



TOWN COUNCIL AGENDA DOCUMENTATION

PREPARATION DATE: June 13, 2018
MEETING DATE: June 18, 2108

SUBMITTING DEPARTMENT: Legal
DEPARTMENT DIRECTOR: Audrey Cohen-Davis
PRESENTER: Audrey Cohen-Davis, Town Attorney

SUBJECT: Non-Discrimination Ordinance M for First Reading

STATEMENT/PURPOSE

The purpose of this workshop item is to present Ordinance M for first reading to add Chapter 9.26 to the Jackson Municipal Code regarding non-discrimination related to sexual orientation and gender identity or expression.

BACKGROUND/ALTERNATIVES

On December 7, 2015, the Town Council approved Resolution 15-26 supporting non-discrimination in the Town of Jackson.

At the December 4, 2017 Town Council meeting, Mayor Muldoon asked Town Council if there was interest in directing staff to draft a non-discrimination ordinance for review. A motion was made by Jim Stanford and seconded by Hailey Morton Levinson to direct staff to bring back at a future workshop a discussion for a non-discrimination ordinance and to discuss any associated legal issues or constraints.

Staff's understanding of the goals for such an ordinance was to prohibit discrimination in employment, places of public accommodation (restaurants, bars, other businesses, etc.), and housing, as well as providing a procedure for the investigation and enforcement of complaints and violations.

Research indicated the following cities in Wyoming have taken the following actions (in descending chronological order):

- Casper – Adopted a Non-Discrimination Resolution (February, 2018)
- Sheridan – Adopted a Non-Discrimination Resolution (October, 2017)
- Cheyenne – Adopted a Non-Discrimination Resolution (October, 2016)
- Gillette – Adopted a Non-Discrimination Resolution (September, 2016)
- Jackson – Adopted a Non-Discrimination Resolution (December, 2015)
- Laramie – Enacted a Non-Discrimination Ordinance (May, 2015)

At the March 19, 2018 workshop the Town Council passed a motion "to direct staff to bring back an ordinance dealing with antidiscrimination in the workplace, housing and public accommodations in general, including sexual orientation and gender identity, and to bring back an outline of staff and fiscal costs at a future workshop."

A draft ordinance was presented at the May 26, 2018 meeting for review and consideration by the Town Council. A motion was passed to direct the Town Attorney to finalize the non-discrimination ordinance based upon the discussion and direction today for first reading at an upcoming Town Council meeting.

One final issue for the Town Council's consideration is the definition of Employer. I have added the following highlighted language to that definition:

B. EMPLOYER: Any person or entity doing business within the Town of Jackson who employs one (1) or more employees, and any agent of such person or entity **including but not limited to local and national property management companies, property managers, rental agents and guest referral companies**, for purposes of this Chapter, the term does not include:

1. The United States or any department or agency thereof, a corporation wholly owned by the government of the United States or Indian Tribe;
2. The State of Wyoming or any department or agency thereof, including any political subdivision of the State;
3. a bona fide private membership club (other than a labor organization) which is exempt from taxation under the Internal Revenue Code of 1986; or,
4. a fraternal or religious association or corporation if the association or corporation is neither organized for private profit nor has as its primary purpose the provision of accommodations or services that are available on a non-membership basis.

The Wyoming Fair Employment Practices Act defines employer as: "Employer" shall mean the state of Wyoming or any political subdivision or board, commission, department, institution or school district thereof, and every other person employing two (2) or more employees within the state; but it does not mean religious organizations or associations." As to the issue of (2) or more employers versus (1) or more employees, the Town may be more strict than state statute. Additionally, the ACLU has opined that the Town not expand exemptions beyond those accorded to other protected classes in Wyoming. This is a policy decision if want to change what is drafted, and staff is prepared to discuss.

ATTACHMENTS

Ordinance M Adding Chapter 9.26 Regarding Non-discrimination.

