IN THE CIRCUIT COURT OF IZARD COUNTY, ARKANSAS
CIVIL DIVISION

CITY COUNCIL OF HORSESHOE BEND, ARKANSAS,
By and through its Members, **PETITIONER**

v. **Case No. 33CV-25-155**

DUANE DeLAIR, in his official capacity as
Mayor of the City of Horseshoe Bend, Arkansas, **RESPONDENT**

MAYOR DUANE DELAIR'S BRIEF IN SUPPORT OF MOTION TO DISMISS PETITION FOR WRIT OF MANDAMUS

COMES NOW, Duane DeLair, in his official capacity as Mayor of the City of Horseshoe Bend, Arkansas, (the "Mayor") by and through his attorneys, Mitchell, Williams, Selig, Gates & Woodyard, P.L.L.C., and in support of his Motion to Dismiss the Petition for Writ of Mandamus submitted by the City Council of the City of Horseshoe Bend, Arkansas, respectfully states as follows:

I. INTRODUCTION

The City Council of Horseshoe Bend, Arkansas, (the "Council") seeks through its October 14, 2025 Petition a Writ of Mandamus (the "Petition") directing the Mayor to "sign and authenticate all ordinances and resolutions duly passed by the City Council, past, present, and future, as required by Ark. Code Ann. 14-55-205," among other relief.

Pursuant to Ark. R. Civ. P. 12(b)(2), 12(b)(5), 12(b)(6), and Ark. Code Ann. § 16-115-106, and as and for his response to the Petition,[1] the Mayor respectfully states that, for the reasons

[1] Arkansas Courts appear to presume, without having decided, that a Rule 12(b) motion to dismiss is a permissible and appropriate response to a petition for writ of mandamus. *See, e.g.*,

discussed herein, there is good cause *not only* to deny the Petition but rather to dismiss it altogether and to do so *with prejudice*.

II. FACTUAL AND PROCEDURAL HISTORY

The latest in a series of long-running political and legal disputes[2] related to the proper governance of the City of Horseshoe Bend, Arkansas, and more particularly its Recreational Facilities Improvement District and Municipal Street Improvement District, this Petition for the extraordinary relief of mandamus was filed by the "City Council of Horseshoe Bend, Arkansas, by and through its Members," on October 14, 2025, against the Mayor "in his official capacity." Service of process putatively was effected on October 20, 2025, although the Affidavit of Service states that the Mayor was served only by personal service at his home address rather than at City Hall. *See* October 21, 2025 Affidavit of Service ("Arrived at Horseshoe Bend City Hall . . . Duane DeLair not in office. Obtained Home address . . . + personally served Duane DeLair . . . .").

The Petition seeks to compel the Mayor to, among other things, certify a number of acts passed by the Council, some or all of which (it is not clear from the Petition) over his veto.

Arkansas Dep't of Fin. & Admin. v. 2600 Holdings, LLC, 2022 Ark. 140, 646 S.W.3d 99 (opinion on the merits of the circuit court's denial of a motion to dismiss a writ of mandamus); *but see* Ark. Code Ann. § 16-115-106 ("The party against whom the writ of mandamus . . . is sought, when properly served with notice, shall file *an answer* before the hearing and show cause why the writ of mandamus . . . should not be granted; otherwise, upon a proper showing, suitable relief shall be speedily granted." (Emphasis added.)). The existence and application of Ark. R. Civ. P. 78(d), which sets rules for hearings on petitions for writs of mandamus or prohibition "in election matters," further suggests that such petitions are as a general matter subject to the Rules of Civil Procedure, except where statute provides otherwise. *See* Ark Code Ann. §§ 16-115-101 through 109 (governing mandamus and prohibition).

[2] The Mayor respectfully suggests that the Court may and should take judicial notice of the following actions: (1) a class action suit captioned *Graetz v. Municipal Rec. Fac. Improv. Dist. No. 80-1 of the City of Horseshoe Bend et al.*, Case No. 33CV-20-81 (Cir. Ct. Izard Co. Oct. 28, 2024); and (2) a pending appeal captioned *Chevallier et al. v. Delair et al.*, Case No. CV-24-65 (Ark. Ct. App.) (oral argument scheduled today, November 19, 2025)—an appeal from this Court, Case No. 33CV-23-30 (Cir. Ct. Izard Co. Oct. 20, 2023).

III. LEGAL STANDARD

Rule 12(b)(5) permits a motion to dismiss based on insufficiency of service of process. The law in Arkansas is well settled that "service of valid process is necessary to give a court jurisdiction over a defendant." *Dobbs v. Discover Bank*, 2012 Ark. App. 678, 425 S.W.3d 50 (2012). Service requirements imposed by court rules, just like statutory service requirements, "must be strictly construed and compliance with them must be exact." *Wilburn v. Keenan Companies, Inc.*, 298 Ark. 461, 463, 768 S.W.2d 531, 532 (1989). Arkansas rules regarding service place an "extremely heavy burden on the plaintiff to demonstrate that compliance with those rules has been had." *Dobbs*, 2012 Ark. App. 678, *8, 425 S.W.3d 50, 55 (2012).

