

SPECIAL CALLED COUNCIL MEETING – COLUMBIA, TENNESSEE

October 26, 2009 – 5:00 p.m.

Mayor Gentner read the notice of the Special Called Meeting.

Council Member Martin moved to spread the Special Called Meeting upon the Minutes. Council Member McCullen seconded the motion. All Council Members present voted aye.

Mayor William E. Gentner called the Special Called Council Meeting to order, pursuant to proper notice having been given. City Recorder Betty Modrall called the roll. Present were Mayor William E. Gentner, Vice Mayor Wayne Kennedy, Council Members Carl McCullen, Christa Martin, Dean Dickey and Susan Stephenson; City Manager Paul C. Boyer, Jr. ; City Attorney Tim Tisher; City Recorder Betty Modrall and Recording Secretary Liz Bermudez. Council Member Debbie Matthews was absent.

Council Member McCullen offered the invocation followed by the Pledge of Allegiance led by Council Member Stephenson.

ADMINISTRATION:

Item 4.1 – **PROVIDE DIRECTION TO THE CITY ATTORNEY CONCERNING JUDGE STELLA HARGROVE’S ORDER IN THE MATTER OF CITY OF COLUMBIA VERSUS TERRY D. PULLEN ET AL.** Mayor Gentner asked the City Attorney to outline why Council is asking this of him tonight. City Attorney Tisher advised that the Judge’s order came down on October 5<sup>th</sup> and the City has 30 days to come up with an appeal if that is what they want to do. City Attorney Tisher explained that the next regularly scheduled Council Meeting would have been “cutting it very, very close” with the time constraints.

Council Member Debbie Matthews arrived at the meeting at 5:04 p.m.

Mayor Gentner advised when he read the Tennessee Code Annotated (TCA), particularly the paragraph that defines eminent domain, it implied that the State of Tennessee has enacted legislation that basically takes a narrow view of the ability of a City to use its eminent domain. Mayor Gentner asked if that is an oversimplification on what he is trying to say. Mayor Gentner asked how the Judge could reverse her decision given the language that was in the State Statute. City Attorney Tisher advised the

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new statute is in response to the Kelo case and many states have enacted more restrictive legislation concerning eminent domain. Mayor Gentner read part of the Judge's opinion and asked the City Attorney if that would be the essence of argument of the City's position relative to asking the Judge to reconsider. City Attorney Tisher advised that it would be along the basis as what was discussed in Executive Session or it would be the same with the appeal. Mayor Gentner asked if the City could appeal the Judge's decision and still be able to address Item 4.2 on the Agenda. City Attorney Tisher advised Council could appeal the decision and still address Item 4.2 on the Agenda. City Attorney Tisher advised he believes there is some risk involved with an adverse ruling. Council Member Stephenson asked the City Attorney about the timeframe if Council asked Judge Hargrove to reconsider and if the November 4<sup>th</sup> deadline would still stay in effect. City Attorney Tisher advised the deadline would be extended until they received a ruling. City Attorney Tisher advised he doesn't know how long it would take for a reconsideration. Council Member Dickey asked how much of the grant is not obligated. Finance Director Patti Baltzer advised one year of Federal and City funding. Finance Director Baltzer said to date the Federal Government has obligated four years of their portion and the City has obligated its match. Finance Director Baltzer informed everyone when she said "obligated" she means the City has received a letter saying the funds have been set aside for the project, not that it has been committed for construction. Council Member Dickey asked if that designates the funds to not be rescinded. City Manager Boyer advised he understanding is that it does not keep the funds from being rescinded. City Manager Boyer said the federal government looks to see if the local government has obligated the funds by seeing if the money has been spent or contracted and if it hasn't been spent or contracted it can be subject to being rescinded. Council Member Dickey asked how much of the funds does the City not have designated or contracted. Finance Director Baltzer advised she will get the answer to Council Member Dickey's question. Vice Mayor Kennedy if there is a certain date that the funding can be rescinded. City Manager Boyer said the grant has a deadline but the deadline can be extended. City Manager Boyer advised the concern he has raised to Council is that Congress has established a track record in the last thirty days of rescinding unobligated grants and that is a direct result of the financial situation that the Federal Government finds itself in. City Manager Boyer advised he is concerned about the money getting rescinded because the City has not spent

