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TO: Mayor Jordan  
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Mayor's Council

CC: Don Marr, Chief of Staff  
Casey Jones, City Prosecutor

FROM: Kit Williams, City Attorney

DATE: September 4, 2014

RE: Legal interpretation of Civil Rights Administration Ordinance

The recently passed Civil Rights Administration Ordinance will be enacted into the Fayetteville Code when it becomes effective about September 20, 2014. There are provisions and terms within this ordinance that are not precisely defined or the legal interpretation of which have raised questions by concerned parties. The Fayetteville City Code charges the Fayetteville City Attorney with the responsibility to interpret Code Chapters such as the Civil Rights Administration Chapter.

**"10.02 Interpretation**

Unless otherwise provided herein, or by law or implication required, the same rules of construction, definition, and application shall govern the interpretation of this Code as those governing the interpretation of state law. Except as noted in the Unified Development Code, **the Fayetteville Code shall be interpreted by the City Attorney.**" (emphasis added).

The purpose of this memo is to fulfill my duty to interpret terms or provisions within the Civil Rights Administration Chapter that need clarification.

The Arkansas Supreme Court has provided clear guidance for the interpretation of City ordinances. While City ordinances are presumed to be constitutional and legal, *Craft v. City of Fort Smith*, 335 Ark. 417, 984 S.W.2d 22, 26 (1998), the Arkansas Supreme Court has repeatedly held ambiguities in City ordinances shall be interpreted or construed against the City and in favor of the property owner, business owner, or person who could be accused of violating the ordinance. *Id.*, *Trice v. City of Pine Bluff*, 279 Ark. 125, 649 S.W.2d 179, 181 (1983). I shall endeavor to follow these Supreme Court mandated rules of ordinance interpretation in this memo which shall constitute the **City Attorney's official interpretation of this Civil Rights Administration Code Chapter.**

#### 1. "Socioeconomic background"

This term was used, but not defined, in the draft Civil Rights ordinance from the Human Rights Campaign which was presented to Alderman Petty who delivered it to my office. I was somewhat unsure what the Human Rights Campaign officials meant by this term and had similar concerns to some expressed to the City Council and personally to me. Alderman Petty provided the Human Rights Campaign's response on the attached email which says:

"A landlord legitimately needs to know if a potential tenant has the ability to pay rent. The landlord can use various measures of judging that, including requesting a credit check or pay stub. This ordinance does not change that. What this ordinance says is that you can't use measures that conflate the legitimate question (does this renter have the ability to pay) with discriminatory (irrelevant and prejudicial) questions, such as "Is the renter Caucasian/a woman/a single mom?" Her race, gender, and marital/familial status are irrelevant to the legitimate question—of "can she pay?" -In the same way, socioeconomic background (note: not status; background

implies history) is also irrelevant...Asking the legitimate question of "can this person pay" and asking for proof of ability to pay is still allowed under this ordinance.

As you can see in the email, "socioeconomic background" was never intended to equate to "socioeconomic status" which could entail the person's current creditworthiness, credit history and credit "score". I publicly stated this in reply to a question from Marshall Ney prior to the City Council's vote to pass the ordinance. **Therefore, no financial institution, landlord, business offering credit, or other such business or person would be in violation of the Civil Rights Administration Chapter for using a credit check, requesting a pay stub or otherwise asking for proof of ability to pay and relying upon such economic evidence to determine whether or not to loan money, extend credit, or agree to rent to an individual.**

What discrimination based upon "socioeconomic background" would prohibit is discrimination against a person who grew up "on the wrong side of the tracks" or in public housing even though that person now has a steady job and a good credit history. What all anti-discrimination acts should do is require that persons be treated as the person he or she actually is right now rather than through the lens of some bias based upon race, religion, ethnic origin, or other disliked characteristic. Someone might have grown up in a single parent's apartment filled with late notices, but if that person now has a solid job and credit history, he or she should not be denied a loan, store credit, or rental housing based upon their long ago socioeconomic condition (which the ordinance refers to as "socioeconomic background").

I asked the Human Rights Campaign attorney for any further guidance they might want to provide me and finally received a 60 page Memorandum from the Poverty and Race Research Action Council entitled: "Keeping the Promise and Preserving and Enhancing Housing Mobility in the Section 8 Housing Choice Voucher Program." That document spoke about "source of income". The HRC's own three page memo entitled "Non-Discrimination on the Basis of 'Socioeconomic Background' stated:

"Without those protections, landlords and those who list property for sale could discriminate against people who receive welfare, other public funds, or funds from a court order."

This "source of funds" language is nowhere found in the Civil Rights Administration ordinance and cannot reasonably be construed to be within the meaning of "socioeconomic background." Thus, no matter how laudable such a concept of preventing discrimination based upon "source of funds" might be, it is not applicable to the Civil Rights Administration ordinance nor should it be considered by the Civil Rights Administrator or City Prosecutor in administering or enforcing the Civil Rights Administration Chapter of the Fayetteville Code.

