5.2 for combined living room/dining room spaces.
b. See Section 4.4.5.1 for limitations on determining the minimum occupancy area for sleeping purposes.

4.4.5.1 Sleeping area. The minimum occupancy area required by Table 4.4.5 shall not be included as a sleeping area in determining the minimum occupancy area for sleeping purposes. All sleeping areas shall comply with subsection 4.4.4.

4.4.5.2 Combined spaces. Combined living room and dining room spaces shall comply with the requirements of Table 4.4.5 if the total area is equal to that required for separate rooms and if the space is located so as to function as a combination living room/dining room.

4.4.6 Efficiency unit. Nothing in this section shall prohibit an efficiency living unit from meeting the following requirements:

(A) A unit occupied by not more than two occupants shall have a clear floor area of not less than 220 square feet (20.4 m2). A unit occupied by three occupants shall have a clear floor area of not less than 320 square feet (29.7 m2). These required areas shall be exclusive of the areas required by Items 2 and 3.

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(B) The unit shall be provided with a kitchen sink, cooking appliance and refrigeration facilities, each having a clear working space of not less than 30 inches (762 mm) in front. Light and ventilation conforming to this Code shall be provided.

(C) The unit shall be provided with a separate bathroom containing a water closet, lavatory and bathtub or shower.

(D) The maximum number of occupants shall be three.

4.4.7 Food preparation. All spaces to be occupied for food preparation purposes shall contain suitable space and equipment to store, prepare and serve foods in a sanitary manner. There shall be adequate facilities and services for the sanitary disposal of food wastes and refuse, including facilities for temporary storage.

ARTICLE FIVE
PLUMBING FACILITIES AND FIXTURE REQUIREMENTS

Section 1
GENERAL

5.1.1 Scope. The provisions of this chapter shall govern the minimum plumbing systems, facilities and plumbing fixtures to be provided.

5.1.2 Responsibility. The owner of the structure shall provide and maintain such plumbing facilities and plumbing fixtures in compliance with these requirements. A person shall not occupy as owner-occupant or permit another person to occupy any structure or premises which does not comply with the requirements of this chapter.

Section 2
REQUIRED FACILITIES

5.2.1 Dwelling units. Every dwelling unit shall contain its own bathtub or shower, lavatory, water closet and kitchen sink which shall be maintained in a sanitary, safe working condition. The lavatory shall be placed in the same room as the water closet or located in close proximity to the door leading directly into the room in which such water closet is located. A kitchen sink shall not be used as a substitute for the required lavatory.

5.2.2 Rooming houses. At least one water closet, lavatory and bathtub or shower shall be supplied for each four rooming units.

5.2.3 Employees' facilities. A minimum of one water closet, one lavatory and one drinking facility shall be available to employees.

> **5.2.3.1 Drinking facilities.** Drinking facilities shall be a drinking fountain, water cooler, bottled water cooler or disposable cups next to a sink or water dispenser. Drinking facilities shall not be located in toilet rooms or bathrooms.

Section 3
TOILET ROOMS

5.3.1 Privacy. Toilet rooms and bathrooms shall provide privacy and shall not constitute the only passageway to a hall or other space, or to the exterior. A door and interior locking device shall be provided for all common or shared bathrooms and toilet rooms in a multiple dwelling.

5.3.2 Location. Toilet rooms and bathrooms serving hotel units, rooming units or dormitory units or housekeeping units, shall have access by traversing not more than one flight of stairs and shall have access from an interior common hall or passageway.

5.3.3 Location of employee toilet facilities. Toilet facilities shall have access from within the employees' working area. The required toilet facilities shall be located not more than one story above or below the employees' working area and the path of travel to such facilities shall not exceed a distance of 500 feet (152 m). Employee facilities shall either be separate facilities or combined employee and public facilities.
Exception: Facilities that are required for employees in storage structures or kiosks, which are located in adjacent structures under the same ownership, lease or control, shall not exceed a travel distance of 500 feet (152 m) from the employees' regular working area to the facilities.

5.3.4 Floor surface. In other than dwelling units, every toilet room floor shall be maintained to be a smooth, hard, nonabsorbent surface to permit such floor to be easily kept in a clean and sanitary condition.

Section 4
PLUMBING SYSTEMS AND FIXTURES

5.4.1 General. All plumbing fixtures shall be properly installed and maintained in working order, and shall be kept free from obstructions, leaks and defects and be capable of performing the function for which such plumbing fixtures are designed. All plumbing fixtures shall be maintained in a safe, sanitary and functional condition.

5.4.2 Fixture clearances. Plumbing fixtures shall have adequate clearances for usage and cleaning.

5.4.3 Plumbing system hazards. Where it is found that a plumbing system in a structure constitutes a hazard to the occupants or the structure by reason of inadequate service, inadequate venting, cross connection, back-siphonage, improper installation, deterioration or damage or for similar reasons, the Code official shall require the defects to be corrected to eliminate the hazard.

Section 5
WATER SYSTEM

5.5.1 General. Every sink, lavatory, bathtub or shower, drinking fountain, water closet or other plumbing fixture shall be properly connected to either a public water system or to an approved private water system. All kitchen sinks, lavatories, laundry facilities, bathtubs and showers shall be supplied with hot or tempered and cold running water.

5.5.2 Contamination. The water supply shall be maintained free from contamination, and all water inlets for plumbing fixtures shall be located above the flood-level rim of the fixture. Shampoo basin faucets, janitor sink faucets and other hose bibs or faucets to which hoses are

attached and left in place, shall be protected by an approved atmospheric-type vacuum breaker or an approved permanently attached hose connection vacuum breaker.

5.5.3 Supply. The water supply system shall be installed and maintained to provide a supply of water to plumbing fixtures, devices and appurtenances in sufficient volume and at pressures adequate to enable the fixtures to function properly, safely, and free from defects and leaks.

5.5.4 Water heating facilities. Water heating facilities shall be properly installed, maintained and capable of providing an adequate amount of water to be drawn at every required sink, lavatory, bathtub, shower and laundry facility at a temperature of not less than 110°F (43°C). A gas-burning water heater shall not be located in any bathroom, toilet room, bedroom or other occupied room normally kept closed, unless adequate combustion air is provided. An approved combination temperature and pressure-relief valve and relief valve discharge pipe shall be properly installed and maintained on water heaters.

Section 6
SANITARY DRAINAGE SYSTEM

5.6.1 General. All plumbing fixtures shall be properly connected to either a public sewer system or to an approved private sewage disposal system.

5.6.2 Maintenance. Every plumbing stack, vent, waste and sewer line shall function properly and be kept free from obstructions, leaks and defects.

Section 7
STORM DRAINAGE

5.7.1 General. Drainage of roofs and paved areas, yards and courts, and other open areas on the premises shall not be discharged in a manner that creates a public nuisance.

ARTICLE SIX
MECHANICAL AND ELECTRICAL REQUIREMENTS

Section 1
GENERAL

6.1.1 Scope. The provisions of this chapter shall govern the minimum mechanical and electrical facilities and equipment to be provided.

6.1.2 Responsibility. The owner of the structure shall provide and maintain mechanical and electrical facilities and equipment in compliance with these requirements. A person shall not occupy as owner-occupant or permit another person to occupy any premises which does not comply with the requirements of this chapter.

Section 2
HEATING FACILITIES

6.2.1 Facilities required. Heating facilities shall be provided in structures as required by this section.

6.2.2 Residential occupancies. Dwellings shall be provided with heating facilities capable of maintaining a room temperature of 65°F (18°C) in all habitable rooms, bathrooms and toilet rooms. Cooking appliances shall not be used to provide space heating to meet the requirements of this section.

6.2.3 Heat supply. Every owner and operator of any building who rents, leases or lets one or more dwelling unit, rooming unit, dormitory or guestroom shall supply heat sufficient to maintain a temperature of not less than 65°F (18°C) in all habitable rooms, bathrooms, and toilet rooms.

> *Exception*: When the outdoor temperature is less than 20°F (-7°C), maintenance of the minimum room temperature shall not be required provided that the heating system is operating at its full design capacity.

6.2.4 Room temperature measurement. The required room temperatures shall be measured 3 feet (914 mm) above the floor near the center of the room and 2 feet (610 mm) inward from the center of each exterior wall.

Section 3
MECHANICAL EQUIPMENT

6.3.1 Mechanical appliances. All mechanical appliances, fireplaces, solid fuel-burning appliances, cooking appliances and water heating appliances shall be properly installed and maintained in a safe working condition, and shall be capable of performing the intended function.

6.3.2 Removal of combustion products. All fuel-burning equipment and appliances shall be connected to an approved chimney or vent.

Exception: Fuel-burning equipment and appliances which are labeled for unvented operation.

6.3.3 Clearances. All required clearances to combustible materials shall be maintained.

6.3.4 Safety controls. All safety controls for fuel-burning equipment shall be maintained in effective operation.

6.3.5 Combustion air. A supply of air for complete combustion of the fuel and for ventilation of the space containing the fuel-burning equipment shall be provided for the fuel-burning equipment.

6.3.6 Energy conservation devices. Devices intended to reduce fuel consumption by attachment to a fuel-burning appliance, to the fuel supply line thereto, or to the vent outlet or vent piping there from, shall not be installed unless labeled for such purpose and the installation is specifically approved.

Section 4
ELECTRICAL FACILITIES

6.4.1 Facilities required. Every occupied building shall be provided with an electrical system in compliance with the requirements of this section and Section 6.5 below.

6.4.2 Service. The size and usage of appliances and equipment shall serve as a basis for determining the need for additional facilities. Dwelling units shall be served by a three-wire, 120/240 volt, single phase electrical service having a rating of not less than 60 amperes.

6.4.3 Electrical system hazards. Where it is found that the electrical system in a structure constitutes a hazard to the occupants or the structure by reason of inadequate service, improper fusing, insufficient receptacle and lighting outlets, improper wiring or installation, deterioration or damage, or for similar reasons, the Code official shall require the defects to be corrected to eliminate the hazard.

Section 5
ELECTRICAL EQUIPMENT

6.5.1 Installation. All electrical equipment, wiring and appliances shall be properly installed and maintained in a safe and approved manner.

6.5.2 Receptacles. Every habitable space in a dwelling shall contain at least two separate and remote receptacle outlets. Every laundry area shall contain at least one grounded-type receptacle or a receptacle with a ground fault circuit interrupter. Every bathroom shall contain at

least one receptacle. Any new bathroom receptacle outlet shall have ground fault circuit interrupter protection.

6.5.3 Lighting fixtures. Every public hall, interior stairway, toilet room, kitchen, bathroom, laundry room, boiler room and furnace room shall contain at least one electric lighting fixture.

Section 6
ELEVATORS, ESCALATORS AND DUMBWAITERS

6.6.1 General. Elevators, dumbwaiters and escalators shall be maintained to sustain safely all imposed loads, to operate properly, and to be free from physical and fire hazards. The most current certificate of inspection shall be on display at all times within the elevator or attached to the escalator or dumbwaiter; or the certificate shall be available for public inspection in the office of the building operator.

6.6.2 Elevators. In buildings equipped with passenger elevators, at least one elevator shall be maintained in operation at all times when the building is occupied.

> ***Exception***: Buildings equipped with only one elevator shall be permitted to have the elevator temporarily out of service for testing or servicing.

Section 7
DUCT SYSTEMS

6.7.1 General. Duct systems shall be maintained free of obstructions and shall be capable of performing the required function.

ARTICLE SEVEN
FIRE SAFETY REQUIREMENTS

Section 1
GENERAL

7.1.1 Scope. The provisions of this chapter shall govern the minimum conditions and standards for fire safety relating to structures and exterior premises, including fire safety facilities and equipment to be provided.

7.1.2 Responsibility. The owner of the premises shall provide and maintain such fire safety facilities and equipment in compliance with these requirements. A person shall not occupy as owner-occupant or permit another person to occupy any premises that do not comply with the requirements of this chapter.

Section 2
MEANS OF EGRESS

7.2.1 General. The occupant shall maintain a safe, continuous and unobstructed path of travel shall be provided from any point in a building or structure to the public way. Means of egress shall comply with the Arkansas Fire Prevention Code.

7.2.2 Aisles. The required width of aisles in accordance with the Arkansas Fire Prevention Code shall be unobstructed.

7.2.3 Locked doors. All means of egress doors shall be readily openable from the side from which egress is to be made without the need for keys, special knowledge or effort, except where the door hardware conforms to that permitted by the Arkansas Fire Prevention Code.

7.2.4 Emergency escape openings. Required emergency escape openings shall be maintained in accordance with the building codes in effect at the time of construction, and the following. Required emergency escape and rescue openings shall be operational from the inside of the room without the use of keys or tools. Bars, grilles, grates or similar devices are permitted to be placed over emergency escape and rescue openings provided the minimum net clear opening size complies with the building codes that were in effect at the time of construction and such devices shall be releasable or removable from the inside without the use of a key, tool or force greater than that which is required for normal operation of the escape and rescue opening.

Section 3
FIRE-RESISTANCE RATINGS

7.3.1 Fire-resistance-rated assemblies. The required fire-resistance rating of fire-resistance-rated walls, fire stops, shaft enclosures, partitions and floors shall be maintained.

7.3.2 Opening protectives. Required opening protectives shall be maintained in an operative condition. All fire and smokes top doors shall be maintained in operable condition. Fire doors and smoke barrier doors shall not be blocked or obstructed or otherwise made inoperable.

Section 4
FIRE PROTECTION SYSTEMS

7.4.1 General. All systems, devices and equipment to detect a fire, actuate an alarm, or suppress or control a fire or any combination thereof shall be maintained in an operable condition at all times in accordance with the Arkansas Fire Prevention Code.

7.4.2 Smoke alarms. Single or multiple-station smoke alarms shall be installed and maintained in all residences, regardless of occupant load at all of the following locations:

(A) On the ceiling or wall outside of each separate sleeping area in the immediate vicinity of bedrooms.

(B) In each room used for sleeping purposes.

(C) In each story within a dwelling unit, including basements and cellars but not including crawl spaces and uninhabitable attics. In dwellings or dwelling units with split levels and without an intervening door between the adjacent levels, a smoke alarm installed on the upper level shall suffice for the adjacent lower level provided that the lower level is less than one full story below the upper level. Single or multiple-station smoke alarms shall be installed in other groups in accordance with the Arkansas Fire Prevention Code.

7.4.3 Power source. In all residences, regardless of occupant load, single-station smoke alarms shall receive their primary power from the building wiring provided that such wiring is served from a commercial source and shall be equipped with a battery backup. Smoke alarms shall emit a signal when the batteries are low. Wiring shall be permanent and without a disconnecting switch other than as required for over-current protection.

***Exceptions*:** Smoke alarms are permitted to be solely battery operated when located:

(A) in buildings where no construction is taking place;

(B) in buildings that are not served from a commercial power source; and

(C) in existing areas of buildings undergoing alterations or repairs that do not result in the removal of interior wall or ceiling finishes exposing the structure.

7.4.4 Interconnection. Where more than one smoke alarm is required to be installed within a residence, the smoke alarms shall be interconnected in such a manner that the activation of one alarm will activate all of the alarms in the individual unit. The alarm shall be clearly audible in all bedrooms over background noise levels with all intervening doors closed.

Exceptions:

(A) Interconnection is not required in buildings which are not undergoing alterations, repairs, or construction of any kind.

(B) Smoke alarms in existing areas are not required to be interconnected where alterations or repairs do not result in the removal of interior wall or ceiling finishes exposing the structure.

ARTICLE 8
NUISANCES

Section 1
GENERAL

8.1.1 Intent. It is the intent of this Code to prevent and abate nuisances within the municipal boundaries of the City of North Little Rock. For the purposes of this Code, the word "nuisance" is defined as any act, omission, or property condition that is detrimental to the health, safety and welfare of the public in that it:

(A) Injures or endangers the comfort, repose, health or safety of others;
(B) Offends decency;
(C) Is offensive to the senses;
(D) Unlawfully interferes with, obstructs or tends to obstruct, or renders dangerous for passage any public or private street, highway, sidewalk, stream, ditch or drainage;
(E) In any way renders other persons insecure in life or the use of property; or
(F) Essentially interferes with the comfortable enjoyment of life and property, or tends to depreciate the value of the property of others.

8.1.2 Prohibited. It shall be unlawful for any person or entity to cause, permit, maintain or allow the creation or maintenance of a nuisance within the City of North Little Rock.

8.1.3 Illustrative enumeration of a nuisance. The maintaining, using, placing, depositing, leaving or permitting to be or remain on any public or private property of any of the following items, conditions or actions is hereby declared to be and constitute a nuisance; provided, however, this enumeration shall not be deemed or construed to be conclusive, limiting or restrictive:

(A) Noxious weeds and other rank vegetation;
(B) Accumulations or storage of rubbish, garbage, materials, metals, lumber, and other materials;
(C) Any condition which provides harborage for rats, mice, snakes and other vermin;
(D) Dilapidated structures;
(E) All unnecessary or unauthorized noises and annoying vibrations, including animal noises.
(F) All disagreeable or obnoxious odors and stenches, as well as the conditions, substances or other causes which give rise to the emission or generation of such odors and stenches.
(G) The carcasses of animals or fowl not disposed of within a reasonable time after death.
(H) The pollution of any public well or cistern, stream, lake, canal or body of water by sewage, dead animals, creamery, industrial wastes or other substances.
(I) Any building, structure or other place or location where any activity which is in violation of local, state or federal law is conducted, performed or maintained.

(J) Any accumulation of stagnant water permitted or maintained on any lot or piece of ground.
(K) Dense smoke, noxious fumes, gas, soot or cinders in unreasonable quantities.
(L) Graffiti.
(M) Inoperable, wrecked or abandoned motor vehicles, or any parts thereof.
(N) Unsafe equipment, including, but not limited to, any boiler, heating equipment, elevator, moving stairway, electrical wiring or device, flammable liquid containers or other equipment on the premises or within the structure which is in such disrepair or condition that it is a hazard to life, health, property or safety of the public or occupants of the premises or structure.
(O) The use of tarpaulins, canvas, plastic, oil cloth, sheeting and other similar materials as fencing or to shield or enclose any structure (including, without limitation, openings for windows, doors, walls, roofs, garage doors or carports) except when temporarily necessary to perform repairs under a properly issued building permit.
(P) Permanent or temporary basketball goals (except those approved by the City) on any public street or on any right-of-way adjacent to a public street.
(Q) Outside storage of household furniture manufactured for indoor use including, but not limited to, mattresses, box springs, upholstered couches/sofas, dressers, recliners, tables, desks, bed frames, chairs, and parts thereof. This does not include furniture *or other items* manufactured for outdoor use kept on a covered front porch, a deck, patio or porch at the rear of the structure.
(R) Outside storage of appliances including, but not limited to, dishwashers, stoves, ovens, televisions, refrigerators, freezers, computers, electronic equipment, kitchen accessories, sinks, plumbing fixtures, and/or parts thereof. This does not include freezers or refrigerators that are **in use** and are not visible from the road or street, unless they are in a covered carport.
(S) Any outdoor storage, collection or keeping of items on a carport. *Exceptions*:
    (1) Building materials that are temporarily stored as part of or in conjunction with an active building permit for construction or remodeling, provided the building materials are stored against a permanent wall.
    (2) The parking of operable motorized lawn equipment, lawn hand tools, or other equipment used for lawn maintenance stored against a permanent wall.
    (3) Plastic or metal storage container stored in an orderly manner in a single row against a permanent wall. Stacked storage containers' height cannot exceed or be taller than 50% (1/2) the wall height.
(T) Any use of tarpaulins, blankets, plastic or fabric sheets or similar covering materials to cover items on a carport.
(U) Storage of scrap metals and dismantled equipment in residential zones.
(V) Items not manufactured for outdoor use.
(W) Unauthorized, excessive or improper accumulation or storage of used or scrap tires.

Ref. Ord. 8668 adopted 08-25-14; Ord. 8684 adopted 10-13-14; Ord. 8720 adopted 03-23-15.

Section 2
GENERAL REMEDIES

8.2.1 Other remedies unaffected. The remedies found in this article are not intended to displace any other remedies of law or equity found in the common or statutory law of Arkansas that may be available to the City of North Little Rock, a citizen of the City of North Little Rock, or any public or private entity to abate or prevent a nuisance.

8.2.2 Citations. Code Enforcement Officers are authorized to issue citations or notices of violation to any person in violation of subsection 8.1.2.

8.2.3 Abatement. In addition to the authority found in this section, Code Enforcement Officers are authorized to take such action as may be reasonably necessary to abate nuisances within the City of North Little Rock. For the specific nuisances that are defined in Section 3 below, Code Enforcement Officers may use the associated method of abatement which is deemed to be both a reasonable and necessary response by the City to abate a nuisance.

Section 3
REMEDIES FOR SPECIFIC NUISANCES

8.3.1 Uncut weeds, grass and unsanitary articles. All property owners and occupants within the municipal boundaries of the City of North Little Rock are required to cut weeds and grass, remove garbage, rubbish and other unsanitary articles and things from their property, and to eliminate, fill up, or remove stagnant pools of water or any other unsanitary thing, place or condition which might become a breeding place for mosquitoes, flies and germs harmful to the health of the community. For specific requirements related to the required maintenance of grass and weeds, refer to subsection 3.2.4.

> **8.3.1.1 Authorized abatement.** If the owner of any lot or other real property within the city shall neglect or refuse to remove, abate or eliminate any condition as may be provided for under subsection 8.3.1, after having been given a Notice of Violation with seven days' notice in writing to do so by a Code Enforcement Officer, the city is hereby authorized to take such action is necessary to correct the condition, including but not limited to entering upon the property and having such weeds, rank grass or other vegetation cut and removed, or eliminating any unsanitary and unsightly condition, or causing necessary repairs to be made and charging the cost thereof to the owner of such premises, which shall constitute a lien thereon. The abovementioned seven days' notice shall be calculated by counting the first day of the seven day period as the day after written notice is given to the owner, by counting every calendar day, including weekends and holidays, and by establishing the deadline to take the above required actions as 11:59 p.m. on the seventh day. The City reserves the right to secure a lien for its costs, including a priority clean-up lien pursuant to Ark Code Ann 14-54-903.

8.3.1.2 Special notice rules for weed lots. For purposes of this section, a "weed lot" is a previously platted and subdivided lot that is vacant or upon which an unsafe and vacant structure is located and that contains debris, rubbish, or grass contrary to this Code. Due to the continual growth cycle of vegetation on weed lots, continuous abatement is often necessary. Thus the seven day Notice of Violation described in subsection 8.3.1.1 shall be issued with the following additional statement, "Work to abate this nuisance will not be complete until the end of the growing season." No additional Notice of Violation need be given unless and until the growing season concludes and further abatement is necessary.

8.3.2 Inoperable or wrecked motor vehicles and any parts thereof. The accumulation of inoperable or wrecked motor vehicles in the City is degrading to the environment, property values, and the aesthetic beauty of the City. Thus, the only location where an inoperable or wrecked motor vehicle, or any parts thereof, may be parked, kept, or stored within the City is in an approved storage area on property that is properly zoned and permitted for that purpose. (*See also* Section 12.24 of the Zoning Ordinance.) The parking, keeping, or storing of inoperable or wrecked motor vehicles, or any parts thereof, at any other location, or unauthorized area thereon, in the City is declared to be a nuisance and may be cited for violation of subsection 3.2.8 and, if necessary, abated as provided in subsection 8.3.2.1, below.

8.3.2.1 Presumption of inoperability. A vehicle shall be deemed inoperable when one or more of the following conditions exist:

(A) It has not been moved for more than three days.

(B) One or more tires are flat.

(C) One or more wheels are missing.

(D) The hood or trunk is raised or missing and has appeared to remain so for more than three days.

(E) Weeds or grass have grown up around the vehicle.

(F) The engine is missing.

(G) The vehicle has no current vehicle tags or registration.

(H) The door or doors, fender or fenders are removed or missing.

(I) The front or rear windshield is broken, removed or missing, or the side windows are broken or removed or missing.

8.3.2.2 Removal of inoperable motor vehicles near public streets. If an owner or occupant of property within the City shall neglect or refuse to remove an inoperable or

motor vehicle that is parked, kept or stored near a public street without proper authority, a Code Enforcement Officer may cause the removal of the inoperable motor vehicle, provided that a **Notice of Violation** is affixed to the vehicle for a period of no less than three days which shall state that the vehicle is a nuisance and order the property owner, occupant, or whoever has an interest in the vehicle to remove it from the property. If the vehicle is found on private property with one or more occupiable structures, a copy of the notice shall additionally be placed on one of the structures. For purposes of this section, a vehicle shall be deemed "near" a public street if it can be seen with the unaided eye from a public street.

8.3.2.3 Removal of other inoperable motor vehicles. If an owner or occupant of property within the City shall neglect or refuse to remove an inoperable or motor vehicle that is parked, kept or stored without proper authority but away from public streets, a Code Enforcement Officer may cause the removal of the inoperable motor vehicle, provided that a **Notice of Violation** is affixed to the vehicle for a period of no less than thirty days which shall state that the vehicle is a nuisance and order the property owner, occupant, or whoever has an interest in the vehicle to remove it from the property. If the vehicle is found on private property with one or more occupiable structures, a copy of the notice shall additionally be placed on one of the structures.

8.3.3 Impediments to City streets, easements, or rights-of-way. The City owns property rights throughout the jurisdiction of this Code which are necessary to the efficient flow of traffic, storm water, utility service, and the like. Impediments to these property rights are declared to be a public nuisance as they reduce the public benefit of public property and can endanger the health and welfare of the citizens who use and depend upon these property rights. Code Enforcement Officers shall have the authority to order the immediate removal of any impediment to the use of public streets, sidewalks, drains, ditches, utilities, easements, or other right-of-ways. If the apparent owner of the impediment is not known, available, or willing to remove the impediment, a Code Enforcement Officer may cause the same to be removed. Any person who is aggrieved by the actions of a Code Enforcement Officer under this subsection may appeal the same pursuant to Section 9 of Article I.

8.3.3.1 Special rules for basketball goals. Code Enforcement Officers and Law Enforcement Officers shall have the authority to order the immediate removal of any permanent or temporary basketball goal (unless approved by the City) that is on any public street or on any right-of-way adjacent to a public street. If the apparent owner of the basketball goal is unknown, unavailable, or unwilling to remove the basketball goal, a Code Enforcement Officer or Law Enforcement Officer may seize and remove it to a City storage site where it may be reclaimed by the owner. Any person who seeks to reclaim a basketball goal and offers proof of ownership (such as the testimony of a witness), may obtain custody of the goal after paying an administrative reclamation fee of $25 per goal. Any person who is aggrieved by the actions taken under this subsection may appeal the same pursuant to Section 9 of Article I.

8.3.3.2 Shopping carts. Code Enforcement Officers shall have the authority to seize any shopping cart that is left unattended on any public streets, sidewalks, drains,

ditches, utilities, easements, or other right-of-ways. Any cart so seized shall be removed to a City storage site where it may be reclaimed by the owner. Any person seeking to reclaim a seized shopping cart and offering proof of ownership (such as a label on the shopping cart), may obtain custody of the shopping cart after paying an administrative reclamation fee of $25 per cart. Any person who is aggrieved by the actions of a Code Enforcement Officer under this subsection may appeal the same pursuant to Section 9 of Article I.

8.3.3.3 Property deemed abandoned. Any property seized by the City pursuant to subsection 8.3.3 shall be deemed abandoned after thirty (30) days and properly disposed of by the Senior Code Enforcement Officer.

8.3.4 Nuisance Structures. Any building or other structure which is in such a dilapidated condition that it is unsafe or unfit for human habitation, or kept in such an unsanitary condition that it is a menace to the health or safety of people residing in the vicinity thereof, or presents a more than ordinarily dangerous fire hazard in the vicinity where it is located shall constitute a nuisance.

8.3.4.1 Definitions. For purposes of this Article, the following terms are defined as follows:

(A) Unsafe structures. An unsafe structure is one that is found to be dangerous to the life, health, property or safety of the public or the occupants of the structure by not providing minimum safeguards to protect or warn occupants in the event of fire, or because such structure contains unsafe equipment or is so damaged, decayed, dilapidated, structurally unsafe or of such faulty construction or unstable foundation, that partial or complete collapse is possible.

(B) Unfit structure for human occupancy. A structure is unfit for human occupancy whenever the Code official finds that such structure is unsafe, unlawful or, because of the degree to which the structure is in disrepair or lacks maintenance, is unsanitary, vermin or rat infested, contains filth and contamination, or lacks ventilation, illumination, sanitary or heating facilities or other essential equipment required by this Code, or because the location of the structure constitutes a hazard to the occupants of the structure or to the public.

(C) Unlawful structure. An unlawful structure is one found in whole or in part to be occupied by more persons than permitted under this Code, or was erected, altered or occupied contrary to law.

8.3.4.2 Vacating of Unfit or Unsafe Structures and Utility Services. Any premises declared as unsafe or unfit for human habitation by a Code Enforcement Officer Department and so designated by placard, shall be vacated within seven (7) days after notice of such action has been given to both the owner and occupant of the building. On the eighth (8th) day after said notice the Code Enforcement Department shall notify all utilities to discontinue services to the dwelling or dwelling unit. After

utilities services are cutoff no further services shall be made available until a rehabilitation permit is obtained or until the Director of Code Enforcement notifies utilities that services may be provided to the dwelling or dwelling unit.

8.3.4.2.1 Placarding. Upon failure of the owner or person responsible to comply with the Notice of Violation for a nuisance structure or equipment within the time given, the Code official shall then post on the premises or on defective equipment a placard bearing the word **"NUISANCE"** and a statement of the penalties provided for occupying the premises, operating the equipment or removing the placard.

8.3.4.2.2 Placard removal. The Code Official shall remove the placard referred to in this subsection whenever the defect or defects upon which the placarding actions were based have been eliminated. Any person who defaces or removes a condemnation placard without the approval of the Code Official shall be subject to the penalties provided by this Code.

8.3.4.3 Prohibited occupancy. Any person who shall occupy placarded premises and any owner or responsible person of placarded premises who allows another person to occupy such placarded premises shall be subject to the penalties provided by this Code.

8.3.4.4 Abatement. When warranted, Code Enforcement Officers may perform work to secure, abate and otherwise cause a nuisance structures to conform with this ordinance and seek reimbursement for the cost thereof in the manner provided by law.

