Municipal Law in Arkansas Questions and Answers

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ARKANSAS MUNICIPAL LEAGUE

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Introduction

The legal staff of the Arkansas Municipal League daily receives dozens of communications from city officials and employees who have questions about legal issues affecting them and their cities and towns. This booklet is a compilation of some of those questions, arranged by subject matter. It is intended to complement the *Handbook for Arkansas Municipal Officials*, which contains the most essential statutes and case notes relevant to municipalities. Most of the statutes from the Arkansas Code Annotated (A.C.A.) cited herein can be found in the *Handbook*. A few may not be, so contact your city attorney or the League legal staff if you need a copy, or search online at https://www.lexisnexis.com/hottopics/arcode/. A web browser search for "Arkansas Code Online" will also work.

This publication also refers to Arkansas Attorney General Opinions. These may be found online at http://www.arkansasag.gov/opinions/index.php, or simply search for "Arkansas Attorney General Opinions."

Finally, we refer throughout to other publications, which may prove useful, and have included at the end a list of publications available from the League. Order or download them from the League website, www.arml.org, or call 501-374-3484, Ext. 248 to request hard copies.

Disclaimers

The information contained in this book is not intended as legal advice for any specific case. Only the most recent version should be used, though bear in mind that the law may change prior to a new edition. Readers are responsible for consulting with legal counsel when questions arise concerning the application of the law to a particular set of facts. This book is intended solely for educational and informational purposes.

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Americans with Disabilities Act (ADA)

See also the Municipal League publications Americans with Disability Act Compliance Guide and Understanding Municipal Personnel Law and Suggestions for Avoiding Lawsuits.

Q: Can the mayor or city attorney act as the ADA coordinator for the city?

A: While it would be permissible for either the mayor or city attorney to hold this position, it would be desirable to have a permanent employee fill this spot. Since elected and appointed officials come and go, it would be advantageous to have someone develop the expertise and experience over a longer period of time in this critical area.

Q: Does the ADA apply to persons who are being arrested?

A: Yes. The U.S. Court of Appeals for the Eighth Circuit (which includes Arkansas) has held that the ADA applies during an arrest (*Gorman v. Bartch*, 152 F.3d 907 (8th Cir. 1998)). Gorman, a wheelchair-user, requested that police officers help him get back into a bar that had just ejected him. When Gorman began to argue with the officers, they arrested him. Because the patrol wagon that arrived was not equipped with wheelchair restraints or a wheelchair lift, officers placed Gorman on a bench and used his belt and a seatbelt to secure him to the mesh wall behind the bench. In transit, the belts loosened, and Gorman fell to the floor. He required surgery for the resulting injuries he received. The ADA prohibits discrimination in the services of public entities. A United States Supreme Court decision held that state prisons fall within the statutory definition of a public entity. The Eighth Circuit determined that a police department, like a state prison, is a public entity and that the transportation of an arrestee is a program or service of the police department. The police department's failure to provide adequate transportation for disabled persons was therefore discriminatory under the ADA.

Q: Where can I get more information about the ADA?

A: The U.S. Department of Justice has a toll-free ADA information line staffed by specialists to answer your questions, 800-514-0301. In addition, an automated service allows callers to listen to recorded information and order publications. The number is 800-514-0383. You can also find information online at www.ada.gov. These services are not for employment-related ADA questions, however. The federal Equal Employment Opportunity Commission (EEOC) website, www.eeoc. gov, provides information on a range of employment law issues, including those raised by the ADA.

Boundary Changes

(Annexation, Consolidation, etc.)

See also Municipal Annexation, Incorporation and Other Boundary Changes.

Q: What are the proper procedures for reporting boundary changes in Arkansas? What state and local offices should be contacted when we have a boundary change?

A: The statutes dealing with annexation, detachment and consolidation (A.C.A. §§ 14-40-303, 14-40-605, and 14-40-608) provide for filing in the county clerk's office. A.C.A. §§ 14-40-605 and 14-40-608 require filing with the county clerk, who is required to notify the Tax Division of the Public Service Commission. These statutes require the filing of a map and other listed documents.

In addition, a new law, Act 914 of 2015 (A.C.A. § 14–40–101), now provides, "Before an entity undertakes an annexation, consolidation, or detachment proceeding under this chapter, the entity shall coordinate with the Arkansas Geographic Information Systems Office for preparation of legal descriptions and digital mapping for the relevant annexation, consolidation, and detachment areas."

Building And Construction

Q: Is the city required to use an architect or engineer on building or other construction projects?

A: The answer depends on the type and cost of the project. Generally, the law requires the assistance and supervision of a registered professional engineer or architect (A.C.A. § 22-9-101). However, this rule does not apply to:

a. engineering projects that do not exceed $25,000
b. architectural projects that do not exceed $100,000
c. municipal projects planned and executed according to plans and specifications furnished by an authorized state agency.

These amounts apply to the fair market value of the capital improvement (A.C.A. §§ 17-15-302, 17-15-307). The law sets forth criminal penalties and civil remedies for violations in A.C.A. §§ 17-15-103 and 105.

Q: Does issuance of a building permit require proof that the contractor is licensed?

A: Yes. A.C.A. § 17-25-301 provides:

"Upon making application to the building inspector or other authority of any incorporated city or town in Arkansas charged with the duty of issuing building or other permits for the construction of any building, apartment, condominium, utility, highway, sewer, grading or any other improvement or structure, when the cost of the work to be done by the contractor, but not limited to labor and materials, is fifty thousand dollars ($50,000) or more, any person, firm or corporation, before being entitled to the issuance of such permits, shall furnish satisfactory proof to the inspector or authority that he or she is duly licensed under the terms of this chapter."

Q: Must a contractor working on a city construction project be licensed?

A: A.C.A. §§ 17-25-101 and 17-25-103 require a contractor to be licensed in order to work on projects costing $50,000 or more, including but not limited to labor and materials. Act 275 of 2007 amended these statutes to include demolition. Act 1048 of 2015 raised the limit from $20,000 to $50,000. The effective date of the Act is July 22, 2015.

Q: What about subcontractors?

A: Prime contractors must hire only licensed subcontractors when the subcontractor's portion of the work is $50,000 or more (A.C.A. § 22-9-204, as amended by Act 1048 of 2015). However, an exception is made for projects designed to meet the city's need for utilities (A.C.A. § 22-9-201).

Note that A.C.A. § 22-9-204 does not state that it applies to cities, but only to work done for the State of Arkansas. However, because A.C.A. § 22-9-201 mentions an exception for city utility work, it appears that the Legislature meant to apply A.C.A. § 22-9-204 to cities, according to the Arkansas Attorney General (Ark. Atty. Gen. Op. No. 91-352).

Q: If the city does its own contracting, is it considered a "prime contractor" under A.C.A. § 22-9-204?

A: The Attorney General has issued an opinion that a school district doing its own contracting is not a prime contractor subject to the statute's requirements (Ark. Atty. Gen. Op. No. 94-401).

Q: Can we hire non-licensed contractors by dividing the project into segments costing less than $50,000?

A: The law forbids dividing projects up in this manner with the intent to avoid the licensing requirements (A.C.A. § 17-25-101(b)). However, situations may arise in which the city is not trying to avoid the law, but may need to do a project in stages over time for other reasons, such as budget limitations. If you find yourself in this or a similar situation, seek the advice of an attorney before proceeding.

Q: If a city does its own contracting for a construction project, must the city or one of its employees acquire a contractor's license?

A: No. Cities that do their own contracting through an authorized representative are not required to have a contractor's license (A.C.A. § 17-25-102).

Q: May a city use its own employees to perform construction work without putting the work out for bid?

A: Yes. A.C.A. § 22-9-202 provides that any taxing unit may perform the work on public improvements. In addition, the statute provides that the taxing unit may use its own employees without receiving bids from contractors. (Note, the term "taxing unit" refers to the language in A.C.A. § 22-9-203 referring to, among others, a "municipality … or other taxing unit".)

Courts and Law

Lawsuits Against Cities

Q: Are cities and their employees liable for injuries suffered by citizens?

A: It depends. A.C.A. § 21-9-301 provides that all municipal corporations shall be immune from liability and from suit for damages, except to the extent that they may be covered by liability insurance. The law also says that no tort action shall lie against any such political subdivision because of the acts of its agents and employees. A tort is basically any wrong causing injury to a person or property for which a civil damages suit would be allowed. (A breach of contract is not considered a tort.)

Although the law applies to torts in general, the Arkansas Supreme Court has interpreted it to mean only negligence (*Deitsch v. Tillery*, 309 Ark. 401, 833 S.W.2d 760(1992); *Battle v. Harris*, 298 Ark. 241, 766 S.W.2d 431 (1989)). Negligence means that a person did not act with reasonable care, but negligence does not cover intentional acts such as battery, slander, invasion of privacy and many other acts. Examples of negligence are carelessly leaving water on a floor, causing someone to slip and fall; or failing to fill a pothole in the street, causing damage to someone's vehicle.

The Arkansas Supreme Court has indicated, however, that it may refuse to grant immunity in cases of "gross negligence." (*Doe v. Baum,* 348 Ark. 259, 72 S.W.3d 476 (2002)). Gross negligence is defined as "[t]he intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another."

Thus, only negligence, as opposed to intentional acts (or possibly gross negligence), receives immunity from suit. This applies to the city's employees as well as the city itself, but only to the extent that the act was committed while the employee was carrying out his or her official duties (*Waire v. Joseph*, 308 Ark. 528, 534, 825 S.W.2d 594, 598 (1992); *Cousins v. Dennis*, 298 Ark. 310, 312, 767 S.W.2d 296, 297 (1989)).

The law does not apply to vehicle accidents. An accident is by definition a form of negligence since no one intended it to happen. Even so, the law says that a city will be held liable up to the amount it has liability insurance. Cities are required to insure their motor vehicles or become self-insurers (A.C.A. § 21-9-303).

Cities, their officials and employees may also be sued for violation of the United States or Arkansas Constitutions. The Arkansas immunity statute, A.C.A. § 21-9-301, would not apply to federal violations. Cities do not enjoy immunity from suits under the federal constitution or laws.

Individual officials and employees are immune in certain cases. Judges, prosecutors, and council members are, in certain circumstances, given complete immunity. Aldermen, for example, enjoy immunity from a suit based on the passage of an ordinance. (The city itself might still be liable if the ordinance is found unconstitutional.)

Other officials may be granted qualified immunity if the unlawful nature of their conduct was not clearly established at the time the conduct occurred. Therefore, it is important for public officials to understand the rights of their residents, and to check with their city attorney or the Municipal League lawyers when in doubt about how particular conduct might impact those rights.

For a fuller discussion of this topic, please refer to *Tort Immunity for Arkansas Cities and Towns*, *Their Officials and Employees,* published by the Arkansas Municipal League.

District Courts

Q: Who appoints a judge to the district court when a vacancy occurs?

A: The Governor, according to Ark. Atty. Gen. Ops. No. 2001-259; 2015-018. This is a change from municipal judge vacancies. A.C.A. § 16-17-132 provides that district court judgeships shall be filled as provided in Amendment 29 of the Arkansas Constitution, which provides for appointment by the Governor to fill vacancies in "district" offices.

Q: May a district judge who is appointed by the Governor to fill a vacancy run for that office at the next election?

A: No. Section 2 of Amendment 29 provides that "No person appointed under Section 1 shall be eligible for appointment or election to succeed himself." See also Atty. Gen. Op. No. 2001-259. However, the appointee may run for a district court judgeship other than the one to which he or she was appointed (Atty. Gen. Op. No. 2015-018).

Q: Who appoints and pays the clerk of the district court?

A: A.C.A. § 16-17-211(a) provides that the judge of a district court may appoint the clerk. Subsection (b) provides that the city council shall fix the salary, but that if the county pays any portion of the clerk's salary, then it must also be approved by the quorum court. If the expenses and salary is paid entirely by the county, then it shall be fixed by the quorum court and not by the city council. Where the duties of the office of district court clerk do not require a full-time employee, the city council may require that the duties of the clerk be performed by any other officer of the city, except a member of the police department or marshal's office.

Q: Who must authorize a salary increase for the district court judge or clerk if the city shares the cost of those salaries with the county?

A: Two Arkansas statutes govern this question, A.C.A. §§ 16-17-108 and 16-17-121. Section 16-17-108 lists district courts individually and provides for salary ranges for judges and clerks. Typically, the statute provides for the county to pay one-half the salary and for the city to pay one-half.

Section 16-17-121 provides that salaries authorized under § 16-17-108 may be increased within the ranges provided in that statute by the city council or the county quorum court or both, if authorized after considering six listed factors. According to the Attorney General, this means that where both a city and a county are responsible for the salaries, both must authorize the increase. If only one pays the salaries, then that governing body may alone authorize an increase (Atty. Gen. Op. No. 94-210).

Therefore, when the cost of salaries is shared by the county and city or town, then both the quorum court and city council must approve any increase.

Q: May cities contract with a private company to collect fines imposed by the district or city court?

A: The court itself is authorized to enter such an agreement with the city council's approval by A.C.A. § 16-17-127. In addition, the court may contract for probation services, pretrial supervised release programs, and alternate sentencing programs. The provider of such services must be registered with the Secretary of State and must file a surety bond with the Secretary of State in the amount of $50,000.

County Courts

Q: Is the "county court" referred to in A.C.A. 14-40-1202 the county judge or quorum court?

A: This term is used in other statutes as well. The term "county court" is explained by the Attorney General as follows: "The 'county court' strictly speaking, is neither the 'county judge' nor the quorum court. It is, however, presided over by one judge, the 'county judge,' who, when so presiding, acts in a judicial, rather than an executive capacity. (Arkansas Constitution, art. 7, § 28; A.C.A. § 14-14-1105(a); Ark. Atty. Gen. Ops. No. 97-181; 2001-335 n. 1.)

Elected and Appointed Officials

Recorders and Treasurers

Q: Who is the recorder-treasurer's supervisor?

A: The recorder-treasurer is an elected official and therefore is not supervised in the same sense as an employee. However, the council may prescribe additional duties (A.C.A. § 14-44-109). The recorder-treasurer should in general perform his or her duties in cooperation with other elected officials.

Q: May the treasurer's duties be assigned to someone else?

A: The duties of the treasurer found in the Municipal Accounting Law (A.C.A. §§ 14-59-101 through 118) may be assigned to another employee or contractor if (1) the treasurer requests the reassignment or (2) the treasurer fails to perform those duties (A.C.A. § 14-59-115). Note, however, that the law forbids contracting out the collecting of funds. On the other hand, the law's previous prohibition on disbursing funds by a non-employee of the municipality was amended by Act 582 of 2015 (amending A.C.A. 14-59-115). The law now states that "the governing body of a municipality may assign or contract with a private, qualified person or entity for the duties relating to the disbursing of funds for payroll, bonded debt, or construction projects funded with bond proceeds."

