



City of Fayetteville, Arkansas

113 West Mountain Street
Fayetteville, AR 72701
(479) 575-8323

Legislation Text

File #: 2024-1790

Revisions to Section 39.10 Water and Wastewater Damage Claims

AN ORDINANCE TO AMEND §39.10 WATER AND WASTEWATER DAMAGE CLAIMS AND §39.11 DAMAGE CLAIMS OTHER THAN WATER AND WASTEWATER DAMAGE CLAIMS OF THE FAYETTEVILLE CODE TO INCREASE THE AMOUNT OF COMPENSATION THAT THE CITY COUNCIL CAN AWARD

WHEREAS, the City of Fayetteville is authorized to pay reasonable claims of citizens damaged by water and sewer infrastructure problems and uninsured city vehicles, equipment, infrastructure and personnel even though statutory sovereign immunity protects our taxpayers for such unintentional, actions even if negligent; and

WHEREAS, a dozen years have passed since these code sections were enacted by the City Council and recent inflationary pressures necessitate an increase in the City Council's authority to grant reasonable compensation for appropriate claims.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF FAYETTEVILLE, ARKANSAS:

Section 1: That the City Council of the City of Fayetteville, Arkansas hereby amends § 39.10 and § 39.11 of the *Fayetteville Code* to increase the City Council's authority to grant reasonable compensation to citizens whose property have been damaged by City infrastructure or personnel by repealing the current § 39.10 and § 39.11 and by enacting new § 39.10 and § 39.11 as shown on Exhibit A attached to this ordinance to more properly compensate a person whose property has been damaged.



MEETING OF MARCH 19, 2024

TO: Mayor Jordan and City Council
THRU: Susan Norton, Chief of Staff
FROM: Tim Nyander, Utilities Director
SUBJECT: Revisions to Section 39.10 Water and Wastewater Damage Claims

RECOMMENDATION:

This memorandum requests revisions to the Water and Wastewater Damage Claims Ordinance which I feel will benefit the residents as well as city staff. This ordinance was recently amended in September of this year to enable the City Council to exceed the \$50,000 cap on payments if the damage was a result of a 36-inch or larger water pipe.

BACKGROUND:

The biggest driver to this request is because of the rising costs of labor and materials we have been experiencing. In today's economy, the current \$50,000 ceiling does not provide the funds to repair the damage of the substantial water leak and sewage overflows in the City's efforts to facilitate repair of the homeowner's damage. This is true even for the smaller diameter piping incidents.

Under the authorization of payments, I feel that the Utilities Director should be permitted to authorize up to \$35,000 for a claim. This is in alignment with the dollar amount threshold before a purchase must be approved by the City Council. Additionally, I suggest the ordinance be changed to where the Mayor can authorize a greater amount up to \$50,000, and a maximum of \$100,000 by the Mayor's recommendation and a two-thirds majority approval by the City Council.

DISCUSSION:

In addition to funding requests, there are additional items the Utilities Department would like to be considered or amended in the current ordinance.

1. To mitigate further damage during a water or sewage damage incident, the Utilities Director would like to reserve the right to immediately hire (within hours) a remediation service to begin cleaning up the water or sewage that has accumulated in a residence, as well as begin drying the floors and walls with fans and dehumidifiers. This will reduce damage and potentially reduce the repair costs. The cost of the remediation will be added to the total cost of the repairs and factored into the maximum amount allowed for the incident.
2. The Ten States Standards of the Recommended Standards for Wastewater Facilities, 2014 Edition, states, "Homes or buildings where the lowest elevation to have gravity sewer service is less than 1 foot above the cover of either the first upstream or downstream manhole on the sewer main shall have a cleanout with a pop-up type, non-locking cover at an elevation no less than 6-inches below the lowest sanitary facility in the structure." Following this recommendation of installing a backflow preventor would reduce the amount of sewage overflowing into a residence. Remediation outside the structure would be far less expensive. The

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discussion needed with this request is whether a residence constructed before this standard was implemented is “grandfathered” and exempt.