FISCAL IMPACT

The fiscal impact of directing staff to prepare an ordinance could include the expenditure of already authorized professional services funds for outside legal counsel. Additional fiscal impact may include the cost of an investigator (potentially a contract or town employee), cost of processing of the complaint, and cost to prosecute such complaints. The fiscal impact associated with adoption and codification of any non-discrimination ordinance includes the potential for challenges to the ordinance and costs associated with defending any challenge. The fiscal impact of passage of this ordinance after third reading varies between \$250 and \$700 depending on the length of the ordinance. (Shorter ordinances average around \$350 and short franchise ordinances can reach \$700.)

STAFF IMPACT

Staff impact on the Legal Department has been researching and drafting a legally-sound ordinance. Significant additional staff impact will occur to enforce such an ordinance. Additional staff impacts would need to be addressed once the content of an ordinance is finalized. The ordinance may include a complaint process that impacts various departments including Administration (investigating and processing the complaint), Legal (prosecuting the complaint), Municipal Court (adjudicating the complaint), Finance (addressing issues associated with the business license for the business in question), Police (investigation and citations).

The staff impact of passage of this ordinance after third reading is notable in the Town Clerk's office and involves preparing the ordinance for advertising and sending to the newspaper, updating the Jackson Municipal Code online and in hard copy for those receiving hard copy versions of the code. The ordinance is also printed and signed and placed in the permanent record storage book in the vault and indexed and posted on the website. The ordinance is also prepared and sent to the newspaper for advertising. Should an ordinance be passed and then challenged, this would also involve significant time on the part of the Legal

Department, the Town Clerk Department, and other Town departments in terms of defense, document production, etc.

LEGAL REVIEW

Complete.

RECOMMENDATION

Staff makes no recommendation at this time.

SUGGESTED MOTION

I move to approve Ordinance M at first reading.

Synopsis for PowerPoint (120 words max):

PURPOSE

The purpose of this workshop item is to present a non-discrimination ordinance related to sexual orientation and gender identity or expression for first reading.

BACKGROUND/ALTERNATIVES

At the March 19, 2018 workshop the Town Council passed a motion “to direct staff to bring back an ordinance dealing with antidiscrimination in the workplace, housing and public accommodations in general, including sexual orientation and gender identity, and to bring back an outline of staff and fiscal costs at a future workshop.”

A draft ordinance was presented at the May 26, 2018 meeting for review and consideration by the Town Council. A motion was passed to direct the Town Attorney to finalize the non-discrimination ordinance for first reading at an upcoming Town Council meeting.

FISCAL IMPACT

The fiscal impact of directing staff to prepare an ordinance could include the expenditure of already authorized professional services funds for outside legal counsel. Additional fiscal impact may include the cost of an investigator (potentially a contract or town employee), cost of processing of the complaint, and cost to prosecute such complaints. The fiscal impact associated with adoption and codification of any non-discrimination ordinance includes the potential for challenges to the ordinance and costs associated with defending any challenge. The fiscal impact of passage of this ordinance after third reading varies between \$250 and \$700 depending on the length of the ordinance. (Shorter ordinances average around \$350 and short franchise ordinances can reach \$700.)

AN ORDINANCE ESTABLISHING CHAPTER 9.26 TO THE TOWN OF JACKSON MUNICIPAL CODE REGARDING NON-DISCRIMINATION; AND PROVIDING FOR AN EFFECTIVE DATE.

NOW, THEREFORE, BE IT ORDAINED BY THE TOWN COUNCIL OF THE TOWN OF JACKSON, WYOMING, IN REGULAR SESSION DULY ASSEMBLED THAT:

SECTION I.