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the money or contracted the money. City Manager Boyer advised the Congress could deobligate the funding. City Manager Boyer said the Grant Administrator at TDOT said he isn't concerned, but the Commissioner at TDOT did say that he is concerned about the grant money they have received from the Federal Government being rescinded if it isn't spent. City Manager Boyer mentioned some of the newsletters that have spoken about grant monies getting rescinded. City Manager Boyer said it is a concern that they need to keep in the back of their mind so they don't need to let this stretch out for too long. City Manager Boyer said the Grant Administrator for TDOT said the City has a March 2011 deadline and it is not a big deal to extend the deadline, but there is a political issue with what Congress is doing with grant funds. Council Member Dickey said he assumes it is a substantial amount and if the money is rescinded it would stop the project. Council Member Dickey asked what the City can do about completing the Riverwalk. City Manager Boyer said the City needs to make a decision on what they are going to do about the property and, in his opinion; they then need to diligently move forward on getting the project built. City Manager Boyer said if they choose an alternate route and they expend funds on that, less funds would remain to finally establish the route originally envisioned by the committee, staff and design engineer. City Manager Boyer reminded everyone that the project is more than the walk along the river. He advised there a significant amount of the project is for improving the north side of downtown and that the entire project can be at risk when they are talking about the grant being at risk. City Manager Boyer advised if the City doesn't receive the money, then the project cannot be done because the City doesn't have the money to complete the project. Finance Director Baltzer advised that the Federal share of funds allocated for the project is slightly over four and a half million and the City funding allocated for the project is about one point one million for a total of five million six hundred seventy two thousand dollars. Finance Director advised that through July, the City has spent about six hundred and thirty-five thousand of that and has been reimbursed for five hundred and eight thousand. Council Member Dickey said time is an important issue here and the City doesn't have control of the court's decisions. Council Member Martin asked about the time associated with the three options listed in the information on the Agenda. City Attorney Tisher advised with the first option there is one property owner who agreed to convey his property to the City that Council may or may not choose to use. City Attorney Tisher said with the first option there is no

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time element. He said with Option 2, he would think the City would know something in a thirty-day period. Council Member Martin asked what Option 2 would entail. City Attorney Tisher advised he would file a motion to the court, the motion would be docketed, they would argue the motion and then the Judge would rule on the motion. City Attorney Tisher advised that with an appeal, the shortest amount of time may be six months and the outer limits would be up to one year. Council Member Martin asked about the process in filing an appeal. City Attorney Tisher said he would file a notice of appeal, then file a brief and the other side would file a brief. Then, if docketed, there would be an argument in Nashville once it was set and then the Court of Appeals would issue a ruling. City Attorney Tisher the last option would be the longest of the three options, time wise. Council Member Martin said that from the project standpoint and the timing of the project, any one of the options would push the City out. Council Member Martin asked what any one of the options would do to the project if Council decides on any of the options. City Manager Boyer advised that with Option 1, Council only has one concept and the design would have to be completed in 30 to 45 days, then the City would need final approval from TDOT on the right-of-way plan. Once that has been done, the bid specs can be done so it will be ready to bid. City Engineer Jim Fuller advised that the bid specs are already completed. City Manager Boyer said the City would be able to award the bid in 60 to 75 days and construction has been estimated to take a year. City Manager Boyer advised the City is looking at around 16 to 17 months until the project is completed with Option 1. City Manager Boyer advised the City might have to go to TDOT and seek an extension of the grant deadline. City Manager Boyer said with Option 2, staff would do little until we know what the Judge's decision is, because it has a lot to do with what the final design would be. City Manager Boyer said Option 2 would be around 21 to 22 months if the decision went against the City. City Manager Boyer advised if the decision on Option 2 went in the City's favor, it would maybe put the project at around 20 months. City Manager Boyer reminded Council that the time estimates are guesses. City Manager Boyer said with Option 3, it could be 23 to 29 months until the project is complete. Mr. Chuck Saunders with Fisher and Arnold was present for any questions that Council may have. Council Member Matthews apologized for being late. Council Member Matthews said she has great plans for the Riverwalk and to her this is a park and it is huge economic engine for the City. Council Member Matthews said it can't be a

