

# The M.A.P.

*The Municipal Attorney Periodical*

Publication of the  
Springdale  
City Attorney's Office  
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## Focus on the Springdale Planning Commission

Pages 1 through 3 of this edition of *The M.A.P.* focuses on the Springdale Planning Commission.

The Springdale Planning Commission was created on May 20, 1946 and consisted of nine members. The Planning Commission still consists of nine members who are recommended by the Mayor and approved by Council.

The general purpose of the Planning Commission is to prepare and maintain a plan of the City of Springdale, receive and make recommendations on public and private proposals for development, prepare and administer planning and zoning regulations, and prepare and transmit to the City Council recommended ordinances implementing these plans.

Ark. Code Ann. §14-56-412 sets forth the specific powers and duties of the planning commission. These powers and duties are set out in full in this article. Also, the planning commission, in fulfilling its legal responsibilities, performs many functions also covered in this article.

The Springdale Planning Commission normally meets once a month, on the first Tuesday, at 5:00 p.m. in the council chamber.



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## A Discussion of Certain Legal Issues Facing Planning Commissioners and City Council

The Planning Commission and City Council face many legal issues. In the article found on page 3, zoning decisions are discussed. While most zoning decisions are easy, all experienced Planning Commissioners and Council members know some rezoning requests can be bitterly contested.

In deciding these contested rezoning requests, what should Planning Commissioners and Council

members consider when making a decision of whether to approve or disapprove the rezoning request? If the City is sued after the Council's decision, what will courts look at in determining whether the City's action was lawful?

The legal test on rezoning decisions is whether the Council's action was arbitrary and capricious. If any rational basis can be found for the decision, the City's action will be

upheld. It is imperative for the Planning Commission and Council to make a record showing a rational basis existed for their decision. A discussion of certain issues which may affect the decision of the Planning Commission or City Council on zoning issues is contained in this article.

**Focus on a Commission or Board of the City of Springdale: The Springdale Planning Commission**

**History:** The Springdale Planning Commission was originally created by Springdale City Ordinance No. 273 on May 20, 1946. The first Springdale Planning Commission consisted of nine (9) members, and they were L.E. Johnson, Shelby Ford, D.D. Deaver, J.O. Kelley, J.L. Stafford, Cecil Norman, H.D. Ewalt, L.S. Phillips, and R.E. Wages. The Springdale Planning Commission still consists of nine (9) members, who are recommended by the Mayor with the approval of the City Council. The current Planning Commissioners are Michael Kaufman, Andrew Marks, Joel D. Kelsey, Bob Arthur, Fadil Bayyari, Jeff Williams, Stan Szmyd, Vivi Haney, and Jerry Horton. Planning commissioners serve four (4) year terms and may not hold other elected municipal offices.

**General Purpose:** The general purpose of the planning commission is to prepare and maintain a plan of the City of Springdale, receive and make recommendations on public and private proposals for development, prepare and administer planning and zoning regulations, and prepare and transmit to the City Council recommended ordinances implementing these plans.

**Legal Responsibilities:** Ark. Code Ann. §14-56-412 sets forth the specific powers and duties of the planning commission. Among these powers and duties are:

- (1) Promoting public interest in, and understanding of, long-term planning.
- (2) Preparing programs and studies of the present conditions and the probable future growth of the City and its neighboring territory.
- (3) Preparing and maintaining a planning area map.
- (4) Preparing plans for any portion of the planning area, including:
  - (a) A master street plan.
  - (b) A land use plan; and
  - (c) A community facilities plan.
- (5) In order to promote, regulate, and control development, and to protect the various elements of the plans, the commission may prepare and transmit to the City Council such ordinances and regulations as are deemed necessary to carry out the intent of the plans.
- (6) All changes to the plans, recommended ordinances, and regulations are adopted through the procedures found in Ark. Code Ann. §14-56-422, and include the requirement of a public hearing on the proposed changes, with prior notice of the hearing to be published in the newspaper. After the public hearing, proposed plans may be adopted and proposed ordinances and regulations may be recommended as presented, or in modified form, by a majority vote of the entire commission. Following its adoption of plans and recommendation of ordinances and regulations, the commission shall certify adopted plans or recommended ordinances and regulations to the City Council for action. The City Council may return the

plans and recommended ordinances and regulations to the commission for further study or, by a majority vote, may, by ordinance or resolution, adopt the plans and recommended ordinances or regulations submitted by the commission.

