

City of Fayetteville Staff Review Form

B. 1
Amend §154.03 Private
Parties/Zoning Amendment
Page 1 of 14

City Council Agenda Items
and
Contracts, Leases or Agreements

7/17/2012

City Council Meeting Date
Agenda Items Only

Andrew Garner
Submitted By

Planning
Division

Development Services
Department

Action Required:

ADM 12-4170: Administrative Item (UDC SECTION 154.03(C)(2)): Submitted by the CITY PLANNING DIVISION to repeal UDC section 154.03(C)(2).

Cost of this request	\$ -	Category / Project Budget	Program Category / Project Name
Account Number	\$ -	Funds Used to Date	Program / Project Category Name
Project Number	\$ -	Remaining Balance	Fund Name

Budgeted Item

Budget Adjustment Attached

James P. King
Department Director
A large rewrite was needed.
JK
City Attorney

06-21-2012
Date

Previous Ordinance or Resolution # _____
Original Contract Date: _____
Original Contract Number: _____

June 25, 2012
Date

Marsla Hester
Finance and Internal Services Director

6/25/12
Date

06-22-12 A09:29 RCVD
Received in City Clerk's Office
King J.

Alan Mann
Chief of Staff

6/26/12
Date

Received in Mayor's Office
ENTERED
6/25/12
PH

Leonell Jaylan
Mayor

6/26/12
Date

Comments:

Left on first reading at the 7/17/12 Cmty.

CITY COUNCIL AGENDA MEMO

To: Mayor Jordan, City Council

Thru: Don Marr, Chief of Staff

From: Jeremy Pate, Development Services Director

Date: June 20, 2012

Subject: ADM 12-4170 Repeal UDC Section 154.03(C)(2) Petition opposed to rezoning

BACKGROUND:

Chapter 154.03(C)(2) states that if a certain number of property owners have signed a petition opposed to a rezoning, then the rezoning cannot become effective except by a three-fourths vote of the City Council. This code section appears to have been enacted with all other zoning and development code sections for the City during a Special Meeting of the City Board of Directors on June 29, 1970. The City Attorney does not believe this section of the code has ever been used in an attempt to require a super majority vote. Further, the City Attorney believes that this code section is illegal because it is beyond our statutory power. A memo from the City Attorney is attached.

RECOMMENDATION:

Staff recommends approval of an ordinance to amend the Unified Development Code to repeal Section 154.03(C)(2).

BUDGET IMPACT:

None.

CHAPTER 154: AMENDMENTS

154.03 Private Parties/Zoning Amendment

(A) *Petition.* Any private party or parties desiring an amendment to Chapter 160, upon payment of the appropriate fee, shall submit to the Planning Commission a petition giving the following information:

- (1) Legal description of the property involved;
- (2) Zoning classification request for the property; and,
- (3) Statement explaining why the proposed changes will not conflict with the surrounding land uses.

(B) *Action by Planning Commission.* The Planning Commission may take one of the following actions:

- (1) *Approval.* The proposed amendment may be approved as presented.
- (2) *Approval in modified form.* Approved in modified form by a majority of the Planning Commission and recommended for adoption by the City Council with the reasons for such recommendations stated in writing.
- (3) *Disapproval.* If the Planning Commission disapproves a proposed amendment, the reason for such disapproval shall be given in writing to the petitioner.
- (4) *Neither approves nor disapproves.* If the Planning Commission neither approves nor disapproves a proposed amendment within 45 days after the public hearing the action on such amendment by said Planning Commission shall be deemed favorable; this period may be further extended by vote of the Planning Commission if all the parties involved agree in writing to an extension.

(C) *Action by the City Council.*

- (1) *Action.* The City Council, may take one of the following actions:
 - (a) *Approval.* The City Council, by majority vote, may by ordinance adopt the recommended amendment submitted by the Planning Commission.
 - (b) *Modify and adopt.* By ordinance, may modify and adopt the proposed amendment.

(c) *Return to Planning Commission.* By resolution, may return the proposed amendment to the Planning Commission for further study and recommendation.

