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September Trivia

Labor Day is September 1st.

National Grandparents' Day is September 7th.

September 11, 2001 is a day of remembrance.

The United States Constitution was signed on September 17, 1787.

The first day of Fall this year is September 22nd.

September is Native American Month

September is Hispanic Heritage Month





Property Owner Awarded New Trial in Eminent Domain Case

On May 28, 2008, the Arkansas Court of Appeals issued its opinion in the case of *Arkansas State Highway Commission v. Wood*. This case originated in Poinsett County, where Mr. Wood owned 15.69 acres to the north of Highway 63 and 528 acres directly south of Highway 63. The Highway Commission, in preparation for the construction of Interstate 554, converted Highway 63 into a non-access facility. The case proceeded to trial to determine the amount of damage to the land due to the changes in access.

At trial, the Commission's appraiser testified that the project would result in the 15.69 acres north of the highway being landlocked and completely without access, thereby reducing the value from \$3,200 per acre before the project, to \$250 per acre after the project. The Commission therefore estimated just compensation at \$46,250.

As far as the 528 acres to the south of Highway 63, the Commission's appraiser testified that the value of the land was not affected by the loss of access to Highway 63 because the property could be accessed at its south end by another highway (Highway 322). The only damage the Commission's appraiser attributed to this parcel was for the replacement of a culvert, which cost \$5,000. In all, the Commission estimated Wood's just compensation to be \$51,250.

The property owner testified that the 528 acre tract was actually divided into two parts that were separated by a slough that held water and remained wet. Although Highway 322 provided easy access to the property south of the slough, the only access to the property north of the slough was by

way of Highway 63. The property owner went on to testify that he had depended upon his access to Highway 63 so that heavy farming equipment and trucks could access the portion of the property north of the slough, which contained 378 acres, and that this property suffered great damage when the Commission removed access from Highway 63. The property owner asked for just compensation in the amount of \$472,500 for the loss of access to the 378 acre portion north of the slough.

The Commission's appraiser testified that he had no knowledge of any slough on the property, as he only went part of the way onto the 528 acre tract when he conducted his inspection of the property. The Commission's appraiser also testified that he had no knowledge of how the tract was farmed or how farming equipment entered and left the field during planting and harvesting seasons.

At the conclusion of the trial, the jury returned a verdict of \$51,250. The property owner filed a motion for a new trial, stating that the verdict was clearly against the preponderance of the evidence. The court agreed, set aside the verdict, and ordered a new trial. The Commission appealed to the Arkansas Court of Appeals.

On appeal, the Court agreed with the trial court's decision to set aside the verdict and order a new trial. The Court stated that the evidence was clear that the Commission's appraisal was based on the faulty assumption that since the 528 acre tract could be fully accessed from the south, that it had not diminished in value by the loss of access from the north. The Court found that it was obvious that the jury had relied on this faulty assumption in arriving at its verdict. Since the physical facts of the case



clearly established that the Commission's appraisal was based on inaccurate conclusions, the trial court was well within its discretion to set aside the verdict and order a new trial.

This case is important in a couple of different respects. First, it illustrates the importance of the property owner accompanying the taking entity's appraiser on the inspection of the property. Had the appraiser had more information from the property owner, the outcome of this case might have been avoided. The case does not indicate whether or not the Commission's appraiser attempted to contact the property owner.

Second, this case illustrates just how powerful a property owner's testimony can be regarding the fair market value of property. In this case, the property owner had over 30 years experience farming this particular piece of land, and knew every inch of it. Meanwhile, the Commission's appraiser testified he inspected only part of it, and had no knowledge of key aspects of the property. The property owner's testimony in this case was powerful enough for the Judge to set aside a verdict rendered by a jury that clearly ignored the property owner's testimony.

