

## AGENDA REQUEST FORM

**FOR: Council Meeting of June 18, 2019**

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**FROM: City Council Member Kyle Smith**

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**ORDINANCE OR RESOLUTION TITLE AND SUBJECT:**


AN ORDINANCE TO AMEND CHAPTER 33 **DEPARTMENTS, BOARDS, COMMISSIONS, AND AUTHORITIES** OF THE FAYETTEVILLE CITY CODE TO EXPAND OPPORTUNITIES FOR FAYETTEVILLE RESIDENTS TO SERVE ON CITY BOARDS, COMMISSIONS AND COMMITTEES

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**APPROVED FOR AGENDA:**

  
\_\_\_\_\_  
Kyle Smith, Council Member

6/11/19  
Date

  
\_\_\_\_\_  
Asst. City Attorney Blake Pennington  
Approved as to form

6/11/19  
Date



OFFICE OF THE  
CITY ATTORNEY

## DEPARTMENTAL CORRESPONDENCE



Kit Williams  
*City Attorney*

Blake Pennington  
*Assistant City Attorney*

Jodi Batker  
*Paralegal*

TO: **Mayor Jordan**  
**City Council**

FROM: **Blake Pennington**, Assistant City Attorney

DATE: **June 11, 2019**

RE: **Qualifications to serve on City boards and commissions**

Not long after Mayor Jordan announced in his 2017 State of the City address his intention to create a Welcoming Fayetteville Plan I was asked to research the legality of allowing Fayetteville residents who are not registered voters for one reason or another to serve on the City's various boards and commissions. Council Member Kyle Smith's request to sponsor an ordinance implementing that particular portion of the Welcoming Plan prompted me to again review the relevant state statutes and our City Code to determine to what extent this can be enacted.

Currently, Fayetteville City Code § 33.329 restricts appointments to City boards, commissions or committees to "registered voters within the corporate limits of Fayetteville." In addition, most city boards, committees, and commissions have been codified and some of those contain a citizenship requirement separate from the general rule in § 33.329 that must be amended.

The City Council has full authority to control the composition of City-created boards which include: Active Transportation Advisory Committee, Airport Board, Animal Services Advisory Board, Audit Committee, Civil Rights Commission, Environmental Action Committee, Fayetteville Arts Council, Keep Fayetteville Beautiful Committee, Parks & Recreation Advisory Board, Town & Gown Advisory Committee, and the Urban Forestry Advisory Board.

The NWA Regional Planning Commission is a “maybe” only because I have not been able to find the interlocal agreement governing the qualifications of members. The City is entitled to appoint three members, though all of them have historically been elected officials or staff members. Currently Mayor Jordan, Development Services Director Garner Stoll, and City Engineer Chris Brown represent the City on this Commission.

A non-citizen would be eligible to serve on some statutorily authorized boards and commissions. I discuss each of the boards created under the authority of state law below and have broken them into two parts: 1) a list of boards on which non-citizens could serve if the City Code (and in one case, an agreement with another city) is changed; and 2) a list of board on which non-citizens are not eligible to serve because of state law:

## **I. Non-Citizens Could be Eligible to Serve with Some Restrictions**

### Advertising and Promotion Commission

Ark. Code Ann. §26-75-605 authorized the City to create the Fayetteville A&P Commission, which was done in 1977. Two commissioners “shall be members of the governing body” and, therefore, must be citizens of Fayetteville. The remaining members do not have the same requirement. “Four members shall be owners or managers of businesses in the tourism industry, and the owner or manager shall **reside in the levying municipality**, or if the governing body of the municipality provides for by ordinance, the owner or manager **may reside outside of the municipality but within the county where the municipality is located.**” Finally, “one member shall be from the **public at large who shall reside within the levying municipality or in the county of the levying municipality.**” This statute only contains a residency requirement; therefore, the five non-city council positions could be filled by non-citizens as long as they meet the residency requirement established by ordinance.

### Board of Adjustment

Ark. Code Ann. § 14-56-416 authorized the City to establish the Board of Adjustment for zoning appeals and contains no language restricting membership to citizens. Subsection (b) provides that the City’s zoning ordinance “shall provide for a board of zoning adjustment, which may either be composed of at

least three (3) members, or the [planning] commission as a whole may sit as the board of zoning adjustment.” Since the City has established a separate Board of Adjustment, the restrictions that apply to the Planning Commission (discussed below) do not apply.

