**NO. D-1-GN-18-001968**

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| TEXAS ASSOCIATION OF BUSINESS; NATIONAL FEDERATION OF INDEPENDENT BUSINESS; AMERICAN STAFFING ASSOCIATION; LEADINGEDGE PERSONNEL, LTD.; STAFF FORCE, INC.; HT STAFFING LTD., d/b/a THE HT GROUP; and THE BURNETT COMPANIES CONSOLIDATED, INC., | § | IN THE DISTRICT COURT OF |
| *Plaintiffs*, | § | |
| and | § | TRAVIS COUNTY, TEXAS |
| TEXAS, | § | |
| *Intervenor*, | § | |
| v. | § | |
| CITY OF AUSTIN, TEXAS; STEVE ADLER, MAYOR OF CITY OF AUSTIN; and SPENCER CRONK, CITY MANAGER OF THE CITY OF AUSTIN, | § | |
| *Defendants*. | § | 459TH JUDICIAL DISTRICT |

## PLEA IN INTERVENTION OF TEXAS

Texas intervenes under Rule 60 of the Texas Rules of Civil Procedure to protect the laws of this State. Texas is concerned that the City of Austin's Sick Leave Ordinance unlawfully regulates private employee wages in violation of Texas law.

## FACTUAL BACKGROUND

1. On February 15, 2018, the City of Austin adopted Ordinance No. 20180215-049 ("Paid Sick Leave Ordinance" or "Ordinance"), which requires

employers to provide paid sick leave to their employees. A true and correct copy of the Paid Sick Leave Ordinance is attached as Exhibit 1.

2. The City enacted the Paid Sick Leave Ordinance because it believes "denying sick time to employees" is "unjust," "detrimental to the health, safety, and welfare" of City residents, and "contributes to employee turnover and unemployment, and harms the local economy." Ex. 1 at Part 1.

3. The Paid Sick Leave Ordinance requires an employer to provide an employee "one hour of earned sick time for every 30 hours worked." *Id*. at Part 2, § 4-19-2(A).

4. The Paid Sick Leave Ordinance broadly applies to myriad employers, including individual persons, companies, corporations, firms, partnerships, unions, and non-profit organizations or associations. *Id*. at Part 2, § 4-19-1(D). The Ordinance does not exempt household employers, religious employers, and charitable foundations, among other employers.

5. The Paid Sick Leave Ordinance covers an "individual who performs at least 80 hours of work for pay within the City of Austin in a calendar year for an employer," except independent contractors and unpaid interns. *Id*. at Part 2, § 4-19-1(C).

6. Under the Paid Sick Leave Ordinance, an employee begins earning paid sick leave immediately upon the commencement of employment, *id*. at Part 2, § 4-19-2(B), and may use paid sick leave immediately upon accrual, *id*. at Part 2, § 4-19-2(C).

7. An employee of a medium or large employer (defined as an employer with more than 15 employees, excluding family members) may earn a maximum of 64 hours of paid sick leave each year. *Id*. at Part 2, § 4-19-2(G). An employee of a small employer (defined as an employer with no more than 15 employees) may earn

a maximum of 48 hours of paid sick leave each year. *Id*. Earned leave carries over from one year to the next. *Id*. at Part 2, § 4-19-2(H).

8. An employer must pay earned sick leave at the same rate to what the employee would have earned if the employee had worked the scheduled time, but "no less than the state minimum wage." *Id*. at Part 2, § 4-19-2(J).

9. An employer must provide each employee, at least every month, a statement showing the amount of the employee's paid sick leave available for use. *Id*. at Part 2, § 4-19-2(K).

10. Defendants estimate that it will cost the City $170,000 to implement the Ordinance in fiscal year 2018 and $460,000 to implement it in fiscal year 2019. Most of the costs are due to new hiring new staff. Thus, the fiscal year 2019 costs will continue indefinitely.

11. By giving employees of private employers paid sick leave, the City's Paid Sick Leave Ordinance conflicts with and is preempted by Texas law. Thus, Texas intervenes.

