THE CITY OF ASHEVILLE

Staff Report

Council Meeting Date: April 27, 2021

Subject: Non-Discrimination Ordinance

Staff Resource(s): Eric Edgerton, Sr. Asst. City Attorney; Brad Branham, City Attorney

Action Requested: Adoption of an ordinance prohibiting discriminatory practices in private employment and public accommodations.

Background:

- Presently, the State of North Carolina does not prohibit businesses from discriminating against employees or customers on the basis of certain personal characteristics, like sexual orientation and gender identity.
- From March 30, 2017 through December 1, 2020, the State of North Carolina expressly prohibited local governments from regulating private employment practices and/or public accommodations.
- Because it appears unlikely that the State will adopt laws prohibiting discriminatory practices in private employment and public accommodations, it is necessary for local governments to adopt non-discrimination ordinances in order to prevent such expressions of bigotry and inequity.
- City staff has worked closely with Buncombe County staff to develop substantially similar non-discrimination ordinances, to be adopted by each government, in order to ensure that discriminatory practices in employment and public accommodations will be consistently prohibited throughout the Asheville metropolitan area.
- The ordinance proposed would prohibit discrimination in employment or in public accommodations based upon any of the following: race, natural hair or hairstyles, ethnicity, creed, color, sex, sexual orientation, gender identity or expression, national origin or ancestry, marital or familial status, pregnancy, veteran status, religious belief or non-belief, age, or disability.

Council Goal(s):

- An Equitable and Diverse Community
- A Thriving Local Economy

Committee(s): Governance

Pro(s): Prohibits discriminatory practices in private employment or public accommodations.

Con(s):

- May result in counteraction by the State Legislature.
- This occurred previously with the bill commonly known as HB2 which temporarily prohibited cities from passing such ordinances.

Fiscal Impact:

- It is expected that the enforcement of the proposed Non-Discrimination Ordinance will be able to be fulfilled by the City's Office of Equity and Inclusion, without an increase in that department's budget.

Suggested Motion:

- Motion to adopt an ordinance, to be codified as Section 10-2 of the City Code, prohibiting discriminatory practices in private employment and public accommodations.

Attachment(s):

- Ordinance

ORDINANCE NO. _____

ORDINANCE ADOPTING SECTION 10-2 OF THE CITY CODE, PROHIBITING DISCRIMINATORY PRACTICES IN PRIVATE EMPLOYMENT AND PUBLIC ACCOMMODATIONS.

WHEREAS, the City has the authority, pursuant to Section 160A-174 of the North Carolina General Statutes to define, prohibit, regulate, or abate acts, omissions, or conditions, detrimental to the health, safety, or welfare of its citizens and the peace and dignity of the city, and may define and abate nuisances; and

WHEREAS, the City finds that the use of discriminatory practices in private employment and public accommodations constitutes a nuisance that is detrimental to the health, safety, and welfare of its citizens; and

WHEREAS, the City finds that it is necessary and proper to prohibit the use of discriminatory practices in private employment and public accommodations within the City;

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF ASHEVILLE THAT:

1. Section 10-2 of the City Code is repealed in its entirety, and replaced with the following:

Section 10-2 Non-Discrimination Ordinance

(a) Definitions- As used within this Section, the following terms shall be defined as follows:
   (i) *Discrimination* means any difference in treatment based on race, natural hair or hairstyles, ethnicity, creed, color, sex, sexual orientation, gender identity or expression, national origin or ancestry, marital or familial status, pregnancy, veteran status, religious belief or non-belief, age, or disability.
   (ii) *Employer* means any person employing one or more persons within the City and any person acting in the interest of an employer, directly or indirectly, including an employment agency. “Employer” shall include the City and any City Contractor.
   (iii) *Gender identity or expression* means having or being perceived as having gender-related identity, expression, appearance, or behavior, whether or not that identity, expression, appearance, or behavior is different from that traditionally associated with the sex assigned to that individual at birth.
   (iv) *Person* includes one or more individuals, partnerships, associations, organizations, corporations, legal representatives, unincorporated organizations, fiduciaries, and other organized groups of persons.
   (v) *Public accommodation (or place of public accommodation)* means any place, facility, store, or other establishment which supplies accommodations, goods, or services to the public or which solicits or accepts the patronage or trade of the public.
   (vi) *Reasonable cause* means circumstances in which a preponderance of the available evidence, when taken as a whole, shows the violation is more likely than not.