8.3.4.5 Condemnation. When warranted, Code Enforcement Officers may initiate condemnation proceedings under Section 7 of Article I in lieu of or in addition to the procedures in this section

8.3.5 Used and scrap tires.

(A) A person who owns or operates a business within the City that (a) offers used vehicle tires for sale, trade, or barter or (b) provides installation services for used tires shall:

(1) Dispose of scrap or waste tires at an official public waste tire collection center authorized by the Inter-District Waste Tire Management Program pursuant to the guidelines set forth in Arkansas Pollution Control and Ecology Commission Regulation No. 14;

(2) Store all tires in a dry, secure structure or closed trailer that complies with the North Little Rock Zoning Ordinance. All tires shall be maintained in an orderly and organized manner, being stacked in columns no more than six (6) feet in height or standing vertically in rows of single tire height, or on racks; *except*, up to twenty-five (25) tires may be displayed outdoors in an orderly fashion no closer than ten (10) feet from the primary structure of the business during business hours;

(3) Isolate all tires from other stored materials that may create hazardous conditions or emissions in the event of a fire, including, but not limited to, lead acid batteries, fuel tanks, solvent barrels, and pesticide containers;

(4) Separately store useable used tires, scrap tires, and tire pieces;

(5) Schedule regular pick-up of tires by a licensed carrier to avoid excessive amounts of tires and tire pieces to be stored on the property;

(6) Ensure that all stored tires remain free of water and other liquids, trash, and debris; and

(7) Make and maintain complete and accurate inventory records as well as complete and accurate manifest records reflecting proper disposal of all scrap or waste tires as prescribed by the City's Code Enforcement Department and as issued by an authorized public waste tire collection center at the time of disposal.

(B) Violation of Section A above is a fine not less than $100 nor more than $1000.

(C) Except as otherwise allowed herein, any person storing used or scrap tires stored within the City must be kept in a dry and secure structure, free from collection of liquids, dirt or debris and stored tires shall be maintained in an orderly and organized manner, being stacked in columns no more than six (6) feet in height or standing vertically in rows of single tire height, or on racks. The tires must be isolated from other stored materials that may create hazardous conditions or emissions in the event of a fire, including, but not limited to, lead acid batteries, fuel tanks, solvent barrels, and pesticide containers. Any person who maintains or allows tires to be maintained on premises owned or under their control in violation of this section shall be fined not less than $250.00, nor more than $1000.00.

(D) This article shall not apply to:

(1) Any department, branch, or agency of the federal, state or municipal government;
(2) Scrap tires located within a properly permitted landfill; or
(3) Tires that are not intended for use on vehicles that are motorized or towed by motorized vehicles.

Ref. Amended 3-24-08 (Ord. 8065), 7-27-09 (Ord. 8184), 03-23-15 (Ord. 8720).

(Begin North Little Rock City Council meeting.)

COUNCIL MEMBER: Hi.

MAYOR SMITH: Yes?

COUNCIL MEMBER: On 1337, Mayor Smith.

MAYOR SMITH: Please call it.

COUNCIL MEMBER: A resolution declaring certain buildings, houses, and other structures located at 6615 Highway 70 in the City of North Little Rock to constitute a public nuisance and condemning said structures providing a period of time for the property owner to obey the said nuisance.

MAYOR SMITH: Have a motion?

COUNCIL MEMBER: To move.

COUNCIL MEMBER, MS. ROBINSON: Second.

MAYOR SMITH: Call to public hearing 6615 Highway 70 .

COUNCIL MEMBER: Yes, sir.

ATTORNEY, MICKEY STEVENS: Good evening. My name is Mickey Stevens. I'm a -- the attorney for Convent Corporation. And I'd like to start by telling you how the power of -- talking about how this property came to be in the condition it's in. It's my understanding that the -- the damage is from vandalism and the owners didn't really know about this until the condemnation proceeding started, they weren't aware of the condition of the property.

I understand some people broke in; ripped out the wires in the ceiling for copper; they fell through the ceiling; they just really left it in a mess. But most of the problems were cosmetic. And the -- the owners want to rehab the property, they want to fix it up. But they're afraid to do it under condemnation order, because they're afraid whatever they do won't be enough.

You know, they -- the -- the problem with the condemnation order from what I understand under District Court Rule 9, we only have 30 days to appeal that order. And that's a -- so we would lose our right to appeal very quickly if the property is condemned. What the owners want to do is come up with a plan with the City, postpone the condemnation vote, come up with a plan to rehab the building in agreement.

They -- they had talked -- it's my understanding they had talked with Code Enforcement before about doing this but they had told -- were told they couldn't get a permit until after condemnation.

MAYOR SMITH: I believe, Counselor, if I may , I believe the rule is that your owners have 30 days to negotiate with our attorneys and Code Enforcement on your plan, and you'll be required to put up a bond. You don't have to do all of the work in the 30 days, you just have to negotiate the plan in 30 days.

ATTORNEY MICKEY STEVENS: Right, but my concern is after 30 days we have no basis to appeal to the Circuit Court. The rule – District Court Rule 9 says you have to appeal within 30 days or you lose it. So we don't want to be under that gun.

COUNCIL MEMBER: It's my understanding there's nothing to prohibit the – should the Council go ahead and do the condemnation, there's nothing to prohibit them from filing their appeal and at the same time kind of twin-track it and work with Code Enforcement to abate it. So I don't see that – where there's going to be any chance that they're going to lose their right to appeal should they go ahead and file that appeal with the Circuit Court, while at the same time pursuing a – an abatement agreement.

MAYOR SMITH: Good option. Ms. Ross, were you going to say something?

COUNCIL MEMBER, MS. ROSS: What – I'm just curious, you said they're wanting to "rehab" it, have they tried to do anything to it before now until they received their condemnation notice from the City Council that was going to come before the City Council?

ATTORNEY, MICKEY STEVENS: They went in and cleaned it out. There was a lot of clutter. The people that vandalized it stole as much as they could load apparently and piled everything else up by the door. And they were told – it's my understanding they were told by Code Enforcement that they couldn't do any kind of work because they wouldn't get a permit until after the condemnation.

COUNCIL MEMBER, MS. ROSS: Cleaning up, they couldn't clean it up?

ATTORNEY, MICKEY STEVENS: No, they cleaned it up but they couldn't do any repairs, you know, the wiring or any of that kind of stuff.

COUNCIL MEMBER, MS. ROSS: How long has this been empty?

ATTORNEY, MICKEY STEVENS: Quite a while, I'm not sure exactly.

COUNCIL MEMBER, MS. ROSS: So did somebody go out there and check on the property, I mean, no one –

ATTORNEY, MICKEY STEVENS: I'm sure.

COUNCIL MEMBER, MS. ROSS: – can just leave the property sitting there, I mean, it's – just wondering if anybody had been checking on it because this – this looks like a lot more than just vandal.

ATTORNEY, MICKEY STEVENS: Well, if you can – you can see right there those – that's part of the ceiling that fell down. They climbed up in there, like I said, to get the copper out and fell through the ceiling. All the clutter's been cleaned out now from what I understand; I haven't seen it myself. But

[redacted]

there is some water damage; they're – they're willing to put a new roof on it. Like I said, they just don't want to spend the money under a condemnation order and the City tear it down any way.

COUNCIL MEMBER, MS. ROSS: But were they going to spend money before the condemn – before it came to the City Council?

ATTORNEY, MICKEY STEVENS: They weren't really aware of the condition before. And I'm not sure when the vandalism happened either. It's my understanding it was fairly recent as far as I know, I mean.

MAYOR SMITH: Ms. Robinson.

COUNCIL MEMBER, MS. ROBINSON: You mentioned them wanting to "rehab" it, what are they wanting to put in there once it's ...

ATTORNEY, MICKEY STEVENS: As far as I know, they don't have any plans right now for the building. I understand there's – there's been some concern about the kind of business that was there before and something like that going in again, but from what I understand there was a settlement that – a covenant was put in place that a club couldn't go in there again of that sort. So as far as I know, nobody's got any plans for it right now. The – the owners just don't want the building torn down because they feel like it adds value to the property.

COUNCIL MEMBER, MS. ROBINSON: The neighborhood association, the Meadowpark Neighborhood Association, wanting – is wanting that building torn down. They feel like that building is a nuisance and a distraction to their community. And they've asked that we vote to condemn it, to – to tear it down.

SPEAKER: (Inaudible) ... next to it.

ATTORNEY, MICKEY STEVENS: Well, I – I

COUNCIL MEMBER, MS. ROBINSON: That's just – just comment.

MAYOR SMITH: Quickly, Counselor.

ATTRORNEY, MICKEY STEVENS: We're concerned that the condemnation ordinance doesn't mean the constitutional due process requirements, there's no – three minutes isn't enough for us to – to put on witnesses and evidence. If the – the Council is going to go ahead with the condemnation, we'd ask that it be postponed until we can have a full hearing to be able to bring witnesses and present evidence.

MAYOR SMITH: Counselor, I appreciate your eagerness but remember we're a legislative body not a judicial body so we're not here to – to hear cases. That's what the court system is for so ...

ATTORNEY, MICKEY STEVENS: Yes, sir, I understand, but due process requires a meaningful opportunity to be heard and this ordinance just doesn't provide for that. I don't think it'll hold up to a constitutional challenge.

MAYOR SMITH: Ms. Ross.

[redacted]

COUNCIL MEMBER, MS. ROSS: Was there a fire at this building?

ATTORNEY, MICKEY STEVENS: I'm not sure. Somebody – the paperwork said something about the fire damage but –

COUNCIL MEMBER, MS. ROSS: It looks like –

ATTORNEY, MICKEY STEVENS: – the person I talked to said he didn't know, that maybe –

COUNCIL MEMBER, MS. ROSS: We still have the pictures up, because I know it – it looks like there's been a fire in here so I was just curious if there was any insurance money, you know, to repair this or ...

ATTORNEY, MICKEY STEVENS: Not that I'm aware of.

COUNCIL MEMBER, MS. ROSS: I'm sure that the building was insured?

ATTORNEY, MICKEY STEVENS: I'm not sure about that.

COUNCIL MEMBER, MS. ROSS: Okay.

MAYOR SMITH: Any other questions, Counselor, Mr. Taylor?

COUNCIL MEMBER, MR. TAYLOR: Well, now – now how long has this building been vacant?

ATTORNEY, MICKEY STEVENS: I'm not sure, it's been a while.

COUNCIL MEMBER, MS. ROSS: (Background speaking.) See it's burnt.

ATTORNEY, MICKEY STEVENS: I'm not sure. I've just recently gotten involved in this so I don't know the history really.

COUNCIL MEMBER, MR. TAYLOR: It's always interesting to me that is – is, you know, nobody ever wants to do anything to – to something we're getting ready to condemn until we're ready to condemn it then –

ATTORNEY, MICKEY STEVENS: I understand – I understand what you're saying –

MR. TAYLOR: – well, wait a minute – and then all of a sudden there's a problem. I mean, this building, I drive by this building quite often, never been in it, but I've drove by it quite often. This –

this – this building it's been a mess for a while, for a while.

COUNCIL MEMBER, MS. ROSS: (Inaudible)

MAYOR SMITH: I agree. Any final comments, Counselor?

ATTORNEY, MICKEY STEVENS: I would like to – I have a brief I'd like to submit that's got some additional issues covered since we don't have more time. I believe I have enough copies here for everybody.

[redacted]

This document attached hereunto was prepared in accordance and within good faith by Shawna Denise Gauntt-Hicks.

State of Texas County of Bowie

On this 30th day of January, 2014, I certify, pursuant to Tex. Gov't Code §406.014(c), that the preceding or attached document is a true, exact, complete, and unaltered copy made by me of (description of notarial record), the original of which is held in my custody as a notarial record.

Shawna Denise Gauntt-Hicks
Notary Public, State of Texas
My Commission Expires 06/21/2017
610 Cedar
Maud, Texas 75567
(903) 276-1090

SHAWNA DENISE GAUNTT-HICKS
Notary Public, State of Texas
My Commission Expires
June 21, 2017

[redacted] ADD 601

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
EL DORADO DIVISION

ELEASE HILL; CARLTON NEWSOME;
VADA SMITH PLAINTIFFS

vs. Case No. 13-cv-1089

CITY OF EL DORADO, an incorporated body through Mayor Frank Hash in his Official Capacity as mayor; and the City Council in their Individual Official Capacity as the City Council of El Dorado[1] DEFENDANTS

ORDER

Before the Court is Defendants' Motion for Summary Judgment. (ECF No. 68). Plaintiffs have responded. (ECF No. 83). Defendants have filed a reply. (ECF No. 86). The parties have also filed documents on the docket which call into question Plaintiffs' standing to bring a claim for a particular property at issue. The Court ordered the parties to file briefs regarding the standing issue (ECF No. 91), and has considered that briefing in making this determination. (ECF Nos. 92 & 93). The Court finds this matter ripe for its consideration.

I. Background

On November 14, 2013, Plaintiff Elease Hill filed this action seeking preliminary and permanent injunctive relief against the City of El Dorado and its officers. Hill claimed the Defendants violated her due process and equal protection rights under the Fifth and Fourteenth Amendments to the United States Constitution. (ECF No. 1, ¶ 8).

On April 22, 2014, Hill amended her Complaint to add two additional plaintiffs, Carlton

[1]The Court has taken the language of the caption verbatim from the style of Plaintiffs' Amended Complaint. (ECF No. 28).

EXHIBIT
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Newsome and Vada Smith (together with Hill, "Plaintiffs"). (ECF No. 28, ¶ 2). Plaintiffs' Amended Complaint contains legal conclusions and "threadbare recitations" of causes of action supported by conclusory statements. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); Federal Rule of Civil Procedure 8(a)(2). Specifically, the Amended Complaint alleges the "City of El Dorado has, without due process, condemned [Plaintiffs'] properties and has marked them for immediate demolition," and Plaintiffs "were not given any notice by the Defendants or specific reasons for these condemnation and demolition actions taken." (ECF No. 28, ¶ 6). Plaintiffs allege that "the process used by the city in selecting properties to condemn and demolish property is arbitrary, capricious and violates the due process and equal protection of the Fifth and Fourteenth Amendments, and Plaintiffs' legitimate property interest." (ECF No. 28, ¶ 10). Plaintiffs do not mention any El Dorado city ordinances in their Amended Complaint, nor do they allege underlying facts demonstrating any unconstitutional processes used in the condemnation proceedings. Finally, Plaintiffs asserted that Defendants' "actions violate the Plaintiff's [sic] due process and equal protection rights under" the Constitution, and that the "process used by the city in selecting properties to condemn and demolish . . . violates . . . equal protection." (ECF No. 28, ¶8, ¶10).

In their Response to Defendants' Motion for Summary Judgment, Plaintiffs expand upon the vague allegations of their Amended Complaint. Plaintiffs assert that their substantive due process claim is based upon "the City's Ordinance's failure to provide specific processes, procedures and criteria by which it will consider the condemnation of property in the City," and that "the City's Ordinance, process, procedures and criteria are at fault in causing their constitutional injuries." (ECF No. 83, pg. 10). They assert that it is irrational, shocking, and unreasonable for the City "to put in place a condemnation process that does not provide for the protection of property owner's federal

constitutional rights" (ECF No. 83, pg. 13), to "sanction a condemnation process that fails to apprise property owners of the specific reasons their properties are deemed to be in violation" (ECF No. 83, pg. 14), and to have a process that "does not notify property owners of an administrative remedy." (ECF No. 83, pg. 14). Further, they allege that the City did not not properly notify them of their opportunity to be heard, and that "the City's condemnation Ordinance, process, procedure and criteria make no provision for . . . an opportunity to be heard." (ECF No. 83, pg. 9). They assert that "any steps taken by the City to notify [them] was but a mere gesture." (ECF No. 83, pg. 9) (internal punctuation omitted). Finally, they assert that their properties, in predominately African American neighborhoods, were condemned when properties in predominately Caucasian neighborhoods have not been condemned.

II. Preliminary Arguments

Defendants first make preliminary arguments, including which Defendants are proper parties, which properties are properly before the Court, and which Plaintiffs have standing. The Court will address these preliminary issues before addressing the merits of Plaintiffs' claims.

A. Proper Parties

Plaintiffs have sued the City of El Dorado, the Mayor of El Dorado in his official capacity, and the "City Council in their Individual Official Capacity as the City Council of El Dorado." (ECF No. 1; ECF No. 28). The Amended Complaint fails to state the City Council members by name, and Plaintiffs have submitted no proof that the individual council members have been served. The Court finds that this is a lawsuit against the City Council members in their official capacities. The mayor is also named in his official capacity. Because all claims are brought against the City's officials in their official capacities, the claims are tantamount to claims against the City of El Dorado. *See*

Kentucky v. Graham, 473 U.S. 159, 166 (1985); *Wilson v. Spain*, 209 F.3d 713, 717 (8th Cir. 2000). Therefore, the only proper Defendant in this lawsuit is the City of El Dorado.[2] All other Defendants should be dismissed.

B. Properties at Issue

Defendant asserts that Plaintiffs' Amended Complaint only incorporates one of the properties at issue, and therefore all other properties should be dismissed. Plaintiffs' Amended Complaint requests an injunction to protect the demolition of all of Plaintiffs' properties. Plaintiffs' attorney provided Defendant a list of additional properties by letter sent October 23, 2014. Because Defendant was notified through discovery of the properties upon which Plaintiffs' claims rest, Defendant's request that the Amended Complaint be dismissed on these grounds should be denied.

C. Standing

Defendant asserts that Plaintiffs Vada Smith and Elease Hill lack standing to bring claims of damage to their property.[3] Standing is "assessed under the facts existing when the complaint is filed." *Lujan v. Defenders of Wildlife*, 504 U.S. 560 (1992). The Supreme Court has recognized three requirements of Article III standing:

> First, the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of. . . . Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

United States v. Hays, 515 U.S. 737, 742-43 (1995) (quoting *Lujan*, 504 U.S. at 560-61). For

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[2]Notably, Plaintiffs have failed to contest Defendants' assertions as to this point in their response.

[3]Plaintiffs assert that Defendant has waived the right to contest standing. Lack of standing is a jurisdictional defect under Article III of the Constitution and therefore may not be waived.

injunctions, an additional inquiry is required, namely that Plaintiffs show that they are likely to suffer future injury by Defendant and that the sought-after relief will prevent that future injury. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983) ("'Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief.'" (quoting *O'Shea v. Littleton*, 414 U.S. 488, 495-96 (1974))); *see also Pederson v. Louisiana State Univ.*, 213 F.3d 858, 869 (5th Cir. 2000). Because Defendant has factually challenged Plaintiffs' standing, Plaintiffs must demonstrate standing by a preponderance of the evidence.

Plaintiffs allege that Vada Smith owns property located at 709 Nelson Street; 620 West 5th Street; "Ouachita," which describes property on 5th Street; and 636 Nelson Street. Defendant argues that Smith does not have standing to bring a claim on any of these properties.

For the 709 Nelson Street property, the Union County, Arkansas property records list Gracie Lee Wilbert c/o Marzella Smith, as owner. In discovery, Vada Smith admitted that she did not own that property. (ECF No. 68-7, p. 21-22). Plaintiffs, citing her affidavit, now contend that she has an equitable interest in the property derived through her tenant by the entirety interest in conjunction with her husband, the grandson of the late Gracie Lee Wilbert and the son of the late Marzella Smith. However, a party may not create an issue of fact by producing an affidavit which contradicts prior deposition testimony. *Camfield Tires, Inc. v. Michelin Tire Corp.*, 719 F.2d 1361, 1363 (8th Cir. 1983). Therefore, based upon Smith's prior deposition testimony, there is no issue of fact regarding Smith's lack of ownership of this property. Smith does not have standing to bring this lawsuit regarding the property located at 709 Nelson Street.

The Union County property records list Iola Hays as the owner of the 620 West 5th Street property. That structure has not been demolished, but the Iola Hays family has entered into a

payment agreement with Defendant to pay for its destruction. Smith admitted in her deposition that she does not have a deed for the property nor was a deed for the property ever recorded. She admitted that she had no evidence that would demonstrate she owned the property. (ECF No. 64-7, pg. 20). Smith attached to her affidavit a deed showing that she purchased the property. (ECF No. 83-3). However, the deed reveals that she purchased the property on February 13, 2015. Because standing is addressed at the time the Complaint is filed, and the Amended Complaint, which added Smith, was filed on April 22, 2014, Smith's subsequent purchase of the property does not cure her lack of standing. Accordingly, Smith does not have standing to bring a claim for property located at 620 West 5th Street.

Smith did not produce an address for the property known as "Ouachita" during her deposition. She described some properties apparently located on 5th Street. (ECF No. 68-7, p. 11-12). In Plaintiffs' response to Defendant's Motion for Summary Judgment, Plaintiffs identify these properties as 909 Ouachita and 911 Ouachita. In her affidavit attached to Plaintiffs' response, she claims an interest in "__ Ouachita Street," without filling in the blank made for the street address. (ECF No. 83-3). Plaintiffs may not put additional properties at issue in their Response to Defendant's Motion for Summary Judgment, after discovery has closed, without giving Defendant an opportunity to conduct discovery on those properties. Accordingly, Plaintiffs cannot bring a claim as it relates to any properties encompassed within the description "Ouachita," including 909 Ouachita and 911 Ouachita.

Finally, Smith asserts in her affidavit that she owns or has an interest as tenants in common in the property located at 636 Nelson. Defendant does not dispute her claim of ownership. Plaintiffs have demonstrated that the City condemned this property, and that Smith is likely to suffer future

injury should the Court not grant the relief sought. Accordingly, Plaintiffs have demonstrated that Smith has standing to assert a claim on the property located at 636 Nelson.

Plaintiff Elease Hill owns structures located at 321 Grove and 608 Nelson. She was sent notice by Defendant of its intent to demolish those properties, but they have not been demolished. Defendant argues that Hill does not have standing because she has not sustained personal injury. While she has not presently sustained actual injury to her property, she has demonstrated that, should the Court not award the injunction that she seeks, she will suffer imminent injury. Accordingly, Hill has standing to bring an action for an injunction on the properties located at 321 Grove and 608 Nelson.[4]

Accordingly, the following properties remain in this lawsuit: 636 Nelson owned by Vada Smith; 321 Grove and 608 Nelson owned by Elease Hill; and 703 Union owned by Carlton Newsome.[5]

III. Discussion

A. Summary Judgment Standard

A motion for summary judgment will be granted if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). To establish that a genuine issue of material fact exists, the

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[4]The parties have demonstrated that there may be a factual issue regarding the ownership of 321 Grove. Because the Court finds that Defendant is entitled to summary judgment on all claims related to the property located at 321 Grove, however, it is unnecessary to resolve those factual issues at trial.

[5]Defendant has not challenged the standing of Carlton Newsome to bring this suit in relation to his property, 703 Union, and the Court sees no reason that Newsome would not have standing.

nonmoving party must show that (1) there is a factual dispute, (2) the disputed fact is material to the outcome of the case, and (3) the dispute is genuine. *RSBI Aerospace, Inc. v. Affiliated FM Ins. Co.*, 49 F.3d 339, 401 (8th Cir. 1995). A dispute is genuine only if a reasonable jury could return a verdict for either party. *Id.*; *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986); *see also McLaughlin v. Esselte Pendaflex Corp.*, 50 F.3d 507, 510 (8th Cir. 1995). The party opposing a motion for summary judgment must rely on more than conclusory statements or allegations unsupported by facts. *Davis v. U.S. Bancorp*, 383 F.3d 761, 765 (8th Cir. 2004) (citation omitted).

B. Fourth and Fifth Amendment

Defendant argues that Plaintiffs' Fifth Amendment claims should be dismissed because all of those claims are properly analyzed under the Fourteenth Amendment. "The Due Process Clause of the Fifth Amendment prohibits the United States, as the Due Process Clause of the Fourteenth Amendment prohibits the States, from depriving any person of property without 'due process of law.'" *Dusenbery v. United States*, 534 U.S. 161, 167 (2002). Likewise, municipal governments are prohibited by the Fourteenth Amendment from denying citizens the equal protection of law. *Avery v. Midland Cnty., Tex.*, 390 U.S. 474, 480 (1968) ("A city, town, or county may no more deny the equal protection of the laws than it may abridge freedom of speech, establish an official religion, arrest without probable cause, or deny due process of law.").

Plaintiffs assert that their Amended Complaint contains a typographical error, and they instead intended to allege a violation of the Fourth Amendment. Since Plaintiffs concede that they did not intend to assert a Fifth Amendment claim, and all claims are contained within the Fourteenth Amendment claims, all Fifth Amendment claims should be dismissed.

In their Response to Defendant's Motion for Summary Judgment, Plaintiffs requested to

amend their Amended Complaint to allege Fourth Amendment violations. This request was not made in compliance with the local rules or the Federal Rules of Civil Procedure. *See* Local Rule 5.5(e). Moreover, though the Court allows amendments for correction of typographical errors, the difference between asserting a Fifth Amendment claim and a Fourth Amendment claim is substantive, and not a typographical error. Therefore, Plaintiffs' request to amend their Amended Complaint to allege a Fourth Amendment claim is denied. Plaintiffs' lawsuit is limited to arguments under the Fourteenth Amendment.

C. Fourteenth Amendment

Defendant next asserts that all Plaintiffs' Fourteenth Amendment claims fail. The Fourteenth Amendment to the United States Constitution provides as follows:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Court has interpreted Plaintiffs' Fourteenth Amendment claims as alleging both substantive and procedural due process violations as well as equal protection violations. Those claims which relate to the alleged arbitrary process used by the City in selecting properties to condemn and demolish, (ECF No. 28, ¶ 10), are claims regarding the City ordinances and processes and are, therefore, construed as substantive due process claims. *See Williams v. City of St. Louis*, 783 F.2d 114 (8th Cir. 1986). Those claims related to Plaintiffs' lack of notice of the condemnation proceedings, (ECF No. 28, ¶ 6), are construed as procedural due process claims. All claims related to the unequal treatment of Plaintiffs by the City are construed as equal protection claims. The Court will address each Fourteenth Amendment claim in turn.

i. Substantive Due Process

The Due Process Clause imposes certain substantive limitations on the power of state and local governments to deprive individuals of life, liberty, or property. Section 1983 establish a means by which people can enforce the constitution against a municipality. For a municipality to be held liable under § 1983, a plaintiff is required to identify either an official municipal policy or a widespread custom or practice that caused plaintiffs' injury. *See Bd. of Cnty. Comm'rs of Bryan Cnty., Okl. v. Brown*, 520 U.S. 397, 403 (1997); *Kinman v. Omaha Pub. Sch. Dist.*, 94 F.3d 463, 467 (8th Cir. 1996); *McGautha v. Jackson Cnty., Mo., Collections Dep't*, 36 F.3d 53, 55-56 (8th Cir. 1994). After identifying a policy or custom, there are two ways for a plaintiff to state a substantive due process claim. *See Weiler v. Purkett*, 137 F.3d 1047, 1051 (8th Cir. 1998). First, the municipality violates substantive due process when it infringes on "fundamental" liberty interests, without narrowly tailoring that interference to serve a compelling interest. *Reno v. Flores*, 507 U.S. 292, 301-02 (1993). Second, the municipality violates substantive due process when it engages in conduct that is so outrageous that it shocks the conscience or otherwise offends "judicial notions of fairness, [or is] offensive to human dignity." *Weimer v. Amen*, 870 F.2d 1400, 1405 (8th Cir. 1989) (quotations omitted).

In this case, the Court interprets Plaintiffs' allegations as asserting two separate substantive due process violations. First, they allege that Defendant's ordinances violate their substantive due process rights, which is a challenge to the municipality in its legislative capacity. *See, e.g., Griswold v. Connecticut*, 381 U.S. 479 (1965). Second, they assert that Defendant's processes in carrying out the ordinances violate their substantive due process rights, which is a challenge to the actions of the municipality in its executive capacity. *See, e.g., Rochin v. California*, 342 U.S. 165 (1952).

a. Challenge to City Ordinances

Plaintiffs assert that the City's ordinances are unconstitutional because they fail to specify how the City is to consider property for condemnation, fail to include a procedure to inform persons that the City is making a claim against their property, and fail to include any administrative remedy before an impartial decisionmaker. (ECF No. 83).[6]

A city's ordinances are officially promulgated policies for which a city may be held liable under § 1983. *Monell v. Dep't of Social Servs. of City of New York*, 436 U.S. 658, 693 (1978). However, Plaintiffs have not pointed the Court to a specific ordinance or language of an ordinance they intend to challenge. Rather, Plaintiffs have only generally asserted that the "City's Ordinances" violate their due process rights. Without a challenged ordinance, Defendant is unable to respond to Plaintiffs' allegations. Nonetheless, the Court has interpreted Plaintiffs' challenge to be to all ordinances produced by Defendant on the Court's docket. (ECF No. 68-9).

The Court interprets Plaintiffs' allegations as a facial challenge to the City's ordinances, and it finds that the ordinances do not violate due process. *See St. Croix Waterway Ass'n v. Meyer*, 178 F.3d 515, 519 (8th Cir. 1999) (facial constitutional challenge is a question of law and specific facts are not relevant). A facial challenge requires a showing that no set of circumstances exists under which the ordinance would be valid, or that the ordinance lacks any plainly legitimate sweep. *United States v. Stevens*, 559 U.S. 460 (2010). Plaintiffs allege that the ordinances do not give specific instructions on how the City is to carry out condemnations and, therefore, they are unconstitutional.

[6]The Amended Complaint does not contain a substantive due process claim for an unconstitutional ordinance. In fact, the Amended Complaint does not reference any ordinance of the City, but instead refers only to the City's processes in carrying out the condemnation processes. These allegations are found within Plaintiffs' Response to Defendant's Motion for Summary Judgment.

The lack of specificity in the ordinances is insufficient to establish that the ordinance is unconstitutional on its face, as there are a myriad of circumstances in which the City could carry out the ordinances that would satisfy constitutional standards. Accordingly, Plaintiffs' facial challenge to any ordinance is without merit and should be dismissed.

b. Challenge to "City Processes"

Plaintiffs also assert that the City denied them their substantive due process rights because "the City's . . . process, procedures, and criteria for condemnation are unreasonable, make no sense and are totally unjustified." (ECF No. 83, pg. 13). Defendant asserts that Plaintiffs have failed to put forth proof of a official policy or widespread custom that caused any constitutional violation, *Radloff v. City of Oelwein, Iowa*, 380 F.3d 344, 348 (8th Cir. 2004), and, even if they had put forth a policy or custom, any actions by the City fail to meet the "shock the conscious" standard.

In attempting to demonstrate a policy or custom of the City, Plaintiffs have presented evidence that the City Code Enforcement Officer recommended to condemn their properties and that the City Council voted to condemn their properties. In their affidavits, they assert that their properties were not in violation of the City Code or they could have remedied the properties to meet City Code if they would have been given the opportunity.

Plaintiffs' evidence does not demonstrate the City utilized a "process" that constitutes an official policy for which it may be held liable for violating their constitutional rights. Plaintiffs have presented no evidence showing a policy or process that the City uses to select properties to condemn, and the Court remains unclear which official policy or processes Plaintiffs are complaining. *Chambers v. St. Louis Cty.*, 247 Fed. Appx. 846, 848 (8th Cir.2007) (stating that the "district court did not err in dismissing the claims against the County" because plaintiff's "speculative allegations

about an apparent policy to condone and conceal police brutality were merely conclusory"). Plaintiffs have not described any process, or even made speculative allegations of any process, but have instead merely conclusory stated that an unconstitutional process exists. Moreover, this Court cannot independently locate anything in the record that would allow a judge or jury to find that the City violated Plaintiffs' constitutional rights through the utilization of an official policy.

