CITY OF TYBEE ISLAND

A G E N D A
REGULAR MEETING OF TYBEE ISLAND CITY COUNCIL
October 08, 2020 at 6:30 PM

Please silence all cell phones during Council Meetings

Consideration of Items for Consent Agenda 6:30PM

Opening Ceremonies
- Call to Order
- Invocation
- Pledge of Allegiance

Announcements

Approval of the minutes of the meetings of the Tybee island City Council
1. City Council Meeting September 24, 2020

Citizens to be Heard: Please limit comments to 3 minutes. Maximum allowable times of 5 minutes.

Consideration of Approval of Consent Agenda

Public Hearings
2. Site Plan Approval to enlarge warehouse and add office space. 201 McKenzie Street, LLC. Zoning C-2; PIN: 4002602011
3. Text Amendment: Amendment to Article 7, Tree Removal Regulations

Consideration of Bids, Contracts, Agreements and Expenditures
4. Georgia Municipal Employees Benefit System Defined Benefit Retirement Plan; Amendment to Establish an Early Retirement Incentive Program
5. George Shaw: Septic to Sewer Fee Policy

Consideration of Ordinances, Resolutions
6. Discussion, 2020-20 (Draft), Article 4, Chapter 22, Section 22-110 through 22-112, Noises

Council, Officials and City Attorney Considerations and Comments

7. Barry Brown: Increase the amount Mayor and Council paid to GMA for retirement.
8. Barry Brown: Open Containers in Festival Zone
9. Monty Parks: Marine Science Building Improvements:
    - Security gate on East side to prevent entrance from beach crossover
    - Security gate on West side to prevent access to rear of building
    - Attractive temp/semi-permanent fence in front and around sides, removal of City traffic control barricades
    - Front sign to identify the building
    - Upgrade indigenous plant exhibit placards

Minutes of Boards and Committees

10. Minutes, Planning Commission, September 21, 2020, Information Only

Executive Session

Discuss litigation, personnel and real estate

Possible vote on litigation, personnel and real estate discussed in executive session

Adjournment

Individuals with disabilities who require certain accommodations in order to allow them to observe and/or participate in this meeting, or who have questions regarding the accessibility of the meeting or the facilities are required to contact Jan LeViner at 912.472.5080 promptly to allow the City to make reasonable accommodations for those persons.

***PLEASE NOTE:** Citizens wishing to speak on items listed on the agenda, other than public hearings, should do so during the citizens to be heard section. Citizens wishing to place items on the council meeting agenda must submit an agenda request form to the City Clerk's office by Thursday at 5:00PM prior to the next scheduled meeting. Agenda request forms are available outside the Clerk's office at City Hall and at www.cityoftybee.org.

THE VISION OF THE CITY OF TYBEE ISLAND

"is to make Tybee Island the premier beach community in which to live, work, and play."

THE MISSION OF THE CITY OF TYBEE ISLAND

"is to provide a safe, secure and sustainable environment by delivering superior services through responsible planning, preservation of our natural and historic resources, and partnership with our community to ensure economic opportunity, a vibrant quality of life, and a thriving future."

File Attachments for Item:

City Council Meeting September 24, 2020

Consideration of Items for Consent Agenda

Mayor Sessions called the Consent Agenda to order at 6:30PM. Those present were Jay Burke, Monty Parks, John Branigin, Barry Brown, and Spec Hosti. Also attending were Dr. Shawn Gillen, City Manager; Bubba Hughes, City Attorney; George Shaw, Director, Community Development; and Janet LeViner, Clerk of Council. Nancy DeVetter was excused.

Mayor Sessions listed the following items on the consent agenda:

- Minutes: City Council Meeting, September 10, 2020
- Agreement: City of Tybee Island and GMA: Telecommunications and Right of Way Management
- Ante Litem: Michael Lucas, Kathleen Flynn and other Similarly Situated Persons **TO REJECT**

Mayor Sessions called the regular meeting to order. All those present for the consent agenda were present.

Opening Ceremonies

- Call to Order
- Invocation: Jan LeViner, Clerk
- Presentation of Colors and Pledge of Allegiance

Recognitions and Proclamations

Mayor Sessions stated she would like to take this time to publically thank the **Department of Natural Resources** and **Georgia State Patrol** who assisted Tybee with the closure of the beach during COVID-19. Major Fobes and SGT Hattrich assisted in recognizing with the distribution of Certifications of Appreciation.

Mayor Sessions stated she would like to recognize Ms. Cooper and Ms. Davis as they were instrumental in depicting the history of Tybee Island on painted tiles. These tiles are now handing in the hallway of the Burke Day Public Safety Building. She also thanked Sgt. Hattrich for building a wooden display case. **Polly Wylly Cooper and Joy Davis** were not able to attend.

Barry Brown made a motion to approve the consent agenda**. Monty Parks** seconded. Vote was unanimous to approve, 5-0.

Consideration of Ordinances, Resolutions

Resolution: HB 1203 Repealing Parts of Citizen Arrest Powers. Mayor Sessions stated Sen. Gilliard is taking HB 1203 to the Senate Floor for a vote which would repeal Article 4 of Chapter 4 of Title 17 of the official Code of Georgia. Mr. Hughes stated the Tybee Island Police Department has reviewed the proposed HB which limits the ability of a private arrest and recommended it is not appropriate for the City to support. Mr. Parks concurred and well as Mr. Hosti. **Spec Hosti** made a motion to not support HB 1203. **Jay Burke** seconded. Vote was unanimous to not support HB 1203, 5-0.

Monty Parks made a motion to adjourn. **John Branigin** seconded. Vote was unanimous to approve, 5-0.

Meeting adjourned at 7:35PM.

_____

Janet R. LeViner, MMC
Clerk

File Attachments for Item:

2. Site Plan Approval to enlarge warehouse and add office space. 201 McKenzie Street, LLC. Zoning C-2; PIN: 4002602011

STAFF REPORT

PLANNING COMMISSION MEETING: August 17, 2020
CITY COUNCIL MEETING: September 10, 2020

LOCATION: 201 McKenzie St.

PIN: 40026 02011

APPLICANT: 201 McKenzie St., LLC

OWNER: 201 McKenzie St., LLC

EXISTING USE: Commercial

PROPOSED USE: Commercial

ZONING: C-2

PROPOSED ZONING: C-2

USE PERMITTED BY RIGHT: Yes

COMMUNITY CHARACTER MAP: Commercial Gateway

APPLICATION: Site plan review

PROPOSAL: The applicant requests site plan approval to enlarge warehouse and add office space.

ANALYSIS: The owner intends to remove current retail use and have only office and warehouse on site. The access to the proposed parking spaces comes directly from a currently unopened right of way. While this is not normally ideal, the right of way is an unused dead end currently. This should not pose a problem. Using Chatham County's code for warehouse parking of 1 space for 1000 square feet of warehouse plus Tybee's code for 1 space for 350 square feet of office the amount of parking is sufficient and there will be an ADA space on site. The City's engineer has approved the drainage plan.