Ernest Cate
Senior Deputy City Attorney



Arkansas Attorney General Gives Opinion Concerning Emails Which do not Exist at the Time of the Request

On May 7, 2008, Arkansas Attorney General Dustin McDaniel, in an opinion prepared by Deputy Attorney General Elana C. Wills, addressed the issue of a request under the Arkansas Freedom of Information Act (FOIA) concerning on-going daily access to emails. Specifically, the Little Rock School District received a request under the FOIA from the Arkansas Democrat Gazette for on-going daily access to the following:

- Email messages sent among school board members
- Email messages sent by the superintendent or her designee to one or more school board members, including each daily and weekly update sent to the board
- Email messages sent by school board members to the superintendent or other school district administrators

In its request, the newspaper proposed that the simplest and most direct method of accomplishing the release of emails should be to include the newspaper in the list of recipients at the time each message is sent. The specific question posed by the requestor, The Honorable Irma Hunter Brown, State Senator, was "Does the newspaper's request under the FOIA for emails which may not yet exist at the time of the request comply with the FOIA?"

In the response, the Attorney General opined that the answer to the question is "no." The FOIA does not contemplate or



authorize "continuing" or "ongoing" request for records that are not in existence at the time the request is made. However, because the question involved email exchanges to, from, or between members of a "governing body" and/or administrators of a school district, the Attorney General opined that it is possible that such exchanges could constitute a "meeting" for purposes of the open meetings requirements of the FOIA. If so, the usual notification procedures required for such meetings must be observed.

After giving the opinion that the FOIA does not contemplate or authorize "continuing" or "ongoing" request for records, it is the opinion of the Attorney General that the newspaper's request under the FOIA for emails which do not exist at the time of the request, do not comply with the FOIA. However, the Attorney General went on to address the issue of the email exchanges among members of the governing body, constituting an open meeting under the FOIA. Information sent to the Attorney General from representatives of the newspaper in question stated that "[t]he emails from the superintendent – as well as among board members – have become the equivalent of electronic meetings" and stated that "if the board chooses to hold 'electronic' meetings, we feel we have an ongoing right to the email discussions between board members."

In addressing whether the emails constituted a meeting, the opinion noted that this issue was addressed in Op. Att'y Gen. 2005-166 and in this opinion, then Attorney General Beebe concluded that the issue is "a matter that remains uncertain under the Arkansas FOI."

However, he noted that "some jurisdictions draw the line based upon the presence or absence of some exchange among the members of the governing body, concluding that the passive receipt of information does not give rise to a violation." In that opinion, Attorney General Beebe issued a note of caution that there will likely be risk whenever email is used to disseminate information to the members of a governing body concerning the body's official business. Accordingly, then Attorney General Beebe reiterated his previous predecessor's caution against any discussion of pending public business outside a public meeting context. See Ark. Op. Att'y Gen. 2001-166.

Note From City Attorney: The bottom line, in my opinion, is that members of the Council, including the Mayor, who is an ex-officio member, should not engage in email discussions of public business with each other, outside a public meeting context. It is my opinion that if a proposed ordinance is sent out by one council member to other council members indicating the ordinance will be on the next agenda, this does not constitute a meeting and the FOIA is not violated (the email is subject to disclosure upon request under the FOIA but no meeting is taking place). However, if discussion results among members about the proposed ordinance, a meeting is taking place and this is a violation of the FOIA unless the press is notified of the meeting. The easiest way to avoid a problem in my opinion is for members of the council to not engage in email discussions with each other about public business.



Opinion: Opinion No. 2008-055 was issued by Dustin McDaniel, Attorney General, on May 7, 2008, and was prepared by Deputy Attorney General Elana C. Wills.

Jeff Harper
City Attorney



City Prevails in Case Involving Maintenance of a Drainage Ditch

On May 7, 2008, the Arkansas Court of Appeals issued its opinion in the case of *City of Alexander v. Doss*. Mr. Doss was the owner of a restaurant in Alexander that is bordered on two sides by storm-water drainage ditches. For almost six years, Doss maintained the drainage ditches. He mowed them, but his requests for reimbursement for his mowing services were repeatedly denied by the City. In addition, Doss built a retaining wall on his property, alleging that such a wall was necessary to stop the erosion of his land by the water flowing in the ditches.

Eventually, Doss filed suit against the City, claiming he was entitled to compensation for maintaining the ditch for six years. Doss also claimed he was entitled to compensation for the cost of building the retaining wall on his property. Doss justified his seeking compensation for building the retaining wall because the City had failed to properly maintain the drainage ditch that resulted in the alleged erosion of Doss' property.