Nevertheless, the law places significant limitations on allowing a non-employee to disburse funds. Act 582 states, "[b]efore the governing body of a municipality assigns or contracts with a person or entity for the disbursing of funds, the governing body of a municipality shall establish by ordinance a method that provides for internal accounting controls and documentation for audit and accounting purposes." The Act further provides, "[t]he municipal treasurer shall approve the disbursement of funds before the private, qualified person or entity disburses the funds." Moreover, "[t]he governing body of a municipality shall ensure that the person or entity is adequately insured and bonded and conforms to best practices and standards in the industry."

Conflicts of Interest and Multiple-Office Holding

Q: Is there a conflict of interest if a mayor or alderman is married to another council member or a city employee?

A: Arkansas has no laws prohibiting a mayor or council member from serving on the same governing body. However, marriage to a city employee might implicate A.C.A. § 14-42-107(b), which forbids officials and employees from having an interest, either direct or indirect, in the profits of a contract with the city. The Arkansas Supreme Court has ruled that employment by the city constitutes a contract for purposes of the statute (*Thompson v. Roberts*, 333 Ark. 544, 970 S.W.2d 239 (1998)). See also Ark. Op. Atty. Gen. No. 2014-104 (discussing spouse contracting with city and concluding that "in most cases the spouses' financial affairs will in all likelihood be such that a court apprised of all relevant facts would conclude that such an interest exists"). Note, however, that the statute permits the city council to enact an ordinance permitting an interest in a contract and prescribing the extent of this authority.

In addition, the law prohibits a public official from using or disclosing confidential information for the benefit of the official or his or her family members (A.C.A. § 21-8-801).

Finally, an alderman should abstain from voting where his or her public duty conflicts with his or her personal interests (*Van Hovenberg v Holeman*, 201 Ark. 370, 144 S.W.2d 718 (1940); Ark. Atty. Gen. Op. No. 2000-278). For example, an alderman should not vote on personnel matters involving the alderman's spouse. Not every issue affecting an alderman's family member will require that he or she abstain, however. For example, a council member may vote on issues pertaining to the fire department, notwithstanding that an immediate family member works for the department (Ark. Atty. Gen. Op. No. 95-099).

Whether or not the council member has a conflict of interest in a particular case will depend on the facts. For example, is there a financial benefit to the council member? Does the council member's loyalty to a family member outweigh his sense of duty to the public? These are questions that will have to be considered on a case-by-case basis.

Q: Does a conflict of interest exist if the mayor or an alderman works at the bank where the city's money is deposited?

A: As discussed above, A.C.A. § 14-42-107(b) provides that no alderman, official, or municipal employee may have an interest, directly or indirectly, in the profits of any contract with the city. Banking services would undoubtedly fall into this category (Ark. Atty. Gen. Op. No. 2000-276). There are two exceptions: (1) The city may pass an ordinance permitting aldermen, officials, or employees to conduct business with the city and prescribing the extent of this authority, and (2) the law does not apply to a business in which the alderman, official or employee does not hold an executive or managerial office or to a corporation in which a controlling interest is held by stockholders who are not aldermen or council members. (Note that

in *Thompson v. Roberts*, 333 Ark. 544, 970 S.W.2d 239 (1998), the Arkansas Supreme Court held that the reference to aldermen in 14-42-107 applies to mayors.)

Q: May an elected city official be appointed to another municipal office?

A: During the term for which he or she is elected, no elected city official may be appointed to any municipal office except to fill a vacancy in the office of mayor, alderman, clerk, clerk-treasurer, recorder, or recorder-treasurer (A.C.A. § 14-42-107(a)). The Attorney General has opined that A.C.A. § 14-42-107 prohibits an elected city official from serving as the fire chief, municipal waterworks superintendent, or city inspector (Atty. Gen. Op. Nos. 95-178, 94-389, 93-177). In some instances, however, the courts have approved the assigning of additional job duties so that the official is effectively performing only one job rather than holding two positions with different duties (*Kindricks v. Machin*, 135 Ark. 459, 205 S.W. 815 (1918)). Consult with a your city attorney or legal advisor if you are considering this type of action.

Q: Is there a conflict of interest if a city official offers to provide a service to the city at no charge?

A: No, as long as there is no benefit, direct or indirect, that flows to the city official as a result and that would form a contract. Note that not all contracts are in writing, so check with your legal adviser if this type of situation arises. See A.C.A. § 14-42-107(b).

Q: May a city official be employed by the city in another capacity?

A: Generally speaking no, with a possible exception. A.C.A. § 14-42-107(b) prohibits any city official from having an interest in a contract with the city, which the Arkansas Supreme Court has ruled includes employment (*Thompson v. Roberts*, 333 Ark. 544, 970 S.W.2d 239 (1998)). However, the statute does allow the council to authorize contracting by a city official by passing an ordinance setting for the extent of authority allowed.

Thus an employee of the city cannot hold a city office unless the council has passed an ordinance authorizing the officer to also hold city employment. (Generally speaking, the legal staff of the Municipal League does not recommend that cities do this, given the conflicts that are likely to arise from this type of dual service). Volunteer firefighters and police officers may serve on the council pursuant to A.C.A. § 14-42-108, however.

Q: Does A.C.A. 14-42-107(b) prohibit a mayor or other official from receiving a "vehicle allowance?"

A: A.C.A. § 14-42-107 states that an official may not have an interest in the "profits from a contract" with the city without an authorizing ordinance. If by "vehicle allowance" the official is merely being compensated for the use of a personal vehicle in order to reimburse for normal maintenance, fuel, depreciation, and similar costs, then this should not be considered "profit from a contract" and no ordinance would be necessary. If, however, the amount of the "allowance" was significantly more than those costs, then it is possible that a court might find that does in fact constitute "profit." As with any municipal expense, the allowance should be appropriated by the council through the city budget. A better practice would be to reimburse for actual mileage that is documented in place of paying a flat fee. Note: this reply does not address any potential state or federal income tax consequences. The point here is simply that reimbursement of legitimate expenses incurred for a valid public purpose would not violate the prohibition on an official holding an interest in a contract with the city.

Q: Does A.C.A. § 14-42-107(b) prohibit city employees from holding an interest in a contract other than their employment?

A: Yes. However, the city council may waive the conflict by ordinance detailing the limits of the authority granted.

Q: Can a state legislator hold a municipal office, or for that matter, any other civil office?

A: No. Article 5, Section 10 of the Arkansas Constitution states: "No Senator or Representative shall, during the term for which he shall have been elected, be appointed or elected to any civil office under this State." (See also *Collins v. McClendon*, 177 Ark. 44, 5 S.W.2d 734 (1928); *Wood v. Miller*, 154 Ark. 318, 242 S.W. 573 (1922).)

Q: May a municipal official hold another elected office in another government?

A: Generally, yes, with the exception noted above that state legislators cannot hold other elected office.

In addition, the law provides that "No person shall simultaneously hold office and serve as an elected county justice of the peace and hold office and serve as an elected city council member" (A.C.A. § 14-14-1202(c)(3)(A)).

Q: May a person who is elected to more than one office keep both salaries?

A: No. A.C.A. § 21-5-107 states in part: "A person holding more than one (1) elective office shall be entitled to receive compensation from only one (1) of the offices held. The person shall select the office from which he or she may receive compensation by filing a statement with the Secretary of State and the disbursing officer of each governmental entity in which he or she holds an elective office." The statute defines compensation to mean: "all salaries, retirement allowances, group insurance, medical benefits, and anything else of value that a governmental entity provides in return for the services of its officers." Elective office is defined as any "office created by or under authority of the laws of the State of Arkansas, or of a subdivision thereof, that is filled by the voters, except a federal office."

Salaries

Q: Can the city council members vote to decrease their own salaries or the salaries of other elected officials?

A: Generally, a city may not decrease officials' salaries during the term for which the officials have been elected or appointed (A.C.A. § 14-42-113). However, the statute does allow a salary to be decreased during an official's term of office at the official's request. Once the official's term expires, the salary for the office is restored to what it was before the decrease. In addition, the statute provides that: "[t]he salary of an elected official of a city … or an incorporated town shall be withheld if: (A) The elected official is required to hold a professional license or registration as a qualification of his or her position; and (B) The elected official's professional license or registration is suspended."

Terms of Office

Q: How long are the terms of municipal officials in cities of the second class?

A: Mayors, recorder-treasurers, and recorders are elected every four years, with the mayor being elected in an even-numbered year and the recorder-treasurer and recorder being elected the following even-numbered year (A.C.A. §§ 14-44-105 and 14-44-115). According to A.C.A. § 14-44-103, alderman are elected for two-year terms, although the council may refer an ordinance to the voters designating four-year terms. Recorders, treasurers, and recorder-treasurers serve for a four-year term (A.C.A. § 14-44-115).

The Attorney General has opined that the term length for marshals is two years and implied that other municipal offices not specifically covered by statute, such as city collector, are also two years (Ark. Atty. Gen. Op. No. 94-263).

Q: How long can a municipal elected official serve in an office when he or she does not run for reelection and no one else runs for the position?

A: A person serves in his or her elected position until another individual is duly qualified and elected. Article 19, Section 5, Arkansas Constitution, states: "All officers shall continue in office after the expiration of their official terms until their successors are elected and qualified." This is frequently referred to as the "holdover clause." This means that if no one is elected to the position, or he or she is disqualified before taking office, then the incumbent remains in office until his or her successor is elected and qualified (*Justice v. Campbell*, 241 Ark. 802, 410 S.W.2d 601 (1967); Ark. Atty. Gen. Op. Nos. 2000-138, 96-011, 95-401, 94-303). Thus, if a successor is not elected, the incumbent would hold the office throughout the new term (Ark. Atty. Gen. Op.No. 88-353; *McCraw v. Pate*, 254 Ark. 357, 373, 494 S.W.2d 94, 103 (1973)).

Q: What if a "holdover" official does not wish to continue for another term?

A: The official may resign. The office would then be vacant and would be filled as provided by statute.

Q: If a mayor or recorder-treasurer is appointed to fill a vacancy, can he or she be fired by a vote of the council?

A: No. A.C.A. § 14-42-109 governs removal of "elective and appointed officers." Subsection (a)(1) provides for removal of "elective" officers only for nonfeasance in office after an indictment and court conviction. The Governor then appoints a replacement, according to section (b)(1) of the statute. On the other hand, subsection (a)(2) provides that "appointive" officers may be removed by ordinance enacted by a majority of the council. According to the Arkansas Attorney General, an appointed mayor is an "elective officer" even though the office was filled by appointment (Ark. Atty. Gen. Op. No. 98-085). The same is true of an appointed recorder-treasurer (Ark. Atty. Gen. Op. No. 96-052)

Elections

Eligibility for Office

Q: Must a candidate for mayor, clerk, recorder or treasurer reside within the corporate municipal limits at the time of filing and continue doing so during his or her term if elected?

A: Yes (A.C.A. § 14-42-201). In addition to other residency requirements of state law for municipal officeholders, candidates for the positions of mayor, clerk, recorder, or treasurer must reside within the corporate municipal limits at the time they file as a candidate and must continue to reside within the corporate limits to retain elective office. In addition, please note that Article 19, section 3 of the Arkansas Constitution requires all elected and appointed officers to be "qualified electors." According to the Arkansas Supreme Court, this means they must be residents of the city or town (*Thomas v. Sitton*, 213 Ark. 816, 212 S.W.2d 710 (1948); *Davis v. Holt*, 304 Ark. 619, 804 S.W.2d 362 (1991)).

Q: May municipal officials who were appointed to their elected position run for that position at the next election?

A: Yes. The relevant Arkansas constitutional provisions in this regard are Amendment 29, Sections 1-4. These sections are more significant for what they don't say than what they do. In essence, they deal with state, district, circuit, county, and township offices, but specifically do not deal with municipal offices. Section 2 prohibits election to succeed oneself, but it does not apply to municipalities. As a result, those appointed to hold municipal offices are eligible to run for that same office (Ark. Atty. Gen. Op. No. 86-392).

Q: How many signatures are needed on a petition to run for office in the mayor-council form of government?

A: Please see A.C.A. § 14-42-206(b).

Q: Can a felon run for municipal office?

A: No. A felon cannot run for municipal office unless his or her conviction has been expunged pursuant to A.C.A. §§ 16-93-301 through 16-93-303 or similar laws from another state. The candidate must present a certificate of expunction from the convicting court (A.C.A. § 7-6-102).

Q: May a candidate run for more than one municipal office in one election?

A: No. Act 1066 of 2013 amended A.C.A. § 14-42-206 to add subsection (e), prohibiting this practice.

Filing Deadlines

Q: What filing deadlines apply to independent candidates for municipal offices?

A: Please refer to A.C.A. § 14-42-206 in the most recent version of the Handbook for Arkansas Municipal Officials. In recent years these deadlines have been amended repeatedly, so it is important to make sure that you have the latest information.

Q: In mayor-council cities, are city elections nonpartisan and, if so, are they required to stay non-partisan?

A: Generally, city elections in mayor-council cities are nonpartisan. However, the city may elect to hold party primaries by resolution (A.C.A. § 14-42-206). To proceed with party primaries, no less than sixty (60) days before the party filing period under A.C.A. § 7-7-203, the governing body must pass a resolution requesting that the legally recognized political parties of the state conduct such primaries. After passage of the resolution, the clerk or recorder must mail certified copies of the resolution to the chairmen of the county and state parties.

Q: Once the city passes a resolution, does it stay in effect for future elections?

A: Previously, it did not, but now it does. Act 1165 of 2003, Section 10, changed A.C.A. § 14-42-206 to provide that such a resolution shall remain in effect for the subsequent elections unless revoked by the city or town council. However, resolutions from prior to 2003 would probably be ineffective. In other words, if the council wishes to have primaries, it should pass another resolution to comply with the new statute, and then the new resolution would stay in effect for future elections.

Q: How do the filing deadlines differ for cities with a mayor-council form of government that have by resolution decided to hold a primary?

A: Please refer to A.C.A. § 7-7-203(c).

Q: What happens when a filing deadline falls on a weekend or a holiday?

A: When a deadline lands on a weekend or holiday, the date is moved to the following business day (Ark. Atty. Gen. Op. No. 97-249).

Q: Do candidates for alderman/council member have to run by position?

