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Regular 7.

Regular City Council Meeting**Meeting Date:** 08/11/2014**TITLE:** Public Hearing & First Reading, Non-Discrimination Ordinance**PRESENTED BY:** Tina Volek**Department:** City Hall Administration

PROBLEM/ISSUE STATEMENT

Following a work session presentation in December 2013 by the City's Human Relations Commission, the City Council on January 27, 2104, directed staff to review non-discrimination ordinances adopted by other Montana cities, and to bring a draft ordinance forward for Council consideration after adoption of the Fiscal Year (FY) 2015 budget. The Council also directed staff to revise City employment non-discrimination administrative orders.

At a May 27, 2014, work session, the Council directed staff to stop working on the non-discrimination ordinance (NDO) and, if required for public input or comment, to place that directive on the next regular Council meeting for a vote. The Council subsequently defeated the directive at a June 9, 2014, business session.

The City Council reviewed a first draft ordinance at its June 16, 2014 work session. Council reviewed additional drafts at work sessions on July 7 and 21, 2014. On June 23, 2014, the City Council directed the City Attorney to seek a Montana Attorney General's opinion on whether Billings has the authority to enact an NDO. At the July 21, 2014, work session, the Council directed staff to put the NDO draft on the agenda for a public hearing and vote.

As noted previously, the NDO prohibits discrimination in employment, housing and public accommodation against lesbians, gays, bisexuals or transgendered people. Billings is the first jurisdiction of those adopting an NDO in Montana to use a municipal infraction process to handle discrimination complaints. Other amendments were made as directed by Council during work sessions.

Amendments to the City's administrative orders are dependent on the version of the NDO that is adopted, and will be made by staff following the Council's approval of the NDO.

Administrative orders do not require a Council vote.

ALTERNATIVES ANALYZED

The City Council must hold a public hearing and then may:

- Approve the ordinance on first reading, undertake a second reading on the consent agenda of August 25, 2014, and, if approved, allow the ordinance to become effective 30 days after the second reading;
- Approve the ordinance on the first reading, undertake the second reading on August 25, but delay the ordinance's effective date until the Attorney General's opinion is received on the City's authority to enact it;
- Amend the ordinance, undertake the second reading on the amended ordinance August 25, and allow the amended ordinance to become effective in 30 days;

- Place the ordinance on a future ballot (it is too late to process the ordinance for the November 4, 2014, election);
- Postpone action to another date; or
- Not approve the ordinance.

FINANCIAL IMPACT

There is no cost to enacting the ordinance, other than the Council and staff time it has taken to develop and discuss it. If the Council decided to put the ordinance to a public vote, there would be costs for an election, which would depend on whether it was a stand-alone item, or combined with another item on the ballot. The cost of enforcing the ordinance in the future cannot be predicted. No cases have been filed in the four other Montana cities that have enacted non-discrimination ordinances over the past four years, so there may be no cost at all.

RECOMMENDATION

The Council previously has taken public comment, reviewed and given staff direction on the NDO three times. Barring some additions or corrections at the August 11, 2014, meeting, Staff believes the NDO is ready for action by the Council. However, staff is concerned about taking the time and money to create a process for handling complaints or to actually begin processing complaints, only to be told by the Attorney General that the City does not have the authority to enact such an ordinance.

For those reasons, the staff recommends that the Council adopt the NDO at first and second readings, but that it postpone enactment of the ordinance until an Attorney General's opinion is received.

