

Added at  
Agenda Session  
2/26/13

**AGENDA REQUEST**

**FOR: COUNCIL MEETING OF MARCH 5, 2013**

---

---

**FROM:**

**KIT WILLIAMS, CITY ATTORNEY**

---

---

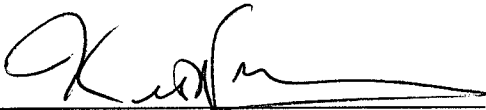
**ORDINANCE OR RESOLUTION TITLE AND SUBJECT:**

A Resolution To Oppose Senate Bill 367's Endangering All Of Fayetteville's  
Development Regulations

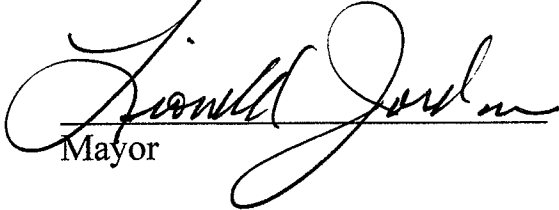
---

---

**APPROVED FOR AGENDA:**

  
\_\_\_\_\_  
City Attorney

February 22, 2013  
Date

  
\_\_\_\_\_  
Mayor

2/26/13  
Date


02-25-13 P04:02 RCVD  
Wsj

**Kit Williams**  
*City Attorney*

**Jason B. Kelley**  
*Assistant City Attorney*

**TO: Mayor Jordan**  
**Don Marr**, Chief of Staff  
**Jeremy Pate**, Development Services Director  
**Andrew Garner**, Senior Planner – Current Planning  
**Peter Nierengarten**, Sustainability & Strategic Planning

**FROM: Kit Williams**, City Attorney



**DATE: February 22, 2013**

**RE: Senate Bill 367 – Taxpayers may be forced to pay for application of development regulations including stormwater, drainage, tree preservation, landscaping, etc.**

Senate Bill 367 seeks to penalize city implementation of all regulatory programs affecting property by forcing taxpayers to pay for any perceived diminution in value of the immediately affected property owner's land. The legislators supporting this bill disagree with the United States Supreme Court which upheld reasonable zoning regulation of a parcel by recognizing that neighboring property owners also had property rights that were also worthy of protection. This "every lot is an island" approach ignores any ill effects or loss in value of neighboring lots if the property owner develops his lot with absolutely no regulation enacted by the democratically elected representatives of the citizens.

This law expressly attacks "overlay districts" such as the Fayetteville City Council enacted in 1994 to prevent further ugly and property devaluing commercial development near I-540. Some property owners complained that the City was devaluing their property by requiring greenspace, minimal landscaping and the construction of something other than the cheapest, square all metal buildings. Since a developer might be able to convince a jury that those regulations could "devalue" his property by more than 10% (by requiring

additional expenditures or not allowing construction and paving of 100% of his lot), the taxpayers would face serious financial losses if the City tried to enforce these regulations. Thus, these and all other development and any new zoning regulations could not be safely enforced.

When the I-540 Overlay District was being considered, one of our most successful and largest developers rose to speak to the City Council. Long known for his conservative views and his property development smarts, Mr. Jim Lindsey said this about the effect of the proposed land regulations of the I-540 Design Overlay District. "(T)his ordinance will create an atmosphere of beauty (and) growth along the bypass." (Minutes of the June 20, 1994 City Council meeting.)

Although the legislators sponsoring this bill evidently think Mr. Lindsey was wrong to believe reasonable land regulations could foster beauty **and** growth, his predictions have been proven true. In fact, these regulations spurred such quality commercial development along I-540 (increasing everyone's land values) that later, the Fayetteville citizens requested and the City Council passed commercial design standards for the entire City.

Since the adoption of such commercial design regulations and the later enactment of Tree Preservation, Hillside and Streamside Preservation and other development regulations, the City of Fayetteville has experienced great commercial growth. Indeed Fayetteville's sales tax receipts have doubled since the I-540 Design Overlay District was enacted. So history has proven Mr. Lindsey was absolutely correct that reasonable developmental regulations can spur quality development, growth, and increasing land values.

If SB 367 passes, all these development regulations must be thrown in the trash because it would be too risky to try to convince a jury that regulatory requirements and limitations on John Doe's land have not at least slightly (10%) decreased his property values to protect the property values of his neighbors. The landowner (like the legislative sponsors of this Bill) would argue that the jury must only look at his property in isolation and with no consideration of his neighbors. If John Doe shows some of his land must be landscaped or remain greenspace or that his building would cost more than the cheapest construction, a jury might believe he suffered enough of a devaluation (10% of the land's value) and award him taxpayer money to compensate him for doing what all his neighboring landowners already did. John Doe would cash in by building the "cheapest house on the block" devaluing all of his neighbor's properties which are left with no protection when development regulations are gutted by SB 367.

