

November 10, 2014

M E M O R A N D U M

To: Chamber Board

From: Steve Clark

Re: Update on Impact on Chamber Civil Rights Position for Repeal

I wanted to provide you with background information to help you to engage anyone who wants to understand the Chamber's position recommending the repeal of Ordinance 5703 Chapter 119. This ordinance is most commonly referred to as Chapter 119 or the Civil Rights ordinance.

I realize this document is several pages. But this background helps frame the current situation.

Background:

In 1998, the City Council passed, over Mayor Fred Hanna's veto, the Human Dignity Resolution (ordinance). The resolution called for the City to provide its employees protection from discharge based on sexual orientation and urged other businesses to follow this model.

A petition drive for repeal was started and 2198 signatures were gathered. The Chamber endorsed the repeal of the ordinance. The Chamber stated these rights were already protected under federal law and that additional protections were not needed.

The issue was put on the ballot and on Nov 3, 1998 the ordinance was repealed by voters with a margin of 58% for repeal and 42% against repeal.

It was a nasty campaign on both sides with each attacking the other. Both campaigns used extreme and out-of-context statements to make their points.

The supporters of the ordinance protections, *the Campaign for Human Dignity*, stated that they only wanted to do the right thing and to have people be judged in the workplace on their skills and qualifications and nothing else. They suggested, and the media often repeated, that their opponents were religious zealots relying on their faith to say that others had to be protected from the gay lifestyle. The inference was that if one voted for repeal that one was likely a bigot or one who harbored hate towards those who chose alternative lifestyles.

The collorary campaign, *Citizen's Aware*, took the position that if you voted against repeal, then you were likely someone with views and values outside the norm at least as to your sexual preferences. The repeal message was, "I believe in equal rights not special privileges based on sexual preference. Vote for repeal".

Both sides projected doom and gloom if the ordinance was not repealed or maintained. A check of the newsletters the Chamber published at the time (*Statesman*) for late 1998 and most of 1999 never mentioned a word about the ordinance battle or outcome having any impact on Fayetteville. The same is true from the minutes of the Chamber's convention and visitors committee. Economic indicators for Fayetteville indicated steady growth as the region welcomed XNA, I-540 and expansion of the Research Technology Park. Fayetteville also welcomed Arkansas' first fiber optic technology park.

Today there is an overlap of the rhetoric from the previous campaign. This campaign may create some divisions within our community. That would be an unfortunate result, but the Chamber cannot ignore the negative impact of Chapter 119 on the business community, especially when there has been so little attention given to the specific problems identified.

Today's Background:

Ordinance 5703 Chapter 119 was adopted on August 14, 2014, to be effective 30 days later. After the vote, a petition drive was started to obtain the necessary 4,075 signatures, of Fayetteville's registered voters, to call a special election asking citizens to either vote for repeal of the ordinance or against repeal of the ordinance. The petition drive was successful and 4,250 valid signatures were collected. The election was set for December 9, 2014. A lawsuit was filed challenging the signature collection process, the validity of the petition signatures, and the form of the ballot title. The lawsuit was dismissed by Circuit Judge Mark Lindsey and the special election will take place on December 9th.

In the interim, our Chamber delivered a letter to the Mayor asking that he convene a group of citizens, representing stakeholders affected by the ordinance, to share their thoughts with the Mayor regarding implementation of this new ordinance. The Mayor agreed and appointed 19 citizens including Bill Bradley and Tony Uth, the Chamber's Chair and Chair Elect.

Our representatives asked the following:

What is socioeconomic discrimination? How is the term defined? What law or precedent will be used in defining that term? Where would an employer obtain guidance as to how that term will be interpreted and enforced?

Moreover, following the previous theme, we asked how "gender expression" and "gender-related behavior" is defined.

Federal law prohibits age discrimination against those 40 or over, Chapter 119 seems to extend this protection to individuals 18 and above. Was that the intention?

Ordinance 5703 Chapter 119 applies to "contractors doing business with the city." Does this mean contractors with a formal contract? Contractors that seek permits to operate within the city? Does the ordinance contain any section or language that answers these concerns?

If Ordinance 5703 Chapter 119 is a criminal statute, who is the criminal? What crime is being prosecuted, if the process ever comes to that? What conduct is criminal? We generally view this critical provision of the ordinance as written very vaguely and entirely lacking in specifics. Imposing criminal penalties is contrary to all existing federal and state discrimination laws, which impose only civil remedies.

Many other questions were asked at this same meeting, including those from two attorneys who were part of the stakeholder group and Kim Coats, a former law professor and special counsel at Littler Mendelson, a national law firm specializing in employment and labor law practices including workplace discrimination.