**Functions of the Planning Commission:**

The planning commission, in fulfilling its legal responsibilities, performs many functions. Among them are:

- (1) **Plat Approval/Large Scale Developments/Lot Splits** -- Review all plans for development to ensure compliance with all applicable ordinances and standards, and thereafter make recommendations to the City Council. The development of land includes the provision of access to lots, the extension or provision of utilities, the subdividing of land into lots and blocks, and the parceling of land resulting in the need for access and utilities. The regulations controlling the development of land also provide for the design and layout of subdivisions, including standards for lots and blocks, street rights-of-way, street and utility grades, and standards for improvements to be installed by the developer at his own expense, such as street grading and paving, curbs, gutters, sidewalks, water, storm and sewer mains, and street lighting. The regulations permit the developer to post a performance bond in lieu of actual installation of these required improvements before plat approval. The regulations also govern lot splits, which is the dividing of an existing lot into two or more lots.
- (2) **Master Street Plan** -- Ensure compliance with the City's master street plan, which designates the general location, characteristics, and functions of streets and highways within the city. This plan shall include the general locations of streets and highways to be reserved for future public acquisition. The plan may also provide for the removal, relocation, widening, narrowing, abandonment, and change of use or extension of any public ways. Furthermore, the commission may also establish setback lines on such streets and highways as are designated by the plan and may prohibit the establishment of any new structure or other improvements within the setback lines.
- (3) **Land Use Plan** -- Ensure compliance with the City's land use plan by enforcing the City's zoning ordinances. Among other things, the City's zoning ordinances regulate the location, height, bulk, number of stories, and size of buildings, open space, lot coverage, density and distribution of population, and the uses of land, buildings, and structures.
- (4) **Communities Facilities Plan** -- The commission may prepare and adopt a community facilities plan indicating the general location and extent of the service areas of, and the future requirements of community facilities such as schools, playgrounds, parks, hospitals, governmental buildings and areas, utility terminals and lines, and transportation terminals and lines.
- (5) The commission may recommend a coordinated program of capital expenditures for public improvements.

**Board of Adjustment:** Arkansas law also provides for a board of zoning adjustment, and this board may either be composed of at least three (3) members, or the planning commission as a whole may sit as the board of zoning adjustment. In Springdale, the planning commission as a whole sits as the board of zoning adjustment. The board of zoning adjustment hears appeals from decisions of city administrative officers with respect to the enforcement and application of the city’s zoning ordinances, and may affirm or reverse, in whole or in part, the decisions of city administrative officers. Also, this board hears requests for variances from the literal provisions of the city’s zoning ordinances in instances where strict enforcement of the ordinance would cause undue hardship due to circumstances unique to the individual property under consideration, and grant such variances only when it is demonstrated that such action will be in keeping with the spirit and intent of the provisions of the city’s zoning ordinances. The board may impose conditions in the granting of a variance to insure compliance and to protect adjacent property. An appeal of a decision of the board of zoning adjustment is heard by the courts, not the City Council.

**Meetings:** The Springdale Planning Commission normally meets once a month, on the first Tuesday, at 5:00 p.m. in the council chamber.

**Note from City Attorney’s Office:** The Springdale Planning Commission and the Springdale City Council have adopted a master street plan, a land use plan, and zoning ordinances and regulations as required by Arkansas law. Copies of these documents may be obtained from the

Department of Planning and Community Development and from the City Clerk’s Office. The complete law on planning commissions is codified as Ark. Code Ann. § 14-56-401, *et. seq.*

Ernest Cate  
Senior Deputy City Attorney



**A Discussion of Certain Legal Issues Facing Planning Commissioners and City Council Members**

**Zoning Decisions**

Most of the time zoning decisions are easy. The petitioner shows up at the Planning Commission and is unopposed by all adjoining land owners, the zoning is consistent with the land use plan, the Planning Director recommends the rezoning, and after a few comments the Planning Commission votes 9 - 0 to approve. The matter is then sent to the Springdale City Council, who considers the issue for a few minutes and then votes 8 - 0 to approve the rezoning. The emergency clause is also passed by the Council so that the petitioner can start building on the property immediately.

While many rezonings are uncontested, like the example set out above, all experienced Planning Commissioners and Council members know some rezoning requests are bitterly contested. Perhaps no issue considered by the Planning Commission and City Council can invoke passions like the contested rezoning. In such cases, what should Commission and Council members

consider in deciding whether to approve or disapprove the rezoning request? If the City is sued after the City Council's decision, what will courts look at in determining whether the City's action was lawful?