**STANDARD FOR INTERVENTION**

12. "Any party may intervene [in a case] by filing a pleading, subject to being stricken out by the court for sufficient cause on the motion of any party." Tex. R. Civ. P. 60. An intervenor is not required to secure a court's permission to intervene in a cause of action, or prove that it has standing. *Guar. Fed. Sav. Bank v. Horseshoe Operating Co.*, 793 S.W.2d 652, 657 (Tex. 1990). Rather, an intervenor need only show a "justiciable interest in a pending suit to intervene in the suit as a matter of right." *In re Union Carbide Corp*., 273 S.W.3d 152, 154 (Tex. 2008). "A party has a justiciable interest in a lawsuit, and thus a right to intervene, when his interests will be affected by the litigation." *Jabri v. Alsayyed*, 145 S.W.3d 660, 672 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (citing *Law Offices of Windle Turley v. Ghiasinejad*, 109 S.W.3d

68, 71 (Tex. App.—Fort Worth 2003, no pet.)). "The interest asserted by the intervenor may be legal or equitable." *Guar. Fed. Sav. Bank*, 793 S.W.2d at 657 (citation omitted).

13. The Uniform Declaratory Judgment Act provides that when a proceeding alleges a municipal ordinance to be unconstitutional, "the attorney general of the state must also be served" with a copy of the lawsuit, and "'is entitled to be heard.'" Tex. Civ. Prac. & Rem. Code § 37.006(b); *see Am. Veterans, Dep't of Texas v. City of Austin*, 03-03-00762-CV, 2005 WL 3440786, at *1 (Tex. App.—Austin Dec. 15, 2005, no pet.) (mem. op.). Plaintiffs brought a declaratory judgment action alleging the City's Paid Sick Leave Ordinance violates the Texas Minimum Wage Act and the Texas Constitution. Pls.' Orig. Pet. ¶¶ 43–67. Thus, Texas, as an intervenor, has a right to "be heard." Tex. Civ. Prac. & Rem. Code § 37.006(b).

14. There is no pre-judgment deadline for intervention. *Tex. Mut. Ins. Co. v. Ledbetter*, 251 S.W.3d 31, 36 (Tex. 2008) (citing Tex. R. Civ. P. 60; *Citizens State Bank of Sealy v. Caney Invs.*, 746 S.W.2d 477, 478 (Tex. 1988)). Texas courts recognize an "expansive" intervention doctrine in which a plea in intervention may be untimely only if it is "filed after judgment," *Texas v. Naylor*, 466 S.W.3d 783, 788 (Tex. 2015) (quoting *First Alief Bank v. White*, 682 S.W.2d 251, 252 (Tex. 1984)), though even post-judgment interventions are permissible under certain circumstances. *Ledbetter*, 251 S.W.3d at 36 (citing *In re Lumbermens Mut. Cas. Co.*, 184 S.W.3d 718, 725–26 (Tex. 2006)). There is no final judgment in this case. Texas's intervention is timely.

**TEXAS'S INTERESTS**

15. Texas regulates the payment of wages under Chapter 61 of the Labor Code. That chapter defines "wages" as "vacation pay, holiday pay, sick leave pay, parental leave pay, or severance pay owed to an employee under a written agreement

with the employer or under a written policy of the employer." Tex. Labor Code § 61.001(7).

16. Chapter 62 of the Labor Code, the Texas Minimum Wage Act ("Act"), establishes and regulates the minimum wage in Texas. *Id*. § 62.001–.205. Conspicuously absent from chapter 62 is any mention of any minimum amount of paid sick leave employers must provide employees.

17. Chapters 61 and 62 of the Labor Code apply in every city in Texas.

18. The Act states that "an employer shall pay to each employee the federal minimum wage under Section 6, Fair Labor Standards Act of 1938 (29 U.S.C. Section 206)." *Id*. § 62.051.

19. The Act preempts all other wage laws in Texas. The Act states "the minimum wage provided by this chapter supersedes a wage established in an ordinance, order, or charter provision governing wages in private employment, other than wages under a public contract." *Id*. § 62.0515. The Act also states "[t]his chapter and a municipal ordinance or charter provision governing wages in private employment, other than wages under a public contract, do not apply to a person covered by the Fair Labor Standards Act of 1938 (29 U.S.C. Section 201 *et seq*.)." *Id*. § 62.151.