### Construction Board of Adjustments & Appeals

The Construction Board of Adjustments & Appeals was first created in 1976 and continues under the authority of Section 113 of the 2012 Arkansas Fire Prevention Code, Volume II - Building. The qualifications it sets forth for members are that they “be appointed by the applicable governing authority and shall hold office at its pleasure” and that its members “are qualified by experience and training to pass on matters pertaining to building construction and are not employees of the jurisdiction.”

### Energy Improvement District No. 1

Ark. Code Ann. § 8-15-108 governs the membership of an energy improvement district board of directors. For a district composed of one or more cities, subsection (b)(4) provides that members include (A): “the mayor or his or her designated representative of each city that is a member of the district”; and (B): “...additional members shall be appointed as specified in the agreement establishing the district until a total of seven directors has been appointed.” Subsection (c) requires that the designated representative of a mayor “shall be a qualified elector of the jurisdiction that the designated representative is appointed to represent.”

Even though the state law does not restrict appointments to citizens or electors, our agreement that is in place with the City of Springdale, which was authorized by Ord. 5883, provides that the four Fayetteville members “shall be qualified electors of the District chosen by the Fayetteville City Council.” This agreement, and the ordinance, would have to be amended with the consent of Springdale to allow a non-electors to be appointed.

### Housing Authority Board of Commissioners

Ark. Code Ann. § 14-169-208 provides for the appointment of Housing Authority commissioners, though appointments to vacancies are made by the board itself

rather than the City Council. The appointments are, however, subject to confirmation by the City Council. This statute contains no requirement that a commissioner be a citizen or elector in order to serve. However, if the board ever votes to pay compensation to a commissioner, as authorized by A.C.A. § 14-169-208(e), then the commissioners would have to have some form of work authorization.

### Public Facilities Board

Ark. Code Ann. §14-137-108 provides that members of the Public Facilities Board “are not required to be residents” but they must take an oath of office in which he or shall “shall swear to support the Constitution of the United States and the Constitution of the State of Arkansas and to discharge faithfully his or her duties in the manner provided by law.”

### Washington County Regional Ambulance Authority Board

The Washington County Regional Ambulance Authority Board, which oversees the operations of Central EMS, is governed by an interlocal agreement with Washington County. The agreement provides for two Fayetteville appointees, at least one of whom must be a City Council member. There is no citizen or elector requirement for the second appointee but I believe this position has traditionally been filled by the Fire Chief.

## **II. Non-Citizens Ineligible to Serve Pursuant to State Statute**

### Fayetteville Public Library Board of Trustees

Ark. Code Ann. § 12-3-502 provides that the “trustees shall be chosen from the **citizens at large** with reference to their fitness for office.” I do not believe state law will allow the appointment of a non-citizen to the Library Board of Trustees.

### Historic District Commission

Ark. Code Ann. § 14-172-206, which governs the appointment of members to the Historic District Commission, provides that “commission members shall: (i) be appointed by the mayor, subject to confirmation by the governing body of the

city; (ii) **be electors of the municipality**; and (iii) hold no salaried or elective municipal office.

### Northwest Arkansas Regional Airport Authority

The NWA Regional Airport Authority Board was created under the authority of Ark. Code Ann. § 14-362-105. Fayetteville participates along with Springdale, Bentonville, Rogers, Siloam Springs, Washington County and Benton County. The members of the board “shall be bona fide **residents and qualified electors of the...municipality which the members represent.**”

### Planning Commission

Ark. Code Ann. § 14-56-405, which governs the appointment of members to the Planning Commission, provides in subsection (a) that “appointment and terms of the members of the planning commission shall be as provided by city ordinance.” However, subsection (b) goes on to state that the City Council “may appoint one-third (1/3) of the membership of the commission from **electors** living outside the corporate limits of the municipality but within the recorded planning jurisdiction of the municipality.” While no case law has addressed the issue, the requirement that a non-resident Planning Commissioner must be an “elector” leads me to conclude that a resident Planning Commissioner must also be an elector.

Even if a non-citizen or a person not registered to vote in Fayetteville could serve on the Planning Commission, he or she would be required to have some form of work authorization since it is a paid position.

### Civil Service Commission

Ark. Code Ann. § 14-51-201, which governs the appointment of Civil Service Commissioners, provides in subsection (a) that “the city’s governing body shall name by ordinance five (5) upright and intelligent **citizens of their cities** as a board of civil service commissioners for the police and fire departments...” Subsection (c)(1) authorized the City of Fayetteville to add up to two more members, which is why we currently have a Commission of seven.

**ORDINANCE NO. \_\_\_\_\_**

**AN ORDINANCE TO AMEND CHAPTER 33 DEPARTMENTS, BOARDS, COMMISSIONS, AND AUTHORITIES OF THE FAYETTEVILLE CITY CODE TO EXPAND OPPORTUNITIES FOR FAYETTEVILLE RESIDENTS TO SERVE ON CITY BOARDS, COMMISSIONS AND COMMITTEES**

**WHEREAS** the City of Fayetteville has established several boards and commissions to convene experts and interested parties from our community to research and discuss issues, and to advise the council on a variety of specialized topics; and

**WHEREAS** the City Council believes our community is enriched when our policy discussions include the diverse experiences of community members from different races and cultures; and

**WHEREAS** the current requirement that applicants for volunteer boards and commissions be “registered voters” excludes many legal residents with long-term investments in Fayetteville or who may have expertise in a certain field; and

**WHEREAS** the City Council has the authority to establish the criteria for appointment to those boards and commissions not otherwise specified in state law; and

**WHEREAS** the City Council on April 3, 2018, voted unanimously to adopt the Welcoming Plan, including its first recommendation to “Explore barriers and encourage civic engagement for new Americans who wish to participate in boards, committees, commissions and other leadership positions.”

**NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF FAYETTEVILLE, ARKANSAS:**

**Section 1:** That the City Council of the City of Fayetteville, Arkansas hereby repeals subsection (A) of §33.329 in Article XXI – **Rules of Conduct for All Fayetteville Boards, Commissions and Committees** and enacts a new § 33.329(A) as follows:

**“33.329 - Eligibility Of Resident Volunteers To Serve On City Boards, Commissions And Committees**

- (A) All Fayetteville residents shall be entitled to apply and, if selected by the City Nominating Committee and approved by the City Council, shall be entitled to serve on a city board, commission, or committee.
- 1) Exceptions. Only registered voters within the corporate limits of Fayetteville shall be eligible to serve on the following boards, commissions or committees:
    - a) Fayetteville Public Library Board of Trustees
    - b) Historic District Commission
    - c) Northwest Arkansas Regional Airport Authority
    - d) Planning Commission

- e) Civil Service Commission
- f) Energy Improvement District No. 1
- 2) Any person serving on a board, commission or committee who moves out of Fayetteville or violates the Rules of Conduct or Attendance Requirements shall no longer be eligible to serve.

Section 2: That the City Council of the City of Fayetteville, Arkansas hereby amends and supersedes Resolution 14-01, which governs the Airport Board, and Resolution 179-12, which governs the Keep Fayetteville Beautiful Commission to the extent that the provisions for the composition of members conflicts with Section 1 of this Ordinance.

Section 3: That the City Council of the City of Fayetteville, Arkansas hereby repeals subsection (D) of §33.351 **Composition** in Article XXIII **Active Transportation Advisory Committee** and enacts a new §33.351(D) as follows:

“(D) Five (5) voting members shall be residents of the City of Fayetteville, and appointed by the City Council, at least one (1) of whom shall represent a bicycle advocacy organization;”

Section 4: That the City Council of the City of Fayetteville, Arkansas hereby repeals §33.371 **Composition and Term** in Article XXV **Audit Committee and Internal Auditor** and enacts a new §33.371 as follows:

“The Audit Committee shall include one (1) City Council member appointed by the Mayor and three (3) residents of Fayetteville, at least one (1) of which shall be a Certified Public Accountant. The three (3) residents shall serve three (3) year terms of office.”

Section 5: That the City Council of the City of Fayetteville, Arkansas hereby repeals subsection (A) of §33.241 **Composition** in Article XI **Environmental Action Committee** and enacts a new §33.241(A) as follows:

“(A) Membership: Such Committee membership shall be composed of the following:

- (1) One (1) City Council member
- (2) One (1) member from local industry
- (3) One (1) member from a science discipline
- (4) Eight (8) residents at large

Section 6: That the City Council of the City of Fayetteville, Arkansas hereby repeals subsection (B) of §33.340 **Arts Council Established; Membership** of Article XXII **Arts Council** and enacts a new §33.340(B) as follows:

“(B) The members of the Fayetteville Arts Council shall be arts professionals or residents of diverse backgrounds with strong links to the Fayetteville arts and cultural community. At least four (4) members shall be artists working professionally in their field.”



Section 7: That the City Council of the City of Fayetteville, Arkansas hereby repeals subsection (D) of §33.361 **Composition** of Article XXIV **Town and Gown Advisory Committee** and enacts a new §33.361(D) as follows:

“(D) Two (2) members shall be residents at large from different wards appointed by the City Council.”

Section 8: That the City Council of the City of Fayetteville, Arkansas hereby repeals subsections (A)(1) and (A)(2) of §33.283 **Composition and Terms** of Article XV **Urban Forestry Advisory Board** and enacts a new §33.283(A)(1) and (A)(2) as follows:

“(A) The board shall consist of seven (7) members who shall be appointed by the City Council.

- (1) One (1) position shall be filled by a representative from the land development community; one (1) position shall be filled by a representative of the tree service community; one (1) position shall be filled by a representative from the University of Arkansas with knowledge of urban forestry or arboriculture practices; and four (4) positions shall be filled by residents of the city at large with an interest in urban forestry or arboriculture.
- (2) In the event no application for a position as a representative from a specified discipline is received, the position may be filled by any resident of the city.”

**PASSED** and **APPROVED** this 18<sup>th</sup> day of June, 2019.

APPROVED:

ATTEST:

By: \_\_\_\_\_  
**LIONELD JORDAN**, Mayor

By: \_\_\_\_\_  
**SONDRA SMITH**, City Clerk/Treasurer



OFFICE OF THE  
CITY ATTORNEY

## DEPARTMENTAL CORRESPONDENCE



Kit Williams  
City Attorney

Blake Pennington  
Assistant City Attorney

Jodi Batker  
Paralegal

TO: **Mayor Jordan**  
**City Council**

FROM: **Blake Pennington**, Assistant City Attorney

DATE: **June 24, 2019**

RE: **Non-Citizen Qualifications to serve on City boards and commissions**

As we discussed at the City Council meeting on June 18, the Arkansas General Assembly earlier this year passed Act 1076 of 2019, entitled "An Act to Prohibit Municipal Sanctuary Policies." A copy of the Act is attached for your reference. The Act lists six types of "sanctuary policies" the enactment or adoption of which would lead to Fayetteville (or any city) becoming ineligible to receive discretionary moneys from the state. As our Finance Director stated, depending on how "discretionary moneys" is defined, that could be several million dollars cut from our budget.

Of greatest concern to our office, the Sanctuary Cities Act prohibits a policy that "grants to illegal immigrants the right to lawful presence or status within the municipality in violation of federal law." A.C.A. § 14-1-103(b)(2). Lawful presence or status is not defined by the statute and, unfortunately, the statute grants to the Attorney General the authority to determine whether an ordinance or policy is in violation of the Act. The statute provides for an appeal of the Attorney General's opinion to the Pulaski County Circuit Court but, presumably, the state discretionary funds could continue to be withheld during the pendency of an appeal.

The proposed amendments to Chapter 33 of the City Code would make any person who resides in the City of Fayetteville eligible for appointment to most of the City's boards, committees, and commissions. It is possible that an undocumented person could apply and be appointed to one of several volunteer boards, some of which are considered "governing bodies" by the Freedom of Information Act, meaning those boards have final decision-making authority over certain matters. These include the Board of Adjustment, the Advertising & Promotion Commission, the Construction Board of Adjustment & Appeals, and the Arts Council.

While we feel confident we would prevail with such an ordinance in court, we do not feel that same confidence in the Attorney General's opinion if we are challenged. I have not reviewed the letter from Governor Hutchinson that Ms. Reith mentioned at the last meeting but I'm not sure that alleviates our concerns because the Attorney General is a separately elected office that does not answer to the Governor.

Until the issues with this terrible law have been cleared up, we recommend amending the ordinance to state that all Fayetteville residents **who are legally authorized to live or work in the United States** are eligible to apply for and serve on most City boards, committees, and commissions.



1 State of Arkansas

As Engrossed: S4/3/19

2 92nd General Assembly

## A Bill

3 Regular Session, 2019

SENATE BILL 411

4  
5 By: Senator G. Stubblefield

### For An Act To Be Entitled

8 AN ACT TO PROHIBIT MUNICIPAL SANCTUARY POLICIES; AND  
9 FOR OTHER PURPOSES.

### Subtitle

12 TO PROHIBIT MUNICIPAL SANCTUARY POLICIES.

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16 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

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18 SECTION 1. *Effective January 1, 2020, Arkansas Code Title 14, Chapter*  
19 *1, Subchapter 1, is amended to add an additional section to read as follows:*

20 14-1-103. Sanctuary policies prohibited.

21 (a)(1) A municipality shall not enact or adopt a sanctuary policy.

22 (2) A municipality that enacts or adopts a sanctuary policy is  
23 ineligible for discretionary moneys provided through funds or grants  
24 administered by the state until the sanctuary policy is repealed or no longer  
25 in effect.

26 (b) As used in this section, "sanctuary policy" means an order,  
27 ordinance, or law enforcement policy, whether formally enacted or informally  
28 adopted by custom or practice, that:

29 (1) Limits or prohibits a municipal official or person employed  
30 by the municipality from communicating or cooperating with federal agencies  
31 or officials to verify or report the immigration status of a person within  
32 the municipality;

33 (2) Grants to illegal immigrants the right to lawful presence or  
34 status within the municipality in violation of federal law;

35 (3) Violates 8 U.S.C. § 1373, as in effect January 1, 2019;

36 (4) Restricts or imposes any conditions upon the municipality's



1 cooperation or compliance with detainers or other requests from United States  
2 Immigration and Customs Enforcement to maintain custody of an immigrant or to  
3 transfer an immigrant to the custody of United States Immigration and Customs  
4 Enforcement;

5 (5) Requires United States Immigration and Customs Enforcement  
6 to obtain a warrant or demonstrate more than probable cause before complying  
7 with detainers or other legal and valid requests from United States  
8 Immigration and Customs Enforcement to maintain custody of an immigrant or to  
9 transfer an immigrant to the custody of United States Immigration and Customs  
10 Enforcement; or

11 (6) Prevents law enforcement officers from asking a person about  
12 his or her citizenship or immigration status.

13 (c)(1) Upon receiving a complaint from a resident of the state of a  
14 violation of this section by a municipality, the Attorney General shall issue  
15 an opinion stating whether the municipality is in violation of this section.

16 (2) If the Attorney General issues an opinion stating that the  
17 municipality has enacted or adopted a sanctuary policy that violates this  
18 section, the municipality is ineligible to receive discretionary moneys  
19 provided through funds or grants administered by the state until the Attorney  
20 General certifies that the sanctuary policy is repealed or no longer in  
21 effect.

22 (d)(1) Before the provision of funds or the award of grants is made to  
23 a municipality, a member of the General Assembly may request that the  
24 Attorney General issue an opinion stating whether the municipality has  
25 current policies in violation of this section.

26 (2) A municipality deemed ineligible for discretionary moneys  
27 under this section is ineligible to receive discretionary moneys provided  
28 through funds or grants administered by the state until the Attorney General  
29 certifies that the municipality is in full compliance with this section.

30 (e) A municipality may appeal a decision of the Attorney General under  
31 this section to the Pulaski County Circuit Court.

32 (f) Records created in connection with administrative investigations  
33 related to this section are not subject to the Freedom of Information Act of  
34 1967, § 25-19-101 et seq.

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*/s/G. Stubblefield*

**APPROVED: 4/17/19**