~~(2) *Vote.* When a proposed amendment affects the zoning classification of property, and in case a protest against such change is signed by the owners of 20% or more either of the area of the lots included in such proposed change, or of those immediately adjacent in the rear thereof extending 300 feet from the street frontage of such opposite lots, then such amendments shall not become effective except by the favorable vote of three-fourths of the City Council.~~

(D) *Re-petitions for amendment.* No application for zoning amendments will be considered by the Planning Commission within 12 months from the date of final disapproval of a proposed amendment unless there is evidence submitted to the Planning Commission which justifies reconsideration.

(E) *Withdrawal.*

- (1) *Before publication.* A petition for amendment may be withdrawn at any time before publication of the notice and posting signs for the public hearing.
- (2) *After publication and posting of notice.* After the publication and posting of notice, the petition may be withdrawn at the discretion of the Planning Commission. If the petition is permitted to be withdrawn after the public hearing, it shall be in the Planning Commission's discretion whether or not a petition affecting part or all of the same property may be refiled sooner than one year from the date of withdrawal.

(Code 1965, App. A., Art. 12(1); Ord. No. 1747, 6-29-70; Ord. No. 2538, 7-3-79; Code 1991, §160.156; Ord. No. 2716, §1, 6-15-93; Ord. No. 3925, §7, 10-3-95; Ord. No. 4100, §2 (Ex. A), 6-16-98)

Cross reference(s)--Notification and Public Hearings, Ch. 157.

154.04-154.99 Reserved



Departmental Correspondence



www.accessfayetteville.org

LEGAL
DEPARTMENT

TO: Mayor Jordan
City Council

Kit Williams
City Attorney

Jason B. Kelley
Assistant City Attorney

CC: Andrew Garner, Senior Planner – Current Planning
Sondra Smith, City Clerk

FROM: Kit Williams, City Attorney

DATE: June 18, 2012

RE: Update on §154.03 (C)(2) Petition opposed to rezoning

HISTORY

My research reveals that this code section was enacted along with all other zoning and development code sections for the City during a Special Meeting of the City Board of Directors on June 29, 1970. The Board of Directors suspended the rules to get to the third and final reading at this Special Meeting. The minutes do not reflect any discussion or questions before Ordinance No. 1747 was passed unanimously. Current Code §154.03 (C) was on pages 85 and 86 of Ordinance No. 1747. During my six plus years as an Alderman and eleven plus years as City Attorney, I do not believe this section has ever been used in an attempt to require a super majority vote. I do not believe the City Board of Directors then nor the City Council now could require such a three-fourths vote to rezone property because it is probably beyond our statutory power to do so. Therefore I recommend the repeal of this probably illegal subsection of the UDC.

A.C.A. §14-55-203 **Voting requirements for passage** -- **Effective dates** is the general state statute detailing how many votes are needed to pass an Ordinance or resolution: "To pass any bylaw, ordinance, resolution, or order, a concurrence of a majority of a whole number of members elected to the council shall be required." There are a few specific exemptions to this rule (for example a two-thirds vote is required to pass a business license **tax**).

The state statutes are clear that an amendment to the zoning of a district shall be “by a majority vote of the city council.” A.C.A. §14-56-423. Can the Board of Directors or City Council place more strenuous requirements for passage of a zoning amendment than specified in state law? I do not think so.

“**[4-6]** Cities have no inherent authority to enact legislation. That authority is dependent upon the Constitution and the General Assembly. Municipal zoning authority is conferred solely by state enabling legislation. **Failure to comply with mandatory procedural requirements of the enabling statute renders a zoning ordinance invalid.**” *Brooks v. City of Benton*, 308 Ark. 571, 826 S.W. 2d 259, 261 (1992) (Citations omitted). (emphasis added)

Arkansas Attorney General David Pryor opined in Opinion NO. 2002-132: **“a municipality may not, by the adoption of procedural rules, deviate from the requirement of state law.** The procedure for the passage of municipal ordinances is a state, rather than a municipal affair.” (emphasis added).

ORDINANCE NO. _____

AN ORDINANCE TO AMEND §154.03 PRIVATE PARTIES/ZONING AMENDMENT TO CLARIFY THE POWERS OF THE PLANNING COMMISSION AND CITY COUNCIL WHEN A PROPERTY OWNER SEEKS REZONING

WHEREAS, the provision of §154.03 **Private Parties/Zoning Amendment** relating to the Planning Commission should clarify that it cannot approve a rezoning request, but only recommend approval to the City Council; and

WHEREAS, subsection (C) should be repealed as it does not comply with statutorily required procedures for approving a rezoning request.