The legal test on a rezoning decision is whether or not the Council's action was arbitrary and capricious. If any rational basis can be found for the decision, then the City's action will be upheld. It is imperative for the Planning Commission and Council to make a record showing a rational basis existed for their decision. What follows is a discussion of certain issues which may affect the decision of the Planning Commission or City Council on zoning issues.

**When Your Decision Follows the Land Use Plan** – The Land Use Plan is one of the first items that should be considered by Planning Commissioners and Council members when deciding whether to vote for a rezoning request. The Land Use Plan represents the City's comprehensive plan on the particular property in question. The plan was adopted after public hearings and study and therefore a rezoning consistent with such plan will usually be held by the courts to be rational.

The Arkansas Courts are moving a little closer toward giving legal affect to a City's Land Use Plan. However, as everyone knows, there are times when a City believes a proper decision goes against its own plan.

**When Your Decision Goes Against the City's Land Use Plan** – In a case where the Planning Commission or the City Council goes against its own Land Use Plan, the courts will look to see if there was a rational basis to do so. Courts in Arkansas have traditionally allowed cities to go against

their own plan, so long as a rational basis is found. A short review of such a case in a city close to Springdale can give you a good idea on what to consider in voting on a zoning decision that goes against the City's Land Use Plan.

M & N Mobile Home Park, Inc. purchased 7.19 acres of land in Lowell in 1971. Between 1971 and 1986, it operated a mobile home park on slightly less than two of the acres. The other five acres remained unoccupied. In 1986, the City passed a zoning ordinance that designated the two acres as MHP, zoned for a mobile home park, and designated the remaining five acres as R-1, for single family dwellings. However, according to the dissent in the case, M & N's proposed use of the land was consistent with the City's overall land use plan.

The Lowell Land Use Plan divided the City into broad category zones, such as residential, commercial, or industrial. Patsy Christie (then at Lowell) testified that a mobile home park district falls within the residential category and therefore is consistent with the Land Use Plan. The Mayor of Lowell, likewise, testified that M & N's proposed rezoning was consistent with the Land Use Plan in effect in Lowell since 1971. However, both the Lowell Planning Commission and the City Council turned down the rezoning request, resulting in M & N Mobile Home Park filing a lawsuit in the Benton County Chancery Court.

The Benton County Chancery Court ruled in favor of M & N Mobile Home Park, and ruled that Lowell's decision was arbitrary, a decision which was appealed by the City of Lowell to the Arkansas Supreme Court. The

Arkansas Supreme Court reversed the Benton County Chancellor's decision and ruled in favor of the City of Lowell.

In making their decision, the Arkansas Supreme Court set out certain findings as to why Lowell's decision to deny the rezoning request was rational. The Court noted that "the mere fact of public opposition to a zoning application will not supply a rational basis for denial of an application. The public opposition must reflect logical and reasonable concerns. If the rule were otherwise, public opinion by itself could justify the denial of Constitutional rights and those rights would thus be meaningless."

However, in this case the Arkansas Supreme Court noted that the public opposition to the trailer park was logical and reasonable. Citizens of Lowell appeared both at the Planning Commission and City Council to oppose the trailer park because of increased traffic on limited roads. The Court held this concern was reasonable because the only way M & N could comply with the street frontage requirements was by coupling the five acres with the two acres and by using the street frontage located on the two acres for the entire seven acres.

The next area of public opposition was related to noise. The Arkansas Supreme Court held that this was also reasonable since there would be a greater concentration of considerably more mobile homes.

The Court also considered the public opposition to the rezoning because of probable decrease of the value of surrounding lands. Five land owners appeared before the Planning Commission and Council and testified that the value of their land would decrease if the tract were rezoned. The Court noted, "it is well settled

that the owner of property, because of his relationship as owner, is competent to give opinion testimony on an issue of the value of his property regardless of his knowledge of property values and it is not necessary to show that the owner is an expert or is acquainted with the market value of local real estate."

The Court, considering all these reasons, held, "the opinion of local residents, when it reflects logical and reasonable concerns, is an appropriate factor for a Planning Commission or a City Council to consider in zoning cases, and can help form a rational basis for a City's legislative decision making."

The bottom line is that Planning Commissioners and Council members must decide if the public opposition is logical and reasonable, and if so, consider it in making their decision. Of course, all decisions have to be constitutional. For instance, Courts have held that it is unconstitutional to totally ban certain uses in a City, although they can be zoned.

**What is Spot Zoning?** -- Spot zoning is a concept often mentioned by participants in contested zoning decisions. It is often used as a reason for opposing a rezoning decision because spot zoning has often been held by courts to be arbitrary.

