

RESOLUTION NO. 14-57

A Resolution of the City Council of the City of Whitefish, Montana, declaring it to be its intention to take a stance in support of the community values that recognize the dignity of all persons and welcome diversity and inclusion for all of its inhabitants and visitors.

WHEREAS, at the November 17, 2014 City Council meeting many members of the Whitefish community and area residents requested the City Council to take a stance in support of diversity, inclusion, free speech, and freedom of assembly for all inhabitants and visitors, and condemn ideologies, philosophies and movements that deny equality of human rights and opportunities and challenge our Constitutional freedoms granted by the United States and the State of Montana; and

WHEREAS, the history of Whitefish includes the significant contribution of immigrants from many countries who came to this community to live peacefully with one another despite their differences in culture, race or religion; and

WHEREAS, Article II, Declaration of Rights, of the Montana Constitution, states unequivocally that "[t]he dignity of the human being is inviolable" and prohibits discrimination in the exercise of civil and political rights, on account of race, color, sex, culture, social origin or condition, or political or religious ideas; and

WHEREAS, Section 49-1-101, MCA, Montana state law declares and recognizes as a civil right, the right to be free from discrimination because of race, creed, religion, color, sex, physical or mental disability, age, or national origin, which includes the right to obtain and hold employment without discrimination, the right to the full enjoyment of any accommodation facilities or privileges of any place of public resort, accommodation, assemblage or amusement; and

WHEREAS, it is the intent of the City of Whitefish that every person within the jurisdiction of the City of Whitefish shall be entitled to its protection of each person's civil rights with the right not to suffer from discrimination; and

WHEREAS, Article 1, Section 1.01 of the City of Whitefish Charter states the City shall have all powers not prohibited by the Constitution of Montana or the laws of Montana and that its powers and authority shall be liberally construed; and

WHEREAS, the City's powers include but are not limited to its police power which is its fundamental authority to enact laws on behalf of the health, safety, and general welfare of its citizens; and

WHEREAS, the City finds that discrimination in the areas of employment, public accommodations and housing is a serious threat to the health, safety, and general welfare of the community, because that discrimination is a violation of basic civil rights, creates strife and unrest and deprives the City of its full capacity for economic development; and

WHEREAS, the City finds that a diversity of views, exchange of ideas, and the right to peacefully assemble are important to a healthy a vibrant community; and

WHEREAS, at a lawfully noticed public hearing on December 1, 2014, the Whitefish City Council received an oral report and a written report from staff, invited public input, and approved the Resolution declaring it to be its intention to support the community values that recognize the dignity of all persons and welcome diversity and inclusion for all of its inhabitants and visitors; and

WHEREAS, nothing in this Resolution is intended to alter or abridge other rights, protections, or privileges secured by state or federal law, including state and federal constitutional protections of freedom of speech, assembly, and exercise of religion; and

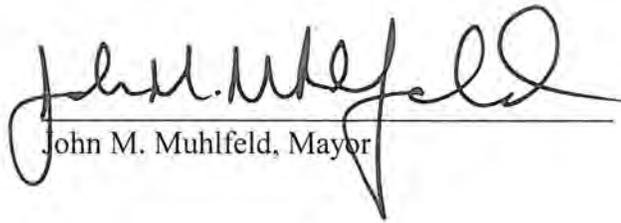
WHEREAS, it is in the best interests of the City of Whitefish, Montana, and its inhabitants to adopt this Resolution.

THEREFORE, BE IT RESOLVED by the City Council of the City of Whitefish, Montana and its inhabitants, as follows:

Section 1: The Whitefish City Council declares its support of Whitefish community values that recognize and celebrate the dignity, diversity, and inclusion of all of its inhabitants and visitors, and protect and safeguard the right and opportunity of all persons to exercise their civil rights, including the rights of free speech, freedom of assembly, and freedom from discrimination.

Section 2: This Resolution shall take effect immediately after its adoption by the City Council of the City of Whitefish, Montana, and signing by the Mayor thereof.

PASSED AND ADOPTED BY THE CITY COUNCIL OF THE CITY OF WHITEFISH, MONTANA, ON THIS 1st DAY OF DECEMBER, 2014.



John M. Muhlfeld, Mayor

ATTEST:



Nevin Lorange

Staff Report

December 1, 2014

To: Mayor John Muhlfeld and City Councilors

From: Mary VanBuskirk, City Attorney

Re: Community Values Resolution



Introduction/History

During the public comment segment of the November 17, 2014 City Council meeting, community members addressed the Council with requests for the City to take a stand against bigotry, hatred and prejudice in their community. The community members asked the City Council to enact a “no-hate” ordinance or some type of anti-discrimination legislation “to protect the community from the destructive effect hate organizations can have on a community”. Many of the speakers identified themselves as members of “Love Lives Here”, a Flathead Valley affiliate of the Montana Human Rights Network, a statewide pro-tolerance group. While some sought a positive statement from the Council affirming civil rights, they expressed concern about the possible misconception of the values embraced by the community of Whitefish that are friendly, tolerant and welcoming of the diversity of its inhabitants and visitors.

