

SUMMARY OF ADMINISTRATIVE MEETING
October 31, 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; Fire Chief J.R. Feucht; Parks & Recreation Director Amy Teegarden; Administrative Services Director Tim Magee; Administrative Assistant Carrie Hahn, Community Development Director Sharon Haugen; Human Resource Director James Fehr; Public Works Director John Rundquist; Police Chief Troy McGee; Assistant Chief of Police Dave Jeseritz; Lieutenant Torey Keltner, Captains Corey Livesay, Steve Hagen and Curt Stinson and City Clerk Debbie Havens.

Others in attendance included: IR Reporter Sanjay Talwani, Vigilante Reporter Shane Castle, Jenny Seeka and George Pauley with Fish, Wildlife and Parks. NOTE: There were many citizens in attendance interested in the non-discrimination ordinance agenda item.

2. **October 24, 2012 Administrative Meeting Summary** – The October 24, 2012 administrative summary was not available for review.

3. **Commission comments, questions –**

A.) Upcoming Appointments – There are no appointments on the November 5, 2012 city commission agenda.

B.) Commission Comments – Commissioner Elsaesser asked where the city is at on the electronic waste recycling program. Manager Alles reported the city is no longer charging for some of the electronic waste; however, he would need to get the specifics on the program and report back to the commission.

4. **City Manager's Report-**

Recognition of Assistant Chief Dave Jeseritz - Manager Alles announced Assistant Chief Jeseritz will be retiring from the Helena Police Department on November 9th. He thanked Assistant Chief Jeseritz for his 23-years of service and wished him luck with his new position at the Attorney General's Office. Chief McGee spoke of Assistant Chief Jeseritz's work history and time with the department and the community.

Assistant Chief Jeseritz addressed Chief McGee, Manager Alles and the Commission and thanked them for the career he has had the opportunity to experience. Commissioner Elsaesser thanked Assistant Chief for his years of service and the professionalism he has shown. Commissioner Thweatt thanked Assistant Chief Jeseritz and wished him well. Commissioner Ellison stated the city will miss Assistant Chief Jeseritz and thanked him for his years of service, professionalism and leadership. He spoke of his personal experience working with Assistant Chief Jeseritz during the last air show in Helena.

Mayor Smith summarized his experience with Assistant Chief Jeseritz and his involvement with his wife's office when it was vandalized and a fire started. He also thanked Assistant Chief Jeseritz and wished him good luck.

City Manager Alles reported since Assistant Chief Jeseritz announced his retirement there have been several other; including Human Resource Risk Manager Katherine Swindle, Fire Captain Bob Fearon, Fire Chief JR Feucht and Executive Assistant Clinda Feucht. Manager Alles acknowledged and thanked each of them for their years of service.

Utility Bill Inserts – Manager Alles noted the he received input from some commission members on their priorities for the water bill inserts. Following policy, city department inserts have top priority and then the county inserts. Manager Alles handed out the updated list for the 2013 water bill inserts.

There was commission concurrence with the list as presented by staff and to include United Way and Montana Shares for the November 2013 insert.

5. Department Discussions

Parks & Recreation

Weed Control Efforts and Partnership Structure – Parks & Recreation Director Teegarden introduced Code Enforcement Officer Greta Dige who gave a PowerPoint presentation on weed management practices, prevention and partnerships. It included an overview of how the city manages noxious weeds, average treated acres, successes, prevention methods, and partnerships.

Commissioner Elsaesser stated this was a great presentation and noted he appreciates serving on the City-County Weed Board; weed control is an essential city service.

Mayor Smith commented the Code Enforcement position is a vital position within the city that has helped move the city forward with control of weeds and sidewalk snow removal. These two programs are ongoing and the commission needs to make an ongoing commitment to fund it. Director Teegarden concurred with the commission comments and noted there has been a huge increase in complaints there were 460 weed complaints in 2011 and over 1100 in 2012. Mayor Smith noted the dramatic increase in complaints and again noted the commission would review the funding next budget year.

Police Department

Deer Count – City Manager Alles gave the history of the urban deer annual survey. The Fish, Wildlife and Parks Commission will hold a hearing on the city's recommendation on November 8th. The urban wildlife plan indicates the average number of deer per square mile should be approximately 25-deer in the city limits. However, at this time it is estimated there are 34-deer per square mile in the city limits.

Police Chief McGee reported the latest survey indicates there are approximately 350 to 400 deer in the city limits. Staff's recommendation is to recommend to the Fish Wildlife & Parks Commission that 150 to 200 deer be removed during the winter of 2012-2013.

If the commission concurs with staff's recommendation, staff will present the recommendation to the Fish, Wildlife and Parks Commission at the November 8th meeting. Chief McGee reviewed the number of deer that has been removed since the program started in 2007. The current budget is \$15,000 and at this time, that would not cover removing up to 200 deer.

Jenny Seeka and George Pauley with FWP addressed the commission regarding the deer removal program. They concurred with the estimated number of 150 to 200 deer that would need to be removed. Mr. Pauley stated this recommendation will be presented to the Fish Wildlife and Parks Commission at their November 8th meeting and the final decision would be on December 20th. Included in the recommendation would be a "No Take" period from April 2013 to November 2013.

Mayor Smith stated he would support continuing the program and the recommendation to remove 150 to 200 deer. Mayor Smith also noted if additional funding is warranted, he would support finding a way to fund the program.

Commissioner Elsaesser stated he too would support moving forward with staff's recommendation to remove 150 to 200 deer and continue the deer program in conjunction with Fish, Wildlife & Parks.

Commissioner Ellison concurred with Mayor Smith's comments including pursuing additional funding, if necessary.

City Attorney

Non-Discrimination Ordinance – City Attorney Jeff Hindoien stated per discussions at the October 24, 2012 administrative meeting, he attached what is intended to be a "close-to-final" draft of the above-referenced ordinance. The changes from the original draft (dated August 31) are marked on the attached, and are based on his understanding of the consensus "revisions" as developed through discussions at the September 5th, October 10th and October 24th administrative meetings. The following are explanations of the mark-ups:

- The strike-outs for the sections on "Discrimination in Educational Institutions Prohibited" and "Posting of Notices" are based on consensus decisions to remove those;

- The proposed revisions in Section 1-8-1 are mine, and are intended to "condense" that section based on previous discussions. The deletion of the previous section (B) was a consensus decision, and I've simply moved the language from the previous sections (C) and (D) up into the opening text itself.

In terms of the proposed deletion of Section (A), it represents (much like Section (B)) language that was taken from the Missoula ordinance that is perhaps not applicable to our contemplated approach here in Helena. In short, the Missoula ordinance actually prohibits all of the same forms of discrimination already prohibited by state and federal law, and then adds in the categories that aren't clearly addressed by state and federal law (i.e., LGBT). The Commission opted at the outset to develop a more narrow draft here in Helena, i.e., one directed only at the forms of discrimination not clearly addressed by state or federal law. Given that, the language in the original Section (A) does not really "fit" with the approach currently taken in our draft.

- The proposed revisions in the Section 1-8-2 "Definitions" are as follows:
 - to remove "familial status" as a form of discrimination;
 - to remove "educational institution", consistent with the removal of the Section 1-8-6 provision re: discrimination in educational institutions.
- The strike-out of the Section 1-8-6 provision on discrimination in educational institutions is based on previous consensus decision.
- The strike-out of the Section 1-8-8 provision on posting of notices is based on previous consensus decision.
- The new language in Section 1-8-10 is based on Commissioner Haque-Hausrath's proposal, and is intended to prohibit the "two bites at the apple" concept discussed at the last Administrative Meeting. In short, the Helena City Code remedy will not be available to an individual unless:
 - they have not filed a complaint with the Montana Human Rights Bureau; or
 - they have filed a complaint with the Bureau, but it was dismissed or otherwise resolved unfavorably for the complainant because of a determination that the Bureau did not have the authority to investigate it.

The only remaining potential "amendment" that has been discussed extensively to date, and ***is not*** reflected in the attached, relates to the concept of "perceived." As discussed at last week's Administrative meeting, there will be further opportunity to offer amendments on that subject as part of the ordinance adoption process. Thus, absent a clear consensus on that subject at tomorrow's meeting, I will plan on proceeding to finalize a draft that still contains the "perceived" language for the ordinance consideration process later this fall.

Mayor Smith noted he will begin with the memo from Attorney Hindoien and will ask for commission comments on the memo and then go through the ordinance page by page.

City Attorney Hindoien's Memo – Commission recommended no changes to memo language

Final Draft Ordinance:

Page One – no comments

Page Two – no comments

Page Three – Commissioner Thweatt referenced the definition of "Employer" and offered the following amendment:

An employer of one or more persons or an agent of the employer but does not include a fraternal, charitable, or religious association or corporation **unless** the association or corporation is ~~not~~ organized either for private profit or to provide accommodations or services that are available on a non-membership basis.

There was commission concurrence to amend definition of Employer as recommended by Commissioner Thweatt.

Mayor Smith stated he has read the definition of employer a number of times and then asked Commissioner Thweatt who he believes would not be an employer. Commissioner Thweatt stated his

understanding is it would exclude those fraternal, charitable and religious associations or corporations. He gave the example of the Moose Lodge, Elks Club, Salvation Army, Catholic Charities and churches.

Those employers who would be included would be God's Love and others who are organized for private profit or provide accommodations for non-members. Commissioner Ellison stated by that definition, this ordinance would apply to those like God's Love. Commissioners Thweatt, Haque-Hausrath and Attorney Hindoien concurred with Commissioner Ellison's statement.

Mayor Smith asked about the organizations and churches that are providing services to those who are not their members, for example the YWCA and Family First Program. Commissioner Thweatt stated if it is an organization or corporation that is "organized" for the purpose of private profit or to provide services, then yes they would be subject to the ordinance; however, if a church were to take in the homeless and house them, the ordinance would not apply because the organized purpose is to be a church. Attorney Hindoien concurred with Commissioner Thweatt's comments.

Commissioner Elsaesser asked if it would be accurate to say that governmental and/or educational employers would also be exempt from the ordinance. Attorney Hindoien stated the commission could say that; however, the city would be expressly prohibited from doing anything that would result in money judgments against the state; the courts cannot entertain employment claims against the state. This is a non- issue because those express provisions are covered under Chapter 7. Governmental limitations would apply to state and federal employees and educational institutions would be both private and public.

Commissioner Ellison asked if the Holter Museum, Montana Audubon Society and the Helena Housing Authority would be affected by the ordinance. Attorney Hindoien stated both the Holter Museum and the Montana Audubon Society would fall under the ordinance; the Helena Housing Authority would also fall under the ordinance as an entity related to the city.

Page Four – Commissioner Ellison stated he submitted four amendments that he may offer; one would strike the definition of "perceived". Most of the amendments are accommodated by the changes that City Attorney Hindoien has made to the draft agenda. Therefore, he would like to discuss the proposed language of Commissioner Haque-Hausrath at this time.

Commissioner Haque-Hausrath stated she has proposed alternative language to the definition of "perceived". If there is commission concurrence on the following language, the other amendments would be null and void.

Commissioner Haque-Hausrath offered the following amendment:

Add the following sentence to the definition of "Discrimination"; "Discrimination", "discriminate" or "discriminatory" also means any act, policy, or practice that has the effect of unfavorably subjecting any person to different or separate treatment on the belief that a person has a particular sexual orientation or gender identity or expression, even if this belief is incorrect.

The commission would then need to delete all of the instances of "actual or perceived" and delete the definition of "perceived" from the draft ordinance.

Commissioner Thweatt stated this proposed language would work for him. Commissioner Elsaesser stated the word "belief" is still in the same line of "perceived". He stated it is important that the plaintiff does not need to prove that the belief is accurate and there is an act of discrimination. If "belief" does that, he would support the recommended amendment. City Attorney Hindoien stated the amendment is clearer than the previous language. The objective is to make it clear that the terminology of discrimination law that actually proving you are a member of the protected class is not an indispensable element of your claim. He spoke of other case law cases regarding national origin and burden of proof when filing a claim.

Mayor Smith stated Commissioner Haque-Hausrath's language appears to be clearer; however, he continues to be concerned that by adopting this ordinance the city is not subjecting employers and landlords to frivolous claims. City Attorney Hindoien stated ultimately a person filing a claim has to prove they are on the receiving end of a discriminatory action.

Mayor Smith stated he understands the intent of the language; however, he asked if someone goes to rent an apartment and has a cat and the landlord does not rent to that person and they file a claim that they were discriminated against because of sexual orientation or gender identity. Attorney

Hindoien stated no language will prevent frivolous claims. He again reiterated a person claiming discrimination will have to prove their claim.

Commissioner Ellison asked if this ordinance passes, what level of burden of proof is there. Attorney Hindoien stated it would be by the preponderance of the evidence.

Commissioner Ellison stated there is commission consensus in support of Commissioner Haque-Hausrath's amendment; therefore his four amendments would become moot and he would withdraw them from consideration.

Mayor Smith stated he is going to consider the recommended amendments. Commissioner Thweatt stated he understands the discomfort of someone abusing this ordinance against an employer or landlord; however, he does believe Section 1-8-9: Violation – Civil Remedy would cover frivolous claims by allowing the defendant to recover attorney's fees.

Mayor Smith asked for clarification on Public Accommodations, would the Montana Club be classified as a public or private. Commissioner Thweatt stated if it has more than 100-members it would be classified as a public accommodation. Attorney Hindoien stated the language of 100-members parallels the Montana Human Rights Act; all of definitions in this draft ordinance include language from the MHRA, the only difference is the classification of sexual orientation and gender identity have been added to the ordinance.

Page Five – Commissioner Elsaesser referenced 1-8-3 and asked if compensation would include health benefits. Attorney Hindoien stated yes

Page Six – Commissioner Elsaesser referenced 1-8-10: Availability of Remedy and asked for clarification on how the civil remedy would work. Attorney Hindoien explained if someone believes to be a victim of discrimination, they have the ability to take it to the HRB and they would decide to move it forward or not; if the HRB does take the claim, the victim could not then file with the Municipal Court. If the HRB does not take the claim then the victim could file with Municipal Court. A plaintiff could decide to go straight to Municipal Court and not go through the HRB.

Commissioner Elsaesser asked if the plaintiff chooses to go with the HRB as their route, and the HRB did not take their case would 180-day limitation be waived. Attorney Hindoien stated yes, the timeframe would be put on hold while the case is being looked at. He also noted if a case goes through the HRB and it is resolved unfavorably, then the plaintiff could not file with Municipal Court.

Commissioner Elsaesser asked if someone goes through Municipal Court first and does not get a favorable decision, can they then file with HRB. Attorney Hindoien stated a victim could conceivably file two claims by going through Municipal Court first. He believes a person most probably could not meet the timelines.

Commissioner Haque-Hausrath stated the HRB has similar statute of limitations. Attorney Hindoien concurred with Commissioner Haque-Hausrath's comments; the statute of limitations for the HRB is six months from the date the complaint is filed.

Page 7 – Mayor Smith referred to 1-8-9: Violations – Civil Remedy: C, second paragraph where it states: The initiation of or the granting of relief under a grievance procedure shall not preclude or limit any other claims or remedies available under this title. Defendants shall not collect attorney's fees unless the claim is clearly frivolous, unreasonable, or factually groundless, or the claimant continued to litigate after the claim clearly became so.

He asked Attorney Hindoien to summarize the meaning of this language. Attorney Hindoien stated the first sentence simply means if someone has an internal grievance procedure and plaintiff can and does use it; it does not preclude them from filing with the HRB or Municipal Court.

Mayor Smith asked for clarification on who can recover attorney fees. The language in the ordinance is the same as what is in Human Rights Act. If a plaintiff is the prevailing party, they can recover attorney fees. However, a defendant does not necessarily get their attorney fees even if they prevail. It is called the "American Rule" where defendants are not necessarily on the same level as plaintiffs.

Mayor Smith asked who determines a claim is frivolous. Attorney Hindoien stated it ultimately is up to the court.

Attorney Hindoien stated he will prepare a final draft of the ordinance and schedule first reading for December 3, 2012.

Mayor Smith referred to an email from Commissioner Ellison received regarding the legality of the city commission adopting this ordinance.

Commissioner Ellison stated that he has had communications with citizens expressing concerns about the draft ordinance; he then referred to the following questions:

1. The first question concerned whether local governments can establish a civil remedy in municipal court. The reference cited was Section 7-1-111(1), MCA, that prohibits exercising power that "applies to or effects any private or civil relationship."
2. The next question related to Section 7-1-111(13), MCA, that appears to prohibit local governments from exercising power that tends to regulate Landlords for issues covered in Title 70, chapters 24 & 25 (The Landlord-Tenant Act.
3. The third question references the Montana Human Rights Act and whether or not that Act precludes local governments having authority in the area of discrimination. The citizen cited a court case called Harrison vs. Chance, 244 Montana 215 in 1990, and provided this excerpt: "The language of Section 49-2-509 (now 512) indicates that the legislature intended the procedures of the Human Rights Commission to provide the exclusive remedy for discrimination in employment." The question continued with a reference to the Human Rights Act, Section 49-2-512 citing the human rights process as the exclusive remedy for discrimination claims.

Attorney Hindoien stated there are not insignificant uncertainties with adopting this ordinance. However, at this time he does not believe there is anything that is a show stopper. It is his opinion that the commission has the authority to adopt the ordinance. He does believe there will be legal objections to the passage of this ordinance. Attorney Hindoien gave examples of specific case law that would apply to each of the three questions asked by Commissioner Ellison.

Commissioner Ellison thanked Attorney Hindoien for his response to his questions.

Mayor Smith asked for final comments from the commission if they would like to move the ordinance forward to a public hearing:

Commissioner Thweatt – move to a public hearing

Commissioner Elsaesser – move to a public hearing – interested in options that would make it a clearer process

Commissioner Haque-Hausrath – move to public hearing

Mayor Smith – move to public hearing

The following persons addressed the commission:

Tom Rasmussen – Spoke in opposition to moving the ordinance forward to a public hearing

Jerry Hamlin – Spoke in opposition to moving the ordinance forward to a public hearing

Jamie Greer – Spoke in support to moving the ordinance forward to a public hearing

Barb Hamlin – Spoke in opposition to moving the ordinance forward to a public hearing

Kim Milburn – Spoke in opposition to moving the ordinance forward to a public hearing

Jan Stewart – Spoke in opposition to moving the ordinance forward to a public hearing

Marc Cramer- Spoke in opposition to moving the ordinance forward to a public hearing

Mayor Smith thanked those who addressed the commission. There was commission consensus to hold a public hearing on first reading on the non-discrimination ordinance on December 3, 2012.

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 November 5, 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.