Fayetteville
ARKANSAS
www.accessfayetteville.org

Departmental Correspondence

LEGAL DEPARTMENT

Kit Williams
City Attorney

Jason B. Kelley
Assistant City Attorney

TO: **Mayor Jordan**
City Council

CC: **Karen Minkel**, Strategic Planning Director

FROM: **Kit Williams**, City Attorney

DATE: **February 11, 2011**

RE: **Legality and Constitutionality of Proposed Streamside Protection Ordinance**

Several speakers at the last City Council meeting questioned the legality and constitutionality of the proposed Streamside Protection Ordinance. I believe this proposed ordinance is clearly within the statutory power of the City Council to enact.

For example, A.C.A. §14-54-702 states that "Municipal corporations shall have the power to … prevent pollution of water or injury to waterworks." A "reservoir" (like Beaver Lake) is one type of "waterworks" that cities are authorized to construct, acquire, purchase and protect by A.C.A. §14-54-702. This ordinance attempts to protect our drinking water source, Beaver Lake, by reducing by 75% the amount of sediment (which carries phosphorous) into our streams that flow into Beaver Lake and the Illinois River. The Beaver Water District's spokesman spoke to the City Council in favor of the Streamside Protection Ordinance because it would protect Beaver Lake as our water source. Thus, A.C.A. §14-54-702 clearly supports our efforts to protect this reservoir.

This statute even gives the City Council the ability to go **five miles beyond our city limits to prevent pollution or injury to any stream or source of water.**

> "(b) For the purpose of establishing and supplying waterworks, any municipal corporation may go beyond its territorial limits. Its jurisdiction to prevent or punish any pollution or injury to the stream or source of water, or to the waterworks, shall extend five (5) miles beyond the corporate limits." A.C.A. §14-54-702(b).

The Arkansas Supreme Court has interpreted this statute as providing a municipality with the power and duty to protect the comfort and well-being of its citizens by furnishing pure water. *Bourland v. City of Fort Smith*, 190 Ark. 289, 78 S.W. 2d 383, 385 (1935).

Probably the broadest statutory power given to cities is found in §14-55-102 **General purpose**

> "Municipal corporations shall have power to make and publish bylaws and ordinances, not inconsistent with the laws of this state, which, as to them, shall seem necessary to provide for the safety, preserve the health, promote the prosperity and improve the morals, order, comfort, and convenience of such corporations and the inhabitants thereof."

This statute and others give the City Council considerable discretion under its "police power" to regulate activities within and near its city limits.

> "This court long ago recognized that the varied uses and conflicts of city life required that much must be left to the discretion of city authorities, whose actions should not be judicially interfered with unless manifestly unreasonable and oppressive, an unwarranted invasion of private rights, or clearly in excess of powers grants." *City of Little Rock v. Linn*, 245 Ark. 260, 270, 432 S.W. 2d 455, 462 (1968).

> "(W)hen a municipality acts in a legislative capacity, it exercises a power conferred upon it by the General Assembly, and consequently, an act of a municipality in the co-equal of an act of the General Assembly."
>
> ...
>
> "**The legislative power includes discretion to determine the interests of the public as well as the means necessary to protect those interests.** Within constitutional limits, the legislative branch is the sole judge of the laws that should be enacted for the protection and welfare of the people and when and how the police power of the State is to be exercised." *City of Lowell v. M & N Mobile Home Park*, 323 Ark. 332, 335, 916 S.W. 2d 95, 97 (1996) (emphasis added).

It is up to the good judgment of the City Council to determine whether protection of streams and drinking water requires some streamside protection zones which would restrict certain soil disturbing construction or other activities from occurring. After considering all the evidence and statements presented to them, if the City Council determines that public necessity requires such regulations, the City Council has statutory power to enact such reasonable regulations.

The Arkansas Supreme Court has held that the "**mere possibility of a public harm is sufficient basis for the municipality to regulate under its police power.**" *Phillips v. Town of Oak Grove*, 333 Ark. 183, 191, 968 S.W. 2d 600, 604 (1998). The Supreme Court also cited Ark. Code Ann. §14-55-102 as a grant of police power:

> "The police power of the state is founded in public necessity and this necessity must exist in order to justify its exercise. *Id.* **It is always justified when it can be said to be in the interest of the public health, public safety, public comfort, and when it is, private rights must yield** to public security, under reasonable laws. The State has authorized the municipalities to legislate under the police power in Ark. Code Ann. §14-55-102 (1987)." *Id.* (emphasis added).

Planning statutes also give the City Council authority to regulate land uses for broad purposes. For example, A.C.A. §14-56-403 provides power to adopt plans "in order to promote, in accordance with present and future needs, the safety, morals, order, convenience, prosperity and general welfare of the citizens."

