

1 **CITY OF HOMER**
2 **HOMER, ALASKA**

Aderhold

3
4 **ORDINANCE 17-06**

5
6 AN ORDINANCE OF THE CITY COUNCIL OF HOMER, ALASKA,
7 AMENDING HOMER CITY CODE 2.80 AND HOMER CITY CODE
8 1.18.050 TO APPOINT A HEARING OFFICER TO HEAR ETHICS
9 COMPLAINTS AGAINST CITY COUNCIL MEMBERS AND THE MAYOR
10 AND TO AMEND HOMER CITY CODE SECTION 2.08.050 TO PERMIT
11 THE BOARD OF ETHICS OR HEARING OFFICER TO DISMISS
12 WITNESSES PRIOR TO THE ADMINISTRATIVE HEARING AND
13 CLARIFY THE INVESTIGATIVE AND HEARING PROCESS.
14

15 WHEREAS, The City Council highly values the public's confidence in the propriety and
16 fairness of City of Homer ("City") administrative hearings and appeals; and
17

18 WHEREAS, It is in the City's best interest to designate a hearing officer to decide ethics
19 complaints filed against City Council members or the Mayor, preserving the ability of Council
20 members to work collaboratively and respectfully with one another while maintaining the
21 accountability and responsible governance of each member; and
22

23 WHEREAS, Permitting the Board of Ethics or a hearing officer to utilize witness
24 testimony in a manner that preserves the confidentiality of the Board's or the officer's
25 investigation and review.
26

27 NOW, THEREFORE, THE CITY OF HOMER ORDAINS:
28

29 Section 1. Section 1.18.050 entitled "Procedures for violation reporting" is amended to
30 read as follows:
31

32 a. Any person who believes that a violation of any portion of this chapter has
33 occurred may file a written complaint of potential violation with the City Clerk's
34 office.

35 b. All written complaints of potential violation submitted under this chapter
36 shall be signed by the person submitting the complaint. A written complaint of
37 potential violation shall state the address and telephone number of the person
38 filing the complaint, identify the respondent, and affirm to the best of the
39 person's knowledge and belief the facts alleged in the complaint of potential
40 violation signed by the person are true. The person filing the complaint of

[Bold and underlined added. Deleted language stricken through.]

41 potential violation shall identify the section of this chapter the person believes
42 was violated, state why the person signing the complaint of potential violation
43 believes the facts alleged constitute a violation of that section, and identify any
44 documentary or testimonial evidence the person filing the complaint believes is
45 in support of the notification of potential violation.

46 c. Written complaints of potential violations filed with the City Clerk's office shall
47 be forwarded to the Board of Ethics under Chapter 2.80HCC. **Except as**
48 **otherwise provided in this section,** ~~the~~ the Board of Ethics has sole jurisdiction
49 to decide the merits of the complaint filed under this chapter.

50 **d. The City Clerk shall appoint a hearing officer to decide and investigate**
51 **properly filed written complaints against City Council members or the**
52 **Mayor and shall have sole jurisdiction to decide the merits of the complaint**
53 **filed under this section.**

54
55
56 Section 2. Section 2.80.010 is repealed and replaced as follows:
57

58 a. There is hereby established a Board of Ethics.

59 b. The Board shall be comprised of all members of the City Council and the
60 Mayor. The Mayor, or the Mayor Pro Tem in the Mayor's absence, will serve as
61 presiding officer of the Board. In the absence of both, the members of the Board
62 shall elect a presiding officer from among its members.

63 c. The City Attorney or other legal counsel for the Board may assist the Board at
64 every stage of the proceedings, but shall have no vote.

65 d. A quorum of the Board shall be a majority of all members who are not excused
66 for cause, such as being the complainant, the respondent, a witness, having a
67 conflict of interest, or other cause for recusal. However, in no event may a
68 quorum be less than three.

69 e. Decisions of the Board shall be adopted by a majority of the members who are
70 qualified to act on the matter, where a quorum is present.

71 f. Unless the Board delegates such authority to another member or decides that
72 no one shall have such authority, **and except as provided for hearing officers**
73 **in subsection (h) of this section,** the presiding officer shall have authority to
74 make procedural decisions between Board meetings on behalf of the Board.

