

**CONCERNS WITH THE PROPOSED CITY OF BILLINGS ORDINANCE
PROVIDING PROTECTION FOR BILLINGS' DIVERSE POPULATION
(January 27, 2020) NUMBERED 7-1801 through 7-1807.**

Larry Seekins, Engineer, Billings

1. THERE IS INTERNAL CONFLICT IN THE ORDINANCE:

A. The proposed Ordinance states:

Sec. 7-1801: "Nothing in this title is intended, however, to conflict with state and federal laws, or to alter or abridge other rights, protections, or privileges secured by state or federal law, including state and federal constitutional protections of freedom of speech and exercise of religion."

B. The proposed ordinance mandates no religious discrimination as well as no discrimination on the basis of sexual orientation/gender identity.

C. Both categories cannot be enforced at the same time. They are on a collision course. The constitutional right of the Free Exercise of Religion should always prevail over a statutorily created right.

D. The US Supreme Court *Obergefell* case emphasizes this conflict. Justice Kennedy created a new constitutional right based upon "personal identity" or "self-autonomy." However, the application of this newly created right is not limited to same-sex marriage. The Court also stated it is grounded in all the rights contained in the Bill of Rights, including the First Amendment. Therefore, both sides on this issue have their personal identity protected under *Obergefell*.

E. The religious exemption contained in the Ordinance does not work as advertised. There are numerous cases against churches and individuals under similar Ordinances where the free exercise rights of businesses and individuals were not protected. The harassment and expense of defending against a claim makes it cost prohibitive for a business or person to try to protect those rights. Lost business revenue from businesses that choose not to locate in Billings because of an oppressive Ordinance will also cost the city.

2. THIS ORDINANCE COERCES BUSINESSES AND CITIZENS:

A. There is no protection for individuals or businesses in this proposed Ordinance. The potential financial penalty is civil remedies, injunctive relief, attorney fees or other equitable relief (Sec. 7-1807). It is possible it would not take long to destroy a local small businessperson who fights an allegation of discrimination under this Ordinance. The Masterpiece Cakeshop case is a primary example of how this plays out in punitive ways for faith-based business owners.

B. The Ordinance is extremely intrusive regarding the investigation and information that can be required if a complaint is made. There is no protection for churches or other membership organizations having to provide sensitive or proprietary information

at the request of the City such as membership lists or other private information.

C. The Section 7-1802: Employee and Employer, offers little real protection to churches and no protection to businesses or individuals. For example, all employees of churches are not exempted. Moreover, it is clearly unconstitutional to require adherence to some standard such as accusing a religious organization of discrimination if they “*provide accommodations or services that are available on a non-membership basis.*” Many churches provide housing for homeless people for limited periods of time. These people seldom are members of a church. These churches could not claim protection under this section. Also many churches do not keep a formal membership list.

D. This Ordinance turns First Amendment jurisprudence on its head. The First Amendment protects all individuals and organizations, not just particular organizations.

3. THIS ORDANANCE VIOLATES FREE SPEECH/FREEDOM OF CONSCIENCE:

A. Traditional views of family/sexuality will be squelched and prosecuted under this Ordinance. Government coercion on divisive issues in the community is never an exercise of good governance. Coerced speech is unconstitutional. The US Supreme Court has repeatedly ruled that a person cannot be forced to propound or communicate a message that violates his or her religious beliefs or conscience.

B. A Jewish or Muslim baker should not be required to participate in an event or ceremony by providing services that violate their faith. Should a Jewish bakery be forced to make a cake with a swastika for an anti-Israel rally? Should a Muslim baker be forced to bake a cake with the image of Mohammed on top? The answer is obvious. This Ordinance could force a gay photographer to participate in and photograph a Traditional Family Rally that violates his or her conscience, or force a Catholic to participate in a pro-LGBT ceremony or event.