Likewise, under Ark. R. Civ. P. 12(b)(6), "[a] pleading is subject to dismissal if it fails to state facts upon which relief can be granted." *Perrodin v. Rooker*, 322 Ark. 117, 120, 908 S.W.2d 85, 87 (1995). A pleading is also deficient if it fails to set forth facts pertaining to an essential element of the cause of action. *Wiseman v. Batchelor*, 315 Ark. 85, 89, 864 S.W.2d 248, 250 (1993). As the Supreme Court has explained, Rule 12 must be read in conjunction with Rule 8, which requires that a pleading contain "'a statement in ordinary and concise language of facts showing that the … pleader is entitled to relief.'" *Ark. Dep't of Envtl. Quality v. Brighton Corp.*, 352 Ark. 396, 403, 102 S.W.3d 458, 462-63 (2003) (quoting Ark. R. Civ. P. 8(a)); *see also Brown v. Tucker*, 330 Ark. 435, 438, 954 S.W.2d 262, 264 (1997) (Rules 8 and 12 "'must be read together in testing the sufficiency of the complaint; facts, not mere conclusions, must be alleged'").

This makes Arkansas a "fact pleading" jurisdiction, where a complaint must sufficiently allege actual "facts," and "not mere conclusions." *Biedenharn v. Thicksten*, 361 Ark. 438, 441, 206 S.W.3d 837, 840 (2005); *see also Ark. Dep't of Envtl. Quality*, 352 Ark. at 403, 102 S.W.3d at 463 (noting that Arkansas has "specifically and deliberately" rejected the "notice pleading"

standard used in federal courts); *McKinney v. City of El Dorado*, 308 Ark. 284, 286-87, 824 S.W.2d 826, 827-28 (1992) (authorizing dismissal when a plaintiff fails to allege facts sufficient to establish every essential element of a cause of action asserted). "Where the complaint states only conclusions without facts," the Circuit Court must dismiss under Ark. R. Civ. P. 12(b)(6). *Brown*, 330 Ark. at 438, 954 S.W.2d at 264.

"[M]andamus is only a limited remedy," and the Arkansas Supreme Court has held that "[c]ertainly a writ of mandamus will not lie to control the discretion of an officer or board in issuing a permit." *Consumers Co-Op. Ass'n v. Hill*, 233 Ark. 59, 63, 342 S.W.2d 657, 659 (1961) "As a general rule, the party applying for a writ of mandamus must show a specific legal right to its issuance, and also the absence of any other legal remedy." *Chavis v. Golden*, 226 Ark. 381, 386, 290 S.W.2d 637, 640 (1956).

The Court only has jurisdiction to issue a writ of mandamus if two factors are established by the petition. *See T.J. v. Hargrove*, 362 Ark. 649, 655, 210 S.W.3d 79, 82 (2005) (compiling cases). First, the duty to be compelled must be "ministerial and not discretionary." *Id.* "The writ cannot be used to control or review matters of discretion." Id. Second, the petitioner must show (1) a clear and certain right to the relief sought and (2) the absence of any other adequate remedy. *Id.* A mandamus action may not be used to establish a right. *Davis v. Kelley*, 2021 Ark. 63, at 7.

Similarly, a claim for declaratory judgment is also limited. "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." *McDougal v. Sabine River Land Co.*, 2015 Ark. App. 281, at 6, 461 S.W.3d 359, 363. An action for declaratory relief "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." Id. (compiling

cases). Declaratory judgment "is procedural, not jurisdictional." *C. Bean Transp. v. Kennedy*, 2014 Ark. App. 38, at 5, 431 S.W.3d 388, 391 (citing *Martin v. Equitable Life Assur. Soc. of the U.S.*, 344 Ark. 177, 181, 40 S.W.3d 733, 736-37 (2001)). In declaratory judgment actions, a circuit court is required to consider the "propriety of exercising jurisdiction, not merely whether it has the legal authority to do so." Id. "The propriety of exercising jurisdiction depends in large part on whether the issue may be resolved in another court." Id.

IV. ARGUMENT

A. The Court should Dismiss the Petition for Insufficient Service of Process and Resulting Lack of Personal Jurisdiction.

Ark. R. Civ. P. 4(f)(17) specifies that "[s]ervice on an officer or employee of a government entity listed in paragraphs (12)–(16) of this subdivision, acting in an official capacity, shall be on the officer or employee and by mailing a copy of the process as specified in subdivision (g)(1)(A)(i) of this rule to an official on whom service can be made pursuant to paragraphs (12)–(16), as applicable, and a copy to the Attorney General if a state officer or employee is sued." As is plain from the Return of Service filed with this Court, the Council failed to comply strictly with this Rule.