Plaintiffs' evidence also fails to demonstrate a "widespread custom or practice" of Defendant authorizing the alleged unconstitutional actions. Plaintiffs' evidence, viewed in a light most favorable to them, demonstrates that the City condemned their property when it was not in violation of City Code. Plaintiffs have presented no evidence of any other similar occurrence such that any policy or custom could be considered "widespread." *Smith v. Watkins*, 159 F.3d 1137, 1138 (8th Cir. 1998) (two specific complaints and various rumors about an officer were not sufficient to establish a policy or custom of condoning unconstitutional conduct); *Jenkins v. County of Hennepin, Minn.*, 557 F.3d 628, 634 (8th Cir. 2009) (testimony from nurse that she "perceived a variety of shortfalls" in Detention Center's provision of medical care was insufficient to establish the pervasive pattern of constitutional violations required to sustain liability); *FDIC v. Bell*, 106 F.3d 258, 263 (8th Cir. 1997) (arguments or allegations, without more, are insufficient to defeat properly supported summary judgment motion). This evidence of only four properties is insufficient to demonstrate to the Court a "widespread custom or practice" under which a municipality may be held liable under § 1983. *See Brumley v. Cnty. of Garland*, 2007 WL 1229340 (W.D. Ark. April 25, 2007) (requiring Plaintiff to demonstrate a custom or policy at summary judgment stage); *Bush v. City of Scranton*, 2013 WL 5465334, *9-10 (M.D. Penn. Sept. 30, 2013).

Even if the Court found Plaintiffs' allegation of unconstitutional "processes" in carrying out

the condemnation procedures sufficient to demonstrate an official policy or a widespread custom, the Court agrees with Defendants that Plaintiffs' substantive due process claim still fails as their allegations do not "shock the conscious." To establish a violation of substantive due process rights by executive action of the City Council, Plaintiffs must show (1) that the official violated one or more fundamental constitutional rights, and (2) that the conduct was shocking to the "contemporary conscience." *County of Sacramento v. Lewis*, 523 U.S. 833, 847 n.8 (1998); *see also South Commons Condominium Ass'n v. Charlie Armet Trucking, Inc.*, 775 F.3d 82, 91 (1st Cir. 2014) (requiring high conscious-shocking allegations to state a substantive due process claim for demolishing buildings).

Assuming Plaintiffs allege a protected interest, it cannot be said that the Defendant's conduct was so arbitrary, egregious, or irrational that it rose to the level of "shocking the conscious." *See County of Sacramento*, 523 U.S. at 846; *see Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 542 (2005). Plaintiffs assert that Defendant's conduct "shocks the conscious" because the condemnation process does not protect their "federal constitutional rights," the notice procedure does not apprise property owners of the specific reasons their property is in violation, and the process does not notify property owners of an administrative remedy in which they can be heard.[7]

Plaintiffs have not provided any legal authority for their argument that the City's condemnation of properties, in accordance with the valid City Ordinances, shocks the conscious. Plaintiffs' assertions that the City's actions are "arbitrary" are not supported by any proof. Plaintiffs

[7]Plaintiffs also point to the fact that the 709 Nelson property was razed as "conscious shocking." Because it has been determined that the 709 Nelson property is not before the Court, the Court will not address any arguments relating to that property.

do not contest the City's authority to regulate unsanitary conditions within the municipality's boundaries. Ark. Code Ann. § 14-54-901. Nor do they contest the City's authority to remove any building or house that has become dilapidated, unsightly, unsafe, or unsanitary. Ark. Code Ann. § 14-56-203. The Court finds that the actions taken by the City do not rise to the high level of "shocking the conscious."

Accordingly, Plaintiffs have failed to meet their burden to demonstrate that there is a genuine disputed issue of material fact regarding their substantive due process claims. All substantive due process claims should be dismissed.

ii. Procedural Due Process

Defendant asserts that it is entitled to summary judgment on Plaintiffs' procedural due process claims for two reasons: (1) Plaintiffs have waived their claims by failing to exhaust state administrative remedies; and (2) Plaintiffs received the process due to them. Plaintiffs respond that Defendant has not demonstrated that there are state administrative remedies available. Moreover, they assert that the process given to them was deficient because the City did not apprise them of the opportunity to be heard.

a. Failure to Exhaust

A procedural due process claim "is not complete when the deprivation occurs; it is not complete unless and until the State fails to provide due process." *Zinermon v. Burch*, 494 U.S. 113, 126 (1990). Plaintiffs must exhaust all state remedies available to them before bringing a § 1983 claim, including judicial remedies. *See Wax 'n Works v. City of St. Paul*, 213 F.3d 1016, 1019 (8th Cir. 2000); *Corder v. City of Sherwood*, 579 F.Supp. 1042 (E.D. Ark. 1984).

Under Arkansas Code Annotated § 14-56-425 and Arkansas District Court Rule 9(f), a party

may appeal a decision of a City Council within thirty days of the council's decision to an Arkansas Circuit Court. *Ingram v. City of Pine Bluff*, 133 S.W.3d 382 (Ark. 2003). Plaintiffs admit that they did not attempt to appeal the decision of the City Council. However, before they are required to exhaust their state remedies, Plaintiffs must first be given proper notice of the proceedings and the adverse decision.

In this case, Newsome received actual notice that his property at 703 Union had been voted to be condemned by the City Council. The resolution was sent, certified mail, to his home (ECF No. 68-4), he received the resolution (ECF No. 68-10), and he subsequently sent an inquiry to the mayor regarding the property (ECF No. 68-10, Ex. 1). Accordingly, Newsome had actual knowledge that his property had been condemned and failed to exhaust his remedies. Summary judgment for Defendant should be granted with respect to Newsome's procedural due process claim.

Resolutions were also sent, via certified mail, to Hill. (ECF No. 68-4). Hill's notices of the resolutions regarding 608 Nelson and 321 Grove were mailed to her home in El Dorado, but were returned undeliverable. (ECF No. 68-4; ECF No. 68-6). While Plaintiffs assert that the City's list of homeowners is out of date, there is no dispute that Defendant attempted to contact Hill by mail, at her address, regarding the resolution to condemn her properties. In fact, both notices were sent to the address Hill provided during her deposition as her home address. It is undisputed that the City Council's resolutions condemning the properties at issue were published in the local newspaper. (ECF No. 68-3). It is also undisputed that the City's Code Enforcement Officer posted at the properties the resolutions condemning the properties. (ECF No. 68-1). Accordingly, there is no disputed issue of fact as to whether the means taken by the City to notify Hill of the City Council's resolutions were adequate, and she should have exhausted her remedies at the state level. The Court

finds that Defendant's Motion for Summary Judgment regarding Hill's procedural due process claims should be granted.

Finally, disputed issues of fact remain as to when and how Smith received notice that the property at 636 Nelson had been voted to be condemned by the City Council. There is no evidence that Smith was mailed a notice regarding the condemnation of that property. The Court finds that there is a disputed issue of fact as to whether notice was delivered to Smith in a manner most reasonably calculated to apprise her of the Council's decision such that she would have been able to exhaust her state remedies. Accordingly, Defendant's Motion for Summary Judgment on Smith's procedural due process claim regarding 636 Nelson due to failure to exhaust remedies should be denied.

b. Procedural Process given Smith

Next, Defendant asserts that it afforded adequate procedural due process to Smith.[8] Specifically, it asserts that because Smith had written notice to abate the hazard, an opportunity to appear before the City Council considering the condemnation, and an opportunity to appeal the decision, she was afforded the process due to her. Smith claims the City denied her the process due to her because it gave her insufficient notice. Smith claims that by failing to give her notice of the reasons for the condemnation of the property, using an outdated homeowners list, and not informing her of the date and time of the hearing, the City has denied her procedural due process.

"The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). The Court must

[8]Defendant made this argument with respect to all Plaintiffs, but the Court has only analyzed it with respect to Plaintiff Smith since the other two Plaintiffs' procedural due process claims have been dismissed for failure to exhaust.

determine whether the City gave Smith "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the [proceeding] and afford them an opportunity to present their objections." *Mullane v. Cent. Hannover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). The record does not contain any evidence that Smith was sent or received notice regarding the condemnation hearing before the City Council regarding her 636 Nelson property. *See* (ECF No. 68-1&2). Accordingly, disputed issues of fact remain and Smith may proceed on her procedural due process claim regarding the 636 Nelson property.

iii. Equal Protection

Defendant next asserts that Plaintiffs cannot establish the elements of their equal protection claim and, therefore, Defendant is entitled to summary judgment. Plaintiffs assert that they have provided evidence to create a genuine issue of material fact on their equal protection claim. The evidence they have identified is two properties that are in violation of the City Code that have not been condemned.

The Equal Protection Clause prohibits government officials from selectively applying the law in a discriminatory way. *See Snowden v. Hughes*, 321 U.S. 1, 8 (1944); *Batra v. Board of Regents of Univ. of Neb.*, 79 F.3d 717, 721 (8th Cir. 1996). Plaintiffs have asserted that they are African American and that their properties are located in areas where the majority of residents are African American. They assert that there are two properties in "predominately white and business community areas" that have not been considered for condemnation. (ECF No. 83, pg. 18-19).

Plaintiffs must demonstrate sufficient evidence that would allow a reasonable jury to infer that it is the policy or custom of the Defendant to treat these Plaintiffs different than other similarly situated individuals, that there is an unlawful intent to discriminate against them for an invalid

reason, and that the Plaintiffs were injured by the policy or custom. *See Ricketts v. City of Columbia, Mo.*, 36 F.3d 775 (8th Cir. 1994) (analysis in the context of city's treatment of domestic abuse cases); *Batra v. Bd. of Regents of University of Nebraska*, 79 F.3d 717, 721 (8th Cir. 1996). To prevail on an equal protection claim, "[p]roof of racially discriminatory intent or purpose is required." *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 264-65 (1977). Plaintiffs have presented no evidence to prove such racial animus.

Plaintiffs have not satisfied their burden regarding their equal protection claim. First, the Court finds that Plaintiffs have failed to establish a genuine issue of material fact that there was a policy, custom, or practice of Defendant resulting in discrimination against the Plaintiffs on the basis of their race. Plaintiffs' allegations are vague as to how Defendant carries out its duties discriminatorily. Plaintiffs allege only that their property was wrongfully condemned and that the actions violated their equal protection rights. They do not allege any facts or any reason as to why the City condemned their properties and not others. They point to two other properties which have not been condemned, but give no evidence of who owns these properties or why they have not been condemned. It is also unclear from Plaintiffs' evidence how long these properties have been vacant, whether they have been boarded up appropriately, or whether they are in violation of the Code. There is also no indication that these are similarly situated buildings. Plaintiffs have presented no evidence that Defendant irrationally classifies certain properties into different groups when considering condemnation, or that there is any underlying intent to discriminate. Plaintiffs have failed to present sufficient evidence to dispute that the City's actions were anything more than a subjective, discretionary decision carried out in accordance with the City's ordinances.

Plaintiffs also cite to Plaintiff Newsome's allegation, in his affidavit, that he has "been treated

differently from other property owners who are similarly situated because the City arbitrarily chose to bill [him] for destroying [his] property at a cost of $3.00 per square foot as opposed to $1.50 per square foot it sometimes chooses to charge to other property owners." (ECF No. 83-4). This is the first time Plaintiffs make any allegation regarding the subsequent processes of payment for demolition of their property. Plaintiffs made no indication in their Complaint or Amended Complaint that they sought to challenge Defendant's processes to charge Plaintiffs for demolition of property, and there is no evidence in the record regarding this claim.

Even if this claim was properly pled, it is no more than a mere allegation, and is insufficient to support the Plaintiffs' burden on summary judgment. *See Marquez v. Bridgestone/Firestone, Inc.*, 353 F.3d 1037, 1038 (8th Cir. 2004) (per curiam) (to survive summary judgment, nonmoving party must substantiate allegations with more than conjecture or speculation). Plaintiffs have not identified any other person who had a house condemned and demolished by Defendant who was charged a different amount than Newsome. This evidence does not create a genuine dispute as to whether Defendant employs a policy or custom that would support Plaintiffs' equal protection claim.

Accordingly, there is no disputed issue of material fact sufficient to reach a jury on Plaintiffs' equal protection claim, *see Batra*, 79 F.3d at 721 ("[C]ourts have consistently required equal protection plaintiffs to allege and prove something more than different treatment by government officials"), and summary judgment for Defendant is appropriate.

IV. Conclusion

For the reasons stated herein, Defendant's Motion for Summary Judgment (ECF No. 68) is **GRANTED IN PART** and **DENIED IN PART**. The Court holds that (1) the proper Defendant in this lawsuit is the City of El Dorado and all other named Defendants are hereby dismissed;

(2) Plaintiffs do not have standing to bring a claim as to the properties located at 709 Nelson or 620 West 5th Street and those claims are hereby dismissed; (3) Plaintiffs have not sufficiently brought a claim as to any properties under the description "Ouachita," and those claims are hereby dismissed; (4) All Fifth Amendment claims brought by Plaintiffs are hereby dismissed; (5) Plaintiffs have not sufficiently alleged a Fourth Amendment claim; (6) Defendant's Motion for Summary Judgment is **GRANTED** with respect to all of Plaintiffs' substantive due process claims, Hill and Newsome's procedural due process claims, and all of Plaintiffs' equal protection claims. The only claim remaining in this lawsuit is Smith's procedural due process claim regarding the property at 636 Nelson, and as to that claim, Defendant's Motion for Summary Judgment is **DENIED**.

IT IS SO ORDERED, this 29th day of September, 2015.

/s/ Susan O. Hickey
Susan O. Hickey
United States District Judge

PETITION TO REDEEM

JOHN THURSTON
COMMISSIONER OF STATE LANDS
STATE OF ARKANSAS
500 Woodlane St, Suite 109, Little Rock, AR 72201
501-683-3053 Fax: 501-324-9421

Sale Date: 04/14/2015
Sale Number:
Parcel Number: 23N0150004100

Date: 01/27/2015 By: dryder Code: 29-4 Year Forfeited: 2010 County: PULASKI

According to the records of the Commissioner of State Lands Office CONVENT CORP was the owner of the following described real property at the time the same was forfeited and certified to the State of Arkansas for the non-payment of taxes, to wit:

Description: "6615 HIGHWAY 70 N LITTLE ROCK, AR 72117" PT NW1/4 SE1/4 FROM THE INTERSECTION OF NLN OF HWY 70 WITH TH WLN OF SE RUN E'RLY AL HWY 100' TO POB TH CONT E'RLY AL HWY 100' TH N TO SLN OF CR&P RY TH WRLY AL RY TO A PT DIRECTLY N OF POB S TO BG Section: 28 Township: 2N Range: 11W Acreage: 0.5 Lot: Block: City: NORTH LITTLE ROCK Addition: SD: 4

These amounts are valid for 30 days, unless the parcel has been sold or additional fees have accrued.

SEE OTHER SIDE FOR INSTRUCTIONS
THIS SECTION TO BE COMPLETED BY THE PETITIONER

ALL PETITIONERS MUST COMPLETE ALL OF THIS FORM. INCOMPLETE PETITIONS WILL BE RETURNED

Name in which redemption deed should be issued.

Claude

If the owner is different than the name printed on this form, send copies of recorded deeds showing how the title transferred from the name listed on this form to the new owner.

Tax statement will be mailed here:

c/o Claude Skelton
19 Lorian Drive
Little Rock AR 72212

Address: Redemption Deed will be mailed here:

TAXES	**2010 - 2013**	**$6,997.79**
Interest		**$1,198.62**
Penalty		**$699.78**
County Costs		**$4.50**
Recording Fee		**$20.00**
State Costs	Commissioner of State Lands	**$168.82**
Total Due		**$9,089.51**

RECEIVED

All payments made within 60 days PRIOR TO the sale date or during the Redemption Period following the sale date must be CASH, MONEY ORDER OR CASHIERS CHECK

I state that the foregoing information is true and correct to the best of my knowledge and that I am the owner of the above described property, or I am the owner's authorized agent to redeem the above-described property.

Record Owner Signature: Claude W Skelton

Authorized Agent Signature:

Printed Name

Company Name

Subscribed and sworn before me this 2nd *day of* February, 20 15

Nancy W Branson
Signature of Notary Public
My commission expires Aug. 12, 2024

NANCY W. BRANSON
PULASKI COUNTY
NOTARY PUBLIC - ARKANSAS
My Commission Expires August 12, 2024
Commission No. 12400018

Mail to:
CONVENT CORP
19 LORIAN DR
LITTLE ROCK, AR 72212

EXHIBIT
exhibit D

REDEMPTION DEED NO. 334286

JOHN THURSTON
COMMISSIONER OF STATE LANDS
STATE OF ARKANSAS
Issued under the provisions of Act 151 of 1891, Act 626 of 1983 and Act 814 of 1987

THE STATE OF ARKANSAS
To All Whom these Presents Shall Come ~ GREETINGS
KNOW YE THAT, WHEREAS The following described lands situated in the County of **PULASKI** in the State of Arkansas, to Wit
Description: SEE ATTACHED

Parcel Number: **23N0150004100** Year Forfeited **29-4 2010** Receipt #: **398103**

were certified to the Commissioner of State Lands, by the County Collector for the non-payment of taxes for the years hereinbelow set forth; and that the taxes, penalties, interest and cost outline below have been paid to the Commissioner of State Lands;

AND WHEREAS **CONVENT CORP**
19 LORIAN DRIVE
LITTLE ROCK, AR 72212

claiming to be the owner(s) of said real property, filed a petition to redeem duly verified according to the law, showing such ownership.

NOW THEREFORE, I, JOHN THURSTON, Commissioner of State Lands within the State of Arkansas, for and in consideration of **$9,089.51** so paid and by virtue of the authority in me vested by law, do hereby release and quitclaim unto the said **CONVENT CORP** and their heirs and assigns forever all right, title and interest the State of Arkansas acquired under any forfeiture, sale or condemnation for taxes.

WITNESS MY HAND AND OFFICIAL SEAL **02/05/2015**

Taxes	2010 - 2013	$6,997.79
ID Taxes		$0.00
Interest		$1,198.62
Penalty		$699.78
County Costs		$24.50
State Costs		$168.82
Total Paid:		$9,089.51

John Thurston
Commissioner of State Lands

kwilliams
Deputy Commissioner of State Lands

Deed Mailed to:
CONVENT CORP
19 LORIAN DRIVE
LITTLE ROCK, AR 72212

Commissioner of State Lands
CERTIFIED COPY

REDEMPTION DEED NO. 334286

JOHN THURSTON
COMMISSIONER OF STATE LANDS
STATE OF ARKANSAS
Issued under the provisions of Act 151 of 1891,
Act 626 of 1983 and Act 814 of 1987

LEGAL DESCRIPTION ATTACHMENT

County: PULASKI

Parcel #: 23N0150004100 Year Forfeited: 2010 Code: 29-4

Property Description:

6615 HIGHWAY 70 N LITTLE ROCK, AR 72117 PT NW1/4 SE1/4 FROM THE INTERSECTION OF NLN OF HWY 70 WITH TH WLN OF SE RUN E'RLY AL HWY 100' TO POB TH CONT E'RLY AL HWY 100' TH N TO SLN OF CRI&P RY TH W'RLY AL RY TO A PT DIRECTLY N OF POB S TO BG Section: 28 Township: 2N Range: 11W Acreage: 0.5 Lot: Block: City: NORTH LITTLE ROCK Addition: SD: 4

State Capitol Building • 500 Woodlane Street, Suite 109 • Little Rock, Arkansas 72201
501-324-9422 • FAX 501-324-9421

EXHIBIT 289

John Thurston
Commissioner of State Lands
State Of Arkansas

Receipt Only

Receipt Number: 398103

Receipt Date: 2/03/2015

Name: CLAUDE WILLIAM SKELTON, TTTE
19 LORIAN DR
LITTLE ROCK, AR 72212-2660

Payment Type: Check
Check Number: 1001

Receipt Type: Redemption Payment
COSL User Id: cauqustine

Walkin Receipt #: 17970

County	Year	Code	Parcel #	Amount
PULA	2010	29-4	23N0150004100	$9,089.51

Receipt Total: $9,089.51

State Capitol Building • 500 Woodlane Street, Suite 109 • Little Rock, Arkansas 72201
501-324-9422 • FAX 501-324-9421

John Thurston
Commissioner of State Lands
State Of Arkansas

Receipt Only

Walk-in Receipt Number: 17970

Receipt Date: 02/02/2015

Name: CLAUDE WILLIAM SKELTON, TTTE
19 LORIAN DR
LITTLE ROCK, AR 72212-2660

Payment Type: Check
Check Number: 1001

Receipt Type: Redemption Payment
COSL User Id: caugustine

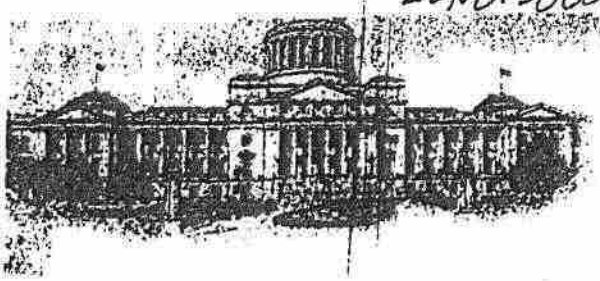
County	Year	Code	Parcel Number	Amount
PULA	2010	29-4	23N0150004100	$9,089.51

Receipt Total: $9,089.51

State Capitol Building • 500 Woodlane Street, Suite 109 • Little Rock, Arkansas 72201
501-324-9422 • FAX 501-324-9421

EXHIBIT A91

23N015000 4100



ARKANSAS
SECRETARY OF STATE
Mark Martin

Search Incorporations, Cooperatives, Banks and Insurance Companies

Printer Friendly Version

LLC Member Information is now confidential per Act 865 of 2007

Use your browser's back button to return to the Search Results

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For service of process contact the Secretary of State's office.

Corporation Name	CONVENT CORPORATION
Fictitious Names	
Filing #	100101946
Filing Type	For Profit Corporation
Filed under Act	Dom Bus Corp: 956 of 1987
Status	Good Standing
Principal Address	6515 HWY 70 NORTH LITTLE ROCK, AR 72117
Reg. Agent	CLAUDE SKELTON
Agent Address	19 LORIAN DR LITTLE ROCK, AR 72212
Date Filed	02/09/1993
Officers	MICHAEL ROSEN , Incorporator/Organizer CLAUDE SKELTON , President
Foreign Name	N/A
Foreign Address	
State of Origin	N/A
Purchase a Certificate of Good Standing for this Entity	Pay Franchise Tax for this corporation

CLAUDE WILLIAM SKELTON TTTE
U/A DTD 01/11/1995
CLAUDE WILLIAM SKELTON REV TR
19 LORIAN DRIVE
LITTLE ROCK, AR 72212-2850

1001
62-15/311

2-02-2015
Date

Pay to the Order of COMMISSIONER OF STATE LANDS $ 9089.51/64

Nine thousand eighty nine + 51/100 Dollars

E.C. ☐ Edward Jones

For 23N015000 4100

⑆031100157⑆ 18781327241" 1001

IN THE CIRCUIT COURT OF PULASKI COUNTY
12th DIVISION

CONVENT COPRORATION **PLAINTIFF**

v. **CASE NO. 60CV-13-1398**

CITY OF NORTH LITTLE ROCK, ARKANSAS, et al. **DEFENDANTS**

BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

COMES NOW Defendants, by and through their attorneys, Deputy City Attorney Marie-Bernarde Miller and Assistant City Attorney Michael A. Mosley, and for their Brief in Support of Motion for Summary Judgment, state:

I. INTRODUCTION

The Plaintiff sued the City of North Little Rock, Arkansas, the Mayor of the City of North Little Rock, each council member ("alderman" or "aldermen") of the City of North Little Rock, the Director of North Little Rock Code Enforcement and a North Little Rock Code Enforcement officer, all in their individual and official capacities. In discussions with Plaintiff's Counsel, the only proper Defendant here is the City and the remaining Defendants should be summarily dismissed.[1]

The Plaintiff's Reinstated Complaint for Declaratory Judgment requests this Court to "enter a judgement finding that Chapter 8, Article 1, Section 7 of the City's Code is unconstitutional and, therefore, invalid and that the City's condemnation procedures fail to provide constitutionally required due process prior to property condemnations." Complaint, ¶ 25. The

[1] Alternatively, if the Plaintiff does not agree that the only proper Defendant is the City of North Little Rock, the Defendants again assert their entitlement to various immunities as already argued in Defendants' prior Brief in Support filed with this Court on June 9, 2014, beginning at page 27. *See Brief in Support of Response of 6/9/2014 field of record*, at pp. 27-35. Those arguments are incorporated by reference herein as if repeated word for word pursuant to Ark. R. Civ. P. 10(c).

relevant provisions of the Code are attached hereto via affidavit of the Deputy City Clerk as ***Exhibit A***. Plaintiff, additionally, seeks "a permanent injunction directing that the Defendants are prohibited from destroying any property that has been condemned pursuant to Chapter 8, Article 1, Section 7 of City's Code (Condemnation), from condemning any additional property or otherwise enforcing Article 1, Section 7 of the City's Code, or taking any action to file or collect liens for the demolition of properties." Complaint ¶ 26.

Plaintiff is *only* making facial constitutional challenges to Chapter 8 of the City Code. That is, Plaintiff is not making as-applied challenges regarding the condemnation of Plaintiff's structure and, in any event, could not as that issue was decided in an Order by Judge Brantley on May 11, 2017. The Plaintiff's claims are without merit. For reasons explained in detail below, Defendants are entitled to summary judgment as a matter of law.

II. STANDARD OF REVIEW

As the Court is aware, on ruling on a motion for summary judgment, the facts must be taken in the light most favorable to the party resisting the motion, here the Plaintiff. *Mitchell v. Lincoln*, 366 Ark. 592, 596-97, 237 S.W.3d 455 (2006). However, in this matter, the Court has already ruled there are no genuine issues of material fact in denying Plaintiff's request for a jury trial. The only issues here are legal issues for the Court to decide and, thus, summary judgment is appropriate.

III. BACKGROUND

While this matter is only a facial—not an as-applied—challenge to the City's Code provision, the following background is relevant.

A. Facts Related to Plaintiff's Structure

In response to complaints the North Little Rock Code Enforcement Department received concerning a structure on Plaintiff's property, located at 6615 Highway 70 (the "Property") in North Little Rock, Arkansas, Officer Felecia McHenry conducted an exterior inspection of the

structure. After her inspection, she determined it was a danger to the public health and welfare and "red-tagged" the property. She notified the Plaintiff of her determination about the structure on November 14, 2012, and informed Plaintiff that its property would be subject to consideration for condemnation by the North Little Rock City Council at a Council meeting. The condemnation was placed on the meeting agenda for February 25, 2013, for the City Council's consideration.

Thereafter, Plaintiff's Attorney appeared before the City Council on behalf of his client for the meeting on the possible condemnation. At that time, Plaintiff's Attorney discussed, amongst numerous topics, (1) his client's position; (2) its unwillingness to enter into a rehabilitation agreement absent the City Council rescinding the scheduled condemnation vote; (3) the concession that the building was damaged, had structural deficiencies, including holes in the roof and rotting ceilings where people had fallen through, and additional damage allegedly caused by vandals; (4) that his client was unaware of the status of the structure until Officer McHenry had notified it; and (5) the pertinent rules governing the process of appealing the Council's decision to condemn his client's property. After discussion and questions were asked and answered, the City Council voted to condemn the structure. *See* attached hereto as ***Exhibit B***, Transcript Excerpt of City Council Meeting re: Convent Corp, February 25, 2013.

On March 27, 2013, Convent Corporation filed an appeal of the North Little Rock City Council's decision to condemn the structure in Pulaski County Circuit Court. Simultaneously and in the same court, Convent Corporation filed a complaint against the City of North Little Rock, Mayor Joe Smith, Aldermen Debi Ross, Beth White, Linda Robinson, Maurice Taylor, Steve Baxter, Bruce Foutch, Murry Witcher, and Charlie Hight both individually and in their official capacities, Tom Wadley, individually and in his official capacity as Director of North Little Rock Code Enforcement, and Officer Felecia McHenry, individually and in her official capacity as a

North Little Rock Code Enforcement Officer alleging constitutional claims under state and federal law.

On May 11, 2017, Special Circuit Court Judge Brantley entered a ruling that the structure was a nuisance. *See Order of Judge Brantley*, p. 2, ¶ 2. Judge Brantley also ruled that the City Council meeting satisfied Plaintiff's right to due process: "a city council meeting where it is decided whether something is or is not a nuisance does not look very much like a hearing in court, and the Court does not think that is required." *Id.* "Plaintiff was provided an opportunity to comment and, thereafter, the City Council decided that the Property was a nuisance." *Id.* "The Court does not find the decision of the City Council to be arbitrary and capricious." *Id.*

Thus, Plaintiff's as-applied challenge regarding due process has been decided, leaving only the current facial challenge to the City's Property Maintenance Code. That is the law of the case.

B. City's Property Maintenance Code at Issue

The City has enacted a property maintenance code, provisions of which Plaintiff contends are unconstitutional. Specifically, Chapter 8, Section 7 is alleged to be facially invalid—that is the only claim remaining before the Court. The Code states in pertinent part:

> 1.7.1 Authority. In addition to other penalties provided herein but not in lieu thereof, the City Council for the City of North Little Rock may condemn structures through the passage of a resolution, after a public hearing that shall include:
>
> (A) A description of the structures; (B) The owner or owners of the structures; (C) Findings that the structures are unfit for human occupancy, or otherwise detrimental to the life, property or safety of the public.

. . .

> 1.7.3 Notices. The Code Enforcement Department shall be responsible for publication, mailing or delivery of all notices required to condemn structures.
>
> 1.7.3.1 Prior Notice of Proposed Condemnation. The owner of the structure will be provided notice of any proposed condemnation action no less than ten (10) calendar days prior to consideration by City Council. If appropriate, any and all lien holders

will also be provided notice of any proposed condemnation action no less than ten (10) calendar days prior to consideration by City Council. Notice will be provided by the method described in subsection 1.6.2.

. . .

Because Section 1.7.3.1 incorporates the method of notice prescribed by Section 1.6.2, it is necessary to include that section here as well. It states:

1.6.2 Method of service. Administrative notices (such as a Notice of Violation) may be issued by any person authorized under Ark. Code Ann. § 14-54-903 by posting on the subject property and:

(A) By personal service; (B) By regular mail or certified mail, return receipt requested; or
(C) When the identity or whereabouts of a person is unknown, by weekly publication in a newspaper having general circulation throughout the City for two (2) consecutive weeks.

1.6.2.1 Notice by Mail. Notice by mail shall be sent to the owner's address of record with the applicable county treasurer or collector. When sent to the proper address with proper postage, notice by mail shall be deemed properly served without regard as to whether the owner or occupant accepted the mail or the mail was otherwise returned.

