2010: A Second Odyssey into Arkansas Land-Use Law

Buckley W. Bridges
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I. INTRODUCTION

In 1980, Professor Robert R. Wright published his comprehensive *Zoning Law in Arkansas: A Comparative Analysis.*\(^1\) For the past thirty years, that insight into Arkansas’s land-use law has stood alone. Needless to say, the past three decades have seen both seismic shifts and subtle undulations in various areas of life and the law. The law of land-use is no different; however, unlike many other areas of the law, no recent attempt has been made to collect, catalogue, and analyze those changes.

To control the scope of the analysis, this article is divided into four sections: one substantive, one structural, one procedural, and an appendix. First, it will look back at Professor Wright’s article and supply updates on the areas of law that have changed (or have failed to change) over the intervening years.\(^2\) Second, the article will address the nature of the government’s power to regulate land-use, the body that may exercise that power, and the manner in which the appropriate body may wield that power.\(^3\) Third, the article will treat the most salient changes in the procedure used to litigate land-use decisions.\(^4\) Finally, the article includes an appendix, which the author hopes will aid readers and researchers studying Arkansas’s enabling legislation.\(^5\)

II. ZONING LAW IN ARKANSAS: THIRTY YEARS LATER

*Plus ça change, plus c’est la même chose.*\(^6\)

As the purpose of this section is to update various aspects of Professor Wright’s original analysis, a quick review of his article is a fitting place to start. In the late 1970s and early 1980s, Professor Wright found Arkansas’s

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2. *See infra* Part II.
3. *See infra* Part III.
4. *See infra* Part IV.
6. “The more things change, the more they stay the same.”
land-use law to be underdeveloped. Surprisingly, this observation holds true today. For more than a generation, the development of large swaths of land-use law has been either neglected or obstructed. Although the following list of topics is not comprehensive (even measured against Professor Wright's article), it highlights the main developments and the most striking stagnation in the law: aesthetics, extra-territorial jurisdiction, spot zoning, conditional-use permits, planned-unit developments, and the Pfeifer Rule.

A. Aesthetics as a Basis for Land-Use Decisions

Professor Wright read the enabling statutes to "permit zoning to be exercised to promote aesthetic purposes only," but at the time of his article, the "Arkansas cases ... suggest[ed] otherwise." Instead, he found Arkansas to be in line with the majority rule at the time—that "aesthetic benefits must be accompanied by some other valid police power consideration." Shortly after his analysis, however, Arkansas courts changed their tune. Before discussing the current law, however, it is necessary to investigate the source of Professor Wright's concern.

Professor Wright cited City of Fayetteville v. S & H, Inc., decided in 1977, for the proposition that Arkansas courts disfavored aesthetics as a basis for zoning. In retrospect, it is clear the court was speaking out of both sides of its mouth. For instance, the court held that it would not strike down an ordinance "merely because aesthetic purposes are taken into consideration, if those purposes are merely incidental to the exercise of the police power in the interest of the public health, safety, morals or welfare." Later the court reinforced this sentiment stating, "The fact that aesthetic considerations [are] a significant factor in the exercise of the police power should not invalidate an ordinance for an otherwise legitimate police-power objective." Both of these citations clearly support Wright's proposition that Arkansas courts find aesthetics an insufficient basis for land-use regulation.

7. Wright, supra note 1, at 421.
8. See infra Part IV (largely dealing with one mechanism of "obstruction").
9. Wright, supra note 1, at 425 passim.
10. Id. at 426.
11. Id.
12. Id.
14. Wright, supra note 1, at 426.
15. S & H, Inc., 261 Ark. at 164, 547 S.W.2d at 103 (emphasis added) (citing Herring v. Stannus, 169 Ark. 244, 275 S.W. 321 (1924)).
16. Id. at 165, 547 S.W.2d at 103 (emphasis added) (citing Naegele Outdoor Adver. Co. v. Minnetonka, 281 Minn. 492, 162 N.W.2d 206 (1968)).
Between the two above quoted sentences, however, the court had something interesting to say in support of aesthetic zoning. The court noted that "public welfare is a broad concept" and that Fayetteville’s board found "the existence of signs" to be "detrimental to its scenic resources," which affected its "economic development." The court approved this as "a constitutionally permissible objective under the police power of the state." If the court meant what it said in this paragraph, it apparently approved of all aesthetic regulation, given that almost any regulation primarily serving aesthetics will have some accidental and ancillary positive effect on the public. In other words, if the court meant City of Fayetteville v. S & H, Inc. to be the test for the permissibility of aesthetic land-use regulation, any aesthetic regulation should pass.

In addition, the general attitude throughout the country has changed. At one time, courts considered aesthetics a "matter of luxury and indulgence rather than a matter of necessity." Today, courts generally hold that "zoning laws are valid even though they may have as their purpose, in part or whole, the promotion of esthetic considerations." Arkansas has followed the national trend.

The Arkansas Supreme Court endorsed the modern view most robustly in City of Fayetteville v. McIlroy Bank & Trust Co. There, the court first recognized the national trend: "At one time the courts held pretty generally that zoning ordinances could not be sustained if they rested primarily or solely upon aesthetic considerations, but that point of view is disappearing." The court went on to make the following sweeping pronouncement: "If the inhabitants of a city or town want to make the surroundings in which they live and work more beautiful or more attractive or more charming, there is nothing in the constitution forbidding the adoption of reasonable

17. Id., 547 S.W.2d at 103. The specific findings of the Fayetteville board follow: that a large and increasing number of tourists have been visiting the City of Fayetteville, Arkansas, and as a result, the tourist industry is a direct source of income for citizens of said city, with an increasing number of persons directly or indirectly dependent upon the tourist industry for their livelihood. Scenic resources are distributed throughout the city, and have contributed greatly to its economic development, by attracting tourists, permanent and part-time residents, and new industries and cultural facilities. The scattering of signs throughout the city is detrimental to the preservation of those scenic resources, and so to the economic base of the city, and is also not an effective method of providing information to tourists about available facilities.

18. Id. at 164, 547 S.W.2d at 103.

19. 8 McQuillen, MUN. ON CORP. § 25.29 (3d ed. 2009).

20. Id.


22. McIlroy Bank & Trust Co., 278 Ark. at 502, 647 S.W.2d at 440.
measures to attain that goal. 23 With only six years and no geography between them (both cases arise out of Fayetteville), S & H, Inc. and McIlroy Bank & Trust clearly evidence a tidal shift in Arkansas’s view of aesthetic regulation. The former couches its endorsement (if it can be called that) in negatives, while the other positively exclaims the virtues of aestheticism. As of this writing, McIlroy Bank & Trust remains the single strongest exposition from the court on aesthetics.

Almost immediately after McIlroy Bank & Trust, the court began a linguistic, and perhaps legal, coupling that remains with us today. In Donrey Communications Co., Inc. v. City of Fayetteville, 24 the court upheld an ordinance based upon “the legitimate governmental interests in traffic safety, the aesthetic landscape and the tourism industry.” 25 First, note that this is another City of Fayetteville case, and second, note that this decision came down only seven months after McIlroy Bank & Trust. 26 The primary difference is that Donrey Communications hinges on whether the governmental interests are substantial enough to survive a First Amendment challenge, 27 whereas McIlroy Bank & Trust focuses generally on the “reasonableness” of the ordinance. 28

Despite its differences from McIlroy Bank, Donrey Communications, on its own terms, follows the trend of endorsing aesthetics as a stand-alone purpose for regulating land use. Independent of the traffic safety concerns, the Arkansas Supreme Court cites numerous Supreme Court of the United States decisions as precedent for the proposition that aesthetics is a “substantial governmental goal.” 29 Later, the court goes on to observe that “[m]any courts have rejected the argument that it is unreasonable to prohibit billboards in commercial and industrial areas of little, if any, natural beauty.” 30 Therefore, despite its coupling aesthetics with traffic safety, it is clear that the Donrey Communications court considered aesthetics a stand-alone principle upon which to base local land-use decisions.

23. Id. at 503, 647 S.W.2d at 441.
25. Id. at 414, 660 S.W.2d at 903.
27. See Donrey Commc’ns, 280 Ark. at 412–14, 660 S.W.2d at 902–03.
28. See generally McIlroy Bank & Trust, 278 Ark. 500, 647 S.W.2d 439.
Since then, the court has considered aesthetics and traffic safety as twin goals. In 1992, the Arkansas Supreme Court found “traffic safety and aesthetics” formed “a rational basis” for legislation.\(^{31}\) In 1998, the court applied the since discredited *Agins* analysis to conclude that “the legitimate state interests of promoting aesthetics and traffic safety” were substantially advanced by the regulation.\(^{32}\) The 1992 case uses the singular indefinite article “a” when describing the two concerns and cites *Donrey Communications* for the proposition.\(^{33}\) By contrast, the 1998 case cites traffic safety and aesthetics as “state interests,” in the plural rather than in the singular, using *McIlroy Bank & Trust*, as well as the 1992 case to support the proposition.\(^{34}\) In sum, even though the more recent cases examine aesthetics along with traffic safety, precedent makes clear that this coupling is not essential to the validity of an ordinance based solely upon aesthetic concerns. Today, Arkansas law strongly supports the idea that aesthetic concerns are rational and legitimate reasons to regulate land-use.