**Representative Charlie Collins (who is sponsor of SB 367)** was an excellent neighborhood representative when he spoke against an adjoining land owner's proposal to develop his land with "too much" density at the end of the dead end road running through Mr. Collins' neighborhood. Drainage issues including loss of trees on the hillside and traffic problems were presented as reasons to deny the development proposal. The neighbors also cited the City's fire safety regulations to prevent the landowner from developing his property as densely as he wished. If Representative Collins' SB 367 had been the law last year, I would have had to inform the City Council that they would have to ignore many of Mr. Collins' and his neighbors' concerns and complaints.

SB 367 would weaken or endanger all development regulations of every city in Arkansas. It basically repeals much of Chapter 56 **Municipal Building and Zoning Regulations – Planning** of Title 14 of the Arkansas Code as well as other State regulatory codes (building codes, fire codes, etc.) Senate Bill 367 would likely result in the virtual freezing of all zoning and changes to the zoning code. Even granting a property owner's request to rezone his property might be dangerous as neighboring property owners could claim that their properties' values have been reduced by more than 10% by the change in zoning authorized for the applicant.

In the many condemnation cases we have faced, the expert real estate appraisers often disagree about the land's value by more than 100% (one estimates the value at \$5,000.00 and the other at \$10,000.00). One major case involved land owner's appraisers' valuation of \$800,000.00 while the City's was \$40,000.00. We eventually settled for \$100,000.00 or one-eighth of the landowner's appraisal. Thus, a 10% difference in the appraised value of real estate will almost always be attainable. Most condemnation jury decisions are compromises between what the two land appraisers say the property is worth. Thus, a jury determination of a 10% difference in overall value regardless of the real impact of any zoning or development regulation on the property would be very likely. SB 367 strongly encourages litigation and would make the taxpayers pay even in very questionable circumstances.

Property owners have long been protected by the 5<sup>th</sup> Amendment of the U.S. Constitution and Arkansas inverse condemnation decisions. SB 367 would throw out decades of careful analysis and decisions by the Arkansas Supreme Court weighing a property owner's rights versus the rights of his neighboring property owners to determine when a regulation goes too far and compensation is

warranted. SB 367 places the bar for compensation so low that no regulation, regardless how reasonable and needed, would be safe to apply.

### CONCLUSION

Senate Bill 367 which is co-sponsored by Fayetteville's own Charlie Collins would basically repeal Fayetteville's:

- (1) Tree Ordinance;
- (2) Flood Damage Prevention Code;
- (3) Land grading regulations;
- (4) Stormwater Management, Drainage and Erosion Control regulations,
- (5) Landscape regulations;
- (6) Fire Prevention Code;
- (7) Virtually all development regulations designed to protect neighbors by requiring responsible development by a property owner.

SB 367 would likely freeze all current zoning in Fayetteville as even approving a property owner's requested rezoning could be dangerous if neighbors claim such rezoning would reduce their own property's value.

**RESOLUTION NO. \_\_\_\_\_**

**A RESOLUTION TO OPPOSE SENATE BILL 367'S ENDANGERING ALL  
OF FAYETTEVILLE'S DEVELOPMENT REGULATIONS**

**WHEREAS**, Senate Bill 367 which is co-sponsored by Fayetteville Representative Charlie Collins, would endanger and likely prevent enforcement of any development regulations by Fayetteville and all other Arkansas cities; and

**WHEREAS**, Fayetteville development regulations are necessary to protect neighboring land owners from flooding, fire hazards, land erosion, large billboards and flashing signs, and other incompatible, unsightly and unscreened development which could damage the peace, health and safety of our citizens and devalue their neighboring properties; and

**WHEREAS**, SB 367 would penalize Fayetteville taxpayers if the City sought to enforce development ordinances such as the Tree Preservation and Protection Ordinance and the Stormwater Management, Drainage and Erosion Control Ordinance or fire safety codes, etc.; and

**WHEREAS**, the Arkansas Supreme Court has consistently held that "the individual's use and enjoyment of property is always subject to reasonable regulations in order to preserve the welfare of the public at large," *Yarbrough v. Arkansas State Highway Commission*, 539 S.W. 2d 419, 421 (1976).