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 §154.03 (B) of the Unified Development Code and enacts a replacement §154.03 (B) as shown below:

“§154.03 (B) *Action by Planning Commission.*

- (1) The Planning Commission may forward the rezoning request as submitted or amended by the Planning Commission to the City Council with a recommendation of approval.
- (2) The Planning Commission may disapprove the rezoning request so that the rezoning request will not be considered by the City Council unless the applicant properly appeals.”

Section 2: That the City Council of the City of Fayetteville, Arkansas hereby repeals §154.03 (C) and enacts a new (C) as shown below:

“(C) Action by the City Council.

- (1) The City Council may by majority vote approve and enact the rezoning ordinance as recommended by the Planning Commission or as requested by the applicant who has properly appealed the Planning Commission’s denial of the requested rezoning.
- (2) The City Council may amend the proposed rezoning request and approve such amended rezoning ordinance by majority vote.
- (3) The City Council may refuse to approve the rezoning request which is thereby denied.
- (4) The City Council can by motion return the proposed rezoning to the Planning Commission for further study and recommendation.

PASSED and APPROVED this 17th day of July, 2012.

APPROVED:

ATTEST:

By: _____
LIONELD JORDAN, Mayor

By: _____
SONDRA E. SMITH, City Clerk/Treasurer

Handed out at the
City Council Meeting 7-17-12

City Clerk - Fwd: PZD ordinance change

From: Alan Long
To: , City Clerk
Date: 7/17/2012 4:01 PM
Subject: Fwd: PZD ordinance change
CC: mayor , , , Justin Tennant , Bob Ferrell , Rhonda Adams , Sarah Lewis , Sarah Lewis , Matthew Petty

Kit, please see below. I believe that there may be some confusion regarding the ammendment that you have brought forward. In your memo to the city council and the mayor it states, "...I do not believe this section has ever been used in an attempt to require a super majority vote."
If you read the email below, you will recall that we specifically asked if this section could prevent a PZD. This was during the time when the 5 person ordinance was being considered and the Marinoni property development was being discussed along with project Cleveland.
Our neighborhood specifically intends to use this section of the UDC. I ask that the council not change this section of the code. It would be improper to change the code during a time when residents have asked if this code can be applied to protect their property.
Best Regards,

Alan Long
Ward 4 resident
Waterman Woods.

From: "Kit Williams" <kwilliams@ci.fayetteville.ar.us>
Date: April 18, 2012 4:41:52 PM CDT
To: "kay steven@rockouselaw.com" <kay.steven@rockouselaw.com>
Cc: Andrew Garner <agarner@ci.fayetteville.ar.us>, Jeremy Pate <jpate@ci.fayetteville.ar.us>, steven kay <steven@rockouselaw.com>
Subject: Re: PZD ordinance change

Steve,
As Alan has informed me that you represent him, I must direct my answer to you. The Unified Development Code speaks for itself. However, it appears to me that this section (which I have never seen used before) would apply to all zoning actions which should include a Planned Zoning District which does have an explicit zoning component. Please keep in mind that zoning regulations are always construed in favor of the Property owner and against the City. Language in this section "those immediately adjacent in the rear thereof" seem to limit those who may object rather strangely. It will be difficult to construe the intended meaning of this language.
Kit

Kit Williams, Fayetteville City Attorney
(479) 575-8313
FAX (479) 575-8315
113 West Mountain
Fayetteville, AR 72701

Alan Long <alanthomaslong@gmail.com> 4/18/2012

11:38 AM >>>

Does the following (154.03)(c)(2) apply to the PZD process for each approved PZD that comes before the city council?

(2)

*Vote. *When a proposed amendment affects the zoning classification of property, and in case a protest against such change is signed by the owners of 20% or more either of the area of the lots included in such proposed change, or of those immediately adjacent in the rear thereof extending 300 feet from the street frontage of such opposite lots, then such amendments shall not become effective except by the favorable vote of three-fourths of the City Council.