APPROVED BY CITY ADMINISTRATOR

Attachments

Ordinance

ORDINANCE NO. _____

AN ORDINANCE OF THE CITY OF BILLINGS, PROVIDING THAT THE BILLINGS, MONTANA CITY CODE BE AMENDED BY ADDING SECTIONS TO BE NUMBERED 7-1801 through 7-1808; PROHIBITING DISCRIMINATION AGAINST PERSONS BASED ON SEXUAL ORIENTATION OR GENDER IDENTITY OR EXPRESSION

Section 1. That Chapter 7, Businesses and Business Regulations, of the Billings, Montana City Code is hereby amended by adding a new Article 7-1800, adding sections to be numbered 7-1801 through 7-1808:

Article 7-1800

ILLEGAL DISCRIMINATION

7-1801: INTENT AND PURPOSE:

WHEREAS, state and/or federal law prohibit the denial of civil rights or discrimination on the basis of age, race, color, national origin, ancestry, religion, creed, sex, pregnancy, marital status, familial status (solely for housing), and physical or mental disability; and

WHEREAS, in addition to these protections, it is the intent of the City of Billings that no person shall be denied their civil rights or be discriminated against based upon their sexual orientation or gender identity or expression; and

WHEREAS, the City Council declares that such discrimination prohibitions are necessary and desirable because existing state and federal laws regarding discrimination do not expressly or clearly address all discriminatory acts reported through correspondence, emails and public comment to the Mayor and City Council by the City's diverse residents; and

WHEREAS, Therefore, the City deems it necessary to adopt local regulations adapted to the needs of its citizens.

WHEREAS, Nothing in this title is intended, however, to conflict with state and federal laws, or to alter or abridge other rights, protections, or privileges secured by state or federal law, including state and federal constitutional protections of freedom of speech and exercise of religion.

Note 1: Per Council Member Cimmino's request, the Intent and Purpose section was divided into separate WHEREAS clauses for better readability and improved listing of the reasons for the Ordinance. Also, a brief underlined portion in the third WHEREAS has been added to clarify that reports of discrimination have

arisen through various communications to the Mayor and Council through public testimony, letters and emails.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF BILLINGS, MONTANA:

7-1802: DEFINITIONS: As used in this Article, unless the context requires otherwise, the following definitions apply:

Bi-sexual: sexually attracted to people of both sexes.

Discrimination: "Discrimination", "discriminate" or "discriminatory" means any act, policy, or practice that has the effect of unfavorably subjecting any person to different or separate treatment because of their sexual orientation or gender identity or expression or association with a person or group of people so identified, or on the belief that a person has a particular sexual orientation or gender identity or expression even if that belief is incorrect.

Employee: An individual employed by an employer.

Employer: An employer of one or more persons or an agent of the employer. It does not include a fraternal, charitable, or religious association or corporation unless the association or corporation is organized either for private profit or to provide accommodations or services that are available on a non-membership basis. It does not include any political subdivision except the City of Billings.

Employment agency: A person undertaking to procure employees or opportunities to work.

Gender identity or expression: A gender-related identity, expression, or behavior, regardless of the individual's sex at birth.

Heterosexual: sexually attracted to people of the opposite sex

Homosexual: sexually attracted to people of the same sex

Housing accommodation: A building or portion of a building, whether constructed or to be constructed, that is or will be used as the home, domicile, residence, or sleeping quarters of its occupants. It does not include the rental of sleeping rooms in a private residence designed for single-family occupancy in which the owner also resides, provided that the owner rents no more than three sleeping rooms within the residence.

Labor organization: An organization or an agent of an organization organized for the purpose, in whole or in part, of collective bargaining, of dealing with employers concerning grievances or terms or conditions of employment, or of other mutual aid and protection of employees.

Non-binary: gender identities other than man or woman.

Person: One or more individuals, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated employees' associations, employers, employment agencies, organizations, or labor organizations.

Political subdivision: federal, state or county government employers or public schools located within the boundaries of the City of Billings.

Public accommodation:

- (a) A place that caters or offers its services, goods, or facilities to the general public, subject only to the conditions and limitations established by law and applicable to all persons. It includes, without limitation, a public inn, restaurant, eating house, hotel, roadhouse, place where food or alcoholic beverages or malt liquors are sold for consumption, motel, soda fountain, soft drink parlor, tavern, nightclub, trailer park resort, campground, barbering, cosmetology, electrology, esthetics, or manicuring salon or shop, bathroom, rest-house, theater, swimming pool, skating rink, golf course, café, ice cream parlor, transportation company, hospital, and all other public amusement and business establishments.
- (b) "Public accommodation" does not include an institution, club, or place of accommodation that proves that it is, by its nature, distinctly private. An institution, club, or place of accommodation may not be considered by its nature distinctly private if it has more than 100 members, provides regular meal service, and regularly receives payment for dues, fees, use of space, facilities, services, meals, or beverages, directly or indirectly, from or on behalf of nonmembers, for the furtherance of trade or business. For the purposes of this definition, any lodge of a recognized national fraternal organization is considered by its nature distinctly private
- (c) "Public accommodation" does not include a church or other religious association or corporation, except to the extent it maintains a place described in subsection (a), other than a bathroom.
- (d) "Public accommodation" does not include a private educational institution with a curriculum based in whole or in part upon religious faith.

- (e) Nothing contained herein shall be construed as a requirement to construct additional facilities such as bathrooms, locker rooms, dressing rooms at any place of public accommodation as defined above.

Sexual orientation: Heterosexual, bisexual, homosexual, transgender, or non-binary.

Note 2: “Transgender” removed from the definition of sexual orientation per Council Member McCall’s request during the July 21, 2014 worksession.

Transgender: of, relating to, or being a person who identifies with or expresses a gender identity that differs from the one which corresponds to the person’s sex at birth.

7-1803: PROHIBITED DISCRIMINATION – Jurisdiction; Exclusions: The prohibited discrimination set forth in this Article applies only to acts and/or incidents occurring within the boundaries of the City of Billings, Montana. This article does not apply to acts or incidents involving political subdivisions, other than the City of Billings.

7-1804: EMPLOYMENT DISCRIMINATION PROHIBITED:

- A. No employer shall discriminate in the employment, failure to hire, refusal to hire, compensation, work classification, terms, conditions, or privileges of employment, including promotion, demotion, or termination of employment.
- B. No employer shall fail or refuse to refer for employment, or give negative information to a potential employer of an individual, in such a manner that would deprive or limit an individual’s employment opportunities or that would otherwise adversely affect an individual’s status as an applicant or prospective employee, for a discriminatory reason.
- C. No labor organization shall discriminate in limiting membership, conditions of membership, or termination of membership of any person in any labor union or apprenticeship program.
- D. No employment agency shall discriminate in the procurement or recruitment of any person for possible employment with an employer.

7-1805: DISCRIMINATION IN PUBLIC ACCOMODATIONS PROHIBITED: It shall be unlawful for a place of public accommodation to deny, directly or indirectly, any person full and equal access or enjoyment of the goods, services, activities, facilities, privileges, advantages, and accommodations for a discriminatory reason. **However, in any place of public accommodation where users ordinarily appear in the nude, users may be required to use the facilities designated for their anatomical sex, regardless of their gender identity, but may use facilities designated as a family bathroom or bathrooms for use by any sex. Such requirement does not constitute unlawful discrimination for purposes of this Section.**

~~However, in any place of public accommodation where users ordinarily appear in the nude, users may be required to use the facilities designated for their anatomical sex, regardless of their gender identity, but may use facilities designated as a family bathroom or bathrooms for use by any sex. Such requirement does not constitute unlawful discrimination for purposes of this Section.~~

Note 3: Per Council Member McCall's request during the July 21, 2014, worksession there are two alternatives here:

1. Alternative One: Keep the shaded/bolded language.
2. Alternative Two: Delete the shaded/bolded language.

7-1806: HOUSING DISCRIMINATION PROHIBITED: It is unlawful for any person, owner, manager, employee, or any entity whose business includes engaging in any residential real estate-related transactions to discriminate in the sale, lease or rental of any housing facility, or to otherwise discriminate in the terms, conditions, maintenance, improvement, or repair of any housing facility.

7-1807: RETALIATION PROHIBITED: No person shall coerce, threaten, discharge, expel, blacklist, or otherwise retaliate against another person for opposing any practices prohibited by this title, making a complaint, or assisting in an investigation or proceeding regarding an alleged violation of this title; nor shall any person require, request, conspire with, assist, or coerce another person to retaliate against a person for making a complaint or assisting in an investigation or proceeding.