Then, as to the destruction of a nuisance property, Section 7 continues:

1.7.4 Destruction and Removal. Condemned structures shall be destroyed and removed from the premises.

1.7.4.1 Destruction and Removal by Owner. The owner of any structure that has been condemned by resolution of City Council is permitted to cause, at his or her own expense, to have the same destroyed and removed within thirty (30) days after the City has provided notice under subsection 1.7.3.2. No person is allowed to repair or refurbish a condemned structure without an agreement approved by City Council that guarantees repairs will be done in a proper and timely fashion. It is the owner's responsibility to obtain a sponsor for any legislation that would allow the repair or refurbishment of a condemned structure.

1.7.4.2 Destruction and Removal by City. If the condemned structure has not been torn down and removed, or otherwise abated, within 30 days after the notice requirements of subsection 1.7.3.2 have been met, then the Senior Code Enforcement Officer shall supervise the removal of any such structure in such a manner as deemed appropriate under existing circumstances. If the structure has a

> substantial value, it or any saleable materials thereof may be sold at public sale to the highest bidder for cash using procedures provided by law. The costs of removal will be presented to City Council for certification and collection from the owner.

See Exhibit A, Affidavit of Deputy City Clerk Talor Shinn, authenticating Chapter 8 of North Little Rock Municipal Code.

IV. DISCUSSION

A. Municipal Authority and Presumption of Constitutionality

The Arkansas General Assembly has granted cities of the first class the power to order, remove, and/or raze nuisances to protect the public health, safety, or welfare. Ark. Code Ann. § 14-56-203; *see also* Ark. Code Ann. § 14-54-103(1). Therefore, the North Little Rock Municipal Code, Chapter 8, is enacted by explicit authority of the Arkansas General Assembly. Furthermore, ordering, removing, and/or razing nuisances is a valid exercise of the City's police power in furtherance of the public health and welfare. *See generally Springfield v. City of Little Rock*, 226 Ark. 462, 290 S.W.2d 620 (1956). Additionally, the Legislature has authorized cities of the first class—which North Little Rock is—"to prevent, abate, or remove nuisances of every kind, and to declare what are nuisances, and also to punish the authors or continuers thereof by fine or imprisonment, or both." Ark. Code Ann. § 14-54-104(4)(D).

Indeed, where the power being exercised by a city is effected via a public health and safety ordinance, due to an explicit State legislative enactment, ". . . municipal authorities have a wide discretion in such matters." *Goldman & Co. v. City of North Little Rock*, 220 Ark. 792, 796, 249 S.W.2d 961, 963 (1952); *See also City of Hot Springs v. Curry*, 64 Ark. 152, 41 S.W. 55, 57 (1897). In *Goldman & Co.*, the Court reiterated: "'Every intendment is to be made in favor of the lawfulness of the exercise of municipal power making regulations to promote the public health and safety, and it is not the province of the courts, except in clear cases, to interfere with the

exercise of the power reposed by law in municipal corporations for the protection of local rights and the health and welfare of the people of the community.'" 220 Ark. at 797 (quoting *Dobbins v. City of Los Angeles*, 195 Ark. 223, 235-36 (1904)). The Court said: "'there is a presumption in favor of the ordinance, and one who challenges its validity, alleging it to be arbitrary, discriminatory, and unreasonable, should make it so appear by clear and satisfactory evidence.'" *Id.* at 796 (internal citation omitted) (emphasis added).

The Court should only review whether a municipal enactment has a rational basis, i.e., is arbitrary and capricious. "'A classification does not fail rational-basis review because it is not made with mathematical [precision] or because, in practice it results in some inequality.'" *Phillips v. Town of Oak Grove*, 333 Ark. 183, 197, 968 S.W.2d 600, 607 (1998).

B. The Rules Regarding Facial Challenges

Plaintiff only makes a facial challenge to the Municipal Code quoted above as its as-applied challenge has already failed. "A facial challenge is [generally a constitutional] attack on a statute itself as opposed to a particular application." *City of Los Angeles v. Patel,* 135 S.Ct. 2443, 2449 (2015). In other words, "[a] facial attack tests a law's constitutionality based on its text alone and does not consider the facts or circumstances of a particular case." *United States v. Marcavage,* 609 F.3d 264, 273 (3d Cir. 2010). "Under the most exacting standard the [Supreme] Court has prescribed for facial challenges, a plaintiff must establish that a ***'law is unconstitutional in all of its applications***.'" *Patel,* 135 S.Ct. at 2451 (quoting *Washington State Grange v. Washington State Republican Party,* 552 U.S. 442, 449 (2008)) (emphasis added). When assessing whether a code meets this standard, a court must consider only applications of the code within its reach. *See Patel,* 135 S.Ct. at 2451.

Local legislative acts enjoy a "presumption of rationality that can only be overcome by a clear showing of arbitrariness and irrationality." *Hodel v. Indiana,* 452 U.S. 314, 331–32 (1981). There, the Court noted "[t]his is a heavy burden . . . ." *Id.* at 332. Discussing *Hodel*, one court said: "This is a difficult presumption to overcome." *Smith v. Lower Merion Township,* 1992 WL 112247, at *2 (E.D. Pa. May 11, 1992).

"A facial challenge, as distinguished from an as-applied challenge, seeks to invalidate a statute or regulation itself." *United States v. Frandsen,* 212 F.3d 1231, 1235 (11th Cir.2000). The general rule is that for a facial challenge to a legislative enactment to succeed, "***the challenger must establish that no set of circumstances exists under which the Act would be valid.***" *United States v. Salerno,* 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987) (emphasis added). "The fact that [a legislative act] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid...." *Id.* This "heavy burden" makes such an attack "the most difficult challenge to mount successfully" against an enactment.

"There is a heavy burden of proof imposed upon the party challenging a public safety law because such legislation is entitled to a strong presumption of constitutionality" and the ". . . strength of this presumption is further enforced when the challenged legislation is designed to promote and protect public safety." *Vanater v. Village of South Point*, 717 F.Supp. 1236, 1242 (S.D. Ohio 1989).

C. Due Process

"The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). However, "the right to a hearing does not depend on a demonstration of certain success." *Cleveland Bd. of Educ. v. Loundermill*, 470 U.S. 532, 544 (1985). That is, Convent Corporation was not entitled to

its desired result; it is entitled to (as is any property owner facing condemnation of a nuisance structure) to notice and an opportunity to be heard. Plaintiff here got both, and the City's Ordinance facially show that any and all persons facing condemnation get such as well. This defeats Plaintiff's claims.

In discussing due process, the United States Supreme Court has been clear: a hearing, "though necessary, need not be elaborate. . ." and the 'formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved ***and the nature of the subsequent proceedings***." *Id.* at 545 (emphasis added).

On its face, the City's Code allows anyone facing condemnation to offer rebuttal evidence and, thereafter, a property owner is permitted via state law a subsequent Circuit Court appeal where the issue at hand (whether the property is a nuisance) can be challenged *de novo*. Under Supreme Court precedent, the City's Code is constitutional.

In *Hill v. El Dorado*, from the Western District of Arkansas, the Court there was also presented a facial challenge to a condemnation ordinance of the City of El Dorado. Case No. 13-cv-01089, Document Number 95, *Order Granting Summary Judgment*, pp. 11-12, 9/29/15, *affirmed Hill v. City of El Dorado*, 686 Fed. Appx. 381 (8th Cir. 2017).[2] There, the Court said:

> "A facial challenge requires a showing that no set of circumstances exists under which the ordinance would be valid, or that the ordinance lacks any plainly legitimate sweep. *United States v. Stevens*, 559 U.S. 460 (2010). Plaintiffs allege that the ordinances do not give specific instructions on how the City is to carry out condemnations and, therefore, they are unconstitutional.

Hill v. El Dorado, Case No. 13-cv-01089, Document Number 95, *Order Granting Summary Judgment*, pp. 11-12, 9/29/15. The Court further said:

> The lack of specificity in the ordinances is insufficient to establish that the ordinance is unconstitutional on its face, as there are a myriad of circumstances in

[2] The District Court Opinion is attached to this Motion for the Court's convenience as **Exhibit C**.

> which the City could carry out the ordinances that would satisfy constitutional standards. Accordingly, Plaintiffs' facial challenge to any ordinance is without merit and should be dismissed.

Id.

So, given the above-noted standards and rulings, the question is: are there circumstances under which, on its face, North Little Rock's Municipal Code regarding condemnations can satisfy constitutional due process standards? The answer is indisputably: yes. The Code provides for notice that can be effected a number of ways: mail, certified mail, personal service, or publication. Clearly, such can satisfy constitutional standards in many circumstances if not all circumstances.

Are there circumstances under which, on its face, the Code can satisfy constitutional due process standards regarding hearings? Again, the answer is indisputably: yes. The Code says the hearing before the City Council shall include:

> (A) A description of the structures; (B) The owner or owners of the structures; (C) Findings that the structures are unfit for human occupancy, or otherwise detrimental to the life, property or safety of the public.

Exhibit A. Nothing on the City Code's face precludes rebuttal evidence from a property owner. Nothing on the City Code's face precludes a property owner from questioning the City's evidence supporting condemnation. So, there are a "myriad of circumstances in which the City could carry out the ordinances that would satisfy constitutional standards." *Hill v. El Dorado*, *supra*. The City denies that it fails to give an appropriate hearing for condemnations, but that's not the question in a facial challenge unless the Ordinance on its face would preclude the type of hearing Plaintiff apparently desires. What Plaintiff really wanted was the City not to condemn its property. But due process does not entitle the Plaintiff to a particular result. "The right to a hearing does not depend on a demonstration of certain success." *Cleveland Bd. of Educ. V. Loundermill*, 470 U.S. 532, 544 (1985). Here, due process entitles someone to appear before the Council and make whatever

showing they wish to make to rebut the evidence that condemnation is appropriate. And on its face, the Ordinance provides for such, i.e., proper due process.

Furthermore, State law allows for an appeal to Circuit Court to challenge a condemnation. *Rosse v. City of Jonesboro*, 2016 Ark. App. 580, 2016 WL 6994814 (Nov. 30, 2016). Such is another opportunity for a property owner to challenge the City's determination a structure is a nuisance and provides an additional layer of due process. Additionally, our Supreme Court has already held that "'[w]here a property owner is given written notice to abate a hazard on his property and has been given an opportunity to appear before the proper municipal body considering condemnation of the property, no due process violation occurs when the municipality abates the nuisance pursuant to the condemnation notice.'" *Ingram v. City of Pine* Bluff, 355 Ark. 129, 136, 133 S.W.3d 382, 386 (2003) (quoting *Samuels v.* Meriwether, 94 F.3d 1163, 1166-67 (8th Cir. 1996)). So, Plaintiff's claim that the City Code doesn't allow rehabilitation is irrelevant and meritless. Plaintiff and anyone else maintaining a nuisance structure are given due process via the City Code and Plaintiff's claim fails. The City is entitled to summary judgment.

D. Bill of Attainder Claim

Plaintiff also claims that the City's Code constitutes an unconstitutional Bill of Attainder. Complaint, ¶¶ 21-24. An unconstitutional bill of attainder is a legislative act, no matter what the form, that applies "either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial . . . ." *United States v. Lovett*, 328 U.S. 303, 315 (1946). However, Plaintiff bases this allegation on its continued and incorrect allegation that the City's Code is facially invalid and fails to provide due process prior to condemnation and razing of a nuisance structure. That argument has already been addressed at

length above and Plaintiff's "bill of attainder" claim fails for the same reason. The Code provides more than sufficient due process and on its face it is not unconstitutional in all of its applications.

Further, the Plaintiff ascribes meaning to the "bill of attainder" clause that was never intended. As the United States Supreme Court said:

> every person or group made subject to legislation which he or it finds burdensome may subjectively feel, and can complain, that he or it is being subjected to unwarranted punishment. *United States v. Lovett*, *supra*, 328 U.S., at 324, 66 S.Ct., at 1083 (Frankfurther, J., concurring). However expansive the prohibition against bills of attainder, it surely was not intended to serve as a variant of the equal protection doctrine, invalidating every Act of Congress or the States that legislatively burdens some persons or groups but not all other plausible individuals. In short, while the Bill of Attainder Clause serves as an important 'bulwark against tyranny.' *United States v. Brown*, 381 U.S., at 443, 85 S.Ct., at 1712, it does not do so by limiting Congress to the choice of legislating for the universe, or legislating only benefits, or not legislating at all.

Nixon v. Administrator of General Services, 433 U.S. 425, 471 (1977). This is one of Plaintiff's own cases cited in the Complaint. Indeed, the cases cited by Plaintiff in the Complaint are completely inapposite and have nothing to do with legislation regarding nuisances.

The City's Code does not legislatively punish Convent Corporation or an identifiable group at all. It is a legitimate legislative enactment designed to protect the public health, safety, and welfare of the inhabitants of the City from, *inter alia*, nuisances. The Code prohibits any property owner from maintaining a nuisance. It allows for condemnation where a nuisance exists, after notice and a hearing. And, as permitted by State law, it also allows a person to be ticketed and tried in state district court. A district court trial also provides due process, and an appeal is likewise permitted from a conviction in district court. Calling the City's Code a "bill of attainder" is, at best for the Plaintiff, exaggerated. Plaintiff's claims fail and the City is entitled to summary judgment.

E. STANDING

Convent Corporation was not the rightful owner of the condemned property at the time of the City Council's vote. Nor was it the rightful owner at the time of appeal. Thus, Convent Corporation does not have standing to pursue their claim for declaratory relief. Standing has been raised previously in this action and, in any event, is not a waivable affirmative defense noted in Ark. R. Civ. P. 8(c).

Convent Corporation, as the only named plaintiff or appellant in this matter, does not have standing. Courts treat the question of standing as a threshold issue. *Farm Bureau Ins. Co. of Ark., Inc. v. Running M Farms, Inc.*, 366 Ark. 480, 485, 237 S.W.3d 32, 36 (2006). "It is fundamental in American jurisprudence that in order to bring a lawsuit against an opposing party, one must have standing to do so." *Id.* Otherwise, "[w]ithout standing, a party is not properly before the court to advance a cause of action." *Id.* The same is true for an appeal of a condemnation decision of a city council. *Talley v. City of North Little Rock*, 2009 Ark. 601, 381 S.W.3d 753, 757 (2009). In *Talley*, it was acknowledged that resolutions passed by the North Little Rock City Council are appealable orders. *Id.* But, the Circuit Court had found, and the Arkansas Supreme Court agreed, that these decisions are *only* appealable by the property owner, either at the time notice of condemnation is given or when the condemnation resolution is passed. *Id.*

At all times relevant, Convent Corporation was not the owner of the property in question. Rather, the State of Arkansas served as the owner. Pursuant to Ark. Code Ann. § 26-37-101, failure to pay taxes for land for one (1) year following the date taxes were due causes the property to be forfeited to the State. Ark. Code Ann. § 26-37-101(a)(1)(A). "When property is transferred to the State due to unpaid taxes, title vests in the State." *Freeman v. Freeman*, 2013 Ark. App. 693, at *6, 430 S.W.3d 824, 829 (2013) (citing Ark. Code Ann. § 26-37-101(b) & (c) (Repl. 2012)).

"At that point, the owner's vested interest in the property is interrupted and he loses title." *Id.* (citing *Givens v. Haybar, Inc.*, 95 Ark. App. 164, 234 S.W.3d 896 (2006)).

Convent Corporation was delinquent on its property taxes beginning in 2010. ***See Joint Exhibit D***. Pursuant to Ark. Code Ann. § 26-37-101(a)(1)(A), the Commissioner of State Lands owned the property beginning on or about October 15, 2010. *Id.* Convent Corporation did not pay its delinquent property taxes until on or about February 5, 2015. *Id.* As such, the Commissioner of State Lands on behalf of the State of Arkansas, and by operation of law, owned the property in question at all times relevant for the actions complained of herein. Indeed, Convent's failure caused it to forfeit the subject property to the Arkansas Commissioner of State Lands. Ark. Code Ann. § 26-37-101. Thus, Convent Corporation did not have standing as the owner of the property at the time of condemnation or for the duration of the appeal up to on or about February 5, 2015, when it did redeem the property as the party who actually owned it. *Freeman*, 2013 Ark. App. *6, 430 S.W.3d at 829.

An accurate timeline can be constructed as follows;

Prior to October 15, 2010	Convent Corporation owns the subject property.
October 15, 2010	Title of subject property transfers to State Land Commissioner on behalf of State of Arkansas for Convent Corporation's failure to pay taxes on the subject property.
February 25, 2013	North Little Rock City Council condemns subject property.

March 27, 2013	Convent Corporation through counsel files administrative appeal.
February 5, 2015	Convent Corporation pays delinquent taxes and redeems property.

It is appropriate and proper for the Court to take judicial notice of matters of public record and reports of administrative bodies in this matter. The Arkansas Supreme Court has long held that courts may consider certain types of matters to be considered. Indeed, the Arkansas Supreme Court "takes judicial notice of the public records and reports of the several departments of the state, when required by law to be so made and filed." *State ex. Rel. Holt v. State Board of Education*, 195 Ark. 222, 112 S.W.2d 18, 20 (1937). *See also Brown v. State*, 375 Ark. 499, 503, 292 S.W.3d 288, 290 (2009); *Cloird v. State*, 349 Ark. 33, 76 S.W.3d 813 (2002); *Mid-State Homes, Inc. v. Knight*, 237 Ark. 802, 803, 376 S.W.2d 556, 557 (1964) ("We take judicial notice of record required to be kept by the Secretary of State."); *Public Loan Corp. v. Stanberry*, 224 Ark. 258, 262 n. 2, 272 S.W.2d 694, 697 n. 2 (1954) ("We take judicial notice of public records required to be kept.").

It cannot be disputed that Convent Corporation failed to pay property taxes on the property at 6615 Highway 70 from 2010 through 2013 and that it was on notice of the consequences of this failure. *See* ***Joint Exhibit D***. However, Convent Corporation has led all parties, and the Court, to believe for the duration of its appeal and litigation that it owns this property. While it may allege that it in good faith believed it owned the property at all times relevant, it bears noting Convent Corporation filed a petition for redemption for the subject property clearly indicating that title was

forfeited to the State **in 2010** and was scheduled to be sold by the State at auction on **April 14, 2015**. ***Joint Exhibit D***.

Unbeknownst to the City, Convent lost title to the subject property for failure to pay its taxes years before the subject condemnation – and years after. *Id.* It did not re-acquire the property until February 5, 2015, more than two years after the notice of condemnation and nearly two years after the challenged condemnation vote and subsequent appeal. *Id.* Any duty or rights attendant thereto were owed to the Commissioner of State Lands as owner, not Convent Corporation, despite the misrepresentations over the course of this appeal and litigation. The City's condemnation decision was not subject to challenge, appeal or constitutional, by Convent Corporation. *Talley v. City of North Little Rock*, 2009 Ark. 601, 381 S.W.3d 753, 756-57 (2009). Nor was it an appealable order by Convent Corporation. *Id.*; *Freeman v. Freeman*, 2013 Ark. App. 693, at *6, 430 S.W.3d 824, 829 (2013). As demonstrated, Convent Corporation does not have standing. Defendants are entitled to summary judgment as a matter of law.

CONCLUSION

For the foregoing reasons, the City respectfully requests the Court enter summary judgment in favor of the City on Plaintiff's remaining claim and dismiss this action with prejudice.

Respectfully submitted,

CITY OF NORTH LITTLE ROCK, ARKANSAS, a Municipal Corporation, JOE SMITH, Mayor, Individually and in his Official Capacity, City Council Members DEBI ROSS, BETH WHITE, LINDA ROBINSON, MAURICE TAYLOR, STEVE BAXTER, BRUCE FOUTCH, MURRY WITCHER, and CHARLIE HIGHT, each Individually and in his or her Official Capacity, TOM WADLEY, Director, Code Enforcement Division, Individually and in his Official Capacity, and FELECIA

MCHENRY, Code Enforcement Officer, Individually and in her Official Capacity
Defendants

Respectfully submitted,

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Deputy City Attorney
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and

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Attorney for Defendants

CERTIFICATE OF SERVICE

I, Michael A. Mosley, do hereby certify that a copy of the foregoing pleading was served upon all interested parties by means of electronically filing through AOC/eflex, on this 26th day of June, 2019, addressed to:

Mr. Mickey Stevens
Attorney for Plaintiff

/s/ Michael A. Mosley

**IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS,
TWELFTH DIVISION**

**CONVENT CORPORATION,
Individually and on Behalf of all
Others Similarly Situated** — **PLAINTIFF**

v. — **NO. 60CV-13-1398**

**CITY OF NORTH LITTLE ROCK,
ARKANSAS, a Municipal Corporation,
JOE SMITH, Mayor, Individually and in
his Official Capacity, City Council Members
DEBI ROSS, BETH WHITE, LINDA
ROBINSON, MAURICE TAYLOR,
STEVE BAXTER, BRUCE FOUTCH,
MURRY WITCHER, and CHARLIE HIGHT,
each Individually and in his or her Official
Capacity, TOM WADLEY, Director, Code
Enforcement Division, Individually and in
his Official Capacity, and FELECIA MCHENRY,
Code Enforcement Officer, Individually and
in her Official Capacity** — **DEFENDANTS**

ORDER

On the 4th day of June, 2017, the Court heard and considered Defendants' Motion to Dismiss or for Summary Judgment Plaintiff's Amended and Reinstated Petition for Declaratory Judgment. Plaintiff was present and represented by its attorney, Mickey Stevens, and Defendants were represented by Michael Mosley. After hearing arguments of counsel and considering all things properly before it, the Court finds as follows:

1. Plaintiff's Amended and Reinstated Petition for Declaratory Judgment was filed timely. The time for filing these claims began to run on May 11, 2017 when the Court entered is Order affirming the City Council's determination that the property at issue is a nuisance. Therefore, Defendants' Motion to Dismiss is DENIED.

2. Because there are no contested factual issues, Plaintiff's request for a jury trial on its Petition for Declaratory Judgment is DENIED.

IT I S SO ORDERED.

Honorable Alice Gray
Circuit Judge

Approved as to form:

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ROBINSON, MAURICE TAYLOR,
STEVE BAXTER, BRUCE FOUTCH,
MURRY WITCHER, and CHARLIE HIGHT,
each Individually and in his or her Official
Capacity, TOM WADLEY, Director, Code
Enforcement Division, Individually and in
his Official Capacity, and FELECIA MCHENRY,
Code Enforcement Officer, Individually and
in her Official Capacity — **DEFENDANTS**

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND COUNTERMOTION FOR SUMMARY JUDGMENT

COMES NOW Plaintiff Convent Corporation, by and through its attorney, Mickey Stevens, and for its Response to Defendants' Motion for Summary Judgment and Countermotion for Summary Judgment, states as follows:

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INTRODUCTION

The Court has previously held that there are no outstanding issue of fact so a recitation of the summary judgment standard is unnecessary. The arguments and authorities cited herein demonstrate that Plaintiff is entitled to judgment as a matter of law on its Petition for Declaratory Judgment. For the reasons stated herein, the City of North Little Rock's condemnation ordinance,

Chapter 8, sections 1.7.1 through 1.7.10 (hereinafter "City's ordinance" or "the ordinance") is unconstitutional and, as such it should be declared invalid and the condemnation decision regarding Plaintiff's property should be set aside.

DISCUSSION

"The right of property is before and higher than any constitutional sanction"

Ark. Const. Art. 2, § 22.

> **So viewed, the prohibition against the deprivation of property without due process of law reflects the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference.**

Fuentes v. Shevin Parham v. Cortese, 407 U.S. 67, 80-82, 90 S.Ct. 1983 (emphasis added).

I. The Arkansas Constitution requires that laws involving property rights be evaluated under the "strict scrutiny" standard.

This Court has already determined that there are no outstanding factual issues so a recitation of the Summary Judgment Standard at this point is unnecessary. However, a discussion of the Standard of Review which should be applied to cases involving property rights in Arkansas is warranted.

The Arkansas Constitution provides that "[t]he right of property is before and higher than any constitutional sanction." Ark. Const. Art. 2, § 22. The Arkansas Constitution should be interpreted precisely as it reads. *See Board of Trustees of the Univ. of Arkansas v. Andrews*, 535 S.W.3d 616 (2018). Thus, a property owner in Arkansas is entitled to not only substantial, but the most and highest due process protections prior to a condemnation. The language of the Constitution cannot be ignored and the phrase "higher than any constitutional sanction" leaves little room for interpretation. While one may question exactly what the highest constitutional

sanction is, the Constitution leaves no doubt that, whatever it may be, at a minimum, that level of scrutiny that must be applied to any law that infringes on private property rights.

The highest constitutional sanction as determined by any court is "strict scrutiny." Therefore, pursuant to the Arkansas Constitution, private property cannot be taken in the absence of, at a minimum, a compelling government interest and provide the least restrictive method available that is narrowly tailored to accomplish the compelling interest. *Arnold v. State*, 2011 Ark. 395, 384 S.W.3d 488 (2011). Plaintiff further contends that the high level of constitutional protection demanded by Article 2 of the Arkansas Constitution required a predeprivation judicial determination should be required prior to any significant infringement of private property rights. The ordinance at issue permits the City to take private property without demonstrating a compelling government interest. Ordering destruction of the property without an opportunity for repair is not the least restrictive method and the ordinance does not provide for a predeprivation judicial determination. Therefore, this ordinance fails under the strict scrutiny standard.

Private property rights are prominently protected by both the state and federal constitutions. The fact that private property rights are specifically mentioned in both documents indicates an intent to require significant due process protections before a governmental entity can intrude on these important rights. And, while Plaintiff's state law claims mirror, in a sense, Plaintiff's federal claims, Arkansas courts have held that the Arkansas Constitution provides more protection in some cases than the federal Constitution and any assessment of these claims must be made pursuant to the Arkansas Constitution and the holdings of the Arkansas courts. *See State v. Brown*, 356 Ark. 460, 156 S.W.3d 722 (Ark., 2004); *Jegley v. Picado*, 349 Ark. 600, 631 (2002); *Griffin v. State*, 347 Ark. 788, 791 (2002). The Arkansas Supreme Court has held "the police power [of the state] can only be exercised to suppress, restrain, or regulate the liberty of individual action, when such

action is injurious to the public welfare." *Jegley*, 349 Ark. at 635 (*quoting Hand v. H& R Block, Inc.*, 258 Ark. 774, 781 (1975)). Taking these holdings into consideration along with the provision of the Arkansas Constitution which requires that property rights be afforded the highest constitutional sanction, it can be reasonably inferred that private property rights are afforded even greater protections under Arkansas law than under federal law.

In the case at bar, the ordinance in question permits the City to take private property from citizens. Therefore, the applicable standard of review should be "strict" scrutiny. Therefore, unless the City demonstrates that this ordinance serves a compelling government interest and provides predeprivation judicial determination, it should not be upheld.

II. In assessing a statute or ordinance pursuant to a facial challenge, the Court should consider "only applications of the statute in which it actually authorizes or prohibits conduct."

In considering the standard applicable to facial challenges to the constitutionality of a statute or ordinance, it is helpful to dig a little deeper in to what is known as "the *Salerno* rule."[1] This is the rule relied upon by Defendants in their Motion to argue that Plaintiff must prove the ordinance at issue is unconstitutional in all its applications. If we look beyond the *Salerno* case to subsequent holdings of the federal courts, we learn that this "rule" has not been steadfastly upheld or applied in facial challenges.

The Eleventh Circuit has noted that "the *Salerno* rule" has not been consistently followed, even by the Supreme Court. *U.S. v. Frandsen*, 212 F.3d 1231, n. 3, (11th Cir. 2000) (citing *City of Chicago v. Morales*, 527 U.S. at n. 22, 119 S.Ct. at n. 22, (1999) (plurality opinion) (Stevens, J., Souter, J., and Ginsburg, J.)). In a plurality opinion, Justice Stevens states, "[t]o the extent we

[1] *United States v. Salerno*, 481 U.S. 739, 107 S.Ct. 2095 (1987). In dicta, the Court said that a person who brings a facial challenge to a statute must establish that no set of circumstances exists under which the act would be valid. *Id.* at 745, 107 S.Ct. 2095. This dicta came to be seen as a rule and courts quickly realized it was problematic and, as discussed herein, its application has been significant qualified and limited.

have consistently articulated a clear standard for facial challenges, **it is not the *Salerno* formulation, which has never been the decisive factor in any decision of this Court, including *Salerno* itself . . .."** *Morales*, 527 U.S. at 55 n. 22, 119 S.Ct. 1849 (1999) (plurality opinion) (Stevens, J., Souter, J., and Ginsburg, J.) (emphasis added). In a Memorandum opinion respecting the denial of a petition for certiorari, Justice Stevens explained that "the *Salerno* rule" was actually dicta and does not accurately reflect the Court's position on facial challenges:

> The Court's opinion in *United States v. Salerno*, 481 U. S. 739 (1987), correctly summarized a long established principle of our jurisprudence: "**The fact that [a legislative] Act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid.**" *Id.*, at 745.
>
> Unfortunately, the preceding sentence in the opinion went well beyond that principle. That sentence opens Part II of the opinion with a rhetorical flourish, stating that a facial challenge must fail unless there is "no set of circumstances" in which the statute could be validly applied. Ibid.; post, at 3. That statement was unsupported by citation or precedent. It was also unnecessary to the holding in the case, for the Court effectively held that the statute at issue would be constitutional as applied in a large fraction of cases. See 481 U. S., at 749-750.
>
> While a facial challenge may be more difficult to mount than an as applied challenge, **the dicta in [Salerno] "does not accurately characterize the standard for deciding facial challenges," and "neither accurately reflects the Court's practice with respect to facial challenges, nor is it consistent with a wide array of legal principles.**" Dorf, Facial Challenges to State and Federal Statutes, 46 Stan. L. Rev. 235, 236, 238 (1994). For these reasons, "'s rigid and unwise dictum has been properly ignored in subsequent cases even outside the abortion context. Accordingly, there is no need for this Court affirmatively to disavow that unfortunate language, in the abortion context or otherwise, until it is clear that a federal court has ignored the appropriate principle and applied the draconian "no circumstance" dictum to deny relief in a case in which a facial challenge would otherwise be successful. I thus concur in the denial of this petition. Janklow v. Planned Parenthood Sioux Falls Clinic (1996)

Janklow v. Planned Parenthood, Sioux Falls Clinic, 517 U.S. 1174,1175-1176, 116 S.Ct. 1582 1583 (1996) (Memorandum opinion by Stevens, J. denying cert.) (quotation marks and citation omitted) (emphasis added).

