

Published by:  
Springdale City  
Attorney's Office  
201 Spring Street  
Springdale, AR 72762  
479-750-8173



# The M.A.P.

## Inside this issue:

## The Municipal Law Letter

U.S. Supreme Court Finds City's Search of Police Officer's Text Messages Was Reasonable and Did Not Violate 14th Amendment Pg. 1

Eighth Circuit: Code Officer's Peering in Window of Detached Garage not a 4th Amendment Violation Pg. 5

Arkansas Attorney General Addresses Annexation Issues Pg. 6

Attorney General Issues Opinion on Whether Certain Documents Related to the Hiring of an Employee are Subject to Release Under the Arkansas Freedom of Information Act Pg. 7

Arkansas Supreme Court Addresses Attorney Fees in Condemnation Case Pg. 9

Attorney General Renders Opinion Concerning Bidding Requirements for Professional Services Pg. 11

## Graffiti Ordinance

Page 12

On July 13, 2010, Ordinance No. 4435 and on August 24, 2010, Ordinance No. 4445 were passed by Springdale City Council, both of which amended Sec. 42-91 of the Code of Ordinances. These ordinances provide that once the City becomes aware of graffiti, the City can use public funds to remove or paint over the graffiti.

All incidents of graffiti are to be reported to the police department who will investigate the crime and notify the property owner, their agent or leasehold tenant of the city's graffiti removal program. Once the property owner is notified of the

necessity to remove the graffiti, the department of public works will make contact with the property owner, their agent or leasehold tenant and request a graffiti abatement identification and permission form be signed allowing them to enter on the property and remove the graffiti. Should the property owner, agent or leasehold tenant refuse to sign the document, code enforcement shall give notice to the property owner, agent or leasehold tenant to remove the graffiti within seven days. If the graffiti is not removed within seven days, the city may remove the graffiti and place a lien on the

property.

In the event the property is vacant and the property owner cannot be located or cannot be contacted locally, the department of public works may remove the graffiti without the signed graffiti abatement identification and permission form.

The ordinance also makes it unlawful for any person to sell spray paint or hobby kits containing spray paint to any person under 18. Also, no person may sell or offer to sale spray paint unless evidence is presented by the buyer of his/her identity and age.

## Fourth Amendment Issues

There are two Fourth Amendment issues addressed in this edition of *The M.A.P.*

The first article which is found on page 1 was heard by the U.S. Supreme Court and involved text messages sent on a pager provided by the police department to a police officer. The U.S. Supreme Court found that although as a general matter, warrantless searches "are *per se* unreasonable under the Fourth Amendment," there are "a few specifically established and well-delineated exceptions" to that general rule and held that "special needs" of the workplace justify one such exception. The case was remanded back to the Ninth Circuit for further proceedings consistent with the U.S. Supreme Court's decision.

The second article found on page 5 was heard by the Eighth Circuit and involved a code enforcement officer inspecting a ravine that had been filled with debris. While inspecting the ravine, the officer saw that a detached garage appeared to have been remodeled to serve as a residence. He observed things indicative of a dwelling, not a garage, such as patio doors, etc.; however the garage appeared to have no electricity. After looking through windows and doors, he saw unfinished work, tools and construction material. Because he knew the zoning ordinance prohibited two separate residences on the property and knew the garage had not been inspected, he placed a placard on the garage stating the structure was unsafe of

human occupancy. The property owner sued the city claiming his Fourth Amendment rights had been violated by the code enforcement officer looking into the windows of the detached garage and contended this was an illegal search.

The Court held that no warrant was needed to approach the garage and peer in its windows because the garage was detached and not part of the residence. The Court also held that the "minimally intrusive exterior search and look through the windows was constitutionally reasonable", thus reaffirming the generally accepted Fourth Amendment principle that "visual observation is no search at all."



**United States Supreme Court Finds that City's Search of a Police Officer's Text Messages Was Reasonable and Did Not Violate the Fourth Amendment**

**Facts Taken From the Opinion:** The City of Ontario (City) is a political subdivision of the State of California. This case arose out of incidents in 2001 and 2002 when respondent Jeff Quon was employed by the Ontario Police Department (OPD). He was a police sergeant and member of OPD's Special Weapons and Tactics (SWAT) Team.

In October 2001, the City acquired 20 alphanumeric pagers capable of sending and receiving text messages. Arch Wireless Operating Company provided wireless service for the pagers. Under the City's service contract with Arch Wireless, each pager was allotted a limited number of characters sent or received each month. Usage in excess of that amount would result in an additional fee. The City issued pagers to Quon and other SWAT Team members in order to help the SWAT Team mobilize and respond to emergency situations.

Before acquiring the pagers, the City announced a "Computer Usage, Internet and E-Mail Policy" (Computer Policy) that applied to all employees. Among other provisions, it specified that the City "reserves the right to monitor and log all network activity including e-mail and Internet use, with or without notice. Users should have no expectation of privacy or confidentiality when using these resources." In March 2000, Quon signed a statement acknowledging that he had read and understood the Computer Policy.

