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Eighth Circuit Upholds District Court's Decision Finding that a Land Use Ordinance Requiring the Enclosure of Racing Vehicles is not a Regulatory Taking Requiring Compensation

Facts Taken From the Opinion: In March of 2006, Vinton Watson ("Watson") leased a shop building and an adjacent parking lot from Ron Inman for \$300 per month on a month-to-month basis. This property is located in the City of Indianola, Iowa, (the "City") on real estate zoned for commercial use. Permissible uses of the property include "automotive display, sales, service and repair," "personal services and repair shops," and "service, repair and rental of trucks [and] trailers." The shop that Watson leases consists of half of one building and amounts to approximately 900 square feet. The parking lot included in the lease is located immediately adjacent of the building and is twenty-seven by thirty-four feet. Watson uses the shop to work on and store "figure eight" race cars. Watson stores up to three cars inside the building at any one time. Additionally, Watson stores up to three cars outside in the parking lot. Watson's use of the property to repair and store race cars has annoyed some Indianola residents, who have complained to the City on numerous occasions. The complaints often focused on the appearance of and noise created by Watson's race cars. In response to these complaints, on November 5, 2007, the City passed a land use ordinance requiring property owners to enclose race cars by a fence in all outdoor areas when two or more vehicles are present. The City subsequently informed Watson that it would file a "municipal infraction" against any person or entity in noncompliance after December 4th, 2007.

On November 30, 2007, Iowa Assurance Corporation, Ron's Automotive, LC, Ronald L. Inman, III, Watson, and Judith Ann Watson (hereinafter collectively referred to as "Watson") sued the City and members of the Indianola City Council (hereinafter collectively referred to as the "City") in state court arguing that the ordinance amounts to an uncompensated regulatory taking in violation of the Fifth and Fourteenth Amendments by requiring him to install a fence in order to continue using the property to store race cars and by reducing the overall value of the property. The City removed the case to federal court, where in January of 2009, the district court questioned whether the City had followed proper procedures in enacting the ordinance. In response, on June 1, 2009, the City passed a new version of the ordinance, which was essentially identical to the previous version except for one provision that clarified the height and type of fencing required. The new ordinance, entitled Ordinance 1432, specifically mandated that the fence be "double-faced opaque wooden or masonry fence or slatted chain link fence, all with the minimum height of six feet (6') above ground." Watson filed a supplemental complaint, alleging that the new ordinance violated the Constitution in the same manner as the previous ordinance.

Decision by the District Court: On January 27, 2010, the district court held a bench trial and, after the trial, issued a decision in favor of the City. In analyzing Watson's takings claim, the district court applied the takings standard from *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). According to the district court, *Penn Central* required the court to consider (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct, investment-backed expectations;

and (3) the character of the government regulation. Additionally, the district court stated that it is appropriate to specifically examine the nature and extent of the ordinance's interference with the use of the leased property.

In its application of the first factor, the district court found that erection of a fence would not be particularly expensive and that any diminution in value to the leased property the fence may cause could be eliminated by removing the fence at low cost. Applying the second factor, the district court found that there was no evidence of significant investment in the property in reliance on the City's zoning scheme prior to the passage of Ordinance 1432. Applying the third factor, the district court noted that Ordinance 1432 did not cause a physical invasion of Watson's property and that the City had passed the ordinance for a legitimate public purpose, namely the promotion of "community aesthetics." Finally, the district court found that Watson would be able to keep the same number of race cars outdoors on his leased property if he erected a gated fence. Accordingly, with all of the factors weighing against Watson, the district court found no constitutional taking.

Appeal to the Eighth Circuit Court of Appeals: Watson appealed the district court's decision to the United States Court of Appeals for the Eighth Circuit. On appeal, Watson argued that the district court erred in using the *Penn Central* framework to analyze his takings claim. Watson did not challenge any of the district court's factual findings or even its application of the *Penn Central* test. Instead, Watson argued that the district court should have found an unconstitutional taking under an alternative regulatory taking test that courts apply to physical invasions of private property.

Watson specifically analogized his case to the Supreme Court's decision in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). In the alternative, Watson maintained that the district court should have found an uncompensated taking under the test the Supreme Court developed for land use exactions in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). As set forth below, the Eighth Circuit disagreed with Watson.

Analysis by and Decision of the Eighth Circuit Court of Appeals: The Eighth Circuit stated that the Takings Clause of the Fifth Amendment, made applicable to the States through the Fourteenth Amendment, provides that private property shall not be taken for public use, without just compensation. The government takes property for purposes of the Fifth Amendment when it literally ousts an owner from his property or when its regulation of the property is so onerous that its effect is tantamount to a direct appropriation or ouster. The Eighth Circuit explained that the non-ouster takings are called "regulatory takings," which come in four types. The first type is a regulation which requires an owner to suffer a permanent physical invasion of his or her property. The second type is a regulation that completely deprives an owner of all economically beneficial use of his or her property. The third type is a governmental requirement that, without sufficient justification, requires an owner to dedicate a portion of his property in exchange for a building permit or license. The fourth type is any other regulation which, after considering its economic impact upon the plaintiff and its essential character, is functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain. The Eighth Circuit

noted that Watson requested a review in this case under the first and third types of regulatory takings: physical invasions and land use exactions.

Watson first argued that the district court erred by failing to find that Ordinance 1432 constituted a physical invasion type regulatory taking under *Loretto*. In *Loretto*, an apartment owner challenged a New York law requiring her to allow the installation of cable-television equipment upon her property. Pursuant to this law, a cable-television provider had entered the owner's property and installed a thirty-four foot, one-half inch diameter cable about eighteen inches above the roof of the owner's apartment. The cables were attached to the property with screws and nails that penetrated the building's masonry about every two feet. The Supreme Court concluded that the New York law, which may have achieved an important public benefit and which had only minimal economic impact on the owner, still resulted in a taking of the owner's property because it authorized a permanent physical occupation of property. As applied to Watson's case, the Eighth Circuit agreed with the district court and stated that Ordinance 1432 should not be analyzed under the standards of *Loretto*. The Eighth Circuit noted that Ordinance 1432, by its own terms, does not require Watson to permit the City or any third party to enter the property and install a fence. Consequently, the ordinance does not erode Watson's right to exclude others from the property, which is central to establishing a *Loretto* claim. Watson attempted to avoid this conclusion by arguing that Ordinance 1432 compels him to permit a physical intrusion because he must install a fence in order to continue storing race cars on his property. The Eighth Circuit noted, however, that Watson is not required to continue storing race cars on the property

and, so long as he still may choose whether to build the fence or forgo placing more than one race car outside, he cannot establish the required compliance necessary for a *Loretto* claim.

Watson next argued that the district court erred in failing to find a taking under *Nollan* because, according to Watson, Ordinance 1432 is effectively conditioning the use of the property as a place to store race cars only upon the building of a fence. The Eighth Circuit found this argument meritless. The Eighth Circuit noted that *Nollan* only applies to land use exactions, which occur when a government demands that a landowner dedicate an easement allowing public access to his or her property as a condition of obtaining a permit or some other governmental benefit or license. Land use exactions, like *Loretto* takings, restrict an owner's right to exclude others from their property. The Eighth Circuit found that, in Watson's case, Ordinance 1432 does not require him to dedicate any portion of his property to the City and/or for public use. In addition, the Eighth Circuit found that the ordinance does not materially affect Watson's right to exclude others. For these reasons, the Eighth Circuit agreed with the district court and found that Ordinance 1432 did not amount to a taking under *Nollan*.

Because the Eighth Circuit rejected Watson's arguments on appeal, finding that Ordinance 1432 did not give rise to a *Loretto* claim or a *Nollan* claim, the Eighth Circuit affirmed the judgment of the district court in favor of the City in its entirety.