Service of a governmental officer (such as mayor) of a municipal corporation *must* be made by certified mail; the Council's service here was by personal service and regardless did not comport with the certified mail requirements set forth in the Rules. *See* Ark. R. Civ. P. 4(g)(1)(A)(i) (requirements for effective service by certified mail).

This form of service does not strictly comply with Rule 4(f)(17), and because the Mayor now has filed a Motion to Dismiss, strict compliance with service requirements is required. *See, e.g.*, *Wine v. Chandler*, 2020 Ark. App. 412, at *10-*12, 607 S.W.3d 522 (affirming dismissal of state appellees for violation of Rule 4 despite substantial compliance where defendant filed a

motion to dismiss); *see also Collins v. Hall*, 2014 Ark. App. 731, 455 S.W.3d 331 (service of process on aldermen individually does not effect service of process on municipal corporation). Accordingly, the Court should dismiss the Petition pursuant to Ark. R. Civ. P. 12(b)(5) for insufficient service of process for the Council's patent failure to abide by Ark. R. Civ. P. 4(f)(17).

Further, the Council's failure to obtain valid service of process on the Mayor means the Court lacks personal jurisdiction over him. The Court thus can and should also dismiss the Petition under Ark. R. Civ. P. 12 (b)(2). Arkansas law is long settled that proper service of valid process is necessary to give a court jurisdiction over a defendant. *Shotzman v. Berumen*, 363 Ark. 215, 213 S.W.3d 13 (2005); *Smith v. Sidney Moncrief Pontiac, Buick, GMC Co.*, 353 Ark. 701, 120 S.W.3d 525 (2003); *Raymond v. Raymond*, 343 Ark. 480, 36 S.W.3d 733 (2001); *Tucker v. Johnson*, 275 Ark. 61, 628 S.W.2d 281 (1982). And again, where strict compliance is required (as here), Arkansas law is equally well-settled that statutory service requirements, being in derogation of common-law rights, must be strictly construed and compliance with them must be exact. *Shotzman, supra*; *Smith, supra*; *Carruth v. Design Interiors, Inc.*, 324 Ark. 373, 921 S.W.2d 944 (1996); *Wilburn v. Keenan Companies, Inc.*, 298 Ark. 461, 768 S.W.2d 531 (1989). Actual knowledge of a pending lawsuit does not relieve a plaintiff of the obligation to serve valid process, and a defendant need not show that he has suffered prejudice or harm to obtain a dismissal based on insufficient process. *Trusclair v. McGowan Working Ptnrs.*, 2009 Ark. 203, 306 S.W.3d 428 (2009).

B. The Court Should Dismiss the Petition Because the City Council as an Entity Lacks Capacity and Standing.

1. The City Council Lacks Capacity and Standing to Petition this Court for a Writ of Mandamus.

Should the Court decline to dismiss this Petition for insufficient service of process and/or lack of personal jurisdiction, it nevertheless should dismiss the Petition because the Council-*qua*-Council lacks capacity and standing to bring a petition for a writ of mandamus *as an entity*. In its Petition, the Council names as petitioner the "City Council . . . by and through its members" collectively, and states that it is "the duly elected City Council of Horseshoe Bend, Arkansas, a municipal governing body organized under Arkansas law." Petition at ¶ 3. But this elides a crucial fact: the Council is not a separate legal entity from the municipal corporation, and even if it were, the Council has no power to sue or be sued as such.

Pursuant to Ark. Code Ann. § 14-54-101, second-class cities "are declared to be bodies politic and corporate . . . capable to: (1) sue and be sued." Thus, the power to sue and be sued is delegated to the municipal corporation, not further devolved to the legislative assembly thereof, *particularly in the absence of the mayor*. *See, e.g.*, Ark. Code Ann. §§ 14-42-102 (corporate authority of organized cities vested in mayor and council); 14-44-107(a) (mayor of second-class cities is ex officio president of city council, presides at meetings, has vote to establish quorum or break ties). And at least one Arkansas court has found that a city council's interests are concomitant with the municipal corporation for substantive and procedural juridical purposes. *See Lawson v. City of Mammoth Spring*, 287 Ark. 12, 15, 696 S.W.2d 712 (1985) ("When an action is brought against a city, it is ordinarily sufficient to only name the city as a party, particularly where no *ultra vires* acts are alleged against particular officers or employees. See McQuillin, *Municipal Corporation* § 49.22 (1982). *Naming the city and the mayor would certainly protect the interests of the city council in this case*." (Emphasis added.))

