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March 30, 2012

Mayor Mark Stodola  
500 West Markham, 2<sup>nd</sup> Floor  
Little Rock, Arkansas 72201

**CITY ATTORNEY OPINION NO. 2012-002**

Dear Mayor Stodola:

This opinion is in response to your questions about the impact of a proposed conditional use permit (CUP) ordinance and a development proposed for 1000 Main Street, as well as on certain food stores.

**QUESTIONS PRESENTED & SHORT ANSWERS**

**QUESTION NO. 1**

1. **What has the Board policy been as to whether an application for a building permit exempts an applicant from any additional requirements that the passage of the proposed ordinance would require?**

**SHORT ANSWER**

**The Board does not have a policy. The practice has been that if a building permit has been applied for and granted prior to the effective date of an ordinance, then the new provisions do not apply. If a building permit has not been granted, then the applicant must either come into compliance with the new provisions, or seek a variance from the requirements before the Board of Adjustment.**

**QUESTION NO. 2**

2. **If the new owners of the property have moved a community welfare center – Brain Injury of Arkansas – into 1000 Main Street as of March 1, 2012, does that “grandfather” in a community welfare center so that a similar use by a subsequent party is not subject to the terms of the proposed ordinance if it is approved?**

**SHORT ANSWER**

**A business in operation would not be impacted by the new CUP ordinance. A successor entity, assuming no abandonment of a nonconform-**

ing use, would not have to comply with the proposed ordinance provisions.

### QUESTION NO. 3

3. If a food store under 5000 square feet wishes to sell beer and wine does it have to comply with the proposed CUP ordinance? Or, if the food store is later purchased by someone, would the new owner have to obtain a CUP?

### SHORT ANSWER

The current ordinance draft applies to businesses that are not in operation. Any business in operation would become a nonconforming use, but would not have to undergo the CUP process. Assuming no expansion or enlargement, the nonconforming use, if purchased by another, would not need to comply with CUP process unless the use is abandoned for a period of six months.

### FACTUAL BACKGROUND

The Board of Directors has pending before it an ordinance to require a conditional use permit (CUP) for certain uses in the City.<sup>1</sup> A conditional use is a land use not permitted by right, but which may be allowed in a specific zoning category. To engage in a conditional use requires planning commission approval. Little Rock, Ark., Rev. Code § 36-106 (1988) (“LRC §\_\_”). A public hearing is required at which people may offer information for and against the grant of the CUP. *Id.* A number of development standards must also be considered by the commission for each particular conditional use location. *See* LRC § 36-107. The planning commission decision can be appealed to the board of directors by an aggrieved party. A further appeal to circuit court may be taken from the board of directors decision. LRC § 36-109.

The current draft of the proposed CUP ordinance that is the subject of this opinion contains a retroactivity clause which states:

Section 16. *Applicability.* The provisions of this ordinance that designate a use as a conditional use shall apply to all such uses indentified in this ordinance where the use is not in operation on the date of the passage of this ordinance.

ATTACHMENT at 3. One business that may be impacted by the ordinance is a proposed Veterans Administration Daytime Treatment Center (VADTC) to be located at 1000 Main Street. Also impacted would be food stores under 5000 square feet that desire to sell beer and wine, and establishments for care of alcoholic, narcotic or psychiatric patients.

In the case of the VADTC, the former use of the structure was as an automobile dealership. It is currently being used as a community welfare or health center named Brain Injury of Arkansas (BIA). The VADTC apparently would replace BIA and use the property for a similar purpose. There has been no request by BIA for a building permit.

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<sup>1</sup> The proposed ordinance is attached to this opinion.

As to the issues about the food stores, the factual details are included in the questions themselves. There is nothing else to add here.

### Discussion

**1. What has the Board policy been as to whether applications for a building permit exempt the applicant from any additional requirements that the passage of the proposed ordinance would require?**

A review of the City's ordinances revealed no policy as to when an ordinance is applied to a project that is undergoing the review process. The anecdotal information gleaned from discussions with the staff in the Department of Planning & Development is that if a building permit has already been issued, then a new ordinance amendment does not impact the project.<sup>2</sup> So absent express language in an ordinance to set a retroactive effective date, the City practice has been not to apply the terms of a new ordinance to a project that received a building permit, although it is not completed, before the ordinance became effective.<sup>3</sup>

**2. If the new owners of the property<sup>4</sup> have permitted a community welfare center – Brain Injury of Arkansas (BIA)– to operate at 1000 Main Street as of March 1, 2012, does that “grandfather” in a community welfare or health center prior to the passage of the proposed ordinance?**

The current ordinance applies to, among other uses, a community welfare center. This is a term of art defined by ordinance:

*Community, welfare or health center* means a community service facility where social, recreational, welfare, health or child care assistance is provided by a public [,] quasi-public, tax exempt, church or municipal agency.

LRC § 36-3. BIA is tax exempt.<sup>5</sup> The passage of the ordinance to require a CUP process for a such a use would not apply to BIA if the section that makes the ordinance applicable to any such use not in operation remains. However, BIA would become a nonconforming use. If BIA is abandoned for a period of six

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<sup>2</sup> Telephone interview with Planning Director Tony Bozynski (March 22, 2012); and, telephone interview with Zoning and Subdivision Manager Dana Carney (March 23, 2012).

<sup>3</sup> An ordinance which interferes with rights already in existence will not be applied retroactively unless the ordinance expresses an unequivocal and inflexible intent to do so. *United States v. Security Industr. Bank*, 459 U.S. 70 (1982); *Gannett River States Publishing Co. v. Arkansas Industr. Dev. Comm'n*, 303 Ark. 684, 799 S.W.2d 543 (1990). Even so, it is not clear that an ordinance could be applied retroactively to take away an established property right.

<sup>4</sup> The owner of the property is SI Property Investments, LLC.

<sup>5</sup> Letter from Drake Mann to Thomas M. Carpenter (March 26, 2012)(on file with the City Attorney).

months,<sup>6</sup> assuming the proposed ordinance is approved, then the new provisions would apply to a subsequent user. However, if there is no abandonment of the use, then the new requirements do not apply.

**3. Does the owner of an existing food store of less than 5000 square feet that wishes to sell beer and wine have to comply with the proposed CUP ordinance and go through the CUP process? Or, if the food store is later purchased, would the new owner have to go through the CUP process?**

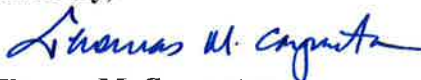
The ordinance classification that triggers the proposed CUP requirement is a food store that sells beer and wine. A food store that does not sell beer or wine is not involved in the CUP process. If it chooses to do so in the future, and is not already selling beer and wine on the effective date of the ordinance, then the CUP process will have to be followed.

Whether a subsequent purchaser has to go through the CUP process will depend upon whether the entity sells beer and wine at the time of the purchase. If so, then the Planning staff will determine that it is the continuation of a nonconforming use, and the CUP process will not be required.<sup>7</sup> However, if the prior business is abandoned for more than six months, the CUP process will have to be followed.<sup>8</sup>

**CONCLUSION**

**The City typically does not make new zoning ordinance provisions applicable to projects that are uncompleted, but have received a building permit, on the date of passage of the new ordinance. Assuming the use BIA makes of the property is not abandoned, the VADTC can locate a community welfare or health facility at 1000 Main as a continuation of the existing use. Finally, if a food store that does not sell beer and wine wishes to do so, it will have to comply with the CUP process set forth in the proposed ordinance.**

Sincerely,



**Thomas M. Carpenter**  
City Attorney

cc. Members of the Board of Directors (via email)  
Bruce T. Moore, City Manager (via email)  
Tony Bozynski, Director of Planning & Development (via email)  
William C. Mann, III, Chief Deputy City Attorney (via email)  
Bonnie Engster, Law Office Coordinator

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<sup>6</sup> LRC § 36-153(c).

<sup>7</sup> See *Blundell v. City of West Helena*, 258 Ark. 123, 133, 522 S.W.2d 661, 668 (1975).

<sup>8</sup> We were not asked, and this opinion does not address, the steps the Alcohol Beverage Control Board would require be taken as to any permit to sell beer and wine.

1                                 **ORDINANCE NO.** \_\_\_\_\_

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3                 **AN ORDINANCE TO AMEND CHAPTER 36 OF THE CODE OF**  
4                 **ORDINANCES TO REMOVE INCONSISTENCIES AND CERTAIN USES**  
5                 **BY RIGHT; TO ESTABLISH A REQUIREMENT FOR A CONDITIONAL**  
6                 **USE PERMIT FOR CERTAIN USES; TO DECLARE AN EMERGENCY;**  
7                 **AND FOR OTHER PURPOSES.**

8

9                 **WHEREAS**, on September 6, 2005, the City Board of Directors passed Little Rock, Ark.  
10                Ord. No. 19,395, which established the requirement for a special use permit for various  
11                residential uses that are transitional in nature, and

12                **WHEREAS**, many of the transitional uses are still shown as permitted uses in various  
13                zoning districts, which conflict with Little Rock, Ark. Ord. No. 19,395 (September 6, 2005) and  
14                should no longer be shown as permitted uses, and

15                **WHEREAS**, it has been determined that certain uses, due to their nature and their possible  
16                impact on the surrounding neighborhood, should receive a public hearing to determine their  
17                appropriateness for the particular site, rather than being a “by right” permitted use, and

18                **WHEREAS**, the City now finds it desirable to revise Chapter 36 of the Code of Ordinances  
19                to make the necessary changes.

20                **NOW, THEREFORE, BE IT ORDAINED BY THE BOARD OF DIRECTORS OF**  
21                **THE CITY OF LITTLE ROCK, ARKANSAS:**

22                **Section 1.** Section 36-3 of Chapter 36 of the Little Rock Code of Ordinances is hereby  
23                amended to replace the definition for the defined term “*Convenience food store with gas pumps*”  
24                with the following definition:

25                *Convenience food store with gas pumps* means a small food store whose  
26                primary function is the sale of convenience food items such as bread, milk, etc.  
27                Operational gas pumps and petroleum sales are provided on the site. No  
28                automobile parts, sales or service is allowed.

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30                **Section 2.** Section 36-3 of Chapter 36 of the Little Rock Code of Ordinances is hereby  
31                amended to replace the defined term “*Establishment of a religious, charitable or philanthropic*  
32                *office*” with the term “*Establishment of a religious, charitable, or philanthropic organization*”  
33                and to revise the definition to read as follows:

ORDINANCE  
To amend Chapter 36 of the Code to remove inconsistencies  
and to declare an emergency

1            *Establishment of a religious, charitable or philanthropic organization* means  
2            the offices and activities sponsored by or operated by organizations established  
3            for religious or philanthropic purposes, including training and educational  
4            facilities and similar establishments, but not including group residential uses.  
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6            **Section 3.** Section 36-259(b)(1)d of Chapter 36 of the Little Rock Code of Ordinances is  
7            hereby amended to delete “rooming, lodging and boarding facilities” from the listing of  
8            permitted uses.

9            **Section 4.** Section 36-279(b)(1) of Chapter 36 of the Little Rock Code of Ordinances is  
10           hereby amended to delete subsections g, “Family care facility”; i, “Group care facility”; and n,  
11           “Rooming or boarding” from the listing of permitted uses.

12           **Section 5.** Section 36-280(c)(1) of Chapter 36 of the Little Rock Code of Ordinances is  
13           hereby amended to delete subsections g, “Community welfare or health center”; and m,  
14           “Establishment for care of alcoholic, narcotic or psychiatric patients” from the listing of  
15           permitted uses.

16           **Section 6.** Section 36-280(c)(3) of Chapter 36 of the Little Rock Code of Ordinances is  
17           hereby amended to add and separately list “Community welfare or health center”; and  
18           “Establishment for care of alcoholic, narcotic or psychiatric patients” to the listing of conditional  
19           uses.

20           **Section 7.** Section 36-281(b)(1) of Chapter 36 of the Little Rock Code of Ordinances is  
21           hereby amended to delete subsections f, “Community welfare or health center”; k,  
22           “Establishment for care of alcoholic, narcotic or psychiatric patients”; m, “Family care facility”;  
23           p, “Group care facility”, and y, “Rooming, lodging and boarding facilities” from the listing of  
24           permitted uses.