The trial court dismissed all of Doss' claims, finding that his allegations that the City

failed to properly maintain the ditch amounted to nothing more than negligence. However, the trial court did find in favor of Doss on the issue of the retaining wall, and allowed Doss to recover \$6,180 for construction of the retaining wall. The City appealed to the Arkansas Court of Appeals.

On appeal, the Court reaffirmed the legal principle that negligence suits against a municipality for its maintenance of drainage ditches, absent an express agreement to undertake such maintenance, are not allowed. Here, the City had no express agreement to maintain the drainage ditch.

In addition, the Court held that by deciding on his own to build the retaining wall, Doss could not have a reasonable expectation that the City would reimburse him for his costs. As such, the Arkansas Court of Appeals reversed the trial court and dismissed Doss' claim for compensation for building the retaining wall.

This case reaffirms the 1977 case of *City of Crossett v. Riles*, which stands for the proposition that if a City merely owns an easement (such as a utility easement, drainage easement, etc.) across land, that it is the owner of the land who is responsible for the care and maintenance of the land subject to the easement, unless an express agreement exists obligating the City to undertake such care and maintenance. For example, a property owner is responsible for keeping their property mowed, even if encumbered by a utility easement.

Ernest Cate
Senior Deputy City Attorney





Appeal of Board of Zoning Adjustment Decisions: What is the Standard of Review

It is not uncommon for a property owner to apply for a variance from the requirements of the City's zoning ordinance. For example, a property owner may wish to obtain a variance as to lot size, paving requirements, building setback, etc. By Arkansas law, requests to vary from the requirements of the City's zoning ordinance are heard by the Board of Zoning Adjustment. In Springdale, the Planning Commission sits as the Board of Zoning Adjustment, and hears requests for variances from the literal provisions of the City's zoning ordinance. Variance requests are governed by Article 2, Section 10 of the City's zoning ordinance. By Arkansas law, decisions of the Board of Zoning Adjustment may only be appealed to Circuit Court, and may not be appealed to the City Council.

When actions of a City are challenged, the standard of review depends upon the nature of the City's action. If the City's action is determined to be legislative in nature, the City's action will be examined using an "arbitrary and capricious" standard. If the City's action is determined to be administrative in nature, the City's action will be reviewed "de novo", which means "from the beginning".

On March 6, 2008, the Arkansas Supreme Court issued its decision in the case of *Fort Smith v. McCutchen*. This case does an excellent job of explaining the applicable standard of review involved when a decision of the Board of Zoning Adjustment is appealed to Circuit Court.

Mr. McCutchen owned property in the City of Fort Smith. One day, a City building inspector happened to notice that McCutchen had located a carport on his property, and that the carport violated the City's setback requirements. Upon being made aware of the violation, McCutchen filed a variance request with the Fort Smith Board of Zoning Adjustment, asking that he be given a variance to allow the carport to remain in the setback. The City subsequently denied McCutchen's variance request, due to no hardship being demonstrated. McCutchen appealed the decision to Circuit Court.

On appeal, the Circuit Court conducted a *de novo* review of McCutchen's variance request. He was subsequently awarded the setback variance after a jury trial. The City of Fort Smith had argued that the City's action to deny the variance request should not have been a *de novo* review, but whether or not the City had "abused its discretion" in denying the request. In other words, the City wanted an "arbitrary and capricious" standard of review, while the property owner wanted a "de novo" review. Unhappy with the Circuit Court's decision to conduct a "de novo" review, the City of Fort Smith appealed to the Arkansas Supreme Court.

In its decision, the Arkansas Supreme Court held that the Circuit Court employed the proper standard of review of the City's denial of the variance request. The Court pointed out that the Board of Zoning Adjustment is an administrative body that does not have authority to legislate. As such, when the Fort Smith Board of Zoning Adjustment denied McCutchen's variance request, it was acting in an administrative fashion, because the variance related to the enforcement of an already-established



ordinance. In other words, the City's action was not an enactment of legislation, it was an application of its existing regulations. Therefore, the City's actions were administrative in nature, not legislative. As such, the City was not entitled to the "arbitrary and capricious" standard of review that is afforded to legislative decisions. Rather, McCutchen was entitled to a "de novo" standard of review that is applied to administrative decisions.

