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MEMORANDUM

To: Mayor and City Council
From: Warren Hutmacher, City Manager
Date: March 11, 2013
Subject: **Revised Ethics Ordinance First Read & Discussion**

ITEM DESCRIPTION

The revised Ethics Ordinance for a "first read" and discussion by Council.

BACKGROUND

At the January Work Session, the Mayor and City Council adopted a moratorium on the application of the City's Ethics Code for ninety days, to allow time for the City Council to review the Ethics Code procedures and prepare ordinance revisions to achieve an improved process for filing and adjudicating ethics complaints.

At the February Work Session, the Council discussed various alternatives for revising the Ethics Ordinance. The Council discussed the issue again at the February regular Council meeting Work Session and based on the general consensus of Council, staff has drafted a "first read" of a revised Ethics Ordinance for public review.

ANALYSIS

The revised Ethics Ordinance significantly changes the process for the consideration of ethics complaints. The list of offenses in the code has not changed. The new process is detailed in the attached Flow Chart.

The revised Ordinance will apply to the City Manager, City Attorney and City Clerk; however, complaints will be sent directly to the Mayor & Council for consideration. Council can choose to deal with the complaint as a personnel issue outside of the Ethics Ordinance, remand the complaint to the Hearing Officer or dismiss the complaint.

The revised Ordinance calls for standing meetings of the Ethics Board, articulates the Ethics Board role as a "jury" and their right to question the Hearing Officer and review documents. It also clarifies and strengthens the role of the Hearing Officer in the quasi-judicial process. The Ordinance allows for City Attorney dismissals for technical deficiencies without convening the Ethics Board and allows the Hearing Officer to determine if complaints are germane to the enumerated ethical violations in the Ordinance. This will help to eliminate frivolous and politically charged ethics complaints. The Ordinance strengthens due process rights by creating new avenues for Appeals and dialing down the strict adherence to the rules of evidence. The Ethics Ordinance was changed so significantly that staff has attached the sections that are changed without strike through and underlines. The edited version is very difficult to interpret.

NEXT STEPS

Council should review the first read of the Ordinance and suggest changes to be made for the planned second read (April 1, 2013). -45-

AN ORDINANCE TO AMEND ARTICLE VIII (ETHICS) OF CHAPTER 2 OF THE CODE OF THE CITY OF DUNWOODY, GEORGIA BY REVISING THE ETHICS CODE COMPLAINT PROCEDURES AND ADJUDICATION

WHEREAS, the City Council is charged with the responsibility to preserve the health, safety and welfare of the citizens of the City; and

WHEREAS, in 2008, the City adopted the Ethics Code for the City, proscribing certain unethical conduct by officers and employees of the City and designating a procedure for filing and adjudicating Complaints of violations of said provisions; and

WHEREAS, the Mayor and City Council, pursuant to a moratorium adopted in January, 2013, has determined that said procedure needed to be revised in order to have the most efficient, clear and fair process for hearing and adjudicating Ethics Complaints; and

WHEREAS, after a thorough investigation of various possible procedures, the Mayor and City Council have determined that the below process for adjudicating Ethics Complaints is the best and most efficient for the City of Dunwoody.

NOW THEREFORE, the Mayor and Council of the City of Dunwoody hereby ordains as follows:

Section 1. Article VIII (Ethics) of Chapter 2 (Administration) of the Code of the City of Dunwoody, Georgia is hereby further amended by revising and renaming Division 2 (Complaints) in its entirety to read as follows:

DIVISION 2. COMPLAINTS

Sec. 2-253. Creation of Board of Ethics; membership; term; compensation.

- (a) *Created; membership.* There is created a Board of Ethics consisting of five members, and two alternate members. Each member of the board of ethics shall have been a resident of the city for at least one year immediately preceding the date of taking office and shall remain a resident of the city while serving as a member of the board of ethics.
- (b) *Member restrictions.* Members of the Board shall not be elected City officials, ~~persons appointed to elective office,~~ fulltime appointed officials (whether exempt or nonexempt), or city employees, and shall hold no elected public office nor any other city office or employment.

