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TO: Mayor Jordan
City Council

THRU: Kit Williams, City Attorney

FROM: Blake Pennington, Assistant City Attorney

DATE: August 5, 2014

RE: Civil Rights Ordinance - Response to Letter from Attorney Stephanie Nichols

Recently, an attorney in Jonesboro sent a letter to the City Council regarding some concerns she was expressing on behalf of a client who is a resident of Fayetteville. Our office's responses to the issues she has raised are below:

1. If a church does not allow anyone outside of its faith to hold ceremonies (weddings, etc.) in its sanctuary or chapel, this ordinance will not force that church to be open to the public or to "subsidize" a ceremony involving beliefs contrary to its own. If the City Council wishes to strengthen this existing legal exemption, the following language could be adopted as a new subsection within § 199.07 **General Exceptions:**

Nothing contained in this chapter shall be deemed to require any religious or denominational institution to open its sanctuary or chapel to any individual or group for any ceremony including, but not limited to, weddings, funerals, confirmations, or baptisms, that do not align with that religious or denominational institution's statement of faith or beliefs.

However, if a church allows outside groups to rent space in a fellowship hall or classroom, then this ordinance would prohibit discrimination in the rental of the classroom against any protected class defined by the ordinance.

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In response to the example given by Ms. Nichols, if a church hosts a Girl Scout troop's meetings, it could not bar an LGBT identified member, parent or leader from attending or participating. Furthermore, the Girl Scouts of America's "Inclusion and Non-Discrimination Policy" appears to be aligned with the intent of this ordinance:

Girl Scouts value inclusiveness and do not discriminate or recruit on the basis of race, religion, ethnicity, sexual orientation, socioeconomic status, national origin, or physical or developmental disability.

2. Ms. Nichols misunderstands or misstates the law when she writes that "'non-secular' positions... may be interpreted to be limited to clergy." The Supreme Court has clearly ruled that "non-secular" positions are **NOT** limited to clergy. Churches and even private religiously affiliated schools have wide discretion about who serves in ministerial positions and may choose to hire members of their own faith as long as the work they are hired to perform is related to the organization's religious activities. For example, in Hosanna-Tabor Lutheran Church and School vs. EEOC, 132 S.Ct. 694 (2012), the United States Supreme Court held that a teaching position, which required the teaching of both secular and religious instruction and leading prayers in class, could be classified as a ministerial because the religious instruction was related to the church/school's religious activities. However, a church could not unlawfully discriminate against a person serving in a purely secular position, such as a receptionist with no ministerial duties at all. Nothing, of course, prevents a church from establishing dress codes or grooming standards.
3. In her third section, Ms. Nichols provides three examples and claims that each would violate the religious liberty of the person providing the service: In response to the first example, the ordinance provides an exception for a landlord when a tenant is sharing a room in the same house or if the landlord and tenant are to share kitchen or bathroom space. When that landlord has opened an apartment or house for rent to the general public, the ordinance would certainly prevent discrimination on the basis of any of the protected classes within the ordinance. In response to the second and third examples, those who choose to advertise to and provide a service to the general public cannot discriminatorily pick and choose which segments of the public they wish to serve under this ordinance. The Arkansas Civil Rights Act, Ark. Code Ann. § 16-123-101, *et seq.* already protects people from discrimination on the basis of religion and race. For example, a

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Christian florist could not refuse to provide flowers for a Hindu wedding ceremony or for an interracial couple even if that florist believed those situations to be a violation of his or her sincerely held religious beliefs. This ordinance merely extends that protection to other groups not already protected by state or federal law.

4. The claim that this ordinance would provide predators with access to women's restrooms in order to assault or leer at girls or women is nothing more than fear-mongering. This ordinance does allow transgender people to use the bathroom in which they feel most comfortable and physically safe. Transgender people – who are far more likely to be the victims of harassment and violence if forced to use a bathroom that is inconsistent with their gender identity or expression – deserve to have the ability to use the bathroom in peace and safety. Using the bathroom is a basic human function and denying that to a person is inhumane. This ordinance has nothing to do with the concerns and examples Ms. Nichols provided – the acts perpetrated by the criminals in those stories will continue to be criminal acts.
5. Public educational institutions were exempted from this ordinance because they are on an equal governmental footing with the City of Fayetteville. The University of Arkansas and Fayetteville Public Schools have their own independent boards of directors and are regulated by state law. This is also the reason county, state and federal institutions are exempted. We cannot control the actions of independent governmental institutions.
6. There has been no notable increase in litigation in other cities that have adopted similar non-discrimination ordinances. As already discussed in the memo that was sent to you on July 18, there is a basis in state law for this ordinance and similar ordinances have been upheld around the country. There is no reason to suspect that we will receive a flood of complaints or that the Civil Rights Administrator or City Prosecutor will violate anyone's civil rights in enforcing the ordinance.
7. A referral to the City Prosecutor does not necessarily translate into a prosecution for violation of the ordinance. Please keep in mind that the Civil Rights Administrator's primary goal is to gather information and work out a solution. Secondly, the Civil Rights Administrator can refer a case to the City Prosecutor to determine if the case should be filed in Fayetteville District Court. There, the burden is very high – even higher than a civil discrimination case – and violations must be proven *beyond a reasonable doubt*. Because of this high burden of proof, only the most serious and clear cases of discrimination will be prosecuted.