(b) Discrimination in employment prohibited- It shall be unlawful for any employer, because of the race, natural hair or hairstyles, ethnicity, creed, color, sex, sexual orientation, gender identity or expression, national origin or ancestry, marital or familial status, pregnancy, veteran status, religious belief or non-belief, age, or disability of any person to refuse to hire or otherwise discriminate against that person with respect to hire, tenure, conditions, or privileges of employment, or any matter directly or indirectly related to employment.

(c) Exceptions- Notwithstanding the prohibition on discrimination set forth in subsection (b), it is not unlawful for:
   (i) An employer to employ, admit, classify, or refer any individual on the basis of religion, sex, national origin, age, familial status, or veteran status, in those certain instances where religion, sex, national origin, age, familial status, or veteran status is a bona fide

occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.

(ii) An employer to print or publish, or caused to be printed or published, any notice or advertisement indicating any preference, limitation, specification, or discrimination, based on religion, sex, national origin, age, familial status, or veteran status, in such instances when religion, sex, national origin, age, disability, familial status, or veteran status is a bona fide occupational qualification for employment.

(iii) A school, college, university, or other educational institution, or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

(iv) An employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, so long as the differences are not the result of an intention to discriminate because of race, natural hair or hairstyles, ethnicity, creed, color, sex, sexual orientation, gender identity or expression, national origin or ancestry, marital or familial status, pregnancy, veteran status, religious belief or non-belief, age, or disability.

(v) An employer to give and to act upon the results of any professionally developed ability test provided that the test, its administration, or action upon the results is not designed, intended, or used to discriminate because of race, natural hair or hairstyles, ethnicity, creed, color, sex, sexual orientation, gender identity or expression, national origin or ancestry, marital or familial status, pregnancy, veteran status, religious belief or non-belief, age, or disability.

(vi) An employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of the employer if the differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. § 206(d)).

(vii) An employer to refuse to assign or continue to assign an individual to a job involving food handling in any case in which such individual has an infectious or communicable disease that is:

(1) Transmitted to others through the handling of food;
(2) Is included on the list developed by the Secretary of the United States Department of Health and Human Services pursuant to section 103(d) of the Americans with Disabilities Act of 1990, (42 U.S.C. §§ 12101, et seq.); and
(3) Cannot be eliminated by reasonable accommodation. Nothing in this subsection shall be construed to preempt, modify, or amend any state, county, or local law, ordinance, or regulation applicable to food handling.

(d) Exceptions regarding drug and alcohol use- Notwithstanding the prohibition on discrimination set forth in the subsection (b), it shall not be a violation of this ordinance for an employer to:

(i) Adopt or administer reasonable policies or procedures, including but not limited to drug testing.

(ii) Prohibit the illegal use of drugs and the use of alcohol at the workplace by employees.

(iii) Require that employees shall not be under the influence of alcohol or be engaging in the illegal use of drugs at the workplace.

(iv) Require that employees behave in conformance with the requirements established under the Drug-Free Workplace Act of 1988 (41 U.S.C. §§ 701 et. seq.).

(v) Hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior that the entity holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of the employee.

(vi) With respect to federal regulations regarding alcohol and the illegal use of drugs, require that employees comply with the standards established in federal regulations of the

Department of Defense, the Nuclear Regulatory Commission, and/or the Department of Transportation, if the employees of the covered entity are employed in an industry subject to the regulations of any such federal agency

(e) Miscellaneous provisions

(i) The prohibitions in this Ordinance against discrimination in employment based upon disability shall not be construed to prohibit or restrict:

(1) An insurer, hospital, medical service company, health maintenance organization, or any agent, or entity that administers benefit plans, or similar organizations from underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or

(2) A person or organization covered by this Ordinance from establishing, sponsoring, observing, or administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering those risks that are based on or not inconsistent with State law; or

(3) A person or organization covered by this Ordinance from establishing, sponsoring, observing, or administering the terms of a bona fide benefit plan that is not subject to State laws that regulate insurance.

(ii) Nothing in this Ordinance shall be construed to require an individual with a disability to accept an accommodation, aid, service, opportunity, or benefit which such individual chooses not to accept.