**B. Cities and Extra-Territorial Jurisdiction**\(^{35}\)

The judiciary is not the only branch of government that has expanded the permissible scope of zoning. The legislature has also expanded or rather, restored its delegation of land-use control power to municipalities. Professor Wright was deeply concerned with the General Assembly’s repeal of “original authority permitting cities to exercise extraterritorial zoning power.”\(^{36}\) In fact, he described it as “probably the most damaging land use regulation ever passed by the General Assembly.”\(^{37}\) Since then, the General Assembly has apparently come around to Professor Wright’s point of view and has restored the original authority of cities to exercise extra-territorial jurisdiction up to *five miles* outside of the corporate limits.\(^{38}\)

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32. *Craft v. City of Fort Smith*, 335 Ark. 417, 427, 984 S.W.2d 22, 27 (1998). Although the quoted phrase from *Agins v. Tiburon*, 447 U.S. 255 (1980), purports to describe a takings analysis, the Supreme Court later clarified that the *Agins* “formula prescribes an inquiry in the nature of a due process, not a takings test, and that it has no proper place in our takings jurisprudence.” *Lingle v. Chevron U.S.A.*, Inc., 544 U.S. 528, 540 (2005). Whatever applicability the *Agins* “substantially advances” formula has in the due process arena (and it may have none), it should no longer be used to determine whether land-use legislation works a regulatory taking.
33. *Carter*, 310 Ark. at 407, 836 S.W.2d at 863.
34. *Craft*, 335 Ark. at 427, 984 S.W.2d at 27.
35. “Extra-territorial jurisdiction” refers to the power of a government actor to act outside of its borders.
37. *Id*.
This restored extra-territorial planning power of cities includes some limitations. First, the power vests only in cities of the first and second class and incorporated towns that have created planning commissions. In addition, when two cities lie within ten miles of one another, their extra-territorial jurisdictions terminate at a line equidistant between them. Plainly, these statutory limitations are not very robust. A city is likely to meet the first condition—creation of a planning commission—before any worry of exercising extra-territorial jurisdiction arises because most cities will want to control internal development before focusing their attention outward. The second condition is really less of a limitation and more of a rule designed to avoid conflict between cities lying within ten miles of one another.

With the enabling statutes providing mild proscriptions in this area, the primary limitations on the extra-territorial planning jurisdiction have come from the judiciary. In 2002, the Arkansas Supreme Court stated, “A municipality clearly does not have absolute power to control water projects within its own boundaries, much less within its five-mile extraterritorial planning area.” Reading the powers granted to the Arkansas Natural Resources Commission in harmony with the Enabling Statutes, the court determined that while a city “may prepare plans” within its extra-territorial jurisdiction, “all water development projects must still comply with the Arkansas Water Plan.” The court’s construction of the statutes in that manner allowed Centerton to provide water to residents outside of its borders but within the borders of Bentonville’s extra-territorial jurisdiction.

In another water-related case, the court construed a municipal annexation statute in such a way as to limit the extra-territorial planning power. In City of Jacksonville v. City of Sherwood, landowners petitioned to have their property annexed into Sherwood to gain access to its municipal utilities even though their properties lay within the extra-territorial jurisdiction

39. The legislature gave the general power to “adopt and enforce plans for . . . development of the municipality and its environs” only to first and second class cities and incorporated towns. Ark. Code Ann. § 14-56-402 (LEXIS Repl. 1998). In addition, only cities having a planning commission have extended jurisdiction. Id. § 14-56-413(a)(1)(A).
42. Ark. Soil and Water Conservation Comm’n, 351 Ark. at 300, 92 S.W.3d at 54 (construing Ark. Code Ann. §§ 15-22-503(e), 14-56-413).
43. Id., 92 S.W.3d at 54.
44. 375 Ark. 107, 289 S.W.3d 90 (2008).
of Jacksonville.\textsuperscript{45} To resolve the case in the landowners' favor, the court relied both on \textit{Arkansas Soil \\& Water Conservation Commission v. City of Bentonville} and the general principle that a land-use plan "is a policy statement to be implemented by zoning regulations, and it is the latter that has the force of the law."\textsuperscript{46} Taking this case in conjunction with its predecessor, it is clear that the mere \textit{plan} to exercise control over the five-mile territory surrounding a city is not enough to actually affect control of that area. In order to maintain control of its extra-territorial planning area, a city must actually regulate that area through the enactment of ordinances and regulations.\textsuperscript{47}

Finally, the legislature and the voters have likely abrogated a once recognized limit on cities' extra-territorial power. In \textit{Butler v. City of Little Rock},\textsuperscript{48} a planning dispute arose between the city and the county.\textsuperscript{49} The court construed Article VII, Section 28 of the Arkansas Constitution to give "exclusive original jurisdiction" to county courts over planning within the county.\textsuperscript{50} The court stated that "[w]here there is a conflict over the exercise of jurisdiction (over matters mentioned in said Section 28) between the county court and any creature of the Legislature the latter must give way."\textsuperscript{51} Even though the case hinged on the county's power over "roads," the court made clear that its decision "concerned primarily, though not necessarily exclusively" that area of planning.\textsuperscript{52} The actual constitutional provision grants jurisdiction over "every other case that may be necessary to the internal improvement and local concerns of the respective counties."\textsuperscript{53} Since then, however, the Arkansas Constitution and the statutes have changed.

In the 1974 election, voters approved Amendment LV to the Arkansas Constitution of 1874. That amendment provides, "A county acting through its Quorum Court may exercise local legislative authority not denied by the Constitution or by law."\textsuperscript{54} Subsequently, the General Assembly stated that "[e]ach county quorum court . . . exercising local legislative authority is prohibited the exercise of . . . any legislative act that conflicts with the exercise by municipalities of any expressed, implied, or essential powers of mu-

\textsuperscript{45} Id. at 114–15, 289 S.W.3d at 95–96.
\textsuperscript{46} Id. at 114, 289 S.W.3d at 95 (citing Taylor v. City of Little Rock, 266 Ark. 384, 387–88, 583 S.W.2d 72, 74 (1979)).
\textsuperscript{47} See, e.g., Potter v. City of Tontitown, 371 Ark. 200, 211–12, 264 S.W.3d 473, 481–82 (2007) (discussing that the lower court's determination that Tontitown's ordinances governed the subject property was not reviewed on appeal).
\textsuperscript{48} 231 Ark. 834, 332 S.W.2d 812 (1960).
\textsuperscript{49} Id. at 834, 332 S.W.2d at 812.
\textsuperscript{50} Id. at 837, 332 S.W.2d at 814; see also \textit{ARK. CONST.} art. VII § 28.
\textsuperscript{51} Id., 332 S.W.2d at 814.
\textsuperscript{52} Id., 332 S.W.2d at 814.
\textsuperscript{53} \textit{ARK. CONST.} art. VII § 28.
\textsuperscript{54} \textit{ARK. CONST.} amend. LV § 1(a).
Since the power to regulate land-use derives from the state’s expressly delegated police power to municipal governments, counties must now give way to the land-use decisions of cities that may conflict with their own. Furthermore, the enabling statutes for counties indicate through negative implication that the extra-territorial powers of a city trump the zoning and planning powers of counties in all cases except those where “a new community has been or is being developed with funds [from] the federal government under . . . the Housing and Urban Development Act.” If the General Assembly intended counties’ land-use powers to supersede those of cities, section 14-17-210 would not be qualified by the previously quoted clause; instead, it would simply state, “The county planning board shall have the exclusive zoning and planning jurisdiction over all unincorporated areas lying within a county and along a navigable stream notwithstanding the fact that such areas may be within five (5) miles of the corporate limits of a city having a planning commission.” Furthermore, note that the county planning board’s “exclusive” jurisdiction is limited to “unincorporated areas” and only those “along a navigable stream.” Because these two conditions are listed in the conjunctive, it is clear that counties do not have exclusive jurisdiction over every unincorporated area within its borders. Specifically, its jurisdictions are limited by cities that have chosen to exercise whatever extra-territorial powers they might have.

In the absence of case law directly on point, the cautious municipal planner will seek cooperation with county authorities. A planning consultant for the Arkansas Municipal League advises, “If you choose to extend control beyond your city limits . . . step carefully. Five miles is way too far. Try a quarter to a half-mile or, more rationally, only that area that you are sure will be annexed within the next five to ten years.” In the absence of governing case law, the cautious course would be to secure the county’s approval, perhaps through intergovernmental agreement or by a resolution of the quorum court. In any case, a municipality must file extra-territorial plans with the county clerk so the county will be on record notice of its plans. Giving the county prior, actual notice and a chance to give feedback

55. Ark. Code Ann. § 14-14-805(12) (LEXIS Repl. 1998). Counties have their own enabling statutes, which are practically (if not perfectly) identical to those of municipalities. Id. § 14-17-201 to - 211 (LEXIS Repl. 1998).
57. Id. § 14-17-210 (LEXIS Repl. 1998).
58. Id.
can bolster intergovernmental relations and may aid in cooperative, comprehensive development.