The bottom line is that, according to Justice Stevens, "the *Salerno* rule" was dicta that misstated and mischaracterized what the law should be and it does not represent the Court's practices in evaluating facial challenges. Instead of requiring that a law be unconstitutional in every conceivable circumstance, the rule, as reflected by precedent and the Court's practices, is, as stated by Justice Stevens: the fact that a law might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it invalid. This is far short of a requirement that a challenger demonstrate there are no conceivable circumstances under which the law could be constitutionally applied. This explains why courts have not strictly applied "the *Salerno* rule."

In *Johnson v. United States*, 135 S. Ct. 2551 (2015), the majority rejected the dissents contention that a statute is void for vagueness only if it is vague in all its applications. The majority embraced the view espoused by Justice Stevens in *Janklow*. Justice Scalia cited *United States v. L. Cohen Grocery Co.*, 255 U.S. 81,91, 41 S.Ct. 298 (1921), which addressed a law that prohibited grocers from charging an unjust or unreasonable rate. Surely, there would be circumstances where such a law could be constitutionally applied, such as a case where a price charged by a grocer is clearly outrageous. Justice Scalia also cited *Coates v. Cincinnati*, 402 U.S. 611, 91 S.Ct. 1686 (1971) which involved a law prohibiting people on sidewalks from conducting themselves in a manner annoying to persons passing by. Again, there would certainly be applications of this law that would fall within constitutional bounds. Yet, in both *L. Cohen* and *Coates*, the court struck down the challenged laws as unconstitutional.

Let's look at how "the *Salerno* rule" was applied in a case cited in Defendant's Brief. In *City of Los Angeles v. Patel*, 135 S.Ct. 2443, 2449 (2015), an ordinance was held to be invalid even where circumstances could be imagined that would make the application of the statutes

ordinance constitutional. Defendants quote for from the case as follows: "[u]nder the most exacting standard the [Supreme] Court has prescribed for facial challenges, a plaintiff must establish that a 'law is unconstitutional in all its applications" and, as Defendants state, "a court must consider only applications of the code within its reach." *Id.* at 2451. In *Patel*, Court held that an ordinance that required hotel operators to make their registries available to the police on demand was facially unconstitutional because it penalized them for declining to turn over their records without affording them any opportunity for precompliance review. *Id.* at 2447.[2] This holding is instructive in interpreting the Court's language regarding "the *Salerno* rule." The opinion demonstrates that the Court was not advocating a standard which requires a statute or ordinance be found constitutional if any imaginable circumstance could make it acceptable. In fact, a circumstance under which the ordinance may have been found to be constitutional jumps out from the wording of the Court's holding regarding the lack of precompliance review. *Id.* Suppose the City provided the hotel operator a chance for a precompliance review. If the standard were that the ordinance is constitutional if it is so in any conceivable circumstances, then, it would be constitutional where a chance for a precompliance review was provided, wouldn't it? Yet, the Court did not engage in this type of supposition. The Court did not consider such a scenario because the ordinance did not provide for such. To reach such a conclusion would require going beyond the ordinance itself and assuming that the City would take actions not required by the ordinance. This indicates that the language "in all its applications," does not mean any conceivable situation or set of circumstances, but is limited to applying the ordinance as it is written without assuming additional, supplemental actions or measures.

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[2] The Supreme Court's opinion notes that the Court of Appeals, *en banc*, held that the ordinance was facially unconstitutional because it authorized inspection of hotel records "without affording an opportunity to obtain judicial review of the reasonableness of the demand prior to suffering penalties for refusing to comply." *Id.* at 2448.

The dissent in *Patel*, posited two additional circumstances in which the ordinance might be constitutional: where police officers demand access to hotel records with a warrant in hand or where exigent circumstances justify the search. *Id.* at 2464-65. These also would require going beyond the language of the ordinance itself to consider additional actions or circumstances not covered by the ordinance. The majority rejected this approach. Therefore, *Patel* demonstrates that an ordinance should not be found to be constitutional based on speculation that a government entity might, in some circumstances, go beyond what the ordinance requires or states, or that there may be some additional circumstance, such as exigency, which might make the conduct at issue constitutional. This is an important point to keep in mind in any situation in which the *Salerno* rule is applied. The takeaway from *Patel* is that **in assessing a statute under this standard, the Court should consider "only applications of the statute in which it actually authorizes or prohibits conduct."**[3] *Patel*, 135 S.Ct. at 2451 (emphasis added).

There are many other examples of cases where one could imagine circumstances in which a statute or ordinance may be constitutional but which the Supreme Court determined otherwise. For example. *Torres v. Puerto Rico*, 442 U.S 465 (1979) was a challenge to a statute authorizing police in Puerto Rico to search the luggage of any person arriving from the United States. The Court held that this statute was unconstitutional because it failed to require either probable cause or a warrant. *Id.* at 441-42. Now, if we were to try to imagine any circumstance in which this statute could be constitutional, we only have to imagine one in which probable cause exists. It would not be a constitutional violation where an officer searched an arriving traveler based on

[3] Courts should not go beyond the statute's facial requirements and speculate about "hypothetical" or "imaginary" cases. *Washington State Grange v. Washington State Republican* Party, 128 S.Ct. 1184, 170 L.Ed.2d 151, 552 U.S. 442, 8 Cal. Daily Op. Serv. 2995, 21 Fla. L. Weekly Fed. S 109, 76 USLW 4127, 2008 Daily Journal D.A.R. 3677 (2008)(citing *United States v. Raines*, 362 U.S. 17, 22, 80 S.Ct. 519, 4 L.Ed.2d 524 (1960)).

probable cause. However, assuming the existence of probable cause goes beyond the scope of the statute and the Court again rejected this approach. This case is also instructive in that it demonstrates a statute or ordinance should not be upheld based on what it does not contain such as a requirement that probable cause exists or that a warrant be obtained or by assuming that, in some cases, government officials may take supplemental actions such as obtaining a warrant.

Similarly, in *Payton v. New York*, 445 U.S. 573, 110 S.Ct. 1371 (1979), the Court invalidated a statute that authorized police officers to enter a private residence without a warrant and with force, if necessary, to make a routine felony arrest. Again, we could imagine that if the officers had probable cause or a warrant, the application of the statute would not be constitutional. This is particularly analogous to the case at bar in that, although the statute authorizes unconstitutional conduct and the fact that it is possible for officers to take actions that would be within the bounds of the constitution, does not make the statute valid.

In *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992), the Court struck down, among others, a provision of Pennsylvania's abortion law that required a woman to notify her husband before obtaining an abortion. *Id.* Those defending the statute argued that facial relief was inappropriate because most women voluntarily notify their husbands about a planned abortion and for them the law would not impose an undue burden. *Id.* The Court rejected this argument, explaining: The "[l]egislation is measured for consistency with the Constitution by its impact on those whose conduct it affects." *Id.* "The proper focus of the constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant." *Id.*

If courts were to imagine situations in which government officials take actions beyond what is required by the statute or ordinance in question or that officials could act in a manner

inconsistent with the statute or ordinance, no facial challenge could ever be successful. The fact that many facial challenges have succeeded confirms that such imagination and speculation going beyond the content or requirements of the ordinance or statute is not an appropriate way to uphold an otherwise unconstitutional statute or ordinance.

In the case at bar, the ordinance authorizes the city council to seize and condemn a property without adequate notice, without an adequate hearing, and to demolish the structure without ever providing an opportunity to the owner to make repairs.[4] A finding that imagining a case where adequate notice is provided, an adequate hearing is held, and the property owner is given an opportunity to repair the property would make the law valid would go against *Johnson, Janklow, L. Cohen Grocery, Patel, Torres, Payton*, and other precedents.

III. Because the ordinance fails to provide for a meaningful hearing, an opportunity to repair the property prior to condemnation, or adequate notice of specific violations, conditions, or appeal rights, it fails to meet the requirements of Constitutional Due Process.

The extent to which due process rights are required in administrative proceedings is determined by a balancing approach. *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.ed. 2d 18 (1976). The *Eldridge* standard balances three factors: (1) the extent that private interests are affected in the proceeding; (2) the risk of wrongfully depriving a party of its interest under the current procedures along with the utility of additional procedures that could lessen this risk; and (3) the government's interest at stake, such as the administrative and financial burdens imposed upon a public actor if additional procedures are incorporated. *Id.* at 334-35.

Considering the requirement of the Arkansas Constitution requiring that property rights receive the highest constitutional protection, under Arkansas law, the first *Eldridge* factor is going

[4] Even if the standard was as Defendants contend, is there any conceivable set of circumstances where the seizure and condemnation of private property by a governmental entity without adequate notice, without an adequate hearing and without an opportunity to make repairs would be constitutional?

to be the most significant in almost any case. Federal courts have also held that property rights have substantial value to an individual under the first *Eldridge* factor. *James Daniel Good*, 510 U.S. at 53-54. In *Connecticut v. Doehr*, 501 U.S. 1, 11, 111 S.Ct. 2105, 115 L.Ed. 2d 1 (1991), the Supreme Court described attachment interests on property to be "significant" in regards to how they affect private interests under *Eldridge* because attachments can result in great economic hardship to a property owner. In *Doehr*, the Court held that even where a decision does not amount to a complete, physical, or permanent deprivation of real property, due process concerns still exist. *Id.* at 12.

Property nuisance cases require increased caution because destroyed property cannot be restored and the best evidence of whether the seizure was justified will have been demolished. *See* Alex Cameron, *Due Process and Local Administrative Hearings Regulating Public Nuisances: Analysis and Reform*, 43 St. Mary's L.J. 619. The demolition of one's property is a substantial private interest under the first *Eldridge* factor and, thus, determine that it warrants substantial protection for due process purposes.

A. The Ordinance contains no provision for providing a meaningful hearing for affected property owners.

The U.S. Supreme Court has repeatedly emphasized the due process requirement of a full and fair opportunity to be heard.

> "The fundamental requisite of due process of law is the opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385, 394, 34 S.Ct. 779, 783, 58 L.Ed. 1363 (1914). The hearing must be "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187 1191, 14 L.Ed.2d 62 (1965). In the present context these principles require that a recipient have timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend **by confronting any adverse witnesses** and by presenting his own arguments and evidence orally. These rights are important in cases such as those before us, where recipients have challenged proposed terminations as resting on incorrect or misleading factual premises or on misapplication of rules or policies to the facts of particular cases.

Goldberg, 397 U.S. at 267-68, 90 S.Ct. 1011. In *Goldberg*, the Supreme Court noted the importance of the **opportunity to confront and cross-examine adverse witnesses.**

> **In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.** *E.g., ICC v. Louisville & N.R. Co.*, 227 U.S. 88, 93—94, 33 S.Ct. 185, 187—188, 57 L.Ed. 431 (1913); Willner v. Committee on Character & Fitness, 373 U.S. 96, 103—104, 83 S.Ct. 1175, 1180—1181, 10 L.Ed.2d 224 (1963). What we said in *Greene v. McElroy*, 360 U.S. 474, 496—497, 79 S.Ct. 1400 1413, 3 L.Ed.2d 1377 (1959), is particularly pertinent here:
>
> > Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment . . . . This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, . . . **but also in all types of cases where administrative . . . actions were under scrutiny.**

Id. at 270, 90 S.Ct. 1011 (emphasis added).

The **right to cross-examine witnesses** is regarded as substantial in connection with examining the entire scope of evidence and making a complete inquiry into the truth. Where important decisions turn on questions of fact, **due process requires an opportunity to confront and cross-examine adverse witnesses.** *See, e.g. Goldberg v. Kelly*, 397 U.S. 254, 269, 90 S.Ct. 1011, 25 L.Ed. 287 (1970). **Rulings based on expedited summary hearings that offer scant evidence of their respective decisions fall short of due process requirements.** *See Freeman v. City of Dallas*, 242 F.3d 642, 653-54 (5th Cir. 2001). The purpose of an adversary hearing is to

ensure the requisite neutrality that must inform all governmental decision-making. *James Daniel Good*, 510 U.S. at 55.

In addition to the substantial federal case law addressing the meaningful hearing requirement, Arkansas courts have held that due process requires "a full and fair hearing, including the right to submit evidence and testimony, **to examine witnesses**, and an opportunity to present evidence or testimony in rebuttal to adverse positions." *Harness v. Arkansas PSC*, 60 Ark. App. 265, 271 (1998) (citing *Arkansas Elec. Energy Consumers v. Arkansas Pub. Serv. Comm'n*, 35 Ark. App. 47 (1991))(emphasis added). Again, given the fact that the Arkansas Constitution requires property rights be afforded the highest constitutional protection, a citizen of the state should not be deprived of a property interest without a prior judicial determination.

The ordinance at issue provides only for a "public hearing" to include a description of the structures, the owner or owners of the structures, and findings that the structures are unfit for human occupancy, or otherwise detrimental to the life, property or safety of the public. Section 1.7.1. Simply because the ordinance contains the word "hearing" does not mean that it provides for a meaningful opportunity to be heard. Plaintiff has been unable to locate any definition for the term "public hearing" in the City's ordinances. In determining the meaning of the language of a statute, it is appropriate to look to the interpretation given by those charged with enforcing it. *See VIP of Berlin*, 593 F.3d at 186. To determine how the City interprets the term "public hearing" we need only look at the City's standard agenda used for city council meetings as well as its practices and procedures. The Agenda has a heading for "Scheduled Public Hearing(s)" and next to this it says "*3 minutes.*" Exhibits A & B. The City holds these "public hearings" during City Council meetings and such hearings are limited to three (3) minutes. In this case, we are dealing with an ordinance which permits the City to take private property from citizens, a right which is

entitled to the highest constitutional protections. A hearing limited to three (3) minutes is not sufficient to provide meaningful due process where such an important right is at stake. Certainly, it does not afford a property owner the highest constitutional protections as required by the Arkansas Constitution.

The typical purpose of "public hearings" in this context is to permit citizens to comment on proposed actions of the city council. It is not intended to be a due process hearing. In fact, the Mayor has admitted that the City Council does not hold such hearings. Exhibit C. At these hearings, the City reviews the limited file provided by Code Enforcement without hearing any testimony. Yes, a property owner may comment on the proposed action as may any other citizen. But, there is no meaningful presentation of evidence and no opportunity is given to cross-examine any witnesses. This is the way in which the City has interpreted the term "public hearing" as it is used in the ordinance. Clearly, this is not the type of "meaningful" hearing contemplated by the extensive case law both from federal and state courts on the subject. To say that this type of abbreviated proceeding provides the type of high constitutional protection required by the Arkansas Constitution is ludicrous.

B. The City's ordinance fails to provide a property owner with a hearing before an unbiased decision maker.

The United States Supreme Court has declared that in an administrative hearing, the right to a hearing before a neutral decision maker is essential. *Goldberg,* 397 U.S. at 271. The Supreme that the seizure is justified. United States v. $ 8,850, 461 U.S. 555, 562 n.12 143 (1983) (*citing Boddie v. Connecticut*, 401 U.S. 371, 378-379 (1971)); see also *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975); *Fuentes v. Shevin*, 407 U.S. 67(1972); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1974); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974). **The U.S. Supreme Court also noted that local governments have a direct pecuniary interest in the**

outcome of a condemnation proceeding and this requires an increased level of scrutiny with regard to an individual's deprivation of due process rights. *James Daniel Good Real Prop.*, 510 U.S. at 56-57 (emphasis added). Other courts have said that because certain procedural safeguards are commonly absent from administrative proceedings, the bias requirement should be applied with greater force. *Ventura v. Shalala*, 55 F.3d 900, 902 (3d Cir. 1995).

In his excellent article discussing judicial review of administrative decisions, Professor Kramer noted the importance of this necessary due process component:

> Minimal effective checks on administrative power require that: (1) each individual whose interests are directly affected by government action shall, if he wishes, have a meaningful day in court (not necessarily a court of law), where he is allowed to present his case upon the assumption that someone with real authority **will in good faith seriously consider his statement before deciding the case**; (2) **the deciding officers shall be independent and objective-inwardly free from influences of personal gain or partisan or popular bias, and outwardly free from external direction by political or administrative superiors-in deciding individual cases on their merits**; and (3) decisions shall be reasoned, taking into account both general principles and the particular situation, and revealing, so far as possible, the relevant factors and theories upon which the decisions are based, thus avoiding either arbitrary departures from general rules or unfair application of general rules to particular facts contrary to their true spirit and intent.

Robert Kramer, *The Place and Function of Judicial Review in the Administrative Process*, 28 FORDHAM L. REV. 1, 8 (1959) (emphasis added).

The "public hearing" as interpreted by the City in its practices, is conducted by the city council and they are the decision makers. The Council members are politically elected and, as such, have a significant interest in pleasing their constituents. In fact, it is to be expected that the interest in pleasing voters will outweigh any interests in providing a fair and just adjudication to the property owner. Judges refrain from discussing case before them with outside parties and it would certainly be inappropriate be a judge to be influenced by such conversations. City council members hear complaints from and discuss properties with citizens. And, they may be influenced

by such discussions. This fact was illustrated in the case involving Plaintiff's property in which one of the council members stated that the neighborhood associate wanted the structure demolished. Exhibit C. As noted by Professor Kramer, **the deciding officers must be "independent and objective-inwardly free from influences of . . . partisan or popular bias, and outwardly free from external direction by political" influences.** Kramer at 8 (emphasis added). And, it bears repeating that the U.S. Supreme Court has noted that **local governments have a direct pecuniary interest in the outcome of a condemnation proceeding and this requires an increased level of scrutiny with regard to an individual's deprivation of due process rights.** James Daniel Good Real Prop., 510 U.S. at 56-57 (emphasis added). City council members often will have other influences and motives for wanting a property condemned and there is a significant risk that a property owner will be deprived of a fair and just adjudication when the decision makers have such biases. The fact that the ordinance fails to provide for an unbiased decision maker means that it fails to provide adequate due process protections and is, therefore, unconstitutional.[5]

C. The fact that City's ordinance does not allow a property owner to maker repairs prior to condemnation is a violation of constitutional due process.

Again, when interpreting an ordinance, it is appropriate to look to the interpretation given by those charged with enforcing it. *See VIP of Berlin*, 593 F.3d at 186. The City's interpretation of its ordinance indicates that it does not permit a property to be repaired prior to condemnation. Exhibit D, *Letter from Asst. City Attorney William Brown to R.C. Livdahl,* Jan. 31, 2013. As the City indicates in Exhibit D, the owners only option prior to condemnation is to demolish the structure. Furthermore, the construction of the ordinance indicates that no opportunity for repair

[5] Pursuant to the case law cited herein, the ordinance cannot be found to be constitutional based on some imaginative or speculative scenario in which the City goes beyond the requirements of the ordinance and provides a substantial hearing before an unbiased decision maker and an opportunity to repair the property.

will be permitted. Section 1.7.4 states that "[c]ondemned structures **shall** be destroyed and removed from the premises." The code makes absolutely no provision for repair of the property either prior to or after condemnation.[6], [7]

The failure to permit a property owner to make repairs prior to condemning the property is also a violation of constitutional due process. Multiple courts have disfavored decisions that issue an order for demolition without any kind of relief afforded to a property owner prior to the order. *See Houston v. Lurie*, 148 Tex. 391 (1949). If the condition causing the property to be a nuisance can be remedied through "cleaning, disinfection, alteration, or repair," then due process requires that these measures be ordered before an order for demolition is made. *See e.g., City of Safford v. Seale*, No. 2 CA-CV 2008-0185, 2009 19 WL 3390172, 3 (Ariz. Ct. App. 2009); *Horne v. Cordele*, 140 Ga. App. 127, 129, 230 S.E.2d 333 (Ga. Ct. App. 1976); *Shaffer v. Atlanta*, 223 Ga. 249, 250-251, 154 S.E.2d 241 (Ga. 1967); *Nazworthy v. City of Sullivan*, 55 Ill. App. 48, 52 (1893); *Albert v. Mountain Home*, 81 Idaho 7480, 337 P.2d 377 (Idaho 1959); *Polsgrove v. Moss*, 157 S.W. 1133, 1136 (Ky. 1913); *Commissioner of State Police v. Anderson*, 344 Mich. 90, 73 N.W.2d 280 (Mich. 1955); *Newton v. Highland Park*, 282 S.W.2d 266 (Tex.App. 1955). If a local government

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[6] Again, pursuant to the case law cited and discussed herein, the ordinance should not be upheld based on some imaginative or speculative case where the City might go beyond the ordinance and provide an opportunity to repair a property.

[7] The City may argue that it can, as it desires, permit the submission of a rehabilitation plan to repair a property after condemnation. First, this is entirely discretionary and, therefore, could itself be discriminatory, allowing elected officials to decide which properties may be repairs and which may not, and, second, even in the circumstances where such a plan is approved, the condemnation order is not set aside, leaving the City free to demolish the property at will, even after repairs have been completed. Second, a rehabilitation plan, is not part of the ordinance. The fact that the City can deprive a person of their property rights and then, potentially, allow them to reearn these rights only on the whim of elected officials is constitutionally problematic. Once the condemnation has occurred, the City has the right to demolish the structure and to impose a fine. Any action taken later does not undue the property deprivation. Therefore, the allowing of a rehabilitation plan is not a circumstance that makes the ordinance constitutional. *See Nev. Homebuilders Ass'n v. Clark County*, 121 Nev. 446, 117 P.3d 171, 173 (2005) (a statute must be interpreted "in a way that would not render words or phrases superfluous or make a provision nugatory") (internal quotation marks omitted). *Bourne Valley Court Trust v. Wells Fargo Bank, NA*, 832 F.3d 1154 (9th Cir., 2016). The ordinance states that "condemned structures **shall** be removed destroyed and removed from the premises." Section 1.7.4 (emphasis added). This does not permit any other circumstances that would not result in the property being removed or destroyed.

contends that remediation is not possible and that the structure, as it exists, cannot be remedied in such a way to prevent it from becoming a nuisance, then the local government must establish by a preponderance of the evidence that the structure should be demolished instead of repaired. *West v. City of Borger*, 309 S.W.2d 250, 253 (Tex.App. 1958).

> The general rule is stated thus in Rhyne, Municipal Law, 1957, p. 559:
>
> Except in clear cases of emergency, a prior notice and a reasonable opportunity to be heard is required to be given to a property owner before attributing legal effectiveness to any order to demolish, repair, alter or improve a substandard building. The owner should also be apprised of the defects in his building to give him an opportunity to remedy them. * * *" See also 14 A.L.R.2d annotation, supra, p. 74 ff.; 16A C.J.S. Constitutional Law § 645, p. 913. *Albert v. Mountain Home*, 81 Idaho 74, 80-81, 337 P.2d 377 (Idaho 1959)(emphasis added).

The ordinance does contain language (section 1.7.4.1)indicating that it is possible that person could be permitted to repair a structure **after** condemnation **if** the council approves a plan and **if** a council member agrees to sponsor the plan. First, this provision conflicts with the provision stating a condemned structure "shall" be destroyed and removed. Second, this provision does not guarantee an opportunity to repair the property. The opportunity is contingent upon the approval of a plan (which in practice requires a bond equal to demolition costs) and a sponsor. If no council member agrees to sponsor the plan, the property owner is left with no recourse. And, this provision vests too much discretion in the council members.

If arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. "[A] statute must not be so vague and standardless that it leaves judges free to decide, without any legally fixed standards, what is prohibited and what is not on a case-by-case basis. *Arkansas Tobacco Control Bd. v. Sitton*, 357 Ark. 357, 166 S.W.3d 550 (2004). Where a law is so vague or so standardless that it invites arbitrary enforcement, the statute or ordinance violates the Fifth Amendment. *Johnson v. United States*, 135 S. Ct. 2551, 192

L. Ed. 2d 569 (2015) (citing *Kolender v. Lawson*, 461 U.S. 352, 357–358, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983); see also *Sessions v. Dimaya*, 138 S. Ct. 1204, 200 L.Ed.2d 549 (2018).

The ordinance does not contain any guidance as to whether a plan should be approved. Again, the property owner is left to guess at what the City wants. Finally, even a property owner is able to develop an acceptable plan, obtain a sponsor and secure approval, the condemnation is not set aside. This means that the City may proceed to demolish the structure at any time.[8] Again, there are no standard to guide city officials in determining what circumstances would warrant such action. As the U.S. Supreme Court has recognized, government officials cannot always be trusted to safeguard the rights of the people and they should not be left with too much discretion. *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004). Total discretion is vested in code enforcement and the council and this is constitutionally unacceptable. Because the language of the ordinance leaves total discretion to council members, the opportunity to repair a property is not governed by the ordinance but is subject to the whim of elected officials. It is inconceivable that such unbridled discretion would ever be found to comport with constitutional due process.

D. **The ordinance fails to provide for constitutionally required notice of the specific violations or conditions to be repaired.**

While the City's Condemnation Code does provide for methods of providing notice to property owners of proposed condemnation actions, the Code does not provide for notice of specific violations or of the right to appeal the decision.[9] Even if the City permitted repairs to be made prior to a condemnation action, which it doesn't, an owner would be forced to guess at what

[8] Indeed, this is exactly what occurred in *Talley v. City of North Little Rock*, 2009 Ark. 601 (2009).

[9] The City's practice is to red-tag properties, prohibiting repair without any notice to the property owner, whatsoever. This is clearly a seizure in violation of the Fourth Amendment. However, this practice does not appear to have ever been enacted into any type of law or regulation by the City Council. Unfortunately, one cannot make a facial challenge to a law that does not exist, leaving the City free to continue to engage in this unconstitutional practice. It shouldn't be the case, that government can violate the rights of its citizens in the absence of any law and then rely on the absence of such law to defeat a challenge to the practice. Yet, this is what the courts seem to have allowed.

conditions the City is seeking to have remedied. Section 1.7.3.1 of the ordinance provides for "notice of any proposed condemnation action . . .." The ordinance does not contain any provision for notice regarding specific violations[10] or conditions to be repaired.

Notice is a fundamental part of due process in all kinds of administrative proceedings, and the regulation of public nuisances is no different. Notice must be executed in a reasonable manner to adequately inform the parties of proceedings that may affect their legal rights. *Armstrong v. Manzo*, 380 U.S. at 550. "[W]hen notice is a person's due, process which is a mere gesture is not due process." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 315, 70 S. Ct. 652, 94 L. Ed. 865 (1950). To satisfy the requirements of due process, notice must convey the required information.

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Milliken v. Meyer*, 311 U.S. 457;*Grannis v. Ordean*, 234 U.S. 385;*Priest v. Las Vegas*, 232 U.S. 604;*Roller v. Holly*, 176 U.S. 398.The notice must be of such nature as reasonably to convey the required information, *Grannis v. Ordean*, supra, and it must afford a reasonable time for those interested to make their appearance, *Roller v. Holly*, supra, and cf. *Goodrich v. Ferris*, 214 U.S. 71.

Id. at 314 (footnotes omitted).

Notice must provide a party with sufficient information to make informed decisions as to how to proceed in order to protect his property interest. *See Grayden v. Rhodes*, 345 F.3d 1225, 1242 (11th Cir. Fla. 2003) (*citing Mullane*, 393 U.S. at 314, 70 S. Ct. at 657). "The right to be heard has little reality or worth unless one . . . can choose for himself whether to appear or default,

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[10] Section 1.6.1 of the ordinance does provide for "Notice of Violations." However, there is no requirement that such notice be provided in condemnation actions. This is confirmed by the City's interpretation and practices indicating that no such notice is required in condemnation actions. Again, a court should not rely on some imaginative or speculative scenario in which the City may go beyond the requirements of the ordinance and provide notice of specific conditions.

acquiesce or contest." *Id.*; *see also West Covina*, 525 U.S. at 240, 119 S. Ct. at 681 (*citing Mullane* for this proposition). **Notice must "set forth the alleged misconduct with particularity**." *In re Gault*, 387 U.S. 1, 33, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967)(emphasis added). Notice must "apprise the affected individual of, and permit adequate preparation for, an impending hearing." *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 14, 56 L. Ed. 2d 30, 98 S. Ct. 1554 (1978) (internal quotations omitted); *see also Bliek v. Palmer*, 102 F.3d 1472, 1475 (8th Cir. 1997). Where Notice fails to advise of the specific violations so that a party may prepare for a hearing, appearance does not cure inadequate notice. *In re Gault*, 387 U.S. at 33.

To be adequate, notice should also advise the party of procedures to appeal an adverse decision. *See Memphis Light, Gas & Water Div.*, 436 U.S. at 14-16.

> Because of **the failure to provide notice reasonably calculated to apprise respondents of the availability of an administrative procedure** to consider their complaint of erroneous billing, and the failure to afford them an opportunity to present their complaint to a designated employee empowered to review disputed bills and rectify error, petitioners **deprived respondents of an interest in property without due process of law.**

Id. at 22 (emphasis added). The Eleventh Circuit has also addressed this requirement specifically in the context of condemnation proceedings:

> To include a one-sentence statement of a tenant's right to appeal the condemnation order in this notice to vacate would not be burdensome. In fact, Rhodes testified that the City amended its standard eviction notice to include a statement regarding the tenants' right to appeal the condemnation order, which suggests that the fiscal and administrative burden of such notice is not prohibitive.

Grayden, 345 F.3d at 1236. And, also specifically in the context of condemnation actions, we again refer to Rhyne, Municipal Law, 1957, p. 539 which states: "[t]he owner should also be apprised of the defects in his building to give him an opportunity to remedy them."

The code provision at issue provides only for notice of the proposed condemnation. Section 1.7.3. It does not provide for any notice of specific violations or conditions or any notice of rights

to appeal. Considering the City's summary condemnation procedure, notice of the right to appeal is especially important. Without notice of specific conditions, a property owner is forced to guess at what conditions the City wants remedied and, without such notice, cannot prepare to address these issues in a hearing (if one were provided). Many of the property owners whose properties are condemned lack the knowledge or resources to initiate court action. Most are unlikely to be aware of the requirements of District Court Rule 9, including the provision that an appeal must be filed within thirty days. Additionally, the requirement of the submission and approval of a plan means that some property owners may not even consider their options for filing an appeal until a submitted plan has been denied. It is likely this process would take more than thirty days. By the time a rehabilitation plan is submitted, reviewed, and put to a Council vote, the thirty (30) day period in which to appeal will have expired and, if the City rejects the plan and proceeds to demolish the property, the owner is left with absolutely no recourse.

In *Unted States v. Fransden*, 212 F.3d 1231 (11th Cir. 2000), an ordinance that required a permit be issued "without reasonable delay" was deemed to be unconstitutional because it failed to adequately confine the time within which the decision maker must act. This tells us that when constitutional rights are restricted by a law, that law must, with some specificity, provide limits on the discretion of public officials. *See, also City of Chicago v. Morales*, 527 U.S. 41, 119 S.Ct. 1849 (1999); *Kolender v. Lawson*, 461 U.S. 352, 358, 103 S.Ct. 1855 (1983); *Redner v. Dean*, 29 F.3d 1495 (11th Cir. 1994). Even if a property owner were to submit a proposed rehabilitation plan, there are no standards by which such a plan must be evaluated, no time frames, and absolutely no other limits on the Council's discretion. Again, this type of unfettered discretion means this ordinance does not pass constitutional muster.