The Arkansas Supreme Court has decided several cases on spot zoning. In one case, the Court noted, "spot zoning singles out a small parcel of land for use in a manner inconsistent with the other predominant land uses in the area." R. Wright, Zoning Law in Arkansas: A Comparative Analysis, 3 UALR L.J. 421, 442 (1980), cited in Smith v. City of Little Rock, 279 Ark. 4 (1983).

In this same case, the Arkansas Supreme Court also held, “spot zoning amendments are those which by their terms single out a particular lot or a parcel of land, usually small in relative size, and place it in an area, the land use pattern of which is inconsistent with the small lot or parcel so placed, best projecting an unharmonious land use pattern.” 1 E. Yokley, Zoning Law and Practice, 8-3 (1965), cited in Smith v. City of Little Rock, 279 Ark. 4 (1983).

In another Arkansas Supreme Court case involving the issue of spot zoning, the court held “spot zoning is invalid because it amounts to an arbitrary, capricious, and unreasonable treatment of a limited area within a particular district. As such, it departs from the comprehensive treatment or privileges not in harmony with the other use classifications in the area and without any apparent circumstances which call for different treatment. Spot zoning almost invariably involves a single parcel or at least a limited area.” R. Wright and S. Weber, Land Use (1978), cited in Riddell v. City of Brinkley, 272 Ark. 84 (1981).

Even though we might agree on the definition of spot zoning, whether or not a particular action is spot zoning is often disagreed upon by even the Judges themselves. For instance, in the Smith v. Little Rock case, the majority of the Arkansas Supreme Court held the particular zoning in question was not spot zoning. The parcel in this case was rezoned from a single family and quiet office classification to a general commercial classification zone, allowing a Wendy’s restaurant. The tract in question was five residential lots on the south side of Markham. It was described as being in the area of the State Hospital, the

University of Arkansas Medical Center, and directly across from War Memorial Park. However, to the east of the property on the same block were located single family homes and an establishment which sold and rented scuba diving equipment. Jerry Speece, Zoning Administrator for the City of Little Rock, testified that this was not spot zoning, because spot zoning involves zoning one lot in a manner entirely different from the surrounding area, which he felt was not done in this case.

In dissent, a Judge who disagreed with the rezoning and thought it did constitute spot zoning, noted that West Markham is the southern boundary of Pulaski Heights/Hillcrest area, a residential area of uncommon beauty and serenity. The Judge further wrote, “there has been no changes in this area since 1966. It is an old residential area, improving in quality, not declining.” The Judge went on to say, “this part of Markham Street is a boundary that has to remain inviolate if the integrity of the Pulaski Heights/Hillcrest area is to be maintained.”

The two different opinions in the same case shows you the difficulty faced by Planning Commissioners and City Council members in deciding a spot zoning issue. Here the Judges on the Arkansas Supreme Court were in disagreement whether or not this particular action of the City of Little Rock was spot zoning.

**Note from City Attorney:** The best approach I can recommend is to look at the overall area in question and then compare it with the spot zoning definitions previously set out in this article. Even then, it is likely that two commissioners or council members

may disagree whether or not the particular decision constitutes spot zoning.

**Subdivision Decisions**

Unlike a zoning ordinance, which is a legislative act, a subdivision approval is considered an administrative decision. Administrative decisions are harder to defend if there is an appeal because the applicant has a second chance to have the plat approved – this time by the Circuit Court (actually a third time if you count the appeal to the Council). The Circuit Court conducts a hearing on an administrative decision, the Court does not just review the action of the Planning Commission and County Council like they would on a zoning appeal. On an appeal from an administrative decision, such as a plat approval, the issue is typically whether the plat complies with the minimum requirements of the subdivision regulations.

Arkansas has a decision right on point in this area. The bottom line is that a City cannot deny subdivision approval if the subdivider meets the City’s minimal requirements. This decision was made in Richardson v. City of Little Rock Planning Commission, decided by the Arkansas Supreme Court in 1988. In this decision, the developer met the minimum requirements of Little Rock’s subdivision ordinance.

In deciding this case, the Arkansas Supreme Court held, “a planning commission may not disregard the regulations set forth in the subdivision ordinance and substitute its own discretion in lieu of fixed standards applying to all cases similarly situated. A Planning Commission is authorized and required to

determine whether a plat presented is in compliance with the particular subdivision regulations. Once compliance is had, no discretionary power to disapprove exists. To rule otherwise would eliminate objective requirements, and instead substitute subjective thinking by individual members of a particular planning commission. This was never contemplated by the law.”

