



Date: January 13, 2021

To: Members of the Durham City Council
Through: Kim Rehberg, City Attorney
From: Crista Cuccaro, Senior Assistant City Attorney
Subject: Non-Discrimination Ordinance

Executive Summary

This ordinance amends Chapter 34 of the City of Durham Code of Ordinance by (1) renaming the Chapter as the Non-Discrimination Ordinance of the City of Durham, (2) incorporating protections for individuals in employment and public accommodations, and (3) expanding the protections of the entire ordinance to include the categories of military status, sexual orientation, gender identity, and protected hairstyle. The Ordinance is effective July 1, 2021.

Recommendation

Staff recommends that City Council adopt an Ordinance Amending Chapter 34 to Rename the Chapter as the Non-Discrimination Ordinance of the City of Durham and Include an Article Regarding Employment and Public Accommodations.

Background

Legislation protecting individuals from discrimination in housing, employment, and public accommodations exists at the federal, state, and local levels across the United States. For example, at the federal level, Title VII of the Civil Rights Act of 1964 and its later amendments protect employees and job applicants from employment discrimination based on race, color, religion, sex, and national origin. Other federal laws protect individuals with a disability¹ or pregnant employees², and assure full and equal enjoyment of public accommodations³ and access to housing⁴. Enforcement of these federal laws is within the purview of the United States Department of Justice's Civil Rights Division and the Equal Employment Opportunity Commission (EEOC).⁵

¹ The Americans with Disabilities Act, 2 U.S.C. § 1201, *et seq.*

² The Pregnancy Discrimination Act, 42 U.S.C. § 2000e, *et seq.*

³ Title II of the Civil Rights Act, 42 U.S.C. § 2000a, *et seq.*

⁴ Title VIII of the Civil Rights Act, 2 U.S.C. § 3601, *et seq.*

⁵ The EEOC and the Department of Justice [share enforcement authority](#) for employment discrimination claims involving state and local government employers under Title VII of the Civil Rights Act. The EEOC receives, investigates, and mediates charges of discrimination against such public employers. Where the EEOC finds reasonable cause to believe an unlawful employment practice has occurred, the agency works with the employer to negotiate a mutually agreeable resolution to the charge. If conciliation of a charge fails, the EEOC refers the charge and its investigative file to the Justice Department, which has sole authority within the federal government to file a lawsuit against state and local governments under Title VII.

States, such as North Carolina, have enacted similar protections for their residents. In North Carolina, the Civil Rights Division of the North Carolina Office of Administrative Hearings (OAH) is responsible for investigating charges of employment and housing discrimination. The State's Civil Rights Division, and specifically its Employment Discrimination Section, operates as a Fair Employment Practices Agency (FEPA) and is a deferral agency for the EEOC, meaning that it hears charges filed by certain State and local government employees pursuant to a worksharing agreement. Additionally, the Housing Discrimination Section of the Civil Rights Division enforces the State's Fair Housing Act⁶, which prohibits discrimination based on race, color, sex, religion, national origin, handicapping condition, or familial status in residential real estate transactions. The State's Fair Housing Act has been deemed substantially equivalent to the Federal Fair Housing Act with regard to substantive rights, procedures, remedies, and the availability of judicial review.

The remainder of this memorandum explains how discrimination is currently regulated in the City of Durham, how Durham has regulated discrimination in the past, and the goals of the proposed ordinance.

Issues and Analysis

The Present: Durham's Human Relations Ordinances

The City of Durham currently has ordinances addressing non-discrimination; these ordinances focus on housing discrimination and are located in [Chapter 34](#) of the City's Code of Ordinances, entitled Human Relations.⁷ The Chapter is divided into three articles, two of which are substantive. The substantive sections include the Fair Housing Ordinance of the City of Durham, and another article establishing the Human Relations Commission of the City of Durham and outlining its duties and procedures. The following paragraphs summarize the City's handling of fair housing complaints under its existing ordinances.

