

JOURNAL OF SPECIAL CITY COMMISSION WORK SESSION
September 8, 2020

Special City Commission Work Session
Civic Center, Commission Chambers Room 206

Mayor Kelly presiding

CALL TO ORDER: 5:30 p.m.

CITY COMMISSION MEMBERS PRESENT: Bob Kelly, Tracy Houck, Mary Sheehy Moe, Owen Robinson and Rick Tryon.

STAFF PRESENT: City Manager Greg Doyon and Deputy City Manager Chuck Anderson; City Attorney Sara Sexe; and, City Clerk Lisa Kunz.

Due to the COVID-19 health concerns, public participation is welcomed as follows:

- Attend in person. Refrain from attending in person if you are not feeling well. The City will require social distancing at the meeting, and may, if necessary, limit the number of persons in the Commission Chambers according to applicable health guidelines.

OF SPECIFIC NOTE: Face coverings will be required for all attendees within the Commission Chambers. If you are unable to wear a face covering you may use one of the alternative means identified below for public participation, observation and to provide your comments.

- Provide public comments in writing or via email. Comments may be sent in writing to City Clerk Lisa Kunz, P.O. Box 5021, Great Falls, MT 59403, or via email to commission@greatfallsmt.net. Comments must be received before 12:00 PM on Tuesday, September 8, 2020 to be shared with the City Commission and appropriate City staff for consideration before the work session, and will be so noted in the official record of the meeting.
- Call-in. The public may call in during specific public comment periods at [406-761-4786](tel:406-761-4786). All callers will be in a queued system and are asked to remain on hold and be patient. Calls will be taken in the order in which they are received. Callers will be restricted to time limits. We ask for your patience in the event there are technical difficulties.

The agenda packet material is available on the City's website: <https://greatfallsmt.net/meetings>. The Public may view and listen to the meeting on government access channel City-190, cable channel 190; or online at <https://greatfallsmt.net/livestream>.

** Due to limited seating and a time restriction of three hours, written public comment as set forth above is encouraged. If you have submitted written comments, please do not duplicate your comments by also calling-in during the meeting so as to allow time for others to be heard.

PUBLIC COMMENT (*Public comment on non-agenda items or any matter that is within the jurisdiction of the City Commission. Please keep your remarks to a maximum of three (3) minutes. Speak into the microphone, and state your name and either your address or whether you are a city resident for the record.*)

None.

WORK SESSION ITEMS

1. Non-Discrimination Ordinance (NDO)

a. City Attorney presents research results

b. NDO Proponent Designee responds/makes case for NDO

c. Clarifying Questions from Commission

d. Public Comment

(Please keep your remarks to a maximum of three (3) minutes. Speak into the microphone, and state your name and either your address or whether you are a city resident for the record.)

Mayor Kelly reviewed meeting process and procedures.

City Attorney Sara Sexe reported that she authored a July 20, 2020 legal opinion that the legal protections that an NDO would provide, already exist under the law, because of the United States Supreme Court decision of *Bostock v. Clayton County*. It is her opinion that once the US Supreme Court specifically included sexual orientation and gender identity within the protected class of sex, wherever in the law there is a prohibition against sex discrimination, LGBTQ persons are included. A detailed analysis was set forth in her legal opinion.

City Attorney Sexe commented that she has spoken with a number of other city attorneys and to other lawyers who practice in human rights or civil rights areas of the law inquiring as to their thoughts regarding her opinion that, because of the *Bostock* decision, the need for an NDO was alleviated. All agreed with this fundamental conclusion.

She reviewed a page pertaining to discrimination from the Department of Labor and Industry, Montana Human Rights Bureau website that is consistent with her opinion.

She reported that the city attorneys for the Montana cities that have enacted NDOs have told her that no complaints have ever been filed under their NDO processes.

Before *Bostock*, other communities enacted NDOs in Montana to provide protections to LGBTQ individuals where they did not already exist. After *Bostock*, sex, as a class protected from discrimination, without question includes LGBTQ+ people.

She reiterated that, where there are prohibitions against sex discrimination in statute, LGBTQ individuals are protected. Under federal fair housing law, 42 USCS §3604, discrimination on the basis of sex is prohibited. Also, Montana statutes specifically prohibit sex discrimination in employment, housing, public accommodations and the provision of governmental services.