Chapter 9.26 of the Municipal Code of the Town of Jackson, is hereby created to read as follows:

CHAPTER 9.26 ILLEGAL DISCRIMINATION

9.26.010 Legislative findings.

- A. The Town of Jackson ("Town") is composed of and welcomes diverse individuals, groups, and communities;
- B. The Town values this diversity and encourages all residents and visitors to contribute to the commercial life and activities of Jackson, and to the cultural and social life of the Town;
- C. Discrimination and discriminatory practices based on sexual orientation or gender identity or expression inhibit and restrict the economic growth and opportunities of Jackson and its citizens and visitors, as well as the cultural, social and commercial activities and life of the Town;
- D. Discrimination disturbs or jeopardizes the public health, safety and welfare of the Town;
- E. While the vast majority of employers, housing providers, and places of public accommodation within the Town do not discriminate on the basis of actual or perceived sexual orientation and gender identity or expression, the Town has received public testimony and written complaints reporting instances in discrimination.
- F. Although state and federal laws have been enacted to eliminate discrimination in employment, housing, and public accommodations the Town finds that existing state and federal laws do not adequately address all discriminatory acts reported by the Town's diverse residents, including lesbian, gay, bisexual, and transgender individuals that have not attained equal opportunity in housing, public accommodations, and employment. A barrier to the advancement of lesbian, gay, bisexual, and transgender individuals in their personal and professional lives within the Town is the potential discriminatory practices of employers and providers of public accommodations and housing on the basis of actual or perceived sexual orientation and gender identity or expression, and thus the Town deems it necessary to adopt local regulations adapted to the needs of its citizens.
- G. Discrimination on the basis of actual or perceived sexual orientation and gender identity or expression impacts all citizens who may be lesbian, gay, bisexual, or trans gender, because it limits the ability to fully and freely identify themselves as they seek employment, housing and the services and products provided by public accommodations;

H. Discrimination in employment prevents the gainful employment of Town residents, may create breaches of the peace, add burdens upon the public for relief and welfare, and cause citizens, including youth, to seek employment elsewhere;

I. Discrimination in housing makes it difficult for persons addressed in this article to find housing in close proximity to urban services, educational facilities, in price ranges that are within their earning ability, and may cause citizens to seek housing outside the Town;

J. Discrimination in places of public accommodation is economically harmful to a prosperous community and is otherwise detrimental to the welfare and economic growth of the Town and may cause citizens to seek public accommodations outside the Town.

K. Discrimination must be prohibited in order to protect the health, safety and welfare of the Town and to ensure the basic human rights of members of groups that have historically been subject to discrimination, including the right of such group members to live in peace where they wish;

L. Prohibition of discrimination will attract new residents and businesses to the Town, will encourage visitors and tourists to the Town, and is necessary to raise and maximize revenue for the Town;

M. The Town wishes to exercise its powers to the fullest extent allowed by the Constitution and statutes of the State of Wyoming and United States to prohibit and regulate discrimination.

9.26.020 Declaration of policy, purpose and intent.

A. It is declared to be among the civil rights of the people of the Town of Jackson, Wyoming to be free from discrimination in housing, public accommodations and employment, and for it to be contrary to the policy of the Town and unlawful to discriminate against any person because of sexual orientation or gender identity or expression in places of housing, public accommodation and employment. It is also declared to be unlawful to retaliate against any person for making a complaint or assisting in an investigation or proceeding as set forth in this Chapter.

B. Consistent with the findings of the Town Council, it is the intent of the Town of Jackson that no person shall be denied his or her civil rights or discriminated against based upon his or her actual or perceived sexual orientation or gender identity or expression, as more specifically set out in this Chapter.

C. Consistent with the findings of the Town Council, and incorporating those findings, this Chapter is enacted to exercise, to the fullest extent allowed by Wyoming statutes and the Wyoming Constitution, the powers of the Town of Jackson to prohibit such discrimination in order to, without limitation, encourage the economic growth of the Town, raise revenue for the Town for the benefit of its residents, prevent activities that disturb or jeopardize the public health, safety, peace or morality of the Town, provide for the health, safety and welfare of the Town, and to generally encourage the growth and economic expansion of the Town, and the ability of its residents to fully participate in the cultural, social and economic life of the Town.

9.26.030 Definitions.

As used in this Chapter the following definitions apply:

A. **DISCRIMINATION, DISCRIMINATE OR DISCRIMINATORY:** Any act, policy or practice that has the effect of unfavorably subjecting any person to different or separate treatment because of his or her actual or perceived sexual orientation, 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.