The City's Fair Housing Ordinance was first enacted in 1982 with the stated purpose of protecting individuals on the basis of race, color, religion, national origin, sex, handicap, or familial status during real estate transactions. There are [exceptions](#) to which the City's Fair Housing Ordinance does not apply, such as single-sex dormitories or commercial real estate.

The City of Durham is designated as a [Fair Housing Assistance Program agency](#) (FHAP) by the United States Department of Housing and Urban Development (HUD). Four other jurisdictions in the State are FHAPS—Charlotte, Greensboro, Winston-Salem, and Orange County. HUD provides funding annually on a noncompetitive basis to these jurisdictions, which, in turn, administer fair housing laws that provide rights and remedies that are substantially equivalent to those provided by the Federal Fair Housing Act. In order to obtain substantial equivalence certification, a state or local agency must have a law that, at a minimum, prohibits discrimination against the same protected classes as the Fair Housing Act.⁸ Under federal regulations, a substantially equivalent agency's law may include additional protected classes.

In the City of Durham, housing discrimination complaints are handled by the [Human Relations Division](#) within Neighborhood Improvement Services. Because the City is a FHAP, the City investigates complaints in both capacities—as the City, and on behalf of the federal government. While the City's ordinances on fair housing enforcement assign investigation duties to the Human Relations Commission (HRC), these

⁶ North Carolina General Statutes § [41A-1](#), *et seq.*

⁷ In addition to these ordinances, the City also has Charter authority to regulate fair housing. See City of Durham Charter, [Chapter VII](#).

⁸ The protected classes under the Federal Fair Housing Act are race, color, national origin, religion, sex, disability and familial status.

responsibilities were delegated to the Human Relations Division staff in 1995 by way of rules that were approved by City Council. The Human Relations Commission has existed since 1968, enacted by City of Durham Ordinance Number 2764.

Initially, complaints are fielded by intake specialists in the Human Relations Division. Once staff has enough information about the complaint, the case is assigned to an investigator in the Human Relations Division. The investigator has [broad authority](#) and can enter the premises, subpoena records, and interview witnesses. The investigation process can take several months and the ordinance [provides](#) that the investigation should be done within 100 days after the complaint is complete. During this period, the City's Fair Housing Ordinance encourages conciliation, which is essentially a settlement. As part of conciliation, the City typically requests policy changes from the respondent, such as the respondent attending trainings or adopting new policies to reflect fair housing laws.

When the investigation is complete, the Human Relations Director must determine whether "reasonable cause exists to believe a discriminatory housing practice has occurred or is about to occur." If there is no cause, the case is closed. If there is cause, the Division issues what's called a charge, which details the facts and the prima facie elements of the claim (e.g., failure to provide reasonable accommodation). The respondent (the person against whom the charge was made) has 20 days to elect to proceed with either an administrative hearing before a five-member panel of the HRC, or proceed with the case in Durham County Superior Court. Within 60 days of an election to proceed in Superior Court, the City Attorney's Office must pursue the matter on behalf of the complainant by filing a civil lawsuit. The City Attorney's Office does not represent the complaint, but represents the public interest. This is similar to how a District Attorney's Office pursues a case on behalf of the State, rather than directly representing the victim of a crime.

The Human Relations Division has advanced 9 "cause" cases this year, and the City Attorney's Office has filed two lawsuits on behalf of 7 complainants. One of those lawsuits is on behalf of 6 complainants, who were aggrieved by the same entity, so the case was consolidated. Last year, the Human Relations had 2 "cause" cases, and there were no "cause" cases in any of the ten years prior to 2019.

As part of the lawsuits that the City files, the City requests civil penalties against the respondents. The City's Fair Housing Ordinance provides latitude for a court or the Human Relations Commission in seeking redress against the respondent. The HRC can award actual damages to the aggrieved person, order equitable or injunctive relief, and [assess civil penalties](#) of up to \$10,000, \$25,000, or \$50,000, depending on the frequency of the respondent's discriminatory behavior. Similarly, a court [may enjoin](#) the respondent from engaging in such discriminatory housing practices, or award special, actual, and punitive damages.