Case: This case was decided by the United States Court of Appeals for the Eighth Circuit on August 16, 2011. The case was an appeal from the United States District Court for the Southern District of Iowa. The

case citation is *Iowa Assur. Corp. v. City of Indianola*, 650 F.3d 1094 (8th Cir. 2011).

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Arkansas Supreme Court Upholds Circuit Court's Decision Finding that a City of Hot Springs Ordinance Authorizing a Stormwater Utility Fee Did Not Constitute an Illegal Exaction or a Tax Requiring Voter Approval and that the Fee was Fair and Reasonable

Facts Taken From the Opinion: Under section 208 of the Clean Water Act, 33 U.S.C. § 1288, certain public entities, including municipal corporations, are charged with unfunded federal and state mandates promulgated through the Environmental Protection Agency (the "EPA") and the Arkansas Department of Environmental Quality (the "ADEQ"). The Clean Water Act requires municipalities to obtain a National Pollution Discharge Elimination System Permit (a "NPDES Permit") for discharges from municipal storm systems. The Clean Water Act permits states to develop a program for obtaining a NPDES Permit. The EPA promulgated certain regulations that established a comprehensive Stormwater Management Program to manage the quality of stormwater passing through municipal separate stormwater systems ("MS-4"). The City of Hot Springs, Arkansas, (the "City") applied for an NPDES Permit and was issued an MS-4 general permit effective on May 28, 2004. The City created a Stormwater Utility in order to meet the

regulations and mandates from the EPA and the ADEQ. The City initially funded the Stormwater Utility with funds from the City's general fund at an expense of between \$80,000 and \$100,000 per year. The EPA set forth additional mandates that were required to be completed by May 2009. The City determined in 2007 that it lacked sufficient funds in its general-revenue fund to implement the new mandates. To fund the creation and operation of the separate utility system for the Stormwater Utility program, including covering the costs of implementing the additional mandates, the Board of Directors of the City adopted Ordinance No. 5629 on January 8, 2008 (the "Ordinance"). The Ordinance established a Stormwater Utility Fund (the "Fund") and imposed a Stormwater Utility Fee (the "Fee") on municipal utility accounts within the corporate limits of the City. The Ordinance fixed a fee of \$6.00 per month for commercial and industrial accounts and \$3.00 per month for residential accounts.

The City enacted the Ordinance pursuant to Ark. Code Ann. § 14-235-223(a)(1), which confers the power on the city council to establish rates or charges for the use and service of a stormwater utility or other similar structure used by a city to dispose of or treat stormwater. The City provides water, wastewater, and sanitation services for certain municipal utility-account customers. The City also provides water and wastewater-utility systems for customers outside the city limits. Approximately forty percent of the municipal-utility accounts receiving water services from the City are for locations outside the city limits and are not required to pay the Fee. Approximately fifty percent of the municipal utility-account customers receiving wastewater services from the City are for locations outside the city limits. The City does not have a stormwater-utility

system beyond its city limits. Garland County has its own MS-4 Permit for areas outside the city limits. The City did not require residents inside the city limits who use wells exclusively for water and septic tanks for sewerage to pay the Fee, and owners of undeveloped property and stand-alone public parking lots in the downtown area were not charged the Fee.

The stormwater program is designed to manage the quality of stormwater from the City's stormwater-drainage program. Polluted stormwater-runoff deposits into Hot Springs Creek and Stokes Creek, which are the major drainage conveyance creeks for the City's stormwater drainage systems and which deposit into Lake Hamilton. Lake Hamilton is the primary drinking water supply for the City's municipal utility accounts for both inside and outside the city limits. The City intended to protect Lake Hamilton as the City's drinking water supply source and as a major tourist attraction, which generates millions of dollars in revenue for the community.

The City deposits all revenue generated by the Fee into the Fund, to be used exclusively for the operation of the stormwater utility and storm-related equipment, construction, material, supplies, or services, including storm-related disaster, recovery, and emergency preparedness. For the year ending December 31, 2008, costs of the Stormwater Utility service were \$414,698, and total revenues received were \$634,009. For the period ending September 30, 2009, costs of the service were \$206,771, and revenues were \$521,658.

Decision by the Circuit Court: Roberta Morningstar and Doyle Shirley, on behalf of themselves and all taxpayers similarly situated (collectively "Morningstar") filed a lawsuit in circuit court against Mike Bush,

in his official capacity as mayor of the City, and several other individuals, in their official capacities as members of the City's Board of Directors (collectively "Bush"). Morningstar filed the lawsuit to challenge the legality of the Ordinance. Specifically, Morningstar argued three things. First, Morningstar argued that the Fee authorized by the Ordinance constituted an illegal exaction because the City allegedly failed to comply with Arkansas law when enacting the Ordinance. Second, Morningstar argued that the Fee authorized by the Ordinance constituted a tax, which required voter approval. Finally, Morningstar argued that the Fee was not fair and reasonable under Arkansas law. During the bench trial, the City's expert witness testified that the base rate the City charged was consistent with the costs of services model that he prepared for the City; that it is similar to other models he prepared for other clients; that the Fee is lower than that in forty-seven of the seventy cities surveyed in a 2007 Southeastern Stormwater Utility survey; that the City operated the Stormwater Utility as a separate utility; that the Fee was fair, reasonable, and bore a reasonable relationship to the benefits conferred; and that the Fee must be used exclusively to fund the Stormwater Utility. After the bench trial, the circuit court upheld the Ordinance finding that the Fee authorized by the Ordinance was not an illegal exaction, was not a tax requiring voter approval, and was fair and reasonable under Arkansas law.

Appeal to and Decision by the Arkansas Supreme Court: Morningstar appealed the circuit court's decision upholding the Ordinance to the Arkansas Supreme Court and argued that (1) the City did not properly enact the Ordinance and, therefore, the Fee authorized by the Ordinance constitutes an illegal exaction; (2) the Fee constitutes a tax requiring voter approval; and (3) the Fee is

not fair or reasonable under Arkansas law. The Arkansas Supreme Court noted that the standard of review on an appeal from a bench trial is whether the Judge's findings were clearly erroneous. A finding is clearly erroneous when a reviewing court looks at all of the evidence and is left with a firm conviction that a mistake has been committed.

The Arkansas Supreme Court noted that an illegal exaction is any exaction that is either not authorized by law or is contrary to law. There are two types of illegal exaction cases: (1) "public funds" cases, where the plaintiff contends that public funds generated from tax dollars are being misapplied or illegally spent and (2) "illegal tax" cases, where the plaintiff asserts that the tax itself is illegal. Morningstar argued that this is an illegal tax case.

Morningstar first argued that the Fee is an illegal exaction because the City did not comply with Ark. Code Ann. § 14-235-223(a)(1). This statute states that the City has the power to establish and maintain just and equitable rates or charges for the services rendered, "to be paid by each user of the sewerage system of the municipality." Morningstar argues that the Fee is an illegal exaction because approximately forty percent of the sewage customers of the City are not required to pay the Fee. Morningstar asserted that the phrase "to be paid by each user," contained in Ark. Code Ann. § 14-235-223(a)(1), means any beneficiary of the Stormwater Utility system must pay a fee. The Arkansas Supreme Court disagreed stating that the statute says each "user" must pay the fee, not that each "beneficiary" must pay the fee. The City argued that its MS-4 Permit is limited to the City, and fees may not be imposed outside the City's corporate boundaries. The circuit court found that imposing the Fee only upon those customers

over which the City had jurisdiction to operate the Stormwater Utility, even if some customers outside the city limits may derive some benefit from the service, did not constitute an illegal exaction. The Arkansas Supreme Court stated that, under the facts presented, the circuit court's ruling was not clearly erroneous.