The Computer Policy did not apply, on its face, to text messaging. Text messages share similarities with e-mails, but the two differ in an important way. In this case, for instance, an e-mail sent on a City computer was transmitted through the City's own data servers, but a text message sent on one of the City's pagers was transmitted using wireless radio frequencies from an individual pager to a receiving station owned by Arch Wireless. It was routed through Arch Wireless' computer network, where it remained until the recipient's pager or cellular telephone was ready to receive the message, at which point Arch Wireless transmitted the message from the transmitting station nearest to the recipient. After delivery, Arch Wireless retained a copy on its computer servers. The message did not pass through computers owned by the City.

Although the Computer Policy did not cover text messages by its explicit terms, the City made clear to employees, including Quon, that the City would treat text messages the same way as it treated e-mails. At an April 18, 2002, staff meeting at which Quon was present, Lieutenant Steven Duke, the OPD officer responsible for the City's contract with Arch Wireless, told officers that messages sent on the pagers "are considered e-mail messages. This means that [text] messages would fall under the City's policy as public information and [would be] eligible for auditing." Duke's comments were put in writing in a memorandum sent on April 29, 2002, by Police Chief Lloyd Scharf to Quon and other City personnel.

Within the first or second billing cycle after the pagers were distributed, Quon exceeded his monthly text message character allotment. Duke told Quon about the overage, and reminded him that messages

sent on the pagers were “considered e-mail and could be audited.” Duke said, however, that “it was not his intent to audit [an] employee’s text messages to see if the overage [was] due to work related transmissions.” Duke suggested that Quon could reimburse the City for the overage fee rather than have Duke audit the messages. Quon wrote a check to the City for the overage. Duke offered the same arrangement to other employees who incurred overage fees.

Over the next few months, Quon exceeded his character limit three or four times. Each time he reimbursed the City. Quon and another officer again incurred overage fees for their pager usage in August 2002. At a meeting in October, Duke told Chief Scharf that he had become “‘tired of being a bill collector.’” Chief Scharf decided to determine whether the existing character limit was too low—that is, whether officers such as Quon were having to pay fees for sending work-related messages—or if the overages were for personal messages. Chief Scharf told Duke to request transcripts of text messages sent in August and September by Quon and the other employee who had exceeded the character allowance.

At Duke’s request, an administrative assistant employed by OPD contacted Arch Wireless. After verifying that the City was the subscriber on the accounts, Arch Wireless provided the desired transcripts. Duke reviewed the transcripts and discovered that many of the messages sent and received on Quon’s pager were not work related, and some were sexually explicit. Duke reported his findings to Chief Scharf, who, along with Quon’s immediate supervisor, reviewed the transcripts himself. After his review, Scharf referred the matter to OPD’s internal affairs division for an

investigation into whether Quon was violating OPD rules by pursuing personal matters while on duty.

The officer in charge of the internal affairs review was Sergeant Patrick McMahon. Before conducting a review, McMahon used Quon’s work schedule to redact the transcripts in order to eliminate any messages Quon sent while off duty. He then reviewed the content of the messages Quon sent during work hours. McMahon’s report noted that Quon sent or received 456 messages during work hours in the month of August 2002, of which no more than 57 were work related; he sent as many as 80 messages during a single day at work; and on an average workday, Quon sent or received 28 messages, of which only 3 were related to police business. The report concluded that Quon had violated OPD rules. Quon was allegedly disciplined.

Quon and other respondents – each of whom had exchanged text messages with Quon during August and September – filed suit, alleging *inter alia*, that the petitioners violated their Fourth Amendment rights and the federal Stored Communications Act (SCA) by obtaining and reviewing the transcript of Quon's pager messages, and that Arch Wireless violated the SCA by giving the City the transcript. The District Court denied respondents summary judgment on the constitutional claims, relying on the plurality opinion in *O’Connor v. Ortega*, 480 U.S. 709, 711 (1987), to determine that Quon had a reasonable expectation of privacy in the content of his messages. Whether the audit was nonetheless reasonable, the court concluded, turned on whether Scharf used it for the improper purpose of determining if Quon was using his pager to waste time, or for the legitimate purpose of determining the

efficacy of existing character limits to ensure that officers were not paying hidden work-related costs. After the jury concluded that Scharf's intent was legitimate, the court granted petitioners summary judgment on the ground they did not violate the Fourth Amendment.

The Ninth U.S. Circuit Court of Appeals reversed. Although it agreed that Quon had a reasonable expectation of privacy in his text messages, the appeals court concluded that the search was not reasonable even though it was conducted on a legitimate, work-related rationale. The opinion pointed to a host of means less intrusive than the audit that Scharf could have used. The court further concluded that Arch Wireless had violated the SCA by giving the City the transcript. The case was then appealed to the United States Supreme Court and the Court granted the petition for certiorari filed by the City, OPD and Chief Scharf which challenged the Court of Appeals holding that they violated the Fourth Amendment.