C. Spot & Contract Zoning

Contrary to the Arkansas Supreme Court’s willingness to wade into issues created by extra-territorial powers, the court has been reluctant to clarify the Arkansas law on spot zoning. Professor Wright noted that in the case of *Tate v. City of Malvern*, the court stated that applicants for spot zoning bore “an additional burden of proof” when appearing before the city zoning authority.61 The applicant seeking spot zoning must show that “the character of a zoned area has become so changed that a modification is necessary to promote public health, morals, safety, and welfare; mere economic gain to [the applicant] is not sufficient.”62 For Wright, the Arkansas formulation of this rule was strictly at odds with “a cardinal rule of the law of zoning,” i.e., “‘spot zoning’ is invalid per se.”63 Today, the general rule still holds that if a particular zoning act amounts to “spot zoning,” the act is invalid.64

Due to the usually strict proscription of “spot zoning” and presumably due to the resulting lack of flexibility to landowners and legislators, spot zoning analysis has become more complicated. Courts have invalidated as “spot zoning” any “devotion of a small area within a zoning district to a use which is inconsistent with the use to which the rest of the district is restricted.”65 In addition, courts have rejected the practice of “contract zoning,”66 a bilateral agreement between a developer and legislative officials that allows a particular plot to be zoned or rezoned subject to site-specific conditions on the use of the property.67 These two concepts are fundamentally related in that they violate the sound policy favoring development based upon a comprehensive land-use plan. Both involve a single parcel or small area of land deviating from the larger area’s zoning scheme. If this practice were widely permitted, it would undermine the comprehensive nature of the plan and potentially lead to ad-hoc, piecemeal, parcel-by-parcel

61. Wright, *supra* note 1, at 443 (citing *Tate v. City of Malvern*, 246 Ark. 316, 438 S.W.2d 52 (1969)).
62. *Tate*, 246 Ark. at 321, 438 S.W.2d at 54.
63. Wright, *supra* note 1, at 442. Wright goes on to state, “contract rezoning is universally held invalid,” but notes that “conditional rezoning has been distinguished from contract rezoning in a number of jurisdictions” with “conditional rezoning” being valid. *Id.* at 455. Today, that semantic distinction is largely meaningless. See 3 *RATHKOPF’S, THE LAW OF ZONING AND PLANNING* §§ 1:23, 41:11 (4th ed. 2010).
67. *Id.* at §§ 1:23, 41:11.
zoning. On the other hand, the rigidity of the prohibition of “spot” or “contract” zoning would prohibit flexibility in the development of communities and place an impossible onus on legislatures to predict whether their current plans will protect the public welfare in the future.

Given the competing policies, many courts have now chosen to accept (albeit under different appellations) practices once dubbed “illegal spot zoning” or “contract zoning.” Many jurisdictions now accept contract zoning under the name “conditional zoning.” Even in jurisdictions approving of conditional zoning, rezonings that primarily benefit a private owner rather than the public health, safety, and welfare are still invalidated as “spot zoning.” In making the “conditional” or “spot” zoning determination, courts are particularly concerned with “an express bilateral agreement that bargains away the municipality’s future use of the police power.” The answers to these questions, whether the zoning primarily benefits the public or the individual or whether there is a bilateral agreement, used to be irrelevant—the action was invalid as illegal spot zoning. Today, the erosion of this bright line rule encourages results-based decision making masked by what amounts to a labeling game. When a judge determines that a particular rezoning is illegal or against public policy, it is called “spot” or “contract” zoning, and if it is permissible in the jurisdiction, it is called “conditional” zoning.

This new majority view of spot zoning, that it is not per se invalid but that it must further police power goals (whether it is allowed as “conditional” or “contract” zoning), seems remarkably similar to the rule developed by the Arkansas Supreme Court in 1969. Although apparently ahead of the curve, Tate v. City of Malvern is the most recent pronouncement in Arkansas on the issue. Since then, the court has twice had the opportunity to wade into the definitional quagmire described above and has declined both times to do so.

In Murphy v. City of West Memphis, the Arkansas Supreme Court cited a Florida opinion defining “contract zoning” as “an agreement between a property owner and a local government where the owner agrees to certain conditions in return for the government’s rezoning or enforceable

68. Id.
69. Id. at § 44:9.
70. Id. at § 44:11.
71. See generally Tate v. City of Malvern, 246 Ark. 316, 438 S.W.2d 52 (1969).
72. 246 Ark. 316, 438 S.W.2d 52 (1969).
74. 352 Ark. 315, 101 S.W.2d 221 (2003).
promise to rezone.” The Florida court invalidated the rezoning at issue, stating:

Assuming that the developer and municipality bargain for a rezoning ordinance that is fairly debatable and nondiscriminatory, contract zoning is nevertheless illegal when they enter into a bilateral agreement involving reciprocal obligations. By binding itself to enact the requested ordinance . . . the municipality bypasses the hearing phase of the legislative process.

Strangely, the Murphy court cited no countervailing authority to support the proposition that some jurisdictions have “found that contracts rezone [sic] are not prohibited.” Because the court went on to avoid the issue, this omission may well be of little consequence; however, it is interesting that the court chose to take its definition of “contract zoning” from a case in which the practice was invalidated.

The most recent opportunity to address this issue occurred in PH, LLC v. City of Conway. In that case, the court reiterated the definition of “contract zoning” used in Murphy without citing any extra-jurisdictional authority. As it did in Murphy, the court again refused to consider the argument at length because the appellant did not show that “there was an agreement to rezone the property or that it agreed to any conditions proposed by the city council.” Clearly, a party intending to challenge contract zoning before the Arkansas Supreme Court needs to do more than merely allege a quid pro quo; instead, the actual existence of an agreement between the legislature and a private party is required to establish contract zoning. Therefore, a fundamental factual finding must be obtained from the trial court before the legal issue can be challenged on appeal.

Perhaps legislative rather than judicial action is needed here. The flexibility and control of the spot-contract-conditional zoning devices offer “a clear incentive on the part of local officials to substitute ‘zoning by negotia-

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75. Id. at 322, 101 S.W.2d at 226 (citing Chung v. Sarasota Cnty., 686 So. 2d 1358 (Fla. Dist. Ct. App. 1996)).
76. Chung, 686 So. 2d at 1359–60.
77. Murphy, 352 Ark. at 322, 101 S.W.2d at 226.
78. The court declined to address the issue because the challenged ordinances were enacted prior to the agreement between the private owner and the city and because the trial court found that the parties had “not entered into any type of binding agreement until the city council meeting.” Id., 101 S.W.2d at 226.
80. Id., 2009 S.W.3d at 17.
81. Id. at 17, 2009 S.W.3d at 17.
82. See id., 2009 S.W.3d at 17.
tion' for a well planned and standardized zoning code.” The “practice of substituting negotiated conditions in even simple cases” is widespread, and judicial review of the reasonableness of imposed conditions is no substitute for a clear legislative directive from the General Assembly.

D. Conditional-Use Permits

Unlike conditional zoning, conditional-use permits have been widely accepted as valid without question. Wright wrote little of conditional-use permits in 1980 and cited no Arkansas authority regarding this device except to note that the City of Little Rock used the permits. The enabling statutes make no express reference to conditional-use permits, and the cases dealing with the permits have not considered their legitimacy. Despite this lack of technical pedigree, the conditional-use permit is widely used by cities throughout the state.

No Arkansas appellate court has considered the general validity of conditional-use permits. Arkansas's cities “have no inherent authority to enact legislation. That authority is dependent upon the Constitution and the General Assembly.” In 2001, the Attorney General’s office issued an opinion indicating that the power to conditionally permit uses comes from section 14-56-416(a)(3)(C) of the Arkansas Code that states that zoning ordinances may provide for “compatible uses” and for “such other matters as are necessary to the health, safety, and general welfare of the municipality.”

83. 3 RATHKOPF'S, supra note 66, at § 44:3.
84. Id.
85. Conditional-use permits are also known as “special-use,” “special-exception,” or other variations. See Wright, supra note 1, at 452. Conditional-use permit is frequently abbreviated “CUP.”
86. Wright, supra note 1, at 452–53.
89. See Mings v. City of Fort Smith, 288 Ark. 42, 701 S.W.2d 705 (1986) (discussing the nature of conditional-use permits but not their validity); Abram v. City of Fayetteville, 281 Ark. 63, 661 S.W.2d 371 (1983) (applying city’s conditional-use ordinance with no reference to enabling statute); Quapaw Quarter Ass’n Inc. v. City of Little Rock Bd. of Zoning Adjustment, 261 Ark. 74, 546 S.W.2d 427 (1977) (applying city’s conditional-use ordinance with no reference to enabling statute); Rolling Pines Ltd. P’ship v. City of Little Rock, 73 Ark. App. 97, 40 S.W.3d 828 (2001) (noting that a conclusion as to the municipality’s statutory authority to issue conditional-use permits is absent from the court’s detailed discussion of the device).
Given that the General Assembly intended readers to construe the enabling legislation liberally,\textsuperscript{92} this seems as good a place as any to find the authority for cities to regulate conditional uses. Regardless, Arkansas courts have been reading conditional-use ordinances for decades, Arkansas cities have been applying them for decades, and they continue to be "quite valuable in providing flexibility to the decisions of boards or commissions involved in the zoning process."\textsuperscript{93}

In fact, the Arkansas Supreme Court recently gave a ringing (albeit incidental) endorsement of the device by upholding a broad "compatibility" condition.\textsuperscript{94} Of all of the conditions placed on the issuance of a conditional-use permit, the single most important condition is "compatibility" with the surrounding uses.\textsuperscript{95} Despite the power to condition use on broad requirements such as "compatibility" with the surrounding neighborhood,\textsuperscript{96} "[a]ny discretion the commission may have cannot be construed so broadly as to permit the commission to inject ad hoc requirements at its fancy."\textsuperscript{97} Whether or not ad hoc decision making is strictly permissible, "[o]ver the years, there has . . . been a proliferation of the land uses made subject to special or conditional use permits, thereby granting zoning officials the discretion to consider a proposed use at a particular location on a largely ad hoc basis."\textsuperscript{98} Keep these issues in mind as we proceed to the next section.

\textsuperscript{92} Ark. Code Ann. § 14-56-401 (LEXIS Repl. 1998) ("This subchapter shall be construed liberally. The enumeration of any object, purpose, power, manner, method, or thing shall not be deemed to exclude like or similar objects, purposes, powers, manners, methods or things.").

\textsuperscript{93} Wright, supra note 1, at 452.

\textsuperscript{94} See infra notes 106-114 and accompanying text.

\textsuperscript{95} Wright, supra note 1, at 453 ("In the conditional use permit situation, the uses will be permitted if, in the discretion of the Planning Commission and the Board, certain conditions have been met – the most important one being that the use in question will not be incompatible with the surrounding neighborhood and will not adversely affect the plan for the area."). See, e.g., Fayetteville, Ark., Code § 163.02(C)(3)(c)(ii)(h) (2010) ("The Planning Commission shall certify: [8 conditions, the last being] General compatibility with adjacent properties and other property in the district.").