In this particular case, the developer received a letter setting forth two reasons for denial: 1) proximity of a proposed culdesac to the adjacent lots; and 2) marginal development potential of the land, resulting in unusual lot shapes and means for access. The Court noted that the final plat submission from which the developer appealed did not contain a culdesac, and the Little Rock subdivision ordinance did not contain the term “marginal development potential.”

Jeff Harper  
City Attorney



**Arkansas Attorney General  
Clarifies Application of Statute  
Pertaining to Zoning Ordinance  
Amendments**

On January 14, 2010, the Arkansas Attorney General issued Attorney General Opinion 2009-194. This opinion clarified the application of Ark. Code Ann. §14-56-423, which provides that:

After adoption of plans, ordinances, and regulations and proper filing in the offices of city clerk and county recorder, no alteration, amendment,

extension, abridgement, or discontinuance of the plans, ordinances, or regulations may be made except in conformance with the procedure prescribed in §14-56-422, or by a majority vote of the city council.

In other words, this statute provides that after a zoning ordinance, master street plan, land use plan, subdivision ordinance, etc., is adopted, it can only be amended by either: 1) using the procedure in Ark. Code Ann. §14-56-422 (which involves publishing notice of a public hearing, conducting a public hearing at planning commission, and planning commission making a recommendation to city council); **OR** 2) by a majority vote of the city council.

Given the language of Ark. Code Ann. §14-56-423, is it permissible for a city to bypass the requirements of Ark. Code Ann. §14-56-422 and simply refer these matters directly to the City Council for a vote? This question was posed to the Arkansas Attorney General by the City of Pine Bluff. The answer is found in Attorney General Opinion 2009-194.

In Attorney General Opinion 2009-194, the Attorney General reaffirmed the long-standing law in Arkansas, stating that zoning amendments may be enacted pursuant to the simplified procedure (directly to city council) only by those municipalities whose zoning ordinances do not themselves require the enactment of amendments through a "complete planning procedure." Since the City of Pine Bluff had ordinances in place which created a "complete planning procedure", the planning commission could not be bypassed in favor of going directly to the city council.

Like Pine Bluff, the City of Springdale has adopted the "complete planning procedure", and the Springdale Code of Ordinances clearly specifies that every proposed amendment to the zoning ordinance and subdivision ordinance must follow a specific procedure (see, for example, Sections 11.2 and 11.3 of Article 2 of the Zoning Ordinance, and see Section 112-12(d) of our Code of Ordinances). In other words, the City of Springdale may not utilize the simplified procedure contained in Ark. Code Ann. §14-56-423 and may not take these matters directly to the city council. Instead, Attorney General Opinion 2009-194 makes it clear that the City of Springdale must comply with both Ark. Code Ann. §14-56-422 and the "complete planning procedure" contained in the City's zoning and subdivision ordinances.

In reaffirming this position, the Attorney General stated:

the requirement to give notice and hold a public hearing is designed to give the planning commission and, indirectly, the municipal governing body the benefit of public comment, suggestion, and objection in order to arrive at more informed and beneficial solutions to zoning questions. The zoning ordinance and the statute that require notice and hearing require the planning commission to conduct the hearing. In my view, this arrangement is designed to permit the commission to assimilate all relevant public comment and to incorporate such public comment into its expert recommendations to the municipal governing body. Such purpose would not be fully realized if the municipal

governing body held the public hearing.

The opinion stated that those cities that have decided not to adopt the "complete planning procedure" would be free to use either alternative method found in Ark. Code Ann. §14-56-423. In other words, those cities could bypass their planning commissions and bring zoning ordinance amendments directly to the city council. Even in those instances, the Attorney General opined that the municipal governing body could, and should, give appropriate notice, hold the required public hearing, and should consider the public comment elicited before proceeding to a vote on the proposal. As noted, however, the City of Springdale does not fall into this category.

Ernest Cate  
Senior Deputy City Attorney



### **Arkansas Court of Appeals Dismisses Developer's Appeal of Denial of Waiver**

On December 16, 2009, the Arkansas Court of Appeals issued its opinion in the case of *Arkansas Constr. & Excavation v. City of Maumelle*. This case had its origins when Kenneth Norman, owner of Arkansas Construction & Excavation, submitted a preliminary plat for Hunter Heights Subdivision to the Maumelle Planning Commission. Norman also requested a waiver of the dedication of right-of-way. On May 24, 2007, the Maumelle Planning Commission approved the preliminary plat, but denied the waiver request.