This is logical; it is long-established Arkansas law that municipal corporations possess only those powers granted, or necessarily implied, by the State Legislature. *City of Dover v. City of*

Russellville, 352 Ark. 299, 100 S.W.3d 689 (2003); *City of Hot Springs v. Gray*, 215 Ark. 243, 219 S.W.2d 930 (1949); *City of Argenta v. Keath*, 130 Ark. 334, 197 S.W. 686 (1917); *Willis v. City of Ft. Smith*, 121 Ark. 606, 182 S.W. 275 (1916); *see also Ark. Code Ann.* § 14-54-102 (prescribing powers and restrictions to statutory subsection). Because the power to sue and be sued rests *exclusively* with the municipal corporation, and not with its subsidiary legislative body, the Council has no power to bring such petition or suit as a Council. *Compare University of Ark. for Med. Sciences v. Adams*, 354 Ark. 21, 117 S.W.3d 588 (2003) (UAMS, as subsidiary department of University of Arkansas "not an entity that can sue or be sued") (citing *Assaad–Faltas v. UAMS,* 708 F.Supp. 1026 (E.D.Ark.1989), *aff'd* 902 F.2d 1572 (8th Cir.1990)); *see also Mollette v. Portsmouth City Council*, 902 N.E.2d 515 (Ohio App. 4th Dist. 2008) (city council lacks capacity to sue or be sued).

This is analogous to school boards and private corporations, whose constituent Boards of Directors, though authorized and even constituted by statute, are not separate juridical entities and whose members and officers have no legal capacity in lieu of the duly-incorporated entity. *Marcum v. Wengert*, 344 Ark. 153, 40 S.W.3d 230 (2001); *First Commercial Bank, N.A. v. Walker*, 333 Ark. 100, 969 S.W.2d 146 (1998), mandate recalled, stay granted 334 Ark. 315, 973 S.W.2d 823, certiorari denied, 119 S.Ct. 410, 525 U.S. 965, 142 L.Ed.2d 332; *Ozarks Unlimited Resources Co-op, Inc. v. Daniels*, 333 Ark. 214, 969 S.W.2d 169 (1998); *Calandro v. Parkerson*, 327 Ark. 131, 936 S.W.2d 755 (1997); *see also* 19 C.J.S. *Corporations* § 784 (2025) ("An unincorporated division of a corporation is not a jural entity amenable to suit in its own right, and lacks the capacity to be sued in its own name. The rationale for this law is pragmatic, as an unincorporated division does not possess separate assets; all of its assets are owned by the corporation."). Instead, a board of directors, like the Council here, is the collection of individuals with the ultimate responsibility

of making decisions on behalf of the corporation; *Drage v. Procter & Gamble,* 119 Ohio App. 3d 19, 24, 694 N.E.2d 479 (1997); but not a separately-incorporated legal entity with capacity to sue or be sued.

This understanding comports with the plain meaning of the enabling statutes governing such bodies. Ark. Code Ann. § 4-26-204, for example, authorizes a corporation to "sue and be sued, *in its corporate name*" (emphasis added). Although no Arkansas court appears to have addressed the question specifically, state and federal courts across the country routinely have determined that a corporation's board of directors cannot, as a body, sue or be sued. *See, e.g.*, *Lopez–Rosario v. Programa Seasonal Head Start/Early Head Start de la Diocesis de Mayaguez,* 245 F.Supp.3d 360, 370 (D.P.R. 2017)), *affd* 847 Fed.Appx. 9 (1st Cir. 2021) ("[a] board of directors is not a legal entity separate and apart from the corporation it directs ... and, thus, lacks capacity to be sued"); *Siegler v. Sorrento Therapeutics, Inc.,* 2021 WL 3046590, *10, 2021 U.S. App LEXIS 21391, * 27-28 (Fed. Cir. 2021) ("a plaintiff may not sue a corporation's board of directors as an entity separate from the corporation"); *Theta Chi Fraternity, Inc. v. Leland Stanford Junior Univ.,* 212 F. Supp. 3d 816 (N.D. Cal. 2016); *Team Sys. Int'l LLC v. Haozous,* No. 14-cv-01018-D, 2015 WL 2131479, at *2 (W.D.Okla. May 7, 2015); *Heslep v. Americans for African Adoption, Inc.,* 890 F.Supp.2d 671, 678 (N.D.W.Va. 2012); *Tahari v. 860 Fifth Avenue Corp.*, Slip. Op., __ N.Y.S.3d __, 2025 WL 2857263 (N.Y. App. Div. Oct. 9, 2025); *Willmschen v. Trinity Lakes Improvement Ass'n,* 362 Ill. App.3d 546, 298 Ill.Dec. 840, 840 N.E.2d 1275, 1280-81 (2005) ("[The] belief that [a] board [of directors] is a separate entity capable of being sued is a misconception of what a board of directors is and how it functions within the corporate structure.") (quoting *Flarey v. Youngstown Osteopathic Hospital,* 151 Ohio App.3d 92, 95-96, 783 N.E.2d 582, 585 (2002)); *Foskey v. Vidalia City School,* 258 Ga.App. 298, 301, 574 S.E.2d 367, 370