The Comprehensive Plan describes the Commercial Gateway in which it lies as follows:

> *This area functions as an activity center and serves as the commercial gateway for the City. Zoning classifications are C-1, C-2, R-1, R-1B, R-T, and R-2. The mix of neighborhood commercial uses include shopping, crafts, restaurants, and eco-tourism*

Comprehensive Plan – Community Character Area *Commercial Gateway*		
Recommended Development Strategies		*Meets Strategy Y/N or N/A*
1.	Encourage commercial and mixed use development and redevelopment along the US 80 commercial corridor	Y
2.	Discourage down-zoning within the US 80 commercial corridor	N/A
3.	Establish standards for a maximum percentage of residential use on a per parcel basis to encourage mixed us	N/A
4.	Enhance pedestrian movements with streetscape improvements	N/A
5.	Allow for the appropriate mix of retail, residential, and tourism related uses consistent with the Plan vision	Y
6.	Implement traffic calming measures and parking improvements	N/A
7.	Establish noise and sight buffers between commercial uses and adjacent residential area	N

8.	Review parking requirements to ensure they are not prohibitive to future commercial development	N/A

STAFF FINDING
Staff recommends approval.

This Staff Report was prepared by George Shaw.

ATTACHMENTS
A. Site plan review application
B. Site plans
C. Property card
D. SAGIS map

llcins@Yahoo.com

CITY OF TYBEE ISLAND
SITE PLAN APPROVAL APPLICATION

Fee
Commercial $500
Residential $250

AE 10'

Applicant's Name 201 McKENZIE ST. LLC

Address and location of subject property 201 McKENZIE AV.

PIN 4-0026-02-011 Applicant's Telephone Number 912-308-9294

Applicant's Mailing Address P.O. Box 2497, TYBEE IS. GA. 31328

Brief description of the land development activity and use of the land thereafter to take place on the property:

OFFICE AND WAREHOUSE EXPANSION

Property Owner's Name 201 McKENZIE ST LLC Telephone Number 912-308-9294

Property Owner's Address 201 McKENZIE AV.

Is Applicant the Property Owner? X Yes ____ No

If Applicant is the Property Owner, Proof of Ownership is attached: ____ Yes

If Applicant is other than the Property Owner, a signed affidavit from the Property Owner granting the Applicant permission to conduct such land development is attached hereto. ____ Yes

Current Zoning of Property C-2 Current Use COMMERICAL

Names and addresses of all adjacent property owners are attached: X Yes

If within two (2) years immediately preceding the filing of the Applicant's application for a zoning action, the Applicant has made campaign contributions aggregating to more than $250 to the Mayor and any member of Council or any member of the Planning Commission, the Applicant and the Attorney representing the Applicant must disclose the following:

a. The name of the local government official to whom the campaign contribution or gift was made;
b. The dollar amount of each campaign contribution made by the applicant to the local government official during the two (2) years immediately preceding the filing of the application for this zoning action, and the date of each contribution;
c. An enumeration and description of each gift having a value of $250 or more made by the Applicant to the local government official during the two (2) years immediately preceding the filing of the application for this zoning action.

Signature of Applicant

1.31.20
Date

NOTE: Other specific data is required for each type of Site Plan Approval.

*Fee Amount $*_____ *Check Number* _____ *Date* _____

City Official _____

NOTE: This application must be accompanied by following information:

____ 1 copy, no smaller than 11 x 17, of the proposed site plan and architectural renderings.

✓ 1 copy, no smaller than 24 x 36, of the engineered drainage and infrastructure plan.

____ 1 copy, no smaller than 11 x 17, of the existing tree survey and the tree removal and landscaping plan.

____ Disclosure of Campaign Contributions

The Planning Commission may require elevations or other engineering or architectural drawings covering the proposed development.

The Mayor and Council will not act upon a zoning decision that requires a site plan until the site plan has met the approval of the City's engineering consultant. (Note: Section 5-080 (A) requires, "Once the engineer has submitted comments to the zoning administrator, a public hearing shall be scheduled.")

The Applicant certifies that he/she has read the requirements for Site Plan Approval and has provided the required information to the best of his/her ability in a truthful and honest manner.

Signature of Applicant

7-31-20
Date

CITY OF TYBEE ISLAND

CONFLICT OF INTEREST IN ZONING ACTIONS
DISCLOSURE OF CAMPAIGN CONTRIBUTIONS

Have you within the past two (2) years made campaign contributions or gave gifts having an aggregate value of $250.00 or more to a member of the City of Tybee Island Planning Commission, or Mayor and Council or any local government official who will be considering the rezoning application?

YES _____ NO X

IF YES, PLEASE COMPLETE THE FOLLOWING SECTION:

NAME OF GOVERNMENT OFFICIAL	CONTRIBUTIONS OF $250.00 OR MORE	GIFTS OF $250.00 OR MORE	DATE OF CONTRIBUTION

IF YOU WISH TO SPEAK CONCERNING THE ATTACHED REZONING APPLICATION, THIS FORM MUST BE FILED WITH THE ZONING ADMINISTRATOR FIVE (5) DAYS PRIOR TO PLANNING COMMISSION MEETING IF CAMPAIGN CONTRIBUTIONS OR GIFTS IN EXCESS OF $250.00 HAVE BEEN MADE TO ANY MEMBER OF THE PLANNING COMMISSION OR MAYOR AND COUNCIL.

Signature _____

Printed Name Ashley O. Mosley

Date 7-24-20

Sec. 5-080. - Site plan approval.

The site plan approval process is intended to provide the general public, planning commission, and mayor and council with information pertinent to how a new development will affect the surrounding area and the city as a whole and to ensure compliance with all applicable regulations and considerations as hereinafter stated. Where a variance, special review, or any other land development activity is involved in connection with a site plan, the standards applicable to the variance, special review, and/or land development activity applied for shall apply.

(A) ***Process.*** Upon submittal of the site plan, the designated city official will review the site plan or noticeable discrepancies and determine if there is a need to apply for other zoning actions. The site plan is then forwarded to the city's consulting engineer. Once the engineer has submitted comments to the designated city official, a public hearing before the planning commission shall be scheduled. The public hearing shall be held regardless of whether the site plan meets the requirements of this Land Development Code. Until the applicant addresses all of the engineer's comments and the site plan is satisfactory, the mayor and council will not consider the plan. In addition to all other requirements, any applicant for a site plan must identify all prior site plan applications made by the applicant, any affiliates/relatives, corporate or business entities in which the applicant has had an interest for the property which is the subject matter of the current application. The applicant must identify any parking meters proposed to be eliminated from city rights-of-way by the proposed site plan implementation. The applicant must demonstrate compliance with all other applicable ordinances including but not limited to stormwater, flood damage prevention, and buffering. In considering a site plan, the mayor and council may consider whether the proposed development will be unreasonably detrimental to adjacent or nearby uses and whether the proposed development will adversely impact existing conditions in the overall neighborhood, including but not limited to:

(1) The impact or lack thereof on available resources and utilities.

(2) Whether the proposed development is of a scale and mass so as to be compatible with the character of the neighborhood.

(3) Whether the proposed development is consistent with the character area under the master plan.

(4) Density considerations for the neighborhood including demands on infrastructure, traffic, and other relevant factors. In considering a site plan, the mayor and council may approve or deny the application as submitted, or add or delete conditions appropriate to protecting the interest of the applicant as well as those of nearby properties. Buffering requirements beyond those expressly identified may also be imposed. If conditions are added or deleted the applicant must subsequently submit a revised plan of the proposed development to the designated city official and all such conditions that had been added or deleted must be accepted by the city's consulting engineer. If all of the foregoing requirements have been satisfied and further if the mayor and council find that the benefits of and need for the proposed use and project are greater than any possible depreciating effects and damages to the neighboring properties, the application may be granted.

(B) ***Other zoning actions.*** Because special review, variances and map amendments require site plans, site plan review may be the first step in the permitting process, however, the site plan should identify any other zoning actions necessary in order for the intended development to be constructed so that a public hearing can be held on all such zoning actions simultaneously with the public hearing on the site plan. Site plan approval should encompass approval of all other zoning actions necessary to accomplish the development, however, if the intended development is to be altered from an approved site plan, additional public hearing and review is necessary if an additional special review, variance or map amendment is necessitated by the proposed alteration.

(C) ***Site plan longevity.*** After a site plan has been approved by the mayor and council it shall be valid for a period of 18 months from the date of approval. If a building permit has not been obtained and work has not begun, the site plan approval shall be void and a new application must be submitted for site plan approval.

(Ord. No. 1999-26, 8-12-1999; Ord. No. 2002-15, 7-11-2002; Ord. No. 2002-15, amended 1-9-2003; Ord. No. 1999-26, amended 8-12-1999; Ord. No. 1999-19, amended 6-15-1999; Ord. No. No. 2005-14, § 1, 5-26-2005; Ord. No. 2005-14, § 1, 5-26-2005; Ord. No. 01-2015, § 1, 1-15-2015)

Property Names

Re: 201 McKenzie Avenue
Tybee Island, Georgia 31328

4-0026-02-013A
Marie S. Haymans
109 McKenzie Avenue
Tybee Island, Ga. 31328

4-0026-02-010
Sundance Ventures, LLP
1205 U.S. Hwy. 80
P.O. Box 1016
Tybee Island, Ga. 31328

4-0026-02-009
Sundance Ventures, LLP
1207 U.S. Hwy. 80
P.O. Box 1016
Tybee Island, Ga. 31328

4-0026-02-008
Sundance Ventures, LLP
1211 U.S. Hwy. 80
P.O. Box 1016
Tybee Island, Ga. 31328

4-0026-02-007
Salt Island Investments, LLC
1213 U.S. Hwy. 80
P.O. Box 2281
Tybee Island, Ga. 31328

4-0026-03-021
Gerald Schantz
1115 U.S. Hwy. 80
P.O. Box 1095
Tybee Island, Ga. 31328

4-0026-03-001
JPW III, LLC
202 McKenzie Ave.
820 Southbridge Blvd.
Savannah, Ga. 31405

DAVIS ENGINEERING, INC.
PO Box 1663 Tybee Island, Georgia 31328
Tel. (912) 695-7262 dkdbus@gmail.com

August 10, 2020

George Shaw
Director of Community Services
City of Tybee Island
P.O. Box 2749
Tybee Island, GA 31328 Phone (912) 786-4573 Fax: (912) 786-9539

RE: 220043 McKenzie $5 Store

Dear Mr. Shaw:

I have reviewed the site design submittal for the above referenced project. I have not attempted to duplicate the work of the Planning Commission or City staff with regard to setbacks, density or other zoning, tree protection or subdivision regulation issues.

It is my understanding City Staff is addressing ADA compliance.

Within the scope of plan review standards, to the best of my knowledge and belief, it is my opinion the site design elements, that I have reviewed, meet the requirements of the Land Development Code of the City of Tybee Island. Any recommendations do not relieve the project of the requirement to obtain any other required permits, approvals, etc... by any other governmental body or authority having jurisdiction over any portion of this project.

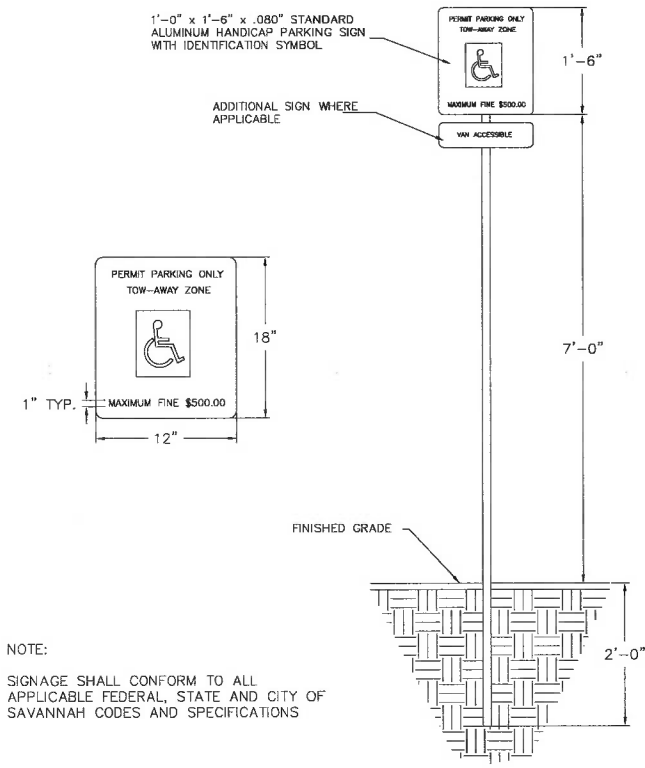
Please contact me if you have any questions on this matter

Sincerely,

Downer K. Davis, Jr., P.E.
President

cc: Lisa Schaaf

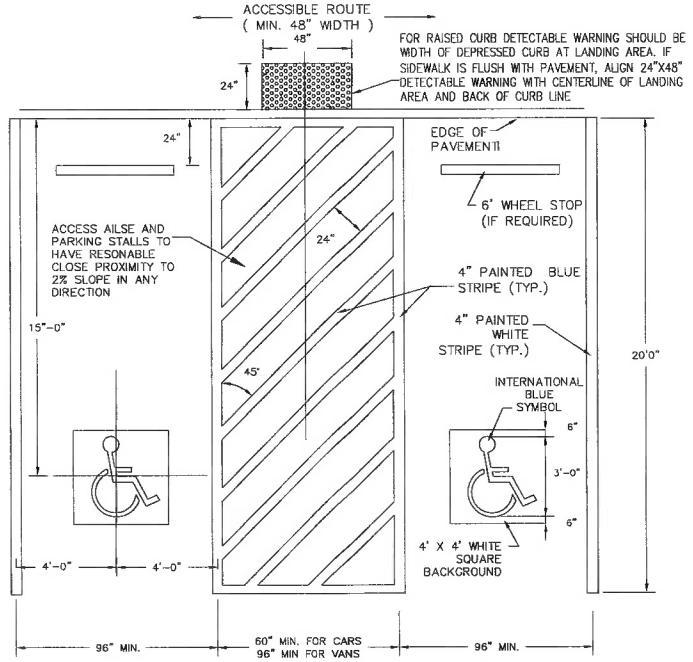
2200430B



NOTE:

SIGNAGE SHALL CONFORM TO ALL APPLICABLE FEDERAL, STATE AND CITY OF SAVANNAH CODES AND SPECIFICATIONS

1 HANDICAP PARKING SIGN DETAIL
SCALE: NTS

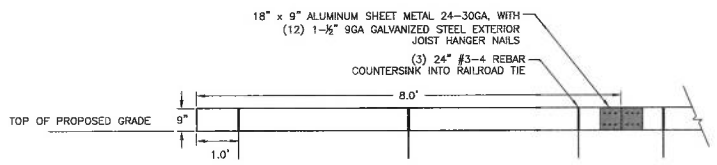


NOTE:

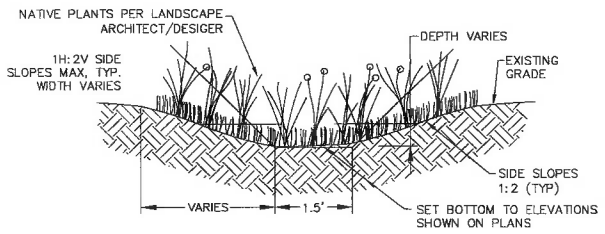
1. STRIPING AND CONSTRUCTION SHALL CONFORM TO ALL APPLICABLE FEDERAL, STATE AND CITY OF SAVANNAH CODES AND SPECIFICATIONS.

2. ALL PAVEMENT MARKINGS AND STRIPING IN THE RIGHT-OF-WAY SHALL BE THERMOPLASTIC.

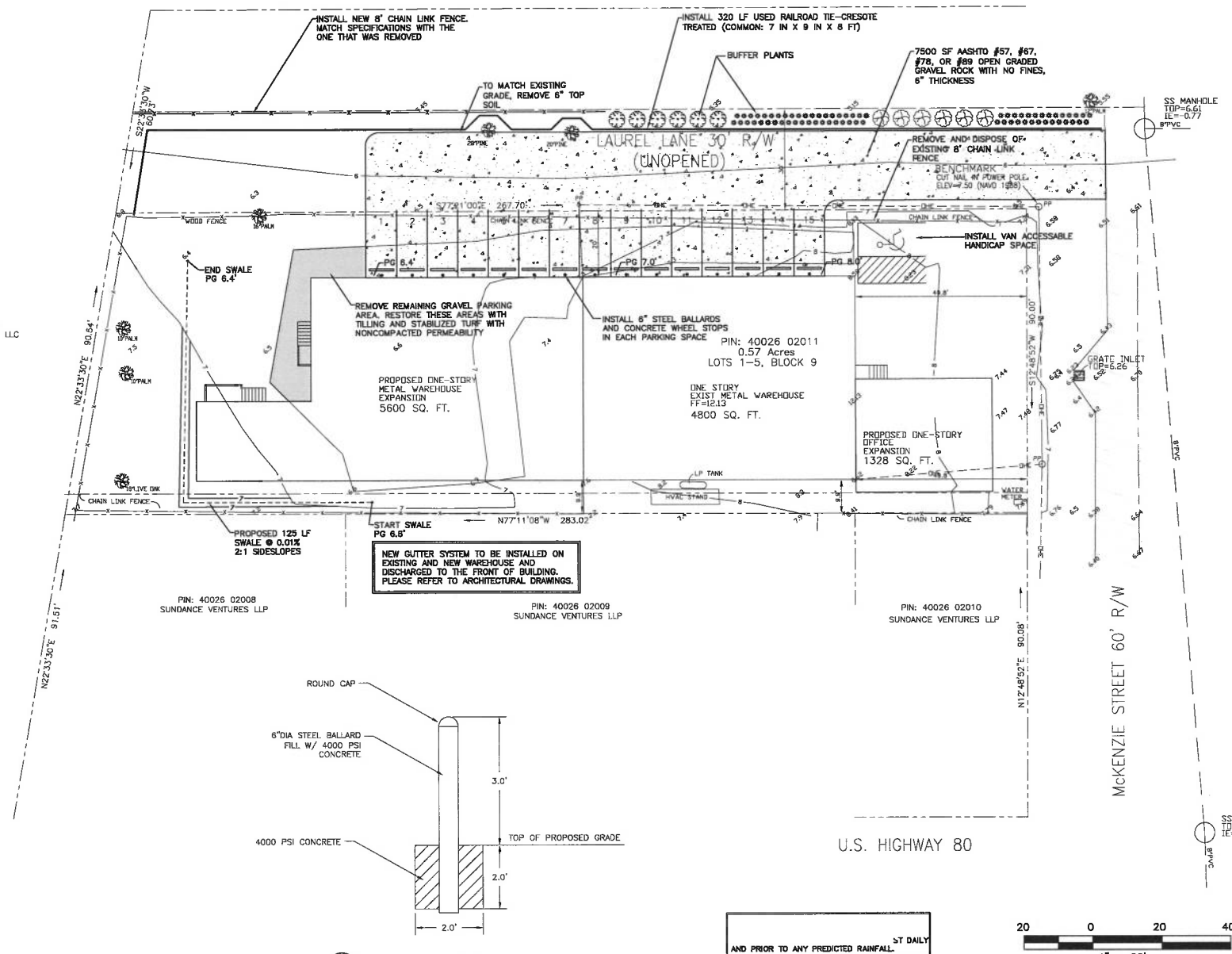
2 ADA HANDICAP PARKING SPACE STRIPING DETAIL
SCALE: NTS



4 TYPICAL RAILROAD TIE DETAIL
SCALE: NTS



5 TYPICAL SWALE DETAIL
SCALE: NTS



3 TYPICAL BALLARD DETAIL
SCALE: NTS

AND PRIOR TO ANY PREDICTED RAINFALL. ...ST DAILY

DATE	REVISION
7-27-20	REVISED PER CITY OF TYBEE
8-5-20	REVISED PER CITY OF TYBEE
8-7-20	REVISED PER CITY OF TYBEE
9-14-20	

UTILITIES PROTECTION CENTER
811

sce engineering
313 East 65th Street
Savannah, Georgia 31405
Phone (912) 354-7114
Fax (912) 355-7534

201 MCKENZIE AVE
CHATHAM COUNTY TYBEE ISLAND, GA
PREPARED FOR MARK CADMAN
DRAINAGE PLAN AND DETAILS

GEORGIA REGISTERED PROFESSIONAL ENGINEER ASHLEY D MOSLEY 9/14/2020

JOB NO.:
FILE: 201 MCKENZIE AVE
DATE: 01/2020
ISSUED FOR CONSTRUCTION
SHEET NUMBER: C03

Item #2.

