

IN THE CIRCUIT COURT OF WASHINGTON COUNTY
CIVIL DIVISION

RICK WOODS

PLAINTIFF

vs.

Case No. CV 11-2607-2

CITY OF FAYETTEVILLE

DEFENDANT

FILED FOR RECORD 3
2011 SEP 23 PM 11:10
WASHINGTON CO AR
CIRCUIT CLERK
B. STAMPS

MOTION TO DISMISS

Comes now the City of Fayetteville and for its Motion To Dismiss states:

1. The Fayetteville City Council's adoption of a revised Master Street Plan to replace its previously adopted Master Street Plan was a legislative act empowered by state law and not an administrative or quasi-judicial action.
2. A.C.A. §14-56-425 only controls "appeals from final action taken by the administrative and quasi-judicial agencies concerned in the administration" rather than the legislation of the City.
3. The Fayetteville City Council's legislative decision to adopt a revised Master Street Plan and street cross-sections is not subject to de novo review or to a trial by jury.
4. Plaintiff has failed to state facts upon which relief can be granted in his "Notice of Appeal."
5. Plaintiff has failed to plead sufficient facts or allegations to establish proper jurisdiction of this Court over the subject matter of the City Council's adoption of a revised Master Street Plan.

WHEREFORE, the City of Fayetteville prays that Plaintiff Rick Woods' "Notice of Appeal" be dismissed with prejudice.

Respectfully submitted,

CITY OF FAYETTEVILLE

Defendant

BY:


KIT WILLIAMS, ABA #76007

Fayetteville City Attorney

113 W. Mountain St., Ste. 302

Fayetteville, AR 72701

Phone: (501) 575-8313

FAX: (501) 575-8315

CERTIFICATE OF SERVICE

I, Kit Williams, swear or affirm that I have sent the above Motion to Dismiss by United States mail, postage prepaid, on this the 23rd day of September, 2011, to: Mr. Nick Churchill of Woods, Snively, Atwell Law Firm, LLP, 115 N. Block Avenue, Fayetteville, AR 72701.



KIT WILLIAMS

Fayetteville City Attorney

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BRIEF IN SUPPORT OF THE CITY'S MOTION TO DISMISS

Comes now the City of Fayetteville by City Attorney Kit Williams and for its Brief In Support Of The City's Motion To Dismiss, presents the following:

The City of Fayetteville agrees with Plaintiff Rick Woods that the Fayetteville City Council passed and adopted a revised Master Street Plan on August 16, 2011. This adoption of the revised Master Street Plan was in complete conformance with the power given to the City Council as the legislative body of the city by state statutes to adopt and amend such plan.

"The legislative body of the city may ... by a majority vote of the entire membership may adopt by ordinance or resolution the plans ... or regulations submitted by the commission." A.C.A. §14-56-422 **Adoption of plans, ordinances and regulations** (4)

"Following adoption by the legislative body, the adopted plans ... shall be filed in the office of the city clerk." {*Id.* at (5)}

One of the plans which is submitted through the Planning Commission for final adoption by the City Council is the Master Street Plan. A.C.A. §14-56-414(d).

Although Plaintiff has requested a trial de novo and jury trial, four decades ago the Arkansas Supreme Court found unconstitutional a previous version of A.C.A. §14-56-425

Appeals to circuit court which had allowed such de novo review of legislative policy making by the City Council..

“ (T)here is nothing better settled than that the Legislature may delegate to a town council legislative authority over the municipal affairs of the town.’ Therefore, when a city exercises the power conferred upon it by our state legislature, the city is acting in a legislative capacity which is coequal with the power of the legislature itself. ... (W)hen a municipality exercised the delegation of this legislative authority, the courts cannot take away the discretion vested in the city’s legislative body.” *Wenderoth v. City of Fort Smith*, 251 Ark. 342, 472, S.W. 2d 74, 75 (1971) (citations omitted).

As stated in Plaintiff’s Notice of Appeal, the Fayetteville City Council actually amended or changed the existing Master Street Plan as it has done periodically as Fayetteville has grown. The Fayetteville City Council has express statutory authority to exercise its discretion to make such legislative changes or amendments to the Master Street Plan, the Land Use Plan, the Zoning Map, and all other plans, ordinances and regulations previously adopted.

“14-56-423. Change in plans, etc.

After adoption of plans, ordinances, and regulations and proper filing in the officers of city clerk and county recorder, no alteration, amendment, extension, abridgement, or discontinuance of the plans, ordinances, or regulations may be made except in conformance with the procedure prescribed in §14-56-422, or by a majority vote of the city council.”

Thus, the Fayetteville City Council has the statutory legislative authority cited above in §14-56-422 to adopt an amendment to the Master Street Plan. The governing body of the City, the Fayetteville City Council, can also legislatively amend any of the plans (such as the Master Street Plan), ordinances and regulations already adopted by simple “majority vote of the city council” without the need to follow any statutory procedure. This express statutory

power demonstrates the broad and discretionary legislative policy making authority provided by the General Assembly to city councils when amending plans such as Master Street plans. This clearly proves that the Fayetteville City Council was not acting administratively or in a quasi-judicial capacity when it determined with its legislative powers to adopt a revised Master Street Plan.

Plaintiff's demand for a jury trial and de novo review violates the Separation of Powers Doctrine enshrined in our Arkansas Constitution.

“By this method of appellate review de novo there is attempted to impose upon the circuit court a function of a nonjudicial character in a matter that is exclusively within the discretion and legitimate power of the city's legislative body. The result would be to substitute the judgment of the circuit court for that of a municipal law-making body. This is contrary to Article 4 of our constitution which prohibits intrusion by the judiciary upon the legislative domain.” *Wenderoth v. City of Fort Smith, supra.*

Plaintiff Rick Woods' assertion of jurisdiction of A.C.A. §14-56-425 for his attack upon Fayetteville City Council's adoption of a revised Master Street Plan is misplaced. This statute only concerns “appeals from final action taken by the administrative or quasi-judicial agencies concerned in the administration,” not final legislative policy decisions made by the legislative body of a city. An appeal pursuant to A.C.A. §14-56-425 would be proper for administrative decisions granting or denying a Large Scale Development, Preliminary Plat, Conditional Use request or other development issue in which the Planning Commission determines whether or not a proposed development complies with the regulations of the Unified Development Code. There the Planning Commission would be **administering** the enacted regulations to ensure a proposed development meets those regulations.

There are no regulations determining how a Master Street Plan should be designed, where certain sizes and types of road should be located, how they should be connected, etc. Instead, it is within the discretion of the legislative body to determine and adopt the “general location, characteristics, and functions of streets and highways,” that will make up the Master Street Plan. A.C.A. §§14-56-414(d), 422 (4) and (5) and 423.

Prior to the Arkansas Supreme Court’s decision in *PH, LLC v. City of Conway*, 2009 Ark. 504, 2009 Ark. LEXIS 689, _____ S.W. 3d _____, (2009), there was some confusion over the applicability of A.C.A. §14-56-425 to amendments to zoning ordinances and other city planning documents. The Arkansas Supreme Court, in *PH, LLC v. City of Conway, Id.* at 10, overruled *Camden Comm. Dev. Corp. v. Sutton*, 339 Ark. 368, 5 S.W. 3d 439 (1999); and clarified that such planning decisions by city councils are legislative and not administrative.

“The plain language of that statute makes clear that it applies only to final decisions from administrative or quasi-judicial agencies. It is well settled that when a municipality acts in a legislative capacity, it exercises a power conferred upon it by the General Assembly. This court has also clearly held that when city councils exercise their legislative power, courts will review their decisions only to determine if they are arbitrary, capricious, or unreasonable. If the city council’s action is purely administrative, then *section 14-56-425* applies.” 2009 Ark. LEXIS 689 at 4 (citations omitted).

In *Kings Ranch of Jonesboro, Inc. v. City of Jonesboro*, 2011 Ark. 123, _____ S.W. 3d _____, 2011 Ark. LEXIS 114 (2011), the Arkansas Supreme Court cited its *PH, LLC v. City of Conway* case that the “crucial test for determining what is legislative and what is administrative [quasi-judicial] is whether the ordinance is making new law, or one executing a law already in existence.” 2011 Ark. 123 at 5. Amendments of such legislative policy clearly constituted “a legislative act by the City Council.” *Id.*

Analyzing this Supreme Court decision, the Arkansas Court of Appeals stated:

“Our supreme court has held that in making the determination we must look to the character of the act (as opposed to the label) in order to determine whether it is legislative or administrative. If the act sets policy, it is legislative; if it effectuates policy, it is administrative.” *Bolen v. Washington County Zoning Board of Adjustment*, 2011 Ark. App. 319 at 7, 2011 Ark. App. LEXIS 351 at 9 (2011) (citations omitted).

The Master Street Plan is one of the fundamental planning documents that sets the policy for how the transportation road network of the City will be developed just as zoning ordinances set the policy for how property can be developed and what uses and density of uses will be allowed. Both of these planning policies may be amended by legislative acts within the discretion of the City Council. Both may be administered by the Planning Commission to ensure proposed development complies with the zoning and street right-of-ways conform to the Master Street Plan.

As opposed to applying facts to an existing ordinance to determine whether or not to grant a conditional use, the Fayetteville City Council exercised its statutory and inherent legislative discretion when adopting a revision to the Master Street Plan.

“In the case before us, both the Planning Commission and the City Council were asked to apply the facts to the existing Ordinance provisions and to decide whether a conditional use should be granted. The provisions of the Ordinance were not amended by the decision on the conditional use; therefore, there was no legislative act.” *Kings Ranch of Jonesboro v. City of Jonesboro, supra* at 6.

In our case the Master Street Plan was indeed amended by the decision of the City Council. There was no test to apply facts to, but instead a legislative decision about what the Master Street Plan should look like and how the existing Master Street Plan should be

amended, if at all. Therefore, A.C.A. §14-56-425 cited by Plaintiff as his sole authority for this suit is inapplicable and his Notice of Appeal should be dismissed.

Furthermore, Plaintiff has failed to even make allegations much less plead facts upon which relief could be granted when challenging the Fayetteville City Council's legislative action in adopting a revised Master Street Plan.

“We begin by observing once more that the standard for review of legislative acts by the city council is well settled. The court should affirm the city council's decision unless it was arbitrary, capricious, or unreasonable.” *PH, LLC v. City of Conway, supra* at 15-16.

The Arkansas Supreme Court also noted that deference must be given to the city council's discretionary actions. This has long been fundamental law based upon the Separation of Powers Doctrine enshrined in the Arkansas Constitution.

“The wisdom, advisability, expediency, propriety, and necessity of particular legislation are matters solely for consideration of the legislative department and are not for judicial determination.” *Hill v. Bank of Northeast Arkansas*, 264 Ark. 412, 572 S.W. 2d 150, 153 (1978)

The Arkansas Supreme Court has established the standard of review of legislative actions many times and always emphasized a presumption of validity and a deference to the legislative branch.

“We first reiterate our standard of review in matters such as these: this court will presume that legislation is constitutional and that it is rationally related to achieving a legitimate governmental objective. *See Streight v. Ragland*, 280 Ark. 206, 655 S.W. 2d 459 (1983). Further, it is not the court's role to discover the actual basis for the legislation; rather, our role is merely to consider if any rational basis exists which demonstrates the possibility of a deliberate nexus with state objectives so that the legislation is not the product of utterly arbitrary and capricious government and void of any hint of deliberate and lawful purpose.” *Arkansas Health Services Commission v. Regional Care Facilities, Inc.* 351 Ark. 331, 93 S.W. 3d 672, 680 (2002).

In the landmark *Wenderoth* case which specifically considered the review of a city council's legislative decision in land use planning, the Arkansas Supreme Court cited and quoted from the century old case of *Little Rock Ry & Electric Co. v. Dowell*, 101 Ark. 223, 142 S.W. 165 (1911). The City Council of Little Rock had been empowered by state law to make a legislative decision just as the Fayetteville City Council has been empowered by A.C.A. §§14-56-422 and 423 to legislatively adopt and amend Master Street plans.

“The power thus conferred upon a city council by the lawmakers is coequal with the power in this respect of the Legislature itself, and in the exercise of this power a discretion is vested which cannot be taken away by the courts. It is only an arbitrary abuse of the power which the courts should control; and when the exercise of that power and discretion is attacked in the courts a presumption must be indulged that the council has not abused its discretion, but has acted with reason and in good faith for the benefit of the public. To proceed upon any other theory would be to substitute the judgment and discretion of the courts for the judgment of the members of the council, with whom the lawmakers have seen fit to lodge this power.” *Id.* at 227, 142 S.W. at 166.

With no allegations or statement of facts in Plaintiff's Notice of Appeal sufficient to comply with the necessary legal standard to overturn the Fayetteville City Council's legislative decision to amend its Master Street Plan, Plaintiff's pleading should be dismissed with prejudice.

Respectfully submitted,

CITY OF FAYETTEVILLE

Defendant

BY: 

KIT WILLIAMS, ABA #76007

Fayetteville City Attorney

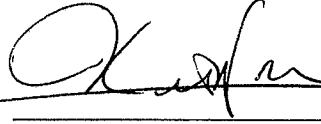
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