\textsuperscript{96} See, e.g., Eureka Springs, Ark., Code § 14.08.08(E)(2) (2010) ("The Planning Commission shall either grant or deny the Conditional Use Permit within a reasonable time of the final public hearing, imposing such conditions, if any, deemed necessary and appropriate to protect the character of the neighborhood.").

\textsuperscript{97} Richardson v. City of Little Rock Planning Comm'n, 295 Ark. 189, 193-94, 747 S.W.2d 116, 118 (1988) (Glaze, J., concurring) (reversing denial of plat where planning commission required more than the fixed standards located in the city's subdivision code). Although Richardson does not address the conditional-use permit situation, which involves substantially more discretion than plat issuance, there is no reason to believe that ad hoc administrative or quasi-judicial decision making is either desirable or permissible in Arkansas.

\textsuperscript{98} 1 Rathkoff's The Law of Zoning and Planning § 1:14 (4th ed. 2010).
E. Planned-Unit Developments

Planned-Unit Developments (PUD) provide “more intensive site-specific control and design review of future land development” than do conditional-use permits or any other currently employed land-use device. In 1980, “the PUD [had] never been challenged in Arkansas,” even though “[w]hen the Arkansas enabling act was passed in 1957, the PUD concept was either non-existent or existed only in the theories of a few urban planners or architects.” Professor Wright read the statutes as “silent with regard to the PUD”; however, he believed “[t]he intent of the enabling act . . . would appear to permit such devices.” Whether the enabling statutes allow for PUDs remains an open question, as Arkansas appellate courts have yet to directly address it. Like conditional-use permits, however, PUDs are used throughout the state. I am more confident today, than was Professor Wright in 1980, that courts would uphold the PUD as a valid exercise of municipal zoning power.

First, unlike Professor Wright, I find a clear textual source for PUDs in the enabling statutes. The statute empowering planning commissions to prepare zoning ordinances states, “The ordinance may provide for districts, of compatible uses, for large scale unified development, for elimination of uses not in conformance with provisions of the ordinance, and for such other matters as are necessary to the health, safety, and general welfare of the municipality.” This is the same statute that the Attorney General’s office interprets as providing a textual basis for conditional-use permits. Although the specific mechanics of the PUD did not exist at the time the statute was drafted, the idea of a comprehensively planned community clearly existed. The phrase “large scale unified development” not only describes a well-implemented PUD, but it is also a synonym in many ordinances. Construing this language liberally, as the drafters intended, a court could

99. Planned-use developments are alternately referred to as “large-scale developments” and “planned-use developments.” Stromwall v. City of Springdale Planning Comm’n, 350 Ark. 281, 86 S.W.3d 844 (2002); see also PH, LLC v. City of Conway, 2009 Ark. 504, S.W.3d _.
100. 1 RATHKOPF’S, supra note 98, at § 1:11.
101. Wright, supra note 1, at 459.
102. Id.
103. See, e.g., SPRINGDALE, ARK., CODE § 130.6.5 (2010); HOT SPRINGS, ARK., CODE § 16-2-47 (2010); PINE BLUFF, ARK., CODE § 29-107 (2010).
105. See supra note 89 and accompanying text.
106. See supra note 97 and accompanying text.
hardly say that the PUD was not a “like or similar . . . method” to those enumerated.\textsuperscript{108}

The Arkansas Supreme Court has yet to directly endorse the PUD, but it may as well have in \textit{Benton County Stone v. Benton County Planning Board}.\textsuperscript{109} In that case, the court held that a large-scale site plan ordinance based on the term “compatibility” was not constitutionally void for vagueness because the term “compatibility” has a dictionary definition.\textsuperscript{110} Specifically, the “compatibility term” of the ordinance stated that the development “\[m\]ust be consistent and compatible with existing development and the environment.”\textsuperscript{111} The court went on to note that “[c]ommercial and industrial developments are encouraged to cluster to minimize incompatible land-use, [that] [a]ny industrial and commercial development(s) that could limit the viability of existing agricultural uses are discouraged [and that] [r]esidential development that could limit the viability of existing commercial and industrial operations are discouraged.”\textsuperscript{112}

As foreshadowed in the conditional-use permit discussion, this decision affects both PUDs and conditional-use permits, because both rely heavily on the “compatibility” test. In deciding \textit{Benton County Stone}, the court looked to an Arkansas Appeals Court decision, \textit{Rolling Pines Ltd. Partnership v. City of Little Rock}.\textsuperscript{113} The earlier case revolved around the denial of a conditional-use permit, and the court held that “‘compatible’ had a well-defined meaning and was not so vague as to leave an applicant guessing as to its import or meaning.”\textsuperscript{114} In support, the court cited an Oregon Court of Appeals case that the \textit{Benton County Stone} court also cited with the following explanatory parenthetical: “(holding that the word compatible was not impermissibly vague because it has a plain and ordinary meaning that could be readily understood by reference to a dictionary).”\textsuperscript{115} To prove that the term “compatible” is not vague, the \textit{Benton County Stone} court went on to cite the \textit{Oxford English Dictionary} and the \textit{American Heritage College Dictionary}.\textsuperscript{116} Finally, the court concluded that because “compatible” is not

\begin{itemize}
  \item \textsuperscript{108} \textit{Id.} § 14-56-425 (LEXIS Repl. 1998).
  \item \textsuperscript{109} 374 Ark. 519, 288 S.W.3d 653 (2008).
  \item \textsuperscript{110} \textit{Id.} at 522–26, 288 S.W.3d at 655–58.
  \item \textsuperscript{111} \textit{Id.} at 522, 288 S.W.3d at 655, 657.
  \item \textsuperscript{112} \textit{Id.} at 523, 288 S.W.3d at 655.
  \item \textsuperscript{113} \textit{Id.} at 523–24, 288 S.W.3d at 656–58 (citing Rolling Pines Ltd. P’ship v. City of Little Rock, 73 Ark. App. 97, 40 S.W.3d 828 (2001)).
  \item \textsuperscript{114} \textit{Id.} at 525, 288 S.W.3d at 657 (citing Rolling Pines Ltd. P’ship v. City of Little Rock, 73 Ark. App. 97, 40 S.W.3d 828 (2001)).
  \item \textsuperscript{115} \textit{Benton Cnty. Stone}, 374 Ark. at 525, 288 S.W.3d at 657.
  \item \textsuperscript{116} \textit{Id.}, 288 S.W.3d at 657. The dictionaries provide the following definitions: “mutually tolerant; capable of being admitted together, or of existing together in the same subject; accordant, consistent, congruous, agreeable” and “capable of existing or performing in harmonious, agreeable, or congenial combination.” \textit{Id.}, 288 S.W.3d at 657.
\end{itemize}
unconstitutionally vague, it served as a proper “discretionary restraint” under which the planning board acted to deny the permit.\textsuperscript{117} Whether the void-for-vagueness doctrine has any future in Arkansas is a question for another time, but the \textit{Benton County Stone} case leaves little doubt that PUDs are safe.

Despite the sweeping discretion of which the \textit{Benton County Stone} case approves, a city’s use of PUDs is limited by the legislatively enacted ordinance that authorizes them; i.e., the Planning Commission (a non-legislative body)\textsuperscript{118} lacks the unbridled discretion to permit or deny the development of PUDs. In \textit{City of Little Rock, Arkansas v. Pfeifer},\textsuperscript{119} the Arkansas Supreme Court upheld the circuit court’s grant of summary judgment, which effectively denied the rezoning of land to a planned commercial district.\textsuperscript{120} The court reaffirmed that once a city “creates a zoning ordinance or a land use plan or adopt[s] planned use districts or planned commercial districts . . . it must follow the ordinance until it is repealed or altered.”\textsuperscript{121} Little Rock’s fatal error in that case was to rezone the subject property to a PUD, while failing to amend the definitional requirements of a PUD.\textsuperscript{122} At the time, the Little Rock ordinance recognized four permissible uses for a PUD: public institutional uses, office uses, industrial uses, and retail commercial uses.\textsuperscript{123} Furthermore, the purpose of the PUD was to accommodate “mixed use developments combining residential, commercial and office uses in a carefully planned configuration.”\textsuperscript{124} Unfortunately, the rezoning accommodated a wholesale rather than a retail use that did not include mixed developments.\textsuperscript{125} Since the rezoning ordinance was at odds with the definitional requirements of its predicate enabling ordinance, the rezoning ordinance failed.\textsuperscript{126}

That ruling seems in line with the general rule that cities must substantially comply with the enabling statues and their own ordinances.\textsuperscript{127} In order to ensure the maximum flexibility and enforceability of a PUD ordinance, it appears that vague standards like “compatibility” are more favorably viewed than strict, easy-to-apply lists of uses. If the standards are maximally flexible and broad, a city will be more likely to “substantially comp-

\textsuperscript{117} Id. at 526, 288 S.W.3d at 657. 
\textsuperscript{118} See infra Part III. 
\textsuperscript{119} 318 Ark. 679, 887 S.W.2d 296 (1994). 
\textsuperscript{120} Id. at 679, 887 S.W.2d at 296. 
\textsuperscript{121} Id. at 683, 887 S.W.2d at 298. 
\textsuperscript{122} Id. at 685–86, 887 S.W.2d at 299. 
\textsuperscript{123} Id. at 685, 887 S.W.2d at 299. 
\textsuperscript{124} Id., 887 S.W.2d at 299. 
\textsuperscript{125} \textit{Pfeifer}, 318 Ark. at 685–86, 887 S.W.2d at 299. 
\textsuperscript{126} Id., 887 S.W.2d at 299. 
ly” with its own standards because compliance with ambiguous standards is easier. By contrast, clear and narrow standards are more likely to discourage substantial compliance by restricting the city’s decision-making power and encouraging deviation.