PLANNING COMMISSION
NOTICE OF DETERMINATION

Meeting date: August 17, 2020

Project Name/Description: 201 McKenzie Avenue

Action Requested: Site Plan – requesting office and warehouse expansion

Special Review	Subdivision:
Site Plan Approval X	Sketch Plan Approval ___ Conceptual ___
Variance	Preliminary Plan Approval ___
Map Amendment	Final Plat Approval ___
Text Amendment	Minor Subdivision ___ Major Subdivision ___

Petitioner has met all documentation requirements, all external approval requirements, and all code requirements, except for the following:

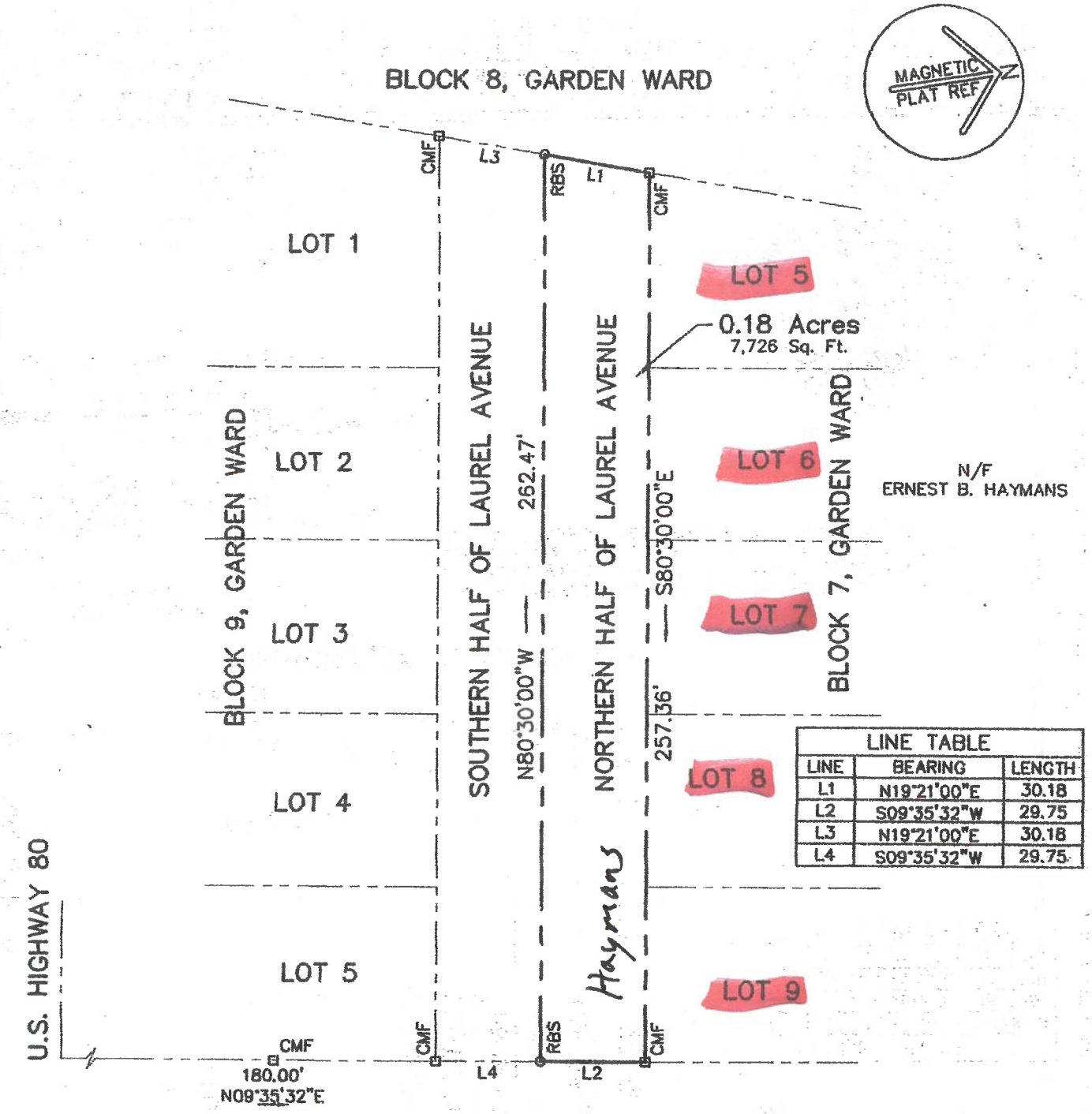
The Planning Commission Motion on Petition: ☐ Approval ☐ Denial ☒ Continued

Action on Motion:

COMMISSIONER	FOR	AGAINST	COMMENTS
Bishop			Chair
Bossick			Vice Chair - absent
Matlock	X		
McGruder	X		MOTION
McNaughton	X		
Reynolds	X		
Robertson	X		SECOND

Planning Commission Chair: _____ Date: 8/20/2020

Planning & Zoning Manager: _____ Date: 8-20-2020



LINE TABLE		
LINE	BEARING	LENGTH
L1	N19°21'00"E	30.18
L2	S09°35'32"W	29.75
L3	N19°21'00"E	30.18
L4	S09°35'32"W	29.75

LEGEND:

CMF = CONCRETE MONUMENT FOUND
RBS = 1/2" RE-BAR W/CAP SET

REFERENCE:

PLAT OF THE WESTERN PORTION OF LAUREL AVENUE BY BERT BARRETT, JR. LAND SURVEYING, INC., DATED MAY 24, 2002

THIS IS TO CERTIFY THAT THE PROVISIONS RELATIVE TO GEORGIA CODE SECTION 15-6-67(D) DO NOT REQUIRE APPROVAL OF THIS PLAT BY ANY GOVERNING AUTHORITY PRIOR TO THE RECORDING WITH THE CLERK OF SUPERIOR COURT.