IV. The City's ordinance contains important and material terms which are undefined and unconstitutionally vague.

In addition to the previously discussed rejections of "the *Salerno* rule," the U.S. Supreme Court has specifically limited the application of the *Salerno* doctrine where an ordinance or statute contains provisions which are vague. *Johnson v. United States*, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015). Where a defendant has been convicted for specific conduct under the challenged law, the court should conduct an as-applied review focusing on the application of the statute or ordinance to the particular facts of the case involved. *U.S. v. Farhane*, 634 F.3d 127 (2nd Cir., 2011); *Village of Hoffman Estates v. Flipside Hoffman Estates, Inc.*, 455 U.S. 489, 495, 102 S.Ct. 1186.; see also *Rolling Pines Ltd. Partnership v. City of Little Rock*, 73 Ark.App. 97, 105, 40 S.W.3d 282, 834 (2001) ([I]t is permissible for a court to look not only at the face of the ordinance but also at its application to the person who has sought to comply with the ordinance and who is alleged to have failed to comply). The bottom line is that if a provision of a challenged statute or ordinance is vague, it does not necessarily have to be vague in all applications to render the statute or ordinance unconstitutional. When a person who has been convicted of violating and ordinance, the court should look at the facts of the particular case.

A determination that a person has violated a statute may be appealed by challenging the constitutionality of the law on its face. *See, e.g U.S. v. Frandsen*, 212 F.3d at 1235; *Papachristou v. City of Jacksonville*, 405 U.S. 156, 92 S.Ct. 839 (1972); *Thornhill v. Alabama*, 310 U.S. 88, 97, 60 S.Ct. 736, 742 (1940) (explaining in the First Amendment context that "[o]ne who might have had a license for the asking may ... call into question the whole scheme of licensing when he is prosecuted for failure to procure it"); *United States v. Acheson*, 195 F.3d 645, 648-50 (11th Cir.1999). The remedy if the facial challenge is successful is the striking down of the regulation and the reversal of the conviction. See *U.S. v. Frandsen*, 212 F.3d 1231 (11th Cir., 2000).;

Stromberg v. California, 283 U.S. 359, 369-70, 51 S.Ct. 532, 536, 75 L.Ed. 1117 (1931) ("The ... statute being invalid on its face, the conviction of the appellant ... must be set aside.").

A vague statute "violates the first essential of due process." *Rolling Pines*, 73 Ark.App. 97, 40 S.W.3d 828. (citing *Connally v. General Constr. Co.*,269 U.S. 385, 391, 46 S.Ct. 126 (1926)). The long-established "law of the land" is that that "no one [could] be taken by surprise" by having to "answer in court for what [one] has not been warned to answer". *Goldington v. Bassingburn*, Y.B. Trin. 3 Edw. II, f. 27b (1310)(as cited in *Sessions v. Dimaya*, 138 S. Ct. 1204, 200 L.Ed.2d 549 (2018)). This requirement of specificity of language has also long been applied to statutes:

> Blackstone illustrated the point with a case involving a statute that made "stealing sheep, or other cattle" a felony. 1 Blackstone 88 (emphasis deleted). Because the term "cattle" embraced a good deal more then than it does now (including wild animals, no less), the court held the statute failed to provide adequate notice about what it did and did not cover—and so the court treated the term "cattle" as a nullity. Ibid. All of which, Blackstone added, had the salutary effect of inducing the legislature to reenter the field and make itself clear by passing a new law extending the statute to "bulls, cows, oxen," and more "by name." Ibid.

Sessions, 138 S.Ct. at 1225.

First, Plaintiff contends that the term, "public hearing" is defined by the City's practices. However, if the City were to disagree with this definition, then alternatively, it would appear that the provision was vague. Second, the wording regarding what the "public hearing" **shall** include is certainly less than clear. The section states that the "public hearing" **shall** include "[t]he owner or owners of the structures." Section 1.7.1. The City may contend this simply means that the owners have to be identified. However, that would not comport with a plain reading of the language which would indicate that the owner or owners themselves must be included. Does this mean the proceeding cannot be conducted with the owners?

The next "public hearing" requirement contains extremely vague language. It requires that the "public hearing" include findings that the structrures are "unfit for human occupancy, or

otherwise detrimental to the life, property or safety of the public." Aside from the lack of clarity or specificity in the terms themselves, the ordinance does not provide any direction or standards, and is therefore vague as to how these determinations are to be made and on what types of information or evidence such determinations should be based. The vague terms do not provide any standards or guidance in interpreting and applying these very broad and generalized terms.

Starting with "unfit for human habitation." The Mayor and City Council members were asked to define "not fit for human habitation" in interrogatories. Exhibits E & F. Mayor Smith's response was "See "dangerous" and "unsafe." Exhibit E. For "Unsafe" he said "See 'dangerous.'" For dangerous, he responded: "Means for someone or something that is not familiar with the property that could allow them to wander onto or into the property and become injured." Apparently, a person's familiarity with the property somehow impacts whether it is fit for human habitation? The various council members responded as follows (Exhibit F):

> Ross: "Should not be occupied because someone can't safely live in a property or occupy the space."
> White: "People not able to be safe in the dwelling."
> Robinson: "Unlivable."
> Baxter: "I probably wouldn't let my dog live there."
> Foutch: "Extreme disrepair makes it not fit for people to live."
> Witcher: "Dirty and does not provide for sanitary inhabitants."
> Hight: "Unhealthy, unsafe, not a good place for people to be in or living at the time.

The definitions vary from "can't safely live in" to not able to be safe, to unlivable, to "extreme disrepair, to "Dirty, to "unhealthy, unsafe, not a good place." And, as previously mentioned, the mayor factors in familiarity with the property. None of these definitions provide any significantly clarity and demonstrate how utterly standardless this provision is. In the absence of any standards,

this provision vests absolute and total discretion with the Council. This type of unfettered discretion cannot pass constitutional muster.

The ordinance also contains the language "detrimental to the life, property, or safety of the public." The Mayor and council members were not asked to define this specific language. The language they were asked to define was based on the language in the Resolution concerning Plaintiff's property. However, one of the terms in the Resolution is very analogous to this language: "Detrimental to public welfare."

Again, the Mayor responded: See 'dangerous, 'unsafe,' and 'not fit for human habitation.'" Exhibit E. So, again, he links familiarity with the property to the issue. Seems a little nonsensical but at least its consistent. The other council members responded as follows (Exhibit F):

> Ross: "The opportunity for drug activity, vagrants, decrease of property values of surrounding properties, and/or possibility of fire."
> White responded: "In this instance, one dilapidated property has a negative impact on the community."
> Robinson responded: "Unsafe."
> Baxter: "Placing in jeopartdy the general public.".
> Foutch: Criminal use, harming property value."
> Witcher: "See previous definitions above."
> Hight: "To the community, it is a hazard; here, homeless people or vagrants could live in it, animals could live in it, it was not improving the appearance of the community, and it did not make a good place to live."

Again, the responses vary significantly, with some merely relying on broad generalizations such as the impact on the community, jeopardy to the general public, or circling back to terms such as unsafe. One indicated that his definition was about criminality and property values. So, that begs the question: is this language about safety issues, crime, property values, the overall impact on the community. One might argue that it involves all of these issues but, if that is the case, why didn't the council members answers more closely resemble that idea. One council member reads

that provision and is concerned about property values while another is concerned about safety. This demonstrates that the provision is overly vague and standardless. Again, it vests too much discretion in the council members as each is free to interpret the provision in a wide range of different ways.

Another issue that makes this ordinance vague is simply that it seems to require every structure in the city to be "fit for human occupancy." Section 1.7.1. Certainly, there are many structures within the City which are not meant for human occupancy, garages, storage buildings, etc. Must each one of these structures be "fit for human occupancy?" Does this mean such structures as a backyard storage shed must have plumbing and electricity. A plain reading of the code would seem to suggest so.

The Code is also vague with regard to its notice provisions. Section 1.7.3 statest that "[t]he Code Enforcement Department shall be responsible for publication, mailing or delivery of **all** notices required to condemn structures." Yet, the code does not specify exactly what notices are **required** to condemn structures. The ordinance simply refers to "notice of any proposed condemnation." The Code does not insure proper notice is provided and, again, it would be improper to speculate as to what actions may be taken to uphold the statute.

V. Because it is vague and not specific, the City's ordinance provides public officials with too much discretion and is, therefore, unconstitutional.

Vague laws invite arbitrary power by investing excessive discretion in public officials. As the U.S. Supreme Court has recognized, government officials cannot always be trusted to safeguard the rights of the people and they should not be left with too much discretion. *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004). "Vague standards are manipulable." *Id.* If arbitrary and discriminatory enforcement are to be prevented, laws must provide explicit standards for those who apply them. *E.g., Sessions v. Dimaya*, 138 S.Ct. 1204 (2018). A vague law

impermissibly delegates matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory applications. *Id.* "[A] statute must not be so vague and standardless that it leaves judges free to decide, without any legally fixed standards, what is prohibited and what is not on a case-by-case basis. *Arkansas Tobacco Control Bd. v. Sitton*, 357 Ark. 357, 166 S.W.3d 550 (2004).

"Unlike the similar doctrines of insufficient notice and overbreadth, the 'arbitrary enforcement' branch of vagueness doctrine is not primarily concerned with the effect of a law on the conduct of regulated parties. Rather, it is focused on the conduct of regulators—specifically, unguided discretion within the process of lawmaking and law enforcement." *United States v. Davis*, No. 07-1964 (6th Cir. 12/19/2008). Where a law is so vague or so standardless that it invites arbitrary enforcement, the statute or ordinance violates the Fifth Amendment. *Johnson v. United States*, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015) (citing *Kolender v. Lawson*, 461 U.S. 352, 357–358, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983); see also *Sessions v. Dimaya*, 138 S. Ct. 1204, 200 L.Ed.2d 549 .

In *Sitton*, the Arkansas Supreme Court took issue with the fact that the terms "trade discounts" and "rebates" were not defined in a statute regulating the sale of tobacco products. 357 Ark. 357, 166 S.W. 3d at 556. Noting that wholesalers and retailers professed confusion as to how what these terms meant, the Court held that the statute was unconstitutional because it was impermissibly vague. *Id.* In *Redner v. Dean*, 29 F.3d 1495 (11th Cir. 1994), an ordinance placed a 45 day time limit on an administrator in which to grant or deny a license for an adult entertainment facility. The ordinance provided that if the administrator failed to act within the 45 day time limit, the applicant "may" be permitted to being operating the establishment for which a license was sought. *Id.* at 1501. The court stated that when analyzing an ordinance pursuant to a facial

challenge, the ordinance must be analyzed "as written." *Id.* In *Lady J. Lingerie, Inc. v. City of Jacksonville*, 178 F.3d 1358 (11th Cir. 1999), the court held that an ordinance that failed to put any real time limit on a zoning board was unconstitutional because it vested too much discretion in the board as to when a decision would be made. In *Kolender v. Lawson*, 461 U.S. 352, 358, 103 S.Ct. 1855 (1983), the Supreme Court struck down as void for vagueness a San Diego ordinance that required individuals on the street to provide "credible and reliable" identification when requested by an investigating police officer because the ordinance failed to provide "minimal guidelines to govern law enforcement." In *City of Chicago v. Morales*, 527 U.S. 41, 119 S.Ct. 1849 (1999), the Court struck down a Chicago ordinance that prohibited "criminal street gang members" from "loitering" with others in a public place, on the grounds that it gave "absolute discretion to police officers to determine what activities constitute[d] loitering." *Id.* at 61. This ordinance, the Court explained, was "impermissibly vague" even though it "d[id] not reach a substantial amount of constitutionally protected conduct" because it "fail[ed] to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests." *Id.* at 52.

The ordinance at issue permits the City to condemn and destroy a property without providing adequate notice of the supposed violations, without ever providing any opportunity to repair the property, and without any **meaningful** hearing with an unbiased decisionmaker.

VI. The City's ordinance results in Bills of Attainder and the Resolution regarding Plaintiff's property is a Bill of Attainder.

In their Motion, Defendants incorrectly state that Plaintiff's Bill of Attainder claim is based on its allegation that the City's Code is facially invalid and fails to provide due process. Plaintiff's Bill of Attainder claim is a stand-alone claim in which Plaintiff contends that the City's condemnation code permits the City to enact unconstitutional Bills of Attainder, in part, because

it permits the City Council, a legislative body, to inflict punishment in the absence of any judicial proceedings.

Next, Defendants state that the Code permits a person to be "ticketed and tried in state district court." This statement is flawed for two reasons. First, the Code says nothing about being ticketed or tried in state court. The relevant sections are as follows:

> **1.7.1 Keeping condemned structures prohibited.** It shall be unlawful for any person to own, keep, or maintain any structure within the corporate limits of the city which is condemned by resolution of the city council.
> . . . .
>
> **1.7.7 Penalty for violation of article.** A penalty as provided by this Code is hereby imposed against the owners of any structure condemned by resolution of the City Council thirty (30) days after such structure has been condemned; and each day thereafter such nuisance be not abated constitutes a separate and distinct offense, provided the notice as provided in subsection 1.7.3.2 has been given within ten (10) calendar days after such structure has been condemned.

Nothing in these sections, nor anywhere else in the condemnation code provides for ticketing and trial. Section 1.7.7 states explicitly that the penalty "is hereby imposed." It does not say that it will be imposed at a later time or following any judicial proceeding. Nor does the Resolution enacted by the Council. The Resolution states that each day, after the initial ninety (90) days "shall constitute a separate and distinct offense." The implication is that the punishment is automatic.

Second, even if a property owner were provided a trial in district court, he would be found guilty simply because the City Council passed a resolution to condemn the property. A conviction would be practically automatic, based **only** on the fact that the City Council passed a resolution, not because the property was actually a nuisance. The title of section 1.7.1 is telling. The offense is "[k]eeping a condemned structure . . .." It is not maintaining a nuisance. Once the council passes the resolution, the issue of whether the property is actually a nuisance becomes irrelevant. Punishment is essentially automatic. Any trial in district court would merely be a formality.

There is no provision for a trial on the underlying issue as to whether the property was, in fact, a nuisance. A property owner would be convicted solely because the City Council passed a resolution without ever having had any type of trial, meaningful hearing, or any other opportunity to meaningfully contest the Council's action. A conviction would likely occur even in a case where there was no evidence the property was a nuisance.

Therefore, the ordinance permits the City Council to inflict punishment on a property owner without ever providing any type of trial on the merits of whether the property actually is a nuisance. As the Supreme Court noted in *United States v. Brown*, 381 U.S. 437, 85 S.Ct. 1707, 14 L.Ed.2d 484 (1965), "it is this type of accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective," that is "the very definition of tyranny." *Id.* (quoting from The Federalist, No. 47, pp. 373—374 (Hamilton ed. 1880)).

Article I, § 10 of the United States Constitution states that no state shall pass any "bill of attainder." Article 2 § 17 of the Arkansas Constitution also prohibits bills of attainder. "The provisions outlawing bills of attainder were adopted by the Constitutional Convention unanimously, and without debate." *United States v. Brown*, 381 U.S. 437, 441 (1965) (*citing* Madison, *Debates in the Federal Convention of 1787*, p. 449 (Hunt and Scott ed. 1920)). A bill of attainder is a law that legislatively determines guilt and inflicts punishment without provision of the protections of a judicial trial. *Selective Service System v. Minnesota Public Interest Research Group*, 468 U.S. 841, 846 (1984) (*citing Nixon v.Administrator of General Services*, 433 U.S. 425, 468 (1977); *see also United States* v.*O'Brien*, 391 U. S. 367, 383, n. 30 (1968); *United States* v. *Lovett*, 328 U. S. 303, 315 (1946). Additionally, a law that permits a conviction with less evidence than would

otherwise be required may be a bill of attainder: *Carmell v. Texas*, 529 US 513; 120 S. Ct. 1620, 146 L. Ed. 2d 577 (2000).

The bill of attainder clause was included in the Constitution to prevent the legislative exercise of the judicial function. *Brown*, 381 U.S. at 442; *see also Fletcher v. Peck*, 6 Cranch 87, 136 (1810). In *Brown*, the Court discussed the scope of the Bill of Attainder Clause with such eloquence that extensive quoting is not only justified, but is necessary:

> While history thus provides some guidelines, the wide variation in form, purpose and effect of ante-Constitution bills of attainder indicates that the proper scope of the Bill of Attainder Clause, and its relevance to contemporary problems, must ultimately be sought by attempting to discern the reasons for its inclusion in the Constitution, and the evils it was designed to eliminate. The best available evidence, the writings of the architects of our constitutional system, indicates that **the Bill of Attainder Clause was intended not as a narrow, technical (and therefore soon to be outmoded) prohibition, but rather as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply—trial by legislature.**
>
> The Constitution divides the National Government into three branches—Legislative, Executive and Judicial. **This "separation of powers" was obviously not instituted with the idea that it would promote governmental efficiency. It was, on the contrary, looked to as a bulwark against tyranny.** For if governmental power is fractionalized, if a given policy can be implemented only by a combination of legislative enactment, judicial application, and executive implementation, no man or group of men will be able to impose its unchecked will. James Madison wrote:
>
> > **"The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."**
>
> . . . .
>
> The authors of the Federalist Papers took the position that although under some systems of government (most notably the one from which the United States had just broken), the Executive Department is the branch most likely to forget the bounds of its authority, "in a representative republic . . . where the legislative power is exercised by an assembly . . . which is sufficiently numerous to feel all the passions which actuate a multitude; yet not so numerous as to be incapable of pursuing the

objects of its passions . . . ," barriers had to be erected to ensure that the legislature would not overstep the bounds of *its* authority and perform the functions of the other departments. The Bill of Attainder Clause was regarded as such a barrier. Alexander Hamilton wrote:

> "Nothing is more common than for a free people, in times of heat and violence, to gratify momentary passions, by letting into the government principles and precedents which afterwards prove fatal to themselves. Of this kind is the doctrine of disqualification, disfranchisement, and banishment by acts of the legislature. The dangerous consequences of this power are manifest. If the legislature can disfranchise any number of citizens at pleasure by general descriptions, it may soon confine all the votes to a small number of partisans, and establish an aristocracy or an oligarchy; **if it may banish at discretion all those whom particular circumstances render obnoxious, without hearing or trial, no man can be safe, nor know when he may be the innocent victim of a prevailing faction. The name of liberty applied to such a government, would be a mockery of common sense.**"

Thus the Bill of Attainder Clause not only was intended as one implementation of the general principle of fractionalized power, but also **reflected the Framers' belief that the Legislative Branch is not so well suited as politically independent judges and juries to the task of ruling upon the blameworthiness of, and levying appropriate punishment upon, specific persons.**

> "Every one must concede that a legislative body, from its numbers and organization, and from the very intimate dependence of its members upon the people, which renders them liable to be peculiarly susceptible to popular clamor, is not properly constituted to try with coolness, caution, and impartiality a criminal charge, especially in those cases in which the popular feeling is strongly excited,—the very class of cases most likely to be prosecuted by this mode."

By banning bills of attainder, the Framers of the Constitution sought to guard against such dangers by limiting legislatures to the task of rule-making. "It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments." *Fletcher* v. *Peck,* 6 Cranch 87, 136.

It is in this spirit that the Bill of Attainder Clause was consistently interpreted by this Court—until the decision in *American Communications Assn.* v. *Douds,* 339 U. S. 382, which we shall consider hereafter. In 1810, Chief Justice Marshall, speaking for the Court in *Fletcher* v. *Peck,* 6 Cranch 87, 138, stated that "[a] bill of attainder may affect the life of an individual, or **may confiscate his property**, or may do both." This means, of course, that what were known at common law as bills of pains

> and penalties are outlawed by the Bill of Attainder Clause. **The Court's pronouncement therefore served notice that the Bill of Attainder Clause was not to be given a narrow historical reading** (which would exclude bills of pains and penalties), **but was instead to be read in light of the evil the Framers had sought to bar: legislative punishment, of any form or severity, of specifically designated persons or groups.** See also *Ogden* v. *Saunders,* 12 Wheat. 213, 286.

Brown, 381 U.S. at 441-47 (internal footnotes omitted)(emphasis added).

A municipal ordinance may constitute a bill of attainder. *See e.g., Crain v. City of Mountain Home,* 611 **F.2d** 726 (8th Cir.1979); *see also Peters v. Hobby*, 349 US 331 75 S. Ct. 790, 99 L. Ed. 1129 (1955) *concurrence* (*an administrative body cannot exercise powers that Congress itself is barred from asserting*) (*citing Anti-Fascist Committee v. McGrath*, 341 U. S. 123, 144-46;71 S. Ct. 624, 95 L. Ed. 817 (1951). In *Crain,* the Eighth Circuit held that two municipal ordinances removing an appointed city attorney for the remainder of his term and reducing the pay for the position to $1.00 per year for the subsequent term were unconstitutional bills of attainder.

> Ordinance 535 falls squarely within these definitions of a bill of attainder. That legislation clearly names an individual "in such a way as to inflict punishment on [him] without a judicial trial,"[5] *United States v. Lovett, supra,* 328 U.S. at 315, 66 S.Ct. at 1079, by requiring Crain to forfeit his job. We conclude, therefore, that the district court was correct in declaring Ordinance 535 unconstitutional.
> Ordinance 534, while facially constitutional,[6] factually constitutes improper action taken by the council in an effort to make Crain forfeit his position since, as a practical matter, its intent was to punish him if he accepted the rights and obligations of his elective position. Because Ordinance 534 is prospective in application, and salaries of elective officials may be specified by city officials pursuant to Ark.Stat. § 19-1025.1, the district court decided that the ordinance was not penal. But **legislation which inflicts a deprivation on named or described persons or groups constitutes a bill of attainder whether its aim is retributive, punishing past acts, or preventive, as in this case, discouraging future conduct.** *See United States v. Brown, supra,* 381 U.S. at 458, 85 S.Ct. 1707.

611 F.2d at 729 (emphasis added).

A law that (1) specifies affected persons, (2) imposes punishment, and (3) fails to provide for a judicial trial is a bill of attainder and is prohibited by the both the state and federal Constitutions. *Planned Parenthood of Mid-Missouri v. Dempsey*, 167 F. 3d 458 (8th Cir.

1999); *see also Selective Service*, 468 U.S. at 847, 104 S.Ct. 3348. A law that involves a consequence that falls within the historical meaning of legislative punishment, fails to further a nonpunitive purpose, or is intended to punish rises to the level of a bill of attainder. *Planned Parenthood*, 167 F.3d at 465 (citing *Selective Service*, 468 U.S. at 852 104 S.Ct. 3348; citing *Nixon*, 433 U.S. at 473, 97 S.Ct. 2777, 53 L.Ed.2d 867).

The City's statutory scheme permits the City Council to determine that a property should be condemned without providing a hearing and then permits the property owner to be convicted of the offense of keeping a condemned structure without ever having been granted a trial on the underlying issue of whether the property was indeed a nuisance. Under this scheme, the City can convict a property owner of a crime without ever having to prove its case. The City first seizes a property be "red-tagging." This seizure deprives the property owner of the ability to use or repair the property. Next, the City refuses to issue a permit to repair the property. Then, the City Council proceeds to condemn the property and order its destruction without conducting a hearing in which witnesses may be cross-examined and evidence presented. The City may then proceed to obtain a criminal conviction and impose a fine based solely on the existence of the resolution condemning the property.

The fact that the City Council can condemn a property and subject the owner to a criminal penalty without a judicial hearing or trial on the underlying condemnation issue makes this exactly the type of situation the Bill of Attainder Clause was intended to prohibit. The City Council is not an unbiased judicial decision maker but is instead the type of body described by the Supreme Court in *Brown*:

> and from the very intimate dependence of its members upon the people, which renders them liable to be peculiarly susceptible to popular clamor, is not properly constituted to try with coolness, caution, and impartiality a criminal charge,

> especially in those cases in which the popular feeling is strongly excited,—the very class of cases most likely to be prosecuted by this mode . . .

381 U.S. at 445. In fact, one of the City Council members has admitted that there has been pressure from a neighborhood association to get this building demolished. Exhibit C.

It's possible that the City will attempt to now argue that the "Resolution" is not legislation. This would be another inconsistent position and, based on the principles and doctrines discussed previously herein, the City should be estopped from making such inconsistent arguments. The City has unequivocally identified the "Resolution" as legislation.

> [T]he Arkansas General Assembly has delegated **legislative** power to cities such as the City of North Little Rock to enact ordinances; **an act of the City is the co-equal of an act of the General Assembly**. This **legislative** power includes discretion to determine the interests of the public as well as the means necessary to protect those interests. Within constitutional limits, **the legislative branch is the sole judge of the laws that should be enacted** for the protection and welfare of the people and when and how the police power of the State is to be exercised. The judicial branch has the power to set aside legislation that is arbitrary, capricious, or unreasonable, but this is a limited power, and the judiciary, in acting under this limited power, cannot take away the discretion that is constitutionally vested in **the City's legislative body**.

DEFENDNATS' SURREPLY TO PLAINTIFF'S REPLY TO DEFENDANTS' RESPONSE, Pgs. 6-7, *Filed Nov. 14, 2016.*

The City's statutory scheme meets all the elements of a bill of attainder. The resolution passed by the City Council is directed at the property owner and therefore, it specifies the affected persons. The passing of the resolution actually imposes two types of punishment. First, the resolution deprives the property owner of the property by ordering that the building be demolished. Second, the passing of the resolution permits the City to charge the property owner with a criminal offense and impose substantial fines. Third, the scheme fails to provide for a judicial trial on the underlying issue of whether the building in question was a nuisance. While the property owner may appear in district court and contest the charge, once the resolution is passed, the owner will, almost certainly, be deemed guilty of violating the ordinance that prohibits

keeping a condemned structure without ever being provided with a meaningful hearing on the question of whether, in fact, the property in question is actually a nuisance. The City's statutory scheme whereby a property may be condemned without any due process and then the property owner can be deemed guilty of a criminal offense based solely on the resolution condemning the property constitutes a bill of attainder and is, therefore, unconstitutional.

VII. Convent Corporation has standing to bring a facial challenge regardless of any ownership issues.

The issue of standing, as raised in Defendants' Motion, has been raised and refuted before in this matter. At the current stage of the case, it is irrelevant. A person has violated a statute may be appealed by challenging the constitutionality of the law on its face. *See, e.g U.S. v. Frandsen*, 212 F.3d at 1235; *United States v. Acheson*, 195 F.3d 645, 648-50 (11th Cir.1999); *United States v. Cunningham*, 161 F.3d 1343, 1344 (11th Cir.1998); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 92 S.Ct. 839, 31 (1972); *Thornhill v. Alabama*, 310 U.S. 88, 97, 60 S.Ct. 736, 742, (1940) (explaining in the First Amendment context that "[o]ne who might have had a license for the asking may ... call into question the whole scheme of licensing when he is prosecuted for failure to procure it"). Further, a person who is injured by a governmental action has standing to challenge the action. *E.g., Martin v. Kohls*, 444 S.W.3d 844, 2014 Ark. 427 (2014). A prejudicial impact is sufficient to confer standing. *Jegley v. Picado*, 80 S.W.3d 332, 349 Ark. 600 (2002); *Tauber v. State*, 919 S.W.2d 196, 324 Ark. 47 (1996); *Lawson v. City of Mammoth Spring*, 696 S.W.2d 712, 287 Ark. 12 (1985).

The remedy if the facial challenge is successful is the striking down of the regulation and the reversal of the conviction. *See Stromberg v. California*, 283 U.S. 359, 369-70, 51 S.Ct. 532, 536, (1931) ("The ... statute being invalid on its face, the conviction of the appellant ... must be set aside."); *Frandsen*, 212 F.3d 1231. Because a determination has been made that Plaintiff violated

the ordinance at issue and a penalty has been imposed, provides Plaintiff with standing to bring a facial challenge to the ordinance regardless of any ownership issues.

A. Because Defendants failed to raise the issue of standing at the administrative level, they may not raise it on appeal.

While the issue is irrelevant to Plaintiff's standing to bring a facial challenge to the ordinance, out of caution, Plaintiff will repeat the arguments here which demonstrate that Defendants' arguments regarding standing are without merit.

First, just as Plaintiff was required to raise issues at the administrative level, so was Defendants. The issue of standing is not a jurisdictional issue that may be raised for the first time on appeal. *Harrill & Sutter, PLLC v. Farrar*, 402 S.W.3d 511, 515, 2012 Ark. 180 (2012). *See also Pulaski County v. Carriage Creek Improvement Dist. No. 639*, 319 Ark. 12, 888 S.W.2d 652 (1994); *State v. Houpt*, 302 Ark. 188, 788 S.W.2d 239 (1990). .Failure to raise an issue bars review of the issue on appeal. *Plant v. Wilbur*, 47 S.W.3d 889, 894-95, 345 Ark. 487 (2001); *Ford v. Ark. Game & Fish Comm'n*, 979 S.W.2d 897, 335 Ark. 245 (1998); *Barber v. Watson*, 330 Ark. 250, 953 S.W.2d 579 (1997); Betts v. Betts, 326 Ark. 544, 932 S.W.2d 336 (1996). A party who initiates an administrative action must raise arguments they wish to pursue in the administrative action. *McGhee v. State Bd. of Collection Agencies*, 243 S.W.3d 278, 368 Ark. 60 (2006) (*citing Ford*, 335 Ark. 245, 979 S.W.2d 897; *Regional Care Facilities, Inc. v. Rose Care, Inc.*, 322 Ark. 780, 912 S.W.2d 406 (1995)). The Arkansas Supreme Court has specifically held that, where the government has initiated an action against a party, the issue of standing may not be raised on appeal. *State v. Houpt*, 788 S.W.2d 239, 240-41, 302 Ark. 188 (1990). When the issue of standing is not properly developed below, it should not be addressed on appeal. *Farrar*, 402 S.W.3d at 514-15, 2012 Ark. 180. *See also, e.g., Camp v. McNair*, 217 S.W.3d 155, 93 Ark. App. 190 (2005); *Arkansas Game & Fish Comm'n v. Murders*, 327 Ark. 426, 938 S.W.2d 854 (1997). Because the

City failed to raise the issue of standing at the administrative level, it is precluded from raising the issue on appeal. *See, e.g., McGhee*, 243 S.W.3d at 284-85, 368 Ark. 60; *Ford*, 979 S.W.2d 897, 335 Ark. 245, *Duke v. Selig*, CA09-518, Ark: Court of Appeals, Div. III, Dec. 9, 2009.

B. Defendants' contention that Plaintiff lacks standing due to ownership issues is without merit because at the time of the condemnation action, Plaintiff had a legally cognizable interest in the property.