It is her opinion that *Bostock* clarified that sexual orientation and gender identity (referenced by Justice Gorsuch as homosexuality and transgender persons) are sex-based classifications and are thus protected under anti-discrimination laws which identify sex as a protected class.

City Attorney Sexe noted that, although she has not observed discrimination in City operations, she has during her 50+ years living here observed members of the LGBTQ community experience discrimination. However, she opined that adopting a new ordinance with limited damages, as compared to those available under current Montana and Federal law, would not provide greater or more timely relief to LGBTQ+ people who suffer from this discrimination.

It is also her opinion that the better approach would be for the Commission to make its position known by considering the adoption of a Resolution or making a Proclamation.

If the Commission still wants to proceed with enacting an NDO, the proposed NDO which was presented would require revision. She discussed the balancing required between the rights to religious freedom and to be free from sex discrimination that was identified in the *Bostock* decision, among other Supreme Court decisions. This necessary balancing is missing in the proposed NDO.

City Attorney Sexe noted that she obtained a copy of the July 27, 2020 press conference statement wherein Jasmine Taylor of the LGBTQ Center was critical of her July 20 opinion. She reviewed the incorrect claims made in that July 27th statement, and added that the Federal Fair Housing Act prohibits sex discrimination, in addition to the prohibitions in HUD regulations.

Also, the Montana Human Rights Act has two explicit statutory protections regarding housing and accommodations:

Mont. Code Ann. § 49-2-305 states: “(1) It is an unlawful discriminatory practice for the owner, lessor, or manager having the right to sell, lease, or rent a housing accommodation or improved or unimproved property or for any other person:

(a) to refuse to sell, lease, or rent the housing accommodation or property to a person because of sex, marital status, race, creed, religion, color, age, familial status, physical or mental disability, or national origin;”

Mont. Code Ann. § 49-1-102, also provides: “(1) The right to be free from discrimination because of race, creed, religion, color, sex, physical or mental disability, age, or national origin is recognized as and declared to be a civil right. This right must include but not be limited to:

(b) the right to the full enjoyment of any of the accommodation facilities or privileges of any place of public resort, accommodation, assemblage, or amusement.”

Finally, the government version of the Montana Human Rights Act, The Governmental Code of Fair Practices, Mont. Code Ann. § 49-3-101 *et seq.*, prohibits sex discrimination.

City Attorney Sexe also addressed and clarified the LGBTQ Center statements pertaining to Governor Bullock’s Executive Order and that the city attorney is using the *Bostock* decision as a

cop-out. According to the highest Court in our country, the protected class of sex includes LGBTQ+ persons.

As Montana anti-discrimination law prohibits sex discrimination in employment, housing, public accommodation and government services, by application of Supreme Court precedent, this includes protections for the LGBTQ+ community. No one has to wait for that decision to be accepted in Montana, it is already binding.

City Attorney Sexe also noted that her opinion as to the effect of the Bostock decision was similar to the initial response by the LGBTQ Center that was on KRTV on June 18th. Shawna Applegate, of the Great Falls LGBTQ Center, was quoted as saying, "We've been working hard here at the LGBT Center to get a non-discrimination ordinance passed here in Great Falls, which would help cover that for employment. Now, we don't have to worry about that."

City Attorney Sexe further disagreed with the LGBTQ Center's July 27th statement about her legal opinion failing to acknowledge the paucity of state-level protections for LGBTQ+ people in both housing and public accommodations. As previously discussed, there are specific Montana statutory prohibitions against sex discrimination in employment, housing, public accommodation and governmental services. She concluded that, without question, now LGBTQ people do have protection from illegal discrimination under the law.

Mayor Kelly again explained that the Commission would not be taking any action or voting on an ordinance tonight. The Commission will provide guidance to City staff on next steps.

