

# The M.A.P.

Issue 09-1

The Municipal Attorney Periodical

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## Issues on When the Mayor Can Vote at City Council Meetings:

On January 29, 2009, the Mayor was required to cast several votes. Covered in in this edition of *The M.A.P.* is an article which reviews the law on three particular issues on when the Mayor can vote.

The first issue covered is whether the Mayor can vote to pass an ordinance or resolution. The second issue discussed is whether the Mayor can vote to put an ordinance on the second or third reading. The third issue is whether the Mayor can vote to pass an emergency clause. Answers to each of these issues can be found in detail beginning on page 11.

## 2009 Ice Storm



Above: Tree limb falls through window of City Attorney's Office at City Administration Building. Photograph by Rose Lawrence.

Below: Picture of park across the street from City Administration Building. Photograph by Brooke Lockhart.



## Case Law

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## Arkansas Supreme Court Upholds Dismissal of Nuisance Lawsuit

On February 5, 2009, the Arkansas Supreme Court issued its opinion in the case of *City of Little Rock v. Jung Yul Rhee, et al.* This case originated when the City of Little Rock filed a complaint for an injunction and order of abatement against a strip mall in Little Rock where numerous criminal violations had taken place. The City's complaint alleged that thirty-four (34) criminal violations had occurred at the mall property in a little over a year. The City requested that the circuit court declare the mall property a nuisance and order the property closed.

The parties subsequently reached an agreement whereby the City and the mall property owners and tenants would sit down and try to address issues with the property, including security, lighting, etc., and if the parties were unable to resolve all the issues, the City would then go forward with the nuisance action.

A little over 3 months later, the City requested an injunction against Pic Pac (one of the tenants), because three violent crimes had occurred there after the parties' agreement. These crimes included a murder and two batteries by gunshot. At the hearing on the City's nuisance action and request for injunction, however, the circuit court found that the City had failed to establish that Pic Pac was a nuisance. The City appealed this decision to the Arkansas Supreme Court.

The City brought its nuisance action pursuant to Ark. Code Ann. §5-74-109(b), which provides as follows:

(b) COMMON NUISANCE DECLARED. Any premises, building, or place used to facilitate the commission of a continuing series of three (3) or more criminal violations of Arkansas law is declared to be detrimental to the law-abiding citizens of the state and may be subject to an injunction, a court-ordered eviction, or a cause of action for damages as provided for in this subchapter.

On appeal, the City argued that the statute does not address the actions of people, but rather only addresses what occurs on the premises. In other words, the City contended that in order to establish a nuisance, it only had to show that three criminal offenses took place at Pic Pac.

The Arkansas Supreme Court disagreed with the City. The Court held that in order for the City to prove a nuisance under this statute, it had to prove that the Pic Pac premises had been used to *facilitate* the commission of the alleged crimes. The fact that the crimes occurred on the premises was not enough. The Court stated that the City must also prove that some link existed between the crimes and the property sought to be declared a nuisance. The circuit court found that the City of Little Rock had not established that link, and the Arkansas Supreme Court agreed.

In this case, the Court noted that Pic Pac had taken extensive measures to curb the criminal activity at or near the property, including hiring security guards, installing flood lights and surveillance cameras, and building a fence to keep loiterers from going behind the building. In addition, one of the police officers testified that Pic Pac had not been involved either directly or indirectly with any of the crimes on the property. As

such, the City was not able to prove a link between the property and the crimes, which was necessary to prove that the property was used to facilitate the crimes.

This case is important in that it clearly establishes that just because crimes occur on a particular piece of property, does not automatically mean that the owner/occupant of the property can be held accountable under this particular nuisance statute. Rather, facts must also be established showing how the premises was used to facilitate a particular crime. Obviously, the type and amount of proof needed in a particular nuisance case will depend on the type of property, the type of business, or the facts of the particular crime.

