



CITY OF
BAINBRIDGE ISLAND

Office of the City Attorney
Memorandum

Date: March 9, 2018

To: City Council, City Manager Doug Schulze, City Attorney Joe Levan

From: Deputy City Attorney Robbie Sepler

Re: Considerations Related to Proposed Ordinance No. 2018-07

In performing a review of proposed Ordinance No. 2018-07, certain considerations have become evident that may hinder the ability of City Staff to enforce the provisions of draft Ordinance No. 2018-07 if it is enacted by the City Council in its present form. In the interest of helping craft an ordinance that will best effectuate the legislative intent of the City Council, additional policy guidance would be helpful regarding the considerations identified in this memorandum.

Consideration #1: To which restroom facilities does the City Council want proposed sections 7.01.01 and 7.01.02 to apply?

Proposed sections 7.01.01 and 7.01.02 state that single occupant restrooms in “facilities of the city and of all Bainbridge Island taxing districts” and in “places of public accommodation” shall:

- Not be restricted to a specific sex or gender identity; and
- Shall use appropriate signage to indicate that any person may use them.

As the provisions are currently written, it is, arguably, unclear as to whether these sections apply only to single-occupant restrooms that are open to the public for use, or also to restrooms that are closed to the general public—such as employee-only restrooms. The term “facilities of the city and of all Bainbridge Island taxing districts” is undefined, and the definition of “places of public accommodation” does not, as currently drafted, clearly address this consideration.

Additional guidance on this consideration will help both enforcement by City Staff as well as clearly set expectations for the owners of “places of public accommodation.” For example, a consideration is whether these sections, as drafted, would require a “place of public

accommodation” to make their restrooms available for public use if they are not doing so already, or whether a “place of public accommodation” could avoid compliance with these sections by making its restrooms unavailable to the public. As currently drafted, a reasonable interpretation of the ordinance is that it wouldn’t affirmatively require a “place of public accommodation” to make its restrooms available to the public if they are not already. In contrast, additional clarification of the Council’s legislative intent is sought in order to determine whether a “place of public accommodation” could avoid compliance by making its restrooms unavailable to the public.

Consideration #2: To which restroom facilities does the Council want proposed section 7.01.03 to apply?

Proposed Section 7.01.03 grants an affirmative right to all individuals to use “whichever public restroom, locker room, or public facility that best conforms to their chosen gender identity and expression.” However, the following terms are undefined and, arguably, ambiguous: public restroom, locker room, and public facility. Additional policy guidance from the Council would be helpful for the sake of interpretation and enforcement regarding, for example, what constitutes a “public facility,” how a “public facility” is different from a “place of public accommodation,” and which restrooms at a public facility are intended to be covered by this section.

Consideration #3: What definition of “place of public accommodation” best fulfills the Council’s legislative intent?

Proposed section 7.01.05 contains a definition of “place of public accommodation” that is drawn from the City of Seattle’s ordinance. This consideration is important if the Council desires to clearly articulate its legislative intent. For reference, the Washington Law Against Discrimination, at RCW 49.60.040(2), contains a definition of “Any place of public resort, accommodation, assemblage, or amusement” that may provide a good basis for comparison.

Consideration #4: What procedure does the Council desire the Hearing Examiner to use during a contested hearing on alleged noncompliance with the proposed ordinance?

Proposed section 7.01.04.G states that contested hearings shall be conducted pursuant to an as-yet unidentified chapter of the BIMC. However, the BIMC does not currently contain a procedure that would be a clear fit for enforcement of this proposed ordinance. The proposed language is drawn from the City of Seattle’s ordinance, which references Seattle Municipal Code Section 3.02.090 for a specific procedure. The closest equivalent in the BIMC is Section 2.16.100, which by its terms appears to have been drafted to most clearly apply to consideration of land use applications.