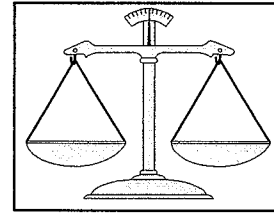


FAYETTEVILLE

THE CITY OF FAYETTEVILLE, ARKANSAS

KIT WILLIAMS, CITY ATTORNEY
DAVID WHITAKER, ASST. CITY ATTORNEY



LEGAL DEPARTMENT

DEPARTMENTAL CORRESPONDENCE

TO: **City Council**

FROM: **Kit Williams, City Attorney**

DATE: **January 17, 2006**

RE: **Litigation Highlights of 2005**

Someone turned on the litigation spigot in 2005 and pointed the hose at us. I have given to Mayor Coody the 2005 Highlights of Court Actions for his use in his State of the City report. This year's highlights include ten significant cases (up from six in 2004) and did not list at least six other pending cases. This more than doubling the litigation workload is the bad news (at least for my office). The good news is that **the City has prevailed in every case.**

BOTTOM LINE

The City of Fayetteville has suffered no civil litigation defeats again in 2005, nor since I became Fayetteville City Attorney in March of 2001. The very modest and favorable \$50,000.00 settlement of the firefighters' suit is the first money paid as a result of litigation in the last four years.

This is in marked contrast with the 1990's when the City of Fayetteville had to pay **several million taxpayer dollars for attorney's fees and damages** as a result of legal or constitutional errors. I appreciate the fact that most aldermen usually take my advice in legally questionable areas because our past shows that good intentions cannot shield our taxpayers if the constitution is mistakenly violated.

HIGHLIGHTS OF 2005

State of the City

Court Actions

(The Schweik case and Wilkins case noted below were decided early enough in 2005 that I included them in last year's highlights which will provide more details than given here.

Rick Schweik and Free Choice-Fayetteville v. City of Fayetteville and City Clerk Sondra Smith, Case No. CV 03-1774-6. Mr. Schweik and Free Choice-Fayetteville sued the City and City Clerk seeking to have the current smoking ordinance (and any future ordinances) declared illegal as preempted by state statutes. The City Attorney filed a Motion to Dismiss on this Court with supporting Brief and later filed a Reply Brief after plaintiffs responded. The Court granted the City's Motion To Dismiss the Preemption issue and later dismissed the whole case.

Wilkins v. Officer Gary Crews, Civil No. 03-5055 Federal District Court. Mr. Wilkins sued Detective Gary Crews and the City of Fayetteville claiming his rights were violated when Detective Crews and other Fayetteville Police officers stopped Wilkins for carrying a prohibited weapon (knife) and held his Outlaw Motorcycle Club vest as evidence. The Federal jury unanimously found in favor of Detective Crews and the Fayetteville police department.

De Palma v. City of Fayetteville, et. al – Case No. CV 04-1685-5. Dr. De Palma sued the City, SWEPCO, and his neighbor for alleged drainage damages. The City filed a Motion to Dismiss with Supporting Brief presenting a defense of sovereign immunity and our overall lack of responsibility for any alleged damages. The City responded to two amended Complaints by filing additional Motions to Dismiss. The City Attorney accompanied City Staff Engineer Ron Petrie twice to view the drainage problem and structures. Eventually, this case was voluntarily dismissed by the Plaintiff.

Basic Construction, Inc. v. City of Fayetteville – Washington County Circuit Court, Case No. 2004-1757-2. Gary Combs, President of Basic Construction and Waterford Estates, Inc. sued the City of Fayetteville when the City could not immediately agree to allow the installation of regular fire

hydrants at this Goshen property because of limited water capacity. The City answered and submitted an Affidavit from engineering staff that the plaintiff's engineering firm had been notified of the capacity issue months previously. The City filed a Motion For Summary Judgment which was granted by the Circuit Judge dismissing all claims against the City with prejudice.

Brock White v. City of Fayetteville – Washington County Circuit Court Case No. CIV 05-113-4. Six months after Mr. White purchased his house on Amber Lane, the City was hit with several unusually large, localized rainfall events which flooded his home (April 22-July 2, 2004). The City Council authorized up to \$100,000.00 to enlarge the drainage structures installed decades earlier by the developer. After this drainage improvement was finished, Mr. White sued the City claiming the City had inversely condemned all of his property to be used as a detention pond.

During his deposition, Brock White was forced to admit that his house was not intended to be nor could it serve as a detention pond. Mr. White admitted his house had not suffered substantial devaluation because of the City's actions, but actually increased in value. The City Attorney filed substantial briefs to support the City's Motion For Summary Judgment and won a dismissal with prejudice for all charges after oral arguments in support of the City's Motion For Summary Judgment.