[Bold and underlined added. Deleted language ~~stricken through.~~]

75 Examples of matters that may be decided by such delegate include scheduling
76 hearings and other matters, establishing pre-hearing requirements and filing
77 deadlines for motions, exhibits, witness lists, hearing briefs, and deciding other
78 procedural matters.

79 g. The presiding officer shall vote on every question, unless required to abstain
80 for cause, and shall not have power to veto any action of the Board.

81 **h. A hearing officer designated by the City Clerk under HCC 1.18.050 shall**
82 **have sole authority to investigate the complaint they have been retained to**
83 **hear and to make procedural decisions regarding the investigation and**
84 **hearing of that complaint. The designated hearing officer shall be the sole**
85 **decision-maker and shall comply with the procedures and requirements of**
86 **this chapter provided for the Board and its members.**

87
88 Section 3. Section 2.80.020 is amended to read as follows:

89
90 2.80.020 Function and authority.

91
92 The Board of Ethics or a **hearing officer appointed under this chapter** has
93 authority to perform the following functions:

94
95 a. Investigate reported violations of Chapter 1.18 HCC.

96
97 b. Hear and decide written complaints of violations of Chapter 1.18 HCC.

98
99 c. Hear and decide on requests for exceptions as specified in Chapter 1.18 HCC.

100
101 d. Make findings and recommendations concerning sanctions, civil penalties
102 and remedies for violations as provided in the code.

103
104 e. Adopt recommended policies and procedures governing the Board's conduct
105 of business.

106
107 f. Upon application of the complainant, respondent, or at the Board's **or hearing**
108 **officer's** discretion, compel by subpoena the appearance and sworn testimony,
109 at a specified time and place, of a person the Board **or hearing officer**
110 reasonably believes may be able to provide information relating to a matter
111 under investigation by the Board **or hearing officer** or the production of
112 documents, records or other items the Board **or hearing officer** reasonably
113 believes may relate to the matter under consideration.

[Bold and underlined added. Deleted language ~~stricken through.~~]

114 g. Administer oaths and receive testimony from witnesses appearing before the
115 Board **or hearing officer**.

116
117 h. Request City agencies to cooperate with the Board **or hearing officer** in the
118 exercise of the Board's **or hearing officer's** jurisdiction.

119
120 i. Request the advising attorney to seek assistance of the Superior Court to
121 enforce the Board's **or hearing officer's** subpoena.

122
123 j. Conduct investigative hearings in executive session, pursuant to notifications
124 alleging violations of matters within the authority of the Board **or hearing**
125 **officer**.

126
127 Section 4. Section 2.80.030 is amended to read as follows:

128
129 2.80.030 Confidentiality – Initial review.

130
131 a. Each written complaint of a violation of Chapter 1.18 HCC received by the City
132 Clerk's office shall be assigned an identification number, which shall be used in
133 lieu of names when referring to the complaint to maintain confidentiality. The
134 City Clerk and the Board **or hearing officer** shall keep all written complaints of
135 potential violation confidential during investigation and the Board's **or hearing**
136 **officer's** deliberative process. Complaints of potential violation may be
137 disclosed only to the staff member of the City Clerk's office providing
138 administrative support to the Board **or hearing officer**, members of the Board
139 **except when a hearing officer has been appointed**, and legal counsel. Upon
140 receipt of a notification of potential violation, the Board **or hearing officer** shall,
141 at its next scheduled meeting or earlier, as determined by the Board Chair **or**
142 **hearing officer**, review the complaint of potential violation ~~in executive session~~
143 and determine if further action on the notification of potential violation is
144 warranted. **The Board shall review the complaint of potential violation in**
145 **executive session. A hearing officer appointed under this chapter shall**
146 **review the complaint in a confidential manner.**

147
148 b. If the Board **or hearing officer** determines the facts alleged in the notification
149 of potential violation, even if proven, do not constitute a violation, or that the
150 Board **or hearing officer** lacks jurisdiction to address the complaint of potential
151 violation, the Board **or hearing officer** shall return the complaint of potential
152 violation to the complaining party or it may recommend to the person filing the
153 complaint that it be amended and re-filed. Notifications of potential violation
154 returned without further action shall remain confidential.