Morningstar next argued that the Fee constituted an illegal tax because it was not approved by a vote of the taxpayers. The Arkansas Supreme Court discussed the difference between a "fee" and a "tax." As explained by the Arkansas Supreme Court, government imposes a tax for general revenue purposes, but a fee is imposed in the government's exercise of its police powers. While a city can assess a fee for providing a service without obtaining public approval, a tax cannot be levied unless it has received approval by the taxpayers. To determine whether an exaction is a "fee" or a "tax," the court looks at the true nature of the exaction rather than its name. A municipality's "taxing power" is usually exercised to provide funding for public services at large, whereas its "police power" is usually exercised to cover the cost of administering a regulatory scheme or providing a service. The Arkansas Supreme Court noted that, in *Holman v. City of Dierks*, 217 Ark. 677 (Ark. 1950), it determined that an annual sanitation charge of \$4.00 per business and residence to pay for fogging the city three times a year with an insecticide was a fee for services to be rendered and not a tax. In another case, *City of North Little Rock v. Graham*, 278 Ark. 547 (Ark. 1983), the Arkansas Supreme Court decided that a "public safety fee" added to the water bill of each residence and business for the purpose of increasing the salaries of the city's policemen and firemen was a tax because it was for the cost of maintaining a traditional governmental function and service already

in effect and not for a special service. Morningstar argued that the Fee authorized by the Ordinance was really a means for paying for services already in existence, like those at issue in the *Graham* case. The Arkansas Supreme Court disagreed stating that the services required in this case, relating to the Stormwater Utility, arose only after the mandates stemming from the Clean Water Act and the NPDES Permit. The circuit court held that the exaction created by the Ordinance in this case does not constitute a tax but, instead, constitutes a fee for which taxpayer approval is not required. The Arkansas Supreme Court stated that, under the facts presented, the circuit court's ruling was not clearly erroneous.

Morningstar's final argument was that the Fee was not fair and reasonable under Arkansas law. The Arkansas Supreme Court noted that the Fee in this case must be fair and reasonable and bear a reasonable relationship to the benefits conferred on those receiving the services. Morningstar argued that, because the revenue generated by the Fee exceeded the operating costs of the Fund, the Fee itself was not fair or reasonable. The Arkansas Supreme Court rejected this argument and stated that a fee can still be fair and reasonable even if it results in a surplus in a utility fund. The City's expert testified that the Fee was reasonable in light of the fees other cities in the region charge for similar stormwater services. In addition, the City properly segregated the Fund for use only for the purpose for which it was created. The Arkansas Supreme Court stated that, while the scope of the services may have exceeded the requirements of the mandate, that fact alone is not determinative, as long as the scope of the services is still within the purposes of the authorizing legislation. The circuit court held that the Fee was fair and reasonable under Arkansas law. The

Arkansas Supreme Court stated that, under the facts presented, the circuit court's ruling was not clearly erroneous.

The Arkansas Supreme Court concluded by stating that, just like any other legislative enactment, the Ordinance in this case is presumed to be constitutional under Arkansas law, and Morningstar did not meet its burden in overcoming the presumption of the constitutionality of the Ordinance. The Arkansas Supreme Court upheld the decision of the circuit court finding that the Fee was not an illegal exaction, was not a tax, and was reasonable and fair under Arkansas law.

Case: This case was decided by the Supreme Court of Arkansas on September 15, 2011, and was an appeal from the Garland County Circuit Court, Honorable John Lineberger, Judge. The case cite is *Morningstar v. Bush*, 2011 Ark. 350.

Jonathan D. Nelson
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Arkansas Court of Appeals Upholds Granting of Summary Judgment for the City of North Little Rock in Case Involving a Former Police Officer

Facts Taken From the Opinion: Tim Green (appellant) began working as a police officer for North Little Rock in 1997. During his tenure as a police officer, he was married to Carmen Green, who was also a North Little Rock police officer. On January 2, 2007, Carmen Green approached North

Little Rock Police Lieutenant Brian Scott and conveyed an allegation that Tim Green was using steroids. Scott relayed the allegations to Captain Donnie Bridges that same day, informing Bridges in a memorandum that Carmen Green had advised Scott that she had discovered a large bag of syringes in her home; in addition, Ms. Green said that she had researched her bank statements and discovered payments for suspected steroids to a company from overseas.

Upon receiving this information, Bridges notified North Little Rock Police Chief Danny Bradley of the allegations. Bridges and Bradley contacted Captain Mike Davis, Tim Green's supervisor, and discussed Carmen Green's allegations. At that meeting, Davis informed Bradley of two recent hostile encounters between Green and two other North Little Rock Police Department officers. Bradley also recalled seeing Green recently and noticing that he had "become swollen and bloated," according to Bridges's affidavit. Bradley concluded that, while Carmen Green's allegations alone might not warrant the ordering of a drug test, her allegations, combined with the two hostile encounters and Bradley's personal observations, amounted to reasonable suspicion that Green was using steroids.

At that point, Bradley ordered Green to submit to a drug test pursuant to the Police Department's "Alcohol and Drug Policy," which provides that members of the police force "shall be required to submit to chemical testing . . . [w]hen the City has reasonable suspicion that a member has violated [the Police Department's] prohibitions regarding use of alcohol or drugs." Bridges informed Green that he was required to take the "reasonable suspicion" drug test, and on January 9, 2007,

Lieutenant Jim Scott and Sergeant Janice Jensen (both of whom were officers with the department's Professional Standards division) transported Green to the testing facility, where Scott read Green the "reasonable suspicion" paperwork. Green signed the form, was photographed, and provided a urine sample. In addition, Green was placed on administrative leave by Bradley.

The sample was analyzed by Dr. Richard Doncer, who contacted Scott and informed him that Green had tested positive for high levels of the anabolic steroid Nandrolone. Dr. Doncer's official test results, however, contained the following conclusion:

After review of the data on Officer Tim Green's drug test, I have made the final interpretation as a negative test. He did have a legal use administered by a physician in the past. Due to the uncertainty and poor data available regarding the metabolism and detectability of the drug (Nandrolone), I feel that this is the correct decision.

Perhaps, you may want to advise the donor to refrain from future use, even if prescribed legally. You may also want to randomly drug test him in the coming months to assure his levels are declining.

On February 1, 2007, Bradley wrote a letter to Green advising that Green was being released from administrative leave and returned to his regularly scheduled duties in the patrol division. On February 5, 2007, Green completed a "work environment survey" in which he claimed to be aware of "behaviors in the workplace" that violated the Police Department's discrimination and harassment policy. Green was interviewed

by Lieutenant Scott and Sergeant Jensen about his claims on February 14, 2007. During that interview, Green complained about “what was done to [him] on January the 9th being placed on administrative leave due to false allegations by members of this department.” Green also asserted that he was treated in a “threatening and intimidated [sic] manner” when he was called and when he tried to explain that he had a prescription for the steroids. Green further advised Scott and Jensen that he did not know the nature of the reasonable suspicion underlying his drug test, and he complained that no one would tell him.

On March 19, 2007, Bradley sent Green a letter in which Bradley related that “the complaint that you voice in your statement does not fall under the purview of [the Department’s discrimination and harassment policy] or any other department policies, rules, regulations, standards of conduct dealing with illegal discrimination or harassment; therefore, no further investigation of your complaint will be conducted.” Bradley did, however, schedule a meeting with Green to discuss the complaint.

Bradley and Davis met with Green on May 16, 2007, after which Bradley wrote an internal memorandum to memorialize the discussion that was had. Bradley wrote that Green felt he was subjected to the drug testing and was being treated differently because of his pending divorce from Carmen Green. Bradley advised Green, “that certainly was not a motivation on my part, nor did I have any knowledge of it being a motivation of any other supervisor in this department.”

Green apparently made no further complaints about the situation, and he received commendations from the Police

Department on July 30, 2007 and September 11, 2007, as well as a letter of recognition on November 9, 2007. Green received a pay raise in July 2007.