3. Following a sewage damage claim, the city will require the claimant to install a backflow preventor to prevent damage from a subsequent overflow. Failure to do so may result in the denial of any future damage claims.

4. There should only be one claim filed per structure per incident, regardless if the resident is a renting tenant who does not own the property. Typically, the owner files a damage claim.

5. The language should be clearer pertaining to when the City may wish to retain an experienced and competent adjuster and then rely upon such adjuster’s professional analysis to establish possible compensation. This will remove the requirement for each claimant to obtain bids or quotes for all items damaged by water and sewage issues. Additionally, this will reduce the lengthy staff time that is currently employed in processing claims.

BUDGET/STAFF IMPACT:

None

ATTACHMENTS: SRF (#3), Kit Williams Memo and Ordinance Changes Jan 2024 (#4), Memo with 39.10 and 39.11 (#5), EXHIBIT A - 39.10 and 39.11 Code Changes (#6)

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DEPARTMENTAL CORRESPONDENCE



OFFICE OF THE CITY ATTORNEY

TO: Susan Norton, Chief of Staff
Tim Nyander, Utilities Director

FROM: Kit Williams, City Attorney

DATE: January 25, 2024

RE: Amendments to § 39.10 and § 39.11 Claims

Kit Williams
City Attorney

Blake Pennington
Senior Assistant City Attorney

Hannah Hungate
Assistant City Attorney

Stacy Barnes
Paralegal

I received Tim's proposed amendments for § 39.10 **Water and Wastewater Damage Claims** and rewrote proposed new sections (B)(5) and (6) for brevity and clarity. I did not change the proposed dollar amounts amendments in (C)(4). I did shorten and clarify (C)(5). § 39.10(C)(5) never did require claimants to submit bids or quotes (that was probably your SOP), so we do not need to mention them. We did and still do require documentary evidence of insurance coverage in (C)(3).

§ 39.10 and § 39.11 **Damage Claims Other Than Water and Wastewater Damage Claims** were drafted together, mirrored each other for allowed compensation amounts, and enacted together. To continue this uniformity, I believe we should increase the allowed compensation authorized in § 39.11(C)(4) to the identical levels in § 39.10(C)(4).

Attached please find my proposed amendments to both Code sections in red.

39.10 Water And Wastewater Damage Claims

(A) *Establishment of Property Damage Claim Compensation Policy.*

- (1) Without waiving its statutory sovereign immunity, the city establishes the following voluntary policy governing the permissible payment of reasonable compensation for property damage claims proximately caused by a failure of the municipally owned water or wastewater infrastructure system that results in a trespass into and damage to private property.

(B) *Requirements for Property Damage Claims To Be Eligible for Compensation.*

- (1) The cause of the damage must be directly attributed to a failure of municipal infrastructure owned and operated by the Fayetteville Water and Wastewater utility, and cannot be associated with or caused by a private sewer or water connection or service line.
- (2) The failure must not be caused by factors beyond the city's control such as loss of electrical service; flooding of its infrastructure; acts of third parties; failure of claimants to properly maintain protective devices (back flow valves, check valves, clean out caps, etc.); acts of God; and other circumstances beyond the city's control.
- (3) A claim form must be completed in writing and submitted to the Mayor's Office within thirty (30) days of property damage occurrence. Claim forms may be supplemented later with additional information, bills, etc. as allowed by the Utilities Director of the City of Fayetteville. Failure to submit the initial claim form within thirty (30) days of the incident terminates the claimant's opportunity to request compensation.
- (4) When a possible water leak claim has been promptly called to the attention of water and sewer staff who initially could not detect or determine the cause of such leak which then caused the property owner to invest in sump pumps and/or other reasonable measures to protect its property, compensation for such property damage prevention efforts may be paid pursuant to this article if a compensable water leak is later discovered or confirmed by city staff.
- (5) A property owner requesting compensation due to a sewer overflow shall install at the property owner's expense an approved sewer backflow prevention device prior to receiving city compensation for such sewer overflow.
- (6) City staff is authorized to promptly hire a remediation/mitigation service for a likely compensable water or sewer claim. The City shall pay for this cost as part of the entire cost of the compensable claim. A property owner's refusal or hinderance of this remediation/mitigation service shall reduce or even eliminate the property owner's damage claim.

