ORDINANCE NO. 1707

AN ORDINANCE OF THE CITY OF FAIRWAY, KANSAS, ADDING A NEW ARTICLE ENTITLED "NONDISCRIMINATION" OF CHAPTER 2. ENTITLED "ADMINISTRATION" OF THE CODE OF THE CITY OF FAIRWAY, KANSAS.

WHEREAS, the City of Fairway, Kansas is an open, welcoming and inclusive community that has a strong public policy rejecting discrimination of any kind, which includes discrimination based upon sexual orientation or gender identity, and it respects the inherent worth of every person, as evidenced by Resolution No. 2019-H passed by the City Council of Fairway on August 12, 2019; and

WHEREAS, discrimination is wrongful and against the City's values and public policy; and

WHEREAS, state and federal laws currently provide protection against discrimination for certain classes of persons in housing, employment and public accommodation, and such laws provide a complaint and enforcement process for violations of such laws; and

WHEREAS, current state and federal laws do not expressly prohibit discrimination on the basis of sexual orientation or gender identity with respect to housing, employment and public accommodation; and

WHEREAS, the absence of state and federal laws protecting individuals against discrimination on the basis of sexual orientation or gender identity could act to frustrate the City's public policy rejecting discrimination of any kind; and

WHEREAS, the City has compelling interests to prohibit and deter discrimination on the basis of sexual orientation or gender identity in the City so that these characteristics are given the same protection state and federal law provide to other characteristics, and to provide a mechanism to address discrimination against individuals based upon their sexual orientation or gender identity in the absence of state and federal laws providing such protection, which compelling interests also include removing barriers to economic advancement and political and social integration, insuring equal access to the marketplace, and preventing the dignity harms and stigmatizing injuries that result from discrimination; and

WHEREAS, the City now desires to prohibit discrimination within the City on the basis of sexual orientation or gender identity to provide equal protection against discrimination for all residents of and visitors to the City, and to provide a local complaint and enforcement process to effectuate protections not available under current state and federal laws in furtherance of the City's public policy rejecting discrimination of any kind.

NOW THEREFORE, BE IT ORDAINED BY THE GOVERNING BODY OF THE CITY OF FAIRWAY, KANSAS:

SECTION 1. That Sections 2-500 through 2-505 of Article IX entitled "Nondiscrimination" of Chapter 2, entitled "Administration" of the Code of the City of Fairway is hereby added to read as follows:

Section 2-500 Declaration of Policy.

A. Rights Recognized - The right of an individual to be free from discrimination because of that individual's race, color, religion, national origin, sex, sexual orientation, gender identity, age, disability, genetic information, marital status, familial status, or military status is hereby recognized. This right shall include, but not be limited to, any of the following:
   1. The right to pursue and hold employment and the benefits associated therewith without unlawful discrimination.
   2. The right to the full enjoyment of any of the services, advantages or privileges of any Place of Public Accommodation without unlawful discrimination.
   3. The right to engage in property transactions, including obtaining housing for Rent or purchase, without unlawful discrimination.
   4. The right to exercise any right granted under this Chapter without retaliation.

B. Protection - To protect these rights, it is hereby declared to be the purpose of this Chapter to prohibit discrimination and retaliation in the City based upon sexual orientation or gender identity and to provide a local process for the acceptance, investigation and resolution of complaints of discrimination and retaliation relating to sexual orientation and gender identity arising hereunder. If discrimination and retaliation relating to sexual orientation and/or gender identity is prohibited by federal or state law(s), and such law(s) provide procedures for addressing complaints of such discrimination and retaliation, nothing shall prevent the City from referring a Complainant to the appropriate federal or state procedure and/or federal or state agency.

Section 2. Fairway Municipal Code Section 2-501is hereby added to read as follows:

Section 2-501 Definitions.