Unhappy that the waiver was denied, Norman then filed a complaint for declaratory judgment in Circuit Court, seeking to have the sixty-foot right-of-way voided as arbitrary and without authority. The trial court affirmed the Planning Commission's denial of the waiver request. Norman appealed this decision to the Arkansas Court of Appeals.

On appeal, the Arkansas Court of Appeals held that the denial of a waiver was an administrative decision, subject to the requirements of Ark. Code Ann. §14-56-425. This statute, along with Rule 9 of the District Court Rules, sets forth the manner in which a final administrative decision may be appealed to circuit court. In a nutshell, this procedure requires the appealing party to file the appeal within thirty (30) days of the "final action" taken by the City.

In order to determine whether the denial of the waiver by the Maumelle Planning Commission was a "final action", it used the standard employed by the Arkansas Supreme Court in the case of *Stromwall v. City of Springdale Planning Comm'n*, 350 Ark. 281, 86 S.W.3d 844 (2002). In *Stromwall*, the Court held that the approval of a preliminary plat was not a final action because "further actions in the matter were contemplated, and there were still outstanding issues to be determined before the plat was finally approved."

The Court determined that, as far as Norman's waiver was concerned, no further action was contemplated and no outstanding issues were left to be determined. As such, the action taken by the Maumelle Planning Commission on May 24, 2007, was the "final action" on the waiver. Accordingly, the Court held that the Maumelle Planning

Commission's decision was a final action subject to Ark. Code Ann. §14-56-425. Because this was a final action, Norman was required to comply with all the requirements of Ark. Code Ann. §14-56-425.

In this case, Norman did not follow the proper procedure in challenging the denial of his waiver request. Specifically, he did not file his appeal until September 10, 2007, well after the 30 day requirement had lapsed. The Court used the case of *Combs v. City of Springdale*, 366 Ark. 31, 233 S.W.3d 130 (2006), to state that "[t]he filing requirements of Rule 9 are mandatory and jurisdictional, and failure to comply prevents the circuit court from acquiring subject-matter jurisdiction." As such, the Court held that since Norman did not file his appeal within the thirty (30) day period, the circuit court had no jurisdiction to hear his case. Therefore, the Court ordered Norman's case dismissed.

This case was decided by the Arkansas Court of Appeals on December 16, 2009, and was an appeal from the Pulaski County Circuit Court. The case cite is *Arkansas Constr. & Excavation v. City of Maumelle*, 2009 Ark. App. 874, \_\_\_\_ S.W.3d \_\_\_\_ (2009).

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**Arkansas Supreme Court  
Dismisses Property Owner's  
Claim Against North Little Rock**

On December 3, 2009, the Arkansas Supreme Court issued its opinion in the case

of *Talley v. City of North Little Rock*. This case originated in 1998 when Talley purchased a parcel of land in North Little Rock. In 2004, he obtained a building permit to build a three-unit apartment complex on the property. In early 2005, this permit was revoked by the City because construction had been abandoned. In 2006, Talley lost the property to the State due to back taxes. The property was purchased by ARChoice, LLC, at a tax sale in early 2006.

In May of 2006, the City sent notice to Talley (even though he was no longer the owner) that the City was considering razing and removing the structure on the property. ARChoice, LLC, the true owner, was given no notice. However, Talley was able to convince the City to hold off on the raze and removal, and was issued a new building permit for the property in September of 2006. However, no work took place and the City passed a Resolution condemning the property on October 9, 2006. Talley repurchased the property from ARChoice, LLC, on October 27, 2006.

In early 2007, Talley again asked the City to hold off on the raze and removal on the property. The result was a "development agreement", agreed to by Talley and adopted by the City on March 26, 2007. This development agreement provided that as long as Talley met certain benchmarks, the City would not raze and remove the structure. Talley did not meet the first benchmark and a stop work order was issued by the building inspector on May 23, 2007. The City then informed Talley that the building would be razed and gave Talley until June 12, 2007, to salvage any materials from the building.

On June 12, 2007, Talley filed suit against the City of North Little Rock. The circuit court eventually dismissed Talley's lawsuit. In doing so, the court ruled that Talley's lawsuit against the City was not proper, and that Talley should have appealed any of the various decisions (i.e., the raze and removal resolution or the stop work order) of the City pursuant to Ark. Code Ann. §14-56-425 within thirty (30) days. Talley appealed the circuit court's decision to the Arkansas Supreme Court.