20. The Fair Labor Standards Act ("FLSA") sets a minimum wage based on employee hours worked in a workweek. 29 U.S.C. § 206.

21. The Act and FLSA, with few exceptions not relevant here, govern minimum wages of workers, including those covered by the Paid Sick Leave Ordinance.

**COUNT ONE**
**Preemption**

22. Texas repeats and incorporates by reference each and every allegation contained in the preceding paragraphs as if fully set forth herein.

23. Defendant City of Austin is a home rule city subject to the laws of the State of Texas. The City enacted the Paid Sick Leave Ordinance.

24. Defendant Adler is the mayor of the City of Austin.

25. Defendant Cronk is the City Manager of the City of Austin, and is charged with implementing portions of the Ordinance.

26. A Texas home rule municipality may not enact an ordinance "inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of the State." Tex. Const. art. XI, § 5.

27. "Home-rule cities possess the full power of self government and look to the Legislature not for grants of power, but only for limitations on their power." *S. Crushed Concrete, LLC v. City of Hous*., 398 S.W.3d 676, 678 (Tex. 2013).

28. "An ordinance of a home-rule city that attempts to regulate a subject matter preempted by a state statute is unenforceable to the extent it conflicts with the state statute." *Dall. Merch.'s & Concessionaire's Ass'n v. City of Dall.*, 852 S.W.2d 489, 491 (Tex. 1993) (citation omitted).

29. When the State "adopts a general law and applies it to all cities of a certain class, no city of such class is authorized to enact contrary legislation." *City of Beaumont v. Gulf States Util. Co.*, 163 S.W.2d 426 (Tex. Ct. App—Beaumont 1942). Cities may not "enter[ ] a field of legislation which has been occupied by general legislative enactments." *City of Baytown v. Angel*, 469 S.W.2d 923 (Tex. Ct. App.—Houston [14th Dist.] 1971). Local regulation must be "in harmony" with "the general scope and purpose of [ ] state enactment[s]." *BCCA Appeal Grp., Inc. v. City of Hous*., 496 S.W.3d 1, 7 (Tex. 2016).

30. The Texas Minimum Wage Act provides that employers in Texas will pay employees a minimum wage established by FLSA.

31. The Act supersedes a wage established by a municipal ordinance, like the Paid Sick Leave Ordinance.

32. The Act prohibits the Paid Sick Leave Ordinance from applying to a person covered by FLSA.

33. FLSA requires employers only to pay wages for hours actually worked.

34. FLSA requires that the pay for employees be evaluated, for minimum wage purposes, based on the work week, not by the hour or day.

35. The Paid Sick Leave Ordinance violates the Act and FLSA by requiring employers to pay employees for hours not worked, thereby increasing wages for the work week beyond those required by the Act and FLSA.

36. The Texas Minimum Wage Act preempts the City of Austin Paid Sick Leave Ordinance.

## REQUEST FOR DISCLOSURE

37. Texas requests that Defendants disclose the information and materials described in Texas Rule of Civil Procedure 194.2.

## PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Texas respectfully requests that the Court award the following relief:

38. Enter an appearance for Texas and provide it with the opportunity to defend the rule of law.

39. Declare, under Chapter 37 of the Civil Practices and Remedies Code, that City of Austin Ordinance 20180215-049 is preempted.

40. Permanently enjoin, under Chapters 37 and 65 of the Civil Practices and Remedies Code, the City and Defendants Adler and Cronk from enforcing City of Austin Ordinance 20180215-049.

41. Award Texas all other and further relief that this Court may deem proper in law or equity.[1]

Respectfully submitted on this the 30th day of April, 2018.

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

BRANTLEY D. STARR
Deputy First Assistant Attorney General

JAMES E. DAVIS
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*/s/David J. Hacker*
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[1] *See, e.g.*, *Yett v. Cook*, 281 S.W. 837, 843 (Tex. 1926) ("[U]nder the common law, by which our Constitution and statutes are to be interpreted, the state could forfeit municipal charters for misconduct of their officers.").

## CERTIFICATE OF SERVICE

I hereby certify on this 30th day of April, 2018, that a true and correct copy of the foregoing pleading has been served on counsel of record for Plaintiffs electronically through the electronic filing manager in accordance with Rule 21a of the Texas Rules of Civil Procedure, and on the unrepresented parties in accordance with Rules 99, 103, and 106 of the Texas Rules of Civil Procedure by personal service of citation.

*/s/ David J. Hacker*
DAVID J. HACKER

**NO. D-1-GN-18-001968**

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**PLEA IN INTERVENTION OF TEXAS**

# Exhibit 1

**ORDINANCE NO. 20180215-049**

**AN ORDINANCE ESTABLISHING EARNED SICK TIME STANDARDS IN THE CITY; CREATING A CIVIL PENALTY; AND CREATING AN OFFENSE.**

**BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF AUSTIN:**

**PART 1.** Findings:

(A) The council finds that most workers in the City of Austin will at some time during each year need limited time off from work to care for their own health and safety needs or the health and safety needs of a close family member.

(B) The council further finds that denying earned sick time to employees:

(1) is unjust;

(2) is detrimental to the health, safety, and welfare of the residents of the City; and

(3) contributes to employee turnover and unemployment, and harms the local economy.

The council further finds that it is within the police power and the responsibility of the City to remedy the problems enumerated in parts (A) and (B) of this Section.

**PART 2.** Title 4 of the City Code is amended by adding a new Chapter 4-19 to read:

**CHAPTER 4-19. EARNED SICK TIME.**

**§4-19-1. DEFINITIONS.**

In this Chapter:

(A) EARNED SICK TIME means a period of paid leave from work accrued by an employee in accord with this Chapter.

(B) EEO/FHO means the City of Austin Equal Employment Opportunity/ Fair Housing Office.

(C) EMPLOYEE means an individual who performs at least 80 hours of work for pay within the City of Austin in a calendar year for an employer, including work performed through the services of a temporary or employment agency. Employee does not include an individual who is an independent contractor according to Title 40, Section 821.5 of the Texas Administrative Code. Employee does not include unpaid interns.

(D) EMPLOYER means any person, company, corporation, firm, partnership, labor organization, non-profit organization or association that pays an employee to perform work for an employer and exercises control over the employee's wages, hours and working conditions. The term does not include:

(1) the United States;

(2) a corporation wholly owned by the government of the United States;

(3) the state or a state agency; or

(4) a political subdivision of the state or other agency that cannot be regulated by City ordinance.

(E) FAMILY MEMBER means an employee's spouse, child, parent, or any other individual related by blood or whose close association with the employee is the equivalent of a family relationship.

(F) MEDIUM OR LARGE EMPLOYER means an employer with more than 15 employees at any time during the preceding 12 months, excluding family members.

(G) PREDECESSOR means an employer who employs at least one individual covered by this Chapter, and for which a controlling interest in such employer or a recognized division of such employer is acquired by a successor.

(H) SMALL EMPLOYER means an employer with no more than 15 employees at any time during the preceding 12 months, excluding family members.

(I) SUCCESSOR means an employer who acquires a controlling interest in a

predecessor or in a recognized division of a predecessor.

**§4-19-2. EARNED SICK TIME STANDARDS.**

(A) An employer shall grant an employee one hour of earned sick time for every 30 hours worked for the employer in the City of Austin. Earned sick time shall be granted in one-hour increments, and shall not be granted in increments of a fraction of an hour.

(B) Earned sick time shall accrue starting at the commencement of employment or the date this Chapter is effective, whichever is later.

(C) Earned sick time shall be available for an employee to use in accord with this Chapter as soon as it is accrued. Provided, that an employer may restrict an employee from using earned sick time during the employee's first 60 days of employment with the employer if the employer establishes that the employee's term of employment is at least one year.

(D) An employee may request earned sick time from an employer for an absence from the employee's scheduled work time caused by:

(1) the employee's physical or mental illness or injury, preventative medical or health care, or health condition; or

(2) the employee's need to care for a family member's physical or mental illness, preventative medical or health care, injury, or health condition; or

(3) the employee's need to seek medical attention, seek relocation, obtain services from a victim services organization, or participate in legal or court ordered action related to an incident of victimization from domestic abuse, sexual assault, or stalking involving the employee or employee's family member.

(E) An employer may adopt reasonable verification procedures to establish that an employee's request for earned sick time meets the requirements of Part (D) of this Section for a request to use earned sick time for more than three consecutive work days.