Jasmine Taylor, President of the LGBTQ+ Center, reviewed and discussed a PowerPoint presentation titled "An NDO for Great Falls." She reported that the Center is a volunteer run, non-profit serving the LGBTQ community and allies in Great Falls and surrounding rural areas. Its mission statement "is to enhance and sustain the health and well-being of the LGBTQ+ community by providing activities, programs and services that will empower our community to embrace and support our cultural diversity." Great Falls is one of three such organizations that have a brick and mortar presence in the state.

LGBTQ President Taylor commented that the Center does community events/services consisting of potlucks, bingo nights, holiday celebrations, and works with other community organizations to provide referrals to clinicians, and free HIV testing; education, including free safe zone trainings for organizations; youth services that includes a teen board, a social support group that provides peer mentoring, and suicide prevention. Last year they provided 140 suicide screenings to teens in Great Falls and provided 12 direct interventions when risk of harm was imminent; and volunteer work, including local parades, a booth at the Farmers Market and at the Montana State Fair, and work with United Way for things like cleaning up parks.

She commented that the Center is needed. She discussed statistics including 40% of LGBTQ+ people experience rejection from friends and family members, queer people are between 2-4 times more likely to experience PTSD as a result of trauma/discrimination because of who they are, queer youth are 120 times more likely to experience homelessness, and queer youth are almost 5 times more likely to attempt suicide.

LGBTQ President Taylor commented that the request for a local non-discrimination ordinance would protect LGBTQ+ people by creating a regulation that prohibits discrimination against LGBTQ+ people, including protections based on both sexual orientation and gender identity. She noted that the cities of Helena, Bozeman, Butte, Missoula and Whitefish all have successfully instituted NDOs. She opined that there are no black-letter protections for LGBTQ+ people in housing and public accommodations at the state level, and that employment has only recently been protected. Any draft of the NDO going forward the Center would like focused on public accommodations and housing.

She explained that the NDO is needed because there is a significant discrimination problem in Great Falls. In Housing, they have HUD protections under the equal access rule. This rule does not protect the LGBTQ+ people in other housing or rental settings. The HUD protections that do exist are currently attempted to be rolled back by the federal government. Specifically, transgender people are being targeted for exclusion from homeless shelters.

She further commented that if public accommodation protections existed, they would be in the Civil Rights Act of 1963 or the Montana Human Rights Act. They are working with lawyers with the Montana ACLU and Free and Fair Coalition that have a different interpretation about how recent decisions apply to public accommodations and housing. What they do agree on is if a queer person experienced discrimination it is likely they would have to go to court to see that these existing protections would then be applied in settings of both housing and public accommodations. However, court is cost prohibitive for most people. The prospect of winning future litigation does not protect people right now. She noted that federal and state law often have redundancies that act as a backstop to assure multiple measures for justice and to prevent discrimination.

LGBTQ President Taylor commented that there are economic benefits to passing an NDO, such as increased revenue to local businesses from LGBTQ+ community members and allies. She noted that there were 10,000 visitors to the 2019 Helena Pride weekend activities, that brought in \$800,000 - \$1 million dollars in revenue to downtown bars, hotels and restaurants. The 2019 Helena Former Felons Ball raised over \$30,000 in revenue spread out between three local bars, not including hotel and restaurant revenue.

She reported that LGBTQ members conduct research before traveling or moving to keep themselves safe. One way to conduct research is through a Municipal Equality Index (MEI) score. MEI is a product of the National Human Rights Campaign to rate the queer friendliness of a city. The perception of Great Falls is that this may not be a safe place for them to be. Great Falls currently has an MEI score of 18/100. She also noted that a google search of Great Falls shows that Great Falls has a consistent negative image as far as the safety of LGBTQ community members.

She continued that an NDO would:

- Provide equal access to housing and public accommodations. She explained that there are landlords that will not rent to LGBTQ people in Great Falls. There is no local recourse for them when landlords won't rent to them because they have a same sex partner.

- Protect queer people from being evicted or denied housing due to their sexual orientation, gender identity, etc. She noted that “gender identity” has not been included in key findings that have been brought up.
- Prevent businesses from discriminating by refusing to serve a queer couple.
- Provide local regulation and local recourse for instances of discrimination, preventing the need for costly court litigation.
- Increase the City’s MEI score and desirability as a home/tourist destination.
- Promote economic growth.
- Affirm that the community believes everyone deserves dignity, equality, and respect.

