

AN ORDINANCE TO AMEND THE CODE OF ORDINANCES OF THE CITY OF BROOKHAVEN, GEORGIA, BY ADOPTING A NEW ARTICLE XVI, “UNLAWFUL DISCRIMINATION” IN CHAPTER 15 “BUSINESS REGULATION” AND FOR ALL OTHER LAWFUL PURPOSES

- WHEREAS,** The City of Brookhaven is authorized by its Charter to provide for the health, safety, and welfare of its citizens, and
- WHEREAS,** The City of Brookhaven finds that discrimination in the business dealings of its citizens harms the citizens involved, impairs the ability of the City to attract new businesses and new residents, and is inconsistent with the City’s status as a “Welcoming City” and a City that embraces and celebrates its diversity; and
- WHEREAS,** The City of Brookhaven was founded in part on a principle of being friendly, welcoming, and encouraging to business; and
- WHEREAS,** The City of Brookhaven seeks to extend its leadership in the Metro Atlanta area to the area of the civil rights and recognition of the rights of all of its citizens to live, work, and play in our City; and
- WHEREAS,** The City of Brookhaven finds that the 14th Amendment to the United States Constitution provides for the equal protection of all citizens under the laws of the several states and of the United States, and thereby empowers the City to take action to provide protection to all persons within the City; and
- WHEREAS,** The State has expressly delegated to the City of Brookhaven in its Charter the power to regulate, through its police powers, matters that touch the health, safety, and welfare of the general public; and
- WHEREAS,** The City expressly finds that it should be subject to the same rules and same policies that it expects its residents and businesses to follow; and
- WHEREAS,** The City acknowledges and relies upon the statement by the Supreme Court of Georgia in *McKinney v. City of Atlanta*, that the City “has the authority to enact anti-discrimination laws under its general police power.”

NOW THEREFORE, BE IT ORDAINED, AND IT IS HEREBY ORDAINED, BY THE MAYOR AND CITY COUNCIL OF THE CITY OF BROOKHAVEN, GEORGIA that the Code of Ordinances of the City of Brookhaven shall be amended as follows:

PART 1:

A new Article XVI titled “Unlawful Discrimination” shall be created in Chapter 15, “Business regulations”, may be cited as the “Richard Rhodes Nondiscrimination Ordinance,” shall read as follows:

ARTICLE VI – UNLAWFUL DISCRIMINATION

Sec. 15-593 - Purpose and Intent. It is the purpose and intent of the Brookhaven City Council to protect and safeguard the right and opportunity of all persons to be free from all forms of discrimination, including discrimination based on actual or perceived race, color, religion, national origin, ancestry, sex, sexual orientation, gender identity, age, disability, marital status, familial status, or veteran/military status. The Council's purpose in enacting this ordinance is to promote the public health and welfare of all persons who live and work in the City of Brookhaven. It is important for the City to ensure that all persons within the City have equal access to employment, housing, and public accommodations.

Sec. 15-594 - Definitions. For the purposes of this ordinance, the following terms shall have the following meanings:

- (1) AGE. An individual's status as having obtained forty or more years of age.
- (2) BUSINESS. Any person or entity conducting business within the city, which is required to obtain a license or permit, or who obtains any benefit from the City including, but not limited to a land disturbance or building permit, variance, rezoning, tax abatement, or other tangible benefit provided for by the City.
- (3) DISCRIMINATE, DISCRIMINATION OR DISCRIMINATORY. Any act, policy or practice that has the effect of subjecting any person to differential treatment as a result of that person's actual or perceived race, color, religion, national origin, sex, sexual orientation, gender identity, age, disability, marital status, familial status, or veteran status.
- (4) EMPLOYEE. Any individual employed by or seeking employment from an employer, excluding any individual employed by his or her parents, spouse, or child.
- (5) EMPLOYER. A person or entity who employs one or more employees in the City of Brookhaven, or any agent of such person. This definition shall include the City of Brookhaven.
- (6) FAMILIAL STATUS. Means an individual's past, current or prospective status as parent or legal guardian to a child or children below the age of eighteen (18) who may or may not reside with that individual.
- (7) GENDER IDENTITY. The actual or perceived gender-related identity, expression, appearance, or mannerisms, or other gender-related characteristics of an individual, regardless of the individual's designated sex at birth.
- (8) HEARING OFFICER. A person charged with determining the validity of alleged violations of this article, and upon determining that a violation has occurred, assessing appropriate damages, penalties, fines or costs. The Hearing Officer may

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be, but need not be, a member of the State Bar of Georgia. The Hearing Officer shall be nominated by the Mayor, upon recommendation of the City Attorney, and confirmed by the Council as required by the Charter. The Hearing Officer may be removed by the Mayor with or without cause.

- (9) **MARITAL STATUS.** An individual's past, current, or prospective status as single, married, domestically partnered, in a civil union, divorced, or widowed.
- (10) **NATIONAL ORIGIN.** An individual's, or an individual's ancestor's, place of origin.
- (11) **PLACE OF PUBLIC RESORT, ACCOMMODATION, ASSEMBLAGE, OR AMUSEMENT.** Any place, store, or other establishment, either licensed or unlicensed, that supplies accommodations or that solicits or accepts the patronage or trade of the general public, or that is supported directly or indirectly by government funds.
- (12) **RELIGION.** All aspects of religious belief, observance, and practice.
- (13) **RELIGIOUS ORGANIZATION.** An entity which conducts regular worship services or is qualified as a religious organization under Section 501(c)(3) of the Internal Revenue Code of 1986, as now or hereafter amended, that is not required to file IRS Form 990, return of Organization Exempt from Income Tax, under any circumstances.
- (14) **RESPONDENT.** The person or business alleged to have violated this Article.
- (15) **RETAIL ESTABLISHMENT.** An entity or business physically located in the City of Brookhaven that serves the general public by providing products or services to the final end user or consumer, and shall include (but is not limited to) restaurants or other businesses selling prepared food to customers, whether on premises or remotely.
- (16) **SEXUAL ORIENTATION.** Actual or perceived homosexuality, heterosexuality, or bisexuality.
- (17) **VETERAN/MILITARY STATUS.** An individual's status as one who serves or served in the uniformed services, military, naval or air service, and who was discharged or released under conditions other than dishonorable.

Sec. 15-595 - Civil Rights Declared. The right of an otherwise qualified person to be free from discrimination because of that person's actual or perceived race, color, religion, national origin, ancestry, sex, sexual orientation, gender identity, age, disability, marital status, familial status, or veteran/military status is recognized as and declared to be a civil right. This right shall include, but not be limited to, all of the following:

- (1) The right to obtain and hold employment and the benefits associated therewith without discrimination.
- (2) The right to the full enjoyment of any of the accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement without discrimination.
- (3) The right to be served or receive service at Retail Establishments without discrimination.
- (4) The right to engage in property transactions, including obtaining housing for rental or sale and credit therefor, without discrimination.

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- (5) The right to exercise any right granted under this ordinance without suffering coercion or retaliation.

Sec. 15-596 - Exceptions. Notwithstanding the foregoing, the following are not discriminatory practices prohibited by Sec. 15-595 of this Article and shall not form the basis of a Complaint under Sec. 15-597:

- 1) A religious organization, association, or society that employs an individual of a particular religion to perform work connected with the organization who insists that the employee adhere to the tenets of the religious organization as a condition of employment.
- 2) An employer who observes the conditions of a bona fide affirmative action plan or a bona fide seniority system which is not a pretext to evade the purposes of this ordinance.
- 3) A business is not required to hire or retain unqualified or incompetent personnel.
 - a) To establish this exception in a hiring decision the Respondent must demonstrate by a preponderance of the evidence that the person selected and hired was better qualified for the position than the Complainant.
 - b) To establish the incompetence of the Complainant in the context of an employment termination, the employer must demonstrate by a preponderance of the evidence that the employee could not perform the essential functions of the job. "Essential functions of the job" shall include the terms found in Georgia Code of Regulations 300-2-1-.01 and proof of any of those terms as applicable may be proof of "incompetence" under this Article.
 - c) Evidence proffered or admitted under this subsection is subject to rebuttal by the Complainant and it shall be the duty of the Hearing Officer to resolve the disputed evidence.
- 4) This ordinance does not prohibit an employer from requiring an employee, during the employee's hours at work, to adhere to reasonable and equitable dress or grooming standards not prohibited by other provisions of Federal, State or local law, provided that all employees are permitted to dress in a manner consistent with their gender identity.
- 5) This ordinance shall not apply to a bona fide nonprofit private club.
- 6) A business is not required to make changes to any existing facility that would require a building permit, except as otherwise required by this Ordinance or general law.
- 7) This ordinance does not prohibit a religious organization from limiting its non-commercial accommodations, advantages, facilities, membership, and privileges to persons of the same religion.

Sec. 15-597 - Enforcement. Subject to the procedures developed by the City of Brookhaven, the City shall receive, initiate, investigate, seek to conciliate, hold hearings on and/or pass upon complaints alleging violations of this ordinance.

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- (1) Any person who believes they have been aggrieved by an alleged breach or violation of Sec. 15-595 of this Article may file a complaint with the City Manager on a form to be provided by the City. The complaint form shall include the full name of the complainant, the identity and address of the alleged violator, a description of the actions alleged to constitute a violation of this article, and verification by the complainant under oath that the allegations of the complaint are true.
- (2) Any such complaint must be filed within ninety (90) calendar days of the alleged act of discrimination.
- (3) The City Manager shall confer with the City Attorney, who will be responsible for conducting an initial inquiry into the allegations of the complaint and attempting to negotiate a conciliatory resolution to the complaint. If those efforts are not successful within 30 days of the filing of the complaint, the City Attorney will certify that their efforts have not resolved the complaint, and the written complaint will be delivered to the Chief of Police for personal service on the Respondent.
- (4) The Chief of Police or their designee shall cause the complaint and a summons to be personally served on the respondent within fourteen (14) business days of receipt by their office of a properly filed complaint. The summons shall direct the Respondent to appear before a Hearing Officer of the City on a date and time certain for a hearing. In the event the Chief of Police or their designee is unable to have the complaint and summons personally served on the Respondent within fourteen (14) business days, the Chief of Police or their designee shall continue to attempt service on a regular basis until such time as the respondent is served or, if service cannot be effected after reasonable diligence, until sixty (60) calendar days from the date the complaint is filed. If service cannot be perfected in that time, service shall be accomplished by leaving the Complaint posted to the door of the location identified in the business license records of the City so that the Notice is clearly visible and notorious. Such posting shall constitute actual notice and service under this section.
- (5) The Respondent may file with the Hearing Officer an answer to the complaint at any time prior to the hearing. If the Respondent intends to rely upon any Exception under Sec. 15-596, the Respondent shall provide written notice to the Complainant and the Hearing Officer no less than 3 business days before the Hearing scheduled in the matter of the Exception being relied upon.
- (6) Prior to the hearing, the Hearing Officer shall review the complaint and answer, if any, to determine: (1) whether the complaint is in conformity with the requirements of this article; and (2) whether the proceeding is preempted by Federal or State law. Upon such determination, the Hearing Officer shall enter a written order, expressly stating the foregoing determinations and either dismissing the complaint or proceeding with the scheduled hearing of the matter on the merits of the alleged violation.
- (7) The Georgia Rules of Evidence shall inform, but need not control, the introduction of evidence before the Hearing Officer.
- (8) Each side to the Complaint shall have the ability to compel the attendance of witnesses by subpoena issued by the Hearing Officer.
- (9) The Complainant shall have the burden of proof, which must be established by a preponderance of the evidence, except for the application of any Exceptions under

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Section 18-143, upon which the Respondent shall bear the burden of proof, also by a preponderance of the evidence.

- (10) Each side shall be entitled to representation by counsel of their choice at their own expense.
- (11) The losing party shall have the right to appeal to the Superior Court of DeKalb County pursuant to a writ of *certiorari*.

Section 15-598 – City Contracting. The City shall require its vendors and contractors to abide by this Article and shall require, as a part of the contracting process an affirmation by the vendor or contractor that it will abide by and be bound by this Article and that it will require any and all subcontractors operating pursuant to the contract with the City to abide by and be bound by this Article.

Section 15-599 - Penalty.

- (1) Any person or business found by the municipal court to have violated any provision of this article shall be subject to a civil penalty of \$1000 for the first violation and \$2,000 for each subsequent violation.
- (2) Any business penalized three (3) times under this article shall lose their right to operate in the City of Brookhaven. The City Attorney shall expressly inform the Respondent within 30 days of the time a 3rd complaint under this Article is received by the City Attorney that the business runs the risk of the loss of their business license (and any other licenses issued by the City) upon a finding of a violation of this Article.
- (3) Nothing in this Article shall prohibit or impair the City from combining the hearing called for in this Article with other administrative procedures called for under the Brookhaven Code of Ordinances or the General Law of the State of Georgia.

Section 15-600 - Voluntary Mediation.

- (1) Within fourteen (14) business days of the City Manager's receipt of a properly filed complaint, the City Attorney shall provide complainant and respondent, in writing, with notice of and instructions regarding the City's voluntary mediation program for discrimination complaints, such notice to be sent to ensure delivery to the recipient.
- (2) Upon written request of the complainant and/or the respondent, the City Attorney or their designee shall provide the services of a private mediator to conduct non-binding mediation between the complainant and the respondent. The mediator shall be recommended by the City Attorney from a list of qualified mediators. Such mediation services shall be paid by the parties, sharing equally. The mediation shall be completed, and the City Attorney notified by the mediator of the result within thirty (30) days of referral to the mediator.
- (3) Any mediation hereunder shall be conducted in accordance with procedures established by the mediator.
- (4) The enforcement proceeding before the Hearing Officer shall be stayed during the time that the matter is referred to mediation.

Sec. 15-601 – No Private Claim Created. Other than as provided in this Article, no other substantive right, claim, or remedy against any person or entity shall be created by this Article.

Sec. 15-602 Other Remedies Preserved. This ordinance shall not be considered exclusive and may not be construed to limit any other rights, privileges, or remedies available to either party to the dispute under local, state, or federal law.

PART II

This ordinance shall take effect 30 days after passage.

PART III

The Mayor is authorized to execute this Ordinance and any other document necessary to give effect to this Ordinance.

PART IV

1. The City Manager is authorized to develop such policies and procedures as are necessary to give effect to this Ordinance.
2. The policies or procedures authorized by this Part shall be created as soon as practicable and may be amended as necessary to give effect to this Ordinance.

PART V

The City Communications Department shall create and implement a program to inform citizens and businesses of this Ordinance, to include direct mail information to all businesses holding a City of Brookhaven Business license (as determined by the Finance Department) and any entity doing business with the City.

PART VI

The City Clerk, in conjunction with the City Attorney, shall have the power and authority to correct any scrivener's errors appearing in this Ordinance.

SO ORDAINED, this 14th day of January, 2020.

John Arthur Ernst, Jr.
Mayor

Attest:

Approved as to form:

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Susan Hiott
City Clerk

Christopher D. Balch
City Attorney

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