This case is an excellent example of the differences between a "legislative" action and an "administrative" action. Whenever an action of the City is challenged in Court, the standard of review of that action will depend upon whether the City's action was legislative or administrative. This case makes it clear that variance decisions made by the Board of Zoning Adjustment are administrative actions, subject to a "de novo" standard of review.

Ernest Cate
Senior Deputy City Attorney



Arkansas Supreme Court Finds that Pine Bluff Civil Service Commission can be Dissolved by the Pine Bluff City Council by Majority Vote of the Council

Facts Taken From the Opinion: On August 16, 1949, the Pine Bluff City Council passed Ordinance No. 2994 by majority vote. The ordinance established the City's civil service commission and was deemed "necessary for the preservation of the public health, peace and safety and for the proper administration of the police and

fire departments" of the city. At that time, Act 28 of 1933 required the city council or other governing bodies of all cities having an organized fire department and all cities of the first class having a police department to establish a civil service commission for the Police and Fire Departments. Civil service commissions were to "prescribe, amend and enforce rules and regulations governing the fire and police departments of their respective cities[.]"

Act 166 of 1971 removed the requirement of the establishment of a civil service commission, stating instead that cities of the first class "may establish a Board of Civil Service Commissioners for the Police and Fire Departments of such cities. Act 166 is currently codified in part at Ark. Code Ann. §14-51-102 (Repl. 1998). In accordance with Section 14-51-102, the Pine Bluff City Council enacted Ordinance No. 6221 by majority vote on April 16, 2007. Ordinance No. 6221 purported to repeal Ordinance No. 2994 and abolish the civil service commission and the entire civil service system for uniformed employees of the city. The ordinance passed with five votes in favor and three against.

On April 17, 2007, the Southern States Police Benevolent Association and Robert Henderson, as a representative of a class consisting of Pine Bluff police officers, filed a complaint against the city in the circuit court. The complaint alleged that the city council acted contrary to Arkansas law in passing the ordinance by less than the required two-thirds vote, that the civil service statutes do not provide for the abolishment of a civil service commission, that the council's actions deprived class members of property and contract rights in violation of the Fifth and Fourteenth Amendments to the United States



Constitution, and that the council acted in bad faith by passing Ordinance No. 6221 for personal reasons. Accordingly, the Association and Henderson requested a declaratory judgment declaring Ordinance No. 6221 null and void, ordering that it have no effect, and reinstating the civil service commission. They also requested that the court temporarily and permanently enjoin the city from abolishing the civil service commission.

The circuit court issued a temporary restraining order on the same date, enjoining the enforcement of Ordinance No. 6221 until the matter could be heard. The city filed an answer as well as a counterclaim for declaratory judgment, seeking a declaration that the enactment of Ordinance No. 6221 was lawful and effective and that the city had the right to abolish and had in fact abolished the civil service commission. Following a hearing on the complaint and counterclaim, the circuit court entered an order making permanent the previously entered temporary restraining order. Specifically, the court found that the city council had removed all members of the civil service commission by less than a two-thirds vote and without cause, in violation of Ark. Code Ann. §14-50-210 (Repl. 1998). Thus, the court declared Ordinance No. 6221 to be "null, void, and of no effect." The city filed a timely notice of appeal to the Arkansas Supreme Court.

Decision by Arkansas Supreme Court: The Arkansas Supreme Court noted the first issue before them involved the interpretation of Ark. Code Ann. §14-50-210. Section 14-50-210, titled "Removal of Commissioner," reads as follows in its entirety:

(a) The city council or governing body of the city, by a two-thirds (2/3) vote,

may remove any of the commissioners during their term of office for cause.

(b) In the event of the removal of one (1) or more of the commissioners, the council or governing body shall fill the vacancy created by the removal.

Ark. Code Ann. §14-50-210 (Repl. 1998). The Court noted that they have interpreted this language, as it originally appeared in Act 28 of 1933, and stated that "the meaning here is plain that the city council, by a two-thirds vote, could remove for cause one, or all, of the civil service commissioners by the resolution. . . and that it had the right to determine what would be a sufficient cause, the statute being silent as to the method of removal or the specific cause for which the commissioners may be removed." *McAllister et al. v. McAllister et al.*, 200 Ark. 171, 178, 138 S.W.2d 1040, 1044 (1940). However, as the City of Pine Bluff argued, the resolution at issue in *McAllister* attempted to remove individual commissioners from office; it did not attempt to abolish the commission altogether. Therefore, the Court agreed with the city's position and held that *McAllister* is inapposite.

The Arkansas Supreme Court, most recently, has addressed the abolishment of commissioners by city councils. In *City of Ward v. Ward Water and Sewer System by Pehosh*, 280 Ark. 177, 655 S.W.2d 454 (1983), the Ward City Council, by majority vote, enacted an ordinance providing for the abolishment of the Ward Water and Sewer Commission, which the council had previously created by ordinance. At issue was the predecessor to Ark. Code Ann. §14-234-305 (Repl. 1998), which provides that any commissioner on a waterworks commission may be removed for cause upon



a two-thirds vote of the duly elected and qualified members of the city council. *Id.* In addressing the argument that the Water and Sewer Commission could only be abolished by a two-thirds vote and with cause, the Arkansas Supreme Court held "[t]he removal of one or more commissioners for cause cannot be equated with the abolishment of the commission itself, although it has the obvious effect of separating the commissioner from the office he holds. But he has not been removed, the office itself has been terminated." citation omitted. The Court in that case observed that no statute expressly permitted the abolishment of the commission but also that no statute restricted the power of the city to do so. The Court held in that case that the city council thus had the power to abolish the water and sewer commission, noting that the question of whether the abolishment would be in the city's best interest was not before the Court.

Therefore, the Arkansas Supreme Court held in this case that the circuit court erred in determining that Ark. Code Ann. §14-51-210 is applicable to the abolishment of a civil service commission. Under the plain language of the statute, it applies only to the removal of individual commissioners, and not to the abolishment of a commission altogether. Pursuant to subsection b of section 14-51-210, which provides that the council shall fill a vacancy created by the removal of one or more commissioners, replacement of commissioners subject to removal is mandatory; thus, the commission could never be abolished pursuant to the terms of this statute, by a two-thirds vote or otherwise. Moreover, as the Arkansas Supreme Court noted in *City of Ward, supra*, the removal of commissioners cannot be equated with the abolishment of a commission. *City of Ward*, like the instant

case, involved a commission created by the city council, the establishment of which was not legislatively required. *See* Ark. Code Ann. §14-234-303 (Supp.2007). The removal statute for waterworks commissions imposes the same requirements as the statute at issue in this case. It is well settled that any interpretation of a statute by this Court (the Arkansas Supreme Court) becomes a part of the statute itself. *Combs v. City of Springdale*, 366 Ark. 31, 233 S.W.3d 130 (2006). The Court held that the removal requirements of Ark. Code Ann. §14-51-210 do not apply in the case of abolishment of a commission. Therefore, the Pine Bluff City Council was free to abolish its civil service commission by majority vote.

Having found that the Pine Bluff City Council could abolish their civil service commission by a majority vote, the Arkansas Supreme Court therefore reversed the judgment of the circuit court and remanded the case.

Note From City Attorney: This case makes it clear that when a city establishes a commission by an ordinance, it can abolish the commission by a majority vote and legislation which requires a two-thirds vote to remove a commissioner does not apply to the abolishment of the commission.

Case: This case was decided by the Arkansas Supreme Court on May 29, 2008, and was an appeal from the Jefferson County Circuit Court. The case cite is *Pine Bluff v. S. States Police Benevolent Ass'n.*, 07-811 (Ark. 5-29-2008).

Jeff Harper
City Attorney





**Arkansas Supreme Court
Decides that an Agreement
Between the City of Dardanelle,
City of Russellville and City
Corporation is too Uncertain to
Establish an Obligation on
Either Party**

Facts Taken From the Opinion: City Corporation is the operator of Russellville's wastewater treatment facility. For several years, City Corporation has been discharging its sewage effluent into Whig Creek, a nearby body of water. In the mid-1990s, City Corporation became aware that it would no longer be able to meet the effluent discharge requirements under its permit from the Arkansas Department of Environmental Quality (ADEQ) unless extensive improvements were made to the treatment facility, or the discharge of sewage effluent was redirected into a large body of water. In 1996, City Corporation and Russellville applied to the ADEQ for a permit to build a pipeline that would discharge the effluent from the plant directly into the Arkansas River.

Russellville's permit application met considerable opposition from Dardanelle because the proposed pipeline outfall would be located downstream from the Dardanelle Dam, directly across the river from the Dardanelle City Park. The outfall would also have been across from a well that provided part of the city's water supply, and, apparently, the hydrology of the well water correlates to the water in the river. In addition, Dardanelle contended that the water in the area of the proposed outfall barely flows during the summer months.

To avoid the possible contamination of its lands and water, Dardanelle recommended

that Russellville build the pipeline downstream of the Dardanelle city limits. A downstream pipeline, however, would cover a longer distance and would require a pumping system. The suggested adjustments would add almost six million dollars to the cost of the project. Because the extra funding was not available, Russellville declined to adopt Dardanelle's plan.

On May 10, 2002, after years of disagreement, city council members for both cities and members of City Corporation's board of directors signed a "Joint Resolution." The complete resolution is quoted below:

WHEREAS, the cities of Dardanelle and Russellville, Arkansas and City Corporation, operator of the Water and Sewer Systems for the City of Russellville, Arkansas, have agreed with each other to cooperate in the pursuit of all avenues of funding for the proposed municipal outfall sewer line from the City of Russellville Treatment Plant to a point downstream of the present city limits of Dardanelle on the Arkansas River, and

WHEREAS, the parties are in agreement with the proposed location for the municipal outfall sewer line from the City of Russellville Treatment Plant to a point downstream of the present city limits of Dardanelle on the Arkansas River, and

WHEREAS, in order for this endeavor to be a successful venture, the cooperation of all concerned will be necessary.

NOW, THEREFORE, BE IT RESOLVED, by the City Council of



the City of Dardanelle, and the City Council of the City of Russellville, and the Board of Directors for City Corporation that we go on record as approving this agreement and urge all citizens of Yell and Pope County to work together in a united effort to obtain funding and approval for the municipal outfall sewer line of the City of Russellville.

Russellville also compiled a document that was circulated to the public, entitled "Russellville/Dardanelle Cooperative Construction Effort for a Wastewater Outfall Line to the Arkansas River." The plan contained a copy of the resolution, an explanation of the ongoing dispute between Russellville and Dardanelle, an estimate of the cost for the downstream pipeline, and maps showing the proposed location of the downstream pipeline. Governor Mike Huckabee wrote a letter addressed to the Arkansas Congressional delegation lending his support to the cities' resolution and urging an allocation of federal funds for the project. Representatives from both Russellville and Dardanelle traveled to Washington, D.C., to obtain federal funding for the downstream-pipeline project, but no funding was available.

On March 29, 2005, Russellville ceased efforts to obtain funding for the downstream pipeline and applied to the ADEQ for a permit to allow a pipeline outfall at the original, upstream location. On May 18, 2006, the ADEQ issued a draft permit for public comment, indicating its intent to issue a final permit. Dardanelle then filed a complaint in the Pope County Circuit Court, against Russellville, City Corporation, and the ADEQ, alleging that the joint resolution was a contract that Russellville breached when it reapplied for the upstream pipeline

permit. Dardanelle requested specific performance of the joint resolution and an injunction preventing Russellville from building the pipeline upstream. Russellville filed a motion to dismiss, arguing that the joint resolution was not a contract; rather, the resolution was merely a non-binding agreement to cooperate in the effort to obtain funding for the downstream pipeline. After a hearing on the motion, the circuit court entered an order dismissing Dardanelle's complaint, based upon its conclusion that the joint resolution did not contain the essential elements of a contract. Dardanelle then appealed to the Arkansas Supreme Court, arguing that the Circuit Court erred in dismissing its complaint and in finding that the joint resolution was not a contract.

Decision by Arkansas Supreme Court:

The Arkansas Supreme Court noted that Ark. Code Ann. §14-54-101 outlines the rights and obligations of municipalities in Arkansas and specifically states that a municipality has the power to enter into "contracts" and to "[a]ssociate with other municipalities for the promotion of their general welfare." The general rule is that where a municipality's charter commits the decision of a matter to the council alone, and is silent as to the mode of exercise, the decision may be evidenced by a resolution. MCQUILLIN, MUNICIPAL CORPORATIONS § 15:6 (3d. ed. 2004). This is especially true when applicable to ministerial acts, or administrative business of a municipality. However, a municipality's ability to act is tempered by its charter and other applicable laws. Given that Ark. Code Ann. §14-54-101 specifically allows for municipalities to contract and because nothing in the record indicates a limitation on either city's ability to contract, the Arkansas Supreme Court concluded that



both Russellville and Dardanelle were capable of making a contract by resolution.

The Court went on to note that although there is a dearth of Arkansas case law regarding contracts between government entities, the leading treatise on municipal corporations informs us that contracts between municipalities are considered to be the same as contracts between natural persons and are governed by the same rules as to validity and effect, as well as the same rules of construction. *See* MCQUILLIN, MUNICIPAL CORPORATIONS §§ 29.116-29.117 (3d. ed. 1999).

The Court noted that the elements of a contract are (1) competent parties, (2) subject matter, (3) legal consideration, (4) mutual agreement, and (5) mutual obligation. *Williamson v. Sanofi Winthrop Pharmaceuticals*, 347 Ark. 89 (2001). The Court cannot make a contract for the parties, but can only construe and enforce the contract that they have made; and if there is no meeting of the minds, there is no contract. *Id.* Moreover, the terms of a contract cannot be so vague as to be unenforceable. *See Ciba-Geigy Corp. v. Alter*, 309 Ark. 426 (1992). The terms of a contract are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy.

The Court then held that despite Dardanelle's arguments to the contrary, the terms of the joint resolution are simply too vague to constitute a legally binding agreement. Specifically, the terms are not certain as to the parties' obligations. One of the essential elements of a contract is mutuality of obligations, which means that "an obligation must rest on each party to do or permit to be done something in

consideration of the act or promise of other; that is neither party is bound unless both are bound." *Townsend v. Standard Indus.*, 235 Ark. 951, 954 (1962). A contract, therefore, that leaves it entirely optional with one of the parties as to whether or not he will perform his promise would not be binding on the other. *Showmethemoney Check Casher, Inc. v. Williams*, 342 Ark. 112 (2000). Dardanelle asserted that the joint resolution contained obligations in the form of the cities' mutual promises to cooperate in pursuing funding and in locating the pipeline outfall downstream. The Arkansas Supreme Court disagreed.

The Court held that the joint resolution states that the parties agreed to "cooperate in pursuit of all avenues of funding for the proposed municipal outfall sewer line." The Court noted that "cooperate" is a nebulous term, meaning to "work or act together." OXFORD AMERICAN DESK DICTIONARY 167 (2d. ed. 2001). The Court held as used in the joint resolution, "cooperate" indicates, at best, that the cities agreed to help each other in obtaining funding. Yet, there is no indication of the length of time or the extent to which the cities must work together. Most importantly, the joint resolution does not provide any explanation as to when a party will be considered to have breached the agreement by not "cooperating" or, in other words, by not being helpful. In sum, the Court held the terms of the resolution are too uncertain to establish an obligation as to either party, and accordingly, the Arkansas Supreme Court affirmed the Circuit Court's decision to dismiss Dardanelle's complaint.

Case: This case was decided by the Arkansas Supreme Court on February 28, 2008, and was an appeal from the Pope County Circuit Court. The case cite is *City*



*of Dardanelle v. City of Russellville, ____
Ark. ____ (2008).*

Jeff Harper
City Attorney



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