155
[Bold and underlined added. Deleted language ~~stricken through.~~]

156 c. If the Board **or hearing officer** determines the allegation in a complaint of
157 potential violation, if proven, may constitute a violation of a matter within the
158 Board's **or hearing officer's** jurisdiction, the Board **or hearing officer** shall:

159
160 ~~1. Request and receive assistance from legal counsel to assist the Board~~
161 ~~in all further deliberative processes, investigations and reports;~~

162
163 ~~2~~**1**. Give the respondent a copy of the complaint of potential violation,
164 along with a copy of the outline of the Board's process under this chapter,
165 including notice that the respondent may choose to hold the proceeding in
166 public and may be represented by legal counsel of respondent's choosing and
167 at respondent's own expense; and

168
169 ~~3~~**2**. Notify both the person submitting the complaint of potential
170 violation and respondent of the date(s) on which each may be requested to meet
171 with the Board **or hearing officer**, present documentary or testimonial
172 evidence, and assist the Board **or hearing officer** in resolving the potential
173 violation.

174
175 Section 5. Section 2.80.040 is amended to read as follows:

176
177 2.80.040 Disclosure of complaint of potential violation prohibited.

178
179 a. A complaint of potential violation of Chapter 1.18 HCC is confidential until the
180 Board **or hearing officer** completes a written report for distribution as a public
181 record.

182
183 1. No person, including the complainant, shall knowingly disclose to
184 another person, or otherwise make public in violation of this chapter, the
185 contents of a complaint of potential violation filed with the Board **or hearing**
186 **officer**, unless:

187
188 ~~ia.~~ **ia.** The respondent elects to proceed in public; or

189
190 ~~ii.~~ **ii.** The written report of the Board **or hearing officer** is
191 electronically published by the City Clerk.

192
193 2. Breach of confidentiality required by any provision of this chapter is a
194 violation of this chapter subject to punishment.

195
196 3. A person filing a complaint of potential violation shall keep
197 confidential the fact that the person has filed the complaint with the City, as well

Bold and underlined added. Deleted language ~~stricken through.~~

198 as the contents of the complaint of potential violation. If the Board **or hearing**
199 **officer** finds probable cause to believe that the person filing the notice of
200 complaint violation has violated confidentiality under this chapter, the Board **or**
201 **hearing officer** shall immediately dismiss the complaint of violation. Dismissal
202 under this subsection does not affect the right of the Board **or hearing officer**
203 or another person to initiate a proceeding on the same factual allegations by
204 filing a complaint of potential violation.

205
206 4. Public disclosure resulting from corrective action under this chapter is
207 not a violation of this section.

208
209 Section 6. Section 2.80.050 is amended to read as follows:

210
211 2.80.050 Conduct of investigation and standard of proof.

212 **a. The Board's investigation shall be conducted in executive session,**
213 **unless the respondent requests to hold the Board's investigation on the**
214 **notification of potential violation in public. The hearing officer's**
215 **investigation shall be conducted in a manner to maintain confidentiality**
216 **unless the respondent requests to hold the hearing officer's**
217 **investigation on the notification of potential violation in public.**

218 **1. The respondent and the person who filed the notification of**
219 **potential violation may identify other individuals and documents that**
220 **each would like the Board or hearing officer to interview and review.**

221 **2. If an individual with information bearing on the notification of**
222 **potential violation is unwilling to come forward with information, the**
223 **respondent and the person who filed the notification of potential**
224 **violation may each request the Board or hearing officer to subpoena the**
225 **person and any documentary evidence.**

226 **3. Persons appearing before the Board or hearing officer may be**
227 **represented by counsel or other person serving in a representative**
228 **capacity.**

229 **4. The Board or hearing officer may question the respondent, the**
230 **person who filed the notification of potential violation, and other**
231 **persons appearing before the Board or hearing officer.**

