

**IN THE CIRCUIT COURT OF POPE COUNTY, ARKANSAS
CIVIL DIVISION (I)**

**CITIZENS FOR A BETTER POPE COUNTY,
a Local Option Ballot Question Committee,
JAMES KNIGHT, in his individual capacity**

PLAINTIFFS

vs.

NO. 58CV-19-439

**BEN CROSS, in his official capacity
as County Judge of Pope County, Arkansas, et al.**


DEFENDANTS

ORDER

On this 29th day of October 2019, this matter came on for hearing the Motion to Dismiss of Defendants, Ben Cross, Phillip Haney, Caleb Moore, Tim Whittenburg, Reuben Brown, Jackie Heflin, Jamie Jackson, Blake Tarpley, Doug Skelton, Bill Sparks, James Kusturin, Ray Black, Joseph Pearson, and Ernie Enchelmayer ("Defendants") and the Motion to Dismiss of Intervenor, Cherokee Nation Businesses, LLC ("CNB"). The Court, having heard the arguments of the parties and having reviewed the Motions of Defendants and CNB and Plaintiffs' responses thereto, being fully advised in the premises, finds and orders:

1. Plaintiffs filed their Amended Verified Petition for Declaratory Judgment and for Writ of Mandamus ("Amended Petition") on September 4, 2019, asserting various claims against Defendants, which are discussed more fully below.

2. Plaintiffs have requested a declaratory judgment that Amendment 100 of the Arkansas Constitution unconstitutionally conflicts with Amendment 14 of the Arkansas Constitution. Defendants and CNB argue that by its terms Amendment 14 applies only to acts of the General Assembly and not to Constitutional Amendments

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RACHEL L. GERTLING
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proposed and adopted by initiative process. Plaintiffs have cited no authority to the contrary. Defendants and CNB also argue that if the two amendments are in direct conflict to each other, then the later adopted amendment (here Amendment 100) controls over the earlier amendment (here, Amendment 14), thus causing a repeal by implication.

3. Amendment 14 provides "The General Assembly shall not pass any local or special act." Ark. Const. Amend. 14. It is silent as to amendments passed by the people of Arkansas pursuant to Amendment 7. The Court is not aware of any authority for the proposition that an initiated amendment to the Arkansas Constitution is limited by Amendment 14, and Plaintiffs have cited none. Therefore, the Court finds that Amendment 14 applies only to acts of the General Assembly.

4. Alternatively, to the extent there may be a conflict between Amendment 100 and Amendment 14 (and the Court does not find any such conflict), Amendment 100 would control and the effect would be a repeal by implication of the conflicting portion of Amendment 14. Defendants' and CNB's motions to dismiss are granted with prejudice on this claim.

5. Plaintiffs have also requested a declaratory judgment that Resolution 19-R-14 (resolution of support) conflicts with Ordinance 18-O-42. Ordinance 18-O-42 was an initiated ordinance that purported to require an election before the County Judge or the Quorum Court could issue a letter or resolution of support for a casino license as provided under Amendment 100. Plaintiffs argue that Ordinance 18-O-42 can be read in harmony with Amendment 100 to further the purpose of local control

provided for in Amendment 100. Plaintiffs also argue that because Amendment 100 is silent regarding how the County Judge and Quorum Court exercise their authority to issue support letters or resolutions, then the County is free to add qualifications to that process. Defendants and CNB argue that Ordinance 18-O-42 is unconstitutional in that it conflicts with Amendment 100's grant of authority and discretion to the County Judge and the Quorum Court to issue letter(s) or resolution(s) of support for potential casino applicants. Defendants and CNB also argue that Ordinance 18-O-42 adds an additional qualification to Amendment 100's qualifications for a casino applicant and is therefore unconstitutional. CNB properly notified the Attorney General's Office on or about October 10, 2019, of its claim that Ordinance 18-O-42 is unconstitutional.

6. The Court finds that Ordinance 18-O-42 is not *in pari materia* with Amendment 100. Indeed, it is in direct conflict with Amendment 100. Amendment 100 specifies that the authority and discretion to issue letters or resolutions of support lie with the County Judge and the Quorum Court. Amendment 100 does not place that authority or discretion in the electorate of Pope County. Accordingly, Ordinance 18-O-42 is unconstitutional and void. Moreover, pursuant to the case law cited by Defendants and CNB in their pleadings and at oral arguments, Ordinance 18-O-42 adds a qualification that was intended to operate and/or has the effect of operating as a bar to the issuance of a letter or resolution of support by the offices charged with that duty: the County Judge and the Quorum Court. In fact, Plaintiffs admit this in their Response to CNB's Motion to Dismiss when stating that "[t]he