- (c) *Appointment.* Members of the Board shall be appointed by the Mayor and approved by the City Council. Each City Councilmember may submit to the Mayor up to two names to consider for appointment to the Board and the Mayor may, but is not required to, choose to appoint members of the Board from the names submitted by councilmembers. An appointment to fill a vacancy on the board shall be made by the Mayor and approved by the City Council.
- (d) *Chairperson.* The board shall elect one of its members to serve as chairperson and one as vice-chairperson of the Board.
- (e) *Term of office.* Board members shall serve staggered terms of no more than two years, starting with the next appointments to the Board following the effective date of this Ordinance. A member shall hold office until a member's successor is appointed.
- (f) *Limit of term.* No person may serve more than two consecutive terms as a Board member.
- (g) *Deliberations, actions open to the public.* The board's deliberations shall be open to the public.
- (h) *Compensation.* Members of the Board are volunteers and shall serve without compensation. The City Council shall provide meeting space for the Board of Ethics. Subject to budgetary procedures and requirements of the City, the City shall provide the Board of Ethics with such supplies and equipment as may be reasonably necessary to perform its duties and responsibilities.
- (i) *Staff support.* The City Council shall provide such staff support for the Board as the City Council determines to be necessary for the Board to fulfill its duties and responsibilities. The City Clerk, or Assistant City Clerk if the City Clerk is the subject of the Ethics Complaint, shall serve as recording secretary to the Board.
- (j) In conjunction with any Special Meetings for purposes of reviewing and holding hearings on Complaints pursuant to this Article, the Board shall have standing monthly meetings on a day as determined by the Board. Said monthly meeting may be cancelled by request of at least two members of the Board if no complaints are pending for review or hearing at said meeting. At the first monthly meeting of the year, the Board shall elect a Chairman and Vice Chairman.
- (k) The Board shall be authorized to develop and adopt written by-laws and procedural rules for meetings outside of the evidentiary hearing process established by this Article.

- (l) The Board shall receive annual training on procedural rules, Open Meetings and Open Records laws and such other matters as pertains to the Board's jurisdiction and operation.

Sec. 2-254. Appointment of Hearing Officer

Whenever the procedures herein require a review by or hearing in front of a Hearing Officer, such Hearing Officer shall:

- (1) Be a competent attorney at law of good standing in his or her profession;
- (2) Have at least five years' experience in the practice of law; and
- (3) Shall not maintain an office within a ten-mile radius of the City.

The City Clerk shall maintain a listing of no less than three (3) qualified attorneys to serve as a Hearing Officer pursuant to this Article. Upon receipt of a property verified complaint as described in this Article, the City Clerk shall draw names randomly from the listing of qualified hearing officers and appoint the first one who is available to serve in the matter. Once a hearing officer is appointed, no public servant shall communicate with or otherwise contact the Hearing Officer, except as authorized herein, unless such public servant is the complainant or public servant charged in the complaint or the City Attorney or City Clerk, unless either is charged in the Complaint; however; no party to a Complaint shall engage in ex parte communications with the hearing officer.

Sec. 2-255. Custodian of Records.

The City Clerk shall serve as legal custodian of the Board's Records, and accept, file, maintain and administer, in accordance with all applicable laws, any information related to the purposes of this Article.

Sec. 2-256. Receipt of Complaints.

- (a) All Complaints filed under this Article, except as otherwise provided herein, shall be filed with the City Clerk, provided, however, to discourage the filing of Ethics Complaints solely for political purposes, complaints will not be accepted against a person seeking election as a member of the City Council or the Mayor, whether currently serving or not, from the date qualifying opens for the elected office at issue through the date the election results for that office are certified. The time for filing complaints shall not run during this period. Properly

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filed complaints will be accepted and processed after the election results have been certified.