(2002) (municipal board of education, unlike the school district it manages, is not a body corporate and does not have the capacity to sue or be sued). The same principle applies to the Council here.[3]

The Council's inability to petition for a writ of mandamus is further evident from the Council's misplaced reliance on Ark. Code Ann. § 14-88-101. Petition ¶ 30. The Council alleges that this statute grants this Court "authority to command the Mayor to act by mandamus." *Id*. But the statute, in fact, is the first subsection of Title 14, Subtitle 5 ("Improvement Districts Generally"), Chapter 88 ("Municipal Improvement Districts Generally"), and provides only that "[a]ny duty required to be performed *by this act* may, at any time, be enforced by mandamus *at the suit of any person or board interested in it*." (Emphasis added.) Ark. Code Ann. § 14-88-101. The Council therefore is doubly incorrect. First, the mandamus-enforcement allowance created by the statute the Council cites to expressly pertains *only* to the specific duties imposed on mayors by the *municipal improvement districts act*, Ark. Code Ann. §§ 14-88-101 to 605. In this case, the specific duty about which the Council petitions is *not* created by the municipal improvement district act; it is by the Council's own allegation found elsewhere in statute (if at all, as discussed further below). *See* Petition ¶¶ 5, 8–11, Second, a petition for such a writ may be brought *only* by a *person or board* interested in the municipal improvement district. As discussed at length herein, the Council is, by definition, neither a "person" nor a "board."

Concomitantly, and for nearly identical reasons, the Council lacks standing. Just as the Council lacks the capacity to sue or be sued as a body, the Council as a body cannot stand in the

[3] Notably, City Ordinance 2.24.02 delegates to the City Attorney the duty to "prosecute and defend, as the case may require, for the city, *all cases in which the city may be interested*, whether civil or criminal, in all the courts, state and federal, *and all duties as designated by the City Council*." (Emphasis added.) Thus, to the extent that the Council endeavors to litigate this action according to its own laws, it apparently may do so only by and through the City Attorney—to the extent the City Attorney does not have ethical obligations to the contrary.

shoes of its particular members or of the City as a municipal corporation or of the residents of the City (to the extent they are subject to actual or potential enforcement of the challenged acts). The Council has suffered no collective injury as a body related to the contested acts. Whether particular individual members of the Council have suffered a particularized, legally-redressable injury in their respective official capacities is a separate question altogether, one not raised (or indeed, even implied) by the Petition. Even then, it is likely a *political* question, not a juridical one.

2. The City Council Lacks Capacity and Standing to Bring a Declaratory Judgment Action.

All of the foregoing applies with equal force to the Council's apparent attempt to include potential declaratory relief in their Petition. *See* Petition ¶¶ V(B) and (C) (purportedly seeking declarations or other statements by the Court because it implies a finding by the Court that the "orders, resolutions, and ordinances, past, present, and future" are "properly passed" and/or require certain actions). The Council lacks the power to sue for declaratory judgment, even in the guise of a petition for writ of mandamus.[4]

Declaratory relief is available according to the Declaratory Judgment Act, Ark. Code Ann. §§ 15-111-101–114. Declaratory judgment is a remedy peculiarly appropriate to controversies between private citizens and public officials about the meaning of statutes. *Jones v. Clark*, 278 Ark. 119, 644 S.W.2d 257 (1983); *McDonald v.* Bowen, 250 Ark. 1049, 468 S.W.2d 765 (1971). It will lie only where: (1) there is a justiciable controversy; (2) it exists between parties with

[4] Beyond that, and additionally, the Council has failed to abide by Ark. Code Ann. § 16-111-111, which provides in relevant part that "In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party, and shall be entitled to be heard . . . ." Failure to follow this provision and join necessary parties like the municipal corporation renders the claim nonjusticiable. *Willis v. Circuit Court of Phillips County*, 342 Ark. 128, 27 S.W.3d 372 (2000); *Billy/Dot, Inc. v. Fields*, 322 Ark. 272, 908 S.W.2d 335 (1995); *Cummings v. City of Fayetteville*, 294 Ark. 151, 741 S.W.2d 638 (1987).

adverse interests; (3) those seeking relief have a legal interest in the controversy; and (4) the issues involved are ripe for decision. *Baptist Health Systems v. Rutledge*, 2016 Ark. 121, 488 S.W.3d 507. The act is not intended to allow any question to be presented by any person; the matters must first be justiciable. *Williams v. City of Sherwood*, 2019 Ark. App. 487, 586 S.W.3d 711, reh'g denied.