A: Yes. A.C.A. § 7-7-304 states that all candidates running for multiple-position offices must designate what position they are running for. See also A.C.A. § 14-42-206.

Runoff Elections

Q: We had three candidates run for mayor and no one got a majority of the vote. Must we have a runoff election?

A: A.C.A. §§ 7-5-106 and 14-42-206(c) require runoff elections when there are more than two candidates for a municipal office and no candidate receives either a majority of the votes cast OR a plurality of forty percent (40%) of the votes cast with at least twenty percent (20%) more of the votes cast than the second-place candidate. The law states, "A candidate who receives a plurality of 40 percent (40%) of the votes cast must obtain at least twenty percent (20%) more of the votes cast than the second-place candidate for the municipal office to avoid a runoff general election against the second-place candidate."

Q: If a runoff is required, when does it occur?

A: Three weeks following the date of the general election (A.C.A. § 7-5-106).

Q: Who gets into the runoff?

A: A.C.A. § 7-5-106 requires that the two candidates receiving the highest number of votes on the first Tuesday in November shall be the candidates in the run-off election.

Q: Does the runoff law apply to other municipal offices, and does it matter what size city you are?

A: The rule is the same for all municipal offices and all size cities. The only exception is for officials in the city manager form of government (A.C.A. § 7-5-106).

Q: Who pays for an election?

A: A.C.A. § 7-5-104 provides the formula for determining who pays and how much for your city election.

Campaign Rules

Q: To what extent may the city, its officials, and employees display brochures or advertisements for public dispersal on political matters within their offices or at their desks?

A: This raises several issues. First, it is clear that city funds may not be used to produce materials expressing the personal views of city officials or employees. Article 12 § 5 of the Arkansas Constitution provides that a city may not obtain or appropriate money for any corporation, association, institution or individual. In addition, the "public purpose doctrine" requires that public funds are to be spent only for valid public purposes. See, for example, Ark. Atty. Gen. Op. No. 91-410. Similarly, employees who prepared the materials during work hours would also probably be found to have violated these provisions.

Note, however, that the city government may take positions on public issues. This is called "government speech." For a general discussion, see Ark. Atty. Gen. Op. 2007-189. On the other hand, city buildings may not be used to support candidates for office (A.C.A. § 7-1-103).

The Constitution recognizes a public employee's right to speak on matters that lie at the core of the first amendment, that is, matters of public concern, so long as "the effective functioning of the public employer's enterprise" is not interfered with (*Rankin v. McPherson*, 483 U.S. 378, 388 (1987); *Pickering v. Board of Education*, 391 U.S. 563 (1968)). This is a complex subject, and the advice of an attorney should be sought with respect to particular cases. For more information on this topic from the standpoint of state election law, see the following questions and answers.

Q: May city or town funds be spent to support or oppose a ballot measure?

A: Generally speaking, no. Act 312 of 2013 added A.C.A. § 7-1-111, which prohibits the use of public funds by a governmental body or by particular "public servants" for the purpose of supporting or opposing a ballot measure. The law does allow for the verbal expression of views on a ballot measure, the passage of a resolution or proclamation, and the dissemination of public information at a speaking engagement if the subject matter of that information is within the scope of the public servant's responsibilities and duties.

Q: Does Arkansas law further regulate campaign practices?

A: Yes. A.C.A. §§ 7-1-103 and 7-1-104 contain an extensive list of prohibited practices.

Campaign Finance

Q: What rules apply to campaign contributions?

A: Please see A.C.A. § 7-6-203.

Employment Law

For additional information on employment law, see Sample Personnel Handbook for Arkansas Cities and Towns and Understanding Municipal Personnel Law and Suggestions for Avoiding Lawsuits, available from the Municipal League.

Drug Testing

Q: Why are certain employees subject to random drug testing under the League Non-CDL policy while other employees and city council members are not?

A: First, bear in mind that all city employees may be tested if a trained observer (such as a supervisor) has reasonable suspicion that the employee is under the influence of drugs or alcohol. However, when it comes to random drug testing, the courts make a distinction between safety or security sensitive employees on the one hand and "run of the mill" employees on the other.

This distinction is based on the fourth amendment to the U.S. Constitution, which forbids unreasonable searches by the government (including local governments). The Supreme Court has ruled that a drug test is a "search" of the person's body under the fourth amendment. Therefore, it must be reasonable in order to be constitutional (*Skinner v. Railway Labor Executives' Assn*., 489 U.S. 602 (1989)). (Please note that the fourth amendment only applies to governments and their agents, not to private industry, which is why random drug testing is allowed in the private sector.)

The Supreme Court has held that a drug test can be a reasonable search only under one of the following circumstances:

1. There is a reasonable, individualized suspicion to believe that the employee is under the influence;
2. The employee performs a safety-sensitive job;
3. The employee performs a security sensitive job (normally law enforcement).

The general rule is that there must be reasonable suspicion. This is similar to the "probable cause" standard police must satisfy in order to conduct a search, although it is an easier standard to meet. Random testing is done without any individualized suspicion whatsoever, and therefore it would normally violate an employee's constitutional rights. However, the Supreme Court found that in certain cases, government has a "special need" to conduct drug testing, and so created the safety and security sensitive exceptions to the reasonable suspicion requirement (*Skinner v. Railway Labor Executives' Assn*., 489 U.S. 602 (1989); *National Treasury Employees Union v. Von Raab*, 489 U.S.656 (1989)).

The safety sensitive category is not easy to define, but basically involves employees who, if they have a momentary lapse of attention, could create a danger of physical harm or death to themselves or the public. This has been developed on a case by-case basis by courts around the country, and the results are not always consistent. The "security sensitive" category applies to law enforcement officers and police department employees who might have access to confidential information that could jeopardize criminal investigations.

Thus, the categories permitted in the League policy are those which have been upheld by the courts. Council members are not randomly tested because, again, their jobs are not safety or security sensitive. The Supreme Court has specifically ruled that candidates for state office were not subject to drug testing, and the same reasoning would apply to city officials (*Chandler v. Miller*, 520 U.S. 305 (1997)).

For additional information, please request a Non-CDL Drug Testing Packet from the Municipal League.

Family and Medical Leave Act (FMLA)

This topic is treated at length in the League's Family and Medical Leave Act Guide.

Harassment and Discrimination

See *Understanding Municipal Personnel Law* and *Sample Personnel Handbook for Arkansas Cities and Towns*, both published by the Arkansas Municipal League.

Hiring and Firing Employees

Q: Who hires and fires department heads such as police and fire chiefs?

A: Mayors have the exclusive right to appoint and remove any and all department heads subject to a two-thirds override by the city council. A city council may not initiate the appointment or removal of a department head under this statute. See A.C.A. § 14-42-110. The same rules apply to the building inspector. See A.C.A. § 14-56-202. In cities with civil service commissions, the governing body may enact an ordinance delegating the power to appoint and terminate police and fire department heads to the civil service commission.

In the city manager form of government, the city manager is empowered to appoint and remove department heads. If the city has a civil service commission, however, the commission may vote to override the city manager's appointment of the police or fire chief.

However, A.C.A. § 14-42-110 does not apply to the city administrator form of government.

Q: Can a mayor veto a city council's override of the mayor's appointment of a department head?

A: No, according to the Arkansas Attorney General. The mayor's regular veto authority (see A.C.A. §§ 14-43-504, 14-44-107, 14-45-105) is not invocable in this situation, because the two-thirds majority that is needed to override a veto will have already been achieved, thus making a veto futile (Ark. Atty. Gen. Op. No. 99-077).

Q: Does the mayor's power to appoint a department head such as a police chief as provided in A.C.A. § 14-42-110)(a)(1) apply equally to the appointment of an "interim" chief?

A: State statutes do not provide for interim appointments as such. A.C.A. § 14-42-110(a)(1) merely provides that the mayor shall appoint department heads, subject to a two-thirds (2/3) override by the council. The statute does not make any distinction based on the duration of the chief's tenure in office. Therefore, the mere fact that the mayor's appointment is intended to be temporary or interim in nature does not change the statutory grant of power to appoint the department head.

Q: Are cities required to advertise city employment or appointment opportunities?

A: No state statute specifically requires this. However, if citizens are not informed of job opportunities, they might argue that they were unfairly or discriminatorily denied access to city employment or appointment. Openly advertising such positions will help prevent these types of claims and lawsuits. In addition, it will give the city a broader pool of qualified applicants from which to make a selection.

Supervision of Employees

Q: What authority do individual council members have to supervise personnel matters and other day to-day operations of the city?

A: The council may set policy on employment matters, departmental operations, and so forth. However, the law gives power to the council as a body. As such, the council has no power to act until a majority of council members have voted to take an action (A.C.A. § 14-55-203). Thus, individual council members are without authority to act on their own in the absence of a vote directing a particular action. (For example, a committee including an alderman could be directed to perform research on certain items, but an individual council member does not alone have authority to direct an employee to perform a task in a certain way.)

Council members should also be aware that they are not individually immune from lawsuits arising from personnel issues. Individual aldermen are immune from liability for action that is "legislative" in nature, such as passing ordinances or resolutions. This immunity does not apply, however, to administrative or executive action such as making individual personnel decisions or supervising city employees or department heads. Although a council as a whole is not prohibited from making personnel decisions, the council should weigh the risk of personal liability against the perceived need to make individual personnel decisions.

Uniformed Employees

Q: What reporting requirements apply when a police officer is hired or separated from employment?

A: A.C.A. §§ 12-9-601 and 12-9-602 place a duty on the person within city government who has hiring and/ or firing authority to make specific reports and inquiry during the hiring and separation from employment phase of police officer employment. Note: This could be the mayor, the police chief, the city council or some combination of these individuals depending on what your city does.) Specifically, when hiring an officer, the city's hiring authority must contact the State Commission on Law Enforcement Standards and Training to determine the officer's previous employment history, including, but not limited to, places of employment and reasons for departure from previous employment. When an officer separates employment from the city, the appropriate city official or employee must fill out a specific form about the separation, stating the reasons for separation. (Again, this could be the mayor, the police chief, the city council or some combination thereof.) An affidavit from this person is also required when the employee leaves for one of the following reasons:

a. The law enforcement officer was separated for his or her failure to meet the minimum qualifications for employment or appointment as a law enforcement officer;
b. The law enforcement officer was dismissed for a violation of state or federal law;
c. The law enforcement officer was dismissed for a violation of the regulations of the law enforcement agency; or
d. The law enforcement officer resigned while he or she was the subject of pending internal investigation.

The affidavit must be executed under oath and is subject to the criminal provisions of false swearing under A.C.A. § 5-53-103. In short, if the affidavit is factually incorrect, the city official or employee may be faced with criminal charges for false swearing. Finally, the Act carries with it an immunity section. The Act states: "An administrator of an employing agency who discloses information pursuant to this section is immune from civil liability for such disclosure or its consequences. No employing agency shall be civilly liable for disclosure of information under the subchapter or performing any other duties under this subchapter" (A.C.A. § 12-9-602). It is the opinion of the legal staff that this immunity section would not apply to lawsuits alleging violations of federal law.

Q: What police benefits are mandated by state law?

A: The state statutes governing municipal police departments are found in Title 14, Chapter 52. Holiday compensation is addressed in A.C.A. § 14-52-105.

Annual vacation leave is addressed in A.C.A. § 14-52-106. Uniform sick leave is addressed in A.C.A. § 14-52-107.

Q: What benefits for firefighters are mandated by state law?

A: The state statutes governing municipal fire departments are found in Title 14, Chapter 53. Holiday compensation is addressed in A.C.A. § 14-53-106, annual vacation leave is addressed in A.C.A. §14-53-107, and uniformed sick leave is addressed in A.C.A. §14-53-108.

Q: When can the officer or firefighter begin to take vacation? Can we make them wait until after the first year?

A: The law does not require a one year waiting period; rather it grants "an annual vacation." "Annual" means yearly, and does not exclude the first year. See Atty. Gen. Op. No. 99-172 (construing the identical provision for police in 14-52-106). However, the Attorney General stated that local officials may determine how to allocate the time during the first year.

Q: Our firefighters work a 24-hour shift. Should the fifteen (15) days' vacation for firefighters provided by A.C.A. § 14-53-107 and holiday pay be calculated as eight-hour days or 24-hour days?

A: The Arkansas Attorney General has addressed this issue as follows:

"Following the ruling in *City of Fort Smith v. Brewer*, 255 Ark. 813, 502 S.W.2d 643 (1973), … vacation and holiday pay should not be based upon the 24-hour work shift … for purposes of the grant of 'fifteen (15) days' annual vacation under §14-53-107, 'days' should be construed to refer to 8-hour rather than 24-hour shifts" (Atty. Gen. Op. No. 94-227).

In addition, the Arkansas Supreme Court has held that the city of Pine Bluff did not violate the law in charging three sick days to an employee who missed a 24-hour shift (*Donaldson v. Taylor*, 327 Ark. 93, 936 S.W.2d 551 (1997)). Note, however, that the statute makes the rules for sick leave for firefighters more complex. Please refer to A.C.A. § 14-53-108 for these provisions. It may be that in some instances, however, a "day" should be longer than eight hours in calculating leave time, if the employees work more than 40 hours a week. This is because five "eight hour" days of vacation leave would not give the employee a full week of vacation in that case (Ark. Op. Atty. Gen. No. 93-013).

Military Leave

Q: Do employees who leave work for military duty have any rights when they return?

A: The Federal Uniformed Services Employment and Reemployment Rights Act does provide certain rights for returning service members. For additional information on USERRA, refer to the website www.esgr.mil.

In addition, the Act should be read in conjunction with A.C.A. §§ 21-4-102, 21-4-212(e), and 21-4-301 through 21-4-313.

Financial Affairs

See also Building Construction, Employment Law, Fire Departments, Pensions And Utilities.

Budgeting

Q: Must a city adopt a budget and, if so, how does that occur?

A: Yes. Before December 1 of each year, mayors of all cities and incorporated towns with a mayor-council form of government must submit to the governing body of those cities a proposed budget. That proposed budget should be for January 1 through December 31 of the following year (A.C.A. § 14-58-201).

Further, it is mandatory for the governing body of the municipality to adopt a budget for the operation of the city on or before February 1 of each year (A.C.A. § 14-58-202).

The statutes contemplate that the mayor will present the council with a proposed budget as noted above before December 1 of each year. This will enable the council to study the document, make any proposed changes and get the budget adopted before February 1 of the following year.

Q: Can the budget be altered periodically?

A: Yes. Under A.C.A. § 14-58-203, the governing body of the city, from time to time, may alter or revise the budget to better suit city governmental needs. There are two exceptions: Taxes that are levied for specific purposes may not be diverted for other purposes, and creditors may not be prejudiced by the diversion of funds.