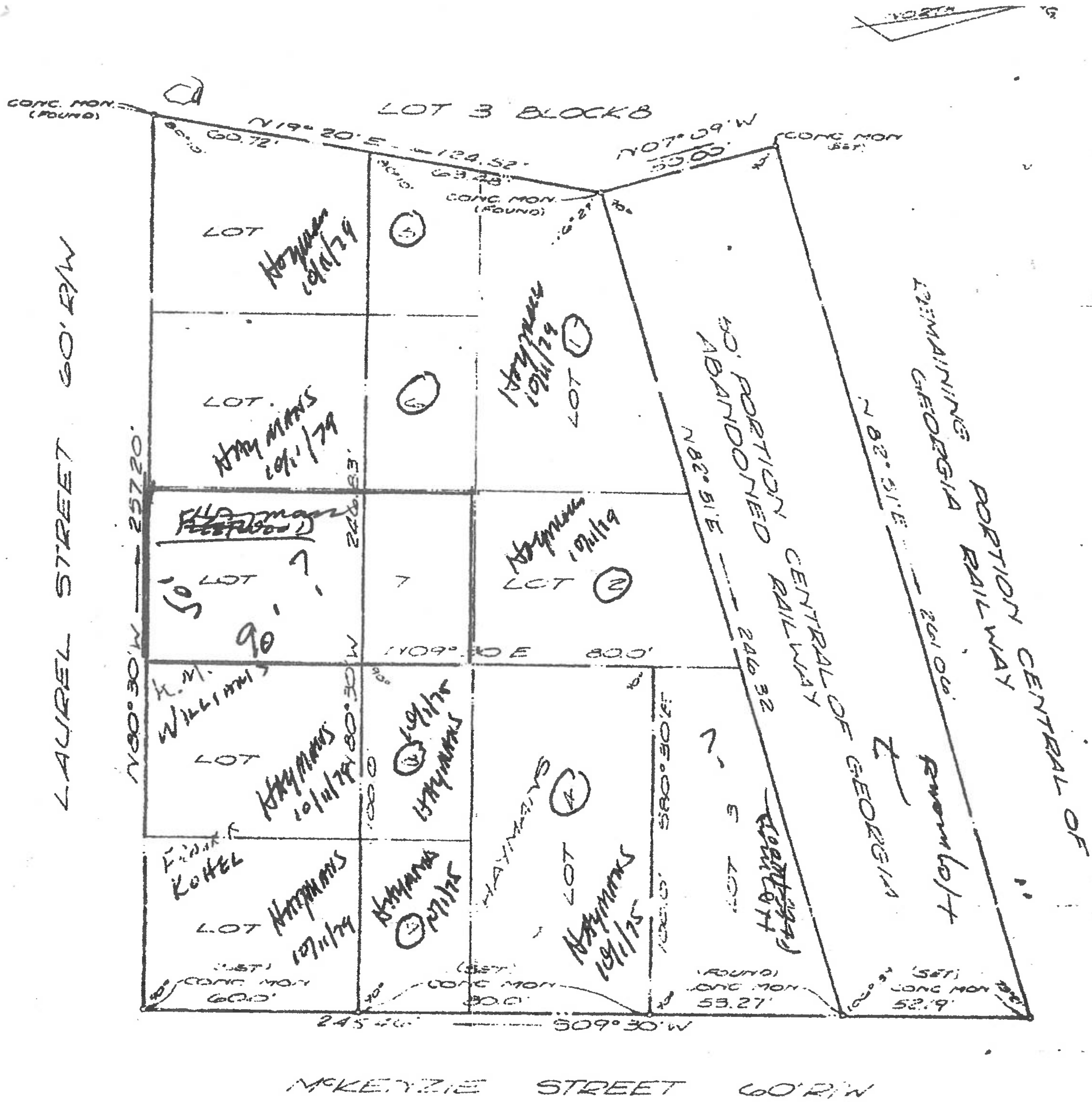
40 20 0 40 80

GRAPHIC SCALE

PREPARED FOR: ERNEST B. HAYMANS

GEORGIA REGISTERED No. 2812 8-28-03 LAND SURVEYOR

E.O.C. FIELD 1/38,942



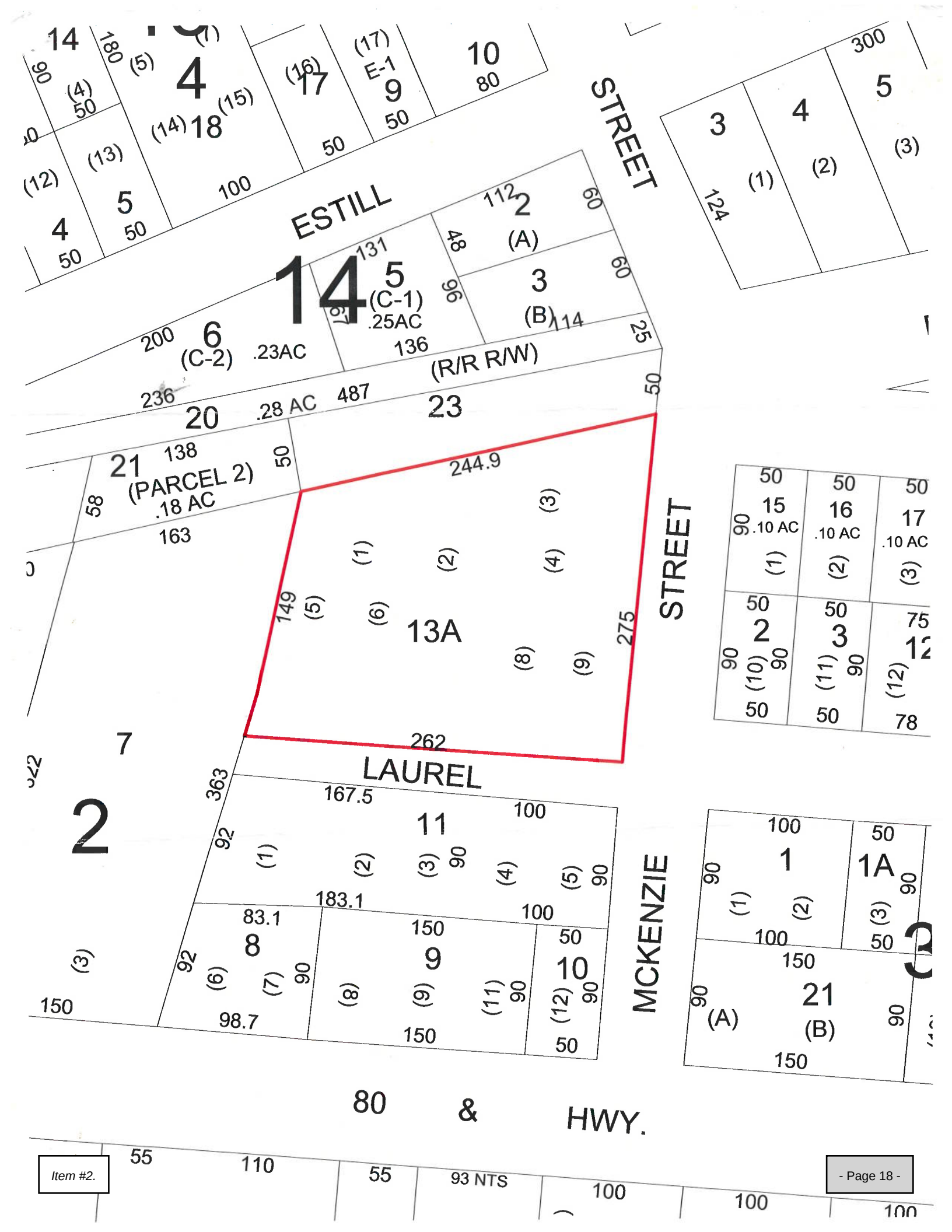
STATE OF GEORGIA
CHATHAM COUNTY

PLAT OF LOTS

1 THRU 9, BLOCK 7, GARDEN WARD AND A SOUTHERN 50' PORTION OF THE CENTRAL OF GEORGIA ABANDONED RAILWAY LOCATED ON THE NORTHWEST CORNER OF McKENZIE AND LAUREL STREETS, SAVANNAH BEACH, GEORGIA

SURVEYED FOR: W. L. FLEETWOOD

I CERTIFY THAT THIS PLAT IS A CORRECT REPRESENTATION OF THE L[illegible] ... PREPARED IN CONFORMITY WITH THE MINIMUM STANDARDS AND REQUIREMENTS OF LAW.


ESTILL
STREET
14
5
(C-1)
.25AC
6
(C-2)
.23AC
2
(A)
3
(B)
(R/R R/W)
20
.28 AC
23
21
(PARCEL 2)
.18 AC
138
163
244.9
13A
149
275
262
LAUREL
7
2
363
167.5
11
183.1
8
9
10
MCKENZIE
STREET
15
.10 AC
16
.10 AC
17
.10 AC
1
1A
21
(A)
(B)
80 & HWY.
55
110
55
93 NTS
100
100
100

PLANNING COMMISSION
NOTICE OF DETERMINATION

Meeting date: September 21, 2020

Project Name/Description: Site Plan

Action Requested: requesting office and warehouse expansion – 201 McKenzie Ave. – 4002602011 - Zone C-2 – 201 McKenzie St. LLC.