She continued that the NDO would not affect churches as religious organizations are already protected by the 1st Amendment. It would not affect organizations that require membership. Private membership organizations are not open to the public and do not provide public accommodations. And, the NDO would not change any laws/regulations relating to bathrooms.

LGBTQ President Taylor added that the consequences of failing to pass an NDO includes a continued negative image of Great Falls, opens the door for further discrimination, and that there could be a significant loss of potential revenue. All citizens of Great Falls deserve to feel safe, welcome and protected.

LGBTQ President Taylor made the disclaimer that her statements thus far pertaining to legal opinions have been under the advisement of the Free and Fair Coalition and the Montana ACLU. She noted that there are different interpretations of the current laws, and concluded by reading a letter from local attorney, Meghan Lulf Sutton, that does not find the City Attorney’s legal opinion persuasive.

Mayor Kelly asked if the Commissioners had any questions.

Commissioner Moe inquired what the proposed ordinance would do, what the process would be, and how an NDO ordinance would be a gain as opposed to what is in place now.

City Attorney Sexe provided a handout titled “Discrimination Remedy Flow Chart under Montana Law,” and reviewed the existing remedies under the Human Rights Bureau processes and how they would exist with a non-discrimination ordinance. If a claimant loses at a hearing at the Human Rights Commission or in State District Court, the claimant could file in Municipal Court under the proposed NDO. She noted that she has concerns about that process in that theories of res judicata/collateral estoppel would likely preclude action. Additionally, she noted the civil jurisdictional limits in Municipal Court civil judgments is \$9,500.

Commissioner Tryon inquired if the LGBTQ Center had legal counsel.

LGBTQ President Taylor responded that the Center does not have a billable lawyer on staff. In this process they have been working with other non-profit organizations that have already done this in other cities.

Commissioner Tryon commented that there appears to be disagreement on whether there is state and federal protection for discrimination. He inquired if the five-member City Commission has the legal authority to create such a law at the local level. It seems to him that power is something

beyond the Commission's purview. He has serious questions about whether this Commission can actually take this action.

City Attorney Sexe responded that she specifically referenced challenges to these type of ordinances and some of the Montana statutory limitations to self-governing, charter forms of government as the City Commission is here. What she pointed out in her legal opinion is that it could be subject to challenge and there are arguments that could be accepted by a Court that would say the City would be exceeding its powers.

Commissioner Tryon inquired if other cities with NDOs have been challenged.

City Attorney Sexe responded that the City of Bozeman's NDO had a challenge and the Plaintiffs were found not to have standing or the ability to bring the charge because there wasn't an active charge under the NDO that was being determined.

Commissioner Robinson commented that his question here is whether *Bostock* applies to a local community or not.

Commissioner Houck noted she received phone calls from people in support of an NDO but were concerned about submitting written communication that would be a public document for everyone to see. With regard to reference to Meghan Lulf Sutton's written comments about the cell phone ordinance, Commissioner Houck noted that the City has authority to enact ordinances that are more strict than state law, and that the cell phone ordinance was recently challenged.

City Attorney Sexe explained that the Supreme Court recently denied a challenge to the cell phone ordinance. Cities with self-governing powers can be more restrictive, but not less restrictive, than state laws. In the cell phone example, the City's ordinance was more restrictive. She added that this NDO request would be something different in that it allows an additional recourse to those already in place.

Mayor Kelly inquired if there have been discrimination claims by people utilizing the NDO process in any of the five Montana cities that have NDOs.

City Attorney Sexe responded that no one has brought a claim under the NDO process. The claims have gone through the State or Federal process. She added that the proposed NDO here requires a Human Rights Bureau investigation and final determination by the Human Rights Bureau/Commission or a court before going to the Municipal Court.

In response to Mayor Kelly, City Attorney Sexe reported that the Human Rights Bureau does investigate housing discrimination on the basis of sex.

Mayor Kelly commented that the Commission received written comments/concerns about religious beliefs and single use/single sex bathrooms. He asked City Attorney Sexe to discuss current protections pertaining to those concerns.