Green sustained an on-the-job injury to his knee on December 10, 2007, while responding to a police service call. He sought workers’ compensation benefits, and on December 11, 2007, his physician, Dr. Vander Schilden, recommended that Green be taken off work until further notice. Green received workers’ compensation benefits until February 27, 2008. In addition, he was given “injured-on-duty days,” meaning he was entitled to full pay while recovering from his injury, from December 11, 2007, the day after his injury, until January 27, 2008.

Green submitted the initial paperwork for taking leave pursuant to the Family and Medical Leave Act (FMLA) to Bradley on December 10, 2007. Green never completed the paperwork, however. On December 12, 2007, Green filed an application for duty-disability retirement with the Arkansas Local Police and Fire Retirement System (LOPFI). On December 26, 2007, a representative from LOPFI contacted Bradley to inform him that Green had applied for duty-disability retirement and to seek a written statement certifying whether the disability was duty-related. Bradley advised LOPFI on January 3, 2008, that Green injured his knee while responding to a service call and that the Department did not oppose Green’s application for disability retirement.

On January 31, 2008, Dr. Vander Schilden released Green to return to a “desk-type occupation until a determination is made by the medical board as to the status of his medical retirement.” In a separate note dated that same day, Dr. Vander Schilden advised

that Green was capable of returning to a desk-type job on January 28, 2007, but the doctor did not want Green returning to work in any capacity while he was taking pain medication. Dr. Vander Schilden again stated on February 4, 2008, that Green could return to work in a “desk-type capacity.”

Based on Dr. Vander Schilden’s representations, Bradley assumed that Green would seek light-duty work when he returned to duty, and Bradley thus began filling out the appropriate paperwork that would allow Green to do so. The “Light/Modified Duty Agreement” provided that Green could perform light-duty work in the service division of the Police Department from February 4, 2008, until February 18, 2008.

On February 8, 2008, however, Green sent an interdepartmental communication to Bradley informing the chief that Green intended to resign, effective as of February 22, 2008. Green’s supervisor, Captain Davis, received this letter on February 14, 2008. On that same date, Bradley approved Green for light-duty work. When Bradley received Green’s resignation letter, however, he rescinded his decision to allow Green to work a light-duty position. Bradley explained in an affidavit as follows:

Upon reflection of . . . Green’s medical retirement, which I believed meant that he was claiming a disability and could not return to work; his resignation, which also meant he would not be returning to work; and the “light-duty” policy, which limits “light duty” positions to those who are going to return to work, I decided to rescind my decision concerning . . . Green’s “light duty” position.

In a deposition, Bradley stated, “I mean, he’s leaving the department, so there’s no point in continuing his light duty.” Bradley denied, however, that he would ever have denied Green light duty in order to force a retirement.

Upon receiving Bradley’s rescission of the light-duty agreement, Green submitted a revised resignation letter in which he expressed his belief that he was “being discriminated against and treated unfairly.” Accordingly, Green announced his intention to make his resignation effective February 19, 2008.

Green filed a complaint against the City on December 15, 2008, alleging that, on January 9, 2007, the City caused Green to be arrested without probable cause, drug tested, and placed on administrative leave. Green also alleged that, by virtue of the drug test, he was deprived of his right to be free from unreasonable search and seizure pursuant to the Fourth Amendment of the United States Constitution and also pursuant to the Arkansas Constitution. Moreover, Green alleged that the deprivation of his state and federal constitutional rights constituted a violation of the Arkansas Civil Rights Act. In the second count of his complaint, Green alleged that the City denied him the benefit of his rights pursuant to the FMLA and that the City’s actions constituted “interference with [Green’s] FMLA rights as well as retaliation.”

The City answered and filed a motion for summary judgment. In its motion, the City asserted that Green failed to establish that a violation of his Fourth Amendment rights or his FMLA rights occurred, and that, even assuming any violations had occurred, the City was entitled to qualified immunity and, accordingly, summary judgment. Regarding Green’s Fourth Amendment claims, the City

asserted that ordered submission to a drug test was incidental to Green's employment as a police officer and thus did not violate the Fourth Amendment; moreover, the City contended that Bradley had reasonable suspicion to order the drug test. As for Green's FMLA claims, the City argued that there is no entitlement to "light-duty" work under the FMLA, and accordingly, Green had failed to state a cause of action for a violation of that Act.

Green responded to the City's motion for summary judgment by claiming that the City had "raised strawman arguments on [Green's] constitutional claims." He reiterated his claims from his complaint that he was arrested and subjected to an unconstitutional search and additionally argued that he was denied his rights pursuant to *Garrity v. New Jersey*, 385 U.S. 493 (1967). In addition, Green argued that with respect to his FMLA claim, he was "denied light duty, when others were given this benefit" and was "forced to retire before his FMLA leave was exhausted." Green further asserted that the City was not entitled to any kind of qualified immunity.

After a hearing, the circuit court entered an order on March 4, 2011, granting the City's motion for summary judgment, finding that there existed no genuine issue of material fact, that the City was entitled to judgment as a matter of law, and that Green had failed to meet proof with proof. Green filed a timely notice of appeal on March 14, 2011 and an appeal was taken to the Arkansas Court of Appeals.

Decision by Arkansas Court of Appeals: In Green's first point of appeal, he argued that he was unconstitutionally arrested and searched when he was required to take a drug test on January 9, 2007. He began from the premise that there was no probable cause

for "arresting" and obtaining a urine sample from him, and thus, according to Green, the "nonconsensual, warrantless, and suspicionless search" was unauthorized and unconstitutional and violated his Fourth Amendment rights. The Court of Appeals disagreed.

The Court noted that it is true that a urine test conducted by a state actor is a search within the meaning of the Fourth Amendment. *Ferguson v. City of Charleston*, 532 U.S. 67, 76 (2001); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 617 (1989).

The Court went on to look to see if the drug test was reasonable. In so doing, the Court balanced the State's interest to grant Green's privacy expectations. The United States Supreme Court has found that the government has a compelling interest in ensuring the safety and fitness for duty of government employees engaged in activities that implicate public safety.

Here, the "purpose statement" of the North Little Rock Police Department's Alcohol and Drug Policy makes clear that the Police Department "has a vital interest in providing for the safety and well being of all members and the public as well as maintaining efficiency and productivity in all of its operations." The policy further includes police officers in its category of "safety and security-sensitive positions," which are described as those

in which a momentary lapse of attention may result in grave and immediate danger to the public or one where the position requires enforcement of the laws pertaining to the use of illegal substances. Officers who themselves use such substances may be unsympathetic to the

enforcement of the law and are, therefore, potentially subject to blackmail and bribery.

Thus, the Court concluded that the City's interest in maintaining an efficient police department and providing for the public safety falls squarely in the category of "'special needs' beyond normal law enforcement that may justify departures from the usual warrant and probable cause requirements." *Skinner*, 489 U.S. at 620.

The Court held that in the instant case, officers with the North Little Rock Police Department carry firearms and are frequently involved in apprehending individuals who are dealing in illegal drugs. Thus, it is not unreasonable for the City to require officers to submit to drug testing in certain circumstances in order to determine fitness of those officers to complete their duties. As such, the Court concluded that the drug test meets the "reasonableness requirement of the Fourth Amendment." As the *Von Raab* Court noted, "neither a warrant nor probable cause, nor, indeed, any measure of individualized suspicion, is an indispensable component of reasonableness in every circumstance." *Nat'l Treasury Employees' Union v. Von Raab*, 489 U.S. 656 (1989)

The Court of Appeals also noted that, in the present case, not only did the test meet the general reasonableness standard, but the City actually had some "measure of individualized suspicion." Chief Bradley determined that he had reasonable suspicion to order a drug test of Green based not solely on Green's ex-wife's allegation about the bag of syringes and the bank statements showing purchases of steroids, but also on his own personal observation of Green's physical appearance and recent aggressiveness, traits which Bradley

associated with the use of anabolic steroids. The Police Department's drug policy provides that an officer may be required to submit to chemical testing "[w]hen the City has reasonable suspicion that a member has violated any of the [policy's] prohibitions regarding use of alcohol or drugs." Under the policy, "reasonable suspicion" must be "based on specific, contemporaneous, articulable observations concerning the appearance, behavior, speech or body odors of the member." The Court held that clearly, Bradley's observations, coupled with Carmen Green's allegations, provided the Police Department with reasonable suspicion to order Green to submit to a drug test.