The Arkansas Supreme Court upheld the decision of the circuit court. In addition, the Arkansas Supreme Court made an additional finding of note. Specifically, the Court held that Talley had no standing to appeal the October 9, 2006, Resolution passed by the City ordering the razing and removal of the structure. Talley was not the owner of the property at the time, and therefore had no standing to challenge the City's raze and removal decision on the property. The fact that the Court held that one must have legal standing before appealing a final administrative action of a City pursuant Ark. Code Ann. §14-56-425 is significant, and likely could be applied in other situations in the future.

This case was decided by the Arkansas Supreme Court December 3, 2009, and was an appeal from the Pulaski County Circuit Court. The case cite is *Talley v. City of North Little Rock*, 2009 Ark. 601, \_\_\_\_ S.W.3d \_\_\_\_ (2009).

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### **Arkansas Supreme Court Upholds City of Conway's Denial of Rezoning Request**

On October 22, 2009, the Arkansas Supreme Court issued its opinion in the case of *PH, LLC v. City of Conway*. This case involved a rezoning request by PH, who owned property in Conway. The property was zoned A-1. PH requested a rezoning to R-1 (Residential), and simultaneously submitted a preliminary plat for consideration by the Conway Planning Commission. The Planning Commission approved the preliminary plat, subject to the City Council approving the rezoning request. The Planning Commission, however, unanimously recommended denial of PH's zoning request.

PH appealed the Planning Commission's denial of its rezoning request to the City Council. By a vote of 7-1, the City Council upheld the Planning Commission and denied the rezoning request.

PH filed suit in circuit court, requesting a review of the City's decision under Ark. Code Ann. §14-56-425. The trial court held that the City's decision on the rezoning request was legislative in nature, not administrative. Therefore, the trial court held that Ark. Code Ann. §14-56-425 did not apply, and the only proper analysis was whether the City had acted arbitrarily, capriciously, or without a reasonable basis in denying PH's rezoning request. After hearing the evidence, the trial judge found that the City had legitimate concerns regarding the rezoning request, and, therefore, did not act arbitrarily and capriciously in denying the rezoning request. The trial judge dismissed PH's

complaint. PH appealed to the Arkansas Supreme Court.

The Arkansas Supreme Court affirmed the trial court's decision. In so doing, it upheld the long standing doctrine that Ark. Code Ann. §14-56-425 only applies to administrative decisions, and does not apply to legislative decisions. The question to be determined, then, was whether the City of Conway's denial of PH's rezoning request was administrative or legislative in nature.

The Court then went through the history of Arkansas law regarding this issue, and reviewed several past cases which had established that a City's action on a rezoning request was legislative in nature. The Court then held that a decision by a city council on a rezoning request is legislative, not administrative. In doing so, it overruled the case of *Camden Comm. Dev. Corp. v. Sutton*, which had created confusion on this issue. Specifically, the Court stated:

This court now takes this opportunity to clarify whether decisions by a city council to approve or deny a requested rezoning of land are legislative or administrative in nature. We hold, in line with our precedent excepting the *Camden* decision, that zoning decisions by city boards are legislative in nature. We specifically hold that zoning decisions, whether grants or denials, are legislative in nature. Accordingly, the procedure set forth in section 14-56-425 does not apply. Moreover, because our holding in *Camden Comm. Dev. Corp. v. Sutton*, 339 Ark. 368, 5 S.W.3d 439 (1999), involved a denial of a zoning request and has lent confusion to this issue, we overrule it.

Since the action taken by the City of Conway on PH's rezoning request was legislative in nature, Ark. Code Ann. §14-56-425 did not apply. Instead, the Court held that the correct standard of review was whether the City of Conway had acted arbitrarily, capriciously, or unreasonably. The record submitted by the City of Conway clearly indicated the reasons for the denial of the rezoning request. As such, the Court was able to conclude that the City had not acted in an arbitrary, capricious, or unreasonable manner when it denied PH's zoning request.

One other interesting note about this case is that PH had argued that since its preliminary plat had satisfied all the minimum standards and requirements of the subdivision ordinance, the City was precluded from considering traffic concerns or public safety issues in evaluating the rezoning request. The Court disagreed, and stated that "the fact that the planning commission approved a preliminary plat, in the event the land was rezoned to R-1, does not automatically entitle PH to have the property rezoned".

This case was decided by the Arkansas Supreme Court on October 22, 2009, and was an appeal from the Faulkner County Circuit Court. The case cite is *PH, LLC v. City of Conway*, 08-1383 (Ark. 10-22-2009).