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Riverwalk unless it is on the river and she feels that the decision they made earlier was the best decision for the long-term in the City. Council Member Matthews said there is not a lot of support for the Riverwalk in the City and there is less support for eminent domain. She said she believes in the park and the project. Council Member Matthews said her main concerns are the bridge, Main Street and 6<sup>th</sup> Street, and she doesn't want to lose the funding. Council Member Matthews said she would like the City to talk to the Judge, do the appeal but at the same time approve an alternate. City Attorney Tisher said Council can approve an alternate and still appeal but they might run the risk, if they modify the project, of not having the funding for that. Council Member Matthews said she wants to try to get the City the money and the Riverwalk down the river. Council Member Matthews said, with all due respect, she is having a "crisis of confidence in legal" and she is very concerned because what she is seeing and hearing the City missed it in our litigation part of this. Council Member Matthews she understood the Judge to say the City just "said it wrong". Council Member Matthews said after the methadone clinic last week and now this, she is concerned. Council Member Matthews asked if the City goes to an appeal, whether the City could pull TML in or someone else who has taken part in eminent domain before on the State level. Mayor Gentner said the intent of the legislation is that the State legislature is concerned about the use of eminent domain and has put restrictions on the use of eminent domain. Mayor Gentner said he thinks the Judge's decision will be upheld and he thinks the Judge ruled correctly. Council Member Matthews said she thinks it comes down to how you present and litigate it. Council Member Matthews said this is a park and that is how it should have been looked at. Council Member Matthews advised she is at a loss as to how the City lost this. Council Member Matthews said she wants the City to consider rescinding this to Judge Hargrove for 30 to 60 days and then see where they are at that time. City Manager Boyer advised that TML doesn't provide Council for City-initiated legal action. City Manager Boyer advised that the TML Risk Management Pool provides legal defense when the City is a defendant in an action and MTAS doesn't provide legal defense to anyone; they provide legal advice to cities throughout the state. City Manager Boyer advised that neither organization would provide legal representation for the City. Vice Mayor Kennedy said he wanted to clarify a point and said no matter which way the City goes, they have a chance of losing the money by not starting the work. City Manager Boyer advised the risk exists as long as the money isn't

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contracted. Council Member McCullen said his concern is the time restraints. Council Member McCullen advised he feels if they try to get the Judge to reconsider, her feelings would be the same and the City would be wasting time. Council Member McCullen said he is concerned about the project going forward. Council Member Stephenson asked if Council were to vote to have Judge Hargrove reconsider and she ruled against the City, would Council still have the option to seek an appeal after that. City Attorney Tisher advised that is correct. Council Member Stephenson said she is inclined to lean to the reconsideration mainly because that is an option that may work instead of jumping into an appeal where they don't know the cost. Council Member Stephenson also spoke about the length of time it would take to get an appeal. Council Member Matthews moved to approve Option 2, of going back for reconsideration in front of Judge Hargrove. Council Member Martin seconded the motion. Council Member Stephenson asked if Council was going to hear from the committee before Council makes a decision. Ms. Gale Moore, Chairperson of the Riverwalk Committee asked if the City goes with the reconsideration, whether new information would be allowed. City Attorney Tisher advised the Judge would be reconsidering the proof that was submitted. Council Member Stephenson advised that the City Attorney would still be able to speak to the Judge on the City's behalf. Ms. Moore advised that the Riverwalk Committee would like to recommend appealing the decision. Ms. Moore said the City should win and the City shouldn't allow what happened, which was a mistake, to be a precedent. Ms. Moore advised eminent domain has been used for parks all around the state and if it is for the public good then eminent domain can be used. Ms. Moore said the City can win this and should win this. Council Member Matthews asked the City Attorney if Judge Hargrove overlooked things in the information that was sent. City Attorney Tisher spoke about some things not being considered that he hoped would have been considered. Mayor Gentner read part of the Judge's decision. Mayor Gentner advised he thinks the judge will not change her opinion. Council Member Matthews asked if the project was not presented as a park. City Attorney Tisher advised it was presented both ways - as a sidewalk along the river and the streetscape. Mayor Gentner announced Council was going to go into an Executive Session.

Council went into Executive Session at 5:46 p.m.

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Council returned from Executive Session at 6:11 p.m.