Special Review	Subdivision:
Site Plan Approval X	Sketch Plan Approval ___ Conceptual ___
Variance	Preliminary Plan Approval ___
Map Amendment	Final Plat Approval ___
Text Amendment	Minor Subdivision ___ Major Subdivision ___

Petitioner has met all documentation requirements, all external approval requirements, and all code requirements, except for the following:

The Planning Commission Motion on Petition: ☒ Approval ☐ Denial ☐ Continued

Action on Motion:

COMMISSIONER	FOR	AGAINST	COMMENTS
Bishop			Chair
Bossick		X	Vice Chair
Matlock	X		Second
McGruder	X		
McNaughton	X		
Reynolds	X		Motion
Robertson			Absent

Planning Commission Chair: _____ Date: 9/20/2020

Planning & Zoning Manager: _____ Date: 9.23-2020

File Attachments for Item:

3. Text Amendment: Amendment to Article 7, Tree Removal Regulations

STAFF REPORT

PLANNING COMMISSION MEETING: September 21, 2020
CITY COUNCIL MEETING: October 8, 2020

LOCATION: N/A

APPLICANT: City of Tybee Island

OWNER: N/A

EXISTING USE: N/A

PROPOSED USE: N/A

ZONING: N/A

USE PERMITTED BY RIGHT: N/A

COMMUNITY CHARACTER MAP: N/A

APPLICATION: Amendment to Article 7, Tree removal regulations.

PROPOSAL: To clean up some language and increase the replacement size for replacement trees pursuant to a citation for violation.

ANALYSIS: This amendment makes the replacement size for a tree following a violation increase from 2" diameter at breast height (dbh) to 4" dbh.

STAFF FINDING
While some species may be hard to find in the larger size this will provide incentive to obtain a tree permit before removing trees.

This Staff Report was prepared by George Shaw.

ATTACHMENTS
A. Amendment

Fee $500

CITY OF TYBEE ISLAND
LAND DEVELOPMENT CODE
TEXT AMENDMENT APPLICATION

Applicant's Name CITY OF TYBEE ISLAND

Applicant's Telephone Number 912-472-5031

Applicant's Mailing Address P.O. Box 2749, TYBEE ISLAND, GA 31328

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a. The name of the local government official to whom the campaign contribution or gift was made;
b. The dollar amount of each campaign contribution made by the applicant to the local government official during the two (2) years immediately preceding the filing of the application for this zoning action, and the date of each contribution;
c. An enumeration and description of each gift having a value of $250 or more made by the Applicant to the local government official during the two (2) years immediately preceding the filing of the application for this zoning action.

Disclosure of Campaign Contributions form attachment hereto: ____ Yes

Signature of Applicant

9-11-2020
Date

NOTE: Other specific data is required for each proposed Text Amendment.

City Official _____ *Date* _____

NOTE: This application must be accompanied by additional documentation, including drawings and/or text that include or illustrate the information outlined below.

Indicate in the spaces provided whether or not the required information is provided.

YES or NO	REFERENCE	DESCRIPTION
Y	5-020 (E)	An amendment to the text of this Land Development Code follows the same process as an amendment to the zoning map. However, a text amendment requires different materials to be included with the application.
Y	5-040 (E) (1)	In the case of a text amendment, the application shall set forth the new text to be added and the existing text to be deleted.
	5-110	Section 5-110, Standards for Land Development Code or Zoning Map Amendment Approval, identifies standards and other factors to be considered by the Mayor and Council in making any zoning decision. The Applicant should provide written data addressing each of the below listed standards and factors to assure consideration of applicable information.
N	5-110 (A)	The existing land use pattern;
N	5-110 (B)	The possible creation of an isolated district unrelated to adjacent and nearby districts;
N	5-110 (C)	The existing population density pattern and the possible increase or overtaxing of the load on public facilities;
N	5-110 (D)	Whether changed or changing conditions make the passage of the proposed amendment reasonable;
N	5-110 (E)	Whether the proposed change will adversely influence existing conditions in the neighborhood or the city at large;
N	5-110 (F)	Potential impact on the environment, including but not limited to drainage, soil erosion and sedimentation, flooding, air quality, and water quality and quantity;
N	5-110 (G)	The reasonableness of the costs required of the public in providing, improving, increasing or maintaining public utilities, schools, streets and public safety necessities when considering the proposed changes;
N	5-110 (H)	Whether the proposed change will be detrimental to the value or improvement or development of adjacent or nearby property in accordance with existing requirements;
N	5-110 (I)	Whether the proposed change is out of scale with the needs of the neighborhood or entire city;
N	5-110 (J)	Whether the proposed change will constitute a grant of special privilege to the individual owner as contrasted with the adjacent or nearby neighborhood or with the general public; and,
N	5-110 (K)	The extent to which the zoning decision is consistent with the current city master plan or other local planning efforts, if any, of the city.

The Applicant certifies that he/she has read the requirements for Land Development Code Text Amendments and has provided the required information to the best of his/her ability in a truthful and honest manner.

Signature of Applicant

9-11-2020
Date

CITY OF TYBEE ISLAND

CONFLICT OF INTEREST IN ZONING ACTIONS

DISCLOSURE OF CAMPAIGN CONTRIBUTIONS

Have you within the past two (2) years made campaign contributions or gave gifts having an aggregate value of $250.00 or more to a member of the City of Tybee Island Planning Commission, or Mayor and Council or any local government official who will be considering the rezoning application?

YES _____ NO X

IF YES, PLEASE COMPLETE THE FOLLOWING SECTION:

NAME OF GOVERNMENT OFFICIAL	CONTRIBUTIONS OF $250.00 OR MORE	GIFTS OF $250.00 OR MORE	DATE OF CONTRIBUTION

IF YOU WISH TO SPEAK CONCERNING THE ATTACHED REZONING APPLICATION, THIS FORM MUST BE FILED WITH THE ZONING ADMINISTRATOR FIVE (5) DAYS PRIOR TO PLANNING COMMISSION MEETING IF CAMPAIGN CONTRIBUTIONS OR GIFTS IN EXCESS OF $250.00 HAVE BEEN MADE TO ANY MEMBER OF THE PLANNING COMMISSION OR MAYOR AND COUNCIL.

Signature _____

Printed Name George B. Shaw

Date 9-11-2020

ARTICLE 7. - TREE REMOVAL REGULATIONS[3]

Footnotes:

--- (3) ---

Editor's note— Ord. No. 12-2012, adopted April 26, 2012, amended and restated former Art. 7, s;§ 7-010—7-100, in its entirety to read as herein set out. Former Art. 7 pertained to similar subject matter and derived from Ord. No. 1996-14, 7-11-1996; Ord. No. 1999-20, 6-10-1999; Ord. No. 1999-21, 6-10-1999; Ord. No. 2002-20, 9-12-2002; Ord. No. 2003-22, 11-13-2003; Ord. of 12-15-2003; Ord. of 9-22-2005.

Sec. 7-010. - Findings of fact.

(A) Natural vegetative growth and trees add physical, aesthetic, and economic value to the island and should be preserved where possible.

(B) Trees help stabilize the soil with their root systems and control soil erosion caused by storm damage as well as moderate surface runoff of rainwater.

(C) Trees make life more comfortable on the island by providing shade, cooling both land and air, reducing noise and air pollution, providing scenic amenities, and provide habitat of desirable wildlife.

(D) Trees are essential to the present and future health and welfare of residents and visitors to Tybee Island.

(Ord. No. 12-2012, 4-26-2012)

Sec. 7-020. - Purpose.

The various sections of this article are adopted for the following purposes:

(A) To help control the effects of accelerated water run-off and soil erosion due to clearing, and assist in dune stabilization and mitigation of storm drainage.