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### 8th Circuit Upholds Missouri City's Denial of a Cell Tower Request

On October 9, 2009, the United States Court of Appeals for the Eighth Circuit issued its opinion in the case of *USCOC of Greater Missouri v. City of Ferguson, Missouri*. This case originated when USCOC (a subsidiary of US Cellular) wanted to place a cell tower on property it owned in Ferguson, Missouri. Pursuant to Ferguson's zoning ordinance, a cell tower required a "special use permit". Additionally, the zoning ordinance contained other restrictions and conditions on cell towers, such as setback requirements (one foot for each foot of its height) and no tower may be located within 200 feet of a residential structure. The dimensions of USCOC's lot made the construction of the tower impossible without obtaining a variance from the setback requirement.

Accordingly, USCOC applied for a special use permit for the cell tower. It also applied for the variances necessary to avoid the setback requirements. City staff recommended denial of the special use permit, and the Ferguson Planning Commission followed the staff's recommendation by voting unanimously to recommend that the City Council deny the special use permit. The City Council ultimately passed a resolution denying the special use permit.

The variance requests were denied by the board of adjustment as well. Specifically:

The decision indicated that the Board had found no "unique characteristics" related to USCOC's property which would amount to the "unnecessary hardship or practical difficulties" required to justify a variance under state law and the City's Code. In addition, it stated that "the proposed

variance [would] adversely affect adjacent property owners" and "violate the general spirit and intent of the Zoning Ordinance."

Unhappy with this outcome, USCOC filed suit in federal district court alleging that the City of Ferguson's actions violated the federal Telecommunications Act (TCA). The City filed a motion for summary judgment, which was granted by the federal district court. The court found that Ferguson's denial of the special use permit was proper, that the denial of the variances was supported by substantial evidence, and that the denial of the variances was in writing. In short, the federal district court found that Ferguson's actions satisfied the TCA.

USCOC appealed this decision to the United States Court of Appeals for the 8<sup>th</sup> Circuit. USCOC argued that the City of Ferguson had violated the section of the TCA which required that any local government decision denying a request to construct a wireless communications facility "be in writing and supported by substantial evidence contained in a written record". In reaching its decision that Ferguson had complied with this requirement, the Court held, for the first time, that the "final action" of a city occurs when the city issues a written decision denying an application to construct a wireless service facility, not when the local government votes to deny an application.

USCOC also argued that Ferguson's denial of the special use permit and the variances was inconsistent with the TCA, which required that the decision be "supported by substantial evidence". In finding that Ferguson had not violated the TCA, the Court stated that:

The TCA's "substantial evidence" requirement does not impose substantive standards on local governments. Rather, it requires a reviewing court to determine whether the local authority's decision comports with applicable local law. Our review of local government decisions under the TCA is "essentially deferential," and the party seeking to overturn a decision bears the burden of proving that it is not supported by substantial evidence. Thus, the City's decisions must be affirmed if they are "supported by some substantial level of evidence (but less than a preponderance) on the record as a whole." We will not overturn the City's decisions simply because the evidence might reasonably support a different conclusion. (citations omitted)

It is important to note that the Court clearly held that the city does not have to prove its decision was based on substantial evidence. Instead, the Court held that the telecommunications provider has the burden of proving that the City's decision was not supported by substantial evidence. This is a significant victory for municipalities.

Similarly, the Court held that "[t]he party seeking the variance bears the burden of demonstrating that practical difficulties exist and that the variance should consequently be granted". As such, OSCOC bore the burden of justifying the variances. Ferguson's board of adjustment found that OSCOC did not meet that burden when it denied the variance requests.

When examining the reasons for the denial of the special use permit and the variances, the Court found that Ferguson had based its decisions on many factors, including the staff's recommendation. These factors were found in the record of the City's proceedings, and in the resolution it passed. After reviewing these factors, the Court found that ample "substantial evidence" existed to support the City's decisions. In fact, the Court held that "[t]he staff report provided substantial evidence to support denial" of the special use permit.

Accordingly, the 8<sup>th</sup> Circuit affirmed the decision of the federal district court, and held that the City of Ferguson did not violate the TCA when it denied OSCOC's request for a special use permit, and when it denied OSCOC's variance requests.

This case is clearly a victory for municipalities.

This case was decided by the United States Court of Appeals for the Eighth Circuit on October 9, 2009, and was an appeal from the United States District Court for the Eastern District of Missouri. The case cite is *USCOC of Gt. Mo v. City of Ferg. Mo.*, 583 F.3d 1035 (8th Cir. 2009).

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