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ORDINANCE NO. 19-02-02

**AN ORDINANCE AMENDING CHAPTER 2 – ADMINISTRATION
OF THE ABERDEEN CITY CODE TO ESTABLISH
AN ADMINISTRATIVE APPEALS PROCEDURE**

WHEREAS, South Dakota Constitution Art. IX, § 2 describes the powers of “home rule” municipalities in pertinent part as follows:

A chartered governmental unit may exercise any legislative power or perform any function not denied by its charter, the Constitution, or the general laws of the state. The charter may provide for any form of executive, legislative and administrative structure which shall be of superior authority to statute, provided... that the administrative proceedings be subject to judicial review; and

WHEREAS, the South Dakota Supreme Court ruled in *Daily v. City of Sioux Falls*, 2011 S.D. 48, that S.D. Const. Art. IX, § 2 requires a “home rule” municipality to establish an administrative appeals procedure that provides individuals the right to meaningful judicial review of the facts and law supporting a municipality’s administrative decisions; and

WHEREAS, the City of Aberdeen is a “home rule” municipality; and

WHEREAS, the Aberdeen City Code does not provide an adequate administrative appeals procedure subject to judicial review for all persons aggrieved by an administrative decision of a city official; and

WHEREAS, the City Council of the City of Aberdeen has determined that it should amend the Aberdeen City Code to provide a more comprehensive administrative appeals procedure to uphold state and federal Due Process rights of all persons aggrieved by a decision of a city official.

BE IT ORDAINED BY THE CITY OF ABERDEEN THAT THE FOLLOWING CHANGES AND ADDITIONS SHALL BE MADE TO THE ABERDEEN CITY CODE:

1. Chapter 2 – *ADMINISTRATION*, Article VIII is hereby created as follows:

Secs. 2-501 – 2-509. - Reserved.

ARTICLE VIII. – ADMINISTRATIVE APPEALS

Sec. 2-510 – Appeal permitted.

(a) *Right to appeal.* Any party who is harmed by any action or decision of a city official from which an appeal is not otherwise provided under this Code may appeal the administrative action or decision. The party who wishes to appeal is referred to as the “appellant.”

(b) *Hearing examiner.* An independent hearing examiner who is a member in good standing of the State Bar of South Dakota shall be assigned by the city manager, or an appeals administrator designated by the city manager, to hear the appeal and render a final decision.

(c) *Time to appeal.* Appeals shall be commenced within fifteen (15) days of the administrative action or decision by delivering a written notice of appeal with the responsible official or department director either in person or postmarked within fifteen (15) days of notification of the action or decision. Such delivery shall be deemed the date of filing of the appeal.

(d) *Notice of appeal.* The notice of appeal shall be printed legibly or typed and contain the following information:

- (1) The reasons the appellant believes the administrative action or decision is erroneous or illegal;
- (2) The amount and type of claim or dispute involved and the time when it accrued or occurred;
- (3) The name, address, email address, if any, and telephone number, if any, of the appellant;
- (4) The decision being appealed;
- (5) A statement indicating whether the appellant desires the appeal hearing to be open or closed to the public. All hearings are presumed open to the public. If either party requests a hearing to be closed to the public, the party requesting the closed hearing must present good cause to the hearing examiner that the public interest in having an open hearing is outweighed by the privacy interest involved in a particular case or that a closed hearing is legally required due to the sensitive nature of the evidence to be presented at the hearing;
- (6) If the appellant is to be represented by a representative, the name, address, email address, if any, and telephone number of the representative; and

(7) The signature of the appellant, the appellant's representative, or the appellant's corporate agent.

(e) *Appeal fee:*

(1) *Processing fee.* An appeal processing fee of \$75.00 shall be paid by cash, check, or certified funds simultaneously with the filing of the notice of appeal. If the processing fee is not paid in full pursuant to these provisions, the notice of appeal shall be deemed incomplete and waived and the administrative decision shall be deemed final. The processing fee is nonrefundable except as provided in section 2-515. Any appellant who is financially unable to pay the processing fee may file a request for a hardship waiver in lieu of the processing fee.

(2) *Hardship waiver.* A request for hardship waiver must be filed simultaneously with the filing of the notice of appeal and include the sworn affidavit of the appellant, together with any supporting documents, demonstrating to the satisfaction of the independent hearing examiner the appellant's financial inability to deposit with the city the full amount of the processing fee. Written proof of financial hardship includes wage records, financial statements, bank account records, tax returns, or similar documentation demonstrating that the appellant is unable to pay the processing fee. The hearing examiner shall issue a written order granting or denying a hardship waiver. The order of the independent hearing examiner regarding the hardship waiver shall be mailed by first class mail to the appellant, the appellant's representative, or the appellant's corporate agent. If the request for a hardship waiver is denied, the appellant shall pay the processing fee within five days of the order or prior to the administrative appeal hearing, whichever occurs first.

(f) *Jurisdictional prerequisites.* Compliance with subsections (c), (d), and (e) of this section shall be jurisdictional prerequisites to any appeal. Failure to comply with any of these subsections shall be deemed to waive the right to an appeal. A waiver of the right to an appeal may be determined by the city attorney prior to assignment of the appeal to a hearing examiner or by the hearing examiner at any time during the proceeding. A determination that the appellant waived the right to an appeal shall be the final decision.

(g) *Stay pending appeal.* If the appellant complies with the jurisdictional prerequisites for an appeal, then the city will take no further action to enforce the fine, penalty, or result until the hearing examiner renders a final decision. The provisions for prior notice and hearing may be dispensed with when, in the opinion of the city manager or department director, immediate action is necessary to summarily abate a dangerous condition on public or private property, there is an imminent threat to life or safety on public or private property, or there is an imminent threat to essential governmental services, such as utilities. The city manager or department director shall take only such action as is reasonably necessary to summarily abate the danger or threat and the city will take no further action to enforce the fine, penalty, or result until the hearing examiner renders a final decision.

(h) *Copy to city attorney.* The responsible official or department director, or his or her designee, shall immediately deliver a copy of the notice of appeal to the city attorney who will act as legal counsel for the city.

Sec. 2-511. – Time and notice of hearing.

(a) *Time of hearing.* A hearing shall be held on all appeals within thirty (30) days after the filing of the appeal, unless a later date is scheduled by the hearing examiner upon a showing of good cause why the matter should be scheduled beyond that date.

(b) *Notice of hearing.* The city attorney shall cause written notice of the date, time, and place of the hearing, along with a copy of this article, to be served upon the appellant at least fifteen (15) days before the hearing date, except that the appellant may consent in writing to a shorter notice period.

(c) *Method of service.* The notice of hearing shall be served upon the appellant, the appellant's representative, or the appellant's corporate agent in any of the following ways:

- (1) By personal delivery by a law enforcement officer upon the appellant, the appellant's representative, or the appellant's corporate agent or by leaving the notice with a family member of the appellant over the age of fourteen years upon the premises;
- (2) By mailing a copy of the notice to the appellant, the appellant's representative, or the appellant's corporate agent by certified mail and by first class mail. If the notice sent by certified mail is returned unsigned, service shall be deemed effective pursuant to first class mail if the notice sent by first class mail is not returned; or
- (3) By electronic mail if requested by the appellant, the appellant's representative, or the appellant's corporate agent, or if a course of dealing in such communication has been established with the appellant, the appellant's representative, or the appellant's corporate agent, and the appellant replies to such electronic mail or otherwise acknowledges receipt of the notice.
- (4) By written admission of service of the notice by appellant, the appellant's representative, or the appellant's corporate agent.

Sec. 2-512. – Hearing procedures.

(a) *Rules for hearing.* The following rules shall govern the procedures for a hearing on an appeal:

- (1) Hearings shall be governed by the rules of civil procedure and the rules of evidence as set forth in the South Dakota Codified Laws, except that the foundational requirements of SDCL 19-19-803(6) and (8) will not be required as long as the hearing examiner is reasonably satisfied regarding the source of a document.
- (2) Oral evidence shall be taken only on oath or affirmation.
- (3) The hearing examiner shall administer oaths or affirmations to witnesses.
- (4) The city bears the burden of proof at the hearing, unless the burden of

proof is required to be borne by the appellant under due process or state law. The standard of proof to be used by the hearing examiner shall be a preponderance of the evidence, except in a matter concerning the revocation of a professional license the standard of proof shall be clear and convincing evidence.

- (5) The proponent of any testimony to be offered by a party or witness who does not proficiently speak the English language shall provide an interpreter. The interpreter shall be approved by the independent hearing examiner conducting the proceeding as proficient in the English language and the language in which the witness will testify. The cost of the interpreter is to be paid by the party providing the interpreter.

(b) *Failure to appear.* Any party who fails to appear at the hearing is deemed to waive the right to a hearing and the adjudication of the issues related to the hearing.

Sec. 2-513. – Rights of parties at hearing.

(a) *Evidence.* The appellant, the city, and any other party to the appeal shall have the right:

- (1) To call and examine witnesses on any matter relevant to the issue of the hearing;
- (2) To introduce documentary and physical evidence;
- (3) To cross examine opposing witnesses on any matter relevant to the issues of the hearing;
- (4) To rebut evidence; and
- (5) To have reasonable access to city officials or employees with information relevant to the appeal and to review relevant records, books, papers, and documents in their possession. Such officials or employees shall appear, if reasonably available, at the hearing and produce records relevant to the appeal upon written request of the appellant to such officials or employees provided no later than five (5) days before the scheduled time of the hearing.

(b) *Record of hearing.* The hearing examiner shall cause to be made a substantially verbatim record of the hearing, either stenographically or by sound recording. A recording of the hearing shall be made available to any person upon request and payment in advance of the estimated cost of reproducing the recording. The hearing examiner may waive the cost of the recording for the appellant if a hardship waiver was granted under section 2-510.

Sec. 2-514. – Decision.

Upon conclusion of the hearing, the hearing examiner shall make a written report of the decision, including findings of fact, unless such written report is waived by the appellant and the city. The decision shall be issued within fifteen (15) business days from the date of the conclusion of the appeal hearing. The hearing examiner may affirm, reverse, modify, or remand

for further hearing or action the complained action or decision. The decision of the hearing examiner shall be final.

Sec. 2-515. – Costs and fees.

Each party shall bear its own costs of the appeal proceeding, except as specifically provided herein. The processing fee shall be refunded to the appellant if the hearing examiner determines that the appellant prevailed at the hearing. The hearing examiner may waive the payment of any reinstatement or late penalty fee.

Sec. 2-516. Final decision subject to judicial review.

The final decision may be subject to judicial review as provided by law. If judicial review has been commenced by the aggrieved party within thirty (30) days after the final decision has been entered, or as otherwise provided by law, the city will take no further action to enforce the fine, penalty, or result until the judicial review is completed, with the exception of those matters which require immediate action of the city as set forth in section 2-510.

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/s/ Mike Levsen
Mike Levsen, Mayor

ATTEST:

/s/ Karl Alberts
Karl Alberts, Finance Officer