



CITY OF JONESBORO

Honorable members of the Jonesboro City Council:

I am returning ORD-18-060 unsigned. Although I appreciate the work done by various people on this issue, the ordinance would violate state law in at least three important provisions. I cannot ask our staff or the Council to carry out such an ordinance so I am vetoing it.

The City Attorneys of Jonesboro and the General Counsel for the Arkansas Municipal League have both advised against the actions that would take place under ORD-18-060, and I am attaching copies of their written opinions. We have found since Tuesday night's action that Sections 11 and 12 of the ordinance would not comply with ACA 14-58-1001 for projects whose cost would exceed \$2 million.

Because the Arkansas Municipal League now represents the City of Jonesboro on insurance matters, ORD-18-060 could put the City at risk in any resulting legal actions if we go against legal advice of our counsel.

ORD-18-060 would also take away administrative authority from our professional staff and give it to the Council's Public Works Committee, a legislative body. That committee already has oversight power on such matters as the selection of professional services. ORD-18-060 would eliminate the check-and-balance system built into our government.

My Administration took positive steps last summer to correct any deficiencies in the selection processes for professional services by establishing written policies complying with state laws for all such projects. On Aug. 1 we distributed copies of four administrative policies – two for services related to construction projects (above and below \$2 million) and one each for legal services and financial services. At the same time we pointed out RES-08-016, a measure that had been devised (but never passed) in 2008 to require that all relevant materials used in the selection process be made available to the appropriate committee and the full Council. We urged the Council then and on later occasions to consider a similar measure.

I pledge to work with the Council to find a solution that will ensure fairness and transparency while complying with applicable laws.

The selection of professional services can be handled most effectively and efficiently through administrative policies by the City's professional staff. We remain open to suggestions in regard to those written policies, and they could certainly be incorporated by reference into an ordinance or resolution. The Council's committees can and should have an oversight role in the process. But ORD-18-060 is not the answer.

Signed by:

Mayor, City of Jonesboro, Arkansas

Date:



Carol M. Duncan
CITY ATTORNEY

Jessica Thomason
ASSISTANT CITY ATTORNEY

February 8, 2019

Honorable Mayor Harold Perrin
City of Jonesboro
300 S. Church Street
Jonesboro, AR 72401

RE: Ordinance 18-060

Dear Mayor Perrin:

As discussed previously, as well as on the Council floor, it is my position that Ordinance 18-060, as written, is not in compliance with state law. In addition, this ordinance opens the City of Jonesboro to unnecessary and possibly costly litigation.

First, Section 7 of the ordinance mandates that the City Engineer shall negotiate contracts. Negotiating contracts is a power given to the Mayor, by state law. The mayor then has the ability to select a designee who can negotiate on his behalf, but Council cannot mandate who that designee is.

Second, Section 13 removes any negotiating power given to the mayor under state law. It allows Council to give instructions for changes in a contract. This negates the Mayors authority to enter into contract, thus allowing council to dictate the terms of the contract.

Lastly, after further review, Sections 11 and 12 violate state law for projects exceeding two million dollars. State law requires a preselection committee have a minimum of three (3) persons. Ordinance 18-060 designates the City Engineer and the Public Works Committee Chair as the only members of the preselection committee. Also, state law requires that the final selection committee be comprised of the preselection committee, and that committee shall make a recommendation to the governing body after ranking. As the ordinance stands, the Public Works Committee would be ranking the professionals.

Sections of this ordinance would require city employees, under the direction of the mayor, to violate state law in order to satisfy the requirements of Ordinance 18:060. Because of the violation of state law, the City of Jonesboro would be opening itself up to litigation. As we all know, this can become very costly for the City. Should you decide to exercise your power of veto, I believe there are valid legal reasons to do so.

Thank you for your cooperation and attention to this matter.