The definitions contained within the Kansas Act Against Discrimination, K.S.A. 44-1001 *et seq.*, and amendments thereto, and the Fairway Municipal Code, and amendments thereto, shall apply to this Chapter unless a term is specifically defined herein. For purposes of this Chapter, certain terms shall be interpreted or defined as follows unless the context clearly indicates otherwise:

City means the City of Fairway, Kansas.

Complainant means any individual who has a good faith belief that such individual has been injured by an Unlawful Discriminatory Practice as set forth herein.

Days means calendar days. If a deadline falls on a day City Hall is not open (e.g. a weekend, a holiday recognized by the City, emergency closure) the deadline will be extended to the next day City Hall is open.

Employee means any individual who is employed by an Employer and receives a salary or

wages from such Employer, but does not include any individual employed by such individual's parents, spouse or child or in the domestic service of any individual. The term Employee does not include an independent contractor.

Employer means: (1) any individual or entity (e.g. corporation, partnership, limited liability company, association, labor organization, mutual company, joint-stock company, trust, unincorporated organization) doing business within the City who has one or more Employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, (2) the City, and (3) any City contractor. For purposes of this Chapter, the term does not include: (1) The United States or any department or agency thereof, a corporation wholly owned by the government of the United States, or an Indian tribe; or (2) a Nonprofit Fraternal or Social Association/Corporation.

Gender Identity means an individual's actual or perceived (by the individual or another) gender-related identity, expression, appearance, or mannerisms, or other gender-related characteristics regardless of the individual's designated sex at birth.

Hearing Officer means a Municipal Court Judge of the City.

Injury means the violation of another's legal right for which the law provides a remedy.

Investigator means one or more individual(s) designated by the City Administrator.

Nonprofit Fraternal or Social Association/Corporation means an association or corporation that meets all of the following requirements: (1) it is organized in good faith for social or fraternal purposes; (2) membership entails the payment of bona fide initiation fees or regular dues; (3) there exists a regularly established means of self-government by the members thereof clearly set forth in a constitution or by-laws adopted by the membership; (4) membership is limited and there is a regularly established means of and criteria for admitting members and for expulsion of members by the existing membership or by their duly elected or appointed delegates; and (5) it is not operated, directly or indirectly for purposes of profit for any individual or groups of individuals other than the membership as a whole. To the extent not otherwise included, the term also includes any bona fide membership club that is exempt from taxation under Title 26, Section 501(c) of the United States Code. The term does not include a labor organization.

Place of Public Accommodation shall include every establishment within the city that is open to the general public and offers any product, service or facility. The term Place of Public Accommodation shall include, but not be limited to, all taverns, hotels, motels, apartment hotels, apartment houses with one or more tenant units, restaurants or any place where food or beverages are sold, retail and wholesale establishments, theaters, motion picture houses, museums, bowling alleys, golf courses and all public conveyances, as well as the stations or terminals thereof. The term Place of Public Accommodation shall not include any establishment operated by a Nonprofit Fraternal or Social Association/Corporation, or bona fide civic, political or religious organization, which restricts its products, facilities and services to the members of that association/corporation or organization, their guests, or individuals who promote the

principles for which the association/corporation or organization is established or maintained.

Religious Organization means a church, mosque, temple, synagogue, nondenominational ministry, interdenominational and ecumenical organization, mission organization, faith-based charity, faith-based social agency, faith-based educational institution, or other entity principally devoted to religious practice, teaching or education.

Rent means to lease, to sublease, to let or otherwise to grant the right to occupy premises not owned by the occupant in exchange for payment or other consideration.

Rental Housing means any real property, consisting of one or more dwelling units, which is required to obtain a license or permit or is otherwise addressed in Chapter 7 of this Code.

Respondent means the individual or entity against whom a complaint alleging discrimination or retaliation has been filed with the City.

Sexual Orientation means an individual's actual or perceived (by the individual or another) emotional, romantic, or sexual attraction to other people, such as heterosexual, homosexual, bisexual, pansexual or asexual.

Unlawful Discriminatory Practices means those practices prohibited by Section 2-502 of this Chapter.