> "The plans may provide, among other things, for:
>
> (1) Efficiency and economy in the process of development;
> (2) The appropriate and best use of land;
> ...
> (7) Good civic design and arrangement;
> (8) Adequate public utilities and facilities; and
> (9) Wise and efficient expenditure of funds."

Because the express purpose of the proposed Streamside Protection Ordinance (within the Flood Damage Prevention Chapter of the UDC) include protecting our water resources, reducing pollutants in water resources, stabilizing stream banks to reduce erosion and loss of property owners' usable property and reducing flooding damage, not only does the City Council's police power enable it to regulate streamsides, but its statutory planning power for property provides additional statutory power to protect streambanks.

CONSTITUTIONAL ISSUES

Some speakers at the last City Council meeting also claimed that the proposed regulations would result in a constitutional "taking" of the property owners' land such that an inverse condemnation had occurred requiring the City pay for the land within the streamside protection zones. I do not believe the proposed regulations would be deemed a constitutional taking.

We have been challenged before over regulations that a landowner alleged constituted an inverse condemnation of his property. Mr. Richard Berry, as owner of the Thunder Valley Raceway, sued the City for $500,000.00 over this issue in 2003. Much of my memo of February 18, 2003 discussing this issue is also relevant to streamside regulations so I will provide excerpts from that memo.

Justice Oliver Wendell Holmes stated in a 1922 Supreme Court case, *Pennsylvania Coal v. Mahon:*

> "(T)he general rule at least is that while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking." 260 U.S. 393 (1922)

This statement was reaffirmed in 1987 by Chief Justice Rehnquist in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 316 (1987). The Supreme Court also held in that case that if a property owner proves his property has been "taken" by land use regulation, the property owner may collect monetary damages to compensate for the "taking."

The key issue is always **when a regulation has gone "too far"** so that a city would be exposed to liability. Prior to Fayetteville's first zoning in 1951, property owners could use their property basically, as they chose. The 1951 zoning placed many new restrictions on how the property could be used, but no constitutional takings challenges were made to my knowledge. Again, in 1970, the Fayetteville City Government reconsidered the zoning throughout Fayetteville and made significant zoning changes without the express agreement of all affected property owners. Some "down zoned" property owners (such as the owner of Nick's DX Service Station) attempted to regain their previous zonings politically, but no constitutional takings challenges in Court were made to my knowledge. No suit was forthcoming when residential density in flood plains was reduced by city ordinance in the 90's to one house per acre.

Zoning regulation of land is somewhat similar to the regulation of Motor Vehicle Racing Facilities to prevent a nuisance in that both place restrictions upon someone's right to do as they see fit with their property. Regulation of nuisances has long been a

right of cities and usually not a justification for an inverse condemnation claim. (See my brief.)

In *Agins v. City of Tiburon*, 447 U.S. 255 (1980), a zoning ordinance limited development on a five acre parcel to five houses. The Supreme Court held:

> "(t)he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests or denies an owner economically viable use of his land." Id. at 260.

The Supreme Court held that the open space policies of Tiburon was a legitimate state interest and did not deprive the owner of an economically viable use of his property. The property owner's "takings" claim was denied.

The Arkansas Supreme Court threw out an inverse condemnation claim by property owners who were about to sell their property to the Northeast Arkansas Regional Solid Waste Disposal Authority to be used as a landfill for a price of $750,000.00. Before the sale could go through, the Poinsett County Quorum Court passed a zoning ordinance preventing the land from being used as a landfill. The owners (Barretts) sued Poinsett County for inverse condemnation and then the legislature passed a statute prohibiting one county from placing a landfill in an adjoining county without consent of the other county.

The Arkansas Supreme Court held "it is clear that any injuries sustained were not sufficient to support an action for inverse condemnation." *Barrett v. Poinsett County*, 306 Ark 270, 811 S.W. 2d 324, 325 (1991).

The Arkansas Supreme Court cited the United States Supreme Court's most important case on regulatory takings, *Pennsylvania Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978) (hereinafter *Penn Central*).

> "(R)egulations affecting less than all of the use or all of the value of property, remain to be considered on the particular circumstances of each case." Id.

The Arkansas Supreme Court summarized the *Penn Central* holding and found:

> "In similar cases, we have held that a much greater reduction in value or use of the property than is present here would not constitute a regulatory taking." *Barrett v. Poinsett County,* supra.

When the state required destruction of a horse valued at $1,000.00 which would be worth only $200.00 for slaughter, the owner appealed and claimed her property (the horse) had been taken without just compensation (a "taking"). **The Arkansas Supreme Court held this 80% reduction in value was not a taking.**

> "Here, as already noted, the regulation is a valid exercise of the police power and there has been no total diminution of the value of the appellant's horse, but only a reduction in its value. And while there is no set formula to determine where regulation ends and taking begins ... when comparing this to similar cases, we conclude the reduction in value does not equate to a taking." *Winters v. State,* 301 Ark. 127, 782 S.W. 2d 566, 569 (1990).