232 **5. The Board or hearing officer may solicit questions and**
233 **testimony from the person filing the notification of potential violation,**

[Bold and underlined added. Deleted language ~~stricken through.~~]

234 the respondent and other persons appearing for the purpose of
235 providing information to the Board or hearing officer. The Board or
236 hearing officer may solicit questions from counsel present to represent
237 persons appearing before the Board or hearing officer, but all questions
238 during the Board's or hearing officer's investigation shall be posed
239 through and by a member of the Board or the hearing officer. Consistent
240 with due process, the Board or hearing officer may limit or prohibit
241 questions suggested to the Board or hearing officer by or on behalf of
242 persons appearing before the Board or hearing officer.

243 6. The standard of proof to be applied by the Board or hearing
244 officer in determining a violation under this chapter is proof by a
245 preponderance of the evidence.

246 7. Technical rules of evidence do not apply, but the findings of the
247 Board shall be based upon reliable and relevant information presented
248 to the Board.

249 8. The Board's or hearing officer's finding of a violation of this
250 chapter must be supported by substantial evidence.

251 9. The Board's or hearing officer's findings shall not be binding in
252 a subsequent sanctions proceeding.

253 10. When the Board's or hearing officer's investigation is
254 conducted in executive session or confidentially, the public shall be
255 excluded but an executive session of the Board shall be electronically
256 recorded. The recording shall be available for access as a public record
257 after publication by the municipal clerk of the proposed resolution and
258 settlement.

259 ~~a. The Board's investigation shall be conducted in executive session, unless the~~
260 ~~respondent requests to hold the Board's investigation of written complaint of~~
261 ~~potential violation in public. The respondent and the person who filed the~~
262 ~~complaint, and their counsel, if any, may be present in executive session while~~
263 ~~the investigation is being conducted.~~

265 ~~1. The respondent and the person who filed the complaint of potential~~
266 ~~violation may identify other individuals and documents that each would like the~~
267 ~~Board hearing officer to interview and review.~~

269 2. If an individual with information bearing on the complaint of potential
270 violation is unwilling to come forward with information, the respondent and the
271 person who filed the complaint of potential violation may each request the
272 Board to subpoena the person and any documentary evidence.
273

274 3. Persons appearing before the may be represented by counsel or other
275 person serving in a representative capacity.
276

277 4. The Board may question the respondent, the person who filed the
278 complaint of potential violation, and other persons appearing before the Board.
279

280 5. The Board may solicit questions and testimony from the person filing
281 the complaint of potential violation, the respondent and other persons
282 appearing for the purpose of providing information to the Board. The may solicit
283 questions from counsel present to represent persons appearing before the
284 Board but all questions during the Board's investigation shall be posed through
285 and by a member of the Board. Consistent with due process, the Board may limit
286 or prohibit questions suggested to the Board by or on behalf of persons
287 appearing before the Board
288

289 6. The standard of proof to be applied by the Board in determining a
290 violation under Chapter 1.18 HCC is proof by a preponderance of the evidence.
291

292 7. Technical rules of evidence do not apply, but the findings of the Board
293 shall be based upon substantial evidence, which means reliable and relevant
294 information presented to the Board.
295

296 8. The Board's finding of a violation of Chapter 1.18 HCC must be
297 supported by substantial evidence.
298

299 9. The Board's findings shall not be binding in a subsequent sanctions
300 proceeding.
301

302 10. When the Board's investigation is conducted in executive session, the
303 public shall be excluded and the session shall be electronically recorded. The
304 recording shall be available for access as a public record after publication by the
305 City Clerk of the proposed resolution and settlement under HCC 2.80.090.
306

307 Section 8. Section 2.80.060 is amended to read as follows:

308 2.80.60 Board member **and hearing officer** disclosures.
309
310

[Bold and underlined added. Deleted language stricken through.]

311 **a.** When an investigation is convened in executive session to determine whether the
312 respondent has violated Chapter 1.18 HCC, the Board members will be requested to
313 disclose any conflict of interest, ex parte communications, or other facts that may
314 affect their qualification to hear the matter. After such a disclosure, the other
315 members of the Board shall determine whether a member shall be excused for
316 cause.

317
318 **b. A hearing officer shall disclose any conflict of interest or ex parte**
319 **communications with the complainant or respondent before conducting an**
320 **investigation or holding a hearing under this chapter. The complainant and the**
321 **respondent have ten days from the date the written disclosure is sent to the**
322 **parties to file an objection to the hearing officer with the City Clerk. Upon**
323 **receiving an objection, the City Clerk shall appoint a new hearing officer.**
324

325 Section 9. Section 2.80.061 is amended to read as follows:

326
327 2.80.061 Duty of cooperation.

328
329 A City official or the City Manager subject to a complaint of a violation shall work
330 cooperatively with the City Clerk to establish a hearing date and shall appear at
331 the place and time set for the hearing, regardless of the respondent's intentions
332 concerning defense or exercise of other rights. Failure to appear, except when
333 failure results from a serious condition or event that prevented the respondent's
334 appearance, is a breach of respondent's duties under this chapter and in itself
335 may result in a summary finding of violation by the Board **or hearing officer** and
336 imposition of remedies, penalties and disciplinary action under HCC 2.80.070.
337 For the purposes of this section, a "serious condition or event" may include a
338 serious medical condition, a serious family emergency requiring the presence of
339 the party, a death in the family, or other similar cause that prevents the
340 respondent's attendance at the hearing. Nothing in this section shall prevent the
341 rescheduling of a hearing for cause upon request of the respondent or the
342 complainant.

343
344 Section 10. Section 2.80.065 is amended to read as follows:

345
346 2.80.065 Decisions on the record.

347
348 Using the identification number of the complaint of potential violation to
349 protect confidentiality, the Board **shall vote** or **hearing officer** shall ~~vote~~
350 **determine** in open session on these questions:
351

[Bold and underlined added. Deleted language ~~stricken through.~~]

- 352 a. Whether the Board **or hearing officer** finds by a preponderance of the
353 evidence one or more violations within the jurisdiction of the Board **or hearing**
354 **officer**; and
- 355
- 356 b. Whether the Board **or hearing officer** recommends further administrative or
357 remedial actions; and
- 358
- 359 c. What specific sanctions, corrective actions or referrals, if any, the Board **or**
360 **hearing officer** recommends pursuant to 2.80.070.
- 361
- 362 d. If the Board **or hearing officer** does not find a violation under Chapter 1.18
363 HCC, the Board **or hearing officer** shall prepare a confidential statement of
364 closure listing the complainant and respondent, the assigned identification
365 number, the allegations, the hearing date, and the finding that no allegation was
366 substantiated by the Board **or hearing officer** in whole or in part, and the date
367 of Board **or hearing officer** closure. At the sole discretion of the respondent,
368 the Board **or hearing officer** may release the statement of closure as a public
369 document.

370

371 Section 11. Section 2.80.067 is amended to read as follows:

372

373 2.80.067 Timely completion.

374

375 The Board **or hearing officer** shall complete action on a complaint of potential
376 violation and investigations within 90 days of the filing of the complaint of
377 potential violation. By a majority vote, the Board **or hearing officer** may extend
378 the completion date for up to an additional 90 days, or longer for good cause
379 shown.

380

381 Section 12. Section 2.80.070 shall be amended to read as follows:

382

383 2.80.070 Sanctions, civil penalties and remedies.

384

385 a. Upon conviction for any violation of Chapter 1.18 HCC under criminal
386 procedures or upon a determination of any violation of Chapter 1.18 HCC after
387 an investigation conducted by the Board **or hearing officer** under this chapter,
388 the Board **or hearing officer** may impose (or recommend in the case of
389 subsection (a)(1) of this section) as a sanction, penalty, or remedy any or all of
390 the following, as appropriate to the seriousness of the violation:

391

392 1. A recommendation to the City Council that the office of a City Council
393 member or the position of City Manager be declared vacant for a serious

[Bold and underlined added] Deleted language ~~stricken through.~~

394 violation that is (a) flagrant or (b) willful and knowing. A recommendation that
395 the office of the Mayor be declared vacant may be made only if the violation
396 justifies a declaration of vacancy under AS 29.20.280. Only the City Council may
397 actually declare any of these positions vacant.

398
399 2. A member of a board or commission may be removed from the board
400 or commission.

401
402 3. A public or private reprimand may be given to the official.

403
404 4. The official may be ordered to refrain from voting, deliberating, or
405 participating in any matter in violation of Chapter 1.18 HCC.

406
407 5. The committee assignments of an official may be revoked.

408
409 6. An official's privilege to travel at City expense on City business may be
410 revoked or restricted.

411
412 7. A contract, transaction or appointment, which was the subject of an
413 official act or action of the City that involved the violation of a provision of
414 Chapter 1.18 HCC, may be voided.

415
416 8. The official must forfeit or make restitution of any financial benefit
417 received as a consequence of a violation of Chapter 1.18 HCC.

418
419 9. A civil fine of not more than \$1,000 per violation may be imposed.

420
421 Section 13. Section 2.80.080 shall be amended to read as follows:

422
423 2.80.080 Record of proceedings and public record.

424
425 Permanent records and minutes shall be kept of Board's **or hearing officer's**
426 proceedings. Such minutes shall record the vote of each member upon every
427 question decided in public. Every decision or finding shall immediately be filed
428 in the office of the City Clerk, and shall be a public record open to inspection by
429 any person. Every finding and recommendation shall be directed to the City
430 Council at the earliest possible date.

431
432 Section 14. Section 2.80.090 is amended to read as follows:

433
434 2.80.090 Settlement of complaints.

435

436 a. The respondent in any case accepted for investigation may propose a
437 resolution and settlement of the complaint. A proposed resolution and
438 settlement will include the admitted violation of Chapter 1.18 HCC; the remedial
439 actions agreed to by the respondent subject to the City Council's concurrence;
440 any proposed preventive actions to be undertaken to avoid similar violation by
441 respondent or others in the future; and other matters required by the Board **or**
442 **hearing officer**.

443
444 b. A proposed resolution and settlement is subject to approval by the Board **or**
445 **hearing officer** and has no effect unless approved by the Board **or hearing**
446 **officer**. The Board **or hearing officer** will give the complaining person the
447 opportunity to review and comment on the proposed resolution and settlement
448 prior to approving it. Until approved by the Board **or hearing officer**, a proposed
449 resolution and settlement must be kept confidential.

450
451 c. The proposed resolution and settlement becomes public record upon final
452 approval by the Board **or hearing officer**.

453
454 Section 15. Section 2.80.100 is amended to read as follows:

455
456 2.80.100 Limitation period.

457
458 a. Notwithstanding any other section of this chapter or Chapter 1.18 HCC, and
459 subject to subsection (b) of this section, the Board **or hearing officer** only may
460 investigate or otherwise act upon a complaint of a potential violation of Chapter
461 1.18 HCC that is received by the City Clerk's office within five years after the date
462 of the alleged violation.

463
464 b. After the time limitation in subsection (a) of this section has expired, the Board
465 **or hearing officer** may investigate or otherwise act upon a complaint of a
466 potential violation of Chapter 1.18 HCC that is received by the City Clerk's office
467 within one year after the date of discovery of the alleged violation, but in no case
468 shall this subsection extend the period of limitation in subsection (a) of this
469 section by more than three years.

470
471 Section 16. This ordinance shall take effect upon its adoption by the Homer City Council.

472
473 Section 17. This ordinance is of a permanent and general character and shall be
474 included in the City Code.

475
476 ENACTED BY THE CITY COUNCIL OF HOMER, ALASKA, this _____ day of
477 _____, 2017.

CITY OF HOMER

BRYAN ZAK, MAYOR

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ATTEST:

JO JOHNSON, MMC, CITY CLERK

YES:

NO:

ABSTAIN:

ABSENT:

First Reading:

Public Hearing:

Second Reading:

Effective Date:

Reviewed and approved as to form.

Mary K. Koester, City Manager

Holly C. Wells, City Attorney

Date: _____

Date: _____

Fiscal Note: NA