**Decision by United States Supreme Court:** The Court held that for present purposes, they would assume several propositions *arguendo*: (1) Quon had a reasonable expectation of privacy in the text messages sent on the pager provided to him by the City; (2) petitioners' review of the transcript constituted a search within the meaning of the Fourth Amendment; and (3) the principles applicable to a government employer's search of an employee's physical office apply with at least the same force when the employer intrudes on the employee's privacy in the electronic sphere. The Court held that even if Quon had a reasonable expectation of privacy in his text messages, petitioners did not necessarily violate the Fourth Amendment by obtaining and reviewing the transcripts. Although as a

general matter, warrantless searches "are *per se* unreasonable under the Fourth Amendment," there are "a few specifically established and well-delineated exceptions" to that general rule. The Court has held that the "'special needs'" of the workplace justify one such exception.

Under the approach of the *O'Connor* plurality, when conducted for a "noninvestigatory, work-related purpos[e]" or for the "investigatio[n] of work-related misconduct," a government employer's warrantless search is reasonable if it is "'justified at its inception'" and if "'the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of'" the circumstances giving rise to the search. The search here satisfied the standard of the *O'Connor* plurality and was reasonable under that approach.

The Court held the search was justified at its inception because there were "reasonable grounds for suspecting that the search [was] necessary for a noninvestigatory work-related purpose." As a jury found, Chief Scharf ordered the search in order to determine whether the character limit on the City's contract with Arch Wireless was sufficient to meet the City's needs. This was, as the Ninth Circuit noted, a "legitimate work-related rationale." The City and OPD had a legitimate interest in ensuring that employees were not being forced to pay out of their own pockets for work-related expenses, or on the other hand that the City was not paying for extensive personal communications.

The Court held that as for the scope of the search, reviewing the transcripts was reasonable because it was an efficient and expedient way to determine whether Quon's

overages were the result of work-related messaging or personal use. The review was also not “‘excessively intrusive.’” *O’Connor, supra*, at 726 (plurality opinion). Although Quon had gone over his monthly allotment a number of times, OPD requested transcripts for only the months of August and September 2002. While it may have been reasonable as well for OPD to review transcripts of all the months in which Quon exceeded his allowance, it was certainly reasonable for OPD to review messages for just two months in order to obtain a large enough sample to decide whether the character limits were efficacious. And it is worth noting that during his internal affairs investigation, McMahon redacted all messages Quon sent while off duty, a measure which reduced the intrusiveness of any further review of the transcripts.

Furthermore, and again on the assumption that Quon had a reasonable expectation of privacy in the contents of his messages, the extent of an expectation is relevant to assessing whether the search was too intrusive. Even if he could assume some level of privacy would inhere in his messages, it would not have been reasonable for Quon to conclude that his messages were in all circumstances immune from scrutiny. Quon was told that his messages were subject to auditing. As a law enforcement officer, he would or should have known that his actions were likely to come under legal scrutiny, and that this might entail an analysis of his on-the-job communications. Under the circumstances, a reasonable employee would be aware that sound management principles might require the audit of messages to determine whether the pager was being appropriately used. Given that the City issued the pagers to Quon and other SWAT Team members in order to help them more quickly respond to crises—and

given that Quon had received no assurances of privacy—Quon could have anticipated that it might be necessary for the City to audit pager messages to assess the SWAT Team’s performance in particular emergency situations.

From OPD’s perspective, the fact that Quon likely had only a limited privacy expectation, with boundaries the Court did not explore, lessened the risk that the review would intrude on highly private details of Quon’s life. OPD’s audit of messages on Quon’s employer-provided pager was not nearly as intrusive as a search of his personal e-mail account or pager, or a wiretap on his home phone line, would have been. That the search did reveal intimate details of Quon’s life does not make it unreasonable, for under the circumstances a reasonable employer would not expect that such a review would intrude on such matters. The search was permissible in its scope.

Because the search was reasonable, the Court held that petitioner did not violate respondent’s Fourth Amendment rights, and the Court of Appeals for the Ninth Circuit erred by concluding otherwise. Therefore, the judgment of the Court of Appeals for the Ninth Circuit was reversed and the case was remanded for further proceedings consistent with this opinion.

**Case:** This case was decided by the United States Supreme Court on June 17, 2010. The case cite is *Ontario v. Quon*, 560 U.S. \_\_\_\_\_ (2010).

Jeff Harper  
City Attorney



**Eighth Circuit: Code Officer's Peering in Window of Detached Garage not a 4<sup>th</sup> Amendment Violation**

On May 17, 2010, the United States Court of Appeals for the Eighth Circuit issued its opinion in the case of *Nikolas v. City of Omaha*. This case involved the enforcement of several zoning and code violations on property owned by Nikolas. On March 1, 2004, Scott Benson, a code inspector for the City of Omaha, Nebraska, went to Nikolas' property to inspect a ravine that had been filled with debris. Upon arriving at the property, Benson knocked on the front door of the main residence to contact Nikolas or his tenant. Benson did not make contact with anyone at that time.

While there, Benson saw that the detached garage had apparently been remodeled to serve as another residence on the property. For example, Benson saw patio doors, sky light windows, glass block windows of the type used for bathrooms, plumbing piping entering and exiting the building, furnace venting exiting the building, an air conditioning unit attached to the building, and residential-style bow windows. These things were indicative of a dwelling, not a garage. However, the garage appeared to have no functioning electricity.

Benson then circled the garage and "looked in every window and door." Inside, he saw unfinished work, tools, ladders, and construction materials. He knew that the zoning ordinance prohibited two separate residences on this property. He also knew that the garage had not been inspected or approved for use as a dwelling. Based on this visual evidence that the garage was being changed to an unlawful use as a dwelling unit, Benson placed a placard on

the garage, stating that the structure was unsafe and could not be used for human occupancy.

Nikolas ultimately complied with City ordinances by obtaining approval to use the detached garage as an accessory apartment. However, Nikolas decided to sue the City of Omaha anyway. One of the claims brought by Nikolas was that Code Enforcement Officer Benson had violated the 4<sup>th</sup> Amendment by looking into the windows of Nikolas' detached garage. Nikolas' contended that Benson's peering into the windows of his detached garage constituted an illegal search.

The Court disagreed. The Court held that Benson's actions did not violate the 4<sup>th</sup> Amendment, and did not constitute an unreasonable search of the detached garage. Specifically, the Court stated:

Although...housing and building inspectors need consent or a warrant to *enter* a residence to search for code violations, Nikolas cites no case holding that an inspector who is lawfully on the premises and who sees an apparent public health and safety violation from the exterior of a detached structure needs a warrant before looking in the window to confirm or refute the apparent violation.

In other words, the Court held that Code Enforcement Officer Benson did not need a warrant to approach the garage and peer in its windows because the garage was detached, and was not part of the curtilage of the residence, and the actual residence was actually over thirty feet away. The Court also held that in this instance, even if the garage was part of the curtilage, that

"Benson's minimally intrusive exterior search and look through the windows was constitutionally reasonable". The Court also reaffirmed the generally accepted 4<sup>th</sup> Amendment principle that "visual observation is no search at all".

Ernest B. Cate  
Senior Deputy City Attorney



### Arkansas Attorney General Addresses Annexation Issues

On March 19, 2010, the Arkansas Attorney General issued Attorney General Opinion No. 2009-190. Two questions of significance to the City were addressed in this Opinion.

The first question involves Arkansas Code Annotated §14-40-501, *et seq.*, which contains the procedure for the annexation of "surrounded land". Put more simply, it provides that a municipality may annex an area of land located in the County but that is completely surrounded by one or more municipalities. If more than one municipality borders the surrounded area, the municipality with the greater amount of city limits adjoining the surrounded area has the authority to annex the surrounded area.

The annexation of "surrounded land" is usually needed in order to streamline and coordinate municipal services, such as police and fire protection. Ark. Code Ann. §14-40-503 provides that upon the approval of such an annexation ordinance, "the city shall proceed to render services to the annexed area". The statute also provides that the City's decision will be final unless challenged within thirty (30) days.

The question posed to the Attorney General was:

When the governing body of a municipality approves an annexation ordinance under A.C.A. § 14-40-503, should the county assessor begin applying city millage to the real property in the newly annexed area immediately upon being notified by the municipality, or should the assessor wait until the thirty (30) day time period for challenging the annexation in circuit court has elapsed?

The Opinion responded as follows:

[t]he statute imposes upon the annexing municipality an obligation immediately to provide services to the annexed area, which I believe means the municipality is conversely obliged to assess the residents of the annexed area for the rendering of those services. In my opinion, then, a reviewing court would in all likelihood conclude that the county assessor should apply city millage to real property in a newly annexed area immediately upon being notified by the municipality

In other words, the Attorney General concluded that the County Assessor should begin applying City millage rates to the newly annexed properties as of the date of annexation, and should not wait until the end of the "thirty day challenge period".

The second question of significance posed to the Attorney General involves Arkansas Code Annotated §14-40-601, *et seq.*, which contains the procedure to be used when the owner of land located in the County wants to

be annexed into an adjoining municipality. Under this procedure, the property owner petitions the County Judge and requests to be removed from the County and annexed into an adjoining municipality.

The question posed to the Attorney General was:

When the governing body of a municipality approves an annexation ordinance under A.C.A. 14-40-503 and suit is filed challenging that decision in circuit court within the 30-day period, does the county court hold in abeyance any decision on petitions filed and pending before the county court for voluntary annexation under A.C.A. 14-40-601, where a decision regarding such petitions would affect the distance of city limits adjoining the unincorporated area's perimeter under A.C.A. 14-40-501(a)(1)(B)?