The Court further held that despite Green's contention that he was "arrested," he pointed to no evidence other than his own personal belief that the drug test was not job-related and reasonable under the circumstances. Moreover, although he complains that he was "seized" when he was not allowed to drive his own vehicle to the testing facility, the Supreme Court has held that "the employer's antecedent interference with the employee's freedom of movement" need not be considered an independent Fourth Amendment seizure, *Skinner*, 489 U.S. at 618, and "[t]o the extent transportation and like restrictions are necessary to procure the requisite . . . urine samples for testing, this interference alone is minimal given the employment context in which it takes place." *Id.* at 624.

Green also argued that the drug-testing order violated his rights pursuant to *Garrity v. New Jersey*, 385 U.S. 493 (1967). *Garrity* holds that "the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained [from a police officer]

under threat of removal from office.” *Garrity*, 385 U.S. at 500. The Fifth and Fourteenth Amendment right protected in *Garrity*, however, is the privilege to be free from being compelled to communicate or otherwise provide testimony. Giving a blood or urine sample for drug testing does not violate that privilege. *Schmerber v. California*, 384 U.S. 757, 764 (1966); *see also Oman v. State*, 737 N.E.2d 1131, 1144 (Ind. 2000) (holding “toxicological samples are not evidence of a testimonial nature”). *Garrity* simply has no application in this situation, and Green’s arguments to the contrary are unavailing. In short, we conclude that the trial court correctly granted the City’s motion for summary judgment on this issue.

In Green’s second argument on appeal, he maintained that he “established a clear violation of the FMLA,” and as such, the City and the individually named defendants were not entitled to qualified immunity. Green appeared to raise two basic claims related to the FMLA: that he suffered an adverse job action by being constructively discharged, and that the City interfered with his rights under the FMLA by treating him differently than other employees who exercised their FMLA rights.

As for the “adverse job action,” Green argued that he was told to “resign or be terminated” and was thus constructively discharged. A constructive discharge exists when an employer intentionally renders an employee’s working conditions intolerable and thus forces him to resign. *Sterling Drug, Inc. v. Oxford*, 294 Ark. 239, 743 S.W.2d 380 (1988). It exists only when a reasonable person would have resigned under the same or similar circumstances. *Id.* The Court held that Green offered no compelling argument that he was constructively discharged, nor did he relate the alleged “resign or be

terminated” communication to his FMLA claim.

Green’s second contention was that the City interfered with his FMLA rights because he should have been allowed to work light duty. He posits that “individuals who have not taken FMLA leave have been allowed to work light duty for years,” and he cites 29 C.F.R. § 825.220(c) in support of his argument that the FMLA’s prohibition against “interference” prohibits an employer from discriminating or retaliating against an employee for having exercised or attempted to exercise FMLA rights.

The Court held that under the FMLA, there is no entitlement to light-duty work. *See generally* 29 U.S.C. § 2612. The Court held that if there is no entitlement to light-duty work under the FMLA, Green’s rights under the Act could not have been violated by any alleged refusal to provide him with such work.

Second, the Court held that the chronology of this case belies Green’s arguments. Green was injured on December 10, 2007, and he applied for duty-disability retirement on December 12, 2007. When Green’s treating physician released him to work effective January 28, 2008, Captain Bridges began filling out the necessary paperwork to allow Green to work a light-duty position on February 4, 2008. Green then submitted his letter of resignation to Bradley on February 8, 2008, stating that he would like his resignation to be effective on February 22, 2008. Although Bradley initially approved Green’s light-duty paperwork, when the chief received Green’s resignation letter, Bradley rescinded that decision on February 15, 2008, reflecting that if Green was going to retire, he would not be eligible for light-duty work, which was only available for employees who intended to return to work.

The Court held it was apparent from this timeline that Green decided to retire on February 8, 2008, and the decision that he would not be approved for light-duty work was not made until February 15, 2008. As such, the Court cannot agree with Green that the rescinding of the light-duty approval was the event that triggered Green's decision to retire. That is, as Green had decided to resign *prior* to the decision to decline his request for light-duty work, the denial of light duty could not have been the cause of Green's resignation. Green simply was not "forced" to resign as a result of anything having to do with the exercise of his FMLA rights; in fact, the record demonstrated that he was not "forced" to resign at all.

As there were no violations of Green's FMLA rights, the Court found it unnecessary to determine whether the City was entitled to qualified immunity. A motion for summary judgment based on qualified immunity is precluded only when the plaintiff has asserted a constitutional violation, has demonstrated the constitutional right is clearly established, and has raised a genuine issue of fact as to whether the official would have known that the conduct violated that clearly established right. *Smith v. Brt*, 363 Ark. 126, 211 S.W.3d 485 (2005); *Baldrige v. Cordes*, 350 Ark. 114, 85 S.W.3d 511 (2002). Here, the Court held there was no conduct on the part of the City or its employees that violated any of Green's constitutional rights; accordingly, the Arkansas Court of Appeals held that the circuit court correctly granted summary judgment on this issue and affirmed the judgment.

Case: This case was decided by the Arkansas Court of Appeals on January 4, 2012 and was an appeal from the Pulaski County Circuit Court, Third Division,

Honorable Jay Moody, Jr., Judge. The case cite is *Green v. City of North Little Rock*, 2012 Ark. App. 21.

Jeff Harper
City Attorney



Arkansas Court of Appeals Upholds Jury's Decision to Award Compensation to a Tenant in an Eminent-Domain Case but Reverses the Circuit Court's Decision Granting Attorney's Fees to the Landowners

Facts Taken From the Opinion: Delta Regional Airport Authority ("Delta") is a public corporation formed for the purpose of constructing and operating a regional airport for the general public in St. Francis County and Cross County, Arkansas. Delta sought to acquire 209 acres in St. Francis County (the "Property") from Grover Gunn, III, Michael Scott Gunn, and Edgar Lindsey Gunn (the "Gunns"). When negotiations failed, Delta filed an eminent-domain action on January 21, 2009, seeking to acquire fee title in the Property from the Gunns and to acquire a leasehold interest held by J.T. Jarrett and Sons ("Jarrett") on the Property. At the time of the eminent-domain suit, there were seven years remaining on Jarrett's lease. Delta deposited \$505,000 with the clerk of the circuit court, and the court entered an order allowing Delta to take possession of the Property. The Gunns filed a counterclaim against Delta, alleging breach of a purchase contract. Jarrett filed a counterclaim against Delta seeking

damages, or, in the alternative, the right to keep farming for the remainder of the lease term. Delta filed a motion seeking to prohibit Jarrett from introducing evidence of its anticipated lost profits under the lease. The circuit court denied the motion to the extent it sought to prohibit evidence as to what Jarrett paid in rent. In so ruling, the circuit court said that it realized that proof of what Jarrett earned from the rental of the property was perilously close to being evidence of lost profits. The circuit court also noted that the rent paid does not establish the fair market value.