(C) *Limitation of Any Compensation That Might Be Paid.*

- (1) Because the City of Fayetteville is protected by sovereign immunity, the city shall pay no compensation for any alleged damage associated with or related to any alleged personal injury (except a medical insurance deductible or co-payment) or any other damage except for property damage.
- (2) Compensation which may be paid for damage to property shall be limited to the cost of cleaning or repair of the damage or, in the event that the cost of cleaning or repair exceeds the fair market value of the subject property, less salvage value, compensation shall be limited to the fair market value of the damaged property less any salvage value. No compensation shall be paid for inconvenience, loss of use, loss of profits or rents, consequential damages, or anything other than cleaning, repair or replacement of property, and, in extreme cases, dislocation expenses not to exceed three (3) days.
- (3) No payment by the city may accrue to the benefit, directly or indirectly, of an insurance carrier, nor for any damage if such is covered by any insurance policy. If the insurance company waives any

subrogation right, the city may pay an amount equal to the deductible already paid by the claimant for a property damage claim. Claimants shall be required to provide documents satisfactory to the city establishing their insurance coverage or lack thereof for any claim.

- (4) The Utilities Department Director may not authorize any payment greater than \$35,000.00 for any claim pursuant to this section. The Mayor may request the City Council to authorize an amount greater than \$35,000.00 by resolution, but in no case shall the city pay more than \$50,000.00 pursuant to this claims procedure for a damage claim related to a water or wastewater utility infrastructure occurrence unless in an extraordinary case the Mayor recommends and the City Council by two-thirds (⅔) majority approves an exemption from the \$50,000.00 damage cap and approves a payment up to \$100,000.00.
 - (5) ~~If damage to a residential or commercial property is caused by the failure or rupture of a 36-inch or greater pressurized water transmission line and water from such failure or rupture causes such catastrophic damage to residential or commercial property that exceeds the \$50,000.00 limit of §39.10(C)(4), such claim should be investigated and reviewed by an experienced and competent insurance adjuster hired by the city who shall report and certify to the City Council the estimated total amount of loss actually suffered by such claimant. The City Council may rely on such certified estimate and by two thirds (⅔) vote may then decide to authorize payment to the claimant up to \$100,000.00 as a further exemption from the normal \$25,000.00 damage cap.~~
 - (5) The Water and Sewer Utility Department is empowered and authorized to hire and rely upon an experienced insurance adjustor's professional analysis to establish reasonable compensation for any claim.
 - (6) This subsection does not pertain to nor affect in any manner the motor vehicle liability insurance requirements of A.C.A. §21-9-303 nor the claims procedure and limitations to comply with that state law.
- (D) *Discretion of the City.*
- (1) The city acting through its Utilities Department Director has complete and sole discretion whether or not to pay any compensation pursuant to this section if the claimant has properly and timely submitted the claim form and all necessary documentation. This section provides no right to compensation for any claimant, nor any right to appeal to the Mayor or City Council.
- (E) *Release Required if Compensation Paid.*
- (1) If the city offers to pay any compensation pursuant to this section, the claimant must sign a full release to receive the compensation offered by the city.

(Ord. No. 5504, 6-5-12; Ord. No. 5938 , §1, 12-20-16; Ord. No. 6576 , §1, 6-21-22; Ord. No. 6684 , §1, 9-19-23)

39.11 Damage Claims Other Than Water And Wastewater Damage Claims

- (A) *Establishment of Property Damage Claim Compensation Policy.*
- (1) Without waiving its statutory sovereign immunity, the city establishes the following voluntary policy governing the permissible payment of reasonable compensation for property damage claims (other than water and wastewater) proximately caused by uninsured city vehicles, equipment, infrastructure, or personnel activities. Claims relating to city vehicles which are insured shall be handled by the city's insurance adjustor (currently the Municipal League) except that very small property damage claims may be voluntarily paid by the city if a full release is obtained.
- (B) *Requirements for Property Damage Claims to Be Eligible for Compensation.*