The Opinion responded as follows:

In my view, the mere fact that an appeal is pending challenging an annexation effected pursuant to A.C.A. § 14-40-503 does not stay the effect of the annexation, which will be valid unless and until a court voids the annexation . . . What matters, in my estimation, is the timing of events relating to the two avenues of effecting the annexation. If the city has, in fact, already annexed the land pursuant to A.C.A. § 14-40-503, this event would appear to moot any pending petition by residents within the annexed property to have the county court annex the property into a municipality.

In other words, if the City has already utilized the annexation procedure contained in Ark. Code Ann. §14-40-501, *et seq.*, a property owner could not thwart or derail the process by filing a challenge to the annexation and then file a petition to annex to a different municipality using Ark. Code Ann. §14-40-601, *et seq.*

It should be noted that the Attorney General commented that the answer to these questions are not "entirely clear" and he also encouraged the Arkansas General Assembly to clarify these issues as soon as possible.

Ernest B. Cate  
Senior Deputy City Attorney



**Attorney General Issues  
Opinion on Whether Certain  
Documents Related to the  
Hiring of an Employee are  
Subject to Release Under the  
Arkansas Freedom of  
Information Act**

On July 30, 2010, Arkansas Attorney General Dustin McDaniel issued Opinion No. 2010-099 to Mr. Andy Davis, Staff Writer of the Arkansas Democrat-Gazette. Mr. Davis had made a formal request under the Arkansas Freedom of Information Act (FOIA) to inspect and make copies of personnel records of a former research analyst at the Department of Workforce Services. Specifically, he requested her resume, application and any other materials, including e-mails, letters, memos or other correspondence, related to her hiring.

The custodian declined this request, citing A.C.A. § 25-19-105(c)(1) (Supp. 2009), the

exemption applicable to “employee evaluation or job performance records.”

The Attorney General opined that, "Given that the records in question are in the possession of the Department of Workforce Services and pertain to the hiring of an agency employee, I believe they clearly qualify as “public records” under this definition. Accordingly, they can only be withheld if an exception prohibits their disclosure. As one of my predecessors noted: “If records fit within the definition of ‘public records’ . . . , they are open to public inspection and copying under the FOIA except to the extent they are covered by a specific exemption in that Act or some other pertinent law.”

"Records pertaining to public employees will typically include “personnel records” as well as “employee evaluations or job performance records” for purposes of the FOIA." "It will be important for the custodian of the records to distinguish between the two, because their release is governed by different standards. With regard to “personnel records,” although the FOIA does not define this term, this office has consistently taken the position that “personnel records” are any records other than employee evaluation/job performance records that relate to the individual employee. Personnel records must be released unless their disclosure would constitute a “clearly unwarranted invasion of [the employee’s] personal privacy.”

The FOIA likewise does not define “employee evaluation or job performance records.” Nor has the phrase been construed by the Arkansas Supreme Court. The Attorney General's Office has consistently taken the position, however, that records created by or at the behest of the employer

and that detail the performance or lack of performance of the employee in question with regard to a specific incident or incidents are properly classified as employee evaluation or job performance records. The record must also have been created for the purpose of evaluating an employee, according to numerous opinions of the Attorney General's Office. “Employee evaluation or job performance records” are releasable only if the following three conditions have been met:

1. There has been a final administrative resolution of any suspension or termination proceeding;
2. The records in question formed a basis for the decision made in that proceeding to suspend or terminate the employee; and
3. There is a compelling public interest in the disclosure of the records in question.

The evaluation and job performance exemption promotes candor in a supervisor’s evaluation of an employee’s performance with a view toward correcting any deficiencies. It has therefore been opined that “[d]ocuments not created in the evaluation process do not come within the rationale behind the 25-19-105(c)(1) exemption.”

Turning to the FOIA request at issue, the Attorney General opined that "I believe it is clear that a resume, a job application, and other material related to the hiring of an employee are not created in the evaluation process. "Consequently, it is my opinion that records of this sort are not covered by A.C.A. § 25-19-105(c)(1), as that provision has long been viewed by this office." "To the extent, therefore, that the custodian has denied the FOIA request at hand based on

this subsection pertaining to “employee evaluation or job performance records,” such denial is in my opinion inconsistent with the FOIA. The records instead likely constitute “personnel records” according to this office’s historical view of that term, although it is possible that some of the records either fall within no exemption or are covered by another specific exemption, such as subsection 25-19-105(b)(1) (state income tax records), 25-19-105(b)(2) (medical records), and/or 25-19-105(b)(13) (home addresses).”

The Attorney General noted that one of his predecessors in Op. Att’y Gen. 2006-048, listed a number of documents that were subject to release under the test for personnel records. The items he enumerated that are typically subject to release include: public employee’s names, dates of hire, job titles and salaries; amounts paid for accrued leave; education backgrounds, including schools attended and degrees received; work histories; work e-mail addresses; listed telephone numbers, assuming there is no heightened privacy interest; attendance and leave records; payroll forms documenting leaves of absence; documents related to any compensation a former employee receives in addition to their regular paycheck; contracts or agreements related to an employee’s separation from employment; internal affairs notification documents; notice of personnel action; job applications; resumes, including references; and letters of recommendation.

On the other hand, the previous opinion held that the public generally has little interest in the personal details of the following information: insurance coverage; tax information or withholding; payroll deductions; banking information; marital status of employees and information about dependents; personal e-mail addresses; unlisted telephone numbers; social security

numbers; and date of birth. Also noted were the specific exceptions for state income tax records (A.C.A. § 25-19-105(b)(1) (Supp. 2005)) and home addresses of non-elected state, municipal and county employees (A.C.A. § 25-19-105(b)(13)). Also mentioned were photocopies of drivers’ licenses and social security cards as being exempt.

**Arkansas Attorney General’s Opinion:** Deputy Attorney General Elisabeth A. Walker prepared Opinion No. 2010-099, which was approved by Dustin McDaniel, Attorney General, and was issued on July 30, 2010.

**Note From City Attorney:** This Attorney General’s opinion is set out in this edition of *The M.A.P.* because it gives a good summary of the type of information related to a personnel record which would normally be released, as well as certain information that would normally not be released.

Jeff Harper  
City Attorney



**Arkansas Supreme Court  
Addresses Attorney Fees In  
Condemnation Case**

On April 29, 2010, the Arkansas Supreme Court issued its opinion in the case of *Ellis v. Ark. State Highway Commission*. This case originated as a condemnation case in Poinsett County. Dustin and Dawn Ellis leased a liquor store on property owned by Don Pearson in Poinsett County. In December 2004, the Arkansas State Highway Commission filed a condemnation action against Pearson for the taking of land

~~~~~

for a highway project. Mr. and Ms. Ellis were not originally named as a party in the condemnation action, but were later added at their request.

The case ultimately went to trial on the issue of just compensation for the Ellises' leasehold interest in the property. At trial, the Ellises produced an appraisal stating that their leasehold interest in the Pearson's property was worth \$100,000. Ms. Ellis testified that she thought the leasehold interest was worth \$250,000 to \$300,000. The jury only awarded the Ellises \$4,480. The attorney for the Ellises then asked the Circuit Court to award them attorney fees. The request was denied, and the Ellises appealed to the Arkansas Supreme Court.

In Arkansas, it has long been held that attorney's fees are not recoverable in condemnation cases. The only exceptions to this rule are: 1) when property is condemned for waterworks projects, in which case attorney fees are authorized by statute; and 2) when the condemning authority has acted in bad faith. For example, it has been held that a landowner is permitted to recover a reasonable attorney's fee, as well as other expenses, when a condemning agency fails to act in good faith in instituting and, later, abandoning condemnation proceedings.

On appeal, the Ellises asked the Arkansas Supreme Court to find that the State Highway Commission had acted in bad faith when it brought its condemnation action against the Ellises. They argued that the Highway Commission's initial failure to include the Ellises and their leasehold interest in the condemnation action constituted bad faith. The Highway Commission argued that it had a legitimate belief that the Ellises did not have a compensable interest, and that is why they

were not initially included in the condemnation action. The Arkansas Supreme Court concluded that there was not enough evidence of bad faith to overturn the decision of the Circuit Court. As such, the Ellises bad faith exception argument failed.

In addition, the Ellises also asked the Arkansas Supreme Court to rule, for the first time, that attorney fees are a component of just compensation. In 1989, in the case of *Arkansas State Highway Commission v. Johnson*, the Arkansas Supreme Court had held that attorney fees were not a component of just compensation. However, in 1992, in the case of *Wilson v. City of Fayetteville*, the Arkansas Supreme Court ruled that compound interest was an element of just compensation.

In essence, the Ellises asked the Court to revisit the *Arkansas State Highway Commission v. Johnson* ruling and to expand the *Wilson v. City of Fayetteville* ruling to hold that attorney fees, like compound interest, are an element of just compensation. The Ellises argued that attorney fees were just as much a component of just compensation as compound interest, and that an award of attorney fees was necessary to make a landowner whole in a condemnation case.

The Arkansas Supreme Court disagreed. The Court stated that it had not been presented with any convincing argument nor citation to authority to warrant the reconsideration of the attorney fee issue, and that no evidence or convincing argument had been made to treat attorney fees the same as compound interest. In other words, the Arkansas Supreme Court declined to find that attorney fees were a component of just compensation.

Therefore, the law remains unchanged on the issue of attorney fees in condemnation cases. Attorney fees are not recoverable in a condemnation case absent statutory authority or absent bad faith by the condemning agency.

Ernest B. Cate  
Senior Deputy City Attorney



**Attorney General Renders  
Opinion Concerning Bidding  
Requirements for Professional  
Services**

On July 14, 2010, Dustin McDaniel, Arkansas Attorney General, issued Opinion No. 2010-052 concerning bidding requirements for professional services rendered to a political subdivision in Arkansas. The question posed by the Honorable Kim Hendren, State Senator, was paraphrased by the Attorney General as follows:

Under Arkansas law, municipalities cannot invite competitive bids on the following set of professional services: legal, financial advisory, architectural, engineering, construction management, and land surveying. Arkansas law does, however, recognize “other professional services” outside that list. For the latter services, Arkansas law permits municipalities to forgo “competitive bidding ... with a two-thirds [ ] vote of the [municipality’s] governing body.” Are there any restrictions on the types of services the municipality may designate as a “professional service”?

The Attorney General opined that the answer to the question is "Yes," but the statute is not entirely clear on what those restrictions are. On the one hand, the statutory scheme makes clear that the municipality does not have unbridled discretion when it determines that a given service counts as an “other professional service.” The service must be a legitimate “professional service.” So municipalities’ decisions are limited by the meaning of “professional service.” On the other hand, the statute never exhaustively defines what counts as a “professional service.”

The Attorney General opined that the statutory scheme makes it clear that cities can only forego competitive bidding for legitimate professional services. This is evident from subsection 19-11-801(c)’s wording:

For purposes of this subchapter, a political subdivision ... may elect to not use competitive bidding for other professional services not listed [in 19-11-801(b)] with a two-thirds (2/3) vote of the political subdivision’s governing body."

The Attorney General opined that the fact that subsection 19-11-801(c) explicitly links the professional services it contemplates with the itemized professional services in 19-11-801(b) indicates that the General Assembly had in mind a two-tiered structure of professional services. The itemized professional services in 19-11-801(b) are simply a smaller sub-set of professional services generally. Seen in that light, subsection 19-11-801(c) encompasses all professional services, and 19-11-801(b) acts as a sub-set of 19-11-801(c) by picking out six professional services for special treatment. This structure makes it clear that the “other professional services”

contemplated by 19-11-801(c) must be legitimate professional services.

The Attorney General opined that cities do have some guidance on what counts as a professional service. There are two general ways in which one may define a term: by intension and by extension. The former defines the term by giving its attributes or meaning. The latter defines a term by giving examples of it. Webster’s Dictionary explains both terms: intension “(of a term) [is] the set of attributes belonging to all and only those things to which the given term is correctly applied”; extension is “the class of things to which a term is applicable.”

The statute partially defines “professional services” by giving a sub-set of its extension, but the statute does not provide an intensional definition. Accordingly, the itemized list of professional services contained at 19-11-801(b) gives cities some clue about what counts as a “professional service” because it partially defines the term extensionally. The trouble is that, without either an exhaustive extensional list or an intensional definition, cities cannot definitively know what the General Assembly takes to be “professional services.” That leaves cities with the task of asking whether a particular service is sufficiently like the itemized list of professional services to count as a “professional service.”

The Attorney General opined that when cities vote to forgo competitive bidding on a service they take to be an “other professional service” under subsection 19-11-801(c), the service must be a legitimate professional service. But because the General Assembly has not exhaustively defined “professional services”—which requires giving an exhaustive extensional

definition or an intensional definition—cities must compare the proposed service to the examples of professional services listed in subsection 19-11-801(b) to see whether the proposed service is sufficiently like those listed. That comparison is highly factual, and the statute leaves that comparison to the cities.

**Arkansas Attorney General's Opinion:** Assistant Attorney General Ryan Owsley prepared Opinion No. 2010-052, which was approved by Dustin McDaniel, Attorney General. The opinion was issued on July 14, 2010.

**Note From City Attorney:** The bottom line is that when a city decides they want to declare a certain service as a professional service, to determine if such service would be considered a professional service under Arkansas law, the Council will have to compare the proposed service to those professional services specifically listed to determine if the proposed service is a professional service. Those professional services listed in Arkansas law are legal, financial advisory, architectural, engineering, construction management, and land surveying.

Jeff Harper  
City Attorney



**Graffiti Ordinance**

Attached to this edition of *The M.A.P.* is the City of Springdale's graffiti ordinance passed by the City Council of the City of Springdale, Arkansas on July 13, 2010, and the ordinance is currently in effect.