Decision by the Circuit Court: A jury decided this case, and the court entered judgment on the jury's verdict on July 28, 2010. The jury decided that Delta did not breach any contract with the Gunns. The jury also decided that Delta must pay the Gunns compensation in the amount of \$580,000 for the taking of the Property. The jury then decided that Delta must pay Jarrett compensation in the amount of \$150,000 for the taking of the leasehold interest. On August 2, 2010, the Gunns filed a motion asking the circuit court to order Delta to pay the Gunns for their attorney's fees. The Gunns argued they were entitled to attorney's fees under Ark. Code Ann. § 18-15-605(b) because the jury awarded total compensation that exceeded Delta's initial deposit by more than twenty percent. Delta argued there was no statute that authorized an award of fees in this case and that Ark. Code Ann. § 18-15-605(b) only applied to municipal corporations and corporations that supply water. On September 20, 2010, Jarrett filed a separate motion for attorney's fees. On December 22, 2010, the circuit court awarded the Gunns attorney's fees in the amount of \$43,334.38 and costs in the amount of \$2,322.15. The circuit court's order did not cite any authority for the award but stated that the court considered the

motion and the parties' briefs addressing the motion. The circuit court denied Jarrett's motion for attorney's fees and costs, stating there was no authority for such an award.

Appeal to and Decision by the Arkansas Court of Appeals: Delta filed an appeal from both the judgment in favor of Jarrett, as the leaseholder, and the judgment for attorney's fees and costs in favor of the Gunns, the landowners.

With respect to the judgment entered in favor of Jarrett, Delta argued two points: (1) that the circuit court erred in denying its motion for a directed verdict and (2) Jarrett's proof was improper proof of anticipated lost profits. The Court of Appeals noted that, when evaluating loss of value to a leasehold interest, the correct measure of damages is the amount by which the fair market value of the lease exceeds the agreed-upon rent. The Court of Appeals also stated that the rental value does not mean the probable profits that might accrue to a tenant, but it instead means the value as ascertained by proof of what the premises would rent for or by evidence of other facts from which the fair rental value may be determined. There is no difference in principle when the rent agreed upon was part of the crop instead of money. However, the Court of Appeals also noted that there is an exception to the rule against evidence of lost profits in cases of agricultural property. The reason for the distinction is that, in the case of agricultural land, the income in question is often derived from the use of the property itself. The Court of Appeals noted that it was not error for the circuit court to admit evidence of the value of Jarrett's crops that included profit because those profits were derived from the use of the land itself and not merely from a business conducted on the land. The Court of Appeals found that there was substantial evidence to support the jury's verdict with

respect to the award of \$150,000 to Jarrett for the leasehold interest. The Court of Appeals noted that Jarrett's accountant testified that Jarrett would lose \$202,669 by not having the leasehold interest for the remaining seven years. One of the principals in the Jarrett partnership testified that he believed that Jarrett would lose closer to \$250,000 by not having the leasehold interest for the remaining seven years. The jury also heard other evidence describing the productivity of this particular Property and heard testimony that Delta's appraiser had underestimated the amount of soybeans the Property could yield. Based on all of this evidence, the Court of Appeals concluded that the jury could reasonably infer that the fair market value of the remaining life of Jarrett's lease exceeded the amount of rent remaining under the lease. The Court of Appeals, therefore, concluded that the circuit court did not err in denying Delta's motion for a directed verdict.

With respect to the award of attorney's fees and costs to the Gunns, Delta argued that the circuit court erred in awarding fees and costs to the Gunns because there was no statutory authority for such an award. The Gunns argued that fees and costs are permitted by Ark. Code Ann. § 18-15-605(b). The Court of Appeals noted that, in Arkansas, an award of attorney's fees is generally not allowed, unless an award of fees is specifically permitted by statute. The Court of Appeals held that the circuit court erred in awarding the Gunns their attorney's fees and costs because Ark. Code Ann. § 18-15-605(b) did not apply in this case. The Court of Appeals noted that, when read in conjunction with other statutes in the same subchapter, it is clear that Ark. Code Ann. § 18-15-605(b) applies only to municipal corporations and other corporations that supply water to cities, towns, or rural areas. As noted by the Court of Appeals, the Arkansas Supreme

Court, in *Lois Marie Combs Revocable Trust v. City of Russellville*, 2011 Ark. 186, recently clarified that, in order for Ark. Code Ann. § 18-15-605(b) to apply, the condemning authority must have based its underlying condemnation action upon the use of the power of eminent domain to expand its water-supply facilities. With respect to the Property, the Court of Appeals noted that Delta was not seeking to expand its water-supply facilities but was, instead, seeking to construct an airport. The Court of Appeals, therefore, reversed the circuit court's award of attorney's fees and costs to the Gunns, finding there is no statute that authorizes such an award.

Case: This case was decided by the Arkansas Court of Appeals on November 16, 2011, and was an appeal from the St. Francis County Circuit Court, Honorable Olly Neal, Judge. The case cite is *Delta Regional Airport Authority v. Gunn*, 2011 Ark. App. 701.

Jonathan D. Nelson
Deputy City Attorney



**Arkansas Court of Appeals
Reverses Jury Verdict Against
City of Bryant and Holds that
Director of Public Works did not
Have Authority to Enter into
Contract**

Facts Taken From the Opinion: Edward and Quinn Collins (appellees) filed a complaint against the City of Bryant and Richard Penn, Director of Public Works, on July 10, 2009. The Collinses sought relief for the City's failure to comply with the

terms and conditions of an agreement between the parties for the location of a storm drainage easement upon the Collinses' property. In 2008, the City undertook emergency activities after extensive flooding in Bryant to alleviate future flooding. As part of these activities, the City excavated a ditch on the Collinses' property. The Collinses alleged that they signed and delivered a "storm drainage easement" submitted to them by the City on March 27, 2009, in preparation for the construction of a concrete drain to be installed in the ditch. The Collinses alleged that the City had failed to proceed further in constructing a permanent storm drain in the ditch, covering the drain, and restoring the property in a neat and presentable condition as soon as reasonably practicable. They alleged that the ditch was eroding and constituted a nuisance, an eyesore, and a health and safety hazard. They requested an injunction to require the City to complete the work, damages for the loss of use of their property and breach of the contract, and attorney's fees and costs.

A jury trial was held on November 29 and 30, 2010. In addition to being the director of community development and public works, Richard Penn served as the city engineer. As city engineer, Penn was responsible for reviewing subdivision plats and proposals by developers with regard to the structures that would be built, such as drainage for the streets, water, and sewer. He was also responsible for obtaining easements and other documents for drainage projects. In 2006, the City hired FTN & Associates to study its storm water and flooding problems. The appellees' property was identified as an area of concern in FTN's report, released in 2007, regarding the potential for flooding due to rainfall. The report stated that this could be improved with measures such as

widening ditches and making existing culverts larger.

On April 3, 2008, notable storms caused flooding to 47 homes in Bryant, including the appellees' home. More storms in April and July caused flooding in the city. In April 2008, the city council convened and heard public requests to provide immediate help with the flooding issues. The council decided that this was an emergency situation and empowered Fire Chief Randy Cox "to take actions as necessary until there [was] a permanent fix." Penn assisted Cox in this emergency situation, called Operation Flood Relief.

After flooding issues with a July storm, Fire Chief Cox testified that it was explained to him that the current piping on Augusta Cove, the appellees' street, would need to be enlarged to increase its capacity. Cox asked Penn if a ditch beside the existing pipe on the appellees' property would provide some immediate relief. Cox testified that a representative of FTN agreed that a ditch would provide some relief. The ditch was dug toward the end of July 2008. Soon after the ditch was dug, Cox contacted Penn to request a chain-link fence be erected around the ditch for safety purposes.

Edward Collins testified that after the July storms, Cox and Penn talked to him about having the ditch dug, and Cox explained that there were plans to bring in box culverts around September or October 2008. Collins testified that he and his wife agreed to the ditch based on the information that was provided about installing culverts and the fact that the ditch would be a temporary situation. Collins was not asked to sign any documents at the time the ditch was dug.