Ms. Coats provided a five (5) page legal memorandum that included a section entitled, **Need for Clarification and Definitions**. She noted that “employer” is defined as someone who has five or more employees. Are those employees located anywhere, in Arkansas, or in the City of Fayetteville? She goes on to say that the Arkansas Civil Rights Act defines “employer” as someone with nine employees, but those employees must be in Arkansas. If a company has ten employees out of state and one employee in Fayetteville, will that company be subject to this ordinance? She also noted that Chapter 119 does not specify who is an “employee” for jurisdictional purposes. Must an employee both live and work in Fayetteville to be covered? For example, are you covered by the ordinance if you live in Springdale but work in Fayetteville?

Ms. Coats points out that “socioeconomic background” is not defined in the ordinance. She further states that “socioeconomic background” is not a protected category in federal law or in any state or local law that she could find in her research. For such a novel protected category, clarification and definition is necessary for anyone subject to the law to understand what conduct violates the law.

Ms. Coats also asks if the affirmative defenses available under federal and state discrimination law will be available under the ordinance.

Ms. Coats practices law with Washington County Quorum Court member, Eva Madison, who contributed to the memo Ms. Coats provided the City. Also recall, Justice of the Peace Madison presided over one of the first same-sex marriages in Washington County during the time such marriages were legal. She can hardly be characterized as anti-LGBT in raising these very legitimate legal issues.

Ms. Coat's memo points out that Title 7 of the federal Civil Rights Act permits religious organizations to give preference to members of their religion in employment decisions. It seems Chapter 119 only allows this for non-secular positions. How will the City enforce this issue? How will this issue be reconciled with the First Amendment's freedom of religion clause?

Finally, Ms. Coats states that because Chapter 119 imposes criminal, as opposed to civil, penalties, she recommends that any definitions or clarifications be made in the ordinance itself, as employers need to know what conduct may subject them to criminal liability.

After all of this input, coupled with the City's own research and review of four (4) other college communities that have similar civil rights ordinances, the City has not addressed any of these concerns. These legal questions leave existing and new businesses without guidance regarding how they should train their employees to comply with the law and/or modify any of their policies to comply.

On August 25th our Chamber Board met and learned that three (3) businesses had contacted the Chamber to advise they would not start a business in Fayetteville because of the uncertainty surrounding Ordinance 5703 Chapter 119. These owners stated that did not want to be charged with a crime when they did not know what conduct would constitute a crime under 5703 Chapter 119. Our Board was further advised about the legal flaws in the ordinance raised by other legal experts.

It is a basic rule of statutory construction to give effect to the intent of the legislature—in this case the City Council. The Arkansas Supreme Court, in the case of *Central & S Companies, Inc. v. Weiss*, 339 Ark 76,3 S.W.3d 294 (1999), states that “where the language of the statute is plain and unambiguous, the court determines intent from the ordinary meaning of the

language used. In considering the meaning of a statute, we construe it just as it reads, giving the words their ordinary and usually accepted meaning in common language. We construe the statute so that no word is left void, superfluous, or insignificant; and meaning and effect are given to every word in the statute if possible.”

Our Board was advised that any statutory interpretations by a City Attorney, Prosecuting Attorney or Attorney General are merely advisory and have no value as to precedent. Our Board was aware of the fact that the City Attorney’s stated interpretations of these vague and ambiguous provisions has no weight in court, and therefore provides no defense to someone charged with non-compliance under Chapter 119.

During the news conference introduction and in anticipation of the “why now” question our Board Chair responded accordingly:

The Fayetteville Chamber exists to serve as a leader and advocate for our membership by promoting a strong and healthy business climate in Fayetteville.

As an organization, our Chamber takes public positions on governmental policy only when it believes that the policy is detrimental to the community because it is legally incomplete, vague, or deficient in defining conduct to be regulated as legal or illegal.

In that light, our Board unanimously adopted a resolution calling for the repeal of Ordinance 5703 Chapter 119. While some may regrettably and erroneously choose to characterize our effort as something it is not, I can assure you that our membership abhors discrimination of every kind and support equal treatment for all. The exclusive focus of our informational campaign is that this law is seriously flawed.

The Facts:

Our Chamber does not discriminate against individuals or legally protected classes in membership or employment. Any business or person is eligible for membership provided that their business is operating legally according to local, state and federal law.

Our Chamber personnel policies require that our Chamber comply with all state and federal laws that prohibit any discrimination in hiring or terminating employees and prohibits any discriminatory conduct or harassment in our workplace against any employee.

Our Chamber has never been named a party in any Equal Employment Opportunity Commission claim or named a defendant in a wrongful termination lawsuit.

The Chamber includes LGBT members, a fact we know only because these individuals self identified as being LGBT or minority individuals. These LGBT members have contributed greatly to the Chamber, serving in leadership roles as committee chairs, serving as economic development advisors, and serving as Chamber Diplomats—our formal outreach group to new and existing businesses.

Our Chamber does not know how many of its 1175 investors are LGBT or employ LGBT or other minority individuals because the information is irrelevant to a successful business.

Our Chamber provides the same employee benefits to all employees without regard to gender identity, sexual orientation, or marital/family status and includes medical benefits to same-sex partners.

Our Chamber monitors all of its social media sites and when necessary edits comments or entries that may be offensive or discriminatory.

Our Chamber has a Political Action Committee and this election year the Chamber PAC interviewed 11 out of 12 candidates for City Council, specifically asking each candidate about their position on Ordinance 5703 Chapter 119. Our Chamber Board chose to endorse 5 candidates for City Council, and 4 of those 5 candidates had either voted for Chapter 119 or said they would have voted for the ordinance. We promoted these candidates via our email list, social media and gave a campaign contribution. Our Chamber Board had the option of endorsing the 3 candidates that specifically opposed Ordinance 5703 Chapter 119, but did not do so, believing these individuals were not the best candidates to represent Fayetteville.

Our Chamber is one of the 223 accredited chambers in the United States out of 7,000 chambers which indicates we follow best practices for personnel and human resource programs.

The Politics:

Our Chamber has been the target of a social media campaign to encourage people to drop their membership in the Chamber, or to choose not to join, because of our support for repeal of Ordinance 5703 Chapter 119. This group operates under the name “Keep Fayetteville Fair.” That effort has occurred primarily on Facebook and the Fayetteville Flyer. The last time I looked the Flyer had 58 posts, however, it appears those all came from 11 or 12 persons. Also, most are anonymous posts because comments may be posted with a fictitious name. I saw about 20 Facebook posts and only recognized a few of those posting as Chamber members.

I share all that to further explain that in the midst of the negative campaign, we have had several people contact us to compliment the Chamber on taking the position we have taken. One of those persons said,

“Thank you for coming out against 119. It is poorly written, there is no due process and socioeconomic status is not clearly defined. I knew this would be incredibly divisive and it has proven to be just that. This was unnecessary and has worked to turn neighbor against neighbor. Please do not publicly post my comments because I have to distance myself from it as a horrible petitioner signer (read ‘bigot’ in the eyes of all my super liberal friends here in town.)”

Another called to ask why the Chamber endorsed one of the aldermen who voted for 119 and said he would resign his membership because of the endorsement. When he learned we were supporting repeal of 119 he said “keep me on board.”

The negative comments on social media include:

accusing the Fayetteville Chamber as siding with hate;

claiming the Fayetteville Chamber supports termination of gay employees and eviction of gay people from rental properties;

asserting that the Fayetteville Chamber has diminished the City's reputation of being fair, accepting and forward-thinking.

Our Chamber received eight (8) derogatory phone messages including:

“Tell your Mother F’ ing bosses I know where they live”

“you are despicable and I loathe you”

“you are all disgusting bigots”

“Fayetteville does not need your kind of hate”

“you are pro discrimination”

Officially, I have had seven (7) members out of 1175 members resign. I know that several university professors are trying to persuade the U of A to withdraw its membership.

I know you are all aware that this comes with the job. This is not the first time that members have left based on a position the Chamber has taken and we have continued to grow in spite of the departures. It will not be the last time we lose members who disagree with a position of the Board. Other issues that have resulted in membership cancellations include:

Sam's Club move to Fayetteville - we lost members stating the Chamber's support indicated we favored big business over small locally owned business – non-member citizens complained;

Chamber support for paid parking – lost members who felt the Chamber was too chummy with the City and was choosing the City over businesses – non-member citizens complained;

Chamber support for two school millage elections – we lost members who believed we were supporting unreasonable taxes and wasting money on lavish school buildings – non-member citizens complained;

Chamber support for the Fayetteville business license – we lost members who said we were supporting unnecessary government regulation – non-member citizens complained;

Chamber support for Bikes, Blues and BBQ –members have left claiming the Chamber is not respectful of neighborhoods and there is no real cash benefit to the community – non-member citizens complain;

Chamber did not oppose the city streamside ordinance – we lost members who claimed the Chamber is helping the City take away land from private property owners;

Chamber did not oppose the hillside ordinance – we lost members who believed this is unnecessary regulation and the Chamber “sat on the sidelines” – non-member citizens complained;

Chamber assistance in locating Whole Foods in Fayetteville – members left claiming the Chamber chose a corporate business over a local business like Ozark Natural Foods – non-member citizens complained.

The Chamber’s role is to advocate for its members. This is absolutely not a pro-LGBT vs anti-LGBT debate, though that is how it is being framed. The ordinance as it was drafted is unworkable and unacceptable. If we stand by and ignore the impact of the legal deficiencies in the ordinance, in the next few years our members will bear the burden of funding the inevitable litigation necessary to clarify, amend, or overturn the law as it has been passed. The Chamber abhors discrimination of any kind, and we will not accept the characterization that we favor any form of hatred or discriminatory behavior. I hope the information provided provides a bit more background and context as you are asked to engage in the conversation. If you have questions or I can assist you in any way just let me know.