Mayor Gentner called the meeting back to order. Mayor Gentner asked the City Recorder Modrall to read the motion. City Recorder Modrall advised the motion is to approve Option 2, to go back to Judge Hargrove for reconsideration. Council Member Matthews said if the motion goes through the City would have either thirty days to file a new petition or file an appeal. City Attorney Tisher advised if Judge Hargrove grants the City its relief, then the City would be satisfied. If she partially granted the relief, then the City may need to file a new petition on some of the tracts and there would be an unlimited time with that. City Attorney Tisher advised that if Council decided to appeal, they would have thirty days. All Council Members present voted aye with the exception of Council Members Dickey, McCullen, Vice Mayor Kennedy and Mayor Gentner who voted no. Motion to approve Option 2 failed. Council Member Matthews moved to approve Option 3, to send this on to an appeal and at the same time approve an alternate route. Council Member Matthews apologized and asked for clarification. City Manager Boyer advised if Council accepts the Judge's decision then there is only one concept to accept which is "concept one". Council Member Stephenson said Council still has the option to instruct the City Attorney to pursue another petition. City Attorney Tisher advised he would want it on the heels of a motion because he would want some clarification from the court prior to filing it. City Attorney Tisher advised that Council does have that option but he thinks it would be better served if it followed a motion. Vice Mayor Kennedy asked how long this would take. Council Member Stephenson asked if Council Member Matthews wanted to amend her motion. Council Member Matthews asked Council Member Stephenson to make the motion. Council Member Stephenson advised they are in the middle of a motion. Mayor Gentner advised there is no motion at this time because Council Member Matthews rescinded and asked for Council to have discussion. Council Member Stephenson moved to file another petition. Council Member Matthews seconded the motion. Mayor Gentner asked for discussion on the motion to file a new petition. Vice Mayor Kennedy asked how Judge Hargrove would look at the new motion. City Attorney Tisher advised it would have to be on the heels of a motion because there are some loose ends that need to be tied up first and it would need to follow the motion to reconsider. Mayor Gentner asked for the roll to be called. Vice Mayor Kennedy asked what the motion was. City

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Recorder Modrall advised it was filing of the petition for eminent domain; to file another petition. Council Member Matthews said the petition is for the City since it may have missed the mark and this is a street improvement portion that she may have turned the City down on, but the City believes it can repetition her under parks or industrial parks for her to judge on this. City Attorney Tisher said “not under industrial parks”. Mayor Gentner said if the motion fails and there are no other motions made relative to addressing Judge Hargrove’s order, then concept one is what the City is going to work with. City Manager Boyer advised the City would not have any other alternative because we won’t have the property to do a different alternative. City Manager Boyer advised that the City has all the property for concept one. City Engineer Jim Fuller outlined concept one for Council and the audience. Council Member Matthews wanted to clarify that if they send a repetition under a new brief of parks, that it will cost the City hardly anything. City Attorney Tisher advised that is correct but he reiterated what he had been saying about filing it on the heels of a motion and tying up the loose ends. Council Member Matthews asked about the time frame. City Attorney Tisher advised they are looking at around three to four months. City Attorney Tisher said he feels like it will be necessary to file the motion first and Council already voted down that motion. Council Member Stephenson asked Council to consider in the future reflecting on the past. Council Member Stephenson spoke about projects that have come before Council that needed the support of the Council. Council Member Stephenson mentioned the College Park Realignment, Safe Routes to Schools, Neighborhood Revitalization and Stabilization. Council Member Stephenson advised Council has done all kinds of projects in different wards and there are going to need to be more projects in the future that are just as important as the Riverwalk project. Council Member Stephenson said she would like Council to look at the big picture in terms of all they are trying to do for the wards in the City before they make their vote. Council Member Matthews reminded everyone that currently Ward 5 doesn’t have a park. Council Member Matthews said she believes all the other wards have a place for people to go to for recreation. Mayor Gentner said he still feels even though they are missing five hundred and some feet that doesn’t mean the project is over with. Mayor Gentner said under the right methodology that access can be gained. Mayor Gentner advised there is a good chance if the City doesn’t get to work on the project now then the City could lose it. Mayor Gentner said he hopes this becomes the premier park. All Council