The City already had a permanent easement for the existing pipe on the appellees'

property, but the ditch was partially outside of this easement. After Cox's appointment as incident commander expired around September 2008, the responsibility of organizing and supervising the projects fell back on Penn. Penn testified that the ditch was never intended to become a permanent fixture. Instead, the ditch was intended to take care of the flooding problem until the permanent pipe suggested by FTN was installed, after which it would be covered over with soil and sodded on top.

In late 2008, Penn recommended to the city council that they authorize FTN to do detailed drawings of plans and get bids for the work for the storm-drainage-system modifications on Augusta Cove. The city council authorized FTN to proceed, and FTN delivered a task order describing what they proposed to do. The council accepted the task order and requested that FTN prepare the design drawings, specifications, bid documents, and easements. Penn testified that the council's act of authorizing the design work to be done by FTN did not constitute acceptance of the project. At this point, the city council had only authorized work on the appellees' property as an emergency action taken by Cox as incident commander; they had not authorized any design work to be constructed.

The council approved advertisement of the project, and bids were received. Penn testified that since an easement would have to be executed prior to starting any work after the council made the final approval of the project, he tried to expedite things by taking the easement prepared by FTN to the property owners. Penn took the easement to the appellees on March 27, 2009, and they signed it. He told the appellees that if they got it signed then, they may be able to get a sooner start date for the contractor if it was approved.

Collins, who was on the city council beginning in January 2009, testified that when Penn brought him the easement, he had never seen it before and it had never been discussed at a council meeting. He testified that he did not know whether the project had been funded when he signed the easement, and that as far as he knew, the city had not authorized Penn to acquire part of his property. Collins testified that when he signed the easement, Penn told him that the time frame for the work would be four to six weeks.

After acquiring the easement, Penn placed it in a file along with information regarding the low bidder and drawings to be presented to the council for approval at the April 2009 meeting. Collins testified that it was his understanding that Penn would present everything to the council for the "last bit of approval." At this meeting, the council discussed the project, including where it was located, who benefited, the priority, and the cost; however, the council did not take any action to accept the low bid. Collins testified that a council member told him to fix his property himself and the City might reimburse him someday. Collins acknowledged that the council never approved the project after he signed the easement.

Collins testified that since the ditch had been dug, some water had reached the corner of his garage, but it had not flooded. He testified that the cost to repair the damage to his property would be roughly \$106,000, which was the cost of the project submitted to the city council. Neighbors of the appellees testified about the hazards created by the ditch, including exposed gas and electric lines, increased mosquitoes and snakes, and an overgrowth of weeds. At some point, the City had attempted to secure the fence around the ditch because it was

collapsing. Penn testified that the City had not done any additional work or disturbed the property since he took the easement to the appellees.

The City moved for directed verdict, arguing that there was no evidence that Penn and Cox had the authority to obligate the City to place culverts on the appellees' property and obtain the easement. The City also argued that although the easement required that any disturbed property be restored as soon as reasonably practicable, the City had not disturbed the property since the easement was signed and there was insufficient evidence of damages. The court denied the motion. The motion was renewed after the close of all of the evidence, and it was denied again.

The jury returned a verdict in favor of the Collinses and assessed their damages against the City of Bryant in the amount of \$70,000. The court entered the judgment against the City on December 17, 2010. The City of Bryant and Richard Penn (appellants) filed a notice of appeal on January 14, 2011.

Argument and Decision by the Arkansas Court of Appeals: The City argued that there was no evidence that Penn had the authority to bind the City to a contract with the appellees or that the City ratified any unauthorized agreement with the appellees.

The City argued that the requirements necessary for a city to enter into a contract regarding the purchase of real estate are specifically set out in Arkansas Code Annotated section 14-54-302(a)(2) and (c) (Supp. 2011):

(a)(2) Municipal corporations are empowered and authorized to buy any real estate or personal property.

....

(c) The execution of all contracts and conveyances and lease contracts shall be performed by the mayor and city clerk or recorder, when authorized by a resolution in writing and approved by a majority vote of the city council present and participating.

The City argued that there was no evidence that these requirements were met; thus, any alleged contract was void due to illegality. The City cites *Dotson v. City of Lowell*, 375 Ark. 89, 289 S.W.3d 55 (2008), where the alleged contract was held to be illegal because it was never sanctioned by resolution of the city council, as required by the statute. The City cited Penn's testimony that he brought the easement to the appellees before the city council approved the project and Collins's testimony that the council never authorized Penn to acquire any part of the appellees' property. The City argued that although Penn was authorized to obtain the design drawings, bid documents, and easements from FTN, he was not authorized to execute the easement with the appellees for a project that had not been approved.

The appellees argued that the circumstances under which the easement was obtained indicate that Cox and Penn were given actual authority by the city council to negotiate and execute the easement. They argued that the City had allowed Penn to obtain easements on multiple occasions without objection, as he had signed at least 14 easements for city projects since becoming city engineer and none had been revoked because he was not authorized to sign them. The City argued that the fact that Penn had signed at least 14 easements proves nothing because he could either have been authorized to obtain them when he did so or they could have been subsequently ratified by the council. The appellees also argued that the City's actions in securing the

fence surrounding the ditch and offering to clean out the ditch indicated an obligation the City had toward the ditch. The City argued that any obligation to maintain the ditch is not evidence that Penn had the authority to enter into an agreement with the appellees and obligate the City to put in drainage culverts on their property.

The Arkansas Court of Appeals found that the city council never authorized Penn to acquire an interest in the appellees' property. The city council did approve the preparation of an easement document, along with other plans, in contemplation of acquiring an interest in the appellees' property and performing drainage construction; however, upon receiving these documents, the city council did not authorize the easement to be signed and construction to begin. Furthermore, even if the easement was valid, the agreement does not require that the contemplated drainage pipes be constructed, but only grants the City the right to perform such construction. The Court held that there was insufficient evidence that Penn had the authority to acquire an interest in the appellees' property and obligate the City to perform drainage construction on this property.

Another argument made by the City was that there was no evidence that it ratified the easement agreement by any subsequent actions. In *City of Fort Smith v. Bates*, the Arkansas Court of Appeals held that "a contract illegally entered into or entered into without authority by agents or officers of a municipal corporation may be ratified and rendered binding upon the municipal corporation by affirmative action on its part, or some negative action, which of itself would amount to an approval of the contract." 260 Ark. 777 (1976) (citing *Day v. City of Malvern*, 195 Ark. 804, (1938)). The City of Fort Smith had utilized the

property that was the subject of the agreement and carried out most of the terms of the agreement before ever questioning its validity. The Supreme Court held that this action constituted ratification and that the city was estopped from denying the terms of the agreement. The appellees in this case argued that the City ratified the easement agreement by enjoying the benefits of the easement, specifically the benefit of "no flooding of property in the Augusta Cove area subsequent to the digging of the ditch." The City, however, argued that there was only testimony that the appellees did not experience any more flooding due to the ditch; Collins did not testify that the entire Augusta Cove area benefited from the ditch in his yard. Furthermore, the City noted that the ditch had been dug nearly eight months prior to the signing of the easement; thus, any benefit the ditch bestowed on the City was not a result of the terms of the easement. The Arkansas Court of Appeals held that the City did not ratify the easement after it was signed because the City never approved the project or benefited from obtaining the easement.

Therefore, the Arkansas Court of Appeals reversed the jury's verdict finding the City of Bryant liable to the appellees.

Case: This case was decided by the Arkansas Court of Appeals on November 16, 2011 and it was an appeal from the Saline County Circuit Court, Honorable Gary Arnold, Judge. The case cite is *City of Bryant v. Collins*, 2011 Ark. App. 713.