In a regulatory takings case involving pollution control costs estimated by the owner to be $500,000 to $1,000,000, the Arkansas Supreme Court rejected a takings claim holding that "the company has not shown compliance with the regulation would be commensurate to a taking of its property." *J.W. Black Lumber v. Arkansas Dept. of Pollution Control and Ecology*, 290 Ark. 170, 717 S.W. 2d 807, 811.

> "The mere fact that a partial use of one's property is burdened by regulation does not amount to a taking. In *Goldblatt v. Town of Hempstead,* N.W., 369 U.S. 590, (1962), the court said: There is no set formula to determine where regulation ends and taking begins. Although a comparison of values before and after is relevant ... it is by no means conclusive, see *Hadacheck v. Sebastian*, 239 U.S. 394 where a diminution in value from $800,000 to $60,000 was upheld." *Id.* at 810-811 (citations omitted)

The United States Supreme Court's landmark *Penn Central* case laid out several factors that should be considered in a regulatory takings case:

(1) Interference/reduction with the owner's reasonable investment backed expectations of how the property could be used;

(2) Economic impact of the regulation upon the property's value;

(3) Character/importance of the governmental interest in the regulation.

The Supreme Court has consistently held that each case must be considered on its own individual merits and factual difference. A one-size fits all test is not constitutionally possible in this area of constitutional law.

The most recent holding by the United States Supreme Court in this area was the Tahoe development moratorium case. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Commission*, 535 U.S. ___ (2002).

The Supreme Court reviewed the history of takings law.

> "(C)ompensation is required when a regulation deprives an owner of 'all economically beneficial uses' of his land. ... But our holding was limited to 'the extraordinary circumstance when no productive or economically beneficial use of land is permitted.'" *Id.* (citations omitted)

> "The *Penn Central* analysis involves 'a complex of factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action." *Palazzo v. Rhode Island*, 533 U.S. 606, 617 (2001).

The Supreme Court held that the years long moratorium on development of private land within the Lake Tahoe basin while the regional planning commission formulated development restrictions to protect Lake Tahoe from degradation did NOT constitute a constitutional taking requiring compensation.

The Supreme Court held that "a governmental regulation ... that bans certain private uses of a portion of an owner's property ... does not constitute a categorical taking." *Id.* Thus the *Penn Central* analysis would be necessary to determine the likelihood of a takings claim to be successful in the Streamside Protection Ordinance.

The first prong of a test is:

(1) Interference/reduction with the owner's reasonable investment backed expectations of how the property could be used;

The Streamside Protection Ordinance does not affect any ongoing activity or any existing building on the property. Like all of our zoning ordinances and development ordinances, the Streamside Protection Ordinance could have some affect upon **new development** within the streamside protection zones. However, any reasonable landowner/investor whose property could be affected can obtain a building permit now to accomplish any "reasonable investment based expectations of how the property could be used." Failure of a landowner to use this window of opportunity now would hurt the landowner's argument that a true likelihood or expectation of future use was harmed by this regulation.

Furthermore, the variance procedures within this ordinance would have to be unsatisfactorily exhausted before any claim of unconstitutional taking could be successful.

(2) Economic impact of the regulation upon the property's value;

The variance procedures within this ordinance with appeal rights to the City Council should prevent the regulation from having enough adverse economic impact on any property owner's parcel to constitute a taking. If and when a variance appeal reaches the City Council, you will need to closely analyze any proven economic hardship upon the landowner resulting from the Streamside Protection ordinance in your decision to grant or deny such variance. This should protect the City from a constitutional takings claim.

(3) Character/importance of the governmental interest in the regulation;

The *Lake Tahoe* case decided by the United States Supreme Court against landowners/developers related to the same water quality issues that the Streamside Protection Ordinance is designed to protect.

The state legislature has enacted a statute which the Arkansas Supreme Court interpreted as a power and duty of a city council to protect the comfort and well-being of its citizens by furnishing them pure and clean water. *Bourland v. City of Fort Smith*, supra. The Beaver Water District has requested this Streamside Protection Ordinance from Fayetteville to help preserve the quality and purity of our Beaver Lake water supply. It would be hard to envision a stronger governmental interest that the preservation of a clean and pure water supply for our citizens, businesses, and industries.

CONCLUSION

The City Council has clear statutory authority to enact the Streamside Protection Ordinance. The reasonable regulations, exemptions, and variances within this ordinance should prevent it from constitutionally taking anyone's property.