**NOW, THEREFORE BE IT RESOLVED BY THE CITY COUNCIL OF THE  
CITY OF FAYETTEVILLE, ARKANSAS:**

Section 1: That the City Council of the City of Fayetteville, Arkansas hereby expresses its opposition to Senate Bill 367's unmerited attack upon all Arkansas cities' attempts to protect and preserve the health, safety and welfare of their citizens by enacting and enforcing reasonable zoning and development regulations.

Section 2: The City Council of the City of Fayetteville, Arkansas hereby requests that Representative Charlie Collins, all other State Representatives and Senators who represent citizens of Fayetteville, and all other Arkansas Legislators to oppose, reject and vote against SB 367 and any amended versions thereof.

**PASSED and APPROVED** this 5<sup>th</sup> day of March, 2013.

APPROVED:

ATTEST:

By: \_\_\_\_\_  
**LIONELD JORDAN**, Mayor

By: \_\_\_\_\_  
**SONDRA E. SMITH**, City Clerk/Treasurer

1 State of Arkansas  
2 89th General Assembly  
3 Regular Session, 2013  
4

# A Bill

SENATE BILL 367

5 By: Senators J. Hendren, Bledsoe, A. Clark, J. Dismang, Hester, Holland, J. Hutchinson, Irvin, B. King,  
6 D. Sanders  
7 By: Representatives D. Altes, Baine, Ballinger, Barnett, Collins, Cozart, Davis, Deffenbaugh, C. Douglas,  
8 D. Douglas, Gossage, Harris, Mayberry, Wren  
9

## For An Act To Be Entitled

10 AN ACT TO ADDRESS THE PROTECTION OF PRIVATE PROPERTY;  
11 AND FOR OTHER PURPOSES.  
12  
13

### Subtitle

14 TO ADDRESS THE PROTECTION OF PRIVATE  
15 PROPERTY.  
16  
17  
18  
19

20 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:  
21

22 SECTION 1. DO NOT CODIFY. Legislative findings.

23 (a) From time to time, state and local regulatory programs have the  
24 effect of reducing the market value of private property.

25 (b) When state and local regulatory programs reduce the market value  
26 of private property and do not through their implementation abate a public  
27 nuisance affecting the public health, safety, morals or general welfare, it  
28 is fair and appropriate that the state or the locality compensate the  
29 property owner for the loss in market value of the property caused by the  
30 implementation of the regulatory program.

31 (c) Compensation to the property owner is also fair and appropriate in  
32 cases involving regulatory programs which abate a public nuisance when the  
33 property owner neither contributed to the public nuisance, acquired the  
34 property knowing of the public nuisance, nor acquired the property under  
35 circumstances in which the property owner should have known about the  
36 nuisance based upon prevailing community standards.



1       (d) In order to establish a fair and equitable compensation system to  
2 address these stated public policy concerns and findings, there is hereby  
3 established a compensation system in this act.  
4

5       SECTION 2. Arkansas Code Title 18, Chapter 15, is amended to add an  
6 additional subchapter to read as follows:

7       Subchapter 17 - Private Property Protection Act  
8

9       18-15-1701. Title.

10       This subchapter shall be known and may be cited as the "Private  
11 Property Protection Act".  
12

13       18-15-1702. Definitions.

14       As used in this subchapter:

15               (1) "Real property" means real property, the use of which is  
16 directly controlled or regulated by a regulatory program; and

17               (2) "Regulatory program" means any rule, regulation, law, or  
18 ordinance that affects the fair market value of real property. Such  
19 regulatory programs include without limitation moratoriums on growth,  
20 aesthetic or scenic districts, environmental districts, overlay districts,  
21 green space ordinances, landscape ordinances, tree ordinances, land use  
22 planning programs, or zoning programs.  
23

24       18-15-1703. Inverse condemnation.

25       (a) Whenever implementation by the state or any of its political  
26 subdivisions of any regulatory program operates to reduce by at least ten  
27 percent (10%) the fair market value of real property for the uses permitted  
28 at the time the owner acquires the title, or on the effective date of this  
29 act, whichever is later, the property shall be deemed to have been taken for  
30 the use of the public.

31       (b)(1) The owner or user shall have the right to require condemnation  
32 by and adequate compensation from the governmental unit, or units when more  
33 than one (1) governmental unit is involved, imposing the regulation resulting  
34 in decreased value, or to receive compensation for the reduction in value  
35 caused by government action, and in either case to have the compensation  
36 determined by a jury.



1           (2) When more than one (1) governmental unit is involved, the  
2 court shall determine the proportion each unit shall be required to  
3 contribute to the compensation.