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**United States Supreme Court  
Decides Case in Which  
Employee Alleged She Was  
Retaliated Against for  
Answering Questions in an  
Internal Investigation  
Involving Sexual Harassment**

**Facts Taken From the Opinion:** In 2002, respondent Metropolitan Government of Nashville and Davidson County, Tennessee (Metro), began looking into rumors of sexual harassment by the Metro School District’s employee relations director, Gene Hughes. When Veronica Frazier, a Metro human resources officer, asked petitioner Vicky Crawford, a 30-year Metro employee, whether she had witnessed “inappropriate behavior” on the part of Hughes, Crawford described several instances of sexually

harassing behavior: once, Hughes had answered her greeting, ““Hey Dr. Hughes, what’s up?,”” by grabbing his crotch and saying “[Y]ou know what’s up”; he had repeatedly “put his crotch up to [her] window”; and on one occasion he had entered her office and “grabbed her head and pulled it to his crotch.””

Two other employees also reported being sexually harassed by Hughes. Although Metro took no action against Hughes, it did fire Crawford and the two other accusers soon after finishing the investigation, saying in Crawford’s case that it was for embezzlement. Crawford claimed Metro was retaliating for her report of Hughes’s behavior and filed a charge of a Title VII violation with the Equal Employment Opportunity Commission (EEOC), followed by this suit in the United States District Court for the Middle District of Tennessee, claiming that Metro was retaliating for her report of Hughes's behavior, in violation of 42 U.S.C. §2000e-3(a), which makes it unlawful "for an employer to discriminate against any ... employee(s)" who [1] has opposed any practice made an unlawful employment practice by this subchapter (opposition clause), or [2] has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter (participation clause).”

The District Court for the Middle District of Tennessee granted Metro summary judgment and held that Crawford could not satisfy the opposition clause because she had not “instigated or initiated any complaint,” but had “merely answered questions by investigators in an already-pending internal investigation, initiated by someone else.” The District Court concluded that her claim also failed under the participation clause,

which Sixth Circuit precedent confined to protecting “an employee’s participation in an employer’s internal investigation . . . where that investigation occurs pursuant to a pending EEOC charge.”

The Court of Appeals for the Sixth Circuit affirmed the District Court on the same grounds, holding that the opposition clause “demands active, consistent “opposing” activities to warrant . . . protection against retaliation,” whereas Crawford did “not claim to have instigated or initiated any complaint prior to her participation in the investigation, nor did she take any further action following the investigation and prior to her firing.” Again like the trial judge, the Court of Appeals for the Sixth Circuit understood that Crawford could show no violation of the participation clause because her “employer’s internal investigation” was not conducted “pursuant to a pending EEOC charge.”

Crawford appealed the Sixth Circuit's decision to the United States Supreme Court, which agreed to take the case.

**Decision by United States Supreme Court:** The United States Supreme Court held that the anti-retaliation provision's protections extends to an employee who speaks out about discrimination not on her own initiative, but in answering questions during an employer's internal investigation. Because "oppose" is undefined by statute, the Court held it carries the ordinary dictionary meaning of resisting or contending against. The Court held that the statement Crawford said she gave to Frazier is thus covered by the opposition clause as an ostensibly disapproving account sexually obnoxious behavior toward her by a fellow employee.

The Court held that "oppose" goes beyond "active, consistent" behavior in ordinary discourse, and may be used to speak of someone who has taken no action at all to advance a position beyond disclosing it. Thus, a person can "oppose" by responding to someone else's questions just as surely as by provoking the discussion. Nothing in the statute requires a freakish rule protecting an employee who reports discrimination on her own initiative but not one who reports the same discrimination in the same words when asked a question.