(iii) Nothing contained in this Ordinance shall apply to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

(iv) With respect to discrimination based on age, it is not unlawful for a covered entity to take any action otherwise prohibited under this Ordinance:

(1) Where the differentiation is based on reasonable factors other than age;

(2) Where such practices involve an employee in a workplace in a foreign country, and compliance with those subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located; or

(3) To observe the terms of a bona fide seniority system; or

(4) To observe the terms of a bona fide employee benefit plan; or

(5) To discharge or otherwise discipline an individual for good cause.

(v) Nothing in this Ordinance shall be construed to prohibit compulsory retirement of any employee who has attained 65 years of age provided such retirement is part of a practice consistent with a bona fide employee retirement plan

(f) Discrimination in public accommodations prohibited- It shall be unlawful for any proprietor or their employer, keeper, or manager in a place of public accommodation to deny any person, except for reasons applicable alike to all persons, regardless of race, natural hair or hairstyles, ethnicity, creed, color, sex, sexual orientation, gender identity or expression, national origin or ancestry, marital or familial status, pregnancy, veteran status, religious belief or non-belief, age, or disability the full enjoyment of the accommodations, advantages, facilities or privileges thereof. The provisions of this subsection shall not apply to a private club or other establishments not in fact open to the public.

(g) Housing

(i) The City of Asheville will assist its residents in filing housing discrimination claims with the North Carolina Human Relations Commission.

(ii) In offering this assistance, and consistent with the recent Supreme Court of the United States decision in Bostock v. Clayton County, the City of Asheville interprets the prohibition on sex discrimination in housing to include discrimination on the basis of sexual orientation and gender identity.

(iii) In offering this assistance, the City of Asheville interprets the prohibition on race discrimination in housing to include discrimination on the basis of natural hair or hairstyles.

(h) Enforcement- Complaints alleging violations of this section shall be filed and investigated as

follows:

(i) Any person who claims to have been injured, or claims they are currently being injured, or who reasonably believes that they will be injured, by any practice made unlawful under this Ordinance may file a Complaint with the City of Asheville's Office of Equity and Inclusion (OEI).

(ii) Complaints shall be in writing, signed and verified by the Complainant. Complaints shall state the facts upon which the allegation of an unlawful discriminatory practice is based and shall contain such other information and be in such form as the OEI requires.

(iii) A Complaint that alleges an unlawful employment practice under this Ordinance must be filed with the OEI no later than 180 days after the occurrence, or cessation of the alleged unlawful employment practice.

(iv) A Complaint that alleges any practice made unlawful under this Ordinance, other than an unlawful employment practice, must be filed with the OEI no later than one year from the date of the occurrence, or cessation of the alleged unlawful practice.

(v) OEI staff shall serve upon the Respondent and Complainant a copy of the Complaint and a notice advising the Respondent and Complainant of their procedural rights and obligations under this Ordinance within ten days after the Complaint is filed.

(vi) (A Respondent may file an answer to the Complaint within ten days after receiving a copy of the Complaint. Answers shall be signed and verified by the Respondent and shall be filed with the OEI.

(vii) With leave of the OEI staff, which leave shall be granted whenever it would be reasonable and fair to do so, Complaints and Answers may be amended at any time. Amendments shall be reduced to writing, signed, verified, and filed with the OEI. Amendments shall relate back to the date the original Complaint or Answer was filed.

(viii) OEI staff shall, within 30 days after the filing of a Complaint, commence an investigation into the allegations contained in the Complaint.

(ix) In conducting an investigation, OEI staff shall have access at all reasonable times to premises, records, documents, individuals, and other evidence or possible sources of evidence to ascertain the factual basis of the allegations contained in the Complaint.

(x) Further, OEI staff may examine, record, and copy such materials and take and record the testimony or statements of such persons as reasonably necessary for the furtherance of the investigation.

(xi) In conducting an investigation, Equity Office staff may:

(1) request production of documents, materials, or other evidence;

(2) request witnesses, including any party, to appear and give testimony before Equity Office staff;

(3) Issue interrogatories to a Respondent.

(xii) Upon written application to OEI staff, a Respondent shall be entitled to the issuance of interrogatories directed to the Complainant and to request production of documents, materials, or other evidence.