-
- (1) The cause of the damage must be directly attributed to a malfunction of such uninsured vehicle or equipment, neglect or misuse of such equipment by city personnel, dangerous disrepair of city infrastructure, or other similar situation.
 - (2) Any problem with the city's infrastructure that causes damage must not have been caused by factors beyond the city's control such as floods, tornados, ice storms or other acts of God, nor by acts of third parties, nor by the failure of a claimant to act in a reasonably prudent manner.
 - (3) A claim form must be completed in writing and submitted to the Mayor's Office within thirty (30) days of damage occurrence. Claim forms may be supplemented later with additional information, bills, etc. as allowed by the Chief of Staff of the City of Fayetteville. Failure to submit the initial claim form within thirty (30) days of the incident terminates the claimant's opportunity to request compensation.
- (C) *Limitation of Any Compensation That Might Be Paid.*
- (1) Because the City of Fayetteville is protected by sovereign immunity, the city shall pay no compensation for any alleged damage associated with or related to any alleged personal injury (except a medical insurance deductible or co-payment) or any other damage except for property damage.
 - (2) Compensation which may be paid for damage to property shall be limited to the cost of repair of the damage or, in the event that the cost of repair exceeds the fair market value of the subject property, less salvage value, compensation shall be limited to the fair market value of the damaged property less any salvage value. No compensation shall be paid for inconvenience, loss of use, loss of profits or rents, consequential damages, or anything other than repair or replacement of property.
 - (3) No payment by the city may accrue to the benefit, directly or indirectly, of an insurance carrier, nor for any damage if such is covered by any insurance policy. If the insurance company waives any subrogation right, the city may pay an amount equal to the deductible already paid by the claimant for a property damage claim. Claimants shall be required to provide documents satisfactory to the city establishing their insurance coverage or lack thereof for any claim.
 - (4) The Chief of Staff may not authorize any payment greater than **\$35,000.00** for any claim pursuant to this section. The Mayor may request the City Council to authorize an amount greater than **\$35,000.00** by resolution, but in no case shall the city pay more than **\$50,000.00** pursuant to this claims procedure for a damage claim unless in an extraordinary case the Mayor recommends and the City Council by two-thirds (⅔) majority approves an exemption from this **\$50,000.00** damage cap and approves a payment up to **\$100,000.00**.
 - (5) This subsection does not pertain to nor affect in any manner the motor vehicle liability insurance requirements of A.C.A. §21-9-303, nor the claims procedure and limitations to comply with that state law.
- (D) *Discretion of the City.*
- (1) The city acting through its Chief of Staff has complete and sole discretion whether or not to pay any compensation pursuant to this section if the claimant has properly and timely submitted the claim form and all necessary documentation. This section provides no right to compensation for any claimant, nor any right to appeal to the Mayor or City Council.
 - (2) The city does not waive its sovereign immunity by considering whether or not to voluntarily pay any portion of a damage claim submitted for review under this section. The decision of the city is final and unappealable to any court.
- (E) *Release Required if Compensation Paid.*
- (1) If the city offers to pay any compensation pursuant to this section, the claimant must sign a full release to receive the compensation offered by the city.



DEPARTMENTAL CORRESPONDENCE



OFFICE OF THE
CITY ATTORNEY

TO: **Mayor**
City Council

CC: **Susan Norton**, Chief of Staff
Tim Nyander, Utilities Director
Paul Becker, Chief Financial Officer

FROM: **Kit Williams**, City Attorney

A handwritten signature in blue ink, appearing to read "Kit Williams", with a long horizontal line extending to the right.

DATE: **February 28, 2024**

RE: **Amendments to § 39.10 and § 39.11 Claims**

I consulted and worked with Utilities Director Tim Nyander and Chief of Staff Susan Norton to update § 39.10 **Water and Wastewater Damage Claims**. Tim sought an increase in his authority to pay \$35,000 and then authorizing the Mayor and City Council to increase damage payments to \$50,000 and in extreme cases up to \$100,000 with two thirds vote by the City Council. With Chief of Staff Susan Norton's approval, these proposed changes have been drafted into § 39.10.