The Court opined that if it were clear law that an employee who reported discrimination in answering an employer's questions could be penalized with no remedy, prudent employees would have a good reason to keep quiet about Title VII offenses against themselves or against others. This is no imaginary horrible given the documented indications that "[f]ear of retaliation is the leading reason why people stay silent instead of voicing their concerns about bias and discrimination." Brake, *Retaliation*, 90 Minn. L. Rev. 18, 20 (2005); see also *id.*, at 37, and n. 58 (compiling studies). The Court held the appeals court's rule would thus create a real dilemma for any knowledgeable employee in a hostile work environment if the boss took steps to assure a defense under the U.S. Supreme Court cases. If the employee reported discrimination in response to the enquiries, the employer might well be free to penalize her for speaking up. But if she kept quiet about the discrimination and later filed a Title VII claim, the employer might well escape liability, arguing that it “exercised reasonable care to prevent and correct [any discrimination] promptly” but “the plaintiff employee unreasonably failed to take advantage of . . . preventive or corrective opportunities provided by the employer.”

*Burlington Industries., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998). The Court held that nothing in the statute's text or the Court's precedent supports this catch-22.

The Court held that because Crawford's conduct is covered by the opposition clause, the Court did not address her arguments that the Sixth Circuit had misread the participation clause as well. The Court noted that that does not mean the end of the case, for Metro's motion for summary judgment raised several defenses to the retaliation charge besides the scope of the two clauses, which were never reached by the district court and those issues remain open.

Having decided the case, the United States Supreme Court reversed the judgment of the Court of Appeals for the Sixth Circuit and remanded the case for further proceedings consistent with their opinion.

**Note From City Attorney:** This case makes it clear that retaliation by an employer against an employee who brings out sexual harassment is unlawful, even if the employee brings out the sexual harassment only through the employer's investigation. Retaliation is prohibited whether the employee is the original complainant or just a witness cooperating with the investigation.

**Case:** This case was decided by the United States Supreme Court on January 26, 2009. The case cite is *Crawford v. Metro Government of Nashville and Davidson Cty.*, 555 U.S. \_\_\_\_ (2009).

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### **Eighth Circuit Upholds Denial of Conditional Use Permit in St. Paul, Minnesota Case**

In 2002, Bernard Snaza owned property in St. Paul, Minnesota, that was zoned general business district. Snaza wanted to operate a car lot on the property. However, a car lot was not a permitted use in his zoning classification, but it was a conditional use. As such, Snaza filed for and was granted a conditional use to operate a car lot on his property. The City, however, made the conditional use personal to Mr. Snaza, and specified that at such time as there was a new owner, a new permit would be required. Snaza died in 2005, and his daughter Suzanne became the owner of the property.

In June 2005, Suzanne applied for a new conditional use permit for the property. At the public hearing, the neighboring property owners complained that the business was a nuisance and that the conditional use permit should be denied. The City agreed and denied the conditional use permit. Suzanne's appeals of this decision were ultimately denied, so she filed suit in federal court alleging that her due process rights had been violated by the denial of her conditional use request. In her suit, Suzanne claimed that she had a protected property interest in her application for a conditional use permit, and that since a previous conditional use permit had been granted for her property, the City's denial of her permit was irrational.

On December 4, 2008, the United States Court of Appeals for the Eighth Circuit issued its opinion in this case. In its opinion, the Court stated that in order for Suzanne to prove a due process violation, Suzanne had to prove she had a protected property interest, and then demonstrate that the City's action was truly irrational. To prove she had a protected property interest, Suzanne had to

establish a "legitimate claim to entitlement" as opposed to a mere subjective expectancy. In order to have a "legitimate claim to entitlement", Suzanne would have to show that she had met all terms and conditions of the City's ordinances pertaining to her property, thereby taking away the City's discretion and requiring the City to grant the conditional use permit.

The Court found that Suzanne's property did not meet the requirements of the ordinance (lot size and setback), and, as such, she did not have a legitimate claim of entitlement to a conditional use permit on her property. Without a legitimate claim of entitlement, the Court held, Suzanne could not show she had a protected property interest that was violated by the City's denial of her conditional use permit.