Section 3. Fairway Municipal Code Section 2-502 is hereby added to read as follows:

Section 2-502 Unlawful Discriminatory Practices.
To protect specific individuals within the city from discrimination on the basis of their Sexual Orientation or Gender Identity, it shall be a duty of each individual or entity doing business within the city to not commit the following Unlawful Discriminatory Practices:

A. Employment - It shall be an Unlawful Discriminatory Practice for an Employer to refuse to hire or employ, or to discharge from employment or to otherwise discriminate against an otherwise qualified Employee in compensation or in terms, conditions or privileges of employment, because of the Employee's sexual orientation or gender identity. This Chapter shall not apply to a Religious Organization with respect to the employment of individuals performing work connected with the carrying on of the organization's religious teaching, ministry, religious duties or practices, advancement of religion, or other religious activities.

B. Housing - It shall be an Unlawful Discriminatory Practice for an individual or entity to discriminate against any individual in the terms, conditions, or privileges of the sale or Rental of real property within the city including Rental Housing, or in the provision of services or facilities in connection therewith, because of an individual's sexual orientation or gender identity, or to discriminate against any individual in that individual's use or occupancy of Rental Housing within the City because of the sexual orientation or gender identity of individuals with whom that individual associates. This provision shall

not apply to the Rent of real property containing dwelling units occupied or intended to be occupied by no more than three persons or families living independently of each other, if the owner actually maintains and occupies one of those dwelling units as the owner's residence. Additionally, nothing in this Chapter shall prohibit:

1. A Religious Organization or any nonprofit institution or organization operated, supervised or controlled by or in conjunction with a Religious Organization, from limiting the sale, rental or occupancy of real property or Rental Housing which it owns or operates for other than a commercial purpose to individuals of the same religion or individuals who promote the religious principles for which it is established or maintained, or from giving preference to such individuals.
2. A Nonprofit Fraternal or Social Association/Corporation, which as an incident to its primary purpose or purposes provides real property or Rental Housing which it owns or operates for other than a commercial purpose, from limiting the rental or occupancy of such real property or Rental Housing to individuals who are members or individuals who promote the principles for which it is established or maintained, or from giving preference to such individuals.

C. Public Accommodation - It shall be an Unlawful Discriminatory Practice for the owner, operator, lessee, manager, agent or Employee of any Place of Public Accommodation to refuse, deny or make a distinction, directly or indirectly, in offering its goods, services, facilities, privileges, advantages or accommodations to any individual because of their sexual orientation or gender identity. Nothing in this Chapter shall be interpreted to apply to a Religious Organization's performance of a religious function, including but not limited to the:

1. provision of goods, services, facilities, privileges, advantages or accommodations related to the solemnization or celebration of a marriage, or
2. performance of its religious teachings, ministry, religious duties or practices, advancement of religion, or other religious activities.

D. Defenses - It shall be a defense to any allegation of an unlawful discriminatory practice brought hereunder:

1. that the individual or entity did not know or have reason to know of the Complainant's sexual orientation or gender identity.
2. that the individual or entity acted in good faith and had reasonable grounds for believing that an act or omission was not a violation of this ordinance; or
3. that any adverse action taken against the individual would have been taken regardless of the individual (i.e. the individual violated the law, a workplace rule, a lease provision or policy applicable to all similarly situated individuals, such as employees, lessees, customers, etc.).

Section 4. Fairway Municipal Code Section 2-503 is hereby added to read as follows:

Section 2-503 Interpretation.

Nothing in this Chapter shall:

A. be construed to prohibit an Employer from requiring an Employee, during the Employee's hours at work, to adhere to reasonable dress or grooming standards not prohibited by

other provisions of federal, state, or local law;

B. be construed to require an Employer to hire unqualified individuals or to retain Employees when there is a legitimate non-discriminatory or non-retaliatory reason to hire another candidate or terminate employment, or prevent any adverse action against an Employee that would have been taken regardless of the Employee's sexual orientation or gender identity;

C. be construed to prohibit an Employer from requiring all of its Employees, as a condition of employment, to utilize the Employer's applicable established internal human resource procedure(s) to address any allegation of discrimination or retaliation in the workplace. The fact that an Employer requires an Employee to utilize the Employer's applicable established internal human resource procedure(s) to address any allegation of discrimination or retaliation in the workplace shall not, in itself, be deemed a violation of this Chapter. However, an Employee may simultaneously file a complaint with the City as provided in this Chapter, and completion of the Employer's procedures is not a prerequisite to filing a complaint with the City;

D. be construed to require any person or entity subject to this Chapter to make changes requiring a building permit to any existing facility, except as otherwise required by law;

E. be construed to prohibit an Employer or Place of Public Accommodation from posting signs for restrooms and dressing rooms based on gender.

F. be construed to prohibit a Nonprofit Fraternal or Social Association/Corporation or Religious Organization from limiting membership as is calculated by the association/corporation or organization to promote the principles for which it is established or maintained;

G. be construed or applied in a manner that violates any law or unlawfully infringes upon any rights under the First Amendment of the United States Constitution, Section 7 of the Kansas Constitution Bill of Rights, the Adoption Protection Act (K.S.A. 60-5322, and amendments thereto), or the Kansas Preservation of Religious Freedom Act (K.S.A. 60-5301 *et seq.*, and amendments thereto); and

H. be construed to make it lawful to discriminate or retaliate against individuals on the basis of race, color, religion, national origin, sex, age, disability, genetic information, marital status, familial status, or military status. Such discrimination and retaliation are not addressed in this Chapter because federal and state laws consistently address unlawful discriminatory and retaliatory practices related to those characteristics and provide appropriate procedures for addressing complaints for such discrimination and retaliation.

Section 5. Fairway Municipal Code 2-504 is hereby added to read as follows:

Section 2-504 Enforcement.

A. A Complainant may file a written complaint with the City Clerk that the individual has been, or is being, subject to an alleged Unlawful Discriminatory Practice(s) as prohibited by this Chapter. The complaint may be filed personally or through an attorney (or if a minor, through the minor's parent, legal guardian or attorney) and shall be completed on a form provided by the City. The complaint form shall state the names and contact information of the Complainant, the individual(s) and/or entity/entities alleged to have committed the Unlawful Discriminatory Practice(s), a description of the alleged unlawful conduct, and all other information as may be required by the form provided by the City.

The complaint form shall only be considered complete if all information required by the City's form has been provided to the extent that information is reasonably available to the Complainant.

B. The complaint form must be filed within thirty (30) Days of the alleged Unlawful Discriminatory Practice, unless the act complained of constitutes a continuing pattern or practice of discrimination, in which event it must be filed within thirty (30) Days of the last act of discrimination.

C. Upon receipt of a complete complaint, the Investigator shall notify the Respondent(s) of the complaint, providing sufficient details related to the complaint so the Respondent(s) may respond. The Investigator shall give the Respondent(s) thirty (30) Days to file a written answer to the complaint, and to provide any documentation or evidence related to the complaint. The Investigator may, at the request of Respondent(s), extend the answer period an additional thirty (30) Days. If the Respondent accused of violating the provisions of this Chapter is the City, the City will engage an independent Investigator who shall not otherwise be an Employee, agent, or contractor of the City.

D. The complaint may be referred to an approved mediator for non-binding mediation at the request of the parties. The mediator shall either be a person agreed upon by the Complainant and the Respondent or, if no such agreement can be reached within a reasonable time following the filing of the complaint, a person selected by the City Administrator will serve as the mediator. Any fees charged by the mediator shall be split equally between the parties. If mediation is not successfully completed within sixty (60) Days of the referral, or a party chooses not to pursue mediation, the complaint shall be referred to the Investigator.

E. Following the conclusion of the answer period, the Investigator may initiate an investigation period, requesting that the Complainant and/or Respondent(s) provide additional information, documentation, statements or testimony as needed to facilitate the investigation of the complaint. This investigation period shall be concluded within a reasonable period of time following the submission of additional information, documentation, or testimony.

F. Upon conclusion of the investigation period, the Investigator, if not the City Prosecutor, shall forward all evidence and other information received during the investigation to the City Prosecutor. The City Prosecutor will make a determination whether probable cause exists that: (i) the Respondent(s) committed an Unlawful Discriminatory Practice, (ii) the Complainant was in fact Injured, and (iii) imposition of a penalty pursuant to this Chapter:

    1. would not constitute an unlawful burden of a person's right to exercise of religion pursuant to Section 7 of the Kansas Constitution Bill of Rights or the Kansas Preservation of Religious Freedom Act (K.S.A. 60-5301 *et seq.*, and amendments thereto), or an unlawful burden of a person's freedom of speech, religion, expression, or association (as protected by the First Amendment of the United States Constitution or the Kansas Constitution); or
    2. if imposition of a penalty would constitute a burden, application of that burden to the person would be in furtherance of a compelling governmental interest and the application would be the least restrictive means of furthering that compelling governmental interest.

G. 1. If the City Prosecutor finds that probable cause does not exist, then the City

Prosecutor shall notify the Complainant and the Respondent(s) within a reasonable period of time, and this notification shall be considered a final order and no further action shall be taken by the City, except as set forth in subparagraph 2 below.

2. If the City Prosecutor finds that probable cause exists that a complaint was made in bad faith, then the matter shall be referred to the Hearing Officer who shall review the matter as provided in paragraph I below. If the Hearing Officer determines by a preponderance of evidence that the complaint was made in bad faith, then the Hearing Officer may impose a civil penalty upon the Complainant of up to $1,000.00 for each such complaint.

H. If the City Prosecutor finds probable cause does exist, the City Prosecutor shall notify the Complainant and Respondent(s) and request conciliation and settlement. If a party refuses to participate in conciliation and settlement, or if a settlement agreement is not executed within sixty (60) Days of the date of the finding of probable cause (unless that time is extended by the City Prosecutor for good cause and with the agreement of all parties), the matter shall be referred to the Hearing Officer for review, who shall sit as an administrative judge for purposes of this Chapter.

I. Upon referral to the Hearing Officer, the Hearing Officer shall schedule a hearing on the complaint. The parties shall be given ten (10) Days' written notice via certified mail of the date, time, and place of the hearing. At that hearing, the parties and the City Prosecutor shall be entitled to call witnesses and to present any other evidence as appropriate. The hearing shall be conducted in accordance with any procedures as may be established by the Hearing Officer, but the rules of evidence used in courts of law need not be strictly enforced.

J. Any determination of the Hearing Officer that the Respondent(s) committed an Unlawful Discriminatory Practice shall be issued in writing within sixty (60) Days of the hearing, shall be based upon the preponderance of the evidence, and shall set forth the essential elements and facts of the determination. If the Hearing Officer finds that a civil violation of this Chapter has occurred, the Hearing Officer may impose a civil penalty upon the Respondent(s) in the amount of up to $1,000.00 for each violation. Each party is to bear their own attorneys' fees, if any.

K. The filing of a complaint for the alleged violation of this Chapter or a response thereto shall in no way preclude any party from seeking other relief under state or federal law.

Section 6. Fairway Municipal Code 2-505 is hereby added to read as follows:

Section 2-505 Severability

Should any section, subsection, sentence, clause or phrase of this Chapter, or the application thereof to any person or circumstance, be declared to be unconstitutional or invalid or unenforceable, such determination shall not affect the validity of the remaining portions of this Chapter.

SECTION 7. That this Ordinance shall become effective upon adoption and publication of its summary in the official City newspaper.

PASSED by the City Council this 21st day of November 2019. **APPROVED** by the Mayor.

Melanie Hepperly, Mayor

ATTEST:

Kim Young, City Clerk

APPROVED AS TO FORM:

Stephen P. Chinn, City Attorney