Q: Must our budget be in the form of an ordinance?

A: No. The budget may be adopted by an ordinance or resolution of the city council (A.C.A. 14-58-201 as amended by Act 622 § 1, of 2011). The Arkansas Municipal League recommends using a resolution for ease of amendment. However, if the budget has been enacted by ordinance, it may only be amended by another ordinance.

Bidding Requirements

Q: When must a city take bids in order to purchase goods or services?

A: The answer depends on the class of the city affected and what ordinances the city has in effect regarding bids for purchasing. With the exception of public improvements, state law in Arkansas requires only that bids be taken for purchases in cities of the first class.

A.C.A. §14-58-303 provides that the mayor or his authorized representative has the exclusive power and responsibility to make purchases. In cities of the first class, bids must be taken for purchases that exceed the sum of twenty thousand dollars ($20,000). The bidding process is also described in this statute. For purchases under $20,000, the council of a first-class city must enact procedures by ordinance.

On the other hand, the council may waive bidding by ordinance in "exceptional cases where this procedure is deemed not feasible or practical" (A.C.A. § 14-58-303(b)(2)(B)). In addition, the law now provides that bids are not required for motor fuels, oil, asphalt, asphalt oil, natural gas, and in certain cases, new motor vehicles (A.C.A. § 14-58-104, Act 756 § 23 of 2009). The same law also allows cities to extend or renew existing contracts without bidding. A first-class city's purchase of all types of insurance requires competitive bidding (A.C.A. § 14-58-304). However, this requirement does not apply to cities and towns participating in Municipal League programs (Ark. Op. Atty. Gen. No. 83-198).

Cities of the second class and incorporated towns have no requirement to take bids for general purchasing under § 14-58-303, although a city or town could pass an ordinance to require bidding or other procedures.

Here is an exception to this rule: Cities of all classes must take bids for any public improvements, which include the major repair or alteration or the erection of buildings or other structures or other permanent improvements, exceeding $20,000 in costs. This law is found at A.C.A. § 22-9-203, which also contains the procedure for taking bids for contracts for public improvements which exceed $20,000.

Q: May we negotiate an award of a public improvement contract if all bids exceed the amount appropriated for the contract?

A: Local governments may negotiate an award of a public improvement contract with the apparent responsible low bidder if all bids exceed the amount appropriated for the contract if (a) bidding on alternates was not required and (b) the low bid is within twenty-five percent of the appropriated amount. The apparent low bidder may be determined by deducting the alternates in numerical order. After the deductions are made, the cost must be less than twenty-five percent of the amount appropriated before an award with the low bidder may be negotiated (A.C.A. § 22-9-203).

Q: May we require bidding on alternates on a public improvement contract?

A: Yes, A.C.A. § 22-9-203 permits plans and specifications to require bids on alternates. It imposes a limit of three alternates; requires that they be deductive; and requires that they be set forth in the plans and specifications in numerical order.

Q: Should we take bids for professional services?

A: Competitive bidding may not be used in procuring legal, financial advisory, architectural, engineering, construction management, and land surveying services. See A.C.A. § 19-11-801 and following, which specify the procurement procedures for these types of services. Cities and towns may make other professional services subject to this statute by a two-thirds (2/3) vote of the governing body.

Q: May a first-class city use the statute for professional services to purchase insurance?

A: No. A.C.A. § 14-58-304 states: "The purchase of all types of insurance by cities of the first class shall be governed by the provisions of A.C.A. § 14-58-303."

A.C.A. § 14-58-303 is the statute that requires bidding for the purchase of goods and services necessary for the operation of the municipality. Therefore, bids must be taken by first class cities for insurance. Please note that the bidding requirements do not apply to the joining of a risk management pool such as the programs provided by the League.

Q: May a city or town grant a preference to local bidders?

A: When a municipality is purchasing commodities of services by competitive bidding, it may enact an ordinance granting a preference of up to five percent (5%) to the lowest qualified bid from a firm resident in the municipality. Act 1059 of 2015; A.C.A. § 14-58-105 (b)(1)(A). A "firm resident" is defined as "any individual, partnership, association, or corporation," that: 1) maintains at least one staffed place of business within the corporate limits of the municipality; and 2) has paid taxes, for at least two successive years before submitting a bid, to the county that benefit the municipality on property either used or intended to be used in connection with the firm's business (A.C.A. § 14-58-105 (a)(2)). A municipality may also place a specific dollar cap on the total amount of preference granted, regardless of the percentage designated in the ordinance (A.C.A. § 14-58-105 (b)(1)(B)).

To calculate the preference allowed, the municipality's procurement officials must take the total amount of each bid from a firm resident claiming the preference and deduct the percentage mandated by the ordinance from the total amount (A.C.A. § 14-58-105 (b)(1)(D)(i)). After the deductions have been calculated, if the bid of a firm resident is lower than a bid from a nonresident, then the municipality must award the bid to the firm resident who submitted the lowest bid, regardless of whether or not that particular firm resident claimed the preference (A.C.A. § 14-58-105 (b)(1)(D)(ii)).

The preference only applies when a municipality is comparing bids between one or more firm residents and other bids by nonresidents (A.C.A. § 14-58-105 (b)(2)(A)). It does not apply when all the bids are from firm residents (A.C.A. § 14-58-105 (b)(2)(B)). The preference will not apply when federal or state rules or regulations conflict (A.C.A. 14-58-105).

Debt

Q: When and how may a city or town incur debt?

A: The starting point is Article 12, Section 4 as amended by Amendment 10 of the Arkansas Constitution. This section of the Constitution prohibits municipalities from incurring debt beyond what may be repaid from the current year's revenue. . Any city official violating these constitutional prohibitions may face criminal charges. The penalties are a fine of not less than $500 nor more than $10,000 and the official "shall be removed from office." Article 16 section 1 of the Constitution further prohibits the payment of interest on debt by municipalities.

However, subsequent constitutional amendments have made exceptions to the foregoing prohibitions. Any debt that cannot be paid from the current year's revenue, or which bears interest, must fall into one of the following constitutional provisions:

- Amendment 62: sales tax bonds
- Amendment 65: revenue bonds
- Amendment 89: energy efficiency bonds
- Amendment 78 which allows for short-term financing. The amendment permits municipalities to enter into short-term financing obligations "for the purpose of acquiring, constructing, installing or renting real property or tangible personal property having an expected useful life of more than one (1) year … " The financing may extend for up to five years. There is a dollar limit on the amount a city may finance: A city's total amount of short-term obligations under the amendment may not exceed five percent of the assessed value of taxable property within the municipality.

Other statutory provisions will allow municipalities to "borrow money" via non-interest bearing "evidences of indebtedness" for ordinary operating expenses in anticipation of the collection of property tax monies (A.C.A. § 14-58-401 to 403). The uncollected property taxes serve as security for the loan and are assigned as a method of repaying the indebtedness. A second loan provision is found in A.C.A. § 19-3-401 through 403, which allows for temporary loans from the State Board of Finance which must be paid back within the calendar year.

Donations

Q: Can the city, using city funds, purchase employees Christmas gifts such as cash, fruit baskets, gift certificates, etc.?

A: Generally speaking, no. The Attorney General has issued a series of opinions on this and other related expenditures (Ark. Atty. Gen. Op. Nos. 91-410, 91-411, 93-416, 94-298, 94-317 and 94-397).

The Attorney General has pointed out that analyzing these types of situations requires very careful factual scrutiny. Because of this, if your city is facing any such issue, you should immediately contact your city attorney, or if you are a member of the Municipal Legal Defense Program, contact the League for assistance.

The law in this area is fairly well settled. Article 12, Section 5 of the Arkansas Constitution prevents municipalities from donating or appropriating money to private corporations, associations, institutions, or individuals. Further, the public purpose doctrine as recognized by general case law is also applicable. It states that monies may only be spent on items that will benefit the entire public. Pursuant to these principles, the Attorney General has found that the expenditure of such monies is unconstitutional as a donation and does not serve the general public purpose.

In Ark. Atty. Gen. Op. No. 94-397, the Attorney General reviewed those expenditures that he believes are unlawful. They include:

"Expenditures for Christmas, birthday or other parties for city employees and family members; traveling expenses of municipal officials' spouses, flowers, gifts and cards for city employees and families; Christmas presents (hams) for employees; employee picnics; and monetary payments to employees for long, faithful service" (*Id.* See also (Ark. Atty. Gen. Op. Nos. 94-410 and 94-317).

Q: May we pay a bonus to our employees at Christmas?

A: This is allowable (Ark. Atty. Gen. Op. No. 87-232). This should be treated as compensation, however, with the usual payroll deductions.

Q: If we can't give gifts to our employees, can the city sponsor a party for the entire city and give gifts to children and members of the public?

A: Generally, yes. However, because the facts vary so greatly from city to city, it is again important to make sure that your particular event(s) is reviewed by your legal counsel. The Attorney General has specifically opined that an event sponsored by the city, but held for the entire city population wherein children in the community were given gifts and a potluck supper was held, was lawful (Ark. Atty. Gen. Op. No. 94-397).

In this instance, the Attorney General noted, "Money is not being obtained or appropriated for any 'corporation, association, institution or individual' … and that the goods distributed by the city … inure primarily to the benefit of the public … and not to city officials, employees, their families or other discreet individuals" (*Id.*).

In summary, as long as the city isn't lending its "credit" to any "corporation, association, institution or individual" and it is spending its money only where it clearly benefits the entire community, then there should be no legal problem with the event (*Id.*, citing McQuillin, Municipal Corporations, Section 12, 190 and *Bourlan v. Pollack*, 157 Ark. 538, 249 S.W. 360 (1923)).

Q: May the city donate money to private non-profit charitable organizations such as a senior citizen's center, or boys/girls clubs?

A: Recreational and youth programs are a public purpose and thus are a proper subject for municipal expenditures. See A.C.A. § 14-54-1301 (cities may operate recreational programs); Ark. Atty. Gen. Op. Nos. 96-358 (statute authorizing counties to operate recreational programs establishes them as a public purpose) and 2001-135 (providing youth recreational services is a laudable goal well within the city's discretion.

However, the city may not donate or directly appropriate funds to a private organization, even one that is charitable or nonprofit, without violating Article 12 Sec. 5 of the Arkansas Constitution. That provision prohibits the appropriation of public funds to private individuals or corporations.

On the other hand, a city may enter into a contract with a private charitable organization to provide services that the city itself could provide. See Ark. Atty. Gen. Op. No. 2001-135 (Fayetteville could contract with Boy's and Girl's Club).

One factor a court might examine would be whether the city actually receives some consideration for its money. In other words, the nonprofit organization should in fact provide a service that would not exist (or would be less extensive) but for the funds received by the city. Consult with your city attorney about drafting a suitable contract.

Q: May a city receive donations? If so, what can a city do with the donations?

A: Yes. Once received, the donations become part of the city's general fund and are subject to statutory and constitutional restrictions applicable to the expenditure of public funds (Atty. Gen. Op. No. 92-250).

Fees

Q: Can cities charge a one-time set-up fee to pay garnishments from employees' salaries? If so, can the city charge $10 to set up garnishments?

A: An employer may withhold a maximum of $2.50 a pay period for the administrative cost incurred in each withholding (A.C.A. § 16-110-417). In addition, if authorized by the county quorum court or municipality, the district court clerk may collect $10 for filing or issuing writs of garnishment for any permissible use in the administration of the court pursuant to A.C.A. § 16-17-126.

Q: Our Police Department serves city warrants for misdemeanors. Is it allowed to collect a fee for this?

A: Yes, a $50 fee may be charged. A.C.A. § 14-52-202 and A.C.A. § 14-52-110 (for cities of the second class), state that, for serving city warrants only, the chief of police or deputies may recover fees "allowed to a sheriff under §21-6-307 for similar services in similar cases."

Thus, Arkansas law allows for a fee when city police officers serve city warrants. A.C.A. § 21-6-307 (a) (14) allows a $50 fee. The Attorney General has opined such assessment and collection to be lawful in Ark. Atty. Gen. Op. No. 97-300. However, the Attorney General noted that the collection may only occur at the time a court enters final judgment for costs in the case (*Id.*).

Investments

Q: What types of investments of city funds are allowed?

A: A.C.A. §§ 19-8-101 and 19-8-104 provide that public funds shall be deposited in banks located in the state of Arkansas. Other forms of investment are allowed by A.C.A. §§ 19-1-501 through 19-1-505.

Property

Q: The city has some property that it wishes to sell and some other property that it wishes to lease? What are the procedures for doing these things?

A: If the city wishes to enter into a sale or lease contract for the purchase of real or personal property, please examine A.C.A. § 14-54-302(c), which contains the procedures. These include approval of the contract by a written resolution of the city council. Otherwise, refer to A.C.A. § 14-58-306.

The law also authorizes police departments to exchange real or personal property with other municipal police departments if approved by the governing body (A.C.A. § 14-52-113).

Street Turnback Funds

Q: What are the legal uses of state turnback street funds?

A: Every town and city should have a street fund in its book-keeping system. It is required by state law that two separate bank accounts be maintained for general funds and street funds (A.C.A. § 14-59-104). The accounts should be maintained in the name of the municipality and identify the specific fund. All monies that are required by state law or municipal ordinance to be used on streets should be deposited into the street fund. Specifically they are:

1. Your town's or city's share of the three-mill road tax, levied pursuant to Amendment 61 to the Constitution of Arkansas, and codified as A.C.A. § 26-79-104(b), should go into the street fund. The three-mill share "shall be expended exclusively by the cities or towns for the purpose of making and repairing the streets and bridges within the corporate limits of the town or city"(*Id.*)
2. State turnback street funds, which are revenues transferred to the Municipal Aid Fund for distribution to the towns and cities, in accordance to the Arkansas Highway Revenue Distribution and Revenue Stabilization Law, should also be included in the street fund. A.C.A. § 27-70-207 provides that such revenues shall be distributed to first and second class cities and incorporated towns, for credit to their street funds, which should be used for the maintenance, construction, and reconstruction of streets which are not continuations of state highways. *Id.* In addition, the statute authorizes such revenues to be expended for public transportation.
3. Parking meter revenues are general revenues under the state law, but many cites, by ordinance, authorize parking meter revenue to go into the street fund (A.C.A. § 14-57-604(a)(2)).
4. County and municipality vehicle tax proceeds shall be credited to the county highway fund, or to the municipal street fund, respectively. Such proceeds are to be used "for the maintenance, construction and reconstruction of streets and other public ways" (A.C.A. § 26-78-108). In addition, said proceeds can also be used for the purpose of providing ambulance services in the county or municipality, for purchasing fire-fighting equipment and for municipal parks (A.C.A. § 26-78-109).
5. Many towns and cities collect other miscellaneous revenues that by ordinance are allocated to the street fund. Some examples are fees for the cutting

of streets and curbs by utilities and plumbers; donations for street paving, etc.