Sincerely,

Carol Duncan
City Attorney

CD/mc

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February 5, 2019

Via Email

RE: Proposed Ordinance 18-060

Based on recent conversations with Ms. Duncan, I understand there are discussions to create a sub-committee to review bids from contractors/builders/etc. for City projects. This sub-committee would rank bid submissions based on a set of qualifications and then send that ranking to the Mayor. The Mayor would then negotiate with the top-ranking contractor/builder/etc; but, if an agreement could not be reached, the Mayor would then negotiate with the second ranked bid, and so on. Like Ms. Duncan and I discussed several weeks ago, this appears to be allowable under the law but not necessarily the wisest course of action. Here's why:

As a fundamental matter, a city council is a legislative body, which is responsible for the passage of law. In that capacity, each council member has "legislative immunity." This means, generally speaking, a city council member is immune from suit for an action he or she took in their legislative capacity. That legislative immunity, however, does not apply to council members when they engage in non-legislative matters. A prime example is when a city council votes to terminate an employee. By doing so, the city council is acting administratively. And, because it has acted in a non-legislative capacity, each council member loses its legislative immunity and is subject to suit for wrongdoing as part of the termination. One quick point, legislative immunity is not the same as absolute immunity. Cities and city officials do not have absolute immunity; the focus of this letter is on the waiving of legislative immunity.

I am fairly certain the waiving of this legislative immunity would occur in situations like the one being proposed. Please do not misunderstand, I am not saying that any lawsuit would be successful; I am only saying that city council members serving on the subcommittee would lose their legislative immunity and would thus be subject to a lawsuit. As you know, a contractor/builder who does not get the contract can sue and claim that all sorts of wrongdoing prevented him or her from getting that contract. In situations where the council members had no role in the granting of that contract, which

is most often the case, the city would only be subject to that lawsuit. The city council members would not be subject to suit both because they were not involved in the awarding of the contract and because they would have legislative immunity. However, if the council begins to involve itself in the bidding process like proposed, councilmembers are waiving their immunity and opening themselves up to liability. For instance, if the subcommittee of councilmembers ranks a contractor/builder low and then the contractor/builder does not receive the bid because of that low ranking, the contractor could then sue a city council member in their individual capacity. And, because the members were not acting in their legislative capacity, they would not have legislative immunity and the suit would proceed.

In addition, I am not terribly comfortable with the council involving itself in matters reserved for the Mayor, at all. Again, while city councils have broad discretion to act as they wish, negotiating and entering into contracts are powers reserved for the Mayor. By involving itself so deeply in that process, I fear the council will muddle the separation of powers. For that reason, too, I do not believe that the city council involving itself in this process is wise.

After my initial conversation with Carol, I reviewed proposed ordinance 18-060. I have additional concerns after reading that proposed ordinance beyond what I discussed above. First, section 7 of the ordinance mandates that the City Engineer "shall negotiate a contract . . ." I will note, again, that the Mayor has the ultimate authority to enter into contracts. While I believe the Mayor could delegate this authority to his designee, 18-060 mandates that the City Engineer – and not the Mayor – *shall* negotiate contracts. I'm concerned this would usurp the Mayor's authority. The Mayor has the authority to enter into contracts, and even though he can delegate authority to a designee the city council cannot do that for him.

Second, I have concerns with section 9 thru 13 of the ordinance; but, most of those concerns have been addressed in the preceding paragraphs. However, after reviewing 18-060 more closely, there is one additional concern I must point out. In section 13, the city council is given the authority to approve or not approve contracts. While that is a concern because the Mayor, and not the council, has the authority to enter into contracts; the major concern with this provision is that 18-060 gives the power to the council to return a rejected contract "to the Mayor with instructions on changes to the contract..." This means, essentially, the city council can tell the Mayor what terms he should agree to when negotiating the contract. I'm concerned this, too, would usurp the Mayor's authority to enter into contracts because the council, and not the Mayor, would be dictating the terms of contracts.

Sincerely,


John L. Wilkerson