The City Council asked Staff to prepare various options available to the City to address the community’s expressed concerns heard during public comment. The proposed Resolution was prepared in response to the Community members’ request for the City Council to take a stance in support of diversity, inclusion, and non-discrimination for all inhabitants and visitors. The Resolution celebrates the mutual values of the Whitefish Community to recognize the dignity of all persons, and their commitment to protect all civil rights. The purpose of this Staff Report is to provide a brief outline of the competing constitutional safeguards, enacted State and federal anti-discrimination statutes, and identify an area or category of discrimination that has not been addressed to date.

Current Report

Constitutional Protections. The First Amendment’s free speech and assembly protections were adopted within the Bill of Rights in 1791. The Free Speech clause provides “Congress shall make no law...abridging the freedom of speech...or the right of the people peaceably to assemble”. Free speech and right of assembly are rights protected from all levels of government intrusion through the due process and equal protection clauses of the 14th amendment to include states, and political subdivisions. However, the rights of free speech and assembly are not absolute.

The Montana Constitution provides the freedom of assembly and freedom of speech “[n]o law shall be passed impairing the freedom of speech or expression. Every person shall be free to speak or publish whatever he will on any subject, being responsible for all abuse of

that liberty”. Montana Constitution, Article II, sections 6 and 7. Under Article II, section 4, each person is entitled to the equal protection of the laws and freedom of discrimination in the exercise of his civil or political rights. By Article II, section 17, each person is protected by the due process of law.

Free Speech. The Citizens’ right of free speech has been considered an inviolable right of citizens because it insures an individual’s right of self-expression; protects citizens from federal government intrusion; educates and enlightens citizens; furthers robust debate by exposing ideas to see the light of day by an engaged citizenry; and ensures traditional values of democratic decision-making.

Through U.S. Supreme Court decisions, the notion of free speech has been expanded. Traditional individual speakers’ rights have been extended to corporations, labor unions and other entities. In *Citizens United v. Federal Election Commission* (2010) and recent U.S. Supreme Court cases, the Court recognizes that free speech is essential to a free society but that speech is not less protected because the speaker was a corporation, labor union or other organization.

Free speech may be spoken or written or conduct. Speech may be all kinds and forms of communication, whether photos, film, internet, electronic technologies, sounds, lighting. Controversial protected speech includes speech advocating violence at a KuKlux Klan rally, burning draft cards in protest of the Vietnam War, cross burning, flag burning, using the American flag as clothing, picketing at a military funeral, and so on. In *Snyder v Phelps* (2010) the Court found that protesters picketing at a military funeral were entitled to “special protection” of the First Amendment, because their “speech” addressed matters of public concern, on public property, in a peaceful manner and in compliance with local officials’ instructions.

While the City retains authority to enact laws on behalf of the health, safety and general welfare of its citizens, its authority to regulate is not absolute. City regulations must be “reasonable” and not violate any of the rights protected by state and federal constitutions. As with all regulation, the City must apply its licensure requirements and ordinance uniformly to all regardless of the type of speech. In addition, the City’s regulation must be content neutral. Although the content of speech cannot be regulated without infringing on First Amendment protections, the activities and conduct associated with the speech can be restricted to advance when the City has a substantial interest in protecting its citizens from unwanted invasions of privacy, interference with one’s peace or enjoyment, crime, fraud and to keep its citizens safe.

The Court has developed a four-part strict scrutiny test to evaluate whether the governmental regulation of speech meets First Amendment concerns:

1. The State has to assert a “substantial interest” to be achieved in regulating the speech;
2. The regulation must be in proportion to that interest;

3. The regulation must directly advance the State's interest; and
4. The regulation must be the most limited means available to achieving the State's interest.

There must be a "reasonable fit" between the means and ends, with the means narrowly tailored to achieve the desired State objective. Generally, regulations designed to implement general health, safety or moral concerns are more difficult for government to establish a "reasonable fit" between the speech restriction and governmental interest to regulate.

Any regulation must be:

1. Content neutral (a city generally cannot target or treat individuals differently because of who they are or for their particular message);
2. Narrowly tailored to serve the government's interest; and
3. Allow alternative methods for the same or similar communications to occur.

Consider these examples:

A. A city prohibited commercial handbills, but not newspapers, on freestanding newsracks located on city property, struck down because the city's claimed aesthetic interest in reducing visual clutter was not achieved by making a distinction between prohibited commercial publications and permitting newspapers. The court reasoned "all newsracks, regardless of whether they contain commercial or noncommercial publications, are equally at fault".