A petitioner must also have standing. Significantly, the Declaratory Judgment Act by its plain language is limited to private rights and not public rights, and the Council (as an unincorporated subsidiary body of a municipal corporation) has no such private rights nor any such private injury here. Ark. Code Ann. § 16-111-102 states that "Any *person* interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status or other legal relations thereunder." (Emphasis added.) The Council does not meet the standing requirements embodied by or otherwise implied by this provision. *See Roberts v. Watts*, 263 Ark. 822, 568 S.W.2d 1 (1978) (county clerk is "person" for purposes of act); *AGRED Found. v. Friends of Lake Erling Ass'n*, 2023 Ark. App. 29, at 9, 661 S.W.3d 201, 207 (analyzing Ark. Code Ann. § 16-111-102 in the context of a not-for-profit organization, which satisfied meaning of "person").

Because the Council is not entitled to declaratory judgment, to the extent the Court construes the Petition to request declaratory relief, the Court should dismiss any such request contained in (or embodied by) the Petition.[5]

[5] To the extent the Court intends to reach the merits on the question(s) whether the contested "orders, resolutions, and ordinances, past, present, and future" are "properly passed," require certain actions, and/or are valid, enforceable, and constitutional, the Mayor respectfully

C. The Court Must Dismiss the Petition Because the Council Fails to State a Claim Upon Which Relief May be Granted; the Matter is Moot, there is No Justiciable Issue, and the Court can Afford No Relief.

The overarching premise of the Council's Petition is that the Mayor's purported inaction "has created uncertainty in the public record and obstructed the Council's lawful governance." Petition ¶ 18. For the reasons discussed herein, this is plainly false and entirely contrary to law. Regardless of the Council's contentions, whether stated directly in or implied by the Petition, the contested Ordinances and Resolutions are effective and operative and enforceable—the Mayor has never contended otherwise.

1. The Contested Ordinances, Once Vetoed, are Effective as a Matter of Law as Soon as the Council Duly Overrides the Mayor's Written Veto.

As a preliminary matter, and in an effort to avoid further expense and conflict where none is necessary, the Mayor stipulates (and always has contended) that, **to the extent they are not otherwise adjudicated unenforceable, unlawful, or unconstitutional, the contested ordinances became effective, *as a matter of law* upon: (1) the override of his written veto, *regardless* whether he signs them, *and* (2) the satisfaction of any inherent or statutory conditions precedent.**

To the extent the Council contends otherwise, it is mistaken. The authentication-and-recording requirement of Ark. Code Ann. § 14-55-205 *has no bearing* on an ordinance's validity, enforceability, or effective date. Rather, it is a safe-harbor procedural safeguard for evidentiary purposes against potential parole evidence. Indeed, under a much older and slightly different version of the statute, the Arkansas Supreme Court explained:

> Counsel is mistaken in his assumption that the signature of the mayor to the ordinance is essential to its legal enactment, or that the signature of that officer to

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requests that the Court order a period of limited discovery and set an appropriate briefing schedule pursuant to its inherent authority and/or Ark. Code Ann. §§ 16-111-109 and 16-115-104.

> the record is essential to its proof. The mayor of a city has authority under the statute (Crawford & Moses' Digest, § 7701) to veto an ordinance, but there is *nothing in the statute requiring him to approve it or sign it before it becomes effective*. The statute quoted above merely provides for a method of making a record of ordinances of a city or town similar to the record of enrolled bills enacted by the Legislature and deposited with the Secretary of State. The signature of the presiding officer of the council is merely for the purpose of making a record, but *the failure to sign this does not defeat an ordinance which has been duly passed.*

(Emphasis added.) *Lewis v. Forrest City Special Imp. Dist.*, 156 Ark. 356, 246 S.W. 867, 870 (1923). This holding, though over a hundred years old and rendered under a previous statute, redounds with respect to Ark. Code Ann. § 14-55-205.

Indeed, despite the Council's contentions to the contrary, Ark. Code Ann. §§ 14-44-107(b) and 14-55-203 do not require the Mayor to do anything *after* he vetoes an act *to render it effective upon an override of his veto*. As the Council itself states (Petition ¶ 26), Ark. Code Ann. § 14-55-203 sets specific conditions for various effective dates, none of which include authentication and recording. Likewise, Ark. Code Ann. § 14-44-107(b)(2)(B) states that an "ordinance, resolution, or order, or part thereof, vetoed by the mayor shall not have any force or validity *unless, after the written statement is laid before it, the council passes it over the veto by a vote of two-thirds (2/3) of all the council members elected thereto*," at which point § 14-55-203 plainly applies.