(xiii) Complaints may be resolved at any time by informal conference, conciliation, or persuasion. Nothing said or done in the course of such informal procedure may be made public without the written consent of the person concerned. However, all resolutions of complaints shall be reduced to writing, shall be signed by the Complainant, the Respondent, and OEI staff and shall be enforceable as a binding contract.

(xiv) All complaints alleging an unlawful discriminatory housing practice shall be handled in the manner described in subsection (g) above.

(i) Reasonable cause and conciliation efforts.

(i) If the Complaint is not sooner resolved, the OEI staff shall, upon completion of the investigation, determine whether or not there is reasonable cause to believe that an unlawful discriminatory practice has occurred, is occurring, or is going to occur.

(ii) OEI staff shall make their determination on reasonable cause as promptly as possible and, so far as practicable, no later than 100 days after the Complaint was filed. If OEI is unable to complete the investigation within 100 days after the filing of the complaint, OEI staff shall notify the complainant and respondent in writing of the reasons for not doing so.

(iii) At the end of each investigation, a final investigative report will be prepared and, notwithstanding the prohibitions and requirements with respect to disclosure of information, the report will be made available to the parties upon request.

(iv) If OEI staff determines that there is not reasonable cause to believe that an unlawful discriminatory practice has occurred, is occurring, or is going to occur, it shall dismiss the Complaint and notify the Complainant and the Respondent of its decision.

(v) In the event that OEI staff determines that reasonable cause does not exist, the Complainant may make a written request to the OEI that such decision be reconsidered. Such request shall be filed with OEI staff within 30 days of the date the staff issued its finding of no reasonable cause. The request for reconsideration shall be heard by the OEI director.

(vi) If OEI staff, or the OEI director following request by the Complainant for reconsideration of the Equity Office staff finding of no reasonable cause, determines that reasonable cause exists, OEI shall notify the Complainant and the Respondent and shall attempt to resolve the Complaint by conference, conciliation, and/or persuasion.

(vii) All conciliation agreements shall be signed by the Complainant and the Respondent and shall be recognized as a legally enforceable contract.

(viii) If the OEI, after a finding of reasonable cause, is unable to resolve the Complaint by conference, conciliation, or persuasion, it shall issue a written declaration that conciliation efforts have failed.

(ix) If the OEI issues a written declaration that conciliation efforts have failed, then the OEI may issue penalties as authorized herein.

(j) Legal - All investigative efforts conducted by the OEI shall be done only upon consultation with and approval by the City Attorney.

(k) Appeals- A determination by either the OEI staff or director that there is reasonable cause to believe a violation of this ordinance has occurred may be appealed to a review panel consisting of the City Manager, City Attorney, and the Director of the City's Human Resources Department.

(l) Penalties- Pursuant to G.S. § 160A-175, the city manager, in consultation with the city attorney, may choose from the remedies set forth below to enforce the requirements of this chapter when there is a failure to comply with the requirements of this chapter or the franchise. Those remedies are as follows:

(i) In addition to or in lieu of the other remedies set forth in this chapter the City Manager, or their designee, may issue a citation setting forth a civil penalty of $100.00. In the case of a continuing violation, each 24-hour period in which the violation continues to exist shall constitute a separate violation. The citation shall be served upon the person violating any of the requirements of this Section by hand delivery or certified mail or by any other means made in accordance with the North Carolina Rules of Civil Procedure. In the event the violator does not pay the penalty within 30 days of service of the citation, the civil penalty shall be collected by the city in a civil action in the nature of debt, which shall not subject the offender to the penalty provisions of G.S. § 14-4.

(ii) In addition to or in lieu of other remedies set forth in this chapter or the franchise, the city attorney may seek injunctive relief in the appropriate court.

2. Nothing in this Ordinance shall be interpreted or applied so as to create any requirement, power, or duty in conflict with any existing federal or state law.

3. Should any provision of this Ordinance be found to be unconstitutional by a court of law, such provision shall be severed from the remainder of the Ordinance, and such action shall not affect the enforceability of the remaining provisions of the Ordinance.

4. The provisions of this Ordinance shall go into effect on July 1, 2021.

Read, approved, and adopted this 27th day of April, 2021.

_____ _____

City Clerk Mayor

Approved as to form:

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City Attorney