City Attorney Sexe responded that there are United States and Montana Court decisions that allow for the recognition of other rights. It is a balancing test between the competing interests that those courts that handle those types of cases are equipped to do.

LGBTQ President Taylor commented that the Center would concede that there are employment protections now that didn't exist when they started writing the NDO about a year ago, and employment could be taken out. However, she respectfully disagreed that there is significant protection in housing and public accommodations.

Mayor Kelly again reviewed processes and procedures, and then opened the floor for public comment.

For the various reasons presented by Jasmine Taylor, President of the LGBTQ+ Center, speaking in support of the proposed NDO were City residents:

Tysen Habein, Shawna Applegate, Logan Carter, Rev. Lynne Spencer Smith, Dr. Kelly Quick, and Michael Singels.

Appearing telephonically in support of the proposed NDO were:

Justin Wright, 3314 2nd Avenue North; **Rev. Jeff Wakeley**, City resident; **Troy Lane**, City resident; **Laura Duff**, 2908 3rd Avenue North; **Carolyn Cravens**, City resident; and **Jennifer Ambrose**, City resident.

Written communication in support of the proposed NDO was received from:

Tim Hodges and Kathey Hodges, Jacklynne Brown, William Bates, Sean McGuire, Mary Simonton, Ty Arthur, Sara Habein, Sarah Caniparoli, Timothy Choice, Josh Hughes, Katrina Howse, Michael Singels, Kristy Rankin, Xena Gee, Tyler Menzales, Taylor Curry, Sara Branom, Michael Myers, Donna Williams, Mary Ann Hanning, Pamela Carroll, Helena Lovick, Shawna Applegate, Mandy Younce, David Saslav, Dan Wilkinson, Sam Harrington, Kai Stewart, Meghan Wakeley, Brittany Gammons-Jones, Nicholas Scherrer, Danielle Montgomery, Jennifer Houseman, Seth Lutter, Max Mauch, Connie Thomson, Britney Gibbs, R. John Greenberger, June Rovero, Tim Dallacqua, Gabi Cote-Jump, Paula Evitts, Alison Harris, Cyndy Cooper, Maribeth Wilcox, Katherine Rae McFadden, Emily Auld, Judy Griffith, Carolyn Craven, Carol Juneau, Stephanie Cahill, Katie Richmond, Brenda Way Rubino, Reverend Jessica Crist, Barb Walden, Tom Jacobson, Grace Holzheimer, Sue and Bob Dickenson, Christen LeBlanc Birkholz, and Jim Heckel.

Mayor Kelly called a recess at 7:08 PM, and called the meeting back to order at 7:13 PM.

Speaking in opposition to the proposed NDO were City residents:

Matt Antonich, Fred Miller, Craig Madsen, Mandy Shepherd, Linda Madsen, Jim Boyle, Jo Shepherd, Tony Rausch, Laura Ravenscroft, Brian Jackson, Jason (last name inaudible), Pastor Gary Hart, Pastor Marcus Collins, Barbara Going, Rose Waldenberg, Alyssa Larkey, Bonnie Antonich, Melissa McVeda, Christopher McVeda, Fred Burow, Xavier Mercado and daughter Rhya, Gene Stewart, Ron Staley, and Pastor David Saenz, as well as **Xavier Mercado, Sr.**, Black Eagle.

Appearing telephonically in opposition to the proposed NDO were:

Bill and Lucille Zuidema, Cascade; **Kimberly Schaal**, City resident; **Loretta Marquis** (residency not provided); **Richard and Janice Fura**, City residents; and **Michelle Amato**, 1405 8th Avenue NW.

Those speaking in opposition to the proposed NDO argued anti-discrimination laws already exist/redundant, unintended results/consequences, religious freedoms/beliefs, public safety concerns in restrooms/locker rooms, and diminishing the rights of others.