## 2. § 119.03 (D) Employment References

An attorney representing business owners was concerned that § 119.03 (D) seemed to require an employer to give a departing employee a job reference. Attorneys and Human Resource professionals realize that furnishing a job reference can sometimes be problematic and might have some liability issues. Some businesses therefore are reluctant to give such a reference or simply have a policy not to give job references. § 119.03 (D) does not prohibit such a policy.

(D) must be read in conjunction with the introductory clause of § 119.03 which states that the listed acts are improper if done "for a discriminatory reason." So if a business or employer has a policy not to provide job references to avoid potential liability (if someone does not like the reference they receive or if the new employer claims a good job reference misled him into hiring an unsatisfactory employee), then the employer can maintain its "no job reference" policy without violating § 119.03 (D). A job reference may or may not be given as long as that decision and any job reference given is not done "for a discriminatory reason."

What would not be allowed is for an employer to give most employees favorable letters of recommendation, but for a discriminatory reason (dislike of gay or lesbian employee), the employer refused to give that employee a job reference "that would deprive an individual of employment opportunities."

The key requirement in § 119.03 **Prohibited Acts of Discrimination - Employment** is that for all of these described actions, none would violate the Civil Rights Administration Chapter unless the action was done "for a **discriminatory reason.**" If the employer does not act with a discriminatory intention, there is no violation of the Civil Rights Administration ordinance.

### 3. **Assisted Living Facilities and Nursing Homes**

I believe that Assisted Living Facilities are licensed by the State of Arkansas and operate pursuant to State regulations. I have consistently opined that State law is dominant over and controls the administration of any City ordinance. Under § 119.07 **General Exceptions (H)**, the Civil Rights Administration's age regulations expressly do not apply if contrary to any state law or regulation.

I have been informed that comprehensive state regulations are applicable to the admissions and occupancies of Assisted Living Facilities and this is probably true for Nursing Homes and other similar facilities. If so, those facilities would not be in violation of the Civil Rights Administration Chapter's age regulations for abiding by state regulations because § 119.07 (H) states those state regulations "are not improper age discrimination under this chapter." This exception from such age regulations in Chapter 119 **Civil Rights Administration** would also apply to other such state or federally regulated housing or businesses.

### 4. **Sincerely held religious belief**

The Civil Rights Administration Chapter has a specific provision to honor, respect, and protect our Free Exercise of Religion Right.

## § 119.07 General Exceptions

“(G) If a party asserts that an otherwise unlawful practice is justified as a permissible bona fide religious or denominational preference, that party shall have the burden of proving that the discrimination is in fact a necessary result of such a bona fide condition.”

The current context for this issue presented by some would be the forced attendance at a gay or lesbian wedding by a photographer or musician who for their sincerely held religious beliefs object to such marriage. It is very likely that objections to attending or performing at such wedding ceremony by such person would be excepted or exempted from the discrimination provisions of the Civil Rights Administration Chapter. However, I cannot imagine that such a situation would actually ever occur as I cannot believe that any couple would want a person who objects to their wedding to sing at or photograph their wedding. Nor would they wish to support such person's business with their patronage. Certainly, no minister could be required to officiate at a wedding that would be contrary to the minister's sincerely held religious beliefs.

Businesses that sometimes serve weddings, but are more detached or work from a distance like florists or bakers, could also assert their “discrimination is...necessary” because of their religion. Again, I doubt if the couple to be married would choose to use such a business or ever wish to support such business with their patronage, so this “issue” would probably never arise. If this issue did occur, these business who supply but do not attend or participate in such wedding would not have the strong case to authorize their discrimination as photographers or musicians.

## CONCLUSION

I do not presume to usurp a Judge's power and authority to definitively interpret Chapter 119 **Civil Rights Administration**. My interpretation should control how this Fayetteville Code Chapter will be administered by the Civil Rights Administrator and enforced by the City Prosecutor. I also will listen and consider concerns and suggestions from attorneys and others such as the Mayor's Committee to further refine or clarify these interpretations if necessary or to examine other provisions of the Civil Rights Administration Ordinance that might need interpretive clarification to avoid unanticipated consequences. However, **the Civil Rights Administration Chapter passed by the City Council is always controlling, and no interpretation can change its clear wording.** Only the Fayetteville City Council can amend or change any provision of this ordinance. My basic Official Opinion interpreting this Code Chapter is as follows:

1. **"Socioeconomic background"** means a person's long ago socioeconomic roots as opposed to current socioeconomic status. Business may obtain and use credit checks and credit history of applicants for loans, credit, or housing without violating the Civil Rights Administration Chapter.
2. **Job references** for employees are not required nor would any reference or refusal to provide a reference violate the Civil Rights Administration Chapter unless done "for a discriminatory reason."
3. **Assisted Living and Similar Facilities** whose admissions and housing are regulated by the State will not be violation of potentially conflicting age discrimination regulations of the Civil Rights Administration Chapter.
4. **Ministers** and others intimately associated with a religious ceremony would be exempted from having to participate in, attend or conduct such religious ceremony if such ceremony, such as gay wedding, would violate their sincerely held religious beliefs: