

**SUMMARY OF ADMINISTRATIVE MEETING**  
**October 10, 2012 – 4:00 p.m.**  
**Room 326, City-County Building**

1. Call to order, introductions, opening comments – Mayor Smith called the meeting to order. Commissioners Elsaesser, Ellison, Haque-Hausrath and Thweatt were present. Staff present was: City Manager Ron Alles; Executive Assistant Clinda Feucht; City Attorney Jeffrey Hindoien; Assistant Fire Chief Sean Logan; Administrative Services Director Tim Magee; Community Development Director Sharon Haugen; Human Resource Director James Fehr; Parks & Recreation Director Amy Teegarden; Public Works Director Phil Hauck; Assistant Police Chief Dave Jeseritz and City Clerk Debbie Havens.

Others in attendance included: Jamie Greer, Becky Stockton, Paul Goodman, Mike Dellwo, Kim Milburn, Sharon Nason, Sharon Turner, Jan Stewart, Mike Kescke; Jerry Hamlin, Tom Rasmussen and IR Reporter Sanjay Talwani.

2. **September 19, 2012 Administrative Meeting Summary** – The September 19, 2012 administrative summary was approved as submitted.

3. **Commission comments, questions** – Commissioner Elsaesser reported on the League of Cities of Towns conference in Kalispell; Helena will host the conference in 2013. He offered to sit on a planning committee. He also reported on the topics discussed at the League Conference, including the pension reform; rail crossings and quiet zones. Commissioner Elsaesser stated he recently attended an event at the Holter Museum to welcome the new physicians to St. Peter's Hospital.

Commissioner Ellison spoke on the oil development and impacts on the towns in the eastern part of Montana; a panel discussion on this topic was held at the league conference. Manager Alles noted the sessions were all good in addition to the networking opportunities.

Commissioner Thweatt asked if a budget appropriation was approved for the quiet zone. Commissioner Elsaesser stated 2.5% of the street assessment increase, in the amount of \$75,000, was approved to be dedicated to trail and sidewalk crossings in conjunction with Centennial Trail and establishment of a railroad quiet zone. He noted he believes this amount would be an ongoing budget allocation for long-term projects. Mayor Smith stated he did not think the approved \$75,000 was an ongoing earmark.

Administrative Services Director Magee noted the earmarked amount will be carried over as part of the street program from year to year, unless the commission votes not to do so. Mayor Smith again stated he does not believe the earmark is a continuous funding source; the commission would have to approve it on an annual basis. Commissioner Haque-Hausrath stated she too believes the commission would have to review and vote on any earmark on an annual basis. Commissioner Elsaesser stated the projects identified are very expensive and the allocation would need to be on-going to fund them.

Mayor Smith asked Commissioner Ellison if he heard any predictions on how far west the energy development would be occurring. Commissioner Ellison stated the only map he saw showed energy development ending approximately halfway between the eastern boundary and the western end of the Fort Peck Reservoir. Commissioner Ellison noted he did not hear anyone say the development would be moving any further west.

**A.) Upcoming Appointments** – There are no appointments on the October 15, 2012 city commission meeting agenda.

4. **City Manager's Report**– Manager Alles introduced Human Resource Director James Fehr. Director Fehr addressed the commission and gave his employment background.

Manager Alles reported the Board of Health is looking through the comment period on the institutional controls for East Helena Asarco site. It does affect a small portion of the city and he has met with Health Director Melanie Reynolds and her staff to discuss the city's controls. He will keep the commission informed as the process continues. Representatives from the Board of Health has been invited to the next joint work session to speak on this issue.

City Manager Alles gave an overview of the Board of Health's lead testing program. The Board of Health has also determined a zone of influence; where certain areas have been identified that would require a property owner to notify the Board of Health prior to disturbing the ground.

Commissioner Haque-Hausrath noted the city of Bozeman added a check box on the building permit application asking if a property is located in the identified area of influence.

## **5. Department Discussions**

### **Administrative Services**

**Impact Fees** – Administrative Services Director Magee gave PowerPoint presentation on the Impact Fees Overview/Status report summarizing the following:

- Outline of the process to date
- Project Costs
- 2006 through 2010 progress
- Reports/Drafts developed to date:
  - Impact Fee Study Feasibility Report
  - Impact Fee Service Area Report
  - Impact Fee Ordinance Draft
  - Impact Fee Advisory Committee – Final Report
- Statutory Definitions relating to Impact Fees
  - Capital Improvements
  - Impact Fee
  - Public Facility
  - Service Area Report – budget component
- Recommendations
  - Proceed with ordinance drafting to establish city authority
  - No immediate action on setting impact fees.

Director Magee handed out a hard copy of his PowerPoint presentation and explained the process that would need to happen before impact fees could be adopted and implemented. Manager Alles concurred with Director Magee's comments and recommended moving forward with the ordinance authorizing the city to charge impact fees. Once that is done, the process of setting impact fees could be worked on.

Commissioner Ellison asked where the county is with their Growth Policy Update and on impact fees. Manager Alles stated he does not believe the county has a process or system in place where they could collect impact fees. The county has a ways to go before adopting their Growth Policy update and Subdivision Regulations.

Commissioner Thweatt asked what developments would be covered after an ordinance is adopted and before a fee is approved. Manager Alles stated the fees would not be implemented and enforced until the fee resolution is adopted.

Commissioner Elsaesser asked if the city adopts the impact fees, would it retire the system development fees. Manager Alles stated the system development fees would continue until they are replaced with some other type of fees. Commissioner Elsaesser stated he has concerns with the complexity of impact fees compared to the system development fees. Manager Alles stated he would not put the city's system development fees at risk; however, the initial review is they would not be affected by adopting the ordinance authorizing the city to charge impact fees. Commissioner Elsaesser asked if the ordinance is approved giving the city the authority to adopt impact fees, would there be a legal obligation to implement impact fees and would there be a process for waivers. Manager Alles stated he cannot give specifics on who has to pay the impact fees and who may receive a waiver of the fees.

Commissioner Haque-Hausrath stated she supports moving forward with the ordinance to give the city authority to set impact fees. Commissioner Haque-Hausrath spoke on moving forward without the county and what bills will be addressed during the 2013 legislature that would deal with exempt wells outside the city limits.

Commissioner Elsaesser stated at the present time, he doesn't see where development is not already paying for itself. He then asked if impact fees could be assessed outside the city limits. City Manager Alles noted a legal review would need to be done on that question.

Mayor Smith stated he is uncomfortable proceeding with impacts fees without the county's participation. He believes there will be unattended consequences of driving development further out into the valley. Commissioner Elsaesser stated impact fees are a tool the county needs and he wants to continue to work with the county to adopt joint impact fees.

Manager Alles stated staff will move forward to prepare an ordinance authorizing the city to set impact fees. However, he does not see the city implementing impact fees without the county's participation.

Commissioner Thweatt stated he does not see any adverse effect of moving forward with the ordinance to set up the authority to implement impact fees.

Commissioner Ellison stated he would rather work with the county and get back on track before the commission adopts an ordinance. If the ordinance is what will move the county forward, he would be willing to consider it.

Commissioner Thweatt asked what the costs would be to draft the ordinance. Manager Alles could not give the costs at this time. However, it would be mostly staff time between legal and administrative services.

Commissioner Elsaesser noted the commission could adopt the ordinance; however, he wants the public process to be very clear that by adopting the ordinance, the impact fees are not being adopted. He again expressed his concerns with the statement that development does not pay their own way and noted he believes they already do by the system development fees.

There was commission consensus to have Manager Alles to proceed with the ordinance.

### **City Attorney**

**Non-Discrimination Ordinance Draft** – City Manager Alles and City Attorney Hindoien presented the commission with the following memo for purpose of discussion:

The following is intended to both:

- advise you of some new information that I learned of just last week at the City Attorney Conference at MLCT; and
- provide some additional information concerning at least a couple of the questions that have arisen during our previous discussions of the draft ordinance.

### **MT Human Rights Bureau Memorandum**

In terms of Item (1), I've attached a copy of a "Legal Guidance Memorandum" that was directed to the Bureau Chief of the MT Human Rights Bureau in June of 2012 concerning the effect of an April 2012 decision by the U.S. Equal Employment Opportunity Commission. (See *attached Exhibit "A"*) Although I was aware of and had reviewed the EEOC's decision in *Macy v. Holder* earlier this summer, I was not certain as to what immediate impact – if any – that decision was going to have on the manner in which the Human Rights Bureau investigates and processes claims under both Title VII of the Civil Rights Act and the Montana Human Rights Act (Title 49, MCA). Absent any firm information in that regard, I was hesitant to formally "inject" the potential effect of the *Macy* decision into the analytical dialogue attendant to the Commission's consideration of the present ordinance.

In that regard, the attached Memorandum was provided to the City Attorney's group last Thursday at MLCT. Based on the Memo, it is clear that, in the wake of *Macy*, the MT Human Rights Bureau will now be interpreting the sex discrimination provisions in the MT Human Rights Act in the same fashion as the EEOC (and several federal courts) have interpreted Title VII's sex discrimination provisions, i.e., as extending to claims of discrimination based on gender identity, gender stereotyping, etc. As the EEOC noted in *Macy* regarding the latter, "claims of discrimination based on transgender status, also referred to as claims of discrimination based on gender identity, are cognizable under Title VII's sex discrimination prohibition."

The Memo also indicates that, from the Bureau's perspective, "[t]he *Macy* ruling will also impact gender-based stereotyping claims filed by lesbian, gay and bisexual individuals", and that "[t]he analysis set forth by the EEOC can be applied to any case in which a charging party fails to conform to gender-based stereotypes." Thus, in response to the *Macy* decision, HRB investigators will now be looking at claims of gender-based stereotyping under ***both*** "the classic fact pattern of *Price Waterhouse* (a female who was denied a promotion because her boss felt she was not sufficiently ladylike)" ***and*** as "claims previously rejected by HRB, i.e., (claims related to gender identity and sexual orientation).

To the extent that the Commission's approach to the draft ordinance thus far has been to narrowly target forms of discrimination not currently prohibited under state and federal law, the HRB Memo needs to be addressed and discussed by the Commission. In short, in light of the HRB Memo, there is a significant question as to whether claims based on gender identity / transgender status still fall within that category, and perhaps even whether claims based on sexual orientation would still fall within that category.

## The “Perceived” Standard

Apart from the new (and perhaps larger issue) discussed above, there have been questions – and concerns – raised along the way by several Commissioners concerning that portion of the draft ordinance that incorporates a “perceived” standard, i.e., a prohibition against discrimination based on both “actual” sexual orientation/gender identity and “perceived” sexual orientation or expression. As you’re aware, the current draft defines “perceived” as “[r]efer[ring] to the perception of the actor, and not to the perception of the person for or against whom the action is taken”.

As I’ve indicated before in response to questions on this subject, the only analog to the “perceived” concept that I’m aware of is the “regarded as disabled” standard from the Americans with Disabilities Act. In that regard, I was able to find a brief discussion of that particular standard that may be of help to the current discussion regarding the “perceived” standard:

“ . . . However, the [ADA] gives the plaintiff three potential avenues to follow in proving he is disabled within the meaning of the Act. He may show he has a disability as defined by the ADA, that he has a record of having such a disability, or that he is regarded as having such a disability by his employer. See 42 U.S.C. § 12102(2)

In so constructing the statute, the drafters of the ADA created a vision of membership in a protected class unlike that embodied by other civil rights legislation such as [Title VII] or [the ADEA]. Under the third prong of this portion of [the ADA], an individual may invoke the ADA’s protection even if he is not, in fact, disabled. The breadth of the Act’s protection is the embodiment of its drafters’ will to stamp out stereotyping of and discrimination against persons with disabilities in all their forms, even when that stereotyping or discrimination is misplaced. Thus, in determining who may invoke the protection of the ADA, we do not always look to the individual claiming discrimination; when that individual seeks to proceed under a “regarded as” theory, we must look to the state of mind of the employer against whom he makes a claim. Under the “regarded as” prong of the ADA, membership in the protected class becomes a question of intent. . . .”

See *Ross v. Campbell Soup Company*, 237 F.3d 701, 706 (6<sup>th</sup> Cir. 2001) (emph. added). As the *Ross* court noted later in the same opinion, however, the “regarded as” standard is a very difficult one to meet:

“ Proving that an employee is regarded as disabled . . . takes a plaintiff to the farthest reaches of the ADA. It is a question embedded almost entirely in the employer’s subjective state of mind. Thus, proving the case becomes extraordinarily difficult . . . “

For present purposes, I view the “perceived” standard contained in the draft ordinance as operating in essentially the same fashion as the “regarded as” standard in the ADA. In other words, it creates two independent pathways for establishing membership in a protected class, and an individual can meet that burden by demonstrating either (1) that they are *in fact* a member of the class (i.e., are in fact LGBT) or (2) that they were simply *perceived* as having those traits that define the protected class. In order to demonstrate the latter, however, an individual will need to offer proof as to the subjective state of mind of the employer or landlord who is alleged to have engaged in discriminatory conduct.

## General Questions

In addition to the “perceived” issue, there have been at least a couple of other “general” questions about portions of the draft ordinance. The following is intended to hopefully address those:

- In terms of questions concerning the jurisdictional limits of the Municipal Court forum, it appears that the Court has “jurisdiction coordinate and coextensive with the justices’ court of the county where the city is located” [§ 3-6-103(1), MCA], and the justices’ court have jurisdiction “in actions for damages not exceeding \$12,000, exclusive of court costs and attorneys fees, for injury to the person.” [§ 3-10-301(1)(c), MCA].
- In terms of the current requirements for “posting” notices re anti-discrimination, the only present requirement pertains to federal law, i.e., Title VII and the ADA. Although the Montana Human Rights Commission has been granted authority by the Legislature to require the posting of “a notice to be prepared or approved by the commission containing relevant information that the

commission considers necessary to explain [the Human Rights Act], I could not find where the Commission has actually exercised that authority. See § 49-2-202, MCA. Thus, any "Posting of Notices" requirement of the type embodied in the current draft would create a new regulatory requirement unique to Helena, and separate from the federal posting requirements (which only apply to employers with 15 or more employees).

Mayor Smith asked if the Human Rights Bureau's jurisdiction extend to housing as well as employment. Attorney Hindoien stated he cannot address the housing issue; however, the term "sex" is what is being addressed and he believes that analysis would be carried over to all types of discrimination.

Commissioner Ellison referred to the last paragraph of page two of the memo and asked Attorney Hindoien to tell him what the language means; did he hear him say that maybe the ordinance based on gaps in coverage no longer exists because of this decision and if so, how does that affect the city moving forward with the ordinance. Attorney Hindoien stated his view of the Human Rights Bureau (HRB) memo, that when someone contacts the HRB regarding a complaint on sexual orientation or gender identity, the HRB take that complaint and process it as a complaint under sex discrimination under the Montana Human Rights Act. Commissioner Ellison asked if that is happening now. Attorney Hindoien stated that is what is happening now, he does not believe that it was happening all along.

Commissioner Haque-Hausrath stated the city has not seen any case law on the Equal Employment Opportunity Commissions (EEOC) decision. Attorney Hindoien noted there are three or four federal court cases stating gender identity is part of sex discrimination. Commissioner Haque-Hausrath asked Attorney Hindoien if he thinks since there is an administrative memo with the EEOC decision, would that preempt the city ordinance. Attorney Hindoien stated he believes it creates concerns for preemption that weren't there before. He noted the city has a limited judicial forum and legal process; the Montana Human Rights Bureau would have a lot more resources and processes than the city does.