B. **EMPLOYER:** Any person or entity doing business within the Town of Jackson who employs one (1) or more employees, and any agent of such person or entity including but not limited to local and national property management companies, property managers, rental agents and guest referral companies, for purposes of this Chapter, the term does not include:

1. The United States or any department or agency thereof, a corporation wholly owned by the government of the United States or Indian Tribe;
2. The State of Wyoming or any department or agency thereof, including any political subdivision of the State;
3. a bona fide private membership club (other than a labor organization) which is exempt from taxation under the Internal Revenue Code of 1986; or,
4. a fraternal or religious association or corporation if the association or corporation is neither organized for private profit nor has as its primary purpose the provision of accommodations or services that are available on a non-membership basis.

C. **GENDER IDENTITY OR EXPRESSION:** An actual or perceived gender related identity, expression, or behavior, regardless of the individual's sex at birth.

D. **HOUSING FACILITY OR "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.

E. **PERCEIVED:** Refers to the perception of the actor, and not to the perception of the person for or against whom the action is taken.

F. **PERSON:** A natural person, joint venture, joint stock company, partnership, association, club, company, corporation, business, trust, organization, or the manager, lessee, agent, servant, officer or employee of any them.

G. **PUBLIC ACCOMMODATION:** A place, including the Town and its agencies, however organized, offering services, facilities or goods to or soliciting patronage from members of the general public. This includes places of lodging, establishments serving food or drink, auditoriums and other places of public gathering, shopping facilities, medical and other professional service establishments, public transportation facilities, libraries and other professional service establishments, places of entertainment and recreation, daycare centers and other social service establishments.

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 is not by its nature distinctly private if:

1. It has more than one hundred (100) members, and
2. Provides regular meal service, and
3. 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.

H. SEXUAL ORIENTATION: Actual or perceived heterosexuality, bisexuality, or homosexuality.

Section 9.26.040 Employment discrimination prohibited.

A. It is a discriminatory or unfair employment practice and shall be unlawful:

- i. For an employer to refuse to hire, discharge, promote or demote, or to discriminate in matters of compensation or the terms, conditions or privileges of employment against a person, otherwise qualified, on the basis of sexual orientation or gender identity or expression; and,
- ii. For a person, an employer, an employment agency, a labor organization, or its employees or members, to discriminate in matters of employment or membership against any person, otherwise qualified, on the basis of sexual orientation or gender identity or expression.

Section 9.26.050 Places of Public Accommodation; Discrimination prohibited.

All persons of good deportment are entitled to the full and equal enjoyment of all public accommodations, including accommodations, advantages, facilities and privileges of all places or agencies which are public in nature, or which invite the patronage of the public, including Town facilities and services, without any distinction, discrimination or restriction on account of sexual orientation or gender identity or expression.

Section 9.26.060 Housing; Discrimination prohibited.

It shall be unlawful for any person, owner, manager, employee, or any entity whose business includes engaging in any residential real estate related transactions to discriminate on the account of sexual orientation or gender identity or expression 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. The rental of sleeping rooms in a private residence designed as a single dwelling unit in which the owner also resides is excluded from this section provided that the owner rents no more than two (2) sleeping rooms within the residence.

Section 9.26.070 Other prohibited acts.

- A. No person shall adopt, enforce or employ any policy or requirement, sign or notice which discriminates or indicates discrimination in providing housing, employment or public accommodations.
- B. No person shall discriminate in the publication or distribution of advertising material, information or solicitation regarding housing, employment or public accommodations.
- C. No agent, broker, labor union, employment agency or any other intermediary shall discriminate in making referrals, listings or providing information with regard to housing, employment or public accommodations.

D. No person shall conspire with, assist or coerce another person to discriminate in any manner prohibited by this Chapter.

Section 9.26.080 Retaliation.

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

Section 9.26.090 Discriminatory effects.

No person shall adopt, enforce or employ any policy or requirement which has the effect of creating unequal opportunities according to actual or perceived sexual orientation or gender identity or expression, for an individual to obtain housing, employment or public accommodations.

Section 9.26.100 Exceptions.