(F) An employer shall provide earned sick time for an employee's absence from the employee's scheduled work time if the employee has available earned sick time and makes a timely request to use earned sick time before their scheduled work time. An employer may not prevent an employee from using earned sick time for an unforeseeable qualified absence as established in Part (D) of this Section.

(G) This Chapter does not require an employer to provide an employee with more earned sick time in a calendar year than the yearly cap provided in this Part. This Chapter does not require an employer to allow an employee to accrue more than the yearly cap of earned sick time. All available earned sick time up to the yearly cap shall be carried over to the following year. An employer may inform an employee that leave requested in excess of the employee's available earned sick time will not be paid. The yearly caps for earned sick time under this Chapter are:

(1) 64 hours per employee per year for a medium or large employer; and

(2) 48 hours per employee per year for a small employer.

(H) All available earned sick time up to the yearly cap provided in Part (G) of this Section shall be carried over to the following year. Provided, that an employer who makes at least the yearly cap of earned sick time available to an employee at the beginning of a year under the purpose and usage requirements of this Chapter is not required to carry over earned sick time for that year.

(I) This Chapter does not require an employer to allow an employee to use earned sick time on more than eight days in a calendar year.

(J) An employer shall provide an employee with earned sick time that meets the requirements under this Section in an amount up to the employee's available earned sick time. The employer shall pay earned sick time in an amount equal to what the employee would have earned if the employee had worked the scheduled work time, exclusive of any overtime premium, tips, or commissions, but no less than the state minimum wage.

(K) On no less than a monthly basis, an employer shall provide electronically or in writing to each employee a statement showing the amount of the employee's available earned sick time. For the period required for maintenance of records under Title 29, Section 516(a) of the Code of Federal Regulations an employer shall maintain records establishing the amount of earned sick time accrued and used by each covered employee. This Chapter does not create a new requirement for a certified payroll.

(L) An employer who provides an employee handbook to its employees must include a notice of employee rights and remedies under this Chapter in the handbook.

(M) An employer may not require an employee to find a replacement to cover the hours of earned sick time as a condition of using earned sick time.

(N) Neither the amount of earned sick time nor the right to use earned sick time shall be affected by an employee's transfer to a different facility, location, division, or job position with the same employer.

(O) An employee who is rehired by an employer within six months following separation of employment from that employer may use any earned sick leave available to the employee at the time of separation.

(P) A written contract made pursuant to Title 29, Section 158(d) of the United States Code between an employer and a labor organization representing employees may modify the yearly cap stated in Section 2(G) of this Chapter for employees covered by the contract if the modification is expressly stated in the contract.

(Q) A successor must provide to an employee who was employed by a predecessor at the time of an acquisition and hired by the successor at the time of the acquisition all earned sick time available to the employee immediately before the acquisition.

**§4-19-3. NO CHANGE TO MORE GENEROUS SICK TIME PRACTICES.**

(A) An employer may provide paid leave benefits that exceed the requirements of this Chapter. This Chapter does not require an employer who makes paid time off available to an employee under conditions that meet the accrual, purpose, and usage requirements of this Chapter to provide additional earned sick time to the employee.

(B) This Chapter does not require an employee to provide additional earned sick time to an employee if the employee uses paid time off that meets the requirements of this Chapter for a purpose not specified in Section 2(D) of this Chapter.

(C) This Chapter does not prohibit an employer from providing earned sick time to an employee prior to accrual by the employee.

(D) This Chapter does not prohibit an employer from permitting an employee to donate available earned sick time to another employee.

(E) This Chapter does not prohibit an employer from permitting an employee to exchange hours or trade shifts voluntarily with another employee, or prohibit an employer from establishing incentives for employees to exchange hours or trade shifts.

**§4-19-4. SIGNAGE REQUIRED.**

(A) An employer shall display a sign describing the requirements of this Chapter in all appropriate languages in a conspicuous place or places where notices to employees are customarily posted. An employer is not required to post such signage until the City of Austin makes such signage available publicly on its website.

(B) EEO/FHO shall prescribe by rule the size, content, and location of signs required under Part (A) of this Section.

**§4-19-5. RETALIATION PROHIBITED.** An employer may not transfer, demote, discharge, suspend, reduce hours, or directly threaten these actions against an employee for requesting or using earned sick time, or for reporting a violation or participating in an administrative proceeding under this Chapter.

## §4-19-6. ADMINISTRATION.

(A) The EEO/FHO shall:

(1) educate employers and employees about this Chapter;

(2) receive and investigate complaints, including anonymous complaints, alleging a violation of this Chapter;

(3) enforce this Chapter;

(4) seek voluntary compliance with this Chapter before collecting a civil penalty; and

(5) adopt rules necessary to implement this Chapter.

(B) A complaint alleging a violation of this Chapter must be filed with the EEO/FHO by or on behalf of an aggrieved employee within two years from the date of the violation.

(C) If the EEO/FHO finds after investigation of a timely complaint that a violation of this Chapter has occurred:

(1) the EEO/FHO shall assess a civil penalty up to $500 against the employer for each violation of this Chapter, and shall provide written notice of the assessment to the employer; and

(2) the EEO/FHO shall seek voluntary compliance from the employer to remedy any violation of this Chapter. If voluntary compliance is not achieved within 10 business days following the employer's receipt of the written civil penalty assessment, the employer shall be liable to the City for the amount of the assessed civil penalty.

(D) This Section does not create a criminal offense.

## §4-19-7. INVESTIGATION OF COMPLAINTS.

(A) The director of the EEO/FHO may subpoena relevant information during the investigation of a complaint under this Chapter. Relevant information

includes, and is limited to, only the information necessary to determine whether a violation of this Chapter has occurred. A subpoena shall:

(1) be directed to a person with knowledge or information relevant to a complaint under this Chapter, or to a custodian of records relevant to a complaint under this Chapter;

(2) be in writing and signed by the director of the EEO/FHO;

(3) identify the records or testimony to be produced under the subpoena;

(4) direct the person to whom it is issued to produce the records or provide the testimony identified in the subpoena at a specific place and time, which shall be not earlier than 10 business days from the date of service of the subpoena;

(5) identify the individual complaint made under this Chapter to which the subpoena relates;

(6) state that the subpoena is issued under the authority of this Chapter for purposes of investigating a complaint under this Chapter;

(7) state that failure to comply with the subpoena is an offense and punishable as a Class C misdemeanor under this Code; and

(8) be served on the person to whom it is directed by certified mail or personal delivery.

(B) A person commits an offense if the person fails to comply with a subpoena issued and served on the person as provided in Part (A). The offense is punishable as a Class C misdemeanor as provided in Section 1-1-99 of this Code. A culpable mental state is not a necessary element of the offense.

(C) The EEO/FHO may inform employees at a work site of any investigation of a complaint at that worksite alleging a violation of this Chapter.

**§4-19-8. ANNUAL REPORT.** Beginning in 2019, the EEO/FHO shall provide an annual report to the council regarding this Chapter by October 1 of each year. The report shall include, without limitation, a discussion of the implementation

and enforcement of this Chapter, including the number and nature of violations, specific violations, industries and occupations with high rates of violations, penalties assessed in the prior year, and the impact on businesses and employees. The report shall also include recommendations for improvements to this Chapter.

**PART 3.** For a violation of Chapter 4-19 that occurs after the effective date of this ordinance but before June 1, 2019, the EEO/FHO shall issue a notice to the employer that a civil penalty may be assessed for a violation that occurs after June 1, 2019. Provided, that a civil penalty for violation of Section 5 of this Chapter (Retaliation) may be assessed any time after the effective date of this ordinance.

**PART 4.** The council directs the city manager to design and provide a multilingual public education campaign to inform employers and residents of the requirements of Chapter 4-19, such as a website with best practices for employers, and an educational outreach strategy for informing employees and residents of Chapter 4-19.

**PART 5.** This ordinance takes effect on October 1, 2020 for employers having no more than five employees at any time in the preceding 12 months.

**PART 6.** Except as provided in Part 3 and Part 5, this ordinance takes effect on October 1, 2018.

**PASSED AND APPROVED**

February 15, 2018

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Steve Adler
Mayor

**APPROVED:**

Anne L. Morgan
City Attorney

**ATTEST:**

Jannette S. Goodall
City Clerk