Commissioner Haque-Hausrath asked if the attorney is saying that there might be a remedy available and the concern would be the city might be providing a less effective remedy. Attorney Hindoien concurred and stated any person who believes they have been discriminated against would have more resources through the Montana Human Rights Bureau. Commissioner Haque-Hausrath stated the basic concern to moving forward is providing an additional remedy. However, if the EEOC decision is overturned, and the city does not adopt the ordinance, there would not be any protection. City Attorney Hindoien spoke on the ordinance as drafted and stated he believes someone could file a complaint in city court, it raises concerns with preemption. However, he noted at the end of the day if the ordinance is adopted, it would be a fallback remedy if and when someone would file a claim.

Commissioner Elsaesser asked for the distinction between the EEOC and the Montana Human Rights Bureau. Attorney Hindoien explained the Montana Human Rights Bureau represents cases where employers have less than 15 employees and the EEOC handles those cases where there are more than 15 employees.

Commissioner Elsaesser asked if the ordinance is approved are there any policies that would indicate city institutions being out of compliance. City Attorney Hindoien stated the discussion at the league conference was for a legal update. Commissioner Elsaesser addressed religious institutions and asked if they would be exempt when choosing their leadership. Attorney Hindoien stated he does not know at what point where the line is crossed when a religious institution declares an ordinance interferes with their religious rights. As it stands, a complaint of discrimination on sexual identity and gender orientation could be filed with the Montana Human Right Bureau.

Mayor Smith asked for further clarification on the EEOC decision; would the decision compare to an AG opinion and would the EEOC decision stand until it is changed by an act of the national legislature and the law that would have to be changed would be the Civil Rights Act of 1964. Attorney Hindoien noted the EEOC decision is going to be applied to all federal agencies that employ people; what this means is the Human Rights Bureau will use the EEOC decision.

Mayor Smith asked what happens if a hearing officer declares the EEOC decision is wrong. Attorney Hindoien stated a hearing officer would not be able to do that with respect to a Title 7 claim.

Mayor Smith stated he is going to assume the EEOC decision changes the city's course. He then asked if the city adopts the ordinance and the EEOC stands, would someone potentially be subject to two proceedings. Attorney Hindoien stated there is that possibility.

Commissioner Thweatt asked under the Montana Human Rights Act are all employers covered. Attorney Hindoien stated it covers employers with one or more employees. He reviewed the process

someone would use under the Montana Human Rights Act. Commissioner Thweatt asked if it is City Attorney Hindoién's professional opinion that most courts look at federal law when interpreting Montana law. Attorney Hindoién stated as a general rule Montana courts and hearing officers have always looked at federal law for guidance with interpreting the Montana Human Rights Act and he cannot think of a case where a determination has been less protective.

Commissioner Haque-Hausrath asked how much of this would be subject to a director with the Department of Labor & Industry and their decision on whether or not to enforce a claim based on gender identity and sexual orientation. Attorney Hindoién stated these decisions are being made at the bureau level; he believes it would be impossible for the bureau director to say that they are going to process the Title 7 portion of the claim but not take Title 49 under consideration.

Commissioner Elsaesser asked for clarification if the EEOC decision covers sex identification and gender identity. Attorney Hindoién stated the decision covers all types of sex discrimination.

The following persons addressed the commission:

**Jamie Greer**, Montana Human Rights Network, expressed concerns with the memo being referred to; he does not believe the EEOC decision is being used at this time. Mr. Greer asked the commission to move forward with the ordinance as drafted.

**Tom Rasmussen** stated he believes the commission should take additional time to review Attorney Hindoién's memo. A common thread of discussion has been there is a hole in protection for the GLTGC; however, with this new information, he does not believe that to be the case.

**Kim Milburn** also noted with the EEOC memo, the city should wait to see the impacts. He also expressed concern with specific language in the proposed ordinance.

**Sharon Turner** submitted written testimony in opposition to the ordinance.

**Sharon Nason** spoke in opposition of the proposed ordinance.

**Jan Stewart** – professional counselor for 19-years, spoke in opposition of the ordinance.

**Mike Kesckes** – spoke in opposition of the proposed ordinance

**Jerry Hamlin** submitted written testimony in opposition to the proposed ordinance.

Commissioner Haque-Hausrath stated she would like to move forward with the ordinance as she believes the Macy's ruling applies to gender identity; it did not address sexual orientation. Commissioner Haque-Hausrath stated she would like to discuss Mayor Smith's amendments.

Commissioner Thweatt asked if sexual orientation and gender identity is covered under the EEOC decision. Attorney Hindoién stated the Macy claim did not involve a claim on sexual orientation. However, based on the Montana Human Rights Bureau memo, he believes the decision would cover sexual orientation.

Commissioner Elsaesser asked if everyone is protected, and if that is true, is there additional correspondence to assure the protection. Attorney Hindoién offered to follow-up with the Montana Human Rights Bureau. Commissioner Elsaesser stated he would like additional information.

Commissioner Thweatt stated he is questioning on whether the city needs to move forward with the ordinance with the recent information provided by Attorney Hindoién. Mayor Smith stated he too has those same thoughts; he believes the protection will be there.

Commissioner Haque-Hausrath stated she does not believe the recent decision covers sexual orientation and she wants to move the ordinance forward.

Commissioner Thweatt referred to page two of the EEOC memo and noted the Montana Department of Labor & Industry where it cites three cases and asked if these cases would include sexual orientation and gender identity. Attorney Hindoién could not provide an immediate answer.

Mayor Smith spoke on the amendments he submitted and noted that he cannot offer any amendments at a commission meeting. He continues to be concerned with the indepthness of the draft ordinance and with the new information that was reported on today, he would not support moving forward with the draft ordinance.

Commissioner Ellison noted Commissioner Haque-Hausrath has asked for comments on Mayor Smith's amendment; however, he is reluctant to offer any comments if the commission decides not to move forward with the ordinance. Commissioner Ellison addressed Attorney Hindoién's memo where it cites federal case law and how the Macy v. Holder applies to a case that was heard by the federal EEOC. The initial impetus of this ordinance was to address classifications that are not currently protected by state and federal laws. He heard this during public meetings and in private conversations with the public.

He believes those discrepancies have been closed with the new information. However, if there are other reasons to move forward, he would need to hear them. Commissioner Ellison concurred with Commissioner Thweatt and Mayor Smith's comments and he too would not support moving forward with the ordinance at this time.

Mayor Smith asked that this be put on the next administrative meeting agenda under commission comments; at that time a decision on whether to move forward can be made.

**6. Committee discussions**

- a) ADA Compliance Committee, Audit Committee, Board of Health, Civic Center Board, Montana League of Cities and Towns - No report given.
- b) IT&S, Non-Motorized Travel Advisory Committee (NMTAC), Board of Adjustment, Pre-Release Screening Committee – No report given.
- c) Audit Committee, City-County Weed Board, Montana Business Assistance Connection (MBAC), TCC – No report given.
- d) BID/HPC, City-County Parks Board, TCC, L&C County Mental Health Advisory Committee – No report given.
- e) Audit Committee, City-County Administration Building (CCAB), Public Art Committee, Intergovernmental Transit Committee – No report given.
- f) Helena Citizens Council – No report given

**7. Review of agenda for October 15, 2012 City Commission meeting** –No discussion held.

**8. Public Comment** –No public comment was given.

**9. Commission discussion and direction to City Manager** – No discussion held.

**10. Adjourn** – Meeting adjourned at 6:00 p.m.