Notwithstanding anything contained in this Chapter, the following practices shall not be violations of this Chapter:

- A. For a religious organization or institution to restrict any of its facilities of housing or accommodations which are operated as a direct part of religious activities to individuals of the denomination involved or to restrict employment opportunities for officers, religious instructors and clergy to individuals of that denomination.
- B. For the owner of an owner-occupied one-family or two-family dwelling, or a housing facility or public accommodation facility, respectively, devoted entirely to the housing and accommodation of individuals of one sex, to restrict occupancy and use on the basis of sex.
- C. To limit occupancy in a housing project or to provide public accommodations or employment privileges or assistance to individuals who are of low income, over 55 years of age or disabled, in circumstances in which such limitations are appropriately designated.
- D. To engage in a bona fide effort to establish an affirmative action program to improve opportunities in employment for groups, including, but not limited to, minorities and women, where allowed or required by law.
- E. To refuse to enter a contract with an unemancipated minor.
- F. To refuse to admit to a place of public accommodation serving alcoholic beverages an individual under the legal age for purchasing alcoholic beverages.
- G. To refuse to admit individuals under 18 years of age to a business providing entertainment or selling literature which the operator of said business deems unsuitable for minors.
- H. For an educational institution to limit the use of its facilities to those affiliated with such institution.
- I. To provide discounts on products and services to students, minors and senior citizens.

J. To discriminate in any arrangement for the sharing of a dwelling unit by an individual who is sharing the unit.

K. Nothing herein shall be construed to prohibit any affirmative action laws passed by any level of government. Preferential treatment of or benefits conferred on any of the classes protected from discrimination under this Chapter are permissible to the extent allowed by law.

Section 9.26.110 First Amendment Rights.

This ordinance fully acknowledges all rights guaranteed by the First Amendment of the United States Constitution.

Section 9.26.120 Violation and Remedy.

A. Procedure for Filing Complaints.

1. Any person who claims to have been injured by an unlawful employment practice, an unlawful housing practice or an unlawful public accommodation practice subject to the Town's jurisdiction under this Chapter may file a complaint with the Town Manager or his/her designee. A complaint must be filed within ninety (90) calendar days after an alleged violation under this Chapter has occurred.

2. A complaint must be in writing, made under oath or affirmation, and contain the following information:

- a. The Complainant's name, address, telephone number and signature;
- b. The date the alleged unlawful employment practice, unlawful housing practice or an unlawful public accommodation practice occurred;
- c. A statement of the facts upon which the allegation of an unlawful employment practice, unlawful housing practice or an unlawful public accommodation practice occurred;
- d. The name of the alleged violator, or facts sufficient to identify such person ("Respondent"); and
- e. Whether a complaint concerning this same matter has been filed with another agency and the disposition of said complaint.

3. Upon receipt of the complaint, the Town Manager or his/her designee shall assign such complaint to a person or entity (the "Investigator") with the requisite knowledge, skills and expertise to further investigate the complaint as herein described. Such assignment will be made at the sole discretion of the Town Manager or his/her designee. In the event said complaint involves persons employed by the Town, the Investigator shall be an independent third party. In addition, any remedy provided herein is cumulative with internal disciplinary policies that may apply.

4. Promptly upon receipt of the complaint from the Town Manager or his/her designee, the Investigator shall:

- a. Provide the Respondent written notice that a complaint alleging the commission of an unlawful employment practice, unlawful housing practice or unlawful public accommodation practice has been filed against him/her;
- b. Furnish a copy of the complaint to the Respondent; and
- c. Advise the Respondent of his/her procedural rights and obligations, including the right to file a written, signed, and verified informal answer to the complaint within fifteen (15) calendar days after service of notice of the complaint.

5. Not later than fifteen (15) calendar days after service of the notice and copy of the complaint, a Respondent may file an answer to the complaint. The answer must be in writing, made under oath or affirmation, and contain the following information:

- a. The Respondent's name, address, telephone number, and signature of the Respondent or the Respondent's attorney, if any; and
- b. A concise statement of facts in response to the allegations in the complaint, including facts of any defense or exemption.