To protect the City's rate payers, a new provision requires that any property owner seeking compensation for sewer backup damages would have to install a sewer backflow preventer prior to receiving compensation from the City. This should prevent future interior sewer backup damages from a known dangerous location. The new section also explicitly allows the City to promptly hire a remediation/mitigation service for a likely compensable water or sewer claim to prevent continuing and increasing damage from the water or sewer overflow.

Kit Williams
City Attorney

Blake Pennington
Senior Assistant City Attorney

Hannah Hungate
Assistant City Attorney

Stacy Barnes
Paralegal

The Water and Sewer Utility Department is also “empowered and authorized to hire and rely upon an experienced insurance adjustor’s professional analysis to establish reasonable compensation for any claim.”

§ 39.10 and § 39.11 **Damage Claims Other Than Water and Wastewater Damage Claims** were created and enacted together and mirrored each other in allowing certain amounts of compensation to be allowed for a substantiated claim. We, therefore, have proposed amending § 39.11 to match the new levels of compensation for § 39.10.

These compensation code sections were originally suggested and drafted by my office both to create a more consistent and fair compensation system and to avoid an *Equal Protection of the Law* legal challenge that a purely ad hoc compensation system might inspire. With increased labor, equipment and pipe costs, this change is needed to give Tim and Susan as well as the Mayor and Council enough authority to properly compensate damaged citizens.



39.10 Water And Wastewater Damage Claims

- (A) *Establishment of Property Damage Claim Compensation Policy.*
 - (1) Without waiving its statutory sovereign immunity, the city establishes the following voluntary policy governing the permissible payment of reasonable compensation for property damage claims proximately caused by a failure of the municipally owned water or wastewater infrastructure system that results in a trespass into and damage to private property.
- (B) *Requirements for Property Damage Claims To Be Eligible for Compensation.*
 - (1) The cause of the damage must be directly attributed to a failure of municipal infrastructure owned and operated by the Fayetteville Water and Wastewater utility, and cannot be associated with or caused by a private sewer or water connection or service line.
 - (2) The failure must not be caused by factors beyond the city's control such as loss of electrical service; flooding of its infrastructure; acts of third parties; failure of claimants to properly maintain protective devices (back flow valves, check valves, clean out caps, etc.); acts of God; and other circumstances beyond the city's control.
 - (3) A claim form must be completed in writing and submitted to the Mayor's Office within thirty (30) days of property damage occurrence. Claim forms may be supplemented later with additional information, bills, etc. as allowed by the Utilities Director of the City of Fayetteville. Failure to submit the initial claim form within thirty (30) days of the incident terminates the claimant's opportunity to request compensation.
 - (4) When a possible water leak claim has been promptly called to the attention of water and sewer staff who initially could not detect or determine the cause of such leak which then caused the property owner to invest in sump pumps and/or other reasonable measures to protect its property, compensation for such property damage prevention efforts may be paid pursuant to this article if a compensable water leak is later discovered or confirmed by city staff.
- (C) *Limitation of Any Compensation That Might Be Paid.*
 - (1) Because the City of Fayetteville is protected by sovereign immunity, the city shall pay no compensation for any alleged damage associated with or related to any alleged personal injury (except a medical insurance deductible or co-payment) or any other damage except for property damage.
 - (2) Compensation which may be paid for damage to property shall be limited to the cost of cleaning or repair of the damage or, in the event that the cost of cleaning or repair exceeds the fair market value of the subject property, less salvage value, compensation shall be limited to the fair market value of the damaged property less any salvage value. No compensation shall be paid for inconvenience, loss of use, loss of profits or rents, consequential damages, or anything other than cleaning, repair or replacement of property, and, in extreme cases, dislocation expenses not to exceed three (3) days.
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 - (4) The Utilities Department Director may not authorize any payment greater than \$10,000.00 for any claim pursuant to this section. The Mayor may request the City Council to authorize an amount greater than \$10,000.00 by resolution, but in no case shall the city pay more than \$25,000.00 pursuant to this claims procedure for a damage claim related to a water or wastewater utility infrastructure occurrence

unless in an extraordinary case the Mayor recommends and the City Council by two-thirds ($\frac{2}{3}$) majority approves an exemption from the \$25,000.00 damage cap and approves a payment up to \$50,000.00.