Written communication in opposition to the proposed NDO were:

Lorrie Sewart, Cory McKinney, Richard McGivern, Henry Quinby, Diane Qualley, Grant Van Vranken, G.L. Holmlund, Fred Miller, Donna Anderson, Greg Beeler, Beth Cooper, Karen Gonser, Steve Gonser, Michael Badgley, Jr., Janelle Johnson, Mary Ellen Culpepper, David Phillips, Julie Wolf, Marcia Lennick, Dena Wouters, Jaihmin (last name not provided), Joshua Rohacs, Carl Jurenka, Nathan Swanson, Peter Klevberg, Linda and Michael Knox, Pastor Mike Whitney, Scott Vosen, Pastor Lee Barrows, Jonathan Henry, Doug Engelhardt, Dixie Engelhardt, Darlene Meddock, Diane Moore, Ken and Kathy Lee, Jan Wenaas, Autumn Robertson, Susan Ashley, Christy Frick, Ron Staley, Pastor Robert King, Jeff Lauver, Kerri Koteskey, email from madsbubba (no name provided), Ian White, Jessica Taule, Stephanie Polzin, Ed Caffrey, Ralph and Bev Follinglo, Roxanne Ochs, Gary Gratz, Jerry Levandowski, Cheryl McKinley, Keith Ochs, William Jones, Mary Crowell, Lorraine Wood, Mickael Peabody, Jerome Stafford, Robert Hopkins, Vivian Slape, Patti Hopkins, Robin Baker, Brenda Horne, Lisa Place-Lord, Maren Reilly, Russ Demarais, Jan Goulet, Elizabeth Schwartz, Holly Denning, Robert and Penny Jordan, Keith Duncan, Jennifer Bailey, Susan Waddell, Tony Rausch, Dave Johnson, Donna Johnson, Mrs. Garnett Rope, Sharon Maki, Diane Harrington, Leighton Dresch, Val Keaveny Sr., Lisa Backeberg, Lisa Sheets, Missy Dresch, Vicki Haines, Martin Bauer, Jerry Vion, Brian Cayko, Phillip and Liz Wipf, Laura Hodges, Kimberly Smith, Shirley Bushnell, Sandra Wedel, Shana Chapman, Mary Clayton, Dennis Franz, John Kleinert, David Culpepper, Oran Grotbo, Brian Hoven, Marjorie Ross, Heather Teats, Kelley Lind, Jamie Laabs, Ole Allestad, Dana and Star Darko, Jean Ackerman, Kimberly Linn, Roger Linn, Justin Stilson, Jamie Vosen, Donald Clayton, John Pennell, Jean Fick, Mark Tank, James McMullen, Cyndi McMullen, Polly Olson, James Going, Erica Lewis, Charlie Harant, Tylee Smith, Helene Houghton, Shawn Fladager, Cameron Swathwood, Teresa Schraner, Kurt Depner, Kori Depner, Karen Kleinert, Jessica Service, Elizabeth Wilder, Steve Mix, William Wilder, Donna Johnson, Lola Sheldon-Galloway, Lisa Diekhans, Christine Kowalski, Nequia Hicks, Kyla Anderson, thegatec (no name provided), Ramona Hall, Antonio Hicks, Tia DeFosse, Asha Washington, Tracy Williams, Ike Kowalski, Chazell Singleton, Rick Cornellier, Jennifer Kennedy, Tiffany Sykes, Janice Allestad, Garza9727 (no name provided), Dennis Devine, Bryan Washington, Andrea Bratcher, Stephanie Esannason, Kathy and Bill Austin, Petie Davis, Valerie Smith, Melvin Sykes, Elizabeth Teini, Antonio Hicks, Jeni Dodd, Cheryl Chaon, Fred Brown, Pastor Marcus Collins, Pastor Todd Sasek, Rod Chaon, Larry and Sue Williams, Quincy Hunsucker, Gordon Smith, and Lana Hilton.

e. Commission Questions and Discussion

Commissioner Houck preferred the Commission take the proposed NDO to the next level and continue the dialogue, and Commissioners Moe and Tryon and Mayor Kelly were persuaded by City Attorney Sexe's legal opinion, that the *Bostock* decision is inclusive, and that there are avenues in place that provide more substantive remedies than what the City can provide.

f. Guidance to Staff on Next Steps

The Commission requested that City Attorney Sexe draft a proposed Resolution expressing support for all protected classes for Commission consideration and public comment at a future meeting.

ADJOURN

There being no further discussion, Mayor Kelly adjourned the informal special work session of September 8, 2020 at 8:57 p.m.