25           **Section 8.** Section 36-281(b)(3) of Chapter 36 of the Little Rock Code of Ordinances is  
26           hereby amended to add and separately list “Community welfare or health center”; and  
27           “Establishment for care of alcoholic, narcotic or psychiatric patients” to the listing of conditional  
28           uses.

29           **Section 9.** Section 36-299(c)(1) of Chapter 36 of the Little Rock Code of Ordinances is  
30           hereby amended to delete subsections l, “Community welfare or health center”; and x, “Group  
31           care facility” from the listing of permitted uses.

32           **Section 10.** Section 36-299(c)(2) of Chapter 36 of the Little Rock Code of Ordinances is  
33           hereby amended to add and separately list “Community welfare or health center”; and “Food

1 store under 5,000 square feet gross floor area, with sales of beer or wine” to the listing of  
2 conditional uses.

3 **Section 11.** Section 36-300(c)(1) of Chapter 36 of the Little Rock Code of Ordinances is  
4 hereby amended to delete subsection u, “Community welfare or health center” from the listing of  
5 permitted uses.

6 **Section 12.** Section 36-300(c)(2) of Chapter 36 of the Little Rock Code of Ordinances is  
7 hereby amended to add and separately list “Community welfare or health center”; and “Food  
8 store under 5,000 square feet gross floor area, with sales of beer or wine” to the listing of  
9 conditional uses.

10 **Section 13.** Section 36-301(c)(1) of Chapter 36 of the Little Rock Code of Ordinances is  
11 hereby amended to delete subsections w, “Community welfare or health center”; and gg,  
12 “Establishment for the care of alcoholic, narcotic or psychiatric patients” from the listing of  
13 permitted uses.

14 **Section 14.** Section 36-301(c)(2) of Chapter 36 of the Little Rock Code of Ordinances is  
15 hereby amended to add and separately list “Community welfare or health center”;  
16 “Establishment for the care of alcoholic, narcotic or psychiatric patients”; and “Food store under  
17 5,000 square feet gross floor area, with sales of beer or wine” to the listing of conditional uses.

18 **Section 15.** Section 36-342.1(d)(2) of Chapter 36 of the Little Rock Code of Ordinances is  
19 hereby deleted and other language added to read as follows:

20 *Conditional uses.* Conditional uses shall include those uses allowed in the  
21 Light Industrial “I-2” District as “permitted uses” and those uses allowed in the  
22 residential, office and commercial districts of this chapter as “conditional uses”,  
23 except that all uses must be inside or enclosed.

24 *Other conditional uses.* Commercial surface parking lot.

25 **Section 16. Applicability.** The provisions of this ordinance that designate a use as a  
26 conditional use shall apply to all such uses identified in this ordinance where the use is not in  
27 operation on the date of the passage of this ordinance.

28 **Section 17. Severability.** In the event any title, section, paragraph, item, sentence, clause,  
29 phrase, or word of this ordinance is declared or adjudged to be invalid or unconstitutional, such  
30 declaration or adjudication shall not affect the remaining portions of the ordinance, which shall

1 remain in full force and effect as if the portion so declared or adjudged invalid or  
2 unconstitutional were not originally a part of the ordinance.

3 **Section 18. *Repealer.*** All ordinances or resolutions of the City in conflict herewith are  
4 hereby repealed to the extent of such conflict.

5 **Section 19. *Emergency.*** It has been determined that it is necessary that the proposed  
6 amendments become effective immediately to assure consistency in the Code of Ordinances and  
7 to protect the quality of life in neighborhoods by requiring certain uses, due to their nature and  
8 their possible impact on the surrounding neighborhood, to receive a public hearing to determine  
9 their appropriateness; therefore, an emergency is hereby declared and this ordinance shall take  
10 effect immediately upon its passage.

11 **PASSED: March 6, 2012**

12 **ATTEST:**

**APPROVED:**

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14 \_\_\_\_\_  
15 **Susan Langley, City Clerk**

\_\_\_\_\_ **Mark Stodola, Mayor**

16 **APPROVED AS TO LEGAL FORM:**

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19 **Thomas M. Carpenter, City Attorney**

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