(5) If damage to a residential or commercial property is caused by the failure or rupture of a 36-inch or greater pressurized water transmission line and water from such failure or rupture causes such catastrophic damage to residential or commercial property that exceeds the \$50,000.00 limit of §39.10(C)(4), such claim should be investigated and reviewed by an experienced and competent insurance adjuster hired by the city who shall report and certify to the City Council the estimated total amount of loss actually suffered by such claimant. The City Council may rely on such certified estimate and by two-thirds ($\frac{2}{3}$) vote may then decide to authorize payment to the claimant up to \$100,000.00 as a further exemption from the normal \$25,000.00 damage cap.

(6) This subsection does not pertain to nor affect in any manner the motor vehicle liability insurance requirements of A.C.A. §21-9-303 nor the claims procedure and limitations to comply with that state law.

(D) *Discretion of the City.*

(1) The city acting through its Utilities Department Director has complete and sole discretion whether or not to pay any compensation pursuant to this section if the claimant has properly and timely submitted the claim form and all necessary documentation. This section provides no right to compensation for any claimant, nor any right to appeal to the Mayor or City Council.

(E) *Release Required if Compensation Paid.*

(1) If the city offers to pay any compensation pursuant to this section, the claimant must sign a full release to receive the compensation offered by the city.

(Ord. No. 5504, 6-5-12; Ord. No. 5938, §1, 12-20-16; Ord. No. 6576, §1, 6-21-22; Ord. No. 6684, §1, 9-19-23)

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(1) The cause of the damage must be directly attributed to a malfunction of such uninsured vehicle or equipment, neglect or misuse of such equipment by city personnel, dangerous disrepair of city infrastructure, or other similar situation.

(2) Any problem with the city's infrastructure that causes damage must not have been caused by factors beyond the city's control such as floods, tornados, ice storms or other acts of God, nor by acts of third parties, nor by the failure of a claimant to act in a reasonably prudent manner.

(3) A claim form must be completed in writing and submitted to the Mayor's Office within thirty (30) days of damage occurrence. Claim forms may be supplemented later with additional information, bills, etc. as allowed by the Chief of Staff of the City of Fayetteville. Failure to submit the initial claim form within thirty (30) days of the incident terminates the claimant's opportunity to request compensation.

(C) *Limitation of Any Compensation That Might Be Paid.*

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 - (4) The Chief of Staff may not authorize any payment greater than \$10,000.00 for any claim pursuant to this section. The Mayor may request the City Council to authorize an amount greater than \$10,000.00 by resolution, but in no case shall the city pay more than \$25,000.00 pursuant to this claims procedure for a damage claim unless in an extraordinary case the Mayor recommends and the City Council by two-thirds ($\frac{2}{3}$) majority approves an exemption from this \$25,000.00 damage cap and approves a payment up to \$50,000.00.
 - (5) This subsection does not pertain to nor affect in any manner the motor vehicle liability insurance requirements of A.C.A. §21-9-303, nor the claims procedure and limitations to comply with that state law.
- (D) *Discretion of the City.*
- (1) The city acting through its Chief of Staff has complete and sole discretion whether or not to pay any compensation pursuant to this section if the claimant has properly and timely submitted the claim form and all necessary documentation. This section provides no right to compensation for any claimant, nor any right to appeal to the Mayor or City Council.
 - (2) The city does not waive its sovereign immunity by considering whether or not to voluntarily pay any portion of a damage claim submitted for review under this section. The decision of the city is final and unappealable to any court.
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- (1) If the city offers to pay any compensation pursuant to this section, the claimant must sign a full release to receive the compensation offered by the city.

(Ord. No. 5505, 6-5-12; Ord. No. 6576 , §§ 1, 2, 6-21-22)