Charles Knight v. Officer Hunter, Jailer Bruce, Officer Becker and Officer Lylies, Civil No. 04-5138 – U.S. Federal District Court for the Western District of Arkansas. Mr. Knight was arrested by Fayetteville Police Officer Hunter Carnahan and Fayetteville Officer Bailey on March 18, 2004 for Public Intoxication, Refusal to Submit to Arrest, Disorderly Conduct, and Obstructing Government Operations. After pleading guilty and serving a couple of weeks in the Fayetteville Jail, Mr. Knight was transferred to Benton County which held a felony arrest warrant for him. Evidently, Mr. Knight was sentenced to prison by Benton County. Mr. Knight's Complaint alleges he was racially profiled which led to his arrest by Officer Hunter Carnahan. The City Attorney prepared three affidavits to support the City's Motion For Summary Judgment. The Federal Court dismissed Mr. Knight's case.

Raymond Setzke v. Fayetteville Officer Jeremy Grammar, Chief Frank Johnson, Washington County Sheriff Whitmill, et. al., Civil No. 04-5046 – Federal District Court for the Western District of Arkansas. The Fayetteville Police Department has a long history of arresting and jailing Mr. Setzke for Driving on Suspended License, No Insurance, DWI, Theft by

Receiving (felony), Theft of Property (felony), etc. On September 27, 2003, Mr. Setzke was being pursued by the Johnson Police Department and Washington County Sheriff's Office for Terroristic Threatening. When finally located, Mr. Setzke refused to show his hands that officers were concerned could be holding a weapon. Fayetteville Police Officer Grammar was assisting in the arrest. After a brief standoff, the Washington County K-9 unit used the dog to help subdue Mr. Setzke when the officers moved into seize Mr. Setzke's arms to prevent him from using a hidden weapon. The police dog probably bit Mr. Setzke in the rear during this arrest, but little harm resulted and the dog was called off as soon as Mr. Setzke was under control of the officers.

The City attorney attended Mr. Setzke's scheduled deposition, but Mr. Setzke refused to appear. A Motion to Dismiss for this refusal was filed and the Court ordered Mr. Setzke to appear for a second attempt for his deposition. The City Attorney appeared again, but Mr. Setzke did not. His case was dismissed and attorney's fees awarded to the City.

Cartwright v. City of Fayetteville – Washington County Circuit Court Case No. CIV 2004-1934-4. The Cartwrights, owners of unimproved land adjacent to Lake Wilson Park, petitioned the Circuit Court to grant them an easement of necessity over City-owned land. At one time, the Cartwrights accessed the land through a gate at the park, but frequent vandalism to City property and illegal hunting became such a problem, the Staff found it necessary to block the way. Staff also devoted time and effort to identifying an alternative route for the Cartwrights that did not require passage over City property. The Assistant City Attorney filed an Answer as well as a Motion for Summary Judgment with Supporting Brief. The Cartwrights then voluntarily dismissed their case against us.

Peter T. Reagan, et. al v. City of Fayetteville, Case No. 05-5045, Federal District Court of the Western District of Arkansas. Shortly after the City of Fayetteville announced that it had asked the Department of Labor (DOL) to conduct a supervised settlement and analysis of our entire employee pay system and received word that the DOL would conduct such analysis and settlement, Mr. Reagan and several other current and former firefighters filed suit contending the City has not paid all of the overtime required by the FSLA. The Complaint asked for double damages and attorneys fees. The City Attorney asked for and attended a Court supervised settlement conferences. Initial demands by the firefighters' attorney after this mediation were around \$650,000.00. After long negotiations by the City Attorney and Firefighters'

attorney, a settlement of \$50,000.00 was agreed to and later accepted by the City Council and Federal Court. Upon payment the case was dismissed with prejudice.

City of Fayetteville v. Washington County Assessor, Washington County, Fayetteville School District, Fayetteville Public Library, et. al., Washington County Circuit Court Case No. CV 05-559-2. The City Council authorized the City Attorney to file a Declaratory Judgment suit in order to clarify the law concerning how the tax increment should be distributed by the Assessor after the formation of the Highway 71 East Square Redevelopment District No. 1.

The Trust Indenture approved by the City Council requires the City to seek the maximum amount of tax increment allowed by law to pay off the TIF bonds which will fund the project. This Declaratory Judgment suit is necessary to prevent tax revenue from possibly being diverted to an incorrect recipient which would be an illegal exaction. The City prepared "Stipulated Facts" that were signed off on by six of the seven defendants. Affidavits and certified documents were then obtained and Summary Judgment Motions are pending or being prepared by all parties.

BOTTOM LINE

About six other less significant or pending cases were not included in this summary. **Again in 2005, the City of Fayetteville suffered no civil litigation defeats as has been the case since I became City Attorney in March of 2001.** The very modest and favorable \$50,000.00 settlement of the firefighters suit is the first money paid as a result of litigation in the last four years.

By: _____


KIT WILLIAMS

Fayetteville City Attorney