**ORDINANCES NUMBERED 4435 AND 4445**

**AN ORDINANCE AMENDING THE CODE OF ORDINANCES OF THE CITY OF SPRINGDALE, ARKANSAS RELATED TO GRAFFITI TO PROVIDE AN IMMEDIATE AND PRACTICAL METHOD TO COMBAT THE EFFECTS OF GRAFFITI VANDALISM ON PUBLIC AND PRIVATELY OWNED STRUCTURES AND REAL PROPERTY WITHIN THE CITY OF SPRINGDALE, ARKANSAS; AND FOR OTHER PURPOSES.**

**WHEREAS**, the City Council for the City of Springdale, Arkansas finds that graffiti located on any real property, including structures such as fences or walls, is a public nuisance and destructive of the rights and values of property owners as well as the entire community; and

**WHEREAS**, in order to prevent graffiti and to provide an immediate and practical method, to be cumulative with and in addition to all other remedies available at law, of combating the effects of graffiti vandalism on public and privately-owned structures and real property, the City Council for the City of Springdale hereby finds that graffiti is detrimental to property values, degrades the community, causes an increase in crime, is inconsistent with the City's property maintenance goals and aesthetic standards, is a nuisance, and, unless it is quickly removed from public and private property, results in other properties becoming the target of graffiti;

**NOW THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL FOR THE CITY OF SPRINGDALE, ARKANSAS**, that the Code of Ordinances of the City of Springdale, Arkansas regarding graffiti are hereby amended as follows:

**Sec. 42-91. Defined.**

- (a) Graffiti means and includes any unauthorized inscription, word, figure or design or collection thereof, which is marked, etched, scratched, painted, drawn or printed on any structural component of any building structure or other facility, regardless of the nature of the material of that structural component.
- (b) Spray paint is any paint or pigmented substance in an aerosol or similar spray containing or intended for use in an aerosol or similar spray container.

**Sec. 42-92. Declaration as unsightly and a nuisance.**

The existence of graffiti on buildings, or on structures, such as fences or walls, that is located upon public or privately owned property viewable from a public or quasi-public place within the city is detrimental to property values, degrades the community, causes an increase in crime, is inconsistent with the city's property maintenance and aesthetic standards, and is declared to be a nuisance.

**Sec. 42-93. Right of city to remove.**

- (a) Whenever the city becomes aware, or is notified and determines that graffiti is so located on the exterior of a building or structure, such as fences or walls, on public or privately owned property viewable from a public or quasi-public place within the city, the city shall be authorized to use public funds for the removal of same, or for the painting of same, but shall not authorize or undertake to provide for the painting of any more extensive area than that where the graffiti is located, unless the director of public works, or his designee, determines that a more extensive area is required to be repainted in order to avoid an aesthetic disfigurement to the neighborhood or community.
- (b) All incidents of graffiti shall be reported to the police department, who will investigate the crime and will notify the owner of the property or the property owner's agent and/or any leasehold tenant, concerning the city's graffiti removal program. The police department shall also provide information on how to make contact with the department of public works, for the removal of the graffiti. The police department shall also notify the department of public works of the exact location of the graffiti and the name of the person to be contacted.
- (c) Upon notification by the police department concerning the necessity to remove the graffiti, the department of public works shall make contact with the owner of the property or the property owner's agent, and/or any leasehold tenant and request that they sign a graffiti abatement identification and permission form, allowing the department of public works to enter on the property and remove the graffiti. The document will release the city, its officers, agents and employees of and from any and all liability, claims, demands, causes of action, or obligations of whatsoever arising out of or in any way related to entry upon the property and for the removal of the graffiti.
- (d) In the event the owner of the property or the property owner's agent, and/or any leasehold tenant refuses to sign the document which authorizes the city to remove the graffiti, the city, through the code enforcement division, shall give or cause to be given notice to the owner of the property

or the property owner's agent, and/or any leasehold tenant, to take corrective action and remove the graffiti from the property within seven (7) days from the date the notice is served.

- (e) In the event the property is vacant and the owner of the property cannot be located or cannot be contacted locally, the department of public works shall have the right to enter the property and remove the graffiti without first obtaining a signed graffiti abatement identification and permission form.

**Sec. 42-94. City's right to take corrective action.**

If the owner of the property or the property owner's agent and/or leasehold tenant refuses to give the city authorization to remove the graffiti and the graffiti is not removed in the required time provided by the previous section in this article, then the city shall have the right to enter upon private property to the extent necessary to take corrective action. The city may then seek the cost of the graffiti removal from the property owner and/or leasehold tenant including the filing of a lien on the property to cover the city's costs pursuant to Sec. 42-78, 42-79, and 42-80 of the Code of Ordinances of the city.

**Sec. 42-95. Possession of spray paint and markers.**

Possession of spray paint and markers with intent to make graffiti is prohibited. No person shall carry an aerosol spray paint can or broad tipped indelible marker with the intent to make graffiti.

**Sec. 42-96. Unlawful acts.**

- (a) It shall be unlawful for any person to sell or offer for sale to any person under 18 years of age any spray paint or hobby kit or any similar kind of kit containing spray paint.
- (b) No person may sell or offer to sale spray paint to any other person unless the buyer presents evidence of his or her identity and age.

**PASSED AND APPROVED** this \_\_\_\_\_ day of \_\_\_\_\_, 2010

/s/Doug Sprouse  
\_\_\_\_\_  
Doug Sprouse, Mayor

ATTEST:

/s/ Denise Pearce  
Denise Pearce, City Clerk

APPROVED:

/s/ Jeff C. Harper  
Jeff C. Harper, City Attorney