Beyond that, with respect to the authentication and recording, the statute is facially ambiguous. Section 14-55-205 states that "[a]ll bylaws or ordinances after their passage shall be recorded in a book kept for that purpose and shall be authenticated by the signature of the presiding officer of the governing body and the clerk or recorder." On the text alone this, there are multiple ambiguities. First, the "presiding officer of the governing body" does not necessarily mean the Mayor. In fact, once the Mayor issues a written veto, he need not appear, preside, or participate in the Council's next meeting to make the veto effective—it is incumbent on that point upon the Council to override the veto. *City of Helena-West Helena v. Williams*, 2024 Ark. 102, 689 S.W.3d

62. And in the absence of the Mayor, the "presiding officer of the governing body" is whoever "presides" over the meeting—the statute does not otherwise define "presiding officer." *See Lackey v. Fayetteville Water Co.*, 80 Ark. 108, 96 S.W. 622 (1906) (recorder, where mayor attended and then left meeting due to illness, "was the presiding officer at the time of the passage of the ordinance.") *Compare* Ark. Admin. Code 014.08.1 (defining, for purposes of unrelated administrative procedure, "presiding offer" to mean "the person conducting a public hearing on behalf of the Commission or the Department.").

Second, "authenticated by the signature of the presiding officer" does not necessarily mean "signed by the presiding officer" a second time following his veto. When the Mayor vetoes legislation, he is affixing his signature thereto without approving it—that probably is why the veto must be written in the first place. Ark. Code Ann. § 14-44-107(b). The Mayor's written veto *is* his signature for purposes of Ark. Code Ann. § 14-55-205; the presence of his signature on the written veto *is the signature by which the measure can be authenticated* once his veto is overridden.

Third, there is a structural ambiguity. One fair reading of this section is that the ordinance must be "authenticated by the signature of the presiding officer of the governing body[,] and the clerk or recorder." That is, for present purposes, the Council's interpretation: the Mayor on the one hand plus the clerk or recorder on the other hand. But it also could be read to mean "authenticated by the signature of the presiding officer of the governing body and the clerk[,] or recorder." That is, the Mayor and the clerk on the one hand, or the recorder on the other hand. Regardless whether the first interpretation would seem to be the more likely, the existence of a facial ambiguity deprives this Court of the ability to issue a writ of mandamus: there is no "clear and certain" duty. *T.J. v. Hargrove*, 362 Ark. 649, 655, 210 S.W.3d 79, 82 (2005)

2. The Mayor has No Obligation to Authenticate and Record "Resolutions."

The Council additionally seeks to mandate the Mayor to authenticate a number of resolutions. Petition ¶ 14. There is no requirement that he do so.

A distinction must be made between "ordinances" and "resolutions." Although the Petition treats them identically, the applicable statutes *do not*. For example, as previously discussed, the Mayor has the power to veto an "*ordinance, resolution, or order* adopted or made by the council, or any part thereof" as set forth in Ark. Code Ann. § 14-44-107(b). As previously discussed, a written veto is the extent of the Mayor's obligation. *But even if it were not*, the statute upon which the Council erroneously relies is wholly *silent* on the certification of *resolutions*: "All *bylaws or ordinances* after their passage shall be recorded in a book kept for that purpose and shall be authenticated by the signature of the presiding officer of the governing body and the clerk or recorder." (Emphasis added.) Ark. Code Ann. § 14-55-205. As discussed, the statute is at best ambiguous on the certification requirement, but it is clear on the categories of things the should be authenticated and recorded: bylaws or ordinances. If the state legislature intended to include "resolutions," they undoubtedly would have, as they did elsewhere *in the adjacent sections*. *See* Ark. Code Ann. §§ 14-55-203(a) ("every bylaw, ordinance, *resolution*, or order"); 14-55-203(b) ("any bylaw, ordinance, *resolution*, or order"); 14-55-204 ("all bylaws, ordinances, *resolutions*, or orders . . ."); *see also* § 14-14-904(i) and (j) (different definitions for county "ordinance" and "resolution"). The statute, simply put, does not require recording and authentication of these resolutions.

The Supreme Court already has definitively resolved this question. *See Adams v. Sims*, 238 Ark. 696, 385 S.W.2d 13 (1964) (prior statutes "refer[] only to by-laws or ordinances of a general and permanent nature and the same reasoning and interpretation applies to the resolutions involved

in this litigation . . . Under the facts in this case and the statutes controlling, it was not necessary for the City Council of Trumann to read the resolutions involved on three separate days, nor was it necessary that the said resolutions be authenticated and published"); *see also City of El Dorado v. Citizens' Light & Power Co.*, 158 Ark. 550, 555, 250 S.W. 882 (1923) ("The test as to the requirement of the statute is whether or not the ordinance is one of a 'general or permanent nature,' . . . . Of course, all ordinances enacted by city councils are not permanent in the sense that they cannot be repealed; but those which endure until repealed are deemed to be permanent, and all others are not permanent. Ordinances of a general nature are those which are general and uniform in their application.").