Suzanne also argued that the City's decision to deny her conditional use permit was irrational because the City had granted a permit to her father for the same exact use on the property. The Court disagreed, however, and held that the City had discretion pursuant to its ordinance to deny the permit using the factors and conditions contained in the ordinance. The Court held that the City's decision to exercise its discretion and deny the conditional use request was rational and not improper.

This case is important in that it reaffirms the importance of the language of a conditional use ordinance. The language of the conditional use ordinance for the City of Springdale contains similar language as that used by the City of St. Paul in this case. This language gives the City the authority to examine such things as reasonable enjoyment of adjacent properties, size of the lot, ingress and egress issues, etc., when considering a conditional use permit. This

case also reaffirms that a conditional use permit is not identical to a use by right, and that the City may exercise discretion in examining conditional use permits, using the language of the ordinance. Just as in *Snaza v. City of Saint Paul, Minnesota*, any decision of the City on such permits will be upheld as long as there is a rational basis for the decision.

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### **Arkansas Court of Appeals Upholds Hot Springs' Manufactured Home Ordinance**

On November 12, 2008, the Arkansas Court of Appeals released its decision in *Forest Glade Management, LLC. V. City of Hot Springs, Arkansas*. This case originated when the City of Hot Springs passed an ordinance requiring that all manufactured homes placed within the city after the effective date of the ordinance had to have been manufactured after October 25, 1994, the effective date of federal standards for manufactured homes.

Forest Glade, a manufactured home park, filed suit against the City of Hot Springs, claiming: (1) that the City exceeded the scope of its authority by enacting the ordinance, and (2) that the implementation and enforcement of the ordinance amounted to an inverse condemnation. The Circuit Court disagreed with Forest Glade. Forest Glade appealed this decision to the Arkansas Court of Appeals.

On appeal, the Court of Appeals agreed with the Circuit Court that the City of Hot Springs had not exceeded its authority in

enacting the manufactured home ordinance. In doing so, the Court determined that the ordinance was a valid exercise of the City's police powers in that the ordinance referenced the 1994 federal manufactured home regulations, and, as such, the ordinance had a rational relationship to the health, safety, and welfare of the citizenry because it established minimum standards for manufactured homes in the City of Hot Springs.

The Court of Appeals also agreed with the Circuit Court that the ordinance did not amount to a taking of Forest Glade's property. The Court pointed out that Forest Glade had not lost all economically beneficial use of its property, and that just because Forest Glade lost income from the property due to the ordinance did not mean that the value of the property had been reduced as a result of the ordinance. The Court also pointed out that since Forest Glade could still rent lots to owners of manufactured homes that comply with the 1994 federal standards, it had not been deprived of all uses of its property. As such, the Court concluded, no inverse condemnation had taken place due to the implementation and enforcement of the ordinance.

This case is an excellent example of how a zoning ordinance will be analyzed by the Courts. In this case, the Court recognized that a zoning ordinance may be amended "for such other matters as are necessary to the health, safety, and general welfare of the municipality". The Court concluded that the ordinance passed by the City of Hot Springs clearly fell within that authority, was rationally necessary to implement the 1994 federal manufactured home regulations, and that the economic impact of this ordinance

on Forest Glade did not amount to a compensable taking.

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**Annexation of Surrounded Land  
by the City of Centerton  
Declared Invalid**

On January 30, 2009, the Arkansas Supreme Court issued its opinion in the case of *City of Centerton v. City of Bentonville*. This case started when Centerton annexed land that was completely surrounded by the City of Centerton and the City of Bentonville, but the greatest distance of city limits adjoining this land was Centerton. As such, Centerton proceeded with the annexation pursuant to Ark. Code Ann. §14-40-501, which is the statute dealing with the annexation of surrounded lands. About the same time, the City of Bentonville annexed the same property pursuant to Ark. Code Ann. §14-40-601, which is the statute that allows the owner of property in the county to petition and be annexed into a city.

Bentonville brought suit against Centerton, alleging that Centerton failed to comply with the requirements of Ark. Code Ann. §14-40-501 when it annexed the property. The circuit court agreed with the City of Bentonville and declared Centerton's annexation invalid. Centerton appealed to the Arkansas Supreme Court.

On appeal, the Arkansas Supreme Court agreed with the City of Bentonville and the circuit court. In its opinion, the Court explained that Centerton did not comply with Ark. Code. Ann. §14-40-501(b), which provides that the lands to be annexed must

comply with the standards set forth in Ark. Code Ann. §14-40-302(a). For annexation to be proper, any one of the criteria set out in Ark. Code Ann. §14-40-302(a) must be met. Ark. Code Ann. §14-40-302(a) provides:

(a) By vote of two-thirds (2/3) of the total number of members making up its governing body, any municipality may adopt an ordinance to annex lands contiguous to the municipality if the lands are any of the following:

(1) Platted and held for sale or use as municipal lots;

(2) Whether platted or not, if the lands are held to be sold as suburban property;

(3) When the lands furnish the abode for a densely settled community or represent the actual growth of the municipality beyond its legal boundary;

(4) When the lands are needed for any proper municipal purposes such as for the extension of needed police regulation; or

(5) When they are valuable by reason of their adaptability for prospective municipal uses.

At the hearing on Bentonville's action to set aside Centerton's annexation ordinance, Centerton offered no evidence or testimony to establish how the property to be annexed met any of the requirements of Ark. Code Ann. §14-40-302(a). As such, the circuit court found, and the Arkansas Supreme Court agreed, that Centerton's annexation of the property was invalid.

This case is important in that it reaffirms that an annexation ordinance passed pursuant to Ark. Code Ann. §14-40-501 (annexation of surrounded land) should contain some reference as to how the annexed property meets the criteria set forth in Ark. Code Ann. §14-40-302(a). Failing to do so could result in the annexation being declared invalid.

It is also important to point out that an annexation ordinance passed pursuant to Ark. Code Ann. §14-40-601 (statute that allows the owner of property in the county to petition to be annexed into a city) is also subject to the requirements of Ark. Code Ann. §14-40-302(a). Ark. Code Ann. §14-40-601 does not explicitly state that the property must comply with the standards set forth in Ark. Code Ann. §14-40-302(a), but the Arkansas Supreme Court has held that it must.

On November 13, 2008, the Arkansas Supreme Court issued its opinion in the case of *City of Jacksonville v. City of City of Sherwood*, in which the City of Jacksonville was unsuccessful in stopping the City of Sherwood from annexing property. That case makes reference to the requirements of Ark. Code Ann. §14-40-302(a). Furthermore, the *Centerton v. Bentonville* case also states that the requirements of Ark. Code Ann. §14-40-302(a) apply to an annexation brought pursuant to Ark. Code Ann. §14-40-601.

The lesson learned from these cases is that the requirements of Ark. Code Ann. §14-40-302(a) should be addressed regardless of what type of property is being annexed.

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## **Arkansas Supreme Court Rules for the City of Lowell in Stagecoach Case**

**Facts Taken From the Opinion:** On October 5, 2004, the City of Lowell City Council passed an ordinance authorizing then-mayor Phil Biggers to purchase a stagecoach from Ray Dotson for \$16,500. The stagecoach was intended to serve as a symbol of the City of Lowell's history, and it was anticipated that the stagecoach would be used at events to promote the city. This transaction was consummated on October 20, 2004. In February of 2006, the City of Lowell contacted Dotson for help in refurbishing the stagecoach. Dotson arranged for the stagecoach to be repaired by Lantham Coach Works in Tipton, Missouri. The City of Lowell tendered four checks to Dotson totaling \$10,000 in connection with these services. Upon return from Missouri, the stagecoach remained with Dotson.

On May 23, 2007, the City of Lowell made a written demand on Dotson to return the stagecoach. On that same date, Dotson presented the City of Lowell with an itemized list of expenses associated with the stagecoach totaling \$28,248, but he did not return the stagecoach. On June 1, 2007, Dotson claimed that on December 11, 2006, he had entered into an enforceable contract with then-mayor Biggers whereby he had the right to keep the stagecoach. This document, entitled Memorandum of Understanding, stated that in return for Dotson's prior assistance in procuring, refurbishing, and storing the stagecoach, Dotson would be entitled to use the stagecoach in his private business. Dotson demanded that the City of Lowell comply with the agreement contained in the Memorandum of Understanding.

On June 15, 2007, the City of Lowell filed a complaint and petition for replevin in the Benton County Circuit Court, seeking the return of the stagecoach from Dotson. Dotson next filed a motion to dismiss in which he claimed that venue was improper in Benton County under Arkansas Code Annotated section 16-60-116(a), which requires that an action be brought in the county in which the defendant resides. The City of Lowell filed a response in which it alleged that section 16-60-116(a) had been superseded by Act 649 of 2003, now codified at Arkansas Code Annotated section 16-55-213(a) (Repl. 2005), which allows an action to be brought in the county in which the plaintiff resided. In an order dated June 22, 2007, the circuit judge ruled that venue was proper in Benton County under section 16-55-213(a).

Dotson then filed an answer and a counterclaim against the City of Lowell for breach of contract and unjust enrichment. The City of Lowell moved to dismiss Dotson's counterclaim and alleged the affirmative defenses of illegality and statute of frauds. In an order dated November 2, 2007, the circuit judge held that the Memorandum of Understanding was void for illegality because it allowed Dotson to use property purchased with public funds for his private benefit in violation of Article 12, section 5, and Article 16, section 13, of the Arkansas Constitution and Arkansas common law, and that, even if the memorandum of understanding was not void for illegality, it would be unenforceable under the statute of frauds because it lacked a reasonable description of the lease term. The circuit judge dismissed Dotson's counterclaim for failure to state a claim upon which relief could be granted and ordered him to return the stagecoach to the

City of Lowell. Dotson then appealed the case.

**Decision by Arkansas Supreme Court:**

On the improper venue argument, the Arkansas Supreme Court held that Ark. Code Ann. §16-55-213(a) repeals by implication §16-60-116(a) and therefore ruled for the City of Lowell on this point.

The second point Dotson asserted was the Circuit Judge erred in finding that his counterclaim failed to state a claim upon which relief could be granted due to the illegality of the alleged agreement. Dotson contended that the City of Lowell lacked standing to bring an illegal exaction claim and also that there can be no illegal exaction where there is a mutual benefit to the parties. On this point, the Arkansas Supreme Court turned to Ark. Code Ann. §14-54-302(a) and (c) (Repl. 1998) which reads as follows:

(a) Municipal corporations are empowered and authorized to sell, convey, lease, rent, or let any real estate or personal property owned or controlled by the municipal corporations. This power and authorization shall extend and apply to all such real estate and personal property, including that which is held by the municipal corporation for public or governmental uses and purposes.

....

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

The Court then noted that the record in this case was devoid of any resolution by the City of Lowell's City Council authorizing Dotson's usage of the stagecoach under the alleged Memorandum of Understanding. The Court then held, therefore, that illegality is readily established by the fact that private use of the stagecoach by Dotson was never sanctioned by resolution of the City of Lowell City Council, as required by §14-54-302(c). This noncompliance was noted by the circuit judge in his order in which he said: "No written resolution has been alleged to have been approved by a majority vote of the Lowell City Council. Accordingly, section (a) A.C.A. § 14-54-302 is inapplicable to the facts before this Court."

The Arkansas Supreme Court therefore held that the absence of the City Council's resolution was fatal to the validity and viability of the alleged Memorandum of Understanding.

Having ruled in favor of the City of Lowell on both these points, the Arkansas Supreme Court affirmed the Circuit Judge's dismissal of Dotson's counterclaim and his order for the return of the stagecoach to the City of Lowell.

**Case:** This case was decided by the Arkansas Supreme Court on November 13, 2008, and was an appeal from the Benton County Circuit Court. The case cite is *Dotson v. City of Lowell*, 08-240 (Ark. 11-13-2008).

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## **Attorney General Gives Opinion Concerning E-mails that are Being Used by a Public Official on a Private E-mail Account**

On January 28, 2009, the Attorney General issued Opinion No. 2008-190. The opinion was requested by the Honorable Jon Woods, State Representative from Springdale. In requesting the opinion, the first question asked of the Attorney General was, "Does a corporation have a responsibility to archive and retrieve e-mails that are being used by the public official on a private corporate e-mail account?" The second question posed was, "Are there any prohibitions against public officials using private corporate e-mail to do public business?"

In answering the first question, the Attorney General noted that if the e-mails constitute "public records" under the FOIA, and the corporation is not required to produce them in response to a FOIA request directed to the corporation, a question might arise about how to obtain them. The opinion noted that while it is clear that there must be a procedure to obtain the records, the details of that procedure are unclear under the FOIA because the Arkansas Supreme Court has not squarely addressed the situation addressed. The Attorney General opined that there must be a procedure to obtain these e-mails because, otherwise, the FOIA would be subverted, which is something the Arkansas Supreme Court has repeatedly made clear it will not permit. If no procedural mechanism exists to attain admittedly public records, then a citizens substantive right to obtain the records is effectively destroyed.

In the opinion, the Attorney General concluded that because the corporation is itself subject to the Act (per the assumption

set out in the opinion) it cannot be the proper recipient of the FOIA request. As between the public organization and the public official, the official is the one most likely characterized as having actual possession of the e-mails. Thus, the public official seems the proper recipient of the FOIA request.

The opinion concluded that this analogy is supported by *Fox v. Perroni*, 358 Ark. 251 (2004). In this case, a circuit court judge held an attorney in contempt for failing to appear on a trial date. The attorney maintained he was not able to attend because he had another trial at the same time in federal court. To investigate the attorney's claim, the circuit judge directed his law clerk to obtain copies of court dockets in the federal case. The judge gave his clerk \$20 in cash from the judge's wallet to pay for copies. But when the clerk completed the copies, the total bill exceeded the judge's cash. The clerk then wrote a personal check to cover the outstanding balance for which the judge immediately reimbursed his clerk in cash from the judge's wallet, when the clerk returned.

Later, a FOIA request was directed to the judge requesting "all documents which would evidence the source of the funds" used to pay for the federal court documents. When the judge did not provide copies of the documents, the requester sued. The circuit court held that the law clerk's personal check was a "public record." And the judge was the proper recipient of the FOIA request because he had administrative control of the check, even though the check was written on his clerk's personal bank account and held at the bank in its normal course of business.

The Arkansas Supreme Court affirmed, holding that the circuit judge was required to direct his clerk to obtain a copy of the check in response to the FOIA request. The Attorney General noted that one of the reasons the Fox court gave for this portion of its decision seems directly applicable to the factual situation set out in this opinion request. The Court noted that if the judge had used public channels to pay for the copies, those records would have been subject to the FOIA. If the judge had made "a requisition for a payment voucher from Pulaski County's purchasing department" to pay for the documents, the "payment voucher would have been . . . obtainable under the FOIA. 358 Ark. at 261. By using cash to purchase the copies, the judge bypassed the county purchasing system." *Id.* Public officials cannot use a private means instead of public means for conducting public business and then claim he or she is not the custodian. "Judge Fox (through his law clerk) may not substitute a private bank account for a public bank account and then claim he does not have possession of or control over the resulting public record." *Id.*

The Attorney General opined that the reasoning of the Arkansas Supreme Court in the above case closely applies to the situation here. If the public official had transmitted the same information over a public e-mail account (and no exceptions applied), then obtaining the e-mail would be fairly straight forward. Instead, as in *Fox*, the public official "bypassed" the public medium for a private medium. A court would likely hold that the official "may not substitute" a private e-mail account for a public e-mail" and then claim he does not have possession of or control over the resulting public record." The Attorney General opined that accordingly, while the method to obtain e-mail is not entirely clear,

he believes the court would likely follow *Fox* to hold that the proper recipient of the FOIA request is the public official.

The second question in the opinion was whether there are any prohibitions against public officials be [sic] using private corporate e-mail to do public business? The Attorney General answered this question no, as the FOIA does not prohibit public officials from using private e-mail accounts to conduct public business. *Bradford v. Director*, 82 Ark. App. 332, 345 (2003). ("We find nothing in the Freedom of Information Act that specifies that the communications media by which the public's business is conducted are limited to publicly owned media communications.")

**Attorney General's Opinion Information:** Assistant Attorney General Ryan Owsley prepared this Attorney General's Opinion, which was approved by Dustin McDaniel, Attorney General, and was issued on January 28, 2009. The opinion number is 2008-190.

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**Issues on When the Mayor Can Vote at City Council Meetings**

In light of the several votes that the Mayor was required to cast at the January 29, 2009 Council meeting, I thought it would be good to review the law concerning when the Mayor can vote.

**Mayor Voting to Pass an Ordinance or Resolution:** Arkansas law provides that the Mayor shall have a vote when his vote is needed to pass any ordinance, by-law,

resolution, order or motion (Ark. Code Ann. §14-43-501(b)(1)(B)). As Council members know, it takes a concurrence of a majority of a whole number of members elected to the Council in order to pass an ordinance or resolution (Ark. Code Ann. §14-55-203). In Springdale, a majority of a whole number of members elected to the Council is five (as there are eight total Council positions), so it takes five votes to pass an ordinance or resolution. Therefore, the Mayor can vote to pass any ordinance or resolution when his vote is required to make the fifth vote.

**Mayor Voting to Put an Ordinance on the Second or Third Reading:** Arkansas law provides that an ordinance must be distinctly read on three different days unless two-thirds of the members composing the municipal council shall dispense with the rule (Ark. Code Ann. §14-55-202). Since there are eight members of the City Council, this means there must be six votes in order to dispense with the rule and place the ordinance on its second and third readings. Therefore, the Mayor can vote to place an ordinance on its second and third readings if there are five votes of the Council to do so, and the Mayor's vote makes the sixth vote, since six votes are required. In Attorney General Opinion No. 2004-326, an opinion prepared by Joel DiPippa, Assistant Attorney General, and approved by Mike Beebe, Attorney General at the time, the Attorney General opined that the Mayor, in voting to suspend the rules, is voting to pass a motion to suspend the rules and therefore because Ark. Code Ann. §14-43-501 states that the mayor of a city of the first class may vote to pass any motion, the mayor can vote if his vote is required to pass the motion to suspend the rules.

**Mayor Voting to Pass an Emergency Clause:** The Arkansas Attorney General

has opined that a Mayor cannot vote to pass an emergency clause on an ordinance. In Opinion No. 1996-155, then Attorney General Winston Bryant, in an opinion prepared by Deputy Attorney General Elana C. Wills, opined that the requirement of a two-thirds vote to pass an emergency clause emanates not from any State statute, but from a provision of Amendment 7 to the Arkansas Constitution, governing the initiation and referendum of measures by the people. Because this constitutional provision requires a two-thirds vote by "all the members elected to city or town councils," the mayor cannot vote to pass an emergency clause.

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