Jeff Harper
City Attorney



**Arkansas Court of Appeals
Upholds Circuit Court's
Decision to Deny a Landowner's
Request to Set Aside an
Annexation of Property and to
Deny a Request for
Nonconforming use Status**

Facts Taken From the Opinion: On July 24, 2006, the City of Beebe, Arkansas, (the "City") passed an ordinance proposing to annex certain property, including property owned by Morton Conrad and Minnie Weeks-Conrad (the "Conrads"). The City published a copy of the ordinance in *The Beebe News*, but the publication did not contain a copy of the map and legal description of the property to be annexed. No notice was ever given to the Conrads that their property was being considered for annexation. On November 7, 2006, during a general election, the voters passed the proposed ordinance. The Conrads did not learn that their property had been annexed to the City until they began receiving citations from the city in February 2009 for violations of various provisions of the City Code. The Conrads have owned their property since 1997 and have continuously used the property to raise goats, hogs, ducks, turkeys, emus, geese, chickens, donkeys, cows, dogs, cats, and rabbits. The Conrads also keep old buses on the property as shelter for the animals and trailers for storage and living. Finally, the Conrads also keep various types of scrap metal that they store and sell. The City contended that these uses of property violated various ordinances that prevent keeping nondomestic animals, nonoperating vehicles, and junk within the city limits. On May 26, 2009, the Conrads filed a complaint against the City in circuit court. In their suit, the Conrads asked the circuit court to set aside the annexation of their property, contending, among other things, that they

had no knowledge of the proposed annexation and were not given the opportunity to review the proposal or object thereto. Alternatively, the Conrads asked the circuit court to declare that they were "grandfathered in" because they had owned their property since 1997 and had continuously used it in the same manner. The City filed a motion for summary judgment contending that it complied with all statutory procedures and that, in any case, the Conrads' claims were barred by the thirty-day requirements set forth in Ark. Code Ann. §§ 14-40-303 and 304. The Conrads filed a response and a cross-motion for summary judgment contending that the City failed to comply with Ark. Code Ann. § 14-40-303 by neglecting to attach a copy of a map and legal description of the property proposed to be annexed in its notice of the election by publication and filed to provide any notice whatsoever to the Conrads that their property was being proposed for annexation. The Conrads argued that this lack of notice violated their constitutional right to due process. The Conrads argued, alternatively, that summary judgment should be denied because there were factual issues regarding their request for a declaration "grandfathering in" their nonconforming-use status.

Decision by the Circuit Court: The circuit court granted summary judgment to the City and dismissed the Conrads' complaint asking to set aside the annexation. The circuit court found that Arkansas law does not specifically require publication of a map or legal description and that the annexation laws as a whole contain sufficient safeguards to provide appellants with notice that satisfies due process. Further, the circuit court found that the law required challenges to procedures in annexation elections to be made within thirty days of the annexation election and that the Conrads

failed to present their challenge within that time. The circuit court denied summary judgment on the issue of grandfathering in the Conrads' nonconforming uses, and the parties agreed to stipulated facts and submitted trial briefs on the issue. After reviewing the stipulated facts and the trial briefs, the circuit court found that the purpose of the ordinances prohibiting the keeping of nondomestic animals and maintaining nonoperating vehicles on property within the City was to promote the public health, safety, and welfare and denied the Conrads' request for grandfathering with regard to these uses. With regard to the Conrads' continuance of their scrap-metal business, the circuit court found that this use, along with the placement of trailers for personal use and storage, could continue as long as they complied with the City's zoning provisions concerning nonconforming uses.

Appeal to and Decision by the Arkansas Court of Appeals: The Conrads filed an appeal from both the dismissal of their complaint to set aside the City's annexation of their property and the denial of their request to grant them nonconforming-use status.

The Conrads first contended that the circuit court erred in refusing to set aside the annexation of their property because the City failed to attach a map and legal description of the property proposed to be annexed in its newspaper publication. Specifically, the Conrads argued that the City's failure to publish the map and description was a violation of Ark. Code Ann. § 14-40-303(c)(1)(D), which requires the city clerk to "give notice of the election [regarding the annexation] by publication by at least one (1) insertion in some newspaper having a general circulation in the city." The Court of Appeals noted that the only issue is whether the statute governing

annexation required publication of a map and legal description, and whether any challenge was barred by the limitation period contained in the statute. The Court of Appeals noted that an annexation ordinance that is adopted by a municipality must contain an accurate description of the lands desired to be annexed. The Court of Appeals also noted that, pursuant to Ark. Code Ann. § 14-40-303(b)(1), the annexation ordinance will not become effective until "the question of annexation is submitted to the qualified electors of the annexing municipality and of the area to be annexed." If the ordinance is approved by the voters, then the county clerk must record the certified election results and a description and map of the annexed area in the county records and with the Secretary of State within seven days of the election. Pursuant to Ark. Code Ann. § 14-40-303(b)(6)(B), the annexation is effective thirty days after the county clerk performs those duties. The Conrads did not challenge any of these procedures. The Conrads only contended that the City violated section 303(c)(1)(D), which requires the city clerk to "give notice of the election by publication" in the newspaper. The Conrads did not dispute that the City published the fact that the ordinance regarding annexation was to be submitted to the voters at the general election, only that the notice contained no legal description or map. The Court of Appeals stated that the language in the statute requires only that the City give notice of the election, which it did in this case. While publication of a map or legal description might be helpful to the voters, the Court of Appeals found that the statute did not require the City to include either. In addition, the Court of Appeals held that a party must file a legal action challenging the standards required by section 14-40-302 within thirty days after the election, and the Conrads did not file their legal action within

the required thirty days. For both of these reasons, the Court of Appeals affirmed the circuit court's decision refusing to set aside the City's annexation of the Conrads' property.

The Conrads next contended that the circuit court erred in refusing to grant them nonconforming-use status. The Court of Appeals stated that an owner's use of his property is not unbounded, whether it is a preexisting use or a future use. The Court of Appeals also noted that a zoning ordinance is presumed to be constitutional and the burden of proving otherwise is upon the party challenging it. The Court of Appeals further stated that a municipality has a duty to exercise its police power in the interest of the public health and safety of its inhabitants. This police power is always justified when it can be said to be in the interest of the public health, public safety, and public comfort, and when it is, private rights must yield to public security, under reasonable laws.

The Conrads cited *City of Fayetteville v. S & H, Inc.*, 547 S.W.2d 94 (Ark. 1977), in support of their argument that the City's attempt to deprive them of their preexisting use of their property constituted an unconstitutional taking without compensation in violation of their right to due process. In *City of Fayetteville*, the Arkansas Supreme Court held that an ordinance regulating preexisting uses that were not detrimental to the health, safety, or morals of the community amounted to an unconstitutional taking. However, in *City of Fayetteville*, the Arkansas Supreme Court also noted that a property owner does not have a vested right protected by the constitution for those uses that are detrimental to the public health, safety, or morals of a municipality. In this case, the Court of Appeals noted that the ordinances

prohibiting the keeping of nondomestic animals and nonoperating vehicles both specifically stated that these uses present an imminent threat to the public peace, health, safety, and welfare. The Court of Appeals found that the City's ordinances prohibiting the keeping of nondomestic animals and nonoperating vehicles regulated uses that were detrimental to the public peace, health, safety, and welfare. For this reason, the Court of Appeals held that the Conrads did not have a protected right for these uses. The Court of Appeals upheld the circuit court's decision to deny the Conrad's request to allow them to continue to keep nondomestic animals and nonoperating vehicles on their property in the City as nonconforming uses.

Case: This case was decided by the Arkansas Court of Appeals on January 4, 2012, and was an appeal from the White County Circuit Court, Honorable Craig Hannah, Judge. The case cite is *Conrad v. City of Beebe*, 2012 Ark. App. 15.

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