

IN THE CIRCUIT COURT OF WASHINGTON COUNTY, ARKANSAS

PROTECT FAYETTEVILLE, f/k/a REPEAL 119;
PAUL SAGAN; PETER TONNESSEN;
and PAUL PHANEUF

PLAINTIFFS

vs.

Case No.: CV 15-1510-1

THE CITY OF FAYETTEVILLE, ARKANSAS, WASHINGTON COUNTY, ARKANSAS; LIONELD JORDAN, in his official capacity as MAYOR OF THE CITY OF FAYETTEVILLE, WASHINGTON COUNTY, ARKANSAS; ADELLA GRAY, SARAH MARSH, MARK KINION, MATTHEW PETTY, ALAN LONG, and JUSTIN TENNANT, Individually and, in their official capacities as ALDERMEN OF THE FAYETTEVILLE CITY COUNCIL; MARTIN W. SCHOPPMAYER, JR., and JOHN LA TOUR, in their official capacities as ALDERMEN OF THE FAYETTEVILLE CITY COUNCIL; THE HON. RENEE OELSCHLAEGER, THE HON. MAX DEITCHLER, and THE HON. BILL ACKERMAN, in their official capacities as the COMMISSIONERS of the WASHINGTON COUNTY ELECTION COMMISSION

FILED FOR RECORD
2015 OCT 23 AM 10:23
WASHINGTON CO. AR
CIRCUIT CLERK
K. SYLVESTER

DEFENDANTS

REPLY TO PLAINTIFFS' RESPONSE TO DEFENDANT CITY OF
FAYETTEVILLE'S MOTION TO DISMISS

Comes now Defendant City of Fayetteville by Fayetteville City Attorney Kit Williams and for its Reply to Plaintiffs' Response to the City of Fayetteville's Motion To Dismiss, states:

1. Defendant City of Fayetteville agrees that this Motion To Dismiss is to be decided by examining the allegations within Plaintiffs' Complaint and dismissing only those claims that fail to state a proper cause of action against the City of Fayetteville.
2. Most or all of the claims asserted by Plaintiffs involve undisputed facts, and thus are properly exposed to a Motion To Dismiss which this Court is empowered to decide

as questions of law especially involving interpretations of ordinances, state statutes, the *Arkansas Constitution* and the *United States Constitution*.

3. Plaintiffs' arguments concerning the proper statutory parliamentary procedure of A.C.A. § 14-55-202 and A.C.A. § 14-43-501 (b) (1) (B) when the Mayor voted to pass the Motion To Suspend The Rules and go to second and then to the third and final reading of the ordinance are not dependent upon any factual disputes, but clearly a matter of law for the Court to decide. A Motion To Dismiss is the proper method for this statutory interpretation argument to be resolved.

4. Plaintiffs' Due Process of Law argument is supported solely by their misinterpretation of the statutory parliamentary procedure which expressly provides that "The mayor shall have a vote . . . when his or her vote is needed to pass any ordinance, by-law, resolution, order or motion." A.C.A. § 14-43-501 (b) (1) (B). Thus, the proper statutory interpretation of these statutes defeats Plaintiffs' Due Process claims in their entirety.

5. Plaintiffs' statement in its Response that "the portion of the case that the Defendants rely on was later overturned by the Arkansas Supreme Court," is patently incorrect. (¶ 5) Plaintiffs' allegation that a mayor can vote "only . . . in situations when the vote of the council members is tied or when there are not enough council members present at the meeting to pass a measure," (¶ 5) **is found nowhere in this statute or elsewhere in state law.** Indeed, the previous state law had in fact limited the mayor to voting "in case of a tie." However, that law was amended in 1981 to its current reading

that removed the "in case of a tie" language that Plaintiffs apparently would like to reinsert in clear violation of legislative intent.

6. Plaintiffs outrageously claim that submitting the referred ordinance to the citizens for their vote violates *Amendment 7*. Plaintiffs try to turn *Amendment 7* on its head and use *Amendment 7* to **deny** the citizens their right to vote on the referred ordinance when instead *Amendment 7* guarantees citizens their right to vote. *Amendment 7* was passed by Arkansas citizens to "reserve to themselves the power to propose legislative measures, laws and amendments to the Constitution, and to enact or reject the same at the polls...." *Article 5 § 1 Initiative and Referendum* of the *Arkansas Constitution* (which is the codification of *Amendment 7*).

The special election in 2014 rejected an ordinance and obviously did not enact anything. The proposed ordinance which was referred to voters in 2014 was rendered a nullity by the referendum election. It could be no bar to any later enactment of another ordinance and certainly could not deny Fayetteville citizens their right to vote guaranteed by *Amendment 7* on referred Ordinance No. 5781.

"(W)e give a liberal construction and interpretation of the requirements of Amendment 7 in order to secure its purposes to reserve to the people the right to adopt, reject, approve, or disapprove legislation." Gaines v. McCuen, 296 Ark. 513, 519, 756 S.W. 2d 403, 407 (1988) (emphasis added).

7. Plaintiffs present no authority for their strange theory that once an election has occurred on some subject, the voters are prevented forever from voting to enact or reject an ordinance, law or constitutional amendment concerning the same subject. If that were true, how could *Amendment 89 Government Bonds and Loans* have been passed and

enacted in 2010? *Amendment 89's* § 14 states: "This amendment shall repeal Art 19 § 13, and the interest rate provisions of Amendment Nos. 30, 38, 62, 65 and 78 of the Arkansas Constitution." The people always maintain the right to amend, repeal or enact new legislation whether or not the subject of the legislation has been considered once or many times before and enacted or rejected by popular vote. The Fayetteville citizens are guaranteed by *Amendment 7* the right to vote on initiatives and referendums and that right to vote cannot be abridged because of an earlier vote on legislation even if it addressed a similar subject.

8. Act 137, A.C.A. § 14-1-401, et seq., cannot be constitutionally interpreted to prohibit the City and citizens of Fayetteville, Arkansas from enacting and enforcing an ordinance to protect its citizens from discrimination based upon the citizens' sexual orientation or gender identity. Arkansas Attorney General Opinions have been found "not binding" on courts and are only advisory.

9. The Arkansas Legislature cannot do indirectly what it cannot do directly so if the language chosen by the General Assembly for Act 137 was **intended** to prevent cities in Arkansas from enacting and enforcing ordinances to protect their citizens from discrimination on the basis of their sexual orientation, disguising such intention by using more general terms or a pretense of another purpose will not save the statute from its unconstitutionality.

10. If the Arkansas Legislature **did not intend** to prevent cities from enacting and enforcing ordinances to protect their citizens from discrimination on the basis of their

sexual orientation (which the City of Fayetteville contends is the required constitutional interpretation), then Ordinance No. 5781 is clearly not prohibited by Act 137.

11. The interpretation and construction of Act 137 (A.C.A. § 14-1-403) is a question of law for the Court's determination because there are no facts in dispute. Therefore, the issue of whether the Uniform Civil Rights Protection Ordinance (No. 5781) is compliant with Act 137 or that Act 137 is unconstitutional and incapable of barring the enactment and enforcement of Ordinance No. 5781 is properly before this Court by this Motion to Dismiss.

12. Plaintiffs' vain attempt to plead facts to support a Title 42 U.S.C. § 1983 claim relies not on facts but only on legal suppositions. The Plaintiffs' own Exhibit C, Minutes of the Fayetteville City Council Meeting of June 16, 2015 show that over 50 citizens addressed the City Council on the ordinance. Every citizen present who wished to speak was allowed to be heard. Arkansas city councils are not required by state or constitutional law to allow citizen comments on every ordinance the city council considers. Most city councils do not allow so much citizen input and certainly not the hours of citizen comments reflected in the City Council Meeting Minutes of June 16, 2015 which lasted four and a half hours with two thirds of the meeting minutes devoted to this single ordinance.

13. Plaintiffs vainly claim that the City Council passage of Ordinance No. 5781 following all state statutory rules for enactment of such legislation "was not legislative in nature . . . because the proponents chose to forgo the inclusion of the protected right of religion" (¶ 8). Their casual cite to *Bogan and Roderick v. Scott-Harris* provides no

support for Plaintiffs' claim and indeed clearly contradicts it. Do Plaintiffs assert that every regulatory ordinance (traffic, development, parking?) enacted by a city council would not be "legislative in nature" unless the ordinance includes "the protected right of religion?" Such an absurd theory with no supporting authority should be rejected.

14. Plaintiffs' illegal exaction claim is totally dependent upon their assertion that Ordinance No. 5781 was enacted in such an invalid manner as to be void. There is no merit to their allegation and no factual support. This claim can be dismissed as a matter of law based upon the Court's interpretation of state statutory authority and requirements.

Wherefore, Defendants City of Fayetteville prays that its' Motion To Dismiss for all counts and against all defendants be granted and Plaintiffs' Complaint be dismissed with prejudice.

Respectfully submitted,

City of Fayetteville, Arkansas
Mayor Lioneld Jordan and
Aldermen of the Fayetteville City Council

Separate Defendants

By: 

KIT WILLIAMS, ABA # 76007

Fayetteville City Attorney

and

BLAKE PENNINGTON, ABA # 2008223

Assistant City Attorney

113 W. Mountain St., Suite 302

Fayetteville, AR 72701

(479) 575-8313

kwilliams@fayetteville-ar.gov

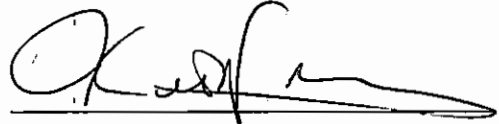
bpennington@fayetteville-ar.gov

CERTIFICATE OF SERVICE

I, Kit Williams, certify that I have hand delivered or sent the above Reply To Plaintiffs' Response To Defendant's Motion To Dismiss By Separate Defendant City of Fayetteville, Mayor Lioneld Jordan, and Aldermen for Fayetteville City Council by United States mail, postage prepaid on this the 22nd day of October, 2015, to:

Travis W. Story
Story Law Firm
438 E. Millsap Rd., Suite 103
Fayetteville, AR 72703

Steven S. Zega
Washington County Attorney
280 North College, Suite 500
Fayetteville, AR 72701



KIT WILLIAMS
Fayetteville City Attorney