4           (3) Compensation is required under this section only in  
5 instances where the fair market value of the property is reduced by at least  
6 ten percent (10%).

7           (c)(1) Governmental units subject to the provisions of this subchapter  
8 shall not make waiver of the provisions of this subchapter a condition for  
9 approval of the use of real property or the issuance of any permit or other  
10 entitlement. Plaintiffs may accept an approval of use, permit, or other  
11 entitlement granted by the governmental unit without compromising their  
12 rights under this subchapter if:

13                   (A) A written reservation of rights is made at the time of  
14 acceptance of the authorization, permit, or other entitlement; or

15                   (B) By oral statement made before the governmental unit  
16 granting the authorization, permit, or other entitlement at a public meeting  
17 at which the governmental unit renders its decision.

18           (2) The owner or user may make his or her reservation in either  
19 or both forms.

20           (d) When any regulatory program resulting from a zoning ordinance  
21 operates to change a permitted use and the fair market value of the affected  
22 real property is the same or greater than before the effective date of the  
23 implementation of the regulatory program, compensation shall not be paid  
24 under this subchapter.

25  
26           18-15-1704. Nuisance matters.

27           (a) Compensation shall not be required under this subchapter if the  
28 regulatory program is an exercise of the police power to prevent uses noxious  
29 or harmful to the health and safety of the public.

30           (b) A use shall be deemed a noxious use if it amounts to a public  
31 nuisance.

32           (c) Determination by the governmental unit or units involved that a  
33 use is a noxious use or poses a demonstrable harm to public health and safety  
34 is not binding upon the court.

35           (d) This subchapter does not apply to laws or rules within the  
36 jurisdiction of the State Health Officer.

1  
2 18-15-1705. Statute of limitations.

3 (a)(1) The statute of limitations for actions brought under this  
4 subchapter is under § 16-56-115.

5 (2) The statute of limitations begins upon the final  
6 administrative decision implementing the regulatory program affecting  
7 plaintiffs' property.

8 (b) A program is implemented with respect to an owner's or user's  
9 property when actually applied to that property.

10  
11 18-16-1706. Regulatory rollback.

12 (a)(1) If the governmental unit exercising inverse condemnation under  
13 this subchapter is unwilling or unable to pay the costs awarded, it may relax  
14 the land use planning, zoning, or other regulatory program as it affects the  
15 plaintiff's land and all similarly-situated land in the jurisdiction in which  
16 the regulatory program is in effect to the level of regulation in place as of  
17 the time the owner acquired title or on the effective date of this act,  
18 whichever is later.

19 (2) In this event, the governmental unit is liable to the  
20 plaintiff landowner or user for reasonable and necessary costs of the inverse  
21 condemnation action, plus any actual and demonstrable economic losses caused  
22 to the plaintiff by regulation during the period in which it was in effect.

23 (b) This section does not affect any remedy which is constitutionally  
24 required.

25 (c)(1) Notwithstanding other law, the governmental unit subject to an  
26 award of compensation under this subchapter may elect to relax the land use  
27 planning, zoning, or other regulatory program without further public  
28 hearings, proceedings, or environmental review.

29 (2) If the governmental unit elects to relax the affected  
30 regulatory program, the previous program shall automatically be in effect.

31  
32 18-15-1707. Legal challenges.

33 Nothing in this subchapter precludes property owners from bringing  
34 legal challenges to regulatory programs affected by this subchapter in  
35 instances in which the regulation caused diminution in value of the property  
36 for the uses permitted at the time the owner acquired title, or the effective

1 date of this act, whichever is later, nor shall it preclude property owners  
2 from bringing legal challenges to regulatory programs under other law.

3  
4 SECTION 4. EMERGENCY CLAUSE. It is found and determined by the  
5 General Assembly of the State of Arkansas that some actions by the state and  
6 its political subdivisions reduce the value of real property; that the  
7 property owners now are not being compensated for that reduction in value;  
8 and that this act is immediately necessary because the inequity needs to be  
9 eliminated as soon as possible. Therefore, an emergency is declared to exist,  
10 and this act being immediately necessary for the preservation of the public  
11 peace, health, and safety shall become effective on:

12 (1) The date of its approval by the Governor;

13 (2) If the bill is neither approved nor vetoed by the Governor,  
14 the expiration of the period of time during which the Governor may veto the  
15 bill; or

16 (3) If the bill is vetoed by the Governor and the veto is  
17 overridden, the date the last house overrides the veto.

18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32  
33  
34  
35  
36

