

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

Erickson

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4 **ORDINANCE 17-07(S-3)(A)**
5

6 AN ORDINANCE OF THE CITY COUNCIL OF HOMER, ALASKA,
7 AMENDING HOMER CITY CODE 21.93.060, 21.93.070, 21.93.080,
8 21.93.100, 21.93.110, 21.93.500, 21.93.540, 21.93.550, 21.93.560,
9 21.93.570, 21.93.700, AND 21.93.710 REQUIRING THE CITY OF
10 HOMER TO USE A HEARING OFFICER WHEN APPEALING A
11 HOMER ADVISORY PLANNING COMMISSION DECISION,
12 REQUIRING ALL APPELLANTS TO USE A HEARING OFFICER
13 WHEN A BOARD OF ADJUSTMENT QUORUM CANNOT BE
14 OBTAINED DUE TO CONFLICT OF INTEREST, BIAS OR
15 PARTIALITY, AND PERMITTING ALL OTHER APPELLANTS THE
16 CHOICE BETWEEN AN APPEAL BEFORE THE BOARD OF
17 ADJUSTMENT AND A HEARING OFFICER IN APPEALS OF
18 PLANNING COMMISSION DECISIONS
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20 WHEREAS, It is in the City's best interest to provide individuals and corporate entities
21 appealing decisions issued by the Homer Advisory Planning Commission ("Commission") the
22 ability to use a hearing officer rather than the Board of Adjustment; and
23

24 WHEREAS, requiring the City of Homer to use appeal decisions issued by the
25 Commission to a hearing officer preserves the appearance of impartiality and minimizes
26 perceptions of conflict or bias; and
27

28 WHEREAS, The use of experienced hearing officers that do not otherwise advise the
29 City on legislative land use matters promotes public confidence in the City of Homer's
30 administrative appeals process,
31

32 NOW, THEREFORE, THE CITY OF HOMER ORDAINS:
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35 Section 1. Section 21.41.400 shall be amended to read as follows:
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37 a. The Planning Commission shall hear and decide appeals when it is alleged
38 there is an error in any requirement, decision, or determination made by the
39 Planning Department.
40

41 b. The Board of Adjustment or a hearing officer appointed by the City Manager
42 shall hear and decide appeals when it is alleged there is an error in any
43 requirement, decision, or determination made by the Planning Commission.
44

45 Section 2. Section 21.91.110 shall be amended to read as follows:

46
47 **a.** Either the Board of Adjustment or a hearing officer appointed by the City
48 Manager shall hear and decide appeals authorized by HCC 21.93. A decision
49 appealed under HCC 21.93 shall be heard by a hearing officer unless the
50 individual or entity appealing the decision selects the Board of Adjustment to
51 hear the appeal in their notice of appeal. A hearing officer appointed by the City
52 Manager shall hear and decide appeals pursuant to the provisions of the zoning
53 code.
54

55 **b.** A hearing officer appointed by the City Manager to act as the decision maker in
56 appeals of decisions made by the Planning Commission must have at least five
57 years' experience acting as an administrative law judge or administrative
58 hearing officer and must be licensed to practice law in the State of Alaska and in
59 good standing.
60

61 **c.** The City Manager, the City Planner or the City Planner's designee, or any City of
62 Homer official, agency, or unit shall appeal to a hearing officer and may not
63 select to appeal to the Board of Adjustment.
64

65 Section 3. Section 21.91.120 shall be amended as follows:

66
67 Appeals heard by the Board of Adjustment or a hearing officer shall be
68 conducted according to applicable procedures specified in Chapter 21.93 HCC.
69

70 Section 4. Section 21.91.130 shall be amended as follows:

71
72 **a.** An appeal from a final decision of the Board of Adjustment or a hearing
73 officer may be taken directly to the Superior Court by a party who actively and
74 substantively participated in the proceedings before the Board of Adjustment
75 or the hearing officer or by the City Manager or City Planner or any
76 governmental official, agency, or unit.
77

78 **b.** An appeal to the Superior Court shall be filed within 30 days of the date of
79 distribution of the final decision to the parties appearing before the Board of
80 Adjustment or hearing officer.
81

82 c. An appeal from a final decision of the Board of Adjustment or hearing officer
83 to the Superior Court is governed by court rules.

84
85 Section 5. Section 21.93.030 shall be amended to read as follows:

86
87 21.93.030 Decisions subject to appeal to the Board of Adjustment or a hearing
88 officer.

89
90 The following acts or determinations of the Commission, when final, may be
91 appealed to the Board of Adjustment or a hearing officer appointed by the City
92 Manager by a person with standing:

93
94 a. Grant or denial of a conditional use permit.

95
96 b. Grant or denial of a variance.

97
98 c. Grant or denial of formal recognition of a nonconforming use or structure, or
99 a decision terminating a nonconforming use or structure.

100
101 d. Grant or denial of a conditional fence permit.

102
103 e. A decision by the Commission in a matter appealed to the Commission
104 under HCC 21.93.020.

105
106 f. Any other final decision that is expressly made appealable to the Board of
107 Adjustment or a hearing officer by other provisions of the code.

108
109 Section 6. Section 21.93.060 shall be amended to read as follows:

110
111 21.93.060 Standing – Appeal to Hearing Officer.

112
113 Only the following have standing to appeal an appealable action or
114 determination of the Planning Commission to the Board of Adjustment or a
115 hearing officer:

116
117 a. Applicant for the action or determination, or the owner of the property that
118 is the subject of the action or determination under appeal.

119
120 b. The City Manager, the City Planner or the City Planner’s designee, or any
121 governmental official, agency, or unit.

122

123 c. Any person who actively and substantively participated in the proceedings
124 before the Commission and is aggrieved by the action or determination.

125
126 d. Any person who actively and substantively participated in the proceedings
127 before the Commission and would be aggrieved if the action or determination
128 being appealed were to be reversed on appeal.

129
130 Section 7. Section 21.93.070 shall be amended to read as follows:

131
132 a. An appeal to the Planning Commission must be filed within 30 days after the
133 date of distribution of the final action or determination to the applicant or
134 other person whose property is the subject of the matter being appealed.

135
136 b. An appeal to the Board of Adjustment or a hearing officer must be filed within
137 30 days after the date of distribution of the final action or determination to the
138 applicant and other parties, if any.

139
140 Section 8. Section 21.93.080 shall be amended to read as follows:

141
142 a. A notice of appeal from an action or determination of the City Planner or
143 the Planning Commission shall be filed with the City Clerk.

144
145 b. A notice of appeal shall be in writing, be signed by the appellant, and shall
146 contain, but is not limited to, the following information:

147
148 1. The name and address of the appellant.

149
150 2. A description of the action or determination from which the appeal
151 is sought and the date upon which the action or determination
152 became final.

153
154 3. The street address and legal description of the property that is the
155 subject of the action or determination being appealed, and the
156 name and address of the owner(s) of that property.

157
158 4. Detailed and specific allegations of error, including reference to
159 applicable provisions of the zoning code or other law.

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161 5. A statement of whether the action or determination should be
162 reversed, modified, or remanded for further proceedings, or any
163 other desired relief.
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6. Proof showing that the appellant is an aggrieved person with standing to appeal under HCC 21.93.050 or 21.93.060. whichever is applicable.
 7. The appellant's choice of decision maker, which may be either the Board of Adjustment or a hearing officer appointed by the City Manager.
- c. The City Clerk shall reject any notice of appeal that does not comply with HCC 21.93.070 and this section and notify the appellant of the reasons for the rejection. If a notice of appeal is rejected for reasons other than timeliness, a corrected notice of appeal that complies with this section will be accepted as timely if filed within seven days of the date on which the City Clerk mails the notice of rejection.
 - d. The City Clerk shall mail copies of the notice of appeal to all parties of record in the proceeding appealed from within seven days of the date on which the City Clerk determines the notice of appeal complies with HCC 21.93.070 and this section.
 - e. Any person with standing under HCC 21.93.050 or 21.93.060, whichever is applicable, may, within seven days after the date the City Clerk mailed copies of an accepted notice of appeal, file notice of cross appeal. Any notice of cross appeal shall, to the extent practical, comply with subsection (b) of this section.
 - f. The City Clerk shall promptly give notice of the cross appeal to the appellant and all other parties who have filed a notice of appearance.

