

CITY OF OAKLAND  
AGENDA REPORT

2003 DEC -4 PM 4: 28

To: Council President Ignacio De La Fuente  
From: City Council Legislative Analyst  
Date: December 16, 2003

Re: **AN ORDINANCE UPDATING LANGUAGE IN THE CITY OF OAKLAND'S MUNICIPAL CODE CHAPTER 9.44 DISCRIMINATION BASED ON SEXUAL ORIENTATION AND AMENDING SECTION 9.44.010 DEFINITIONS TO INCLUDE DISCRIMINATION BASED ON GENDER IDENTITY OR EXPRESSION**

### SUMMARY

The proposed ordinance amends Oakland's existing sexual orientation anti-discrimination policy by adding the term "gender identity or sexual expression" thereby including protection for transgender persons. The ordinance has been further revised from the version that appeared in the November 4, 2003 Council agenda to include a language that illustrates the types of access that cannot be denied based on a person's gender identity.

The City's Administrative Instruction AI 70 "Equal Employment Opportunity/Anti Harassment Policy and Complaint Procedure" should be amended to reflect the new policy. In addition, resources for sensitivity training to facilitate interaction with the transgender community and city staff is important and may be considered by the Council in the next budget cycle.

Staff recommends adoption of the amendments.

### BACKGROUND

The legislation was reviewed and approved by the Finance Committee on October 14, 2003. On November 4, 2003, the City Council postponed action on the proposed ordinance to allow more time for staff to contact other cities with similar ordinances about their experience with the implementation and enforcement of the policy.

Oakland's existing sexual orientation anti-discrimination ordinance provides basic protection in the areas of employment, real estate, business establishments, city services, city facilities and city supported services and facilities. The amendment proposes language that also prohibits discrimination against individuals based on gender identity or sexual expression.

### KEY ISSUES AND IMPACTS

The term "gender identity or expression" will be added to the existing ordinance. The terms mean having or being perceived as having a gender related identity or expression

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whether or not it is stereotypically associated with a person's actual or perceived sex. Inclusion of the term addresses the rights of transgendered persons and protects them under our anti-discrimination policy.

New language has been added to the proposed ordinance that illustrates the policy's intent and application related to an individual's right to full and equal access to goods, services and public accommodations consistent with a person's gender identity.

Approximately 59 cities and counties across the country have adopted similar language and policies. Staff contacted five California jurisdictions, Los Angeles, Santa Cruz, County of Santa Cruz, San Francisco and West Hollywood, to learn about their experience with implementation and enforcement of their ordinances and no significant problems were reported.

#### City of Oakland Internal Policy

Upon adoption of the ordinance, the City of Oakland Administrative Instruction No. 70 "Equal Employment Opportunity/Anti Harassment Policy and Complaint Procedure" should be amended to reflect the amended policy.

#### In House Training

Although budget cuts have severely affected the City's training resources, it is important for police, fire and City personnel, interacting with the public on City streets or in City facilities, to receive training related to the anti-discrimination policy and sensitivity training to facilitate interaction with the transgender community.

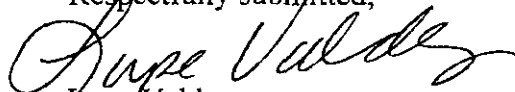
#### **FISCAL IMPACT**

This policy presents no fiscal impact to the City however; the City Council may want to consider allocating resources during the next fiscal year for City and public safety personnel to receive transgender sensitivity training.

#### **RECOMMENDATION**

Adopt the ordinance amendment and direct the City Manager to amend AI 70 to reflect the new policy.

Respectfully submitted,



Lupe Valdez

City Council Legislative Analyst

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OFFICE OF THE CITY CLERK  
OAKLAND

**REVISED**

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APPROVED AS TO FORM AND  
LEGALITY

INTRODUCED BY COUNCILMEMBER DANNY WAN

  
CITY ATTORNEY

**Ordinance No. \_\_\_\_\_ C.M.S.**

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**AN ORDINANCE UPDATING LANGUAGE IN THE CITY OF OAKLAND'S  
MUNICIPAL CODE CHAPTER 9.44 DISCRIMINATION BASED ON SEXUAL  
ORIENTATION AND AMENDING SECTION 9.44.010 DEFINITIONS TO  
INCLUDE DISCRIMINATION BASED ON GENDER IDENTITY OR  
EXPRESSION**

**WHEREAS**, Oakland's Municipal Code Sections 9.44.01 – 9.44.070 provide anti-discrimination protection based on sexual orientation in the areas of employment, real estate, business establishments, city services and facilities and city supported services and facilities; and

**WHEREAS**, it is the desire of the City Council to update and amend Sections 9.44.010 and 9.44.020 to include the term "gender identity or expression" among the characteristics defining "sexual orientation," so as to provide comprehensive anti-discrimination protection for transgender and other gender non-conforming residents in Oakland;

**NOW, THEREFORE, BE IT ORDAINED THAT SECTION 9.44. IS AMENDED TO READ AS FOLLOWS:**

**9.44.010 Definitions.**

"Business establishment" means any entity, however organized, which furnishes goods, services or accommodations to the general public. An otherwise qualifying establishment which has membership requirements is considered to furnish services to the general public if its membership requirements: (1) consist only of payment of fees; (2) consist of requirements under which a substantial portion of the residents of this city could qualify; or (3) consist of an otherwise unlawful business practice.

"Discrimination" means any act, policy or practice which, regardless of intent, has the effect of subjecting any person to differential treatment as a result of that person's sexual orientation or gender identity or expression. The phrase "differential treatment" includes any limitation on a person's full, unsegregated and equal access to or enjoyment of, employment, real estate transactions, business establishments, and municipal services.

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“Gender identity or expression” means having or being perceived as having a gender-related identity or expression whether or not stereotypically associated with a person’s actual or perceived sex.

"Person" means any natural person, firm, corporation, partnership or other organization, association or group of persons however organized.

"Real estate transactions" means and includes the sale, repair, improvement, lease, rental, or occupancy of any interest or portion of any interest in real property and shall also include the extension of credit, financing, insurance or services in connection with the sale, repair, improvement, lease, rental, or occupancy of any such interest in real property.

"Sexual orientation” means actual or perceived homosexuality, heterosexuality, or bisexuality.

#### **9.44.020 Unlawful practices.**

A. In General. It is unlawful for any person to do anything which has the effect of discriminating against any person as a result of that person's sexual orientation or gender identity or expression, with respect to any of the following activities:

1. Employment. Any aspect of employment, opportunities for employment, or union membership;
2. Real Estate. Any real estate transaction;
3. Business Establishments. The availability of goods, facilities or services from any business establishment;
4. City Services and Facilities. The use or availability of any municipal service or facility;
5. City Supported Services and Facilities. The use or availability of any service or facility wholly or partially funded or otherwise supported by the city.

B. Exceptions.

1. Employment.

a. Bona fide Occupational Qualification.

i. Bona fide Occupational Qualification. Nothing contained in subsection (A)(1) of this section shall be deemed to prohibit selection or rejection based upon a bona fide occupational qualification.

ii. Burden of Proof. In any action brought under Section 9.44.040 or 9.44.050 if a party asserts that an otherwise unlawful act of discrimination is justified as a bona fide occupational qualification, that party shall have the burden of proving: (1) that the discrimination is in fact a necessary result of a bona fide occupational qualification; and (2) that there exists no less discriminatory means of satisfying the occupational qualification.

b. Seniority Systems. *It shall not be unlawful discriminatory practice under subsection (A)(1) of this section for an employer to observe the conditions of a contractual seniority system provided such system is not a subterfuge to evade the purposes of this chapter; provided further that no such system shall provide an excuse for failure to hire any individual.*

2. Real Estate Transactions.

a. Owner Occupied Dwellings. Nothing in subsection (A)(2) of this section shall be construed to apply to the rental or leasing of any housing unit in which the owner

or lessor or any member of his or her family occupies one of the living units and it is necessary for the owner, lessor or family member to use either a bathroom facility or a kitchen facility in common with the prospective tenant.

b. Effect on Other Laws. Nothing in subsection (A)(2) of this section shall be deemed to permit any rental or occupancy of any dwelling unit or commercial space otherwise prohibited by law.

3. City Supported Services and Facilities. Subsection (A)(5) of this section does not apply to facilities or services which only receive assistance from the city which is provided to the public generally.

#### C. Notices.

1. Requirements. Every employer with fifteen (15) or more employees, every labor organization with fifteen (15) or more members, and every employment agency shall post and keep posted in conspicuous place upon its premises where notices to employees, applicants for employment and members are customarily posted, the following notice:

Discrimination on the basis of sexual orientation and/or gender identity or expression is prohibited by law. Chapter 9.44 of the Oakland Municipal Code.

2. Alternate Compliance. Notwithstanding the above, the provisions of this subsection may be complied with by adding the words "sexual orientation and/or gender identity or expression" to all notices required by federal or state law, and indicating on the notice that discrimination on the basis of sexual orientation is prohibited by Chapter 9.44 of the Oakland Municipal Code.

D. Advertising. It is unlawful for any person to make, publish or disseminate any notice or statement which indicates that such person engages in or will engage in any practice prohibited by this chapter. (Prior code § 3-20.02)

E. It shall be an unlawful practice for any person to deny any individual access to the full and equal enjoyment of privileges, benefits, goods, services and facilities, including dressing and bathroom facilities, consistent with the person's gender identity.

#### 9.44.080 Severability Clause

If any of the provisions of this article or the application thereof to any person or circumstances is held invalid, the remainder of this Article, including the application of such a part or provisions to persons or circumstances other than those to which it is held invalid, shall not be affected thereby and shall continue in full force and effect. To this end, the provisions of this Article are severable.

IN COUNCIL, OAKLAND, CALIFORNIA, DECEMBER 16, 2003

**PASSED BY THE FOLLOWING VOTE:**

AYES-                    BROOKS, BRUNNER, CHANG, NADEL, QUAN, REID,  
                                  WAN, AND PRESIDENT DE LA FUENTE

NOES-

ABSENT-

ABSTENTION-

Attest:

Ceda Floyd  
CITY CLERK AND CLERK  
OF THE COUNCIL  
OF THE CITY OF  
OAKLAND, CALIFORNIA

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**REVISED**

**AMENDMENT TO OAKLAND MUNICIPAL CODE  
CHAPTER 9.44 DISCRIMINATION BASED ON SEXUAL  
ORIENTATION, UPDATING LAUGE AND AMENDING  
DEFINITIONS TO INCLUDE DISCRIMINATION BASED ON  
GENDER IDENTITY OR EXPRESSION**

**NOTICE AND DIGEST**

This Ordinance updates language in the City of Oakland's Municipal Code Chapter 9.44 Discrimination Based on Sexual Orientation and amends the definitions in this chapter to include discrimination based on gender identity or expression:

- (1) It provides anti-discrimination protection based on gender identity and expression in the areas of employment, real estate, business establishments, city services and facilities and city supported services or facilities.
- (2) It adds gender identity and expression among the characteristics included in the definition of sexual orientation in Section 9.44.01-9.44.070

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