B. A federal law prohibiting broadcasts of lottery advertisements by a broadcaster in a state that prohibits lotteries while allowing broadcast of such ads by stations in state that sponsors lotteries, court upheld finding a "reasonable fit" between the restriction and asserted federal interest in supporting state anti-gambling policies without unduly interfering with policies of neighboring states that promote lotteries.

Consider "no-hate" ordinances within this context. No-hate or anti-hate legislation seeks to protect particular groups by outlawing certain types of expression but not other types. In the U.S. Supreme Court case of *R.A.V. v. City of St. Paul* (1992), the City attempted to single out and proscribe the use of particular fighting words arising from racial, religious or gender bigotry. The Court determined that the City's selectivity raised First Amendment concerns because the City criminalized the expression of certain invective but left unregulated other equally violent or hateful fighting words that expressed an opposing viewpoint. The City had not regulated other fighting words that expressed animus towards an individual's sexual preference or political beliefs and was selective in its regulation. Further, Justice Scalia charged that the City had no authority to favor one side of a debate regardless of how offensive or distasteful those views may be. Thus, in order to

meet First Amendment scrutiny, the City's regulation of speech must be on a non-content basis.

We can expect that if the City enacts a no-hate ordinance focused only on prohibiting certain speech or expression believed hateful, the City would be unable to meet the neutral, non-content requirement of the First Amendment. After all, the purpose of such regulation would be to regulate bias-motivated speech or expression based on the protected categories of race, religion, gender, political beliefs, etc. Such regulation would not meet the Court's concerns for under-inclusiveness and would not be content neutral. In deciding what restrictions are reasonable, the City must satisfy the Court-fashioned "ends and means test" used in First Amendment cases. Would the no-hate speech restriction's general effect demonstrate a "reasonable fit" between the governmental interest (i.e., to stop bigotry, racism) and the means used to accomplish those goals (i.e., regulate speech based on such content). This type of hate speech regulation would not satisfy First Amendment concerns.

Discrimination. The Montana Constitution provides specific civil and political rights under Article II, Declaration of Rights:

Article II, Declaration of Rights, of the Montana Constitution, provides "[t]he dignity of the human being is inviolable", the freedom of speech and expression, peaceable assembly, the right of due process and equal protection of the laws, and the freedom not to be discriminated against in the exercise of civil and political rights, on account of race, color, sex, culture, social origin or condition, or political or religious ideas

In addition, there are several Federal and State laws that address and provide administrative relief for specific types of discrimination. Federal laws include the Age Discrimination in Employment Act, the Civil Rights Act of 1964 (Title VII), Equal Pay Act, Family and Medical Leave Act, Pregnancy Discrimination Act, the American with Disabilities Act, and other laws. Under the direction of the Montana Constitution, additional State laws include the Human Rights Act, Governmental Code of Fair Practices, and Rights of Persons with Disabilities. MCA, Title 49, Chapters 1 through 4.

Generally, State and Federal laws prohibit discrimination on the basis of protected categories such as race, color, national origin, ancestry, religion, creed, sex, pregnancy, familial status (solely for housing), and physical or mental disability. In addition, Montana establishes as a basic civil right the right to be free from discrimination, basic political rights, and includes the additional categories of marital status and political ideas protected from discrimination.

One area of non-discrimination law that has not been addressed is the right to be free from discrimination based upon a person's sexual orientation or gender identity or expression (gay, lesbian or transgender status (LGBT)). No existing Montana or federal law protects the civil rights and the right to be free from discrimination based upon a person's sexual orientation or gender identity or expression. The Montana legislature has considered expanding the non-discrimination protections of the Montana Human Rights Act to include an additional category based on a person's LGBT status, but has not done so yet. Since the State has failed to act, several cities in Montana have enacted non-discrimination ordinances to protect LGBT status residents and visitors (referred to as NDO or nondiscrimination ordinances). The cities of Missoula, Bozeman, Helena and Butte have adopted nondiscrimination ordinances.

If it is the intention of the Council that every person within the jurisdiction of the City should be entitled to its protection, the Council should consider an extension of the unmet civil rights and non discrimination protections found in the Montana Human Rights Act to include a person's sexual orientation or gender identity or expression (LGBT status) through a non discrimination ordinance.

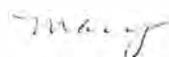
Financial requirements/Impacts. None

Recommendation. Staff respectfully recommends that the Resolution in support of the Whitefish community values that recognize the dignity of all persons, and welcome diversity and inclusion for all of its inhabitants and visitors be approved.

If the City Council wishes to include LGBT status as a protected category, staff should be directed to prepare an NDO draft for its consideration at the next January 5, 2015 Council meeting. The NDO would be similar to measures adopted by other cities in Montana.

Suggested Motion: I move the adoption of Resolution No. 14- ____ declaring it the intention of the City Council to take a stance in support of the community values that recognize the dignity of all persons and welcome diversity and inclusion for all of its inhabitants and visitors.

Respectfully submitted,



Mary VanBuskirk