Q: Is the city authorized to spend revenue from its waterworks, sewer or sanitation operations for general purposes?

A: Surplus waterworks revenue may be used for any municipal purpose (A.C.A. § 14-234-214). However, the funds are not "surplus" under the statute if they are needed for maintaining and operating the plant or if they are needed for bond and interest redemption. See Maddox v. City of Fort Smith, 346 Ark. 209, 56 S.W.3d 375 (2001) (Maddox I); and Maddox v. City of Fort Smith, 369 Ark. 143, 150, 251 S.W.3d 281 (2007) (Maddox II). Please refer to the statute for the order of fund application.

With respect to funds generated by sewer operations, the court in Maddox II stated: "generally accepted accounting principles in 1996 permitted the City's sanitation operating fund to be operated as part of its general fund. Thus, any transfer of surplus funds from the sanitation account would merely have been a transfer within the general fund." Accordingly, the court upheld the city's transfer of surplus sanitation funds to the general fund." This indicates that in general the use of surplus sanitation funds will be acceptable. However, since the court referred to "generally accepted accounting principles," consultation with your accounting professional may be advisable.

In addition, it must be noted that if any utility's revenue is pledged to pay off bonds, any surplus funds (as defined in A.C.A. § 14-199-101(a)) may only be used for certain purposes specified by statute (A.C.A. § 14-199-101(b)).

Also, please note that waterworks systems established under subchapter 2 of chapter 234 (14-234-201 and following) may make payments to the city in return for police, fire, and health protection and in return for other services provided by the city to the waterworks (A.C.A. § 14-234-114(a)). Some limitations are imposed by the statute, so it should be consulted carefully before proceeding.

Bond on City Officials

Q: Must city officials be bonded? If so, where do we purchase the bonds?

A: Various statutes require city officials to be bonded. However, the Legislature has established a fidelity bond program in A.C.A. § 21-2-701 and following. This is administered by the Arkansas Insurance Department's Risk Management Division. Premiums are deducted from state turnback funds and a certificate is sent to each mayor. Therefore, there is no need to purchase bonds from another source.

Taxes and Fees

Q: When may a city impose fees or taxes without an election?

A: The general rule is that a city may not levy a tax without approval by the voters (A.C.A. § 26-73-103). On the other hand, a city may impose a fee without an election. Telling the difference between a tax and a fee is not always easy. The Arkansas Supreme Court has stated that "a 'tax' is imposed to raise general revenue, while a 'fee' is imposed in the exercise of the city's police power" (*City of Marion v. Baioni*, 312 Ark. 423, 850 S.W.2d 1 (1993)). This means that a charge for a specific service or benefit is likely to be considered a fee rather than a tax.

Thus in *Barnhart v. City of Fayetteville*, 321 Ark. 197, 900 S.W.2d 539 (1995) the court held that a sanitation fee was really a tax because it was not designed to provide sanitation services within the city, but rather was dedicated to paying off the debt of another governmental entity, a waste disposal authority. In another case, the court held that a "public safety fee" designed to raise the salaries of police and firefighters was actually a tax. The court stated that this was "a payment exacted by the municipality as a contribution toward the cost of maintaining the traditional governmental functions of police and fire protection." As such, it was an invalid tax, as the voters had not approved it (C*ity of North Little Rock v. Graham,* 278 Ark. 547, 647 S.W.2d 452 (1983)).

The Arkansas Attorney General has addressed the question of whether "municipalities, counties, or airport commissions have the power or authority to impose a gross receipts fee or tax upon the gross receipts received by a vehicle rental company operating upon airport property." The fee would vary according to the vehicle's rental rate, but "the benefit would be the same on a per-vehicle basis regardless of the amount of money charged to the customer." Therefore, the Attorney General determined that this would be a tax rather than a fee, as it was not directly related to conferring a specific benefit (Ark. Atty. Gen. Op. No. 95-100).

On the other hand, the court has upheld the validity of fees when they are charged in exchange for a specific benefit. In *Holman v. City of Dierks*, 217 Ark. 677, 233 S.W.2d 392 (1950), the court held that an annual sanitation charge of $4 for fogging the city with an insecticide three times a year was a fee and not a tax. The court reasoned that this was "a charge for services to be rendered. The city proposes to spray the property of its citizens and to charge the cost of this operation against those who receive its benefits."

In the *Baioni* case the city was allowed to impose tapping fees that exceeded the actual cost of connecting to the water and sewer system. The city intended to use the excess funds to expand the sewer system to new users. The court stated that raising such expansion capital by setting connection charges, which do not exceed a pro rata share of reasonably anticipated costs of expansion, is permissible where expansion is reasonably required, if the use of the money is limited to meeting the cost of that extension. In addition, the city was able to prove that the cost per housing unit of expanding the system was less than the total fee charged and thus reasonably related to the benefits conferred. See A.C.A. § 14-56-103 (development impact fee statute enacted in 2003).

Note that some fees are specifically provided by statute. For example, the court has held that utility franchise fees, authorized by 14-200-101, are not an unlawful tax (*City of Little Rock v. AT&T Communications of the Southwest, Inc.*, 318 Ark. 616, 888 S.W.2d 290 (1994)).

Q: May we charge a license fee or tax on businesses from out of town doing business in our city?

A: Business licenses and fees are authorized by A.C.A. § 26-77-102. However, that law does not permit the city to charge a license fee or tax if the business has a license from another Arkansas city, unless it has a place of business in more than one city.

In addition, the U.S. Supreme Court has held that a city may not charge a business license fee or tax on a person who is soliciting orders that are solely in interstate commerce. The court has held that the Commerce Clause of the Constitution prohibits a "flat sum privilege tax on an interstate enterprise whose only contact with the taxing State is the solicitation of orders and the subsequent delivery of merchandise within the taxing State. Such taxes have a substantial inhibitory effect on commerce which is essentially interstate" (*Dunbar-Stanley Studios, Inc. v. Alabama*, 393 U.S. 537 (1969) (citing *West Point Wholesale Grocery Co. v. City of Opelika*, 354 U.S. 390, (1957); *Memphis Steam Laundry Cleaner, Inc. v. Stone,* 342 U.S. 389 (1952); *Nippert v. City of Richmond,* 327 U.S. 416 (1946)).

On the other hand, the Court held in the *Dunbar-Stanley Studios* case that the Commerce Clause did not prohibit a tax on photographers who took pictures in stores and transmitted exposed film out of state for developing, with finished pictures mailed to stores for delivery to customers. The Court found that this was not purely interstate commerce since the act of photographing the customers took place locally.

Q: Must our city or town pay sales tax?

A: Yes, with a few exceptions. Cities and towns are exempt from sales tax on motor vehicles (A.C.A. § 26-52-410) and on motor fuels used in municipal buses (A.C.A. § 26-52-417). In addition, admission tickets sold by municipalities are not subject to sales tax (A.C.A. § 26-52-411).

The purchase of or a repair to fire protection equipment and emergency equipment to be owned by and exclusively used by a volunteer fire department are exempt from sales taxes (A.C.A. §§ 26-52-434 and 26-53-142). The Department of Finance and Administration's regulations define a "volunteer fire department" as one "in which seventy-five percent (75%) or more of the fire fighters employed are volunteer fire fighters, who receive no regular compensation for their services; … The receipt of appearance fees of less than $20.00 per call by a volunteer is not deemed compensation but as reimbursement for expenses associated with responding to a fire" (GR-31.1.) (available online at tinyurl.com/31-1taxexempt).

Machinery and equipment required by law to be installed by cities or towns to prevent or reduce air or water pollution or contamination is also exempt. (A.C.A. §§ 26-52-402 and 26-53-114).

Q: Are cities and towns exempt from motor fuel taxes?

A: Municipalities are entitled to refunds for federal gasoline taxes. Forms are available from the Internal Revenue Service (IRS) that can be filed on a yearly basis to claim such an exemption. Further, additional forms can be filed to gain refunds on federal gasoline taxes that may have been paid in the past. To get these forms and to obtain such a refund, you may contact: 1-800-TAX-FORM (1-800-829-3676) or 1-800-829-1040 or via the Internet at www.irs.gov/pub/irs-pdf/p510.pdf. Ask for IRS publication number 510 and form number 8849 (www.irs.gov/pub/irs-pdf/f8849.pdf). These documents describe how to obtain the refund and the necessary documentation for filing. After filling the forms out and reviewing the publication, if you have questions, call 1-800-829-1040 and ask for the technical tax/legal department. Once you are transferred to that department, ask to speak with an excise tax specialist.

Finally, Act 419 of 2001 provides for refunds to fire departments for taxes paid on motor fuel and distillate special motor fuel (A.C.A. § 26-56-701 and following). The fire department must secure a permit from the DFA. If you have any questions, you may contact the DFA Motor Fuel Tax Manager at 501-682-4800.

Q: Must a city that engages in garbage collection services have a sales tax permit from DFA?

A: Yes. To obtain a permit call 501-682-1895 or visit the state website, www.arkansas.gov/dfa.

Q: If the city is providing a mosquito control service and is billing city residents for that service, would this be a pest control service subject to the sales tax effective July 1, 2004?

A: Yes, Act 107 provides that pest control services are subject to sales tax. According to the DFA, this will include mosquito control services provided by the city for a fee.

Q: If the city sells water to a customer outside the city, should the customer pay sales tax?

A: Yes, but only if the city or county in which the customer lives charges a sales tax (A.C.A. § 26-75-216). If no sales tax is charged, then the statute requires an invoice showing that the sale was made for delivery to a person outside a city or county in which a sales tax is levied.

Fire Protection and Departments

See also Employment Law and Pensions.

Q: Must a city have a fire department?

A: Yes. The legislature has mandated that city councils "shall establish fire departments" and further, that they must be properly equipped (A.C.A. § 14-53-101). In lieu of establishing its own fire department under this section, the city council by ordinance may enter into a contract or interlocal agreement for city fire protection with an existing fire department certified by the Arkansas Fire Protection Services Board (Act 106 of 2015, effective July 22, 2015).

Q: May a city fire department seek reimbursement for fires it puts out beyond the city limits?

A: Yes, A.C.A. § 14-53-102 provides that cities may authorize their fire departments by ordinance to combat fires beyond the city limits. After a fire is extinguished outside a municipality's corporate limits, the city shall make a reasonable effort for ninety (90) days to collect compensation from the property owner for the services provided. If the city is not reimbursed during that time period, the county where the fire occurred may compensate the city up to two hundred dollars ($200) for the fire-fighting services provided. Act 1345 of 2013 amended this law to add the following provisions:

- The claim must be supported by a completed and attached Uniform Fire Department Insurance Reimbursement Billing Form.
- The Arkansas Fire Protection Services Board shall adopt rules to create the form and the allowable rates for reimbursement.
- The city or town may seek payment or reimbursement from the property owner involved or the county after the ninety-day (90) period for one hundred percent (100%) of the expendable resources the city or town used to respond to an accident if the accident involved personal property only (i.e., not real estate).

Q: May a city or town receive fire protection from a rural fire district?

A: Yes. A.C.A. § 14-284-201 provides:

> If any city or town within the district does not have an organized or volunteer fire department and desires to be included within the fire protection district, upon the adoption of an ordinance therefor by the governing body of the city or town, addressed to the county judge and quorum court, the area covered by the fire protection district may be extended to

provide fire protection within the city limits of the city or town by ordinance adopted by the quorum court.

Q: May the City build a fire station outside of the city limits?

A: A.C.A. § 14-53-102 provides this power to cities under certain conditions. These are:

1. The city must have an ordinance providing that the fire department may operate beyond its corporate limits.
2. No active fire protection services are offered in the area beyond the corporate limits of the city or town where the facilities are to be constructed.
3. The county quorum court approves of the construction of the fire-fighting facilities by a county ordinance.
4. A city or town may construct facilities to house the fire-fighting equipment in areas where fire protection services currently exist if, in addition to passing the ordinance authorizing the operation outside the city, the construction is approved by a unanimous vote of the board of directors of the fire department serving that area outside the corporate limits.

Q: Our city would like to create the position of fire marshal. Are there any specific requirements under state law for such a position?

A: Yes. A.C.A. § 14-53-112 requires that the position of fire marshal be created by city ordinance. The statute further describes the responsibilities of the position, which include the detection and prevention of arson, the enforcement of laws relating to arson, as well as the enforcement of any local or state fire prevention codes. Various training requirements are outlined in the statute. Specifically, the individual must have completed those courses required for certification as a law enforcement officer as approved by the Arkansas Commission on Law Enforcement Standards and Training (ALETA) (available at www.clest.org/oles/Pages/default.aspx).

Also required is successful completion of an 80-hour fire and arson investigation course offered by the National Fire Academy, the Arkansas Fire Training Academy, or another course of similar stature. Finally, a one week fire safety inspection class is also required. It, too, can be offered by the National Fire Academy, the Arkansas Fire Training Academy, or some other equivalent class. A municipal fire marshal is authorized to carry a weapon and to make arrests for violation of arson or other fire laws in the state of Arkansas (A.C.A. § 14-53-112).

Freedom of Information Act

The Arkansas Freedom of Information Handbook is available from the League and gives detailed information on the Arkansas Freedom of Information Act. Another valuable source of information is professors John Watkins and Richard Pelz's book, The Arkansas Freedom of Information Act (Fifth ed. 2009), available from Arkansas Law Press.

Meetings

Q: Does the Freedom of Information Act (FOIA) apply to an informal meeting between less than a quorum of a governing body.

A: The Arkansas Supreme Court has stated that the Freedom of Information Act (FOIA) applies to meetings attended by less than a quorum of the governing body (*Mayor of El Dorado v. El Dorado Broadcasting Co.*, 260 Ark. 821, 544 S.W.2d 206 (1976)). The FOIA statute states that informal meetings are covered as well as formal meetings (A.C.A. § 25-19-106(a)). Even if decisions are not being made during an informal meeting, the Attorney General has opined that the gathering of information regarding matters of public concern or the discussing of matters that could ultimately be decided by the governing body is sufficient to implicate the Act (Ark. Atty. Gen. Op. Nos. 95-098, 91-225, 95-227, 96-317, 96-074); see also *Arkansas Gazette Co. v. Pickens*, 258 Ark. 69, 522 S.W. 350 (1975)).

Q: What about phone calls? Do they come under the FOIA too?

A: Possibly. For example, if the mayor calls aldermen to discuss city business, this could be considered a serial meeting which will violate the Freedom of Information Act unless two hours' notice is given to the press and the meeting is open to the public (A.C.A. § 25-19-106; *Harris v. City of Fort Smith*, 359 Ark. 355, 197 S.W.3d 461 (2004) (city administrator's individual conversations with aldermen violated the Act); *Rehab Hosp. Serv. Corp. v. Delta-Hills Health Systems Agency, Inc.*, 285 Ark. 397, 687 S.W.2d 840 (1985) (telephone poll without notice to public unlawful)).

Q: Under the Freedom of Information Act, may a single council person privately discuss proposed legislation with:

a. the city clerk?

b. the city attorney, who will have to draft the legislation so that the whole council can see what is being proposed?

c. a commission or authority member?

d. a paid city employee, for example, building inspector or police chief?

e. a county official (coroner) or state official (attorney general) or expert (tax information person)?

A: These discussions would not violate the Act, which applies only to meetings of the "governing bodies" of municipalities. The persons mentioned are not members of the city's governing body. For example, see Ark. Atty. Gen. Op. No. 95-227 (city attorney is not a member of the governing body). Note, however, that the normal attorney-client privilege does not apply to defeat FOIA with respect to a meeting between the city attorney and council members. (*Laman v. McCord*, 245 Ark. 401, 432 S.W.2d 753 (1968)).

Q: Does the FOIA permit a council person to send mail or e-mail to another council member?

A: The Attorney General has issued an opinion stating his belief that an e-mail, and impliedly regular mail as well, would not constitute a meeting under the FOIA. Ark. Atty. Gen. Op. No. 99-018. However, he warns that the e-mail message could be a public record subject to disclosure if it constitutes a record of the performance or lack of performance of official functions (A.C.A. § 25-19-103), and no exemption applies (§ 25-19-105). Act 1653 of 2001 amended A.C.A. § 25-19-103 to specifically include electronic or computer-based information in the definition of public records.

However, a more recent opinion, Ark. Atty. Gen. Op. No. 2005-166, warns that courts in other states have stated that e-mail exchanges in which governing body members interact on a topic that may come before the council for a vote could constitute an illegal "meeting." Thus, officials subject to the FOIA should avoid discussions of such matters via e-mail.

Executive Sessions

Q: We sometimes have executive session meetings, which I, the recorder, don't get to attend. Should I be taking minutes for these meetings? Then should the public be aware of what is going on during these meetings behind closed doors?

A: According to Ark. Atty. Gen. Op. No. 83-67, the recorder/treasurer does not attend executive sessions as the recorder is not listed by the statute as a person who may attend. However, the council could tape record its meeting and direct the recorder to prepare a transcript. The public should not have access to any recording or transcript of an executive session, as that would defeat the purpose of an executive session, which is by definition not a public meeting. See *Commercial Printing Co. v. Rush*, 261 Ark. 468, 549 S.W.2d 790 (1977) (discussing need to protect privacy of individuals who were the subject of the meeting); Ark. Atty. Gen. Op. No. 2000-251; 91-323 (tape of executive session, even if attended by unauthorized person and transferred to sheriff's office, remains exempt). Note, however, that executive sessions may only be held for the purposes allowed by A.C.A. § 25-19-106(c).

Q: Can the Mayor be excluded from an executive session?

A: The statute on executive sessions (A.C.A. § 25-19-106) does not state whether the mayor can be excluded. However, the Attorney General has stated in Opinion No. 96-062 that he believes the mayor cannot be excluded from an executive session, as the mayor is an ex officio member of the council.

Q: Can a city council or other public body which has gone into executive session hear testimony from witnesses?

A: No. A.C.A. § 25-19-106(c)(1) allows for executive sessions only for considering employment, appointment, promotion, demotion, discipline or resignation of any public officer or employee. In addition, an executive session is authorized for the discussion of public water system security measures in accordance with A.C.A. §§ 25-19-105(b)(17) and 25-19-106(c)(6).

In subsection (2) (A) the Freedom of Information Act further provides, "Only the person holding the top administrative position in the public agency, department or office involved, the immediate supervisor of the employee involved and the employee may be present at the executive session when so requested by the governing body…." Thus the statute makes it clear that other persons such as witnesses to an event for which an employee may be disciplined, may not be present at the executive session (*Arkansas State Police Commission v. Davidson*, 253 Ark. 1090, 490 S.W.2d 788 (1973)). However, after hearing testimony from witnesses publicly, the governing body may go into executive session to deliberate, although it is not required to do so.

Records

Q: Our city record keeper is taking and keeping city records in her home. Is this lawful?

A: Originals of city records should not be taken to a private residence (Ark. Atty. Gen. Op. No. 88-110). Further, the Arkansas Freedom of Information Act (A.C.A. § 25-19-105), requires that records be opened for inspection and copying by residents of the state of Arkansas. Certainly this requirement cannot be adequately met with city records being located in a private residence. A practical solution would be for a person

who needs to work on records at home to make paper or electronic copies of the original documents.

Q: Does the Freedom of Information Act require the city to allow a citizen to inspect and copy documents showing the salaries of city employees and officials?

A: Yes (Ark. Atty. Gen. Op. No. 95-070). However, certain private information such as social security numbers and payroll deductions should not be disclosed. For more information, refer to the *Arkansas Freedom of Information Handbook*.

Q: Do documents pertaining to investigation of employee misconduct have to be disclosed if requested under the Freedom of Information Act?

A: Only if there has been a "final administrative resolution of any suspension or termination proceeding at which the records form a basis for the decision to suspend or terminate the employee and if there is a compelling public interest in their disclosure" (A.C.A. § 25-19-105(c)). Otherwise, employee evaluation or job performance records, including preliminary notes and other materials, are not subject to disclosure. Documents involved in disciplinary proceedings are considered employee evaluation or job performance records (Ark. Atty. Gen. Op. No. 99-289).

On receiving such a request, the custodian of the records must make a decision within 24 hours whether the records should be disclosed. The requester and subject of the request must then be notified of the decision (A.C.A. § 25-19-105(c)(2)). Note that the law gives the employer, the requester, or the employee the opportunity to have the attorney general review a request for personnel evaluation or job performance records. The Attorney General will issue an opinion within three days of receiving the request, during which time, the records shall not be disclosed (A.C.A. § 25-19-105(c)(3)).

Q: Is an audio tape of a meeting between the mayor and a department head subject to the FOIA?

A: Yes, according to A.C.A. §§ 25-19-103(5)(A) and 25-19-105, if the recorded conversation concerned public business.

Q: May a city charge a requestor for the costs associated with complying with the FOIA request?

A: The FOIA permits a city to charge for copies. The cost of copies must be the actual cost to the city for making the copies (A.C.A. § 25-19-105(d)(2)(A)(ii)). If the estimated fee exceeds $25.00, the city may require that the fee be paid in advance of copying (A.C.A. § 25-19-105(d)(3)(A)(iii)).

Generally, personnel time spent to satisfy the FOIA request may not be charged to the requestor (A.C.A. § 25-19-105(d)(3)(A)(i)). If the request is unusually large, however, the city may be able to charge the requestor with costs associated with hiring temporary workers to process the request (Atty. Gen. Op. No. 2003-203).

Q: Upon request, must a city release the names, home addresses, and phone numbers of municipal utility customers?

A: No. Act 186 of 2015 amended FOIA to exempt from disclosure:

> Personal information of current and former public water system customers and municipally owned utility system customers, including without limitation:
>
> (A) Home and mobile telephone numbers;
>
> (B) Personal email addresses;
>
> (C) Home and business addressees; and
>
> (D) Customer usage data (A.C.A. 25-19-105(b)(20)).

Act 186 contained an emergency clause and went into effect upon signature by the governor. The Arkansas Supreme Court had previously ruled that such records must be disclosed (*Hopkins v. City of Brinkley,* 2014 Ark. 139 (2014)).

Q: Must information concerning minors contained in parks and recreation department records be disclosed under FOIA?

A: A.C.A. § 25-19-105(b)(20) provides that the following information is exempt from disclosure under FOIA: "[t]he date of birth, home address, email address, phone number, and other contact information from county or municipal parks and recreation department records of a person who was under eighteen (18) years of age at the time of the request made under this section…."

Governing Bodies

Municipal Powers

Q: What is "home rule" and how does it operate in Arkansas?

A: Arkansas municipalities are creatures of the state. Prior to 2011, cities had only the powers granted to them by the Arkansas Constitution and statutes passed by the Arkansas General Assembly. This was Dillon's Rule and, according to the Arkansas Supreme Court, it meant:

"a municipal corporation possesses and can exercise the following powers and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation—not simply convenient, but indispensable." (*Tompos v. City of Fayetteville*, 280 Ark. 435, 438, 658 S.W.2d 404, 406 (1983)).

The Legislature expanded this rule to a certain extent for some cities. "Home Rule" statutes gave the power to first-class cities and certain cities operating under a charter the power to exercise all powers relating to municipal affairs so long as they did not conflict with state law. In 1875, the Legislature enacted A.C.A. § 14-55-102, which gave broad authority to municipalities by granting cities and towns the power to pass ordinances. Although A.C.A. § 14-55-102 could be interpreted as repealing "Dillon's Rule," the Arkansas Supreme Court continued to apply Dillon's Rule long after the enactment of that statute in 1875, upholding ordinances under that section if they were legitimately aimed at protecting public health and safety. However, Act 1187 of 2011 repealed Dillon's Rule and extended certain powers granted to cities of the first class to all municipalities. A.C.A. § 14-43-602 states that the rule of decision known as Dillon's Rule is inapplicable to the municipal affairs of municipalities. It gives a municipality the authority to "perform any function and exercise full legislative power in any and all matters of whatsoever nature pertaining to its municipal affairs including, but not limited to, the power to tax." A.C.A. § 14-43-601 defines "municipal affairs" as "all matters and affairs of government germane to, affecting, or concerning the municipality or its government except state affairs subject to the general laws of the State of Arkansas," which are listed in A.C.A. § 14-43-601(a)(1). A municipality may legislate upon the state affairs described in subdivision (a)(1) of A.C.A. § 14-43-601 if not in conflict with state law. Note, however, that when the legislature regulates extensively on a subject (such as the vehicle code), the courts may hold that city governments are "preempted" from enacting legislation on the same topic. This is a complicated subject and will require legal advice in given circumstances.

Meetings

Q: How are city council meetings organized, and who is responsible for such organization?

A: In January of every new year, the council is to organize itself for the following year (A.C.A. § 14-43-501, as amended by Act 235 of 2015). Such organization should determine how the meetings will be run, dates, times and places of meetings, how the agenda is to be set, who will set the agenda and any other procedural matters which will make the remaining meetings run more smoothly (see next question).

Note that Act 235 changed the requirement that the council organize itself at the first meeting of the year and now allows this function to take place at any time during January on an annual basis.

Q: Do we have to follow Robert's Rules of Order for our council meetings?

A: Not necessarily. The League suggests avoiding complex rules of parliamentary procedure. The League publishes a pamphlet of suggested, simplified rules entitled "Procedural Rules for Municipal Officials." The council may adopt these rules as written or modify them to meet local needs.

Q: We have several citizens who come to our meetings and want to address the council. They want to stand up at any time during the meeting and talk for as long as they want. They ask questions of all the council members and generally cause the meeting to go on much longer than necessary. Do we have to let citizens address the city council? Can we set up rules about how such public commentary will be taken?

A: The answer to the first question is no. You do not have to allow public commentary at all. The answer to your second question is yes. The city council may establish a set of rules or otherwise structure public comments.

The law is fairly clear that a city or town council may completely prohibit public commentary during its meetings. Such commentary is considered a privilege, not a right. (For a more detailed review of the case law on this matter, see Tom Carpenter's article, "Opening the Forum: The First Amendment and City Council Meetings," *City & Town*, July 1997, p. 32-33.)

Recognizing, however, that it would likely be politically unwise to forbid public comments, you may wish to establish some rules. Otherwise, the formal structure of the council meeting will collapse, and the meeting will last much longer than necessary. A city or town council may establish reasonable time, place

and manner restrictions on citizen comments. For example, you can set aside, either at the beginning or end of the meeting, a limited time for public commentary, set time limits on public comments (keeping a timer to keep this fair and equitable is a good idea), limit the number of comments on the pro or con side of a given issue and so forth. Some cities and towns require citizens to place themselves on the agenda in order to address the council, and that requirement must be met a set number of days in advance of the meeting. Again, these are local decisions that can be made by the council in light of the needs in your particular community.

Finally, a few words of caution. First, you should never regulate the content of a citizen's speech, except to the extent that it is disorderly or does not relate to the particular issue before the council. This means, for example, that the council may not forbid someone to speak solely because of the views that person wishes to express. If you allow public comments, you may not choose which comments you are willing to hear based on the speaker's viewpoint. To do so would violate the constitutional right to freedom of speech. In addition, make sure that you are consistent in the way that you apply your rules. In other words, apply the rules to everyone in the same manner. By establishing fair and impartial rules and applying them consistently, you will enhance the value of public comments while minimizing potential disruption and unreasonably lengthy meetings.

Q: What is the proper procedure for setting the agenda?

A: This is not governed by state law. The city council may establish its own procedures or follow customary practices previously used by the city. See Ark. Atty. Gen. Op. No. 96-328 (stating opinion that in absence of ordinance establishing rules on setting agenda, an ordinance or resolution need not be submitted to mayor or city attorney for advance review and approval).

Q: How many votes are needed to pass an item by a city commission? Is it a majority of the whole number or a majority of those present?

A: First, look to the statute setting up the particular commission. For example, A.C.A. § 14-56-422 provides that certain votes of a municipal planning commission must pass by a majority vote of the entire commission.

Sometimes, however, the statute does not state what constitutes an acceptable majority for passage of a measure by a particular commission. For example, the statutes governing advertising and promotion commissions do not state what constitutes a majority. In such cases, the Arkansas Supreme Court has held:

Where no statute has required a contrary result, the courts have applied the common law rule that action may be taken by a majority of the members present, provided, of course, that they are sufficient in number to constitute a quorum of the body (*Benton County Taxpayers Assn., Inc., v. Bolain*, 252 Ark. 472, 473, 479 S.W.2d 566, 567 (1972)(quoting 45 A.L.R. 2d 716); see Also Ark. Atty. Gen. Op. Nos. 2001-326, 87-273.)

If a city has created a board or commission that is not governed by state statute, then the answer may be found in the ordinance creating the body. If not, the common law rule referenced in the preceding paragraph will prevail.