(B) To preserve and protect trees for buffers where land use and zoning requirements dictate such buffers.

(C) To maximize the positive benefits of sitting buildings and parking on land in relationship to mature trees.

(D) To ensure that responsible public agencies are made aware in timely fashion of proposed tree removal activities.

(E) To help protect the investments of property owners and buyers, and provide mature native island trees for the enjoyment of future generations.

(F) To help protect the health and well-being of Tybee Island residents and guests by providing shade and otherwise moderating potential dangerous summer temperatures.

(Ord. No. 12-2012, 4-26-2012)

Sec. 7-030. - Applications and exceptions.

The requirements of this article shall apply to all parcels and public rights-of-way within the city. No trees shall be removed within the City of Tybee Island except in compliance with this article, with the following exceptions:

(A) No permit shall be required for the removal of trees which endanger or obstruct public safety and welfare as determined by the zoning administrator or designated city representative.

(B) No permit shall be required for the trimming or pruning of trees, provided that such maintenance activity shall not be so extensive as to constitute tree removal as defined above.

(C) This article shall not apply to utility rights-of-way.

(D) No permit or mitigation shall be required in the event the zoning administrator or designated city representative determines that a tree is or imminently will cause damage to a structure or to appurtenances such as decks, patios, porches and the like. This subsection shall not have application to potential damage to sidewalks or driveways from tree roots.

(Ord. No. 12-2012, 4-26-2012)

Sec. 7-035. - Tree protection during plat and plan approval.

During the subdivision plat approval process and also during the site plan approval process, the existing location of all significant trees shall be considered so as to preserve such trees unless no feasible alternative exists in order to make reasonable, beneficial economic use of the property. To be considered are the locations and the anticipated locations of drainage and utility structures, water and sewer lines, streets, sidewalks, driveways, final site contours, building footprints, and other impacts on existing significant trees. When no feasible alternative exists except to remove existing significant trees, their planned removal shall be noted on the plans, as well as the location, size and types of the trees planned to meet mitigation requirements as outlined in section 7-080.

(Ord. No. 12-2012, 4-26-2012)

Sec. 7-040. - ~~Building~~ Tree permit required.

Any person desiring to clear land or remove trees to a density below that required in section 7-050 or remove a significant tree pursuant to this article shall apply for a ~~building~~ tree permit from the city. See section 9-030 of this Land Development Code for requirements and application procedure. A tree survey must be submitted before a permit can be issued.

(Ord. No. 12-2012, 4-26-2012)

Sec. 7-050. - Tree removal requirements.

(A) Under the limits and conditions set forth below, trees may be removed from a lot or parcel provided that a minimum density of three trees per each 4,500 square feet of area is maintained.

(B) Except as provided in section 7-060 no significant tree shall be removed from any vacant lot, undeveloped parcel, or public right-of-way within the city.

(C) If the siting of a building footprint, the associated driveway, and parking areas require the removal of trees to a density less than that stated in subsection (A) [of this section], the city manager or designated city representative may issue a permit to remove trees to a density below this standard under the following conditions:

1. The applicant must show that, within the applicable setback limitations, no locations for building footprints and driveway/parking exist that comply with the density requirement above.
2. Removal of trees shall be limited to either the fewest number or the least total DBH necessary for siting of the building and the least destructive configuration of driveway/parking.

3. Following construction, trees shall be re-planted on the lot/parcel to establish the minimum density as stated in subsection (A) [of this section]. Such planting shall be in accordance with the standards set forth in section 7-090.

(D) No trees shall be removed from the DNR marsh setback line. Trees in the marsh setback may not be counted as "remaining trees" for mitigation purposes.

(Ord. No. 12-2012, 4-26-2012)

Sec. 7-060. - Removal of significant trees.

(A) Significant trees may be removed only under the following situations or conditions:

1. Upon showing by the applicant that removal of a significant tree is necessary to make reasonable beneficial, economic use of the property; such showing must demonstrate that there is no feasible alternative that would preserve the tree, and must be made for each significant tree the applicant proposes to remove;
2. For improvements, expansion and/or new construction of infrastructure services, including water/sewer systems and streets, but only if no alternatives are available; and
3. Prior to the issuance of a permit allowing the removal of a significant tree, the zoning administrator shall confirm in writing that one or more of the situations enumerated herein exists.

(B) The tree removal permit allowing the removal of significant trees shall require the landowner/permittee to comply with the requirements set forth in sections 7-070 and 7-080 and the additional following conditions:

1. Each removed significant tree shall be replaced with one or more trees of like species having an aggregate DBH at least equal to the DBH of the removed tree, and meeting the requirements of section 7-080; such replacement tree(s) shall be considered to be one tree for the purpose of meeting density requirements established in section 7-050(A); the exception to this provision is a dead tree, or a diseased tree that is a danger to or obstructs public safety and welfare or that might infect otherwise healthy trees.
2. ~~Native~~ Significant trees left remaining on the site may be counted as replacement trees according to the mitigation schedule. These trees must be noted on the plat and shall be protected as a tree as defined by section 2-010.

(Ord. No. 12-2012, 4-26-2012)

Sec. 7-070. - Tree protection during development.

On each lot or tract where construction is ongoing pursuant to a validly issued building permit, protective barricades shall be placed around trees at the tree drip line which are to be retained, and shall remain in place throughout construction. The areas within the protective barricades shall remain free of all building materials, construction debris, vehicles, and development activities. Penalties for violation of this section shall be the same as found in section 7-090.

(Ord. No. 12-2012, 4-26-2012)

Sec. 7-080. - Standards for tree planting and replacement.

(A) *Pursuant to building permit* . Trees planted or replaced, or left remaining on the site pursuant to a validly issued building permit in accordance with this article shall be botanically compatible with local conditions, healthy, disease and pest free, and ~~may~~ shall have a minimum size of two inches DBH,

caliper measure. The permittee/landowner shall choose the species of replacement trees from the ~~native~~ significant species list for Tybee Island. At least one replacement tree or remaining tree shall be of the same species as the tree(s) that are planned to be removed. In no case may palm trees be used as a replacement for any tree except a palm to be removed. Ideally, planting should be done immediately following construction or in the earliest growing season thereafter.

(B) *Pursuant to citation of violation* . Replacement trees planted pursuant to citation of violation shall be of the same type (species) as the tree being removed and shall be the maximum DBH that is commercially available and at least 4" DBH. The aggregate DBH of trees planted as replacement shall equal the DBH of the tree that was removed in violation of this article.

(C) *[Survival of replacement trees.]* All replanted or replacement trees must survive at least two full calendar years for the permittee/landowner to be considered to be in full compliance with this article. If the replanted tree becomes unhealthy or dies, it must be removed from the site and replaced as soon as conditions permit. This duration is not to exceed one calendar year.

(D) *Off-site tree planting option* . If it is not possible to replant trees to the specifications required in these regulations, the applicant may choose to plant the required trees on city property in a location specified by the zoning administrator. A donation may be made to the trees for Tybee fund. All significant trees may be mitigated at a cost of ~~$50.00~~ $100.00 per inch.

(E) *[Definition of replanted, remaining, and replacement trees.]* All replanted, remaining, or replacement trees shall be considered a "tree" as defined in section 2-010.

(Ord. No. 12-2012, