

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

AN ORDINANCE TO AMEND §31.45(C) *DUTIES OF THE FAYETTEVILLE CITY CODE* TO AFFIRM THAT THE CITY PROSECUTOR HAS THE TRADITIONAL INHERENT POWER TO EXERCISE DISCRETION TO DISMISS MOST MISDEMEANOR CRIMINAL CASES

**WHEREAS**, with the exception of driving while intoxicated type cases, the Fayetteville City Prosecutor should have the traditional inherent authority and discretion to dismiss criminal misdemeanor cases within his jurisdiction if agreed to by the Judge; and

**WHEREAS**, the current *Fayetteville City Code* does not expressly recognize a prosecutor's traditional inherent discretionary power when it directs the prosecutor "to prosecute all cases"; and

**WHEREAS**, the *Fayetteville City Code* should be amended to clarify that the City Council recognizes and approves of the City Prosecutor's traditional inherent discretionary power to dismiss appropriate misdemeanor cases especially in light of the citizen-enacted **Lowest Law Enforcement and Prosecutorial Priority Policy** requirements.

**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 amends §31.45(C)(6) of the *Fayetteville City Code* by enacting a final sentence to the subsection as follows:

"The City Council recognizes and agrees that the City Prosecutor has the traditional inherent discretionary power to determine whether or not to prosecute any non-driving while intoxicated type criminal case and encourages the use of such power to ensure that appropriate cases of simple possession of less than one ounce of marijuana for personal, private, adult use be considered for dismissal in accordance with §130.02 **Arrests and Prosecutions of Marijuana Cases** passed by the Fayetteville voters."

**PASSED and APPROVED** this 16<sup>th</sup> day of July, 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

CC: Don Marr, Chief of Staff  
Greg Tabor, Police Chief  
Brian Thomas, Fayetteville City Prosecutor

FROM: Kit Williams, City Attorney

DATE: July 2, 2019

RE: Simple Possession of Less Than One Ounce of Marijuana Cases

Even before the passage of the initiated ordinance codified as **Article II Lowest Law Enforcement and Prosecutorial Priority Policy** on November 4, 2008, the Fayetteville City Prosecutor exercised his discretion for leniency in prosecutions for misdemeanor marijuana offenses involving only adults. After our citizens voted to enact §130.02 **Arrests and Prosecutions of Marijuana Cases** in 2008, the City Prosecutor's office ensured that prosecution of misdemeanor marijuana offenses, where marijuana was intended for adult personal use, would be the lowest prosecution priority. Since 2008, imprisonment for misdemeanor amounts of marijuana was never sought and fines have steadily been reduced over the years. The vast majority of these simple possession cases were approved by the City Prosecutor for expungement or sealing under liberalized state laws which also reduced allowable penalties for even repeated convictions.

Council Member Mark Kinion has agreed to sponsor a clarifying amendment to the section of the *Fayetteville City Code* detailing the duties of the Legal Department including the City Prosecutor. Although prosecutors have traditional inherent discretionary powers to *nolle pros* or dismiss cases that should not be further prosecuted, this discretion is not currently reflected in the *Fayetteville City Code* which lists as a duty: "to prosecute all cases whether civil or misdemeanor criminal cases. . . ." §31.45 (C)(6). I believe that a final sentence should be enacted and added to clarify that the City Council recognizes and approves of the Fayetteville City Prosecutor's discretionary powers especially for cases of simple possession of marijuana of less than an ounce for private, personal, adult use.



Some may wish that we could do more than recognize and authorize the City Prosecutor to exercise his discretion more broadly to comply with the citizen enacted **Article II of General Offenses of the Fayetteville City Code** entitled **Lowest Law Enforcement and Prosecutorial Priority Policy**. But we cannot. A.C.A. §14-2-109(a)(1)(A) prohibits any elected officer of the City to willfully and knowingly refuse to execute any state law. I believe the City Council can change the *Fayetteville City Code* to modify the current requirement to prosecute "all ...misdemeanor criminal cases" by recognizing a prosecutor's traditional inherent discretionary power necessary for fair and just prosecution. However, neither the City Council nor I can demand that all misdemeanor marijuana cases be dismissed. Nor may the Mayor order the Fayetteville Police Department to never execute state laws concerning misdemeanor marijuana possessions. Only the State Legislature can end all arrests and prosecutions for small amounts of marijuana possession.



- (C) *Duties.* The duties of the City Attorney with the assistance of the staff of the Legal Department shall be as follows:
- (1) To draft all ordinances, resolutions, contracts, leases, conveyances, bonds, and such other instruments of writing as may be required by the business of the city.
  - (2) To furnish written opinions upon subjects of a legal nature relating to the affairs of the city government when requested to do so by the Mayor, an administrative department head, a member of the City Council, or the chairperson of any administrative board, commission, or authority of the city.
  - (3) To furnish legal advice regarding the activities of the city to the Mayor, members of the City Council, and all other city officials and administrative department heads.
  - (4) To attend meetings of the City Council, Planning Commission, Board of Adjustments, A & P Commission, and upon request by the chairperson thereof, to attend any meeting of any other City Council Committee, administrative board, commission, or authority of the city.
  - (5) Represent the city as needed in civil litigation; file all cases and civil actions approved by the City Council required to protect the interests of the city.
  - (6) To prosecute all cases whether civil or criminal involving the violation or enforcement of city ordinances before the district court; to prosecute all cases whether civil or misdemeanor criminal cases involving violations of the state laws within the corporate limits of the city before the district, juvenile, or circuit courts and to prosecute or defend all appeals of any of such cases from the district court to the circuit court. The City Attorney shall assign at least one full-time Assistant City Attorney as City Prosecutor to carry out such duties.
  - (7) Perform such other duties as are prescribed by law for City Attorneys of cities of the first class.
- (D) *Full-time Employment.* The City Attorney and his/her duly authorized assistants shall be full time officers and employees of the City of Fayetteville and shall not engage in outside employment, including the private practice of law, without complying with the city's personnel policy.
- (E) *Authority to Retain Counsel Other Than City Attorney.* Should the City Council determine that it would be in the best interest of the city for an attorney other than the City Attorney to render legal services in connection with a legal matter or legal proceedings, the City Council may, by majority vote, retain a private attorney to render said services.
- (F) *Restrictions.* The Legal Department of the city shall not be required to render legal services in connection with a legal matter or legal proceeding not otherwise provided for in subsection (A) above, including but not limited to, bond opinions, representation of any independent organizations, boards, councils or foundations and performing any duties for any improvement district.