--

Alan
479.466.8219

--

Alan Long
Ward 4 resident
Waterman Woods.

Kit Williams
City Attorney

Jason B. Kelley
Assistant City Attorney

TO: Mayor Jordan
City Council

FROM: Kit Williams, City Attorney



DATE: July 12, 2012

RE: State Statutory Procedural Rules To Adopt Ordinances Must Be
Obeyed

I understand there is still some question about the legal need to repeal §154.03 (C)(2) of the Unified Development Code. This section reads as follows:

“Vote. When a proposed amendment affects the zoning classification of property, and in case a protest against such change is signed by the owners of 20% or more either of the area of the lots included in such proposed change, or of those immediately adjacent in the rear thereof extending 300 feet from the street frontage of such opposite lots, then such amendments shall not become effective except by the favorable vote of three-fourths of the City Council.”
§154.03 (C)(2)

By requiring a 75% super majority to pass a rezoning ordinance if a proper opposition petition has been presented, this U.D.C. Code section directly conflicts with at least three State statutes. State law provides that a rezoning amendment shall be “made in conformance with the procedure prescribed in §14-56-422, or by **majority vote** of the City Council.” A.C.A. §14-56-423 **Change in plans, etc.** (emphasis added).

A.C.A. §14-56-422 **Adoption of plans, ordinances and regulations** states that the ordinances recommended by the Planning Commission to the City Council may be adopted by the City Council “by a **majority vote of the entire**

membership” and that “nothing in this subchapter shall be construed to limit the city council’s authority to recall the ordinances ... by a **vote of majority of the council**. (emphasis added).

Therefore both of the statutes that prescribe the procedure for the adoption of the zoning code (§14-56-422) and amendment of that code and all rezoning (§14-56-423) clearly specify that the permissible procedure for passage will be “by a **majority** vote of the city council.”

The general State statute which prescribes the procedure for passing all ordinances by city councils also requires a simply majority.

“To pass any ... ordinance ..., a concurrence of a **majority** of a whole number of members elected to the council shall be required.” A.C.A. §14-55-203 **Voting requirements for passage – Effective dates** (emphasis added).

With these State statutes requiring a majority vote to pass an ordinance, can the city council require 75% rather than a simple majority? The answer is “No”.

In my initial memo to you, I quoted the Arkansas Supreme Court in *Brooks v. City of Benton*, 308 Ark. 571, 826 S.W. 2d 259, 261 (1992) holding that the earlier quoted statutory procedural requirements are **MANDATORY** and must be complied with. Adopting a conflicting procedural rule that a 75% super majority is needed for passage rather than a simple majority is not legally allowed.

“Cities have no inherent authority to enact legislation. That authority is dependent upon the Constitution and the General Assembly. Municipal zoning authority is conferred solely by state enabling legislation. **Failure to comply with mandatory procedural requirements of the enabling statute renders a zoning ordinance invalid.**” *Id.* (emphasis added).

This has been a consistent holding by the Arkansas Supreme Court. For example in *Osborne v. City of Camden*, 301 Ark. 420, 784 S.W. 2d 596, 597 (1990), the Arkansas Supreme Court stated: “Municipal zoning authority is conferred solely by State enabling legislation (such as A.C.A. §§14-56-422 and 423). **Failure to comply with a mandatory procedural requirement of the enabling statute renders a zoning ordinance invalid.**” (citations omitted). (emphasis added).

In an issue of how a rezoning ordinance must be adopted to be valid, the Arkansas Supreme Court stated:

“As we read the statutes, §14-56-423 is controlling, and it permits a change in the zoning plan, or **rezoning, by ‘majority vote of the city council’**” *Russellville v. Banner Real Estate*, 326 Ark. 673, 933 S.W. 2d 803, 805 (1996) (emphasis added).

Thus, we must follow state law and state law prescribes votes by a majority (not 75%) of the City Council to pass a rezoning ordinance.

ARKANSAS ATTORNEY GENERAL OPINIONS

Arkansas Attorney Generals have interpreted the clear holdings of the Arkansas Supreme Court on the requirement to follow State statutory procedure not only for passage of ordinances, but in other similar contexts. I quoted Arkansas Attorney General Pryor’s Opinion No. 2002-132 in my earlier memo to you: **“a municipality may not, by adoption of procedural rules, deviate from the requirements of state law.”** (page 2, emphasis added). Let me provide you with a longer explanation from that same Arkansas Attorney General Opinion:

“State law sets the requisite majority requirement for passage of such matters. A municipality may not adopt local procedural rules that conflict with the requirements of state law. I will also point out that the procedure for the passage of ordinances by a municipality is not a ‘municipal affair’ under A.C.A. §14-43-601 (a)(0), but is rather a ‘state affair’ subject to the general laws of the state. A municipality may not, therefore, deviate from state law on this issue.” *Id.* at page 3

Arkansas Attorney General Mark Pryor’s Opinion is in agreement with both earlier and more recent Arkansas Attorney General Opinions. For example when the City of Conway sought to make the civil service promotion process “more strict” than the statutory process, the Arkansas Attorney General opined such an effort would not be allowed.

“Cities are prohibited by state law from enacting any ordinance that is inconsistent with or contrary to state law.”
Arkansas Attorney General Opinion No. 99-055, page 1

“(I)t is clear under state law that city ordinances – whether more stringent or less stringent than state law – must be consistent with and not contrary to state law.” *Id.* at page 2

Since §154.03 (C)(2) conflicts with state law by requiring a much greater super majority to pass a rezoning ordinance than the simple majority required by state law, this code section must be repealed and is not enforceable.

“Because Conway City Ordinance 2.28.06, No. 6 directly conflicts with this requirement of state law, I must conclude that it is impermissible under Article 12, §4 of the Arkansas Constitution, and under the various statutes limiting cities’ authority to the requirements and parameters of state law.”
Id. at pages 2-3

A very recent Arkansas Attorney General Opinion (No. 2011-064) agrees with these earlier opinions. This opinion deals with state mandated procedure for a mayor to employ when issuing a veto of a ordinance or resolution. The Pine Bluff City Council had enacted a procedural requirement which would have required an earlier presentation to the City Council of the Mayor’s written reasons for vetoing an ordinance than is required by statute. Arkansas Attorney General Dustin McDaniel responded that “the ordinance conflicts with state law and is consequently unenforceable.” (page 1). The Attorney General explains his response later in his Opinion.

“In my opinion, given that the legislature has clearly delineated the mayor’s procedural obligations following a veto, it is equally clear that the city council cannot burden the mayor beyond these statutory obligations. Simply stated, a mayor is obliged to observe only the statutory procedural formalities, which cannot be enhanced by city ordinance.

‘Municipalities are creatures of the legislature and as such have only the powers bestowed upon them by statute or the constitution. ... **The validity of a city**

ordinance thus depends upon the authority granted by the legislature or constitution.' (citations omitted, emphasis in original).

“In the present case, the legislature has unambiguously stated what a mayor is obliged to do following a veto. A city council cannot by ordinance enhance that obligation.” *Id.* at page 4

CONCLUSION

As I stated in my memo of June 18, 2012 to you, §154.03 (C)(2) clearly conflicts with at least three State statutes that mandate only a **majority** of the City Council is needed to pass a rezoning amendment. Because §154.03 (C)(2) would sometimes require a 75% super majority in conflict with these State statutes, §154.03 (C)(2) is unenforceable and should be repealed. All of the decisions of the Arkansas Supreme Court and all of the Arkansas Attorney General Opinions that I could find relevant to this issue agree that **“a municipality may not, by adoption of procedural rules, deviate from the requirement of State law.”** Arkansas Attorney General Opinion No. 2002-132.

I do not believe that the issue of trying to apply or enforce §154.03 (C)(2) had come up during either my Alderman years (1992-1998) or my service as City Attorney (2001 to date) prior to the Cleveland Street Project. When it was brought to my attention that someone might attempt to use §154.03 (C)(2) to require a 75% super majority, I analyzed and researched this old (and unused) code section and determined it was unenforceable because it conflicts with State law. That is why I have presented the City Council with a revised §154 to remove this invalid subsection as well as to clarify and simplify the procedural options for the Planning Commission and City Council when dealing with proposed rezoning amendments.