

MEMORANDUM 18-031

TO: HOMER CITY COUNCIL
FROM: HOLLY C. WELLS
RE: CODE OF CONDUCT ORDINANCE
CLIENT: CITY OF HOMER
FILE NO.: 506742.24
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Introduction

In the current cultural and political climate, our firm encourages local governments to review workplace policies as well as existing codes of conduct to ensure employees and the public are properly protected and that the obligations of management and city officials are easy to identify, follow, and enforce. To this end, Ordinance No. 18-14 (the "Ordinance") proposes several revisions to the Homer Code of Ethics, which are identified and explained in this memorandum.

Proposed Revisions

The Ordinance proposes several revisions, the most substantive of which:

- 1) Require City Council members to comply with applicable Homer workplace policies and procedures;
- 2) Add a definition for the term "impartial" as used in the Homer City Code;
- 3) Clarify the preliminary review process for ethics complaints;
- 4) Consolidate and clarify the ethics complaint process before the Board or a hearing officer in a single title; and
- 5) Protect Council members and City official actions from allegations arising from actions or omissions taken in reliance on advice from the City Attorney.

Revisions Clarifying the Ethics Complaint Process

The revisions regarding the ethics hearing process generally ensure that the intended steps of review and consideration are clear. Under the current Code, the hearing process is governed by provisions in both Title 1 and Title 2, requiring the reader to cross reference between the two sections to determine how to file a complaint and what the standard of review and investigation process of such complaint entails. As a result, it is very easy for a reader to miss important procedural steps or requirements. The Ordinance proposes a much simpler “step-by-step” approach, with the process for all complaints in a single new chapter of the Code entitled “Code of Ethics- complaints.”

In addition to the restructuring of the ethics complaint process, the Ordinance proposes changes to the review process to ensure that hearings are as cost-effective and impartial as possible. Most notably, the Code currently provides for a preliminary review process to ensure that complaints that are not sufficient are rejected before a hearing takes place. However, in recent ethics hearings, the hearing officers expressed confusion as to when and how, and even who, was responsible for conducting the preliminary review. In an effort to avoid such confusion in the future, and legal costs associated with hiring a hearing officer to preside over a complaint that does not contain a viable allegation, even if all the facts asserted are taken as true, the Ordinance requires the City Attorney to review the complaint for preliminary legal sufficiency. The Clerk remains responsible for reviewing the complaint to confirm it contains the information required under the Code. However, the proposed revisions clarify the Clerk’s limited role in the review process.

The changes to the ethics complaint process also include express protection for City officials and the City Manager for acts or omissions taken in reliance on City Attorney advice. While the current Code of Ethics provides protection for City officials and the City Manager when acting in accordance with an advisory opinion, it does not expressly provide such protection when the acts are based on legal advice provided in meetings or during the course of business. Thus, the change is predominately a clarification of the Code of Ethics’s original intent.

Revisions to the Code of Ethics

As with the ethics complaint process, the Ordinance proposes changes to the Code of Ethics itself which are designed to streamline and clarify the obligations imposed upon City officials under the Code. However, these organizational changes are fairly small and clear on the face of the Ordinance and thus need not be discussed in this memo.

In addition to organizational changes, the Ordinance expands upon the definition of “partiality” in HCC 1.18.048 by differentiating the “partiality” prohibited in quasi-judicial proceedings from the “impartiality” required in legislative acts. For example, conducting yourself “impartially” in a quasi-judicial procedure requires a decision-maker to remain neutral, not favoring one side or the other. Conversely, legislative acts necessarily arise

from the advocacy efforts of the legislators who support those acts. Unlike a quasi-judicial decision-maker, legislators are tasked with promoting the interests of their constituents and thus are not expected to be “neutral.” However, legislators are expected to act in a manner that they believe benefits the public’s best interest. Thus, a legislator fails to act “impartially” when he or she takes action to benefit a personal or financial interest rather than the best interest of his or her constituents.

The most significant change to the Code is the clarification of the City official’s duty to comply with the City’s workplace safety policies, and harassment provisions as set forth in the employee policy manual. While many of these provisions currently apply to all City officials, the inclusion of a specific obligation in the Code of Ethics ensures that employees, citizens, and City officials are fully aware of the application of such policies to City official conduct.

Although the applicable policy provisions are not included in the proposed revisions, the provisions that would apply to Council members are as follows:

9.2 Anti-discrimination and Anti-harassment Policy: The City maintains a work environment free from unlawful discrimination and harassment for all employees. All employees have the right to work in an environment free from discrimination, intimidation or harassment that is based upon a protected status.

9.4 Harassment Definition: Prohibited harassment consists of unwelcome verbal or physical conduct or communication based upon an employee’s race, color, creed, religion, national origin, gender, physical or mental disability, age, marital status, pregnancy or parenthood, veteran’s status, status with regard to public assistance, or any other status protected by federal, state or local law. Examples of conduct prohibited by this policy include using racial and ethnic slurs, offensive stereotypes or making jokes about such characteristics.

9.5 Sexual Harassment Definition: Sexual harassment is a form of harassment that is prohibited under these regulations. Sexual harassment encompasses unwelcome sexual advances, request for sexual favors, and other verbal, visual, written or physical conduct of a sexual nature where:

9.5.1 Such conduct is unwelcome; and

9.5.2 Submission to such conduct is made either explicitly or implicitly a term or condition of employment; or

9.5.3 Submission to or rejection of such conduct is used as the basis for decisions affecting an individual's employment; or

9.5.4 Such conduct has the purpose or effect of creating an intimidating, hostile, or offensive work environment. A hostile work environment occurs when the

conduct is sufficiently severe or pervasive enough to alter the condition of the employee's employment and create an abusive work environment.

9.7 Responsibilities:

9.7.1 All City employees at all levels shall report allegations and acts of discrimination. An employee who feels he or she is being harassed or discriminated against or is aware of activities in the workplace that may constitute harassment or discrimination shall report the perceived discrimination or harassment immediately to their supervisor, Department Director, Personnel Director, City Manager or any City Official (as defined by this chapter) that the employee feels comfortable reporting to.

9.10 Retaliation: The City prohibits any form of retaliation against any employee for reporting or participating in a proceeding connected with a matter of public concern pursuant to Section 1.15 of the City Code. However, if the City determines that the complaint was not made in good faith or that an employee has provided false information regarding the complaint, disciplinary action may be taken against the complainant or the individual(s) who gave the false information. Any decision which constitutes an adverse action against an employee who has a current informal or formal complaint of discrimination pending must be approved by the City Attorney's office. All City Officials should avoid actions that might be construed as retaliatory against the complainant.

Again, while many of these provisions already apply to City official conduct through state and/or federal laws and City policies, it is important that Council members and other City officials are aware of the obligations that impact their service and understand the process for reporting violations should they occur.

Conclusion

Homer's existing Code of Conduct provides comprehensive protection to the public, ensuring local government and City officials operate fairly and transparently. However, the proposed changes in the Ordinance serve to clarify the scope of these protections and the resulting obligations placed upon City officials. Similarly, the Ethics Complaint process as currently codified provides a detailed administrative process for enforcing violations of the Code of Ethics but the Ordinance, if adopted, will result in a clearer and more user-friendly hearing process.