7-1808: VIOLATION – CIVIL REMEDY – EXHAUSTION OF HUMAN RIGHTS BUREAU REMEDY

Any person claiming a violation of this chapter may seek civil remedies, injunctive relief, attorney fees or other equitable relief by petitioning the Billings Municipal Court or by seeking to have a municipal infraction issued.

(1) Prior to the filing of a petition or seeking to have a municipal infraction issued in the Billings Municipal Court under this Article, a person must have:

- (a). Timely filed a complaint with the Montana Human Rights Bureau within the time frames set forth in Section 49-2-501, MCA, alleging discrimination in employment, public accommodations or housing, or retaliation; and
- (b). Received a written disposition of the complaint from the Montana Human Rights Bureau, Montana Department of Labor & Industry Hearings Bureau, Montana Human Rights Commission, or any Montana court indicating that the

acts of alleged discrimination or retaliation underlying the complaint do not fall within the scope of the Montana Human Rights Act.

(2) Within ninety (90) days of receipt of the written disposition from the Montana Human Rights Bureau as referenced in (1)(b), a person claiming a violation of this Article may either file a petition with the Billings Municipal Court or file a complaint requesting the investigation of an alleged municipal infraction by the Billings Police Department, but not both. It is intended that violations of this Article not specifically addressed by Montana state law are to be civil municipal ordinance violations intended to be enforceable solely by the complaining person claiming a violation of this Article or their authorized representative through a civil proceeding or a municipal infraction within the exclusive jurisdiction of the Billings Municipal Court. The Montana Rules of Civil Procedure shall apply, except and unless the Billings Municipal Court establishes alternative rules of civil procedure for matters within the exclusive jurisdiction of the Billings Municipal Court.

To the extent allowed by law, a person filing a civil action claiming a violation of this Article may seek civil remedies, injunctive relief, costs, or other equitable relief incurred in the bringing of said claim and within the jurisdiction of Municipal Court. The Court in its discretion may allow the prevailing party a reasonable attorney's fee as part of the costs of suit.

Alternate 1: Any damages awarded by the Court to a successful complainant shall be limited to a maximum of Twelve Thousand Dollars (\$12,000) exclusive of fees and costs. Attorney's fees shall be awarded in the discretion of the Municipal Court and are not mandatory.

Alternative 2: Any award of damages by the Court to a successful complainant shall be limited to a total amount of Three Thousand Dollars (\$3000) exclusive of attorney's fees and costs. Attorney's fees shall be awarded in the discretion of the Municipal Court and are not mandatory.

Alternative 3: No damages shall may be awarded to a successful complainant ~~however~~ and reasonable attorney's fees may be awarded in the discretion of the Municipal Court.

Note 4: Alternative Three has been amended per Council Member Bird's request during the July 21, 2014 worksession. In addition, these alternatives have been continued and remain to be decided , amended or deleted based on the discussions during the July 7 and July 21, 2014 worksessions)

Should a person claiming a violation of this Article choose the option of filing a complaint for a municipal infraction, then the procedure and civil penalties specified in section 18-1304, BMCC, shall exclusively apply.

Section 2. Severability. If any provision of this ordinance or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect the other provisions of this ordinance which may be given effect without the invalid provisions or application, and, to this end, the provisions of these ordinances are declared to be severable.

Section 3. Repealer. All resolutions, ordinances, and sections of the City Code inconsistent herewith are hereby repealed.

Section 4. Effective Date. This ordinance shall be effective thirty (30) days after second reading and final adoption as provided by law.

APPROVED on first reading this ____ day of _____, 2014.

ADOPTED and APPROVED on second reading this ____ day of _____, 2014.

CITY OF BILLINGS

By _____
Thomas W. Hanel, Mayor

ATTEST:

By _____
Cari Martin, City Clerk