B. Investigation.

1. Upon receipt of the complaint, the Investigator shall commence an investigation to determine the facts behind the complaint and whether there is reasonable cause to believe the Respondent committed an unlawful employment practice, unlawful housing practice or unlawful public accommodation practice.

2. No investigation may commence if, after reviewing the allegations of the complaint, the Investigator determines that the complaint does not come within the scope of this Chapter. Upon determining that a particular complaint does not come within the scope of this Chapter, the Investigator shall dismiss the complaint, notify the Complainant and Respondent and take no further action.

3. In connection with any investigation of a complaint filed under this Chapter, the Investigator shall seek the voluntary cooperation of any person to:

- i. Obtain access to premises, records, documents, individuals, and any other possible source of information;
- ii. Examine, record and copy necessary materials; and
- ii. Take and record testimony or statements of any person reasonably necessary for the furtherance of the investigation.

4. The Investigator may dismiss a complaint during the investigation and prior to referral to the Town Attorney if the Investigator determines that:

- i. The complaint was not filed within the required time period;
- ii. The location of the alleged unlawful employment practice or unlawful housing practice is not within the Town's jurisdiction;
- iii. The alleged unlawful unemployment practice or alleged unlawful housing practice is not a violation of this Chapter;

- iv. The Complainant refuses to cooperate with the Investigator in the investigation of the complaint;
- v. The Complainant cannot be located after the Investigator has performed a reasonable search; or
- vi. A conciliation agreement has been executed by the Complainant and Respondent.

C. Disposition of a Complaint.

1. If, upon completion of an investigation of a complaint, the Investigator determines that an unlawful employment practice, unlawful housing practice or unlawful public accommodation practice has occurred the Investigator shall refer the case to the Town Attorney, who shall determine how best to pursue further action, if any, on the complaint.
2. If the Town Attorney determines that cause exists to find that an unlawful employment practice, unlawful housing practice or unlawful public accommodation practice occurred and the facts are sufficient to warrant the initiation of an action, and the Town Attorney determines that cause exists to pursue a matter in municipal court, then the Town Attorney shall provide written notification to the Respondent and Complainant that an action to enforce this Chapter will be initiated in municipal court.
3. If the Town Attorney determines that no unlawful employment practice, unlawful housing practice or unlawful public accommodation practice occurred or that the facts are insufficient to warrant the initiation of an action in municipal court, the Town Attorney shall provide written notification to the Respondent and Complainant that the complaint will be dismissed.

Section 9.26.130 Violation; Penalties

Any violation of this Chapter shall be an offense punishable by a fine of up to \$750.00 per day per violation.

SECTION II.

All ordinances and parts of ordinances in conflict with the provisions of this ordinance are hereby repealed.

SECTION III.

If any section, subsection, sentence, clause, phrase or portion of this ordinance is for any reason held invalid or unconstitutional by any court of competent jurisdiction, such portion shall be deemed as a separate, distinct and independent provision and such holding shall not affect the validity of the remaining portions of the ordinance.

SECTION IV.

This Ordinance shall become effective after its passage, approval and publication.

PASSED 1ST READING THE ____ DAY OF _____, 2018.
PASSED 2ND READING THE ____ DAY OF _____, 2018.
PASSED AND APPROVED THE ____ DAY OF _____, 2018.

TOWN OF JACKSON

BY: _____
Pete Muldoon, Mayor

ATTEST:

BY: _____
Sandy P. Birdyshaw, Town Clerk

ATTESTATION OF TOWN CLERK

STATE OF WYOMING)

) ss.

COUNTY OF TETON)

I hereby certify that the foregoing Ordinance No. _____ was duly published in the Jackson Hole News and Guide, a newspaper of general circulation published in the Town of Jackson, Wyoming, on the _____ day of _____, 2018.

I further certify that the foregoing Ordinance was duly recorded on page _____ of Book _____ of Ordinances of the Town of Jackson, Wyoming.

Sandy P. Birdyshaw
Town Clerk