At the time of condemnation, Convent had a legally cognizable interest in the property which gave it standing to challenge the condemnation action. Persons other than property owners may have standing to challenge ordinances or resolutions which affect a property. *Summit Mall Co. LLC, v. Lemond*, 132 S.W.3d 725, 355 Ark. 190 (2003); *Forrest Const., Inc. v. Milam*, 43 S.W.3d 140, 345 Ark. 1 (2001). In *Summit Mall*, the Court held that individuals who lived in close proximity to a proposed commercial development had standing to challenge the issuance of a building permit because they would be adversely affected by the development. *Summit Mall*, 132 S.W.3d at 734, 355 Ark. 190. "Generally, Arkansas law on 'standing' states that a person or party who has a pecuniary interest in the outcome of the action has standing to assert a claim on his or its behalf." *First United Bank v. Phase II*, 69 S.W.3d 33, 43, 347 Ark. 879 (2002). *See also, e.g., Forrest Const., 6 Inc.*, 43 S.W.3d at 144, 345 Ark. 1; In re $3,166,199, 987 S.W.2d 663, 337 Ark. 74 (1999); *Stilley v. James*, 345 Ark. 362, 48 S.W.3d 521 (2001); *McCoy v. Moore*, 1 S.W.3d 11, 338 Ark. 740 (1999). Those who may have a future interest in a property or who have a monetary interest related to the property have standing to bring a lawsuit concerning the property. See, e.g., *Stokes v. Stokes*, 613 S.W.2d 372, 374-75, 271 Ark. 300 (1981). A party whose economic interest may be impaired by an order is an aggrieved party and has standing to appeal an adverse decision affecting the property. *Forrest Const. Inc.*, 43 S.W.3d at 144, 345 Ark. 1 (*citing Sebastian Lake Pub. Util. Co. v. Sebastian Lake Realty*, 325 Ark. 85, 923 S.W.2d 860 (1996)); *In re $3,166,199*,

987 S.W.2d at 666, 337 Ark. 74. *See also Arkansas State Highway Commission v. Perrin*, 399 S.W.2d 287, 240 Ark. 302 (1966). "The law is settled that a person with a pecuniary interest affected by a trial court's judgment has standing to pursue appellate review of that judgment or order . . . ." *McCoy*, 1 S.W.3d at 12, 338 Ark. 740. *See also, e.g., In the Matter of Allen,* 304 Ark. 222, 800 S.W.2d 715 (1990).

Defendants cite *Freeman v. Freeman*, 430 S.W.3d 824, 2013 Ark.App. 693 (2013) for the proposition that a property owner loses title when a property is seized by the state for unpaid taxes. However, the application of that proposition is limited. The Arkansas Supreme Court has held that "a redemption deed from the State is in effect a mere payment of taxes and does not purport to convey any title." *Buckeye Retirement Co. LLC., LTD. V. Walter*, 404 S.W.3d 173, 177, 2012 7 Ark. App. 257 (2012) (*citing Gott v. Moore*, 218 Ark. 800, 802, 238 S.W.2d 754, 756 (1951); *Mabrey v. Millman*, 208 Ark. 289, 292, 186 S.W.2d 28, 30 (1945)). "[W]hen the title to land is forfeited to the state for nonpayment of taxes, the state holds the title solely for the payment of the taxes charged and chargeable thereon." *Buckeye Retirement*, 404 S.W.3d at 178, 2012 Ark. App. 257 (citing 72 Am.Jur.2d. State & Local Taxation § 907 (2001)). Therefore, it logically follows that a seizure by the state of a property for unpaid taxes does not extinguish property rights existing at the time of the seizure. Indeed, upon payment of the taxes, property rights are restored to the owner, even if it is not the owner who redeems the property.[11]

Convent's property rights were not extinguished by the certification to the state. Indeed, the state held "the title solely for the payment of the taxes charged and chargeable thereon." Until

[11] "One who redeems land from a tax sale, when he has no right, title or interest in the land, acquires no title."Mabrey, 208 Ark. at 292, 186 S.W.2d 28, 30 (quoting Frank Kendall Lumber Co. v. Smith 87 Ark. 360, 112 S.W. 888 (1908)).

the property was sold, Convent had a right to redeem the property.[12] This "right to redeem"[13] is a substantive property right and a legally cognizable interest. *See Givens v. Haybar, Inc.*, 234 S.W.3d 896, 95 Ark.App. 164 (2006). The property was never sold at a tax sale and until such sale, Convent always had the right to redeem the property. As long as Convent had the right to redeem the property, it continued to have a pecuniary interest in the condemnation of the property. The refusal of the City to permit the property to be repaired and the threatened destruction of the property has negatively impacted the value of the property and has impaired Convent's ability to utilize the property. The Resolution states that the structure will be demolished by the City and this will result in a lien placed on the property.

Additionally, Convent could be subject to fines. As long as Convent had the right to redeem the property, anything that negatively impacts the value of the property or could result in a lien being placed on the property affects Convent's pecuniary interest in the property. The right to redeem the property was a legally cognizable interest which gave Convent standing to challenge the condemnation action and to appeal the adverse decision. Therefore, Convent has standing to appeal because the City made it a party to the administrative condemnation proceeding. The City designated Convent Corporation as the owner of the property at issue in this action and initiated the condemnation action against Convent Corporation. Convent Corporation did not initiate this

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[12] Defendants attempt to rely on Talley v. City of North Little Rock, 381 S.W.3d 753, 2009 Ark. 601 (2009) to support their position that Convent lacked standing to challenge the condemnation action. However, Tally is distinguishable because, at the time of the condemnation vote in that case, the property had been sold by the state land commission to another party and, therefore, Talley no longer had a right to redeem the property. Id. at 754, 2009 Ark. 601. In the present case, the property was never sold and, at all relevant times, Convent had the right to redeem the property.

[13] Ark. Code Ann. § 26-37-310. Procedure for redeeming land certified to state. (a) All lands or town and city lots sold to the state under any decree or other proceedings had under the provisions of an act entitled "An act to enforce the payment of overdue taxes," Acts 1881, No. 39, approved March 12, 1881 [repealed], and now owned by the state and all lands or town and city lots forfeited and sold to the state for nonpayment of taxes and certified to the Commissioner of State Lands which have not been sold or otherwise disposed of by the state, or which may hereafter be sold and forfeited to the state, and certified as aforesaid, may, until disposed of by the state, be redeemed by the person owning the land or lot at the time of forfeiture, or by his or her heirs or assigns, in the manner provided by subsections (b), (c), and (d) of this section.

action, the City did. By naming Convent Corporation as the owner in the administrative condemnation action, the City ceded the issue of standing.

While Convent filed the appeal in circuit court as a "plaintiff" and designated the City as a "defendant," this is an appeal and it would be more correct to designate Convent as the "appellant" and the City as the "appellee." As such, a party to an action below certainly has standing to appeal an adverse decision, particularly where the action below was initiated by the other party. 9 Standing to appeal is apparent where a person or entity is made a party in the initial action by the party bringing the action. *Beebe v. Fountain Lake School Dist.*, 231 S.W.3d 628, 635, 365 Ark. 536 (2006). In Fountain Lake, the Court held the state had standing to appeal because it had been made a defendant by the filing of the plaintiff's complaint. *Id.* Particularly, where the government has instituted an action against a party, that party has standing to challenge the action. When the suit is one challenging the legality of government action or inaction, the nature and extent of facts that must be averred (at the summary judgment stage) or proved (at the trial stage) in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue. If he is, there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it. *Lujan v. Defenders of Wildlife*, 504 US 555, 561-62 (1992) (emphasis added).

The City named Convent Corporation as a party to the administrative condemnation action and did not raise the issue of standing at the administrative level. It simply defies common sense to say that an action may be initiated essentially naming a party as a Defendant, obtain a judgment against that defendant, and then, at the appellate level, attempt to strip the party of standing to appeal. Indeed, by proceeding against Convent, the City Council conferred standing upon Convent and now, at the appellate level, argues against itself asserting that it proceeded against the wrong

party. Interestingly, while now arguing that it proceeded against the wrong party, the City has not acted to set aside the condemnation order nor to amend it.

Additionally, in *Beebe*, the Court held that the fact that the state was entitled to be notified and heard gave it standing to appeal a decision by the lower court. *Fountain Lake*, 231 S.W.3d at 635, 365 Ark. 536. The Notice of Public Nuisance sent to Convent by the City was directed to "all owners of, occupants of, heirs of, lien holders of and any other parties having any interest thereof." Apparently, the City believed that Convent was entitled to notice of the proceeding and, therefore, had standing to challenge the action. The City made Convent a party to the administrative proceeding and cannot now assert that Convent lacks standing to challenge the adverse action.

C. Because the City initiated and prosecuted the condemnation action against Convent and litigated the case for more than two and one-half before raising the issue, it should be estopped from challenging Convent's standing at this time.

Being fully aware of the ownership and status of the taxes on the property, the City initiated and prosecuted the administrative condemnation against Convent. Defendants have litigated this matter in both state and federal court for more than two and one-half years as if Convent was the property owner. Convent redeemed the property and has expended significant resources defending the property. Therefore, Defendants should be estopped from challenging Convent's standing at this time.

i. Judicial Estoppel

Judicial Estoppel is a branch of the broader doctrine against inconsistent positions. *Dupwe v. Wallace*, 355 Ark. 521, 140 S.W.3d 464, 477 (2004). The doctrine of Judicial Estoppel applies where a party has taken a position in a prior case that is inconsistent with a position taken in a current case. *Parker v. Advanced Portable X-Ray, LLC*, 2014 Ark. App. 11, 431 S.W. 3d 374, 380 (Ark. Ct. App. 2014) (*citing Dupwe*, 355 Ark. at 531, 140 S.W.3d at 470) "[A] party may be

prevented from taking inconsistent positions in successive cases with the same adversary." *Nucor Corp. v. Rhine*, 366 Ark. 550, 237 SW 3d 52, 58 (2006) (quoting Cox v. Miller, 363 Ark. 54, 210 S.W.3d 842 (2005) (citing *Dupwe* 355 Ark. at 529, 140 S.W.3d at 469)). For example, in *Acuff v. Bumgarner*, 2009 Ark. App. 854, 371 S.W.3d 709, 715 (Ark. Ct. App. 2009), the court held that either Judicial or Equitable Estoppel could be applied where Bumgarner took the position in a Kansas probate proceeding that his deceased father owned a one-half interest in property and that it should pass through his estate but later, in an Arkansas case in which ownership of the property was disputed, argued that the property did not pass through his father's estate but that ownership remained with his mother as a surviving tenant by the entirety.

In *Powers v. Patricia Pan Adams and Alternative Solutions, PLLC*, CA 07-884, Ark. Ct. App. Div. 4 (May 14, 2008), the court applied the doctrine of Judicial Estoppel where the plaintiff attempted to sue a child's therapist for negligence and fraud relating to an allegation of incest. The court held that because Powers pled guilty in criminal court to the offense, he was judicially estopped from taking an inconsistent position in a civil lawsuit. Id. Powers takes a position here that is in direct contrast to his position at the criminal proceeding that he was guilty of incest. The criminal court relied on Powers's unqualified representations of guilt in accepting his plea and sentencing him accordingly. We are convinced that, by now renouncing those representations and attempting to have others bear the blame for his behavior with EP, his guilty plea, and all of his ensuing problems, Powers is manipulating the judicial process for his own purposes. It goes without saying that the integrity of all courts involved in the process would be impaired if he were permitted to maintain and profit by these inconsistent positions. We therefore affirm the dismissal of his complaint. *Id.* The court also upheld the circuit court's imposition of Rule 11 sanctions

against Powers finding that the lawsuit was filed with an improper purpose and was not well-grounded in fact. *Id.*

The Court of Appeals also applied the doctrine of Judicial Estoppel to uphold summary judgment and sanctions in another case where Powers attempted to sue his former wife on the same issues. *Powers v. Powers*, CA07-880, Ark. Ct. App., Div. 4 (May 14, 2008). "[T]he purpose behind judicial estoppel is protection and preservation of the judicial process, that it is designed to prevent parties from 'playing fast and loose with the courts,' and it ensures a court's right 'to rely on representations made in court.'" *Cooper v. Cooper Clinic*, PA, CA08-08, Ark. Ct. App., 3rd Div. (Aug. 27, 2008) (citing Lewis v. Crelia, 365 Ark. 330, 333, 229 S.W.3d 19, 21 (2006)). "The doctrine is particularly applicable to cases, such as the one presented here, where permitting a subsequent proceeding to go forward would produce 'inconsistent determinations . . . endangering the integrity of the judicial process.'" *Commonwealth v. Gardner*, 67 Mass. App. Ct. 744 (2006) (*quoting Otis v. Arbella Mut. Ins. Co.*, 443 Mass. 634 , 643 (2005) *quoting from Alternative Sys. Concepts, Inc. v. Synopsys, Inc.*, 374 F.3d 23, 33 (1st Cir. 2004)).

ii. Equitable Estoppel

Equitable estoppel is the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting a remedy which might otherwise have existed, as against another person who has in good faith relied upon statements, representations or conduct of the other party. *American Casualty Co. of Reading PA., v. Hambleton*, 233 Ark. 942, 349 S.W. 2d 664 (1961) (*citing Geren v. Caldarera*, 99 Ark. 260, 138 S.W. 335 (1911)). A party who by his acts, declarations, or admissions, or by his failure to act or speak under circumstances where he should do so, either with design or willful disregard of others, induces or misleads another to conduct or dealings which he would not have entered upon, but for such misleading influence, will

not be allowed, because of estoppel, afterward to assert his right to the detriment of the person so misled. *Undem v. First Nat'l Bank*, 46 Ark.App. 158, 879 S.W.2d 451 (1994); King v. Powell, 85 Ark.App. 212, 148 S.W. 3d 792, 799 (2004).

iii. The doctrines of Judicial and Equitable Estoppel bar the City from challenging Convent's standing.

The City designated Convent as the owner of the property for the purpose of initiating the administrative condemnation action before the City Council. The City prosecuted the action against Convent as the owner of the property and named Convent as the owner in the condemnation Resolution.. The City knew the status of the property taxes at the time it initiated and prosecuted the condemnation action before the City Council. The City has litigated the action both in state and federal court for more than two and one-half years without raising the issue of standing. Now, the City seeks to have the Declaratory Judgment action dismissed by raising an argument which is completely inconsistent with its position before the City Council and its position throughout this litigation.

To permit the City to argue lack of standing after naming the other party as a defendant in the administrative action would be injurious to judicial integrity. To permit the City to argue lack of standing after it continued to prosecute the action for more than two and one-half years in both state and federal court as if Convent were the property owner would be injurious to judicial integrity. To permit the City to raise an issue which is completely inconsistent with its prior actions in an effort to deny the other party's ability to challenge the adverse action against it is certainly injurious to the integrity of the judicial process. Defendants' should be estopped from raising the issue of ownership or standing at this time and their Motion to Dismiss should be denied.

iv. **By litigating this action for more than two and one-half years without raising the issue of ownership or standing, the City has waived the issue.**

Waiver is the voluntary abandonment or surrender by a capable person of a right known to him to exist, with the intent that he shall forever be deprived of its benefits, and it may occur when one, with full knowledge of the material facts, does something which is inconsistent with the right or his intention to rely upon it. *Smith v. Walt Bennett Ford, Inc.*, 314 Ark. 591, 864 S.W.2d 817 (1993). Goforth v. Smith, 338 Ark. 65, 991 S.W. 2d 579, 586 (1999); *see also Ray Dodge, Inc. v. Moore,* 479 S.W. 2d 518(1972);.*Bethell v. Bethell*, 268 Ark. 409, 420, 597 S.W.2d 576, 581-82 (1980); *Bright v. Gass*, 38 Ark.App. 71, 831 SW 2d 149 (1992). While waiver and estoppel are sometimes used interchangeably, they are distinct doctrines and are not synonymous. Waiver involves the acts and conduct of only one of the parties and does not necessarily imply that one has been misled to his prejudice. *Bethell,* 268 Ark. 409, 597 S.W. at 581-82. Waiver may be by acquiescence, or it may be inferred from the circumstances. *Id.* (*citing Davis v. Davis*, 123 So.2d 377 (Fla.App., 1960); *Graham v. Graham*, 174 Cal.App.2d 678 14 (1959)). Waiver may be found where there is an undue delay in seeking to enforce a right. Id. (citing *Herman v. Herman*, 17 N.J.Misc. 127, 5 A.2d 768 (1939)).

The City named Convent as the owner in the administrative proceeding and in the condemnation resolution. The City did not contest Convent's standing to challenge the condemnation at the administrative level nor when Convent filed its appeal in circuit court. The City continued to litigate this action in both state and federal court for more than two and one-half years without raising the ownership issue. Therefore, the City voluntarily waived the ownership and standing issue and Defendants' Motion to Dismiss should be denied. VI. The City should be barred from raising the issue of ownership or standing by the doctrine of laches. The doctrine of

laches is based on a number of equitable principles that are premised on some detrimental change in position made in reliance on the action or inaction of the other party. *Higgins v. Higgins*, 374 S.W.3d 56, 2010 Ark. App. 71 (2010); *Jaramillo v. Adams*, 100 Ark. App. 335, 268 S.W.3d 351 (2007). Laches or estoppel does not arise merely by delay, but by delay that works a disadvantage to the other. Id. During the more than two and one-half years this litigation has been ongoing, the City never raised the issue of property taxes, ownership, or standing. Throughout this action, beginning with the initiation of the administrative proceeding, the City designated Convent as the owner and has acted as if Convent is the owner of the property. Convent has relied on the City's statements and actions in defending its property. Convent redeemed the property has expended significant resources in defending its property. To permit the City to raise the issue of ownership and standing after more than two and one-half years of litigation certainly would work a disadvantage to Convent. Therefore, Defendants' Motion to Dismiss should be denied.

VIII. The Court should not rely on the federal district court opinion attached to Defendants' Motion.

Defendants attached an order from a federal district court judge to their Motion. First, Plaintiff brings claims under state law, in addition to federal law and Arkansas Courts have found that, in some circumstances, the Arkansas Constitution provides greater protection than the federal constitution. For example, the federal court decision does not consider that the Arkansas Constitution requires a very high level of Constitutional protection for property rights. Relying on this type of opinion is problematic for other reasons. There may be factors influencing that decision that are unknown to this Court. For example, the Court does not know what arguments were presented to the other court. Courts tend to rule on the arguments and authorities put before them. If certain arguments or authorities were not presented or considered by the other court, we don't know what effect presentation of those arguments or authorities may have had on the

outcome. The Plaintiff's Briefs in opposition to the defendants' summary judgment motions are attached to this Response and Countermotion as Exhibits G & H. It is clear that many, if not most of the arguments presented in this Response and Countermotion were not presented to the court in that case. And, the court should not put too much into the fact that the decision was affirmed by the Eighth Circuit Court of Appeals. The opinion (Exhibit I) in that case was a three sentence opinion that notes specifically that arguments appellants raised for the first time on appeal were not considered. n. 2. We don't know if the arguments presented for the first time on appeal would have made a difference in the outcome. Therefore, the court would be on shaky ground to rely on this opinion.

CONCLUSION

Based on the argument and authorities presented herein, the Court should declare that the City's ordinance fails to provide constitutionally required due process protections to property owners and that it permits the Council to issue unlawful Bills of Attainder. The ordinance should be declared to be invalid and the condemnation action against Plaintiff should be set aside.

As a final comment, the undersigned counsel notes Professor Kramer's poignant observation that the purpose of judicial review is "to make certain that there are definite limits, effectively enforced, upon the tremendous powers exercised by the modern state through the administrative process which affects the lives, properties, and fortunes of its individual citizens." No one is protected unless we are all protected.

Respectfully submitted,

/s/*Mickey Stevens*
Mickey Stevens (2012141)
Skelton & Stevens Legal Group, PLLC
501-303-6668
Fax: 877-338-6063
mickeystevens@outlook.com

CERTIFICATE OF SERVICE

I do hereby certify by my signature hereinabove, I have on this 17th day of July, 2017, served a copy of the foregoing pleading on the following persons by mailing same through the AOC efiling system, email or United States mail, properly addressed, and first class postage paid.

Marie-Bernarde Miller
Mmiller@nlr.ar.gov

Michael Mosley
MMosley@nlr.ar.go

/s/Mickey Stevens

Mayor Joe A. Smith

City Clerk Diane Whitbey

City Attorney C. Jason Carter

City Council Members

Ward 1	**Debi Ross** **Beth White**
Ward 2	**Linda Robinson** **Maurice Taylor**
Ward 3	**Steve Baxter** **Bruce Foutch**
Ward 4	**Murry Witcher** **Charlie Hight**

"We welcome you!"

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(unless the meeting falls on a State Holiday)
For more information call 501-340-5317 or visit our website at www.northlittlerock.ar.gov

Municipal Institutions Constitute the Strength of Free Nations. *By A. de Tocqueville*

2013

JANUARY

SUN	MON	TUE	WED	THU	FRI	SAT
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FEBRUARY

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MARCH

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JULY

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AUGUST

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SEPTEMBER

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OCTOBER

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NOVEMBER

SUN	MON	TUE	WED	THU	FRI	SAT
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DECEMBER

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22	(23)	24	25	26	27	28
29	30	31	1			

EXHIBIT A

"The City of North Little Rock welcomes people of diverse cultures and beliefs. Any religious viewpoint expressed during invocation, or at any other time during the meeting, reflects only the personal opinion of the speaker. It is not intended to proselytize, advance, or disparage any religious belief."

COMMUNICATIONS

None as of filing deadline.

PRESENTATIONS

Alderman Charlie Hight – presentation thanking the Charlie Hart and Mello Velo Cycling Club for donation of Bike Fixit Station.

Crews and Associates presentation to Mayor Smith.

SCHEDULED PUBLIC HEARING(S) *3 minutes*

Please sign in with the City Clerk before the meeting convenes at 6:30 p.m.

Convene a public hearing re: O-13-18 – amending Ordinance No. 7946 (regulations to control development and subdivision of land), Chapters 18 and 46 of the NLRMC and Ordinance No. 7697 (the Zoning Ordinance) re: Hillside Cut Regulations

CITIZENS PUBLIC COMMENT ON NUMBERED LEGISLATION *3 minutes*

Please sign in with the City Clerk before the meeting convenes at 6:30 p.m.

INCLUDES ALL PUBLIC HEARINGS

EXHIBIT A

UNFINISHED BUSINESS

RESOLUTIONS

R-13-23 Mayor Smith

Appropriating $500,000.00 from the General Fund for the Street Overlay Program (*$125,000.00 per Ward for Street Overlay Program*)

Held

R-13-28 Mayor Smith

Expressing the willingness of the City of North Little Rock to utilize state aid street monies for city street projects

Held

ORDINANCES

O-13-12 Mayor Smith

Establishing procedures to be followed in the absence of the Mayor

Read 2 times and held

O-13-18 Alderman Ross

Amending Ordinance No. 7946 (Regulations to Control Development and Subdivision of Land), Chapters 18 and 46 of the North Little Rock Municipal Code, and Ordinance No. 7697 (the Zoning Ordinance) regarding hillside cut regulations

Read 1 time and held *Convene public hearing this date*

CONSENT AGENDA

No items

EXHIBIT A

NEW BUSINESS

RESOLUTIONS

R-13-29 Mayor Smith

Authorizing the Mayor to submit an application on behalf of the City of North Little Rock to obtain Grant Funds from the Arkansas Highway and Transportation Department's "Safe Routes to School Program"

R-13-30 Alderman Robinson

Directing the City Attorney to take the required action and/or steps necessary on behalf of the City of North Little Rock to apply to the United States District Court for dissolution of the Consent Decree entered April 21, 1983

R-13-31 Mayor Smith

Authorizing the Mayor and City Clerk to sell property located at 1023 Parker Street (*to Amber Pye - $94,500.00*)

R-13-32 Mayor Smith

Declaring certain buildings, houses and other structures located at 704 West 18th Street to constitute a public nuisance and condemning said structures (*owner: JNYLECO, Inc. c/o Jocelyn Dokes*)

Convene a public hearing this date

R-13-33 Mayor Smith

Declaring certain buildings, houses and other structures located at 2713 Gribble Street to constitute a public nuisance and condemning said structures (*owners: Jessie and Lewis Ford c/o Robert Jerrod, Sr.*)

Convene a public hearing this date

EXHIBIT A

ADD 996

R-13-34 Mayor Smith

Declaring certain buildings, houses and other structures located at 704 Graham Avenue to constitute a public nuisance and condemning said structures (*owner: Cheteer Farrar c/o Bank of America Home Loans*)

_____ *Convene a public hearing this date*

R-13-35 Mayor Smith

Declaring certain buildings, houses and other structures located at 4004 Rogers Street to constitute a public nuisance and condemning said structures (*owners: Robert J. and Barbara Hoyle*)

_____ *Convene a public hearing this date*

R-13-36 Mayor Smith

Declaring certain buildings, houses and other structures located at 1304 East 16th Street to constitute a public nuisance and condemning said structures (*owner: Mary E. Smith*)

_____ *Convene a public hearing this date*

R-13-37 Mayor Smith

Declaring certain buildings, houses and other structures located at 6615 Hwy 70 to constitute a public nuisance and condemning said structures (*owner: Convent Corp, Drugstore Cowboys, Inc., Gentlemen's Club 70 c/o Craig Snyder*)

_____ *Convene a public hearing this date*

R-13-38 Mayor Smith

Certifying the amount of a Clean Up Lien to be filed with the Pulaski County Tax Collector against property located at 2119 Moss Street (*amount - $3,407.90*)

_____ *Convene a public hearing this date*

EXHIBIT A

ADD 997

ORDINANCES

O-13-19 Mayor Smith

Amending Section 20.12 of Ordinance No. 7697 (the Zoning Ordinance) to clarify the existing notice policy for the Planning Commission

---

O-13-20 Mayor Smith

Waiving formal bidding requirements for Insurance for the Murray Hydroelectric Plant; authorizing the Mayor and City Clerk to enter into an agreement with the Holmes Organization, Inc. (*$284,488.00 - Electric Department*)

O-13-21 Mayor Smith *for consideration only*

Granting a Conditional Use to allow a Self-Serve Ice Vending Unit in a C-3 zone for property located at 4032 John F. Kennedy Boulevard (*applicant: Clint Davis*)

O-13-22 Alderman Taylor

Reclassifying property located at 4816 East Broadway from C-3 to Planned Use Development (PUD) to allow a Liquor Store by amending Ordinance No. 7697 (*applicant: James Duncan*)

O-13-23 Aldermen Baxter and Foutch

Allowing and approving variances for an off-premise, freestanding Pole Sign on property located at 10307 Maumelle Boulevard (*applicant: Phil Dively*)

EXHIBIT A

PUBLIC COMMENT ***ON NON-AGENDA ITEMS***

All persons wishing to speak must have completed a ***public comment card*** *and return it to the* ***City Clerk before*** *this meeting is convened; speakers have 3 minutes to address their topic*

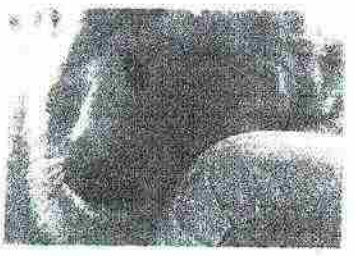
Respectfully submitted,

Diane Whitbey, CMC / CAMC
City Clerk and Collector

Words to live by

Before humans die, they write their last Will and Testament,
give their home and all they have, to those they leave behind.
If, with my paws, I could do the same, this is what I'd ask...
To a poor and lonely stray I'd give:
My happy home,
My bowl and cozy bed, soft pillows and all my toys,
The lap, which I loved so much,
The hand that stroked my fur and the sweet voice which spoke my name.
I'd Will to the sad, scared shelter dog (or cat), the place I had in my
Human's loving heart, of which there seemed no bounds.
So when I die, please do not say, "I will never have a pet again,
for the loss and pain is more than I can stand."
Instead, go find and unloved dog (or cat)
one whose life has held no joy or hope and give MY place to HIM (or her).
This is the only thing I can give...The love I left behind.

Author unknown.



February is Spay and Neuter Month

EXHIBIT A

ADD 999

Mayor Joe A. Smith

City Clerk Diane Whitbey

City Attorney Amy Fields

City Council Members

Ward 1	Debi Ross	753-0733
	Beth White	758-2738
Ward 2	Linda Robinson	945-8820
	Maurice Taylor	690-6444
Ward 3	Steve Baxter	804-0928
	Ron Harris	758-2877
Ward 4	Charlie Hight	944-0670
	Jane Ginn	749-5344

"We welcome you!"

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For more information call 501-975-8617 or visit our website at www.nlr.ar.gov

Municipal Institutions Constitute the Strength of Free Nations. *By A. de Tocqueville*

2019

January 2019

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April 2019

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September 2019

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October 2019

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November 2019

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December 2019

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22	(23)	△	△	26	27	28
29	30	31				

● = Council Meeting

△ = Holiday

EXHIBIT B

ADD 1000

"The City of North Little Rock welcomes people of diverse cultures and beliefs. Any religious viewpoint expressed during invocation, or at any other time during the meeting, reflects only the personal opinion of the speaker. It is not intended to proselytize, advance, or disparage any religious belief."

COMMUNICATIONS

1. Anita Paul, Mayor's Office memorandum re: *Restaurant Mixed Drink – Minimum – Replacement for Bryan Silva #04315*, for SOBO fka Gigi's Soul Café & Lounge, 10840 Maumelle Blvd, by Jermaine Burton.

PRESENTATIONS

SCHEDULED PUBLIC HEARING(S) *3 minutes*

Please sign in with the City Clerk before the meeting convenes at 6:00 p.m.

CITIZENS PUBLIC COMMENT ON NUMBERED LEGISLATION *3 minutes*

Please sign in with the City Clerk before the meeting convenes at 6:00 p.m.

INCLUDES ALL PUBLIC HEARINGS

EXHIBIT B
ADD 1001

UNFINISHED BUSINESS

O-19-77 Mayor Smith

Amending Ordinance 7697 ("The Zoning Ordinance") to conform to Act 446 of the 92nd Arkansas General Assembly

Held

O-19-84 Mayor Smith

Approving the application of Park Hill Pump, Inc. for a private club to be located at 4608 John F. Kennedy Boulevard (*applicant: Park Hill Pump*)

Read 1 time and held

O-19-90 Council Member Baxter

Amending Ordinance No. 9094 which granted a special use to a Bingo Hall in a C-3 zone for property located at 2655 Pike Avenue (*applicant: Highly Favored Ministries)*

Held

CONSENT AGENDA

None filed.