ordinance only acts as a complete bar . . . if the Quorum Court in its discretion presents a resolution of support in favor of a casino applicant and the voters reject it." See Plaintiffs' Response, p. 3. Accordingly, because it imposes an additional qualification not found in or authorized by Amendment 100, especially when such qualification could act as a complete bar, Ordinance 18-O-42 is unconstitutional and void. The Court specifically finds that Ordinance 18-O-42 was unconstitutional and void at the time that the Quorum Court passed Resolution 19-R-14. Thus, the Ordinance was of no effect and does not impair Resolution 19-R-14. Plaintiffs' request for a declaratory judgment finding Resolution 19-R-14 invalid or of no legal effect is denied and dismissed with prejudice, as Plaintiffs do not have a claim as a result of Ordinance 18-O-42 being unconstitutional.

7. Defendants and CNB further contend Ordinance 18-O-42 is unenforceable as an attempt by Pope County to regulate gambling in violation of Arkansas Code Annotated § 14-14-806(4). The Court agrees and grants the Motions to Dismiss with prejudice on this issue, as Plaintiffs do not have a claim as a result of Ordinance 18-O-42 being unconstitutional. The Court specifically finds that Ordinance 18-O-42 was unconstitutional and void at the time that the Quorum Court passed Resolution 19-R-14. Thus, the Ordinance was of no effect and does not impair Resolution 19-R-14. Plaintiffs' request for a declaratory judgment finding Resolution 19-R-14 invalid or of no legal effect is denied and dismissed with prejudice.

8. In their Amended Petition, Plaintiffs assert a claim that the action of the Quorum Court in passing Resolution 19-R-14 was preceded by one or more

unspecified "secret meetings" of some number of members of the Quorum Court. Plaintiffs claim these alleged "secret meetings" violate the open meetings provision of the Arkansas Freedom of Information Act ("FOIA") Ark. Code Ann. § 25-19-106 and, thus, the action of the Quorum Court in passing Resolution 19-R-14 was invalid. Defendants and CNB specifically denied that any non-public meetings took place at any time between CNB or its representatives and any members of the Pope County Quorum Court. Defendants and CNB move to dismiss under Arkansas Rule of Civil Procedure 12(b)(6) arguing the Amended Petition contains insufficient facts to support the alleged violations of the FOIA. Defendants and CNB also argue that the allegations in the Amended Petition demonstrate that the County Judge and Quorum Court complied with the FOIA's open meetings provision and, to the extent there were violations, such violations were cured by the open meeting of the Quorum Court on August 13, 2019, at which Resolution 19-R-14 was adopted.

9. The Arkansas Supreme Court has held that contact between board members before a meeting does not necessarily equate to an FOIA open-meetings violation. *City of Fort Smith v. Wade*, 2019 Ark. 222, 578 S.W.3d 276; *McCutchen v. City of Fort Smith*, 2012 Ark. 452, 425 S.W.3d 671. The Court finds that Plaintiffs have not pleaded sufficient facts to demonstrate that a meeting by Defendants occurred in violation of the FOIA. The Amended Petition provides no details about the alleged secret meetings; i.e. there is no who, what, when, where, or why illuminating what acts Plaintiffs contend violate the FOIA. Accordingly, Plaintiffs' claim asserting a violation of the FOIA is dismissed under Rule 12(b)(6).

10. Plaintiffs acknowledge that after the purported secret meetings by Defendants, a public meeting was held at which the Quorum Court voted to adopt Resolution 19-R-14. Importantly, Plaintiffs do not allege that the Quorum Court or any number of its members met outside a public meeting to vote on adopting Resolution 19-R-14. There is no allegation that the August 13, 2019, public meeting of the Quorum Court was called improperly. Thus, to the extent there was a FOIA violation, that violation was cured, at least as to the relief sought by Plaintiffs, by an open meeting, which subjects Plaintiffs' FOIA claim to dismissal under Rule 12(b)(6).

11. Further, Plaintiffs' only request for relief in regards to alleged FOIA violations is invalidation of Resolution 19-R-14. The allegations submitted by Plaintiffs, even if they constitute a FOIA violation, do not satisfy the elements set forth by the Arkansas Supreme Court and Arkansas Court of Appeals for invalidation of a legislative act for a FOIA violation. Plaintiffs have failed to state a claim for a violation of the FOIA that would warrant the invalidation of Resolution 19-R-14. Accordingly, Plaintiffs' request for declaratory judgment that the Defendants violated the FOIA resulting in invalidation is dismissed under Rule 12(b)(6).

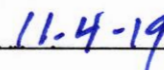
12. Finally, Plaintiffs' request for a Writ of Mandamus is rendered moot by the above findings and will be denied.

13. This Order constitutes a final order disposing of all issues in this matter.

IT IS SO ORDERED.



JUDGE WILLIAM M. PEARSON



DATE

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