The Past: Durham's Prior Ordinances Regulating Public Accommodations and Employment

The City of Durham previously regulated discrimination in public accommodations and private employment in the manner that it currently regulates housing discrimination. In June 1993, the North Carolina General Assembly passed House Bill 779, later codified as [Session Law 1993-227](#). This local law was entitled *An Act to Authorize the City of Durham and Durham County to Prohibit Acts of Discrimination in Employment and Public Accommodations Based on Race, Color, National Origin, Religion, Sex, Disability,*

or Age.⁹ Subsequently, in 1994, the City of Durham passed Ordinance Number 10241, entitled *An Ordinance Enacting Chapter 8.6 of the Durham City Code, "Employment and Public Accommodations."*¹⁰

In 1991, the General Assembly gave similar authority to Orange and Chatham Counties to create a civil rights commission through [Session Law 1991-246](#). Orange County enacted an ordinance that, in part, prohibited employment discrimination on the basis of race, color, religion, sex, national origin, age, disability, familial status, or veteran status. In 1995 and upon Orange County's request, the General Assembly authorized Orange County to serve as a deferral agency for cases deferred by the Equal Employment Opportunity Commission.¹¹ The Session Law also allowed Orange County to defer cases to the Office of Administrative Hearings, which is an independent quasi-judicial agency that hears contested administrative law cases in North Carolina.

In 1999, an employee in Orange County, who had been fired from Blue Cross Blue Shield of North Carolina, filed a lawsuit asserting state claims and violations of Orange County's ordinance. Blue Cross Blue Shield responded, asserting that the local law was unconstitutional under Article II, Section 24(1)(j) of the North Carolina Constitution, which prohibits the General Assembly from passing "any local, private, or special act or resolution . . . regulating labor, trade, mining, or manufacturing." See *Williams v. Blue Cross Blue Shield*, 357 N.C. 170, 581 S.E.2d 415 (2003). When the North Carolina Supreme Court was contemplating the case, numerous jurisdictions across the State filed amicus briefs in support of Orange County. In addition to the City of Durham, the North Carolina Academy of Trial Lawyers, the American Civil Liberties Union of North Carolina, the North Carolina Association of County Commissioners, Durham County Attorney, the New Hanover County Human Relations Commission, and the City of Asheville filed amicus briefs.

Ultimately, on June 13, 2003, the North Carolina Supreme Court ruled that the Session Laws giving Orange County authority to pass its civil rights ordinance and act as a deferral agency for the EEOC were local laws regulating labor, and therefore the General Assembly had enacted the local laws in violation of the State's Constitution. The Court noted that if the General Assembly desired to address employment discrimination, it must "enact either a statewide law applicable to employers and their employees regardless of where they reside within the state or a general law that makes reasonable classifications based upon rational differences of circumstances." *Williams*, 357 N.C. at 188-89. The *Williams* Court did not consider the constitutionality of non-discrimination ordinances, generally.

A month after this decision by the North Carolina Supreme Court, the City of Durham suspended Chapter 8.6 regarding employment and public accommodations.¹² Thus, since 2003, Durham's Human Relations Ordinances have only included fair housing enforcement.

The Future: Expanding Durham's Human Relations Ordinance

Across North Carolina, there has been renewed interest in the adoption or expansion of municipal non-discrimination ordinances following the sunset of a section of [House Bill 142](#) (HB 142). Effective on March 30, 2017, HB 142 was a compromise bill of the North Carolina General Assembly that repealed House Bill

⁹ Session Law 1993-227 was amended in 1995 to add authority and procedures for seeking compensation for the discriminatory act. See Session Law [1995-537](#).

¹⁰ This ordinance (and other City ordinances) can be found by searching [this database](#). In 1995, Chapter 8.6 was amended to clarify remedies available to a complainant and to include forum election. See City of Durham Ordinance Number 10598.

¹¹ See Session Law [1995-339](#).

¹² See City of Durham Ordinance Number 12386, which was approved by City Council on July 24, 2003.