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Members present voted aye with the exception of Council Members Dickey, McCullen, Vice Mayor Kennedy and Mayor Gentner who voted no. Motion failed. Mayor Gentner said by default, Council basically adopted concept one and there is no need for Council to take up Item 4.2. Council Member Matthews said earlier she spoke about the thirty days the City has to file an appeal. Council Member Matthews said if the City files the appeal and it is denied then the City stays with this. Council Member Matthews said if the appeal does take place and the City is awarded it then they can go straight across. Council Member Matthews asked if she can put a motion on the table to go for the appeal and at the same time start this with the adjusted concept. City Manager Boyer advised he doesn't know what the Grantor's position would be on that. City Manager Boyer said if they build one of the alternatives, then they will fully spend the money on the alternative and the City won't have the money to go back to complete the other section. Council Member Matthews advised she was hoping the appeal would either be approved or denied before the City gets to that section. City Manager Boyer advised if the City goes forward and bids the project and contracts for the work to be done, he cannot guarantee Council that the contractor will do a specific portion of the six million dollar project in concert with the Court of Appeals. City Manager Boyer advised that the contractor would need to do the work when the weather is right and the materials are available. City Manager Boyer said if the City delays the contractor because the Court of Appeals hasn't made a decision, then there will need to be Change Orders and the contractor will be seeking more money. Council Member Matthews said if the City goes on with concept one, they are looking at 16 to 17 months and appeal would be 6 months to 12 months. Council Member Matthews said she would just like to leave options open. Council Member Matthews spoke about dismissing an appeal along the way if things don't time out if the City bids the project out on concept one. Council Member Matthews said if there is extra money, they can put it to something else. City Manager Boyer advised in his opinion there will not be any extra money left over from this project. Council Member Matthews asked how much it would cost to file the appeal. City Attorney Tisher advised the money is not the issue. They would have to pay a court reporter. City Attorney Tisher spoke about the property owner whose property the City may or may not be able to acquire. City Attorney Tisher said they need to know if they can acquire the property. City Manager Boyer advised the City has to commit to a right-of-way that the City owns. City Manager Boyer

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said TDOT wants to approve specific right-of-ways plans for the route. City Manager Boyer stressed that the City has to own the property for TDOT to review the plan. City Manager Boyer advised Council would have to commit local money to complete the segment in the future, and that would have to come from a property tax increase because the money isn't in the budget. Council Member Matthews asked if the City doesn't go through with the appeal, will it be lost forever. City Attorney Tisher advised if the City doesn't appeal it in the thirty days, it becomes a final judgment. City Manager Boyer said if Council decides to appeal, then he wouldn't make a routing decision until the appeal is done. City Manager Boyer advised the risk they are taking is about rescission of funds. City Manager Boyer spoke about undermining the case with an alternate. Council Member Martin said a few months ago, a vote was taken and a deferral happened. Council Member Martin said if Council has decided that the work from 2000 up until now is not what Council wants to do, then she thinks that is evidenced by what they are doing tonight. Council Member Martin said if they are comfortable with the Riverwalk coming up to City property and cutting through and being adjacent to the Farmer's Market area and then cutting back to City of Columbia property, then so be it. Council Member Martin advised Council needs to make a decision and move forward. Council Member Martin said there are some strange dynamics going on. Council Member Martin said Council needs to come together and try to do something as a seven to zero vote. Council Member Martin said if the dynamics have changed then Council needs to move forward. Council Member Stephenson said they just witnessed Council shoot down options that would have cost almost nothing. Council Member Stephenson said since it would cost almost nothing then why not give it a try. Council Member Stephenson advised now the plan will be considerably altered and it will cost the City money instead of Federal money. Council Member Stephenson said she wished she can see a seven to zero vote, but right now it isn't possible. Vice Mayor Kennedy asked about what options they voted down. Council Member McCullen advised his decision is based upon what he feels about the Judge's decision. Council Member Matthews moved to approve Option 3 and send the case on for an appeal. Council Member Stephenson seconded the motion. Council Member Martin said the shortest point in existence from where the City is today from where they designed to go was the two motions that have been voted down. Council Member Martin advised now they are going to try to go for an appeal that can take

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six to twelve months. Council Member Martin advised she is worried about the Council. Council Member Dickey said things have changed since the last vote was taken and that is rescinding of the grant money. Council Member Dickey spoke about not being in a position to risk the grant money being taken back. All Council Members present voted aye with the exception of Council Members Dickey, McCullen, Vice Mayor Kennedy and Mayor Gentner who voted no and Council Member Martin voted present. Motion failed.

There being no further business, the meeting adjourned at 6:43 p.m.

APPROVED:

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WILLIAM E. GENTNER, MAYOR

ATTEST:

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BETTY MODRALL, CITY RECORDER