- (b) No action may be taken on any Complaint which arises out of substantially the same facts or circumstances which have previously served as the basis for a Complaint pursuant to this Article.
- (c) Any Complaint shall be in writing, and shall be signed by the person filing the Complaint and sworn in the presence of a notary. Each complaint shall state:
 - (1) A separate count for each alleged violation;
 - (2) The specific section of this Article alleged to have been violated;
 - (3) With specificity, the facts which are alleged to constitute the violation; and
 - (4) The documentary evidence which the Complainant possesses. Copies of said documentary evidence shall be attached to the Complaint as exhibits.
- (d) All Complaints shall contain an oath that the facts set forth therein are true and correct to the best of the complainant's knowledge in substantially the following form:

"STATE OF GEORGIA
COUNTY OF DEKALB
AFFIDAVIT

Personally appeared before the undersigned officer duly authorized to administer oaths, (Name of person filing Complaint), who on oath deposes that the statements in the foregoing Complaint are true and correct to the best of his/her knowledge and belief. The affiant further acknowledges that false statements made in this Complaint may result in a prosecution against them for false swearing, a felony under O.C.G.A. 16-10-71.

(Signature of person filing Complaint)

Sworn to and subscribed
Before me this ___ day of _____, 20__.

Notary Public"

- (e) Complaints against the City Clerk, City Manager, or City Attorney shall be filed directly with the Mayor, who shall forward said Complaint to all Councilmembers. ~~At the next Regularly-Scheduled Council Meeting after the filing of said Complaint, t~~The Mayor and Council shall discuss the Complaint at a Regular or Special Meeting and either:
- (1) Dismiss said Complaint;
 - (2) Choose to treat said Complaint as a personnel matter and determine any consequences against the City Clerk, City Attorney or City Manager for violations complained of; or
 - (3) Determine that a full Ethics investigation is warranted and forward said Complaint to the City Clerk (or Assistant City Clerk if the Complaint alleges violations by the City Clerk) to move forward with the Complaint process outlined in this Article, with the exception that if the Complaint is against the City Attorney, the City Clerk shall forward same directly to the Hearing Officer, who shall, in addition to substantive determination of the Complaint, shall determine if the Complaint has been filed in accordance with the procedures outlined in this Section.

Sec. 2-257. Service of Complaints/City Attorney Review.

- (a) Upon receipt of a filed Complaint, the City Clerk shall cause the Complaint to be served on the public servant charged as soon as practicable but in no event later than seven (7) calendar days after receipt of a verified Complaint. Service may be by personal service, by certified mail, return receipt requested, by statutory overnight delivery or by e-mail. The City Clerk shall also forward the Complaint to the City Attorney for review.
- (b) The Public Servant charged in the Complaint shall have 15 days to file an Answer to the Complaint provided, however, the Public Servant charged shall have no obligation to file an answer to any complaint.
- (c) Within seven days (7) of receiving a filed Complaint, the City Attorney shall review said Complaint for conformity with the requirements of Section 2-256 of this Article. If the City Attorney finds that the Complaint is not in conformance with the requirements of Section 2-256, the City Attorney shall dismiss the Complaint and serve said dismissal in writing to the Complainant and the public servant charged. Said dismissal shall be without prejudice once and, if refiled and still not in conformity with Section 2-256 upon second filing, which shall be within thirty (30) days of the letter of dismissal, shall be with prejudice. The Complainant shall have the right to appeal the City

Attorney's determination to the appointed Hearing Officer by filing a written appeal with the City Attorney no later than five (5) days following receipt of the letter of dismissal. The Hearing Officer's review of the City Attorney's decision in such appeal shall be de novo. If the Hearing Officer concurs with the City Attorney's dismissal, the Hearing Officer shall dismiss said Complaint, and said dismissal shall be with prejudice and shall not have the right to be re-filed. If the Hearing Officer disagrees with the City Attorney's dismissal, he shall proceed with substantive review of the Complaint pursuant to the procedures in this Article.

Sec. 2-258. Procedures for Review and Hearing of Complaints.

- (a) Upon being forwarded a Complaint pursuant to Section 2-257, the Hearing Officer shall review same to determine if the Complaint is unjustified, frivolous or patently unfounded. A frivolous, unjustified or patently unfounded Complaint shall mean a Complaint clearly unsupported by evidence or law which is brought for no other reason than to waste time and be a nuisance to the accused and/or convoluted in reasoning to a point where a reasonable person is unable to clearly establish how the actions alleged by the Complainant serve as a violation of this Article. The Hearing Officer may take into consideration relationship between the Complainant and the Accused, previous allegations by Complainant against the Accused, the timing of the Complaint and any political or other improper motive for filing said Complaint. If the Hearing Officer determines that the Complaint is frivolous, unjustified or patently unfounded, the Hearing Officer shall dismiss the Complaint and notify the Complainant and Accused of said dismissal in writing within fifteen (15) days of receiving the Complaint.
- (b) Upon a determination that a Complaint should not be dismissed pursuant to subsection (a), the Hearing Officer shall be empowered to collect evidence and information concerning any Complaint and to add the findings and results of his investigation to the file containing said Complaint. In furtherance of this investigation, the hearing officer may:
 - (1) First, seek such further information from the Complainant or the public servant charged through inquiry or written questions, provided, however, the public servant charged shall have no obligations to answer any inquiries. Upon collection of such additional evidence, if the Hearing Officer determines that the Complaint demonstrates facts sufficient to invoke disciplinary jurisdiction, the Hearing Officer shall conduct a hearing.

(2) During said hearing which is conducted to determine whether a violation of this article has occurred:

- a. The person under investigation, or the accused, shall receive written notice of the hearing at least fourteen (14) days in advance of the first hearing from the City Clerk (or Assistant City Clerk if the City Clerk is the subject of the Complaint) and may be represented by counsel of his or her own choosing; and
- b. The accused or his representative, if any, shall have an opportunity to:
 - i. Challenge the sufficiency of any complaint which has been filed against him;
 - ii. Examine all documents and records obtained or prepared by the Hearing Officer in connection with the matter heard;
 - iii. Bring witnesses;
 - iv. Establish all pertinent facts and circumstances;
 - v. Question or refute testimony or evidence, including the opportunity to confront and cross examine adverse witnesses; and
 - vi. Exercise, to the extent the Hearing Officer, in his discretion, determines to be just and reasonable, any pretrial discovery procedure usually available in civil actions.
 - vii. During said hearing, the statutory rules of evidence shall not strictly apply.

(3) During said hearing, the Hearing Officer shall serve as the Magistrate of the Proceedings and the Ethics Board shall serve as the "jury," and shall have the right, at the conclusion of each witness testimony and at the conclusion of the hearing, to ask the Hearing Officer questions concerning the law to be applied and clarification on any evidence presented at the Hearing. At the end of each witness presentation, the Hearing Officer shall allow the Board a limited amount of time to ask the witness additional questions and may, at his discretion, rule questions out of order if they are irrelevant or prejudicial to the discussion.

- (4) The burden shall be on the Complainant to show, by preponderance of the evidence, that the accused public servant has violated the provisions of this Article.
- (c) All investigations by the Hearing Officer, including the hearings, shall be completed within forty-five (45) days of the Hearing Officer receiving the Complaint. Should the investigation not be completed in the said period of time, the Complaint shall be deemed dismissed as a failure to state facts sufficient to invoke the disciplinary jurisdiction of the City Council.
- (d) Within seven (7) days following the completion of any Hearing, the Hearing Officer shall prepare a report of findings of fact, Conclusions of law, and recommendations to the Ethics Board. The Report shall consist of
- (1) A written findings of fact and Conclusions of Law; and
 - (2) Recommendations to the Ethics Board on what actions to take.
- (e) Within ten (10) days of receiving the Hearing Officer's Findings of Fact and law, the Ethics Board shall meet to determine whether the Complainant has proven, by preponderance of the evidence and based on the findings of fact of the Hearing Officer that the accused public servant has violated the provisions of this Article. The Hearing Officer shall be present at said hearing to present his Report and to answer any questions of the Board regarding any aspect of the hearing or the Report. If the Board determines by majority vote that the burden has not been met, the Board shall dismiss the Complaint with prejudice.
- (f) If the Board determines, by majority vote, that the accused public servant violated the provisions of this Article, the Board shall recommend punishment for said violation to the Mayor and City Council by stating so on the Record, which shall be transmitted, along with the Hearing Officer's Report, to Mayor and City Council within five (5) days of the conclusion of the Board's determination.
- (g) The Report of the Hearing Officer and the Board, as well as all documentation gathered by the Hearing Officer as part of each Complaint and as presented in any evidentiary hearing, shall be subject to the requirements of the Georgia Open Records Act, and any of its exceptions; and all meetings of the Board, including the evidentiary hearing where the Board serves as "jury," shall be subject to the requirements of the Georgia Open Meetings Act, and any of its exceptions.

