



Kit Williams
City Attorney

Jason B. Kelley
Assistant City Attorney

TO: **Mayor Jordan**
City Council

CC: **Don Marr**, Chief of Staff
Jeremy Pate, Development Services Director

FROM: **Kit Williams**, City Attorney

A handwritten signature in black ink, appearing to read "Kit Williams", with a long horizontal line extending to the right.

DATE: **December 28, 2011**

RE: ***Rick Woods v. City of Fayetteville*** – Case No. CV 11-2607-2
City's Motion To Dismiss Granted

During the August 16, 2011 City Council meeting, Mr. Rick Woods spoke in opposition to continuing the existing status of a four lane or boulevard section of Ruppel Road through his neighborhood as shown on several previous Master Street Plans. On a split vote, the Planning Commission had recommended downgrading this road section on the new Master Street Plan. Development Services Director Jeremy Pate, Chief of Staff Don Marr and Mayor Jordan all recommended that the existing boulevard section shown on the then current Master Street Plan be continued for the 2011 Master Street Plan. The City Council agreed and rejected that one recommendation of the Planning Commission before adopting the 2011 Master Street Plan.

Rick Woods filed a Notice of Appeal of the City Council's decision and asked for "a trial by jury to be tried de novo (meaning a brand new trial) in accordance with A.C.A. §14-56-425." This would have been proper procedure if your decision had concerned a large scale development or a preliminary plat. In those cases, your decision is given virtually no weight, and the case is tried before a jury who sits as if they were the City Council making the final decision pursuant to the Unified Development Code, state law and the state and federal constitutions.

I filed a Motion To Dismiss on September 23, 2011 and argued that your decision was "**legislative**" because it set the policy for Fayetteville for street

development rather than “**administrative**” which effectuates or administers the existing policy. Because your decision on the Master Street Plan of 2011 was legislative or policy-making, the Court would give your decision great deference so that if challenged in Court, your decision will be upheld unless it is arbitrary, capricious or unreasonable (regardless whether or not a judge might believe it prudent or the right decision).

Rick Woods filed a Response to the City’s Motion To Dismiss about October 7, 2011 and argued that your decision should be governed by A.C.A. §14-56-425 and its much lower preponderance of the evidence standard with no consideration given to the City Council’s decision. I filed a final Reply (with Brief) on October 17, 2011.

Today Judge Kim Smith ruled that the City of Fayetteville was correct and that our Motion to Dismiss should be granted unless Rick Woods amends his pleading within thirty days. This is a vitally important decision because it ensures that if Mr. Woods or anyone else wishes to challenge the Fayetteville City Council’s approval of the 2011 Master Street Plan or of any Master Street Plan (or amendment thereto) in the future, the proper and difficult burden to prove the approval was arbitrary or capricious will be applied.

I have attached Circuit Judge Kim Smith’s Letter Opinion and Order Granting Motion To Dismiss Or Requiring Plaintiff To Replead to this memo.

CONCLUSION

I would like to thank **City Clerk Sondra Smith, Senior Planner Andrew Garner and Community Development Services Office Manager Cory Whorton** for helping me research the history of the City’s Master Street Plans and the City Council Resolutions adopting them. I attached this information as well as Andrew Garner’s Affidavit to the City’s Reply to Plaintiff’s Response To Our Motion To Dismiss to better explain the legislative process the City Council historically has used to adopt Master Street Plans.

The City Attorney’s Office often relies upon the expertise and competence of the City Clerk’s Office and Development Services Department if Fayetteville gets sued on development or zoning issues. With the help of these professionals, the City of Fayetteville has not lost such a case during my more than a decade’s tenure as Fayetteville City Attorney.



KIM M. SMITH
CIRCUIT JUDGE

STATE OF ARKANSAS

FOURTH JUDICIAL CIRCUIT - SECOND DIVISION
WASHINGTON COUNTY COURTHOUSE

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December 28, 2011

Mr. Nick Churchill
Attorney at Law
Via E-Mail and Facsimile: 695-1120

Mr. Kit Williams
Fayetteville City Attorney
Via E-Mail and Facsimile: 575-8315

RE: Rick Woods v. City of Fayetteville,
Washington County No. CV 2011-2607-2

LETTER OPINION

Gentlemen:

Pending before the Court is a Motion to Dismiss as filed by the defendant, City of Fayetteville, and both sides have requested that this Court rule on the motion from the briefs filed. The motion argues that the plaintiff has failed to plead sufficient facts to establish this Court's authority pursuant to ACA §14-56-425 to provide for a de novo review or that the plaintiff is entitled to a jury trial.

It is clear that ACA §14-56-425 provides for appeals to circuit court from final action from "final action taken by the administrative and quasi-judicial agencies".

The Arkansas Court of Appeals in *Bolen v Washington County Zoning Board of Adjustments*, 2011 Ark. App. 319 cites the Arkansas Supreme Court case of *City of Fort Smith v. McCutchen*, 372 Ark. 541 (2008). In *Bolen* at page 7, the Court of Appeals states:

"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."

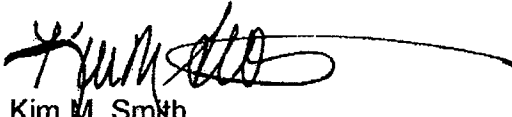
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ACA §14-56-422 and ACA §14-56-423 provide the mechanism for the adoption of plans, ordinances and regulations by the adoption of the city council of the plans and regulations submitted by the planning commission. Those statutes provide that the "legislative body" adopts the plans. In ACA §14-56-423 the alteration, amendment, extension, abridgement, or discontinuance of the plans, ordinances or regulations are provided for by requiring the same procedure as in ACA §14-56-422. Clearly the legislature has labeled these actions as legislative. The City Council's vote to amend the revised master street plan clearly sets the policy for the type, size, and general location of the streets needed for the city. This action was legislative because it was legislating a new master street plan and not enforcing the master street plan.

For the reasons argued by the City of Fayetteville in its briefs and the reasons cited above, it is the ruling of this Court that the action appealed is legislative and not administrative. Since this motion was based on a 12(b)(6) failure to plead sufficient facts, this Court is giving the plaintiff his choice of either appealing this order or filing an amended lawsuit within thirty (30) days.

Please find enclosed an Order concerning my rulings. Thanking you both for the excellent briefs you have provided in regards to this matter, I remain,

Sincerely,



Kim M. Smith
Circuit Judge

xc: court file

IN THE CIRCUIT COURT OF WASHINGTON COUNTY, ARKANSAS
SECOND DIVISION

RICK WOODS

VS.

NO. CV 2011-2607-2

CITY OF FAYETTEVILLE

2011 DEC 28 PM 1:14
CIRCUIT CLERK
B. STAMPS
PLAINTIFF
DEFENDANTS

ORDER GRANTING MOTION TO DISMISS
OR REQUIRING PLAINTIFF TO REPLEAD

For the reasons stated in the letter opinion attached hereto and incorporated herein the Court finds that the Motion to Dismiss for failure to state facts upon which relief can be granted should be granted unless the plaintiff chooses to file an amended pleading within thirty (30) days of the filing of this order.

IT IS SO ORDERED.


KIM M. SMITH - CIRCUIT JUDGE

File-Marked Copies to:

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