194 Section 9. Section 21.93.100 shall be amended to read as follows:

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- a. All appeals must be heard within 60 days after the appeal record has been prepared. The body or officer hearing the appeal may for good cause shown extend the time for hearing. The decision on appeal must be rendered within 60 days after the appeal hearing.
 - b. The appellant, the applicant for the action or determination that is the subject of the appeal, the owner of the property that is the subject of the action or determination, and all parties who have entered an appearance shall be provided not less than 15 days' written notice of the time and place of the appeal hearing. Neighboring property owners shall be notified as set forth in HCC 21.94.030.

207
208 c. When an appellant chooses to appeal to a hearing officer, the City Clerk shall
209 identify the hearing officer in the notice of hearing. All parties shall have ten
210 days from the date of the notice to object to the hearing officer based upon
211 conflicts of interest, personal bias or ex parte contacts. Failure to file an
212 objection to the hearing officer within the ten days shall waive any objection to
213 the hearing officer.

214
215 **ed.** An electronic recording shall be kept of the entire proceeding. Written
216 minutes shall be prepared. The electronic recording shall be preserved for one
217 year unless required for further appeals. No recording or minutes shall be kept
218 of deliberations that are not open to the public.

219
220 Section 10. Section 21.93.110 shall be amended to read as follows:

221
222 a. All final decisions on appeals shall be in writing, and shall state the names
223 and number of members of the body who participated in the appeal, the
224 names and number voting in favor of the decision, and the names and number
225 voting in opposition to the decision. All final decisions issued by a hearing
226 officer must state the name of the officer.

227
228 b. A decision shall include an official written statement of findings and reasons
229 supporting the decision. This statement shall refer to specific evidence in the
230 record and to the controlling sections of the zoning code. Upon express vote,
231 the body or hearing officer may adopt, as their statement of findings and
232 reasons, those findings and reasons officially adopted by the body or officer
233 below from which the appeal was taken.

234
235 c. Copies of the written decision shall be promptly mailed to the appellant, the
236 applicant for the action or determination that is the subject of the appeal, the
237 owner of the property that is the subject of the action or determination, and all
238 parties who entered a written notice of appearance in the appeal proceeding.

239
240 Section 11. Section 21.93.500 shall be amended to read as follows:

241
242 21.93.500 Parties eligible to appeal Planning Commission decision to the
243 Board of Adjustment or a hearing officer – Notice of appearance.

244
245 a. Only persons who actively and substantively participated in the matter
246 before the Commission and who would be qualified to appeal under HCC
247 21.93.060 may participate as parties in an appeal from the Commission to the
248 Board of Adjustment or a hearing officer.

249
250 b. Any person so qualified who desires to participate in the appeal as a party,
251 other than the appellant, the City Planner or the City Planner's designee, the
252 applicant for the action or determination that is the subject of the appeal and
253 the owner of the property that is the subject of the action or determination,
254 must, not less than 14 days before the date set for the appeal hearing, file with
255 the City Clerk a written and signed notice of appearance containing that
256 party's name and address, and proof that the person would be qualified under
257 HCC 21.93.060 to have filed an appeal.
258

259 Section 12. Section 21.93.510 shall be amended to read as follows:

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261 a. Except as provided in subsections (b) and (c) of this section, the Board of
262 Adjustment or hearing officer shall not consider allegations of new evidence or
263 changed circumstances and shall make their decision based solely on the
264 record. If new evidence or changed circumstances are alleged, the Board of
265 Adjustment or hearing officer may, in their discretion, either hear the appeal
266 without considering the allegations or may remand the matter to the
267 appropriate lower administrative body or official to rehear the matter, if
268 necessary.
269

270 b. When the standing of a person is in issue, the Board of Adjustment or
271 hearing officer may take additional evidence for the limited purpose of making
272 findings on the question of the person's standing. No evidence received under
273 this subsection shall be considered for purposes other than determining
274 standing.
275

276 Section 13. Section 21.93.520 shall be amended to read as follows:

277
278 a. The appeal record shall be completed within 30 days after receipt of a timely
279 and complete notice of appeal to the Board of Adjustment or hearing officer,
280 and shall consist of the items, and shall be prepared in the manner, described
281 in this subsection.
282