Because the Mayor has no obligation to authenticate Resolutions,[6] so much of the Council's Petition relating to Resolutions must be dismissed.

In sum, the Council fails to identify either (1) a clear and certain right to the relief sought and (2) the absence of any other adequate remedy, which are required for the Court to grant a writ of mandamus. *See T.J. v. Hargrove*, 362 Ark. 649, 655, 210 S.W.3d 79, 82 (2005). There is nothing in the statutes cited by the Council that shows any "clear and certain" right *of its*. Mandamus is not a remedy for what is at its core a political dispute.

D. The Court should Dismiss the Petition because the Record Before it is Inadequate.

Finally, the Court should dismiss the Petition because the Record before it is insufficient to be "heard and determined *summarily*." (Emphasis added.) Ark. Code Ann. § 16-115-103. Indeed, pursuant to Rule 10(d) of the Arkansas Rules of Civil Procedure, "[a] copy of any written

[6] Nor, for that matter, non-permanent or non-general bylaws, ordinances, or orders. Because the Council failed to create a record of the contents of the challenged Resolutions and Orders as discussed further below, the Court should err on the side of dismissing the Petition as a whole.

instrument or document upon which a claim or defense is based shall be attached as an exhibit to the pleading in which such claim or defense is averred unless good cause is shown for its absence in such pleading." Ark. R. Civ. P. 10(d).

The Council here instead lists a number of Resolutions and Ordinances by number, but attaches the contents of, at best, one. The Council thus fails to comply with the rule. The word "shall" mandates strict compliance with Rule 10(d). *See, e.g., LVNV Funding, LLC v. Nardi*, 2012 Ark. 460, at 3, 2012 WL 6218481, at *3. Thus, where a plaintiff fails to attach to the complaint the content of a written instrument on which a claim is based, the court may issue a dismissal pursuant to Rule 10(d) of the Arkansas Rules of Civil Procedure. *See, e.g., D & D Parks Const. Co. v. Martin*, 2012 Ark. App. 343, at 7, 414 S.W.3d 402, 405 (acknowledging the defendant's right "to demand dismissal of the action based on Rule 10(d)"); *Ray & Sons Masonry Contractors, Inc. v. U.S. Fidelity & Guar. Co.*, 353 Ark. 201, 114 S.W.3d 189 (2003) (affirming JNOV, in part, where the claimant failed to comply with Rule 10(d)). (Likewise, Rule 41(b) of the Arkansas Rules of Civil Procedure also provides a basis to dismiss a complaint, like Plaintiff's, which fails to comply with the Rules of Civil Procedure.)

Here, although not a contract action, the Council is engaging in exactly the kind of pleading Rule 10(d) seeks to forestall. The Council simply provides a list of Resolutions and Orders *by number* without any indication what they contain or state or provide and/or the form or manner they were presented to the Council and the Mayor. It therefore is impossible for the Mayor adequately to respond to the claims in the Petition *and* for the Court to adjudicate this dispute.

By way of example, as discussed above, only permanent and general ordinances (and no resolutions) need be authenticated and recorded. In the absence of the text of the contested ordinances, it is impossible to determine as a matter of law whether any of the ones referenced in

the Petition are of this permanent and general character. Likewise, the Council alleges that at least one of the Ordinances was subject to a veto, but does not specify whether any of the others were. (One must presume all the contested measures were vetoed, or else they would carry the Mayor's signature and thereby any failure to authenticate and record would not be the Mayor's.) But whether the measures were vetoed or approved is a threshold matter for the reasons discussed above.

Accordingly, independent of and in addition to all the other reasons previously discussed, this insufficiency in the pleadings is fatal to the Council's Petition; the Court should dismiss it accordingly.

V. CONCLUSION

In this action, the Council: failed to make effective service upon the Mayor; lacks capacity or standing to petition for a writ of mandamus; lacks capacity or standing to seek a declaratory judgment; failed to state a claim upon which relief may be granted or raise a justiciable issue with respect to the challenged Ordinances; failed to state a claim upon which relief may be granted or raise a justiciable issue with respect to the challenged Resolutions; and violated Rule 10(d) by failing to make an adequate record upon which this Court may decide the Petition.

WHEREFORE, for each of these reasons, and for all of them, the Court should dismiss the Council's Petition *with prejudice*, declare the Mayor's conduct lawful (to the extent it construes the Council's Petition as a prayer for declaratory judgment), award to the Mayor all recoverable costs, and render any and all other relief to which he is entitled in law or equity.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Drew J. Cunningham, do hereby certify that I served a copy of the foregoing to the below named persons via the Court's electronic filing system on this 19th day of November 2025:

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