NEW BUSINESS

RESOLUTIONS

R-19-130 Mayor Smith

Approving retroactive salary increases for the period of January 12, 2019 to May 31, 2019 to full-time salaried employees (excluding uniformed Police personnel, uniformed Fire personnel, I.T. employees who received a salary adjustment in 2019, and elected officials), and the Police and Fire Chiefs, the Assistant Police and Fire Chiefs, the Fire Battalion Chiefs, and the Fire Marshal of the City of North Little Rock

EXHIBIT B

R-19-131 Mayor Smith

Amending Resolution No. 9568 (2019 Budget) to amend the FY19 budget for a 2.5% pay increase, retroactive from January 12, 2019 to May 31, 2019, to current full-time, non-uniformed, salaried and classified employees (excluding uniformed police personnel, uniformed fire personnel, and I.T. employees who received a salary adjustment in 2019), the Police and Fire Chiefs, the Assistant Police and Fire Chiefs, the Fire Battalion Chiefs, and the Fire Marshal of the City of North Little Rock

---

R-19-132 Council Member Taylor

Authorizing the Mayor and City Clerk to enter into an agreement to rehabilitate property located at 3320 East Broadway Street in the City of North Little Rock (*owner: Kunal Manmeet, LLC*)

R-19-133 Mayor Smith

Expressing an intent to issue revenue bonds in the amount of $4,500,000.00 for the purpose of financing improvements to the North Little Rock Airport

---

R-19-134 Mayor Smith

Declaring certain buildings, houses, and other structures located at 5509 Chiquito Road in the City of North Little Rock to constitute a public nuisance and condemning said structures; providing a period of time for property owner to abate said nuisance (*owner: Herman Wilkins, Jr.*)

Convene a public hearing

EXHIBIT B

R-19-135 Mayor Smith

Declaring certain buildings, houses, and other structures located at 5217 Chiquito Road in the City of North Little Rock to constitute a public nuisance and condemning said structures; providing a period of time for property owner to abate said nuisance (*owner: Marquis Thompson*)

_____ *Convene a public hearing*

R-19-136 Mayor Smith

Declaring certain buildings, houses, and other structures located at 1220 West 18th Street in the City of North Little Rock to constitute a public nuisance and condemning said structures; providing a period of time for property owner to abate said nuisance (*owner: Danny L. Hinson*)

_____ *Convene a public hearing*

R-19-137 Mayor Smith

Approving and certifying amounts of liens to be filed with the Pulaski County Tax Collector against certain real properties in the City of North Little Rock, as a result of grass cutting expenses and abatement of other nuisances

_____ *Convene a public hearing*

ORDINANCES

O-19-92 Mayor Smith

Waiving formal bidding requirements and authorizing payment to Fleming Electric, Inc. for electrical services for the operation of generators and pumps (*$34,287.18*)

_____

EXHIBIT B

O-19-93 Mayor Smith and Council Member Taylor

Reclassifying certain property located at Bayou Drive in the planning jurisdiction of the City of North Little Rock, Arkansas, from R-2 zoning classification to Planned Unit Development (PUD) zoning classification by amending Ordinance No. 7697 (*applicant: Brandon Chapman*)

O-19-94 Council Member Taylor

Amending Ordinance No. 9130 which granted a Conditional Use to allow a tire shop and an auto detail business in a C-4 zone for property located at 923 East Broadway Street in the City of North Little Rock (*applicant: Larry Carpenter*)

O-19-95 Council Member Robinson

Allowing a Special Use to allow a tattoo parlor in a C-6 zone for certain real property located at 112 Main Street in the City of North Little Rock (*applicant: Scott Diffee*)

PUBLIC COMMENT *ON NON-AGENDA ITEMS*

*All persons wishing to speak must have completed a **public comment card** and return it to the **City Clerk before** this meeting is convened; speakers have 3 minutes to address their topic*

Respectfully submitted,

Diane Whitbey, CAMC / MMC
City Clerk and Treasurer

EXHIBIT B

Words to Live by:

"Life is just a slide. Back and forth between loving and leaving, remembering and forgetting, holding on and letting go."

— *Nicole Lyons*

For more information, visit our website at www.nlr.ar.gov.
To view council legislation, exhibits, etc., go to the link above, then click on the Government Tab, then select Council Agenda.

EXHIBIT B

(Begin North Little Rock City Council meeting.)

COUNCIL MEMBER: Hi.

MAYOR SMITH: Yes?

COUNCIL MEMBER: On 1337, Mayor Smith.

MAYOR SMITH: Please call it.

COUNCIL MEMBER: A resolution declaring certain buildings, houses, and other structures located at 6615 Highway 70 in the City of North Little Rock to constitute a public nuisance and condemning said structures providing a period of time for the property owner to obey the said nuisance.

MAYOR SMITH: Have a motion?

COUNCIL MEMBER: To move.

COUNCIL MEMBER, MS. ROBINSON: Second.

MAYOR SMITH: Call to public hearing 6615 Highway 70 .

COUNCIL MEMBER: Yes, sir.

ATTORNEY, MICKEY STEVENS: Good evening. My name is Mickey Stevens. I'm a -- the attorney for Convent Corporation. And I'd like to start by telling you how the power of -- talking about how this property came to be in the condition it's in. It's my understanding that the -- the damage is from vandalism and the owners didn't really know about this until the condemnation proceeding started, they weren't aware of the condition of the property.

I understand some people broke in; ripped out the wires in the ceiling for copper; they fell through the ceiling; they just really left it in a mess. But most of the problems were cosmetic. And the -- the owners want to rehab the property, they want to fix it up. But they're afraid to do it under condemnation order, because they're afraid whatever they do won't be enough.

You know, they -- the -- the problem with the condemnation order from what I understand under District Court Rule 9, we only have 30 days to appeal that order. And that's a -- so we would lose our right to appeal very quickly if the property is condemned. What the owners want to do is come up with a plan with the City, postpone the condemnation vote, come up with a plan to rehab the building in agreement.

They -- they had talked -- it's my understanding they had talked with Code Enforcement before about doing this but they had told -- were told they couldn't get a permit until after condemnation.

Exhibit C

MAYOR SMITH: I believe, Counselor, if I may , I believe the rule is that your owners have 30 days to negotiate with our attorneys and Code Enforcement on your plan, and you'll be required to put up a bond. You don't have to do all of the work in the 30 days, you just have to negotiate the plan in 30 days.

ATTORNEY MICKEY STEVENS: Right, but my concern is after 30 days we have no basis to appeal to the Circuit Court. The rule -- District Court Rule 9 says you have to appeal within 30 days or you lose it. So we don't want to be under that gun.

COUNCIL MEMBER: It's my understanding there's nothing to prohibit the -- should the Council go ahead and do the condemnation, there's nothing to prohibit them from filing their appeal and at the same time kind of twin-track it and work with Code Enforcement to abate it. So I don't see that -- where there's going to be any chance that they're going to lose their right to appeal should they go ahead and file that appeal with the Circuit Court, while at the same time pursuing a -- an abatement agreement.

MAYOR SMITH: Good option. Ms. Ross, were you going to say something?

COUNCIL MEMBER, MS. ROSS: What -- I'm just curious, you said they're wanting to "rehab" it, have they tried to do anything to it before now until they received their condemnation notice from the City Council that was going to come before the City Council?

ATTORNEY, MICKEY STEVENS: They went in and cleaned it out. There was a lot of clutter. The people that vandalized it stole as much as they could load apparently and piled everything else up by the door. And they were told -- it's my understanding they were told by Code Enforcement that they couldn't do any kind of work because they wouldn't get a permit until after the condemnation.

COUNCIL MEMBER, MS. ROSS: Cleaning up, they couldn't clean it up?

ATTORNEY, MICKEY STEVENS: No, they cleaned it up but they couldn't do any repairs, you know, the wiring or any of that kind of stuff.

COUNCIL MEMBER, MS. ROSS: How long has this been empty?

ATTORNEY, MICKEY STEVENS: Quite a while, I'm not sure exactly.

COUNCIL MEMBER, MS. ROSS: So did somebody go out there and check on the property, I mean, no one --

ATTORNEY, MICKEY STEVENS: I'm sure.

COUNCIL MEMBER, MS. ROSS: -- can just leave the property sitting there, I mean, it's -- just wondering if anybody had been checking on it because this -- this looks like a lot more than just vandal.

ATTORNEY, MICKEY STEVENS: Well, if you can -- you can see right there those -- that's part of the ceiling that fell down. They climbed up in there, like I said, to get the copper out and fell through the ceiling. All the clutter's been cleaned out now from what I understand; I haven't seen it myself. But

there is some water damage; they're -- they're willing to put a new roof on it. Like I said, they just don't want to spend the money under a condemnation order and the City tear it down any way.

COUNCIL MEMBER, MS. ROSS: But were they going to spend money before the condemn -- before it came to the City Council?

ATTORNEY, MICKEY STEVENS: They weren't really aware of the condition before. And I'm not sure when the vandalism happened either. It's my understanding it was fairly recent as far as I know, I mean.

MAYOR SMITH: Ms. Robinson.

COUNCIL MEMBER, MS. ROBINSON: You mentioned them wanting to "rehab" it, what are they wanting to put in there once it's ...

ATTORNEY, MICKEY STEVENS: As far as I know, they don't have any plans right now for the building. I understand there's -- there's been some concern about the kind of business that was there before and something like that going in again, but from what I understand there was a settlement that -- a covenant was put in place that a club couldn't go in there again of that sort. So as far as I know, nobody's got any plans for it right now. The -- the owners just don't want the building torn down because they feel like it adds value to the property.

COUNCIL MEMBER, MS. ROBINSON: The neighborhood association, the Meadowpark Neighborhood Association, wanting -- is wanting that building torn down. They feel like that building is a nuisance and a distraction to their community. And they've asked that we vote to condemn it, to -- to tear it down.

SPEAKER: (Inaudible) ... next to it.

ATTORNEY, MICKEY STEVENS: Well, I -- I

COUNCIL MEMBER, MS. ROBINSON: That's just -- just comment.

MAYOR SMITH: Quickly, Counselor.

ATTRORNEY, MICKEY STEVENS: We're concerned that the condemnation ordinance doesn't mean the constitutional due process requirements, there's no -- three minutes isn't enough for us to -- to put on witnesses and evidence. If the -- the Council is going to go ahead with the condemnation, we'd ask that it be postponed until we can have a full hearing to be able to bring witnesses and present evidence.

MAYOR SMITH: Counselor, I appreciate your eagerness but remember we're a legislative body not a judicial body so we're not here to -- to hear cases. That's what the court system is for so ...

ATTORNEY, MICKEY STEVENS: Yes, sir, I understand, but due process requires a meaningful opportunity to be heard and this ordinance just doesn't provide for that. I don't think it'll hold up to a constitutional challenge.

MAYOR SMITH: Ms. Ross.

Exhibit C

COUNCIL MEMBER, MS. ROSS: Was there a fire at this building?

ATTORNEY, MICKEY STEVENS: I'm not sure. Somebody -- the paperwork said something about the fire damage but --

COUNCIL MEMBER, MS. ROSS: It looks like --

ATTORNEY, MICKEY STEVENS: -- the person I talked to said he didn't know, that maybe --

COUNCIL MEMBER, MS. ROSS: We still have the pictures up, because I know it -- it looks like there's been a fire in here so I was just curious if there was any insurance money, you know, to repair this or ...

ATTORNEY, MICKEY STEVENS: Not that I'm aware of.

COUNCIL MEMBER, MS. ROSS: I'm sure that the building was insured?

ATTORNEY, MICKEY STEVENS: I'm not sure about that.

COUNCIL MEMBER, MS. ROSS: Okay.

MAYOR SMITH: Any other questions, Counselor, Mr. Taylor?

COUNCIL MEMBER, MR. TAYLOR: Well, now -- now how long has this building been vacant?

ATTORNEY, MICKEY STEVENS: I'm not sure, it's been a while.

COUNCIL MEMBER, MS. ROSS: (Background speaking.) See it's burnt.

ATTORNEY, MICKEY STEVENS: I'm not sure. I've just recently gotten involved in this so I don't know the history really.

COUNCIL MEMBER, MR. TAYLOR: It's always interesting to me that is -- is, you know, nobody ever wants to do anything to -- to something we're getting ready to condemn until we're ready to condemn it then --

ATTORNEY, MICKEY STEVENS: I understand -- I understand what you're saying --

MR. TAYLOR: -- well, wait a minute -- and then all of a sudden there's a problem. I mean, this building, I drive by this building quite often, never been in it, but I've drove by it quite often. This --

this -- this building it's been a mess for a while, for a while.

COUNCIL MEMBER, MS. ROSS: (Inaudible)

MAYOR SMITH: I agree. Any final comments, Counselor?

ATTORNEY, MICKEY STEVENS: I would like to -- I have a brief I'd like to submit that's got some additional issues covered since we don't have more time. I believe I have enough copies here for everybody.

MAYOR SMITH: Sure. Just pass it to our city attorney and he'll pass it around.

I -- I would suggest--and I'm certainly not going to give a lawyer legal advice--but what our -- what our city attorney advised I think will probably be the best way to go.

So anybody else wanting to speak on this particular address?

Thank you, Counselor.

I'm going to close the public hearing on the motion.

COUNCIL MEMBER: Ross? Yes. White? Yes. Taylor? Yes. Robinson? Yes. Baxter? Yes. Foutch? Yes.

(End of City of North Little Rock Council meeting.)

Exhibit C

This document attached hereunto was prepared in accordance and within good faith by Shawna Denise Gauntt-Hicks.

State of Texas County of Bowie

On this 30th day of January, 2014, I certify, pursuant to Tex. Gov't Code §406.014(c), that the preceding or attached document is a true, exact, complete, and unaltered copy made by me of (description of notarial record), the original of which is held in my custody as a notarial record.

SHAWNA DENISE GAUNTT-HICKS
Notary Public, State of Texas
My Commission Expires
June 21, 2017

Shawna Denise Gauntt-Hicks
Notary Public, State of Texas
My Commission Expires 06/21/2017
610 Cedar
Maud, Texas 75567
(903) 276-1090

Exhibit C

City Of North Little Rock, Arkansas
Office Of The City Attorney
300 Main Street P.O. Box 5757
North Little Rock, Arkansas 72119
(501) 975-3755 Fax (501) 340-5341

C. Jason Carter
City Attorney
William M. Brown
Assistant City Attorney
Daniel L. McFadden
Assistant City Attorney

Tyuana C. Byrd
Assistant City Attorney
Paula Juels Jones
Assistant City Attorney

January 31, 2013

R.C. Livdahl C/O
Sunset Partners LLC
11420 Ethan Allen Dr.
Little Rock, AR 72211-2348

RE: Exterior and Interior Clean-Up of Gentlemen's Club 70.

Dear Mr. Livdhal:

I am in receipt of your letter dated January 29, 2013 concerning the above structure which is scheduled for a condemnation hearing before the North Little Rock City Council on February 25th 2013.

It appears from the your letter that you simply intend to clean-up the numerous amounts of trash and garbage from the interior and exterior of the structure by placing said items in a dumpster. It is my interpretation of the Ordinances of the City of North Little Rock that you do not need to obtain a permit for the dumpster for those specific purposes.

However, any construction, remodeling, repairs or demolition to the structure and permanent fixtures would be outside of your request and you would have to obtain any necessary permits from the Planning Department. It is my understanding that since the structure has been Red Tagged no construction or remodeling permits should be issued at this time without approval of City Council.

If you desire to demolish the structure at this time you can obtain a Demolition Permit without City Council approval before the condemnation hearing if you can present to the Planning Department proof of ownership of the structure.

Sincerely,

William M. Brown
Assistant City Attorney for North Little Rock

Exhibit D

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

CONVENT COPRORATION,
Individually and on Behalf of all
Others Similarly Situated

PLAINTIFF

v.

CASE NO. 4:13-CV-0259

CITY OF NORTH LITTLE ROCK,
ARKANSAS, a Municipal Corporation,
JOE SMITH, Mayor, Individually and in
his Official Capacity, City Council Members
DEBI ROSS, BETH WHITE, LINDA
ROBINSON, MAURICE TAYLOR,
STEVE BAXTER, BRUCE FOUTCH,
MURRY WITCHER, and CHARLIE HIGHT
each Individually and in his or her Official
Capacity, TOM WADLEY, Director, Code
Enforcement Division, Individually and in
his Official Capacity, and FELECIA MCHENRY,
Code Enforcement Officer, Individually and
in her Official Capacity

DEFENDANTS

SEPARATE DEFENDANT'S RESPONSES TO PLAINTIFF'S INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS

Comes Separate Defendant, Mayor Joe Smith, by and through his attorney, Assistant City Attorney Daniel L. McFadden, and for his Responses to Plaintiff's Interrogatories and Requests for Production of Documents, states as follows:

REQUEST FOR PRODUCTION NO. 1: Please provide copies of any and all documents, records, emails, text messages, and all other records regardless of how stored, which have any bearing on the factual questions at issue in the present litigation, including, but not limited to, the claims addressed in the Complaint and Amended Complaints. This includes any records stored on any cell phone, computer, or other electronic device which is your personal property.

Exhibit E

owner may sit with the City and work out a rehabilitation agreement or the owner may appeal the decision.

INTERROGATORY NO. 10: Please define the following terms used in Resolution NO. 8272 as you believe they apply to the Property and list each and every condition, fact, or circumstance that supports the application of each term to the property and list each item of evidence which supports these findings that you considered prior to your vote to condemn the Property:

(a) Run down

(b) Dilapidated

(c) Unsightly

(d) Dangerous

(e) Obnoxious

(f) Unsafe

(g) Not fit for human habitation

(h) Detrimental to the public welfare

RESPONSE: Defendant objects to this Interrogatory because it is overbroad and not reasonably calculated to discover evidence admissible at trial. Without waiving this objection, see Response to Interrogatory No. 1. Defendant defines the terms as follows:

(a) Run down – Uninhabitable

(b) Dilapidated – Uninhabitable

(c) Unsightly – Visually obnoxious

(d) Dangerous – Means for someone or something that is not familiar with the property that could allow them to wander onto or into the property and become injured

Exhibit E

(e) Obnoxious – See above definitions

(f) Unsafe – See "dangerous"

(g) Not fit for human habitation – See "dangerous" and "unsafe"

(h) Detrimental to the public welfare – See "dangerous," "unsafe," and "not fit for human habitation"

INTERROGATORY NO. 11: Please list and describe each item of evidence that you considered prior to your vote to condemn the Property which supports the finding that the property constitutes a serious

(a) Fire hazard

(b) Health hazard

RESPONSE: N/A. See Response to Interrogatory No. 1.

INTERROGATORY NO. 12: If the determination that a property is a fire hazard is based on issues with electrical wiring, did you consider the fact that the electricity was not connected to the property prior to your vote to find that the property is a fire hazard?

RESPONSE: N/A. See Response to Interrogatory No. 1.

INTERROGATORY NO. 13: Please list and describe each item of evidence condition, fact, and circumstance you considered prior to your vote which supports your vote finding as stated in Resolution No. 8272 that "immediate actions" were necessary, that "There is a great likelihood that the surrounding property may be destroyed by fire originating from" the Property, that the property is "a breeding place for rats, rodents, and other dangerous germ carriers of disease," that the property is a "menace to abutting properties," and that the property was an immediate threat to public health or safety.

RESPONSE: N/A. See Response to Interrogatory No. 1.

it to no longer be a nuisance, the property must meet all standards the City has in place in its building maintenance code.

INTERROGATORY NO. 25: Please list all lawsuits to which you have been a party within the last five (5) years. Please include the names of the other parties, date filed, court and case number, and disposition.

RESPONSE: In addition to the present suit, to the best of my knowledge I have been a party to the following lawsuits within the last five (5) years

(a) *Lynch, et al. v. Stodola, et al.*, 1-24-13, Pulaski County Circuit Court, 60CV-13-360, pending; and

(b) *Gilbert v. Joe Smith*, 4-24-13, Pulaski County Circuit Court, 60CV-13-1751, dismissed.

Separate Defendant retains the right to supplement any and all responses as discovery progresses.

Respectfully Submitted,

Daniel L. McFadden (2011035)
Assistant City Attorney
300 Main Street
PO Box 5757
North Little Rock, Arkansas 72119
Voice: (501) 975-3755
Fax: (501) 340-5341
Email: dmcfadden@northlittlerock.ar.gov

Exhibit E

CERTIFICATE OF SERVICE

I, Daniel L. McFadden, do hereby certify that a copy of the foregoing pleading was deposited into the U.S. mail, postage prepaid on this 4th day of November, 2013, addressed to:

Mickey Stevens
Attorney for Plaintiff
P.O. Box 2165
Benton, AR 72018

Daniel L. McFadden

Exhibit E

XXXXXXXXX

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

CONVENT COPRORATION,
Individually and on Behalf of all
Others Similarly Situated — PLAINTIFF

v. CASE NO. 4:13-CV-0259

CITY OF NORTH LITTLE ROCK, ARKANSAS, a Municipal Corporation, JOE SMITH, Mayor, Individually and in his Official Capacity, City Council Members DEBI ROSS, BETH WHITE, LINDA ROBINSON, MAURICE TAYLOR, STEVE BAXTER, BRUCE FOUTCH, MURRY WITCHER, and CHARLIE HIGHT each Individually and in his or her Official Capacity, TOM WADLEY, Director, Code Enforcement Division, Individually and in his Official Capacity, and FELECIA MCHENRY, Code Enforcement Officer, Individually and in her Official Capacity — DEFENDANTS

SEPARATE DEFENDANTS' RESPONSES TO PLAINTIFF'S INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS

Come Separate Defendants, Aldermen Debi Ross, Beth White, Linda Robinson, Maurice Taylor, Steve Baxter, Bruce Foutch, Murry Witcher, and Charlie Hight, by and through their attorney, Assistant City Attorney Daniel L. McFadden, and for their Responses to Plaintiff's Interrogatories and Requests for Production of Documents, state as follows:

REQUEST FOR PRODUCTION NO. 1: Please provide copies of any and all documents, records, emails, text messages, and all other records regardless of how stored, which have any bearing on the factual questions at issue in the present litigation, including, but not limited to, the claims addressed in the Complaint and Amended Complaints. This includes any

EXHIBIT F

recommendation to the head of Code Enforcement and they decide to move forward or not. It will be placed on the City Council agenda, and the Councilmen will determine whether or not to vote in favor of the condemnation. The Code Enforcement Department will also work with the property owner for abatement.

F. Bruce Foutch: This comes from the Code Department through the Mayor, who sponsors all condemnation actions. It is read and reviewed and then there is a determination.

G. Murry Witcher: If the Code Enforcement Department cannot work with the property owner to bring the property back into compliance with building and health codes, they make a recommendation to the Council in leave of the Mayor to condemn the property. The condemnation process is supported by letters supplied by Code Enforcement, as well as photographs provided by them. Aldermen may also visit the property to view the exterior. The hearing is heard for the property owner to plead their case and then the Aldermen cast their individual votes to condemn the property or not.

H. Charlie Hight: Aldermen are notified of property considered for condemnation by Code Enforcement when they receive their packet for upcoming City Council meetings, then there is a public hearing before the Council. There are pictures displayed at the hearing and testimony is heard. The Aldermen then determine whether or not to condemn the property. Based on the hearing, the Aldermen may withhold the condemnation action or vote in favor of it.

INTERROGATORY NO. 8: Please define the following terms used in Resolution NO. 8272 as you believe they apply to the Property and list each and every condition, fact, or

circumstance that supports the application of each term to the property and list each item of evidence which supports these findings that you considered prior to your vote to condemn the Property:

(a) Run down

(b) Dilapidated

(c) Unsightly

(d) Dangerous

(e) Obnoxious

(f) Unsafe

(g) Not fit for human habitation

(h) Detrimental to the public welfare

RESPONSE:

A. Debi Ross: Defendant objects to this Interrogatory because it is overbroad and not reasonably calculated to the discovery of admissible evidence. Without waiving this objection, Defendant defines the terms as follows:

a. Run down – Property not kept in a habitable condition

b. Dilapidated -- Property that the owner has failed to keep in acceptable condition

c. Unsightly – Property that has not been maintained in a safe and healthy condition that decreases the attractiveness and property values of a neighborhood

d. Dangerous – Increases the risk for fire or injury

e. Obnoxious – Overall condition of a property that has the potential for rodents, drug activity, and unsanitary conditions

f. Unsafe – Possibility of fire, drug activity due to vagrants, injury, lack of structural support

g. Not fit for human habitation – Should not be occupied because someone can't safely live in a property or occupy the space

h. Detrimental to the public welfare – The opportunity for drug activity, vagrants, decrease of property values of surrounding properties, and/or possibility of fire

B. Beth White: Defendant objects to this Interrogatory because it is overbroad and not reasonably calculated to the discovery of admissible evidence. Without waiving this objection, Defendant defines the terms as follows:

a. Run down – In poor condition

b. Dilapidated – In very poor condition

c. Unsightly – Visually detracting from everything around it

d. Dangerous – Probable and unsafe conditions

e. Obnoxious – Blatantly offensive

f. Unsafe - Dangerous

g. Not fit for human habitation – People not able to be safe in the dwelling

h. Detrimental to the public welfare – In this instance, one dilapidated property has a negative impact on the community

C. Linda Robinson: Defendant objects to this Interrogatory because it is overbroad and not reasonably calculated to the discovery of admissible evidence. Without waiving this objection, Defendant defines the terms as follows:

a. Run down – Property in dire need of work, unlivable, not fit for habitation

b. Dilapidated – Not fir for habitation and needing work

c. Unsightly – Here, trash, debris, and other things scattered throughout, walls and ceiling needing repair

d. Dangerous – Hazardous if allowed to remain in the same condition

e. Obnoxious – Here, all the trash left in the structure, including paint buckets and chemicals

f. Unsafe – Unlivable, dangerous

g. Not fit for human habitation - Unlivable

h. Detrimental to the public welfare - Unsafe

D. Maurice Taylor: Defendant objects to this Interrogatory because it is overbroad and not reasonably calculated to the discovery of admissible evidence. Without waiving this objection, Defendant defines the terms as follows:

a. Run down – Trashy, evidence of leaking roofs, materials falling from ceilings, no utilities connected to a building

b. Dilapidated – See "run down," also rotting.

c. Unsightly – Not pleasing on the eyes, trashy, evidence of leaking roofs, exposed installation, ceiling tiles falling

d. Dangerous – Not fit for human habitation

e. Obnoxious – See "run down"

f. Unsafe – Not fit for human habitation

g. Not fit for human habitation – Dangerous and unsafe

h. Detrimental to the public welfare – Dangerous, unsafe, and not fit for human habitation

E. Steve Baxter: Defendant objects to this Interrogatory because it is overbroad and not reasonably calculated to the discovery of admissible evidence. Without waiving this objection, Defendant defines the terms as follows:

a. Run down – Not in a one hundred percent serviceable condition

b. Dilapidated – Worse than run-down

c. Unsightly – Not visually appealing

d. Dangerous -- Life threatening or cause serious injury to human life

e. Obnoxious – Offensive by any of the five senses

f. Unsafe – Conditions which would cause injury to human life

g. Not fit for human habitation – I probably wouldn't let my dog live there

h. Detrimental to the public welfare – Placing in jeopardy the general public

F. Bruce Foutch: Defendant objects to this Interrogatory because it is overbroad and not reasonably calculated to the discovery of admissible evidence. Without waiving this objection, Defendant defines the terms as follows:

a. Run down – Appears to be abandoned and no upkeep is on the interior or exterior

b. Dilapidated – In disrepair and doesn't appear any attempts to remedy have been made

c. Unsightly – Poor image to surrounding areas

d. Dangerous – Unsafe, potential for harm or injury

e. Obnoxious – See responses to "run down" and "dilapidated"; an eye sore

f. Unsafe – See response to "dangerous"

g. Not fit for human habitation – Extreme disrepair makes it not fit for people to live

h. Detrimental to the public welfare – Criminal use, harming property values

G. Murry Witcher: Defendant objects to this Interrogatory because it is overbroad and not reasonably calculated to the discovery of admissible evidence. Furthermore, Defendant objects because he was not present at the meeting for the condemnation vote, and did not participate in any vote. Without waiving this objection, Defendant defines the terms as follows:

a. Run down – Absence of maintenance to be in such a state to be unsightly and dangerous

b. Dilapidated – Unkept, dangerous, not habitable, not fulfilling requirements for plumbing and electrical codes

c. Unsightly -- Unkept materials falling off and out of a structure

d. Dangerous – Joints falling and building not being properly secured to keep vagrants from utilizing it

e. Obnoxious – Personally repuslvie

f. Unsafe – Structurally unsound

g. Not fit for human habitation – Dirty and does not provide for sanitary inhabitants

h. Detrimental to the public welfare – See previous definitions above

H. Charlie Hight: Defendant objects to this Interrogatory because it is overbroad. Without waiving this objection, Defendant defines the terms as follows:

a. Run down – Worn out; the appearance of the building has not been maintained in this case

b. Dilapidated – Out-of-date

c. Unsightly – Need for repair

d. Dangerous – The inside conditions made it hazardous for physical well-being and health

e. Obnoxious – Ugly

f. Unsafe – Not safe to be around

g. Not fit for human habitation – Unhealthy, unsafe, not a good place for people to be in or living at the time

h. Detrimental to the public welfare – To the community, it is a hazard; here, homeless people or vagrants could live in it, animals could live in it, it was not improving the appearance of the community, and it did not make it a good place to live

INTERROGATORY NO. 9: Please list and describe each item of evidence that you considered prior to your vote to condemn the Property which supports the finding that the property constitutes a serious

(a) Fire hazard

(b) Health hazard

RESPONSE:

A. Debi Ross:

EXHIBIT F

CERTIFICATE OF SERVICE

I, Daniel L. McFadden, do hereby certify that a copy of the foregoing pleading was deposited into the U.S. mail, postage prepaid on this 4th day of November, 2013, addressed to:

Mickey Stevens
Attorney for Plaintiff
P.O. Box 2165
Benton, AR 72018

Daniel L. McFadden

EXHIBIT F

b. *Metropolitan v. City of North Little Rock, et al.*, April 25, 2012, Pulaski County Circuit Court, 60CV-12-2011, dismissed.

G. Murry Witcher:

a. *Lasseigne, et al. v. City of North Little Rock, et al.*, filed on or about January 2, 2012, Pulaski County Circuit Court, 60CV-11-5953, settled.

b. *Metropolitan v. City of North Little Rock, et al.*, April 25, 2012, Pulaski County Circuit Court, 60CV-12-2011, dismissed.

H. Charlie Hight:

a. *Lasseigne, et al. v. City of North Little Rock, et al.*, filed on or about January 2, 2012, Pulaski County Circuit Court, 60CV-11-5953, settled

b. *Metropolitan v. City of North Little Rock, et al.*, April 25, 2012, Pulaski County Circuit Court, 60CV-12-2011, dismissed.

Separate Defendants retain the right to supplement any and all responses as discovery progresses.

Respectfully Submitted,

Daniel L. McFadden (2011035)
Assistant City Attorney
300 Main Street
PO Box 5757
North Little Rock, Arkansas 72119
Voice: (501) 975-3755
Fax: (501) 340-5341
Email: dmcfadden@northlittlerock.ar.gov

EXHIBIT F

CERTIFICATE OF SERVICES

I hereby certify that I served a copy of Appellant's Addendum by personal delivery to Marie Bernarde Miller, Deputy City Attorney, North Little Rock, Arkansas on this _____dayof _____, 2020. A copy has also been delivered to the Circuit Court on the same date.

Mickey Stevens