Sec. 2-259. City Council Action

- (a) Within thirty (30) days following the~~Upon~~ receipt of the findings of the Hearing Officer and recommendations of the Board, the Mayor and Council shall, at their next Regularly Scheduled Meeting, either:
 - (1) By simple majority accept the recommendations of the Board;
 - (2) By simple majority, accept the findings of the Hearing Officer and reject the recommended discipline, instead substituting its own discipline; or
 - (3) By simple majority, dismiss the Complaint.
- (b) If the subject of the Complaint is the Mayor or any Councilmember, he or she will not be allowed to vote pursuant to this Section or participate in any discussion related thereto, nor shall such position be counted for the purpose of establishing a quorum for this particular purpose.
- (c) Upon final determination by the City Council pursuant to this Section, the City Clerk (or Assistant City Clerk if the City Clerk is the subject of the Complaint) shall serve the accused with certified copies of the findings and recommendations of the Hearing Officer and the Board, as well as certified minutes of the final action of City Council, by personal service, certified mail, Federal Express or other overnight delivery service.

Sec. 2-260. Right to Appeal.

A Complainant aggrieved by a dismissal of the Complaint by the Hearing Officer or Board of Ethics, or public servant adversely affected by the final decision of the City Council, may appeal said decision by Petition for Writ of Certiorari in accordance with State Law.

Sec. 2-261. Statute of Limitation.

No action may be taken on any complaint which is filed later than one (1) year after a violation of this Article is alleged to have occurred, and any complaint alleging a violation must be filed within six months from the date the Complainant knew or should have known of the action alleged to be a violation; such limitation periods shall be measured from the date of the last

act occurring in furtherance of such violation. No proceeding under this Article shall be instituted or prosecuted after the earlier of:

- (1) The expiration of the term of office of the person complained against;
or
- (2) The resignation, death, vacancy, disqualification withdrawal or termination from office of the public servant against whom a Complaint is filed.

Sec. 2-262. Wrongful Use of Ethics Complaint Process.

The purpose of the Ethics Code Process delineated in this Article is to endeavor to maintain a high standard of ethical behavior by city officials, employees and other public servants. This will be most effective when city officials, employees and other public servants and citizens work together to set and maintain high ethical standards. Complaints directed to the Hearing Officer and Board must be based on fact and have the intent to improve the ethical climate of the City. Individuals directing unfounded, frivolous, false or politically motivated complaints may be subject to penalties including, but not limited to, dismissal of the complaint, public reprimand, criminal prosecution for perjury, and/or payment of costs associated with the handling and processing of the complaint. Other penalties may be imposed by the board of ethics for the wrongful use of this Article.

Section 2. This Ordinance shall be effective upon adoption. This Ordinance repeals any and all conflicting ordinances and amendments.

SO ORDAINED AND EFFECTIVE, this ____ day of _____, 2013.

Approved:

Michael G. Davis, Mayor

Attest:

Approved as to Form:

**STATE OF GEORGIA
CITY OF DUNWOODY**

ORDINANCE 2013-03-XX

Sharon Lowery, City Clerk

Cecil G. McLendon, City Attorney

(Seal)

Ethics Complaint Process