F. A Belated Wake for the Pfeifer Rule

The Pfeifer rule has nothing to do with the previously cited case dealing with PUDs; instead, it comes from the identically styled case of City of Little Rock v. Pfeifer128 decided in 1925. Generally, the rule was that “any attempt on the part of the city council to restrict the growth of an established business district is arbitrary.”129 The effect of that statement was to create a categorical right to rezone property adjacent to a commercially-zoned lot for commercial purposes: “When a business district has been rightly established, the rights of owners of property adjacent thereto cannot be restricted so as to prevent them from using it as business property.”130 Professor Wright justifiably condemned the rule as “arbitrary [and] contrary to comprehensive planning.”131 In 1980, he declared, “the Pfeifer rule is dead; but also in reality it is not buried. Lawyers and chancellors alike continue to invoke it.”132

Today, Pfeifer is dead, buried and long forgotten. At last, in 1996, the Arkansas Supreme Court announced:

There was an aberration in our case law, which is set out only to show that it existed and that it has ended. Shortly after we correctly decided the foundation case of Herring v. Stannus, we decided City of Little Rock v. Pfeifer, and in essence, held that the

129. Id. at 1029, 277 S.W. at 885.
130. Id., 277 S.W. at 885. For additional application of the rule, see City of W. Helena v. Davidson, 250 Ark. 257, 464 S.W.2d 581 (1971). After the majority upheld the chancellor’s decision to reverse the planning commission’s denial of rezoning, the dissent made the following observation of the chancellor’s findings of fact:

[H]e stated that, in consideration of the testimony in trying to analyze the proof, he had taken into consideration his own opinions formed by a visit to the area during a month’s sojourn in the city in the trial of other litigation and had viewed the premises and noted the activity of the bowling alley, the warehouse and office building of the Arkansas Power and Light Company and the Dairy Queen in the immediate area as well as the commercial activity on the south side of the highway as it proceeds into the City of Helena. He stated that, in his opinion, the area is highly commercial regardless of how the defendant may zone the area.

Id. at 271–72, 464 S.W.2d at 588 (Fogleman, J., dissenting).
131. Wright, supra note 1, at 471.
132. Id. at 478.
review of zoning appeals could be by trial de novo rather than by solely determining whether the enactment by the legislative branch was arbitrary. The effect was to judge the wisdom of the enactment in violation of the separation-of-powers doctrine. We began to retreat from the Pfeifer doctrine in the 1953 case of Evans v. City of Little Rock, and backed further away from it in the 1966 cases of Downs v. City of Little Rock and City of Little Rock v. Parker. The Pfeifer doctrine led to criticism. Morton Gitelman, Judicial Review of Zoning in Arkansas; Morton Gitelman, Zoning-The Expanding Business District Doctrine in Arkansas: An Obstacle to Land Use Planning. In Baldridge v. City of North Little Rock, we re-examined the Pfeifer doctrine and almost laid it to rest. See Robert R. Wright, Zoning Law in Arkansas. Finally, in City of Little Rock v. Breeding, we noted the many cases that “restricted, limited and modified the holding in Pfeifer,” and said the case now has “little if any validity.” In summary, we have returned to the foundational doctrine of Herring v. Stannus, which provides that the judicial department can set aside a legislative enactment only when the legislative branch has abused its discretion in an enactment because of arbitrariness.133

Like the court, I mention the “aberration” only to note that it once existed and that it does no longer. The farther knowledge of its death spreads, the less likely its resurrection.

III. SEPARATION OF POWERS AND THE NATURE OF LAND-USE DECISIONS

The powers of the government of the State of Arkansas shall be divided into three distinct departments, each of them to be confided to a separate body of magistracy, to-wit: Those which are legislative, to one, those which are executive, to another, and those which are judicial, to another.134

Since the General Assembly enacted the enabling act, Arkansas Code section 14-56-425 has been the gate-keeping mechanism for the review of land-use decisions in Arkansas.135 Because that section expressly distin-

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135. See Ark. Code Ann. § 14-56-425 (LEXIS Repl. 1998). While this part parses only a portion of the statute, Part IV, infra, deals with the remaining language. The full statute states:
In addition to any remedy provided by law, appeals from final action taken by the administrative and quasi-judicial agencies concerned in the administration of this subchapter may be taken to the circuit court of the appropriate county
guishes between types of governmental power\textsuperscript{136} and because aphorisms of judicial self-restraint caution against the creation of "super zoning commissions,"\textsuperscript{137} the past three decades have seen a significant amount of litigation dedicated to the categorization of government action. Both sides of the litigation aisle have contested the coloring of official acts, because courts are required to give differing levels of deference to different types of official conduct. While the purpose of Part II was to look at the actual substantive law of land use, the purpose of this part is to analyze the structure within which that law is created. In other words, this part is concerned with the nature of the various land-use related aspects of the municipal decision-making process.

The statute creates essentially two classes of governmental decisions: decisions governed by the statute (administrative and quasi-judicial) and decisions not governed by the statute (legislative).\textsuperscript{138} Beyond application of the immediate statute, one of the fundamental aspects of our republican form of government is that certain bodies are empowered to make certain types of decisions; therefore, these issues are important not only to the litigator but also to those counseling or appearing before land-use officials. To aid in the understanding of the decision-making process, Part III is divided into two sections to discuss both statutory classes. The first section is concerned with administrative and quasi-judicial powers and the second with legislative power.

A. Watching the Watchmen: Administrative & Quasi-Judicial "Deference"

This section is divided into three different, yet related questions about administrative and quasi-judicial decisions. The first deals with defining and identifying administrative and quasi-judicial land-use decisions. The second identifies the government actors capable of engaging in those sorts of decisions. The third looks to the level of judicial deference paid to the decision.

where they shall be tried de novo according to the same procedure which applies to appeals in civil actions from decisions of inferior courts, including the right of trial by jury.

\textit{Id.}

136. \textit{Id.}


1. **What are “Administrative” & “Quasi-Judicial” Decisions?**

First, note that “administrative” and “quasi-judicial” are not necessarily synonymous. Prior to 1971, the appeals statute, section 14-56-425 (then 19-2830.1), read “administrative, quasi judicial, and legislative.” The appeals statute for county land-use decisions still uses this formulation. In 1971, the Arkansas Supreme Court declared the de novo review of a city’s legislative action to be unconstitutional, and as a result, today’s municipal statute includes only the terms “administrative and quasi-judicial.” Arkansas courts construe statutes “so that no word is void, superfluous or insignificant and meaning and effect must be given to every word contained therein, if possible,” and because one of the three listed types of governmental action is so fundamentally different than the other two that it deserves constitutionally mandated deference, it stands to reason that the General Assembly did not intentionally list two synonyms and one unrelated word in a list of three. Reading the words synonymously would result in rendering one or the other (either “administrative” or “quasi-judicial”) mere repetitious surplusage.

Despite this clear rule of statutory construction, no Arkansas appellate court has distinguished between the two. The reason for this is simple and practical: they have no need to do so. Both “administrative” and “quasi-judicial” decisions are subject to de novo review; therefore, litigants and courts have been unconcerned with the difference between these two types of government action—either way, de novo review is used. When and why this distinction matters is fully addressed in the next subsection, but for now we are concerned with the fact that “administrative” action differs from “quasi-judicial” action and with the contours of that difference.

Administrative action involves little-to-no discretion. The word “ministerial” is often used as a synonym for “administrative,” and they can be

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139. See Wenderoth v. City of Fort Smith, 251 Ark. 342, 344, 472 S.W.2d 74, 75 (1971).
141. Wenderoth, 251 Ark. at 344, 472 S.W.2d at 75.
143. See Locke v. Cook, 245 Ark. 787, 793, 434 S.W.2d 598, 601 (1968); see also Michael W. Mul lane, Statutory Interpretation in Arkansas: How Should a Statute Be Read? When Is It Subject to Interpretation? What Our Courts Say and What They Do, 2004 Ark. L. Notes 85, 87 (2004) (“[I]t is presumed that no word or phrase is mere surplusage.”).
144. The logic of this argument survives the statutory revisions removing the term “legislative.” It would be equally wrong to assume that the legislature intended to repeat itself if either “administrative” or “quasi-judicial” would alone be sufficient to effectuate the intent of lawmakers.
146. See infra Part III. A.2.
used interchangeably. "Ministerial" is an adjective "relating to an act that involves obedience to instructions or laws instead of discretion, judgment, or skill." Arkansas courts have often equated these terms in other contexts.

An example of a purely administrative land-use decision is the approval of a preliminary plat. The Arkansas Supreme Court held: "When a subdivision ordinance specifies minimum standards to which a preliminary plat must conform, it is arbitrary as a matter of law to deny approval of a plat that meets those standards." The court held that the planning commission acts in "an administrative capacity" when it performs this function, and that the planning commission had "no discretionary power" to disapprove the preliminary plat. Following this logic, the issuance of use permits must also fall into this category in Arkansas.

As opposed to plats and permits, an obvious example of quasi-judicial decision making occurs when a landowner applies to the board of zoning adjustments for a variance. The term "quasi-judicial" applies to acts by agencies or officers who are empowered to investigate facts, to weigh evidence, to draw conclusions as a basis for official actions, and to exercise discretion of a judicial nature.

Boards of zoning adjustments should issue variances when "strict enforcement of [a land-use] ordinance would cause undue hardship due to circumstances unique to the individual property under consideration." The very essence of the variance device is to provide

147. 63C A.M. JUR. 2d Public Officers and Employees § 21 (2010).
148. BLACK'S LAW DICTIONARY (9th ed. 2004).
149. See, e.g., Kelly v. Miss. Cnty. Cir. Ct., 374 Ark. 396, 398, 288 S.W.3d 243, 244 (2008) ("[A]fter his own recusal . . . in his role as an administrative judge, the ministerial act of assigning another judge to the case."); City of Dardanelle v. City of Russellville, 372 Ark. 486, 490, 277 S.W.3d 562, 565 (2008) ("This is especially true when applicable to ministerial acts, or administrative business of a municipality."); Paragould Cablevision Inc. v. City of Paragould, 305 Ark. 476, 485, 809 S.W.2d 688, 693 (1991) ("[T]he powers to be exercised by the Commission are not legislative powers, but rather administrative or ministerial powers.").
151. Id. at 191–92, 747 S.W.2d at 117.
152. Although no Arkansas authority exists on point, the majority of jurisdictions find that permitting is an administrative function, even when the permitting agency is the legislature.

Assuming an appropriate enabling statute, a municipal legislative authority may specifically retain authority to issue permits by spelling out such a reservation in the zoning ordinance. When permit issuing authority is retained by the legislature, the granting or denial of special permits by that body is regarded by most courts as an administrative rather than a legislative function. 2 A.M. LAW ZONING § 14:10 (5th ed. 2010).
flexibility and discretion to avoid unduly harsh application of land-use regulation.\textsuperscript{155}

The Arkansas Supreme Court has recognized the quasi-judicial nature of variances. In City of Fort Smith v. McCutchen,\textsuperscript{156} the court said, "[I]t is clear that the Fort Smith BZA [board of zoning adjustments] was acting in an adjudicatory or quasi-judicial manner when it denied McCutchen's variance request."\textsuperscript{157} In that case, the landowner added a carport to his home in violation of a thirty-foot setback requirement without first seeking a variance.\textsuperscript{158} The board of zoning adjustments found no hardship and denied the permit.\textsuperscript{159} Pursuant to section 14-56-425 of the Arkansas Code, the landowner appealed to the circuit court and sought a jury trial.\textsuperscript{160} After the jury reversed the decision of the board of zoning adjustments, Fort Smith's sole argument on appeal was that section 14-56-425 of the Arkansas Code did not apply because the variance decision was "legislative."\textsuperscript{161} Therefore, the court's determination that the variance device was quasi-judicial in nature and subsequently subject to the requirements of section 14-56-425 was the central holding of the case.


The differences between the two types of action articulated above—administrative and quasi-judicial—only matter to land-use officials and those appearing before quasi-judicial or administrative land-use agencies. A circuit court or a jury is required to review either decision de novo.\textsuperscript{162} This section, therefore, is primarily concerned with the pre-litigation aspects of land-use proceedings, specifically which land-use officials are empowered to make which types of decisions. First, we will deal with "administrative" decisions and then with "quasi-judicial."

In the enabling legislation, the adjective "administrative" is used twice outside of section 14-56-425, and both usages appear in the context of offi-
cital decisions appealed to the BZA.\textsuperscript{163} The statute first states that the function of the BZA is to "[h]ear appeals from the decision of the administrative officers in respect to the enforcement and application of the ordinance, and may affirm or reverse, in whole or in part, the decision of the administrative officer."\textsuperscript{164} Since "administrative" is used synonymously with "ministerial," it makes sense that individual officers act in a purely administrative capacity.

Administrative decisions are made not only by individual officers, but also by collective entities such as boards and commissions. For instance, in \textit{Richardson v. City of Little Rock Planning Commission},\textsuperscript{165} the court found that the planning commission, acting as a body, engaged in an administrative task when it reviewed a preliminary plat.\textsuperscript{166} Even the governing body of a city can make administrative determinations when its action constitutes an "application of its zoning regulations rather than . . . [an] enactment of them."\textsuperscript{167}

As opposed to administrative decisions, there is no authority that allows an individual actor to make a quasi-judicial land-use determination. The enabling statutes expressly list only one quasi-judicial device: the variance.\textsuperscript{168} That device must be issued by either the BZA or the city's governing body.\textsuperscript{169} Likewise, assuming the conditional-use permit falls into the "quasi-judicial" category (the Arkansas Supreme Court has not affirmatively made that determination), only the planning commission or city council may issue one.\textsuperscript{170} Individuals, therefore, have no quasi-judicial authority, whereas commissions, boards, and councils do.

\begin{itemize}
\item \textbf{163.} \textit{Id.} § 14-56-416(b)(2)(A).
\item \textbf{164.} \textit{Id.} § 14-56-416(b)(2)(B)(i) (listing the "variance," but not specifically identifying it as "quasi-judicial").
\item \textbf{165.} 295 Ark. 189, 747 S.W.2d 116 (1988).
\item \textbf{166.} \textit{Id.} at 191–92, 747 S.W.2d at 117.
\item \textbf{168.} \textit{Ark. Code Ann.} § 14-56-416(b) (LEXIS Repl. 1998).
\item \textbf{169.} "The board of zoning adjustment shall have the following functions: . . . hear request for variances." \textit{Ark. Code Ann.} §14-56-416(b)(2)(B)(i)(a); See Miller v. City of Lake City, 302 Ark. 267, 789 S.W.2d 440 (1990), where an unchallenged ordinance did not provide for a board of zoning adjustment but allowed only the city council to issue variances.
\item \textbf{170.} See \textit{Mings v. City of Fort Smith}, 288 Ark. 42, 47–48, 701 S.W.2d 705, 708 (1986) ("There is not complete agreement about whether issuance of a conditional use permit is a legislative or administrative or quasi-judicial function. As appeals from the planning commission go to the city's legislative body, the board of directors, perhaps it should be a legislative matter . . . . [W]e should recognize that basic land use planning is a legislative function.
\end{itemize}
3. How Do Courts Treat These Decisions?

As the answer to this question has already been repeated almost ad nauseum, this section will be brief. The enabling statutes require de novo review of quasi-judicial and administrative decisions. This includes the right to a jury trial. This also means that the records of the administrative or quasi-judicial proceedings are largely irrelevant because the judge or jury will hear the evidence anew and may even hear evidence that was not presented at the hearing.

This zero-deference standard of review is not the norm in other states or even in our own. Most state courts review administrative and quasi-judicial zoning decisions to determine whether they are based on "substantial evidence." Coincidentally, Arkansas appellate courts apply this standard when reviewing the decisions of the trial court in land-use cases. Compared to other quasi-judicial and administrative agencies in our own state, the standard of deference is also unusually low. Most of the time, an Arkansas "appellate court's review is directed, not toward the circuit court, but toward the decision of the agency, because administrative agencies are better equipped by specialization, insight through experience, and more flexible procedures than courts, to determine and analyze legal issues affecting their agencies." Furthermore, the appellate court upholds the administrative decisions "if they are supported by substantial evidence and are not arbitrary, capricious, or characterized by an abuse of discretion." The

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174. See Carmical v. McAfee, 68 Ark. App. 313, 326, 7 S.W.3d 350, 259 (1999) ("Pursuant to section 14-56-425, 'appeals' to circuit court are not limited proceedings where the circuit court merely conducts a substantial-evidence review but, instead, are trials de novo.").
175. 3 Rathkopf's, supra note 66, at § 62:42.
176. See Quapaw Quarter Ass'n Inc. v. City of Little Rock Bd. of Zoning Adjustment, 261 Ark. 74, 77, 546 S.W.2d 427, 429 (1977); City of Little Rock v. Kaufman, 249 Ark. 530, 532, 460 S.W.2d 88, 89 (1970).
General Assembly apparently did not feel that local land-use agencies warranted the same deference. 179

B. Resolving the Countermajoritarian Difficulty?: Legislative Deference 180

This section asks and answers three questions. First, it defines and gives examples of legislative decisions. Second, it identifies the land-use authorities empowered to engage in legislative decision making. Third, it discusses the level of deference Arkansas courts give to these decisions.

1. What Are “Legislative” Decisions?

The quintessential land-use “legislation” is the enactment of zoning ordinances and subdivision regulations. In the referendum context, the Arkansas Supreme Court has determined that “[t]he crucial test for determining what is legislative and what is administrative is whether the ordinance is one making a new law, or one executing a law already in existence.” 181

“The legislative power includes discretion to determine the interests of the public as well as the means necessary to protect those interests.” 182 The enabling statutes require that all ordinances and regulations be adopted by the city council. 183 Normally, rezoning and other amendments to the ordinance must follow the same procedures as is required for the adoption of the original ordinances and regulations; 184 however, if the original ordinance so provides, amendments (including rezoning) may be accomplished by a simple majority vote of the city council. 185


180. The “Countermajoritarian Difficulty” is a phrase describing the tensions between two competing values of our republican form of government. It serves as shorthand for the problem of reconciling judicial review with popular governance in a democratic society. The problem is this: to the extent that democracy entails responsiveness to popular will, how to explain a branch of government whose members are unaccountable to the people, yet have the power to overturn popular decisions?


181. Scroggins v. Kerr, 217 Ark. 137, 143, 228 S.W.2d 995, 999 (1950) (citing 1 McQuillan, Mun. Corporations § 1000 (2d ed. 1940). The same language was quoted recently in PH, LLC v. City of Conway, 2009 Ark. 504, __ S.W.3d __, __.


184. Id. § 14-56-423.

185. Id.; City of Russellville v. Banner Real Estate, 326 Ark. 673, 676, 933 S.W.2d 803,
Until very recently, the nature of rezoning has posed something of a problem for the courts. Two turn-of-the-century cases took the completely novel view that a vote to deny rezoning was administrative while a vote to approve rezoning was legislative. \(^{186}\) The problem was created by the first case—Camden Community Development Corp. v. Sutton. \(^{187}\) There the court was in such a hurry to deny voters their state constitutional right to initiative \(^{188}\) that it completely misread precedent, determining that Wenderoth v. City of Fort Smith (the case that carved legislative rezones out of the ambit of de novo review under section 14-56-425) \(^{189}\) had nothing to do with a determination as to the legislative nature of the rezoning act. \(^{190}\)

In Summit Mall Company, LLC v. Lemond, \(^{191}\) the court took a step back from Camden in another case concerned with the initiative-referendum power of the people under Amendment VII. The court stated, “Because the City Board [in Camden] failed to pass any ordinance, it obviously did not act legislatively . . . . Here, by enacting Ordinance No. 18,456 in 2001 . . . the Board took legislative action which is a power delegated to it by the General Assembly.” \(^{192}\) This allowed Justice Clinton Imber to concur (she dissented strongly in Camden); \(^{193}\) however, she throttled the opinion because of “the dichotomy created by the majority’s attempt to distinguish Camden” and the fact that the court had “effectively bifurcated the people’s power under Amendment 7 . . . .” \(^{194}\)

805 (1996) (holding that “§ 14-56-423 [was] controlling, and it permit[ted] a change in the zoning plan, or rezoning, by ‘majority vote of the city council’ without following the procedure requiring further planning commission review as prescribed in § 14-56-422”); Taggart & Taggart Seed Co. v. City of Augusta, 278 Ark. 570, 573, 647 S.W.2d 458, 459 (1983) (noting that where a city’s ordinance does not “provide for the alternative method of amendment of boundaries, but, instead, provides for amendment only through the complete planning procedure[, the] choice of procedures does not conflict with the enabling statute for it simply continues to authorize the more extensive planning procedure”); see also Smith Auto Salvage v. City of Pine Bluff, 2002 Ark. App., 2002 WL 432808, at *1 (unpublished).


188. See Ark. Const. amend. VII; PH, LLC, 2009 Ark. at ___, ___ S.W.3d at ___ (explicitly overruling Camden Cnty. Dev. Corp.).


192. Id. at 200–01, 132 S.W.3d at 731–32.


194. Summit Mall Co., 355 Ark. at 213, 132 S.W.3d at 740 (Clinton Imber, J., concur-
In 2009, Justice Brown (author of the *Summit Mall* opinion) penned the unanimous opinion of the court in *PH, LLC v. City of Conway*. There, the court explicitly overruled *Camden* and held that “zoning decisions, whether grants or denials, are legislative in nature.” Since zoning and rezoning create new law rather than execute existing law, this is undeniably the correct result.

2. *What Land-Use Authorities Make Legislative Decisions?*

Only the governing body of the municipality has the power to make legislative decisions. Although not all decisions of the governing body are legislative, the power to legislate is vested in the governing body, and “exclusively” legislative power cannot be delegated. The Arkansas Supreme Court has clearly articulated that “[t]he Planning Commission, sitting as a Board of Adjustment has no power to legislate.” Not surprisingly, no authority exists approving of individual officials making legislative determinations.

3. *How Do Arkansas Courts Treat These Decisions?*

As opposed to the de novo review afforded quasi-judicial and administrative decisions, legislative decisions receive tremendous deference. First, remember that “when 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 is the co-equal of an act of the General Assembly.” Beyond that statement, Arkansas courts have used various formulations of “rational basis” review as indicated by the following phrases: “[T]he application of the appropriate restraint on judicial action in these cases requires that the courts refuse to act unless no reasonable mind could reach the conclusion reached by the city council”; “A chancery court may

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195. *PH, LLC v. City of Conway*, 2009 Ark. 504, ___ S.W.3d ___, ___.
200. *City of Blytheville v. Thompson*, 254 Ark. 46, 58, 491 S.W.2d 769, 775 (1973) (Fogleman, J., dissenting) (citing *City of Little Rock v. McKenzie*, 239 Ark. 9, 386 S.W.2d 697 (1965)).
declare a zoning ordinance void when, and only when, it can say that the action of the authority having power to zone, is clearly unreasonable, arbitrary and capricious or an abuse of discretion”.

In summary, the party alleging that legislation is arbitrary has the burden of proving that there is no rational basis for the legislative act, and regardless of the evidence introduced by the moving party, the legislation is presumed to be valid and is to be upheld if the judicial branch finds a rational basis for it. It is not for the judicial branch to decide from evidence introduced by the moving party whether the legislative branch acted wisely.

The disparity between the lack of deference afforded quasi-judicial and administrative decisions and the high level of deference afforded legislative decisions is one of the two reasons this area has become so important in Arkansas law. If a challenger can convince a court that the municipality’s determination was administrative or quasi-judicial in nature, he receives a de novo trial. If the municipality can convince the judge that its determination was legislative in nature, it is protected by rational basis review. The Arkansas Supreme Court once attempted to justify this disparity, saying, “If de novo review of actions by administrative boards and commissions were not allowed a board or commission might act arbitrarily or unreasonably or even conceal the real facts and thereby protect such acts from proper review.” Whether or not the General Assembly and the court’s skepticism of the competency and reliability of municipal land-use boards is warranted, it is apparent that some deference can be paid to those agencies while still guarding against arbitrary and capricious acts.

203. The second reason, which is wholly procedural, is addressed in Part IV, infra.
206. See, e.g., Ark. Code Ann. § 25-15-212(h)(5)-(6) (LEXIS Repl. 1998) (where the Administrative Procedure Act provides for judicial reversal of administrative decisions where they are not supported by substantial evidence of record or where they are arbitrary, capricious, or characterized by abuse of discretion).
IV. INITIATING LAND-USE LITIGATION

There is a tide in the affairs of men,
Which, taken at the flood, leads on to fortune ....
And we must take the current when it serves,
Or lose our ventures.207

While Part III closely parses a few words in section 14-56-425 of the Arkansas Code, the primary purpose of that code provision is to enable judicial review of land-use decisions. Often, however, it functions to prohibit judicial review entirely. The Chief Justice of the Arkansas Supreme Court has compared section 14-56-425 to a thirty-day statute of limitations on government malfeasance.208 In construing the statutory language, the Arkansas Supreme Court has taken the legislature to mean that those aggrieved with a land-use decision must use Arkansas’s District Court Rule 9 to seek review in circuit court.209 So if the judiciary is unhappy with the application of District Court Rule 9, it has only itself to blame; however, the judiciary seems to be the only branch of state government grappling with this issue at all.

Where Part II dealt with substance and Part III dealt with structure, this part deals with procedure: the judicial application of section 14-56-425 of the Arkansas Code and District Court Rule 9. The first subpart deals with the often criticized application of District Court Rule 9 to municipal land-use decisions.210 The second subpart analyzes the substantial changes made to the rule, which are now in effect. Those changes will help, in part, to ameliorate the harsh effects of the previous rule,211 but they may cause problems of their own.

207. WILLIAM SHAKESPEARE, JULIUS CAESAR THE FOURTH ACT, sc. 3.
208. Green v. City of Jacksonville, 357 Ark. 517, 529, 182 S.W.3d 124, 132 (2004) (Hannah, J., dissenting) (“I strongly believe that unauthorized and illegal acts of government should be subject to challenge and injunction whenever and wherever found. Providing cities with what amounts to a thirty-day statute of limitations beyond which the cities’ unauthorized acts are untouchable seems very unwise.”).
209. Bd. of Zoning Adjustment of City of Little Rock v. Cheek, 328 Ark. 18, 20–21, 942 S.W.2d 821, 822–23 (1997). In addition, the current rule, which contains significant differences from the old, became effective on January 1, 2009.
A. Of "Appeals" and "Inferior Courts"

The enabling statutes provide that parties seeking to appeal the final administrative and quasi-judicial decisions of municipal agencies must use the same procedure as is used to appeal from district courts. In construing this language, the Arkansas Supreme Court has taken the legislature to mean that those aggrieved with a land-use decision must use Arkansas's District Court Rule 9 to seek review in circuit court. Compliance with the statute and the District Court Rules is mandatory and jurisdictional; accordingly, a court must raise the question of compliance sua sponte. Furthermore, courts hold appellants to a strict-compliance standard.

The results have been criticized by both commentators and courts. Courts found the language of District Court Rule 9 an odd fit for appeals from the administrative and quasi-judicial agencies of municipalities. In Wright, the circuit court dismissed for failure to comply with Rule 9. Although the Supreme Court ultimately reversed on this point, it had to apply the following language from Rule 9 in order to do so: "As long as the record of the inferior court proceeding was filed with the circuit clerk within 30 days of the entry of the judgment, the appeal is perfected." The obvious problem with the application of that language is that when the ap-
peal is from a Board of Adjustment (as it was in that case), there is no inferior court proceeding, nor is there an entry of judgment. In Cheek, the court held that Rule 9 required the aggrieved party to file a record of the Board's proceedings with the circuit court or, in the alternative, to file an affidavit with the circuit court stating that the appellant had requested a record, but that the Board had failed and neglected to prepare and certify it. While holding that the circuit court had no subject-matter jurisdiction in that case, the court also acknowledged the difficulty litigators and courts had in applying Rule 9 in like contexts: "Our Inferior Court Rules, of course, generally deal in terms of appeals from 'entry of judgment' and appellate records prepared and certified by a 'court clerk,' terms normally inapplicable to actions taken by administrative agencies, boards, and commissions." Furthermore, commentators noticed the disparity between the administrative appeal procedures created by section 14-56-425 of the Arkansas Code and those used in other contexts. Because the subject is mostly of historical significance and because it has received thorough treatment as recently as 2008, I see no need to re-state and re-analyze those scholarly critiques in depth here. Suffice it to say that like courts, scholars believed that a "change in the procedure for appealing administrative decisions by local governments" was needed.

B. A Long Time Coming: The Revision to District Court Rule 9

Finally, in response to the General Assembly's complete failure to act, the Arkansas Supreme Court interceded to correct the incongruities between the realities of appeal from municipal administrative decisions, the language of section 14-56-425 of the Arkansas Code, and the language of District Court Rule 9. On April 17, 2008, it published the proposed changes to District Court Rule 9, which substantially rewrote the rule and provided for a new subsection (f) governing "Administrative Appeals." On October 9, 2008, it formally adopted the recommendations of the Committee on Civil

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220. Cheek, 328 Ark. at 21, 942 S.W.2d at 823.
221. Id. at 22, 942 S.W.2d at 824.
222. Rowe, supra note 210, at 352 ("Nearly every year in the last ten years, the Arkansas Supreme Court has been asked to decide at least one case dealing with the procedure for appealing from a local governmental body's decision on a planning and zoning matter."); Zachary D. Wilson & Charles N. Carnes, Case Note, Judicial Review of Administrative Agencies in Arkansas, 25 Ark. L. Rev. 397, 431–32 (1972) (suggesting that the Arkansas Administrative Procedure Act should cover local government units).
223. See generally Rowe, supra note 210.
224. Id. at 384.
Practice, and those recommendations became effective January 1, 2009.226 The following analysis will explain the new Rule 9 as it applies to appeals from the quasi-judicial and administrative decisions of cities in the land-use context and will comment on the major differences between the current rule and the prior version. Specifically, it is broken up into discussions of timing, notice, and procedure. Finally, it will raise potential issues created by the new rule.

1. Time

The first major clarification in the rule describes when the appeal must take place. The aggrieved party must file a notice of appeal in the office of the circuit clerk within thirty days of the final action giving rise to the appeal.227 An action is final where the municipal body has arrived at a definitive position on the issue, where that decision inflicts an actual, concrete injury, where the decision puts the body's directive into execution, and where it concludes the parties' rights to the subject matter in controversy without contemplating further proceedings.228 Although recent case law from the Arkansas Supreme Court stated that "final action" was the vote of the administrative body and not the formal approval of the record,229 this has been superseded by Rule 9(f)(2)(A).230 It provides that "[t]he date of decision shall be either the date of the vote, if any, or the date that a written record of the vote is made."231 Furthermore, the Reporter's Notes indicate that "[t]his provision is intended to loosen the governing standard so that parties do not lose their rights to seek judicial review of an administrative decision based on a hyper-technical concern about precisely when the government body made its decision."232 Because this rule clarifies what is meant by "final action," and because it gives two possible dates from which


231. Id.

to begin counting down the thirty-day limitation period, it should have the intended effect of reducing the number of appeals dismissed for lack of subject-matter jurisdiction.

2. **Notice**

The second major change in Rule 9 has to do with the notice requirements. The old rule provided that an appellant had perfected his appeal once he filed in the circuit court either a record of the proceedings of the municipal body or an affidavit showing that the record has been requested but has not been provided. In other words, the appellant did not need to perfect service or obtain an order granting an appeal within the thirty days to perfect his appeal. That is no longer the case. The appealing party “shall serve the notice [of appeal] on all other parties, including the governmental body or agency, by serving any person described in Arkansas Rule of Civil Procedure 4(d)(7), by any form of mail that requires return receipt.” That rule of civil procedure applies to service “upon a state or municipal corporation” and requires delivery of a copy of the summons and complaint to the chief executive officer or other person designated by appointment or law to receive such service. The old rule specifically stated that “no notice of appeal” was required and that “no summons or complaint” needed to be served. Although the new service requirement is somewhat more stringent than merely requiring the filing of the record, it is consistent with normal civil practice and should not be an onerous burden upon litigants.

3. **The Record and the Procedure on Appeal**

The last major changes to Rule 9 deal with the appeals procedure. The appealing party “shall file certified copies of all the materials the party has or can obtain that document the administrative proceeding” within thirty days of “filing its notice of appeal.” The opposing party may supplement these files “with certified copies of any additional documents that it believes are necessary to complete the administrative record” within thirty days of the appellant’s filing of materials. Additionally, “any party” may supplement the record “[a]t any time during the appeal” with “a certified copy
of any document from the administrative proceeding that . . . the party believes the circuit court needs to resolve the appeal.\textsuperscript{240} These procedures starkly differ from the original requirement that a party could simply file the record to begin the appeal.\textsuperscript{241} In fact, the reporter's notes unequivocally state that "[g]etting any needed administrative record materials to the circuit court is a housekeeping matter, not a jurisdictional requirement."\textsuperscript{242} Finally, the new rule makes clear that the circuit court is responsible for the pace of the appeal.\textsuperscript{243} After the "parties have made their initial filing of record materials, the court shall establish a schedule for briefings, hearings, and any other matters needed to resolve the appeal."\textsuperscript{244}

4. Potential Problems

While the revisions of District Court Rule 9 should remedy many of the practical problems caused by application of the old rule, new problems could arise. The revisions create an entirely new incongruity in terms between section 14-56-425 of the Arkansas Code and Rule 9. The statute requires appeals of municipal quasi-judicial and administrative agencies to follow "the same procedure which applies to appeals in civil actions from decisions of inferior courts."\textsuperscript{245} The new Rule 9 is now split to apply to both appeals from inferior courts\textsuperscript{246} and to appeals from administrative bodies.\textsuperscript{247}

The problem is that now there is a different procedure for appealing administrative decisions than there is for appealing the decisions of inferior courts, even though both procedures come under the same rule. Since the new rule became effective on January 1, 2009, no case law yet exists to resolve the tension between these two separate prescriptions for the appeal—the one by statute, the other by rule.\textsuperscript{248} Perhaps the General Assem-

\begin{itemize}
\item \textsuperscript{240} Id.
\item \textsuperscript{241} See Cheek, 328 Ark. at 21, 942 S.W.2d at 823. Note that in lieu of the record, the party could file an affidavit stating that the record was requested but not received. \textit{Id.}, 942 S.W.2d at 823.
\item \textsuperscript{242} ARK. DIST. CT. R. 9 addition to reporter's notes, 2008 amend. ¶ 13.
\item \textsuperscript{243} Id.
\item \textsuperscript{244} ARK. DIST. CT. R. 9(f)(2)(C).
\item \textsuperscript{245} ARK. CODE ANN. § 14-56-425 (LEXIS Repl. 1998) (emphasis added).
\item \textsuperscript{246} ARK. DIST. CT. R. 9(a)–(e) (applying to appeals from district courts).
\item \textsuperscript{247} ARK. DIST. CT. R. 9(f) (applying to appeals from administrative bodies).
\item \textsuperscript{248} Of the opinions handed down since January 1, 2009, none has had the opportunity to construe the new rule. See Talley v. City of N. Little Rock, 2009 Ark. 601, 942 S.W.3d ___ (applying the prior rule to a circuit court appeal initiated in 2007); Brock v. Townsell, 2009 Ark. 224, at 6 n.2, 309 S.W.3d 179 (2009) (applying the prior rule to a circuit court appeal initiated in 2003 but noting that the result would be the same under either version of the rule); Ark. Constr. & Excavation, LLC v. City of Maumelle, 2009 Ark. App. 874, 2009 WL 4844643 (unpublished) (applying the prior rule to a circuit court appeal initiated in 2007);
\end{itemize}
bly lacks authority to state the methods of appeal since the Arkansas Constitution grants the Supreme Court the power to "prescribe the rules of pleading, practice and procedure for all courts."\(^{249}\) If that is so, then surely the entirety of section 14-56-425 is suspect including the de novo review requirement and the right to a jury trial.

Another oddity exists in the new requirement that the person appealing the administrative decision "file certified copies of all the materials the party has or can obtain that document the administrative proceeding."\(^{250}\) Why does the court include this requirement when it is clear that the circuit court must still proceed de novo?\(^{251}\) Former Justice Newbern is of the opinion that it is unnecessary to maintain an evidentiary record of administrative hearings in municipal land-use agencies, because the parties may introduce entirely new evidence at trial and the administrative decisions are entitled to no deference.\(^{252}\) While this should not prove problematic per se, it certainly appears entirely superfluous.

Despite the Arkansas Supreme Court’s best efforts, section 14-56-425 of the Arkansas Code is still a problem. The court’s new Rule 9 marks a substantial improvement from the confusion created by the previous amalgam of rule and statute; however, changes to the District Court Rules alone do not seem to be sufficient to correct all of the problems with appeals from city land-use agencies. The General Assembly created the real problem with the enactment of section 14-56-425, and the General Assembly, therefore, must give us the real fix.

V. CONCLUSION

Despite sputters and spurts, Arkansas’s land-use law is slowly developing. Since Professor Wright published his comprehensive analysis in 1980, many substantive areas of the law have been clarified, while many more remain shrouded in uncertainty. The area that appears to be the most significantly developed is the characterization of the nature of municipal government decision making. The distinctions made in that area are of more than academic interest—they determine the standard of review on appeal to circuit courts, and they determine which government bodies can make which decisions. Hopefully, with the Arkansas Supreme Court’s revisions to the appeals procedure, fewer land-use cases will be dismissed for lack of sub-

\(^{249}\) Ark. Const. amend. 80, § 3 (emphasis added).


\(^{252}\) Newbern, supra note 173, at 503.
ject-matter jurisdiction, which will allow the courts to more fully explore and explain this area of the law.

APPENDIX “A”: PRE-1987 CODIFICATION INDEX

Many of Arkansas’s land-use decisions were handed down prior to the re-codification of 1987. Although judges, practitioners, and students can cross reference case law against the notes following the statutory text in the Code itself, the author has found it more efficient to compile and reference the following index:

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