283 1. The Clerk will assemble and paginate all relevant documents
284 involved in the original decision, including any staff reports, minutes, exhibits,
285 notices, and other documents considered in making the original decision.
286

287 2. A party may elect to include a verbatim transcript of the testimony
288 before the Planning Commission in the appeal record by making a written
289 request to the City Clerk for a recording of the testimony within 14 days after
290 the Clerk mails copies of the notice of appeal to the parties pursuant to HCC

291 21.93.080(d). The requesting party shall arrange and pay for the preparation of
292 the transcript. Only a transcript prepared and certified as accurate by a
293 qualified court reporter shall be accepted. The original transcript must be filed
294 with the City Clerk to be provided to the hearing officer with the record on
295 appeal.

296
297 b. The appellant, the applicant for the action or determination that is the
298 subject of the appeal, the owner of the property that is the subject of the
299 action or determination, and other parties who have entered an appearance
300 shall be notified by mail when the record and transcript, if ordered, are
301 complete. Any person may obtain a copy upon payment of the costs of
302 reproduction and any applicable mailing costs.

303
304 Section 14. Section 21.93.540 shall be amended to read as follows:

305
306 a. The meeting at which the Board of Adjustment hears an appeal shall be
307 open to the public. An appeal before the hearing officer shall also be open to
308 the public. The City Attorney or another attorney acting as legal counsel to the
309 Board shall be present at appeals before the Board of Adjustment.

310
311 b. Each party (each appellant, cross-appellant, and respondent) may present
312 oral argument at the appeal hearing, subject to the order of presentation and
313 time limitations that the Board of Adjustment or hearing officer adopts at the
314 commencement of the hearing. The taking of testimony or other evidence is
315 limited by HCC 21.93.510.

316
317 c. The Board of Adjustment or hearing officer may undertake deliberations
318 immediately upon the conclusion of the hearing on appeal or may take the
319 matter under advisement and meet at such other time as is convenient for
320 deliberations until a decision is rendered. Deliberations need not be public.

321
322 d. The Board of Adjustment or hearing officer may exercise his or her
323 independent judgment on legal issues raised by the parties. "Legal issues" as
324 used in this section are those matters that relate to the interpretation or
325 construction of the zoning code, ordinances or other provisions of law.

326
327 e. The Board of Adjustment or hearing officer shall defer to the findings of the
328 lower administrative body regarding disputed issues of fact. Findings of fact
329 adopted expressly or by necessary implication by the lower body shall be
330 considered as true if they are supported by substantial evidence. But findings
331 of fact adopted by less than a majority of the lower administrative body shall
332 not be given deference, and when reviewing such findings of fact the Board of

333 Adjustment or hearing officer shall exercise independent judgment and may
334 make their own findings of fact. If the lower administrative body fails to make a
335 necessary finding of fact and substantial evidence exists in the record to
336 enable the Board of Adjustment or hearing officer to make the finding of fact,
337 they may do so in the exercise of their independent judgment, or, in the
338 alternative, the Board of Adjustment or hearing officer may remand the matter
339 for further proceedings. "Substantial evidence," as used in this section, means
340 such relevant evidence as a reasonable mind might accept as adequate to
341 support a conclusion.

342
343 Section 15. Section 21.93.550 shall be amended to read as follows:

344 21.93.550 Board of Adjustment or Hearing Officer Decision

345
346
347 a. The Board of Adjustment or hearing officer may affirm or reverse the decision
348 of the lower administrative body in whole or in part. If the appeal is heard by
349 the Board of Adjustment, a A majority vote of the fully constituted Board is
350 required to reverse or modify the action or determination appealed from. For
351 the purpose of this section, the fully constituted Board shall not include those
352 members who do not participate in the proceedings due to a conflict of
353 interest or disqualifying ex parte contacts, disqualifying partiality, or other
354 disqualification for cause. A decision affirming, reversing, or modifying the
355 decision appealed from shall be in a form that finally disposes of the case on
356 appeal, except where the case is remanded for further proceedings.

357
358 b. The Board may seek the assistance of legal counsel, City staff, or parties in
359 the preparation of a decision or proposed findings of fact.

360
361 Section 16. Section 21.93.560 shall be amended to read as follows:

362
363 a. The Board of Adjustment or hearing officer may remand the appeal to the
364 lower administrative body when the Board or hearing officer determines that:

- 365 1. There is insufficient evidence in the record on an issue material to the
366 decision of the case;
 - 367 2. There has been a substantial procedural error that requires further
368 consideration by the lower administrative body; or
 - 369 3. There is other cause requiring further proceedings by the lower
370 administrative body.
- 371
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375 b. A decision remanding a case shall describe any issue upon which further
376 evidence should be taken, and shall set forth any further directions the Board
377 or hearing officer deems appropriate for the guidance of the lower
378 administrative body.

379
380 c. The lower administrative body shall promptly act on the case upon remand
381 in accordance with the decision of the Board of Adjustment or hearing officer.
382 A case on remand has priority on the agenda of the lower administrative body,
383 except cases remanded under HCC 21.93.510(a) are not entitled to priority. The
384 applicant or owner of the property in question may waive the priority given by
385 this subsection.

386
387 Section 17. Section 21.93.570 shall be amended to read as follows:

388
389 If no specific procedure is prescribed by the code, the Board of Adjustment or
390 hearing officer may proceed in an administrative appeal in any lawful manner
391 not inconsistent with this title, statutes, and the Constitution.

392
393 Section 18. Section 21.93.700 shall be amended to read as follows:

394
395 a. A member of the Planning Commission, ~~or~~ Board of Adjustment or a hearing
396 officer appointed to hear an appeal from a Planning Commission decision may
397 not participate in the deliberation or voting process of an appeal if, following
398 the procedures set forth in this chapter, the Commission, or Board member or
399 hearing officer is determined to have a substantial financial interest in the
400 official action, as defined in Chapter 1.18 HCC. In the absence thereof, all
401 Commission; or Board members or a hearing officer shall participate in the
402 deliberation and voting process unless excused pursuant to other provisions of
403 this chapter.

404
405 b. When a financial interest of a member of the Planning Commission or Board of
406 Adjustment is disclosed on the record, the remainder of the Commission or
407 Board, respectively, shall determine whether the member should participate in
408 the matter. If it is determined the member should participate, any action taken
409 thereafter by the body shall be valid notwithstanding a later determination by
410 a court, ~~an~~ appellate tribunal, or a hearing officer that the member should
411 have been disqualified from participation because of a substantial financial
412 interest in the matter; except the action shall be invalidated when the
413 disqualified member's vote was necessary to establish the required majority to
414 approve the decision of the body. When a Commission or Board decision is
415 invalidated because such vote was necessary to establish the required
416 majority, the body shall commence new consideration of the matter beginning

417 at the point where the Commission or Board, respectively, determines it is
418 necessary to do so to eliminate the effect of the member's improper
419 participation.

420
421 c. A hearing officer shall disclose any substantial financial interest, personal bias
422 or ex parte contact immediately upon being appointed by the City Manager
423 and shall refrain from accepting the appointment if a substantial financial
424 interest, personal bias or ex parte contact exists. If the substantial financial
425 interest, personal bias or ex parte contact arises after the hearing officer's
426 appointment, he or she shall disclose his or her interest and shall be
427 disqualified from serving as the hearing officer unless all parties waive any
428 objection to the hearing officer.

429
430 d. For purposes of hearing an appeal, a quorum of the Commission is four
431 members. If it is not possible to obtain a quorum of the Planning Commission
432 to hear an appeal without the participation of members disqualified by reason
433 of a substantial financial interest, then all members who would be so
434 disqualified shall nevertheless participate in the appeal, including
435 deliberations and voting, and the decision rendered in such a case shall be
436 valid notwithstanding the participation of such members. This subsection shall
437 not apply if the matter can be postponed to a later date (not later than 75 days
438 after the appeal record is prepared) when the body can obtain a quorum of
439 members who are not disqualified by a substantial financial interest.

440
441 e. For purposes of hearing an appeal, a quorum of the Board is four members. If it
442 is not possible to obtain a quorum of the Board to hear an appeal without the
443 participation of members who have chosen to abstain or been disqualified by
444 the Board due to substantial financial interest, bias or partiality, then the
445 hearing shall be postponed and a hearing officer shall be appointed. A hearing
446 officer appointed under this subsection shall conduct the rescheduled hearing
447 no more than 60 days after the original hearing date except that the hearing
448 officer may extend the hearing date for good cause shown.

449
450 Section 19. Section 21.93.710 shall be amended to read as follows:

451
452 a. No member of the Commission or Board of Adjustment or any hearing officer
453 appointed by the City Manager to review a decision issued by the Commission
454 shall have ex parte communication with any person. "Ex parte
455 communication" means to communicate, directly or indirectly, with the
456 appellant, other parties or persons affected by the appeal, or members of the
457 public concerning an appeal or issues specifically presented in the notice of
458 appeal, either before the appeal hearing or during any period of time the

459 matter is under consideration or subject to reconsideration, without notice
460 and opportunity for all parties to participate in the communication.

461
462 b. This section does not prohibit:

463
464 1. Members from discussing matters relating to the appeal among
465 themselves.

466
467 2. Communications between municipal staff and Commission or Board
468 members or the hearing officer where:

469
470 a. Such staff members are not themselves parties to the appeal;
471 and

472 b. Such communications do not furnish, augment, diminish, or
473 modify the evidence in the record on appeal.

474
475 3. Communications between the Commission or Board and its legal
476 counsel.

477
478 c. If, before an appeal commences, a member of the Commission or Board
479 receives an ex parte communication of a type that could not properly be
480 received while an appeal is pending, the member shall disclose the
481 communication in the manner prescribed in subsection (d) of this section at
482 the first meeting of the Commission or Board at which the appeal is addressed.

483
484 d. A member of the Commission or Board who receives an ex parte
485 communication at any time shall, at the first opportunity after the
486 communication, place on the record of the pending matter all written
487 communications received, all written responses to the communications, and a
488 memorandum stating the substance of all oral communications received, all
489 responses made, and the identity of each person from whom the member
490 received an ex parte communication. Any party to the appeal desiring to rebut
491 the ex parte communication must be granted a reasonable opportunity to do
492 so if a request is promptly made.

493
494 e. If the Commission or Board determines in its discretion it is necessary to
495 eliminate the harmful effect of an ex parte communication received in
496 violation of this section, the Commission or Board may disqualify the member
497 who received the communication from participation in the appeal. In addition,
498 the Commission may impose appropriate sanctions, including default, against
499 a party to the appeal for any violation of this section.
500

501 f. It is a violation, subject to penalties and other enforcement remedies under
502 this title:

503
504 1. For any person to knowingly have or attempt to have ex parte
505 communication with a Commission or Board or hearing officer in
506 violation of subsection (a) of this section.

507
508 2. For any Commission or Board member or hearing officer to
509 knowingly receive an ex parte communication in violation of subsection
510 (a) of this section.

511
512 3. For any Commission or Board member to knowingly fail to place on
513 the record any matter when and as required under subsections (c) and
514 (d) of this section.

515
516 Section 20. This ordinance shall take effect upon its adoption by the Homer City
517 Council.

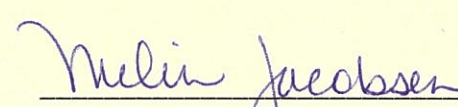
518
519 Section 21. This ordinance is of a permanent and general character and shall be
520 included in the City Code.

521
522 ENACTED BY THE CITY COUNCIL OF HOMER, ALASKA, this 26 day of
523 June, 2017.

524
525 CITY OF HOMER

526
527 
528
529 _____
530 BRYAN ZAK, MAYOR

531
532
533 ATTEST:

534
535 
536 _____
537 MELISSA JACOBSEN, MMC, CITY CLERK

538
539
540 YES: 6

541 NO: 0

542 ABSTAIN: 0

543 ABSENT: 0

544

545

546

547 First Reading: 1-23-17

548 Public Hearing: 3-28-17

549 Second Reading: 4-24-17

550 Effective Date: 6-27-17

551

552 Reviewed and approved as to form.

553

554 Mary K. Koester

555 Mary K. Koester, City Manager

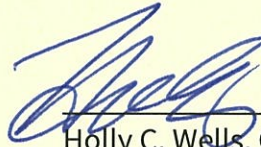
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557 Date: 6-28-17

558

559

560 Fiscal Note: NA



Holly C. Wells, City Attorney

Date: 7-30-17