C. Does the City of Billings really want to become the arbiter of which religious views are permissible or allowed?

4. CONSTITUTIONAL VAGUENESS/DUE PROCESS ISSUES:

A. All citizens are entitled to clear definitions in a law so they can know what is prohibited. The definitions in this Ordinance are not clear. Everyone is entitled to prior notice of proscribed conduct. What constitutes a wrongful act under this Ordinance? It is not clear and depends on the perception of the person who claims to be aggrieved (7-1802 DEFINITIONS). It defines discrimination as:

“any act, policy, or practice that has the effect of unfavorably subjecting any person to different or separate treatment on the basis of their actual or perceived race, color, national origin, ancestry, religion, creed, sex, age, martial or familial status, physical or mental disability, sexual orientation, gender identity or expression, or because of

their association with a person or group of people so identified. Discrimination based on physical or mental disability includes the failure to make reasonable accommodations that are required by an otherwise qualified person who has a physical or mental disability. An accommodation that would require an undue hardship or that would endanger the health or safety of any person is not a reasonable accommodation.”

C. This means that the complainant is the one who defines “**any act, policy or practice.**” They also determine what is “**unfavorable.**” Also it would depend on what they believe is their “**actual or perceived** race, color, national origin, ancestry, religion, creed, sex, age, marital or familial status, physical or mental disability, sexual orientation, gender identity or expression.

D. These all refer to the complainant's identity, not the perpetrator. How is a businessperson supposed to know ahead of time that a 56-year-old 6’6” white man perceives himself to be a 39-year-old 5’6” Asian woman? Or that someone perceives himself or herself as a lesbian? This is an impossible standard to enforce.

E. There are many due process issues with this Ordinance. For example, what rights do defendants have if a complaint is filed against them? How are hearings conducted? Who decides? Is a defendant even entitled to notice of the specific charges against him or her? What standard of proof is going to be applied to these cases? What appeal rights are available? This is not an exhaustive list of the due process problems; it is merely illustrative of the issues involved.

F. This Ordinance attempts to expand the jurisdiction of the Billings Municipal Court which is the sole prerogative of the state legislature.

5. TRANSGENDER BATHROOM ISSUES:

A. This Ordinance allows open bathroom use for any “actual or perceived... sexual orientation... gender-related identity, expression, or behavior, regardless of the individual’s sex at birth.”

B. It also states: “*Nothing contained herein shall be construed as a requirement to construct additional facilities such as bathrooms, locker rooms, dressing rooms at any place of public accommodation as defined above.*” This allows men who believe they are women or are pretending to be a woman to enter a women’s restroom. In the past a woman could call the police. Under this ordinance, once a man states that he is a woman or a woman states she is a man, his or her rights to be in an opposite sex bathroom are protected.

C. This Ordinance will require businesses and schools to permit biological men/boys to use the showers/locker rooms/bathrooms of women/girls. Does the City of Billings really approve of adult men entering showers and locker rooms where teenage or younger girls are also present? The proposed Ordinance clearly violates the privacy rights of others using the facilities.

D. The possible commission of criminal activity is greatly increased in such settings. If a man perceives himself as a woman and undresses and takes a shower with a teenage girl, this would be the crime of indecent exposure.

6. GENERAL OBSERVATIONS:

A. This ordinance is not about non-discrimination or civil rights – it is really about forced civil acceptance of conduct through the force of law. There is no comparison to the civil rights struggles of the African-American community. No gay/transgender person has been required to sit in the back of a bus or drink from a separate water fountain. No gay/transgender person has been denied entrance to a school or university. No gay/transgender person has been forced to live under Jim Crow laws. No gay/transgender person has been denied the right to vote or been enslaved. The comparison is not valid. [L] [SEP]

B. Even if you agree with this proposed Ordinance, it does not give the City of Billings the right to trample on the constitutional rights of others who don't agree. [L] [SEP]

C. The Ordinance's preamble proclaims its purpose is to "*eliminate discrimination within the City and assuring all of its citizens to publically available goods and services.*" Exactly how will this Ordinance do this without denying other citizens their First Amendment rights and/or placing women and children in a dangerous situation?

D. Billings always needs people that are constantly learning, honest, respectful and care about others, take responsibility, work hard, supports and willingly participates as a team-member in our community. People like this are always welcome.

E. This ordinance would tend to divide our community rather than help us work together as the community we all want to have.

F. All individuals already have the protections of the law and the right to fair and equal treatment under existing laws and under federal and state constitutions. [L] [SEP] We respectfully oppose this Ordinance and urge the Billings City Council to consider the above information before deciding whether to enact the proposed Billings.