Q: Do members of city commissions or boards hold over if they are not replaced after their term expires?

A: Article 19 section 5 of the Arkansas Constitution provides that elected officers continue in office after their term expires until their successors are elected and qualified. However, this provision does not apply to members of commissions or boards who are not elected to their positions (Ark. Op. Atty. Gen. Op. No. 99-024). However, according to the Attorney General's opinion, they may continue to serve as de facto officials until their replacements are appointed.

Vacancies

Q: How do you fill a vacancy on the city council/city board?

A: With the exceptions noted below, the city council/board makes the appointment to fill vacancies on their respective governing bodies. A.C.A. § 14-42-103 provides that vacancies in municipal offices that are authorized by state law to be filled by appointment by the city or town governing body shall require a majority vote of the remaining members of the governing body.

A.C.A. § 14-43-411(a) provides that whenever a vacancy shall occur, for any reason, in the office of alderman in any city of the first class having a population of less than 20,000, at the first regular meeting after the occurrence of the vacancy, the city council shall proceed to elect by a majority vote of the remaining members elected to the council an alderman to serve for the unexpired term. At least a quorum of the whole number of the city council is required in order to fill the vacancy. The person elected by the council must reside in the ward where the vacancy occurs at the time of the vacancy.

A.C.A. § 14-43-411(b) provides that: "When a vacancy occurs in any position of alderman in a city having a population of twenty thousand (20,000) or more according to the most recent federal decennial

census, a new alderman shall be chosen in the following manner:

(1) If the unexpired portion of the term of alderman exceeds one (1) year, at the first regular meeting after the occurrence of the vacancy, the city council shall proceed to either elect by a majority vote of the remaining members elected to the council an alderman to serve for the unexpired term or call for a special election to be held in accordance with § 7-11-101 to fill the vacancy; or

(2) If the unexpired portion of the term of alderman is one (1) year or less, a successor shall be chosen by a majority vote of the members of the council.

With regard to cities of the second class, A.C.A. § 14-44-104 provides that "at the first regular meeting after the occurrence of the vacancy, the city council shall proceed to elect, by majority vote of the council, an alderman to serve for the unexpired term." A.C.A. § 14-45-103 provides that in incorporated towns, "[w]hen a vacancy occurs in the office of alderman in an incorporated town, at the first regular meeting after the occurrence of the vacancy, the town council shall elect by a majority vote of the town council an alderman to serve for the unexpired term."

In city manager cities, the board of directors shall, by majority vote, elect a person to fill the vacant board seat and serve for the unexpired term (A.C.A. § 14-47-113). In city administrator cities, the law states, "[i]n the case of a vacancy in the office of mayor or in the office of a member of the board of directors, the board, at the first regular meeting after the occurrence of the vacancy and by majority vote, shall appoint a person or call for a special election to be held in accordance with § 7–11–101 et seq. to fill the vacancy for the remainder of the unexpired term. (A.C.A. § 14-48-115, as amended by Act 384 of 2015).

Q: How many votes does it take to fill a vacancy on a six-member council?

A: Three. A.C.A. § 14-42-103 provides that vacancies shall be filled by a majority of the remaining members. A majority of a quorum is also required. Three votes satisfies both these requirements (Atty. Gen. Op. No. 97-265).

Q: How is a vacancy in the mayor's office filled?

A: In a first class city, the council may, by the vote of a majority of all of its members, fill the vacancy if the unexpired term is less than one (1) year. If the unexpired term is more than one (1) year, a special election must be held in accordance with the state law (A.C.A. § 14-43-401, as amended by Act 339 of 2015). In second class cities and incorporated towns, the council must, at the first regular meeting after the occurrence of the vacancy, either elect by a majority vote of the aldermen a mayor to serve the unexpired term or call for a special election to be held in accordance with A.C.A. § 7-11-101 et seq. (A.C.A. §§ 14-44-106, 14-45-103).

Ordinances and Voting

Q: What is the difference between an ordinance and a resolution?

A: An ordinance is a permanent law. A resolution is temporary in nature, and for that reason, it is more appropriately used when a city wants to make known its intent on certain matters (*Kruzich v. West Memphis Util. Comm'n.*, 257 Ark. 187, 189, 515 S.W.2d 71, 72 (1974)).

Proper subjects of an ordinance would include zoning, animal control, building codes, the setting of salaries and juvenile curfews, just to name a few. Resolutions are commonly used to approve specific expenditures and contracts or to recognize an employee or citizen for distinguished service to the city.

Q: Must an ordinance be read three times if it is not of a "general or permanent" nature?

A: A.C.A. § 14-55-202 requires ordinances of a general or permanent nature to be read on three different days unless two-thirds (2/3) of the council votes to dispense with the rule.

"The ordinances of a general or permanent nature which must be adopted according to the formalities of section [14-55-202] … refer to those regulations and acts of the council which prescribe a permanent rule of government for the municipality" (*City of Batesville v. Ball*,100 Ark. 496, 140 S.W. 712, 716 (1911)). In the *Batesville* case, the court ruled that an ordinance referring the question of an annexation to the voters was not general or permanent.

The Arkansas Supreme Court has also ruled that an ordinance to enter a contract such as a utility franchise is not of a "general or permanent nature" and thus need not be read three times (*Barnett v. Mays*, 153 Ark. 1, 239 S.W. 379 (1922)). The fact that a franchise runs for a long period of time does not make it "general or permanent" (*El Dorado v. Citizens' Light and Power Co.*, 158 Ark. 550, 250 S.W. 882 (1923)).

Q: How many subjects may an ordinance cover?

A: A.C.A. § 14-55-201 provides that "no bylaw or ordinance shall contain more than one (1) subject, which shall be clearly expressed in its title." However, an ordinance may contain subcategories that pertain to a single, overall subject. See, for example, *Craft v. City of Fort Smith*, 335 Ark. 417, 984 S.W.2d 22 (1998), in which the court held that an ordinance dealing with street design was valid even though it covered both landscaping and signage requirements.

Q: Must votes on ordinances be taken by a roll-call vote?

A: A.C.A. § 14-55-203 provides that in voting on an ordinance the yeas and nays shall be called and recorded. It does not specifically require a "roll-call" vote in so many words, although this may be implied. A roll-call vote would certainly be clearer and easier to record and follow. Some councils have a roll call on each vote. Some laws do specifically require a roll-call vote, for example: Ark. Const. Art. 5 § 1 (when enacting an emergency clause or repealing an initiated measure); A.C.A. §§ 14-164-329 (abolishing tax); 26-75-210 (abolishing sales tax); and 26-75-310 (same).

Q: How many votes are needed to pass an ordinance or resolution?

A: Ordinarily, a majority of the entire council is required to pass any bylaw, ordinance, resolution or order" (A.C.A. § 14-55-203). A majority is whatever number it takes to have more than half. On a five-member council, this would be three; a six-member council would require four and so forth. Some actions require a two-thirds (2/3) vote to pass. See, for example, Ark. Const. Art. 5 § 1 (enactment of emergency clause); A.C.A. §§ 14-40-302 (annexation of lands contiguous to the municipality); 14-43-504; 14-44-107; 14-45-105 (override of mayor's veto); 14-55-202 (suspending the reading requirement for ordinances); 14-55-301 (referral of ordinances to voters); 14-58-401 (borrowing against property tax in first class city); 14-164-329 (industrial development bonds not to be issued); 19-11-801 (designation of professional services); and 26-77-102 (establishment of license fees and taxes).

Other statutes require a two-thirds (2/3) vote to override mayoral appointments and removals: A.C.A. §§ 14-42-110 (department heads); 14-42-422 (director of department of public safety); 14-44-111 (marshal in second class city).

Note that on a six-member council, a two-thirds (2/3) vote is the same as a majority: four. On other councils, a two-thirds (2/3) vote should be calculated by rounding up to the next number needed to constitute two-thirds (2/3). For example, two-thirds (2/3) of eight is 5.33, so it would take six members of an eight-member council to constitute a two-thirds (2/3) vote (Atty. Gen. Op. No. 94-128).

Q: What if some members are absent. Does it then take fewer votes to pass?

A: No. You still must have a majority (or in some cases, two-thirds [2/3]) of the entire council. For example, if two members of a six-member council are absent or abstain, a three-to-one vote would not be sufficient, as three is not a majority of six.

Q: How many members must be present in order to have a vote?

A: A quorum consists of a majority of the whole number of the council. See A.C.A. § 14-43-501(a)(2) (A) (first class cities); and Ark. Atty. Gen. Op. No. 96-384; (second class cities); A.C.A. § 14-45-101(b) (incorporated towns). For example, three council members are needed on a five-member council, four are required on a six-member council and so forth.

Q: Is either the number of votes or the number needed for a quorum affected when voting to fill a vacancy on the council?

A: Yes as to the number of votes, no as to the need for a quorum. A.C.A. § 14-42-103 provides that a vacancy may be filled by a "majority of a quorum of the whole number of the governing body." Thus, on a six-member council, three favorable votes out of the remaining five members would be sufficient (Ark. Atty. Gen. Op. No. 97-265).

Q: Can the mayor be counted as part of the quorum?

A: In cities of the first class, the mayor shall have a vote to establish a quorum of the council (A.C.A. §14-43-501(b), as amended by Act 235 of 2015, allowing mayors to vote to establish a quorum at special as well as regular meetings). In second class cities, the mayor has a vote to establish a quorum of the council, with no restriction as to special or regular meetings (A.C.A. § 14-44-107). Thus, on a six-member council, if only three aldermen show up, the mayor could be the "fourth" needed to establish a quorum in accordance with the foregoing statutes.

Q: When can the mayor vote?

A: Whenever the mayor's vote is needed to pass an ordinance, bylaw, order or resolution. See A.C.A. §§ 14-43-501 (first class cities); 14-44-107 (second class cities), and 14-45-105 (incorporated towns); see also *Gibson v. City of Trumann*, 311 Ark. 561, 845 S.W.2d 515 (1993). An obvious example is when the vote is tied, for example, three-to-three on a six-member council. The mayor could cast the fourth vote needed for passage

A tie is not the only situation in which a mayor's vote might be needed to pass, however. For example, in question 2 we had a 3-1 vote on a six-member council. This could be the result of absence and/or abstention of two council members. We don't have a tie, but three votes is not enough for passage. The mayor may cast the fourth vote in order to pass the item.

Suppose the vote in the foregoing scenario is 2-2. The mayor cannot vote to "break the tie" because his vote would only create three in favor, again not enough on a six-member council.

There are two exceptions to the mayor's right to vote for passage of an item. The Arkansas Supreme Court has ruled that a mayor may not vote to amend or repeal an initiative measure enacted by a vote of the people (*Thompson v. Younts*, 282 Ark. 524, 669 S.W.2d 471 (1984)). In addition, the mayor may not vote to enact an emergency clause (Atty. Gen. Op. Nos. 96-155, 85-174).

Q: Can the mayor vote against an ordinance, resolution, etc.?

A: No. The mayor may only vote for a measure, and then only when necessary to pass it. See answer to previous question. However, if a mayor wishes to defeat a measure that would otherwise require the mayor to vote, he or she may simply refrain from voting.

Q: In a first class city, if the mayor is out of town and an alderman presides at the council meeting pursuant to A.C.A. § 14-43-501(b)(2), can the presiding alderman vote?

A: Probably so. The statute does not say one way or the other. However, there does not appear to be any reason to deprive an alderman of a vote merely because he or she is temporarily presiding over the meeting. Note that mayors can vote under certain circumstances, so it would not appear to be the policy of the state to prohibit a presiding officer from voting (A.C.A. § 14-43-501).

Q: What is a "severability clause?"

A: If an ordinance has subparts and a court finds one of the parts invalid, the court will not strike down the other parts if they are different or distinct enough ("severable") from the invalid portion. A severability clause expresses the council's intention to have the court treat the ordinance in this way if the ordinance is challenged (*Drummond v. State*, 320 Ark. 385, 389, 897 S.W.2d 553,555 (1995)). A typical severability clause might read as follows:

> SECTION_____. If, for any reason, any portion or portions of this ordinance shall be held invalid, such invalidity shall in no way affect the remaining portions thereof which are valid, but such valid portions shall be and remain in full force and effect.

Q: May an alderman leave a voting proxy with a co-alderman when the first alderman is out of town?

A: No. According to the Arkansas Attorney General, city council members must be present to vote and thus may not vote by proxy (Atty. Gen. Op. No. 90-034).

Q: What effect does an ordinance have on a prior ordinance dealing with the same subject?

A: This depends on the language used in the new ordinance. The best course of action is for the council to specifically address the prior ordinance, that is, to state in the new ordinance whether the prior one is to be repealed or amended.

Sometimes this has not been done, however. Ordinances often contain a general repealer clause, stating, for example, "that all prior ordinances in conflict with this ordinance are hereby repealed." In that case, any provisions of the older ordinance will remain in effect as long as they do not conflict with the later ordinance.

Even without a repealer clause, however, the later ordinance will impliedly repeal the earlier one if an "irreconcilable conflict" exists between them (*City of Helena v. Russwurm*, 188 Ark. 968, 68 S.W.2d 1009 (1934)).

Q: May the city council refer an ordinance to the voters?

A: Yes. A.C.A. § 14-55-301 provides that by a two-thirds (2/3) vote, a city's governing body may, within 30 days of adopting an ordinance, refer it to the electors for acceptance or rejection.

Police and Law Enforcement

Q: Does the city council decide the number of police officers for the city?

A: Yes. A.C.A. § 14-52-201, states: "The governing body of a municipality shall, by general ordinance, direct the number of subordinate police officers to be appointed."

Q: Is a marshal in a second class city appointed or elected?

A: A.C.A. § 14-44-111 provides that city marshals in second class cities shall be elected. However, the city council may pass an ordinance providing that the marshal shall be appointed or removed by the mayor, subject to a two-thirds (2/3) majority override by the council. See also A.C.A. § 14-42-110. (Note, a second class city may have either a police department or a marshal's office or a public safety department. See A.C.A. §§ 14-52-103 and 14-42-421).

Q: May a city court clerk or court administrator be a police or auxiliary police officer?

A: No. A.C.A. § 16-10-208 provides that the "court clerk or court administrator shall not be a member of the police department, marshal's office, or sheriff's office."

Q: I want to know more about police officer training and standards. Where can I find this information?

A: A.C.A. §§ 12-9-101 through 12-9-507 provide some general information. In addition, you will need to consult the Rules and Regulations Manual of the Arkansas Commission on Law Enforcement and Standards and Training. Your police department should have a copy. They are also available online at www.clest.org.

Q: Are auxiliary police officers subject to the Arkansas Law Enforcement Standards and Training Requirements or are they exempt?

A: Auxiliary officers are subject to training requirements as set forth in A.C.A. § 12-9-305. In addition, the Rules and Regulations Manual of the Arkansas Commission on Law Enforcement and Standards and Training contains regulations governing auxiliary officer training.

Q: Are volunteer auxiliary officers exempt from number restrictions?

A: No. The definition of auxiliary officers includes volunteers (A.C.A. § 12-9-301). The law restricts the number of auxiliary officers that a city may have. However, an exception can be made "due to special or unusual problems or circumstances" upon request to the Law Enforcement Standards and Training Commission (A.C.A. § 12-9-306). Note that the number of allowable auxiliary officers were increased somewhat by Act 705 of 2013 (amending 12-9-306). In addition, the Act exempted school resource auxiliary officers, as well as search and rescue officers, from the numerical restrictions.

Q: Another city hired one of our police officers two months after he graduated from the Academy at our expense. Can we get any of our money back?

A: Yes. A.C.A. § 12-9-209 provides that any city or town paying for a police officer's training at the Arkansas Law Enforcement Training Academy (ALETA) can recoup its monetary investment for the payment of that training if another county, city, town or agency hires that same officer within 18 months of completion of his or her training at ALETA. If the first agency fired the individual it cannot recoup. The statute has a pro-rated scale for how much cost can be reimbursed.

Should an agency fail to reimburse the original employing municipality, then the original employing municipality shall notify the Arkansas state treasurer, who will then withhold any state monies to be appropriated to the second employing agency.

Streets

Q: Can the city council set weight limits for vehicles on city streets?

A: Cities are empowered to enact weight limitations on designated highways as set forth in A.C.A. § 27-35-103. Note that the limits are valid only if posted. In addition, the Arkansas Supreme Court upheld an ordinance banning trucks over one-half ton from certain streets in *House v. City of Texarkana*, 225 Ark. 162, 279 S.W.2d 831 (1955).

However, such limitations must be reasonable and not arbitrary. In other words, the weight limitations should be tailored to avoid a specific, provable harm, such as damage to city streets. Note also that the ordinance in the *House* case did not ban heavy trucks from all streets in the city. Thus, the ordinance was upheld as constitutional because it did not completely deprive the plaintiff, a fuel distributor, from making a living. If it had, the court might have found that the ordinance was unreasonable.

Also note that most weight limit ordinances provide an exception for local deliveries. Following the reasoning in the *House* case, which sought to protect legitimate business operations, this is advisable in any ordinance restricting weight limits.

Q: If a private road is used for a period of time by the public, will the city obtain a right of way even though the road was never dedicated to the city?

A: The Arkansas Supreme Court has stated that: "It is well settled that, where a highway is used by the public for a period of more than seven years, openly, continuously, and adversely, the public acquires an easement by prescription or limitation of which it cannot be disposed by the owner of the fee." (*Weir v. Revo Trucks*, 255 Ark. 494,500 S.W.2d 923 1973 quoting *McLain v. Keel*, 135 Ark. 496, 205 S.W. 894.)

Utilities

Q: Are rural municipalities authorized to charge public utilities a franchise fee?

A: Yes. A.C.A. § 14-200-101(a) authorizes every city and town to charge a reasonable franchise fee. The fee may not exceed the higher of the amount in effect as to that city on Jan. 1, 1997, or 4.25 percent without agreement by the affected utility or approval by the voters of the municipality. A utility may pass this cost on to its customers.

Q: Can municipalities set their own utility rates?

A: Yes, if the utility is owned or operated by the municipality or leased to it by a nonprofit corporation (A.C.A. § 23-4-201(b)). Section 23-4-201(a)(1) gives exclusive jurisdiction to the Public Service Commission to set rates for electric, gas, telephone or sewer public utilities in Arkansas. Subsection (a)(2) says that cities have no authority to fix and determine electric, gas, or telephone rates. However, subsection (b) makes clear that "electric, gas, telephone, or sewer public utilities" do not include "utilities owned or operated by municipalities or leased by them to a nonprofit corporation." The law says cities may set rates for municipal sewer service (A.C.A. § 14-235-223). Cities operating a municipal waterworks may set the rates pursuant to A.C.A. § 14-234-214.

Q: What happens to our utility deposits that go unclaimed by customers who move away?

A: They need to be turned over to the state under the Unclaimed Property Act (A.C.A. §§ 18-28-201 through 230). Utility deposits are presumed abandoned if unclaimed within year after the deposit becomes payable (A.C.A. § 18-28-202(12)). The city must make a report of and deliver any unclaimed property to the Auditor of State before November 1 of each year for the 12 months preceding July 1 of that year (A.C.A.§ 18-28-207). However, the city may charge a reasonable "dormancy charge" from deposits that are presumed abandoned if there is a written contract between the city and customer so providing and if the city "regularly imposes the charge, which is not regularly reversed or canceled" (A.C.A. § 18-28-205).

Note that the unclaimed property law applies only to refundable deposits. It does not apply to any connection or startup fees that a city may impose on new service. An ordinance creating a connection fee could state that it is nonrefundable so that there will not be any misunderstanding by the customer.

Q: Our city needs to do some excavation work, and we're concerned about various underground utility lines. Whom do we call?

A: A.C.A. §§ 14-271-101 through 115 requires that municipalities participate in the One Call Center. The failure to comply with these provisions could result in civil penalties up to $2500.00. (A.C.A. § 14-271-104). However, that same statute recognizes municipalities' tort immunity and indicates that the statute does not modify or repeal that immunity. One Call helps to ensure that your city work will be done safely. It also helps prevents unnecessary damages by others who may be forced to dig in and around your easements or close to utility easements.

The law formerly allowed a municipality to pass an ordinance to "opt out" of certain provisions of the One Call requirements. However, that law, A.C.A. § 14-271-105, was repealed by Act 41 of 2007.

Q: May a city charge different water or sewer rates to customers in order to compensate for additional costs, such as the installation of new lines?

A: Cities may not unreasonably discriminate among residents in charging utility rates (*City of Malvern v. Young*, 205 Ark. 886, 171 S.W.2d 470, 473 (1943)). However, the Arkansas Supreme Court did state in Malvern that a city could pass an ordinance reasonably classifying customers as to distance, location, expense of delivery, etc. The court noted that in *Freeman v. Jones*, 189 Ark. 815, 75 S.W.2d 226, the city of Searcy was held to have acted reasonably in charging more to patrons who connected to a newly constructed extension of the sewer system. Note, however, that rates for water must be set by the city council (A.C.A. § 14-234-214).

Q: What is the procedure for raising city water rates?

A: If the city does not have a water commission, then the legislative body of the municipality establishes water rates (A.C.A. § 14-234-214). Further, the rates charged by the municipality must be sufficient to pay for revenue bonds and promissory notes and for the operation and maintenance of the water works system as well as any other financial obligations of the system.

If, however, the city has a water commission, then the Attorney General has opined that the water commission would have the authority to set water rates (Ark. Atty. Gen. Ops. No. 97-150 and 2004-164). The Attorney General bases his opinion on two statutes. First, A.C.A. § 14-234-307 (a) (1) gives the commission the powers that the city council has. Secondly, as noted above, A.C.A. § 14-234-214 gives the city council the authority to set the water rates. Reading those two statutes in combination, the attorney general concluded that the commission has the power to set water rates. State law does not require a hearing to raise water rates, although in certain cases is may in the case of a sewer rate increase (see next question).

Q: What procedures must a city use to raise a city sewer system's sewer rates?

A: According to the Attorney General, whether there is a commission or not, only the city council may raise sewer rates (Ark. Atty. Gen. Ops. No. 97-150 and 2004-164). The procedure for raising sewer rates is found in A.C.A. § 14-235-223 (d). That statute dictates "no rates or charges shall be established until after a public hearing, at which all the users of the works and owners of property served or to be served by them, and others interested shall have opportunity to be heard concerning the proposed rates or charges" (Id.). The statute goes on to enumerate the specifics of the hearing as it relates to the proposed ordinance and schedule of rates and/or charges. The statute should be consulted in detail before raising such rates.

However, the statute does contain an exception to the hearing requirement: No hearing is required if the change in rates is "substantially pro rata as to all classes of service …." For example, if all customers are to receive a $1.00 per thousand gallons increase, no hearing would be required. On the other hand, if

the increase applied to only certain categories, such as business or residential, or only one area of the city, then a hearing would be mandatory.

Q: Must our water quality report (Consumer Confidence Report or "CCR") be published in the newspaper, or may we save the expense by posting it in a public place?

A: This question is governed by the Code of Federal Regulations (40 C.F.R. section 141.155). The answer depends on the size of the city or town. Cities with water systems serving more than 100,000 in population must mail or hand deliver a copy to each customer and post a copy on a publicly accessible website. Cities serving between 10,000 and 100,000 must mail or hand deliver to each customer. Cities between 500 and 10,000 must publish the CCR in the newspaper at least once unless they choose to hand deliver or mail it. Cities or towns serving less than 500 persons may mail, hand deliver or post the notice in one public place. The governor of the state or his designee may waive the requirement of mail or direct delivery for community water systems serving fewer than 10,000 persons. In that event, the system must:

(i) Publish the reports in one or more local newspapers serving the area in which the system is located;

(ii) Inform the customers that the reports will not be mailed, either in the newspapers in which the reports are published or by other means approved by the State; and

(iii) Make the reports available to the public upon request.

All water systems subject to these regulations must retain their CCRs for three years.

Zoning and Land Use

Q: Impact fees are established to shift a proportional share of the costs of expanding capital facilities to accommodate new residential development onto either the developer or the new residents. Are local governments in Arkansas authorized by law to establish such fees?

A: Yes. Act 1719 of 2003, A.C.A. § 14-56-103, allows and regulates municipalities' use of impact fees.

Manufactured/Mobile Homes

Q: Can we enact building and safety regulations for mobile homes?

A: Manufactured homes are a special case, in that Congress has enacted a statute precluding local regulation. 42 U.S.C. § 5403(d) provides:

> Whenever a Federal manufactured home construction and safety standard established under this chapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any manufactured home covered, any standard regarding construction or safety applicable to the same aspect of performance of such manufactured home which is not identical to the Federal manufactured home construction and safety standard.

"Covered" manufactured homes are those built on or after June 15, 1976. They do not include those that are:

1. Designed only for erection or installation on a site-built permanent foundation;
2. Not designed to be moved once so erected or installed;
3. Designed and manufactured to comply with a nationally recognized model building code or an equivalent local code, or with a State or local modular building code recognized as generally equivalent to building codes for site-built housing, or with minimum property standards adopted by the Secretary pursuant to Title II of the National Housing Act (12 U.S.C. § 1707 et seq.); and
4. To the manufacturer's knowledge [are] not intended to be used other than on a site-built permanent foundation (42 U.S.C. § 5403(h)).

Thus, the city cannot enact building code requirements for covered manufactured homes that are not

identical to the federal standards. As for other types of buildings, A.C.A. § 14-56-201 provides:

Municipal corporations shall have the power to:

1. Regulate the erection, construction, reconstruction, alteration, and repair of buildings;
2. Make regulations for the purpose of guarding against accidents by fire;
3. Require the use of fireproof or fire-resistant materials in the erection, construction, reconstruction, alteration or repairs of buildings; and
4. Provide for the removal of any buildings, or additions thereto, erected contrary to this prohibition.

The ordinance must be reasonably related to one of these purposes and based on legitimate public health or safety concerns. However, the ordinance cannot violate any state law or regulation. Occasionally the Legislature will regulate an area so heavily that local regulation is preempted. In addition, much of this area will be covered in the Arkansas Fire Prevention Code, which includes commercial and residential building codes.

Q: Can we take other steps to improve their appearance?

A: This would be permissible, as it would not conflict with the regulations enacted by HUD pursuant to the statute. Those regulations only address construction standards such as plumbing, electrical, frame construction, fire safety and similar considerations. An underpinning requirement will be fine as long as it does not require any change in the way the home has been manufactured. Although there are no Arkansas or federal Eighth Circuit cases on point, courts from other jurisdictions have held that cities may regulate the appearance of manufactured homes, so long as the regulation does not create a conflict with the federal building and safety standards. See *Georgia Manufactured Housing Assn., Inc. v. Spalding County, Ga.*, 148 F.3d 1304 (11th Cir 1998) (upholding pitched-roof requirement); *CMH Mfg., Inc. v. Catawba County*, 994 F. Supp. 697 (W.D.N.C.1998) (exterior siding and roof shingle requirements did not violate federal Act).

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Q: Does the state building code regulate the siting of manufactured homes?

A: Yes. The Arkansas Fire Prevention Code, Volume III, adopts the International Residential Code. Refer to Appendix E, "Manufactured Housing Used as Dwellings." This regulates subjects such as permitting, inspection, foundations, skirting, structural additions, fees and other matters.

Communications

During each session of the Arkansas General Assembly, members of the League staff analyze the proposed measures that affect the state's municipalities. The League's Legislative Action Center featured on our website, www.arml.org, contains a link to the Legislative Bulletin. This feature enables municipal officials to advise their representatives of the impact of various proposals. *City & Town* is the official publication of the Arkansas Municipal League. It is published 12 times a year and contains information of interest to municipal officials.

The *Handbook for Arkansas Municipal Officials* is published every other year after the regular session of the General Assembly. It includes laws that affect Arkansas municipalities and has become an important source of information on which municipal officials have come to depend. Annual publications of the League include the *Directory of Municipal Officials* and the *Salary Schedule Survey*. The *Directory* contains a list of League member cities, their officials, city addresses, telephone and fax numbers, emails and websites. City classification and the county in which the city is located are also included. The League periodically updates the following publications:

PUBLICATIONS LIST	
Handbook for AR Municipal Officials	$100.00
Directory of Municipal Officials	$25.00
City & Town Subscription	$20.00
Acts Books	$30.00
Council Members Mailing List	$50.00
Mayors/City Managers Mailing List	$50.00
Clerk/Recorder/Treasurers Mailing List	$50.00
Salary Survey (10,000+ population)	FREE
Salary Survey (2,500-9,999 population)	FREE
Salary Survey (500-2,499 population)	FREE
Sales Tax Survey	FREE
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Procedural Rules for Municipal Officials	FREE
Proposed Legislation for Upcoming General Assembly	FREE
Sample Personnel Handbook	FREE
Tech Code Adoption & Implementation	FREE
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These publications may be ordered and several may be downloaded from the League's website, *www.arml.org* on the "Publications" page.

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