2 (HB 2).¹³ Section 3 of HB 142 was a moratorium that preempted local governments from enacting or amending ordinances regulating private employment practices or public accommodations until December 1, 2020. Local governments are still preempted from regulating access to multiple occupancy restrooms.¹⁴

Since the moratorium under HB 142 is no longer in effect, Durham’s City Council has expressed a desire to prohibit discrimination in private employment and public accommodations in the City of Durham. Under its police powers, the City has broad authority to protect its residents from discrimination.¹⁵ Specifically, state law authorizes cities to “define, prohibit, regulate, or abate acts, omissions, or conditions, detrimental to the health, safety, or welfare of its citizens and the peace and dignity of the city, and may define and abate nuisances.”¹⁶ If there is any ambiguity regarding a city’s authority, the General Assembly requires that the scope of the city’s power be resolved in favor of finding that such power exists.¹⁷ Moreover, under state law, the enumeration of specific powers “shall not be deemed to be exclusive or a limiting factor upon the general authority to adopt ordinances conferred on cities.”¹⁸

Numerous federal and state courts have determined that non-discrimination ordinances applicable to businesses providing public goods and services are permissible under the police powers of cities. *See e.g., Hutchinson Human Rel. Comm’n v. Midland Mgmt. Inc.*, 517 P.2d 158 (Kan. 1973) (“the enactment of a civil rights ordinance is a proper exercise of a municipality’s police power as tending to promote the health, safety, convenience and general welfare of its citizens.”); *Chicago Real Estate Bd. v. City of Chicago*, 224 N.E.2d 793 (Ill. 1967) (“[T]he city of Chicago had authority to adopt the Fair Housing Ordinance, which imposed restrictions on real-estate brokers, under its express power to regulate real-estate brokers and its police power incidental thereto”); *Hartman v. City of Allentown*, 880 A.2d 737, 743 (Pa. Commw. Ct. 2005)) (“a municipality’s authority to enact anti-discrimination law is derived from its police powers.”).

In addition to deriving authority from police powers, cities in North Carolina are empowered by the General Assembly to “regulate and license occupations, businesses, trades, professions, and forms of amusement or entertainment [...]”¹⁹ and cities may institute human relations programs that can engage in dispute resolution, among other activities.²⁰

Accordingly, it is appropriate for the City of Durham to expand its non-discrimination ordinance to guarantee fair and equal treatment under law to all of its citizens. Such an ordinance would regulate businesses in order to promote the public health and welfare of all persons who live and work in the City

¹³ As additional background, HB 2, officially titled the *Public Facilities Privacy and Security Act*, was signed into law in March of 2016 by then-Governor Pat McCrory. HB 2 was a direct reaction by the General Assembly to local legislation enacted in Charlotte in early 2016. Charlotte’s ordinance extended local protections to LGBT individuals in Charlotte. While Charlotte was contemplating its ordinance, unfounded fears about the use of bathrooms by transgender individuals became a lightning rod—hence, HB 2 came to be known as the “bathroom bill.” Shortly after Charlotte passed its controversial ordinance, the General Assembly convened a special session and passed HB 2, which far exceeded the scope of curtailing Charlotte’s legislation.

¹⁴ See North Carolina General Statutes § [143-761](#).

¹⁵ See North Carolina General Statutes §§ [160A-174](#) and [160A-4](#).

¹⁶ North Carolina General Statutes § [160A-174](#).

¹⁷ See North Carolina General Statutes § [160A-4](#) (“[T]he provisions of this Chapter and of city charters shall be broadly construed and grants of power shall be construed to include any additional and supplementary powers that are reasonably necessary or expedient to carry them into execution and effect. . .”).

¹⁸ North Carolina General Statutes § [160A-177](#).

¹⁹ North Carolina General Statutes § [160A-194](#).

²⁰ North Carolina General Statutes § [160A-492](#).

of Durham and ensure that all persons within the City have equal access to employment, housing, and public accommodations.

The Framework: How to Enact and Enforce an Expanded Version of Durham’s Human Relations Ordinance

Since the City of Durham already has an ordinance that regulates fair housing discrimination, expanding the existing ordinances to prohibit discrimination in employment and public accommodation is straightforward. Generally speaking, the amendments to Chapter 34 that are necessary to accomplish an expanded non-discrimination ordinance include: (1) adding definitions relevant to employment discrimination, discrimination in public accommodations, and newly protected classes; (2) placing all of the definitions into a single section applicable to housing discrimination, employment discrimination, and discrimination in public accommodations; (3) describing the prohibited acts that constitute employment discrimination or discrimination in public accommodations; and (4) creating an enforcement provision for employment discrimination or discrimination in public accommodations. Each of these necessary amendments is summarized in the following paragraphs, and a redlined version of Chapter 34 reflecting these amendments is included with this memorandum, along with an ordinance making the amendments effective.

(1) Additional Definitions

As currently written, the City’s Fair Housing Ordinance protects individuals on the basis of race, color, religion, national origin, sex, handicap, or familial status. Of these protected classes, only handicap and familial status are defined.

In total, the following terms are defined in the existing ordinance:

Existing Definitions ([Link](#))

<i>Administrative hearing</i>	<i>Financial institution</i>
<i>Aggrieved person</i>	<i>Gender</i>
<i>Commission</i>	<i>Handicap with respect to a person</i>
<i>Complainant</i>	<i>Hearing board</i>
<i>Complaint</i>	<i>Housing accommodation</i>
<i>Conciliation</i>	<i>Person</i>
<i>Conciliation agreement</i>	<i>Qualifying resident or senior citizen</i>
<i>Covered multifamily dwellings:</i>	<i>Real estate broker or agent</i>
<i>Director</i>	<i>Real estate transaction</i>
<i>Discriminatory practice</i>	<i>Real property</i>
<i>Dormitory property</i>	<i>Respondent</i>
<i>Dwelling</i>	<i>Staff</i>
<i>Familial status</i>	<i>To rent</i>
<i>Family</i>	

City Council has articulated adding protection for individuals in the additional contexts of employment and public accommodations and on the additional bases of military or veteran status, sexual orientation, gender identity, and pregnancy, and in alignment with the [CROWN Act](#). Therefore, it is necessary to add the following definitions:

Additional Necessary Definitions

Employee
Employer
Gender identity
Military status
*National origin*²¹
Protected hairstyle
Public accommodation (or place of public accommodation)
Sexual orientation

Pregnancy is not included in the additional definitions. In Durham’s ordinance, the term “familial status” includes gender neutral protection for pregnant individuals. Therefore, it is not necessary to add pregnancy as an additional category for protection.

Finally, in order to expand the applicability of Durham’s ordinance to public accommodations and employment and create a comprehensive ordinance, several definitions must be amended:

Definitions to Amend

Aggrieved person
Complainant
Complaint
Discriminatory practice (or discrimination)
*Gender*²²
*Handicap*²³
Hearing board
*Person*²⁴

(2) Consolidating Definitions

In addition to creating a cohesive set of definitions that are applicable to the entire revised non-discrimination ordinance, the definitions will need to be relocated in the ordinance. Currently, definitions that would be germane to employment discrimination and public accommodations discrimination exist only within Article II, the Fair Housing Ordinance. Thus, the proposed ordinance removes definitions from Article II and puts them into Article I.

(3) Describing Prohibited Acts

Currently, the City’s ordinance defines “Discriminatory practice” as an act that is unlawful under Article II of Chapter 34, which is the Fair Housing Ordinance. [Section 34-36](#) of the Code of Ordinances reiterates this by stating, “it is unlawful to commit or to attempt to commit directly

²¹ In many municipal non-discrimination ordinances, national origin is defined, and so it is included in the proposed ordinance. However, most municipal ordinances do not define race or color, and therefore these have not been added.

²² The City’s existing definition for Gender is a word usage rule, rather than a true definition. In the proposed ordinance, Gender has been defined to reflect its social construction. Moreover, gendered language throughout the ordinance was amended to use more neutral and inclusive language.

²³ Only the actual defined term is being changed, from using the word handicap to using the word disability. The substantive definition, which aligns with federal law, has not been amended. Additionally, throughout the ordinance, the word handicap was changed to reflect modern usage of disability or person with disability.

²⁴ This existing definition was amended to remove other local governmental entities.

or indirectly a discriminatory practice as defined” in Article II, Division 2. In turn, Division 2 enumerates specific discriminatory acts, such as [discrimination in financial practices](#) related to residential real estate transactions.²⁵ This enumeration of prohibited acts has the advantage of being more detailed; however, this level of detail also means the ordinance is more narrow.²⁶ On the other hand, some jurisdictions do not identify discriminatory behavior by type, and instead define discrimination broadly. For example, [Chamblee, Georgia](#) defines “Discriminate, discrimination or discriminatory” as:

Any act, policy or practice that, regardless of intent, 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.

Chamblee also declares certain civil rights in its ordinance and [succinctly summarizes](#) how these rights are expected to be upheld in employment, housing, and public accommodations; the ordinance does not enumerate specific types of discriminatory behavior. For the purposes of simplicity while making amendments, Durham’s City Council may prefer to take the Chamblee approach—and this approach is used in the proposed ordinance. However, this means fair housing discrimination is detailed explicitly under the City’s non-discrimination ordinance, but employment and public accommodations discrimination is not. If the City Council chooses to specify discriminatory behavior, [San Francisco](#), [Philadelphia](#), and [Baltimore](#) have NDOs with detailed descriptions of discrimination.

(4) Penalties and Enforcement

Under Durham’s existing Fair Housing Ordinance, the Hearing Board of the Human Relations Commission can award actual damages to the aggrieved person, order equitable or injunctive relief, and [assess civil penalties](#) of up to \$10,000, \$25,000, or \$50,000, depending on the frequency of the respondent’s discriminatory behavior.

Other cities impose a wide range of penalties, both monetary and otherwise, for housing, employment, and public accommodations discrimination in their jurisdictions. Below is a sample of some jurisdictions’ monetary penalties, listed as a maximum allowable amount.

- [Birmingham, AL](#): \$100 first violation / \$250 second violation / \$500 third + violation
- [Roeland Park, KS](#): \$500 for each violation or actual damages to aggrieved party, whichever is greater
- [Chamblee, GA](#): \$500 first violation / \$1,000 second + violation and/or revocation of tax certificate
- [San Francisco, CA](#): Misdemeanor and fine of \$2,000 and/or imprisonment up to 6 months
- [Philadelphia, PA](#): \$2,000 each violation

²⁵ See City of Durham Code of Ordinances, Chapter 34, Article II, Division 2, Sec. [34-49](#).

²⁶ The ordinance does contain a seeming catchall at Sec. 34-51(d), which makes it unlawful to interfere with a person in the exercise or enjoyment of their rights under the Fair Housing Ordinance.

Baltimore, MD: \$1,000 each day of violation / \$10,000 second violation / \$25,000 second violation within 5 years / \$50,000 second + violation within 7 years²⁷

The proposed ordinance provides that anyone who violates the ordinance provisions regarding employment or public accommodation may be guilty of a misdemeanor, subject to a fine up to \$500, and subject to enforcement by equitable relief (e.g. an injunction).

As a final point for consideration, the Ordinance has an effective date of July 1, 2021, which will allow time for the Administration and the Durham community to become familiar with the Ordinance and plan for its implementation.

Alternatives

Council may choose to not approve the Ordinance. If Council chooses not to approve the Ordinance, there will be no local protections for individuals in the proposed protected categories or in the context of employment and public accommodations.

Financial Impact

Not applicable

Equal Business Opportunity Summary

Not applicable

Attachments

1. An Ordinance Amending Chapter 34 to Rename the Chapter as the Non-Discrimination Ordinance of the City of Durham and Include an Article Regarding Employment and Public Accommodations, which includes an Exhibit A

²⁷ Baltimore's penalty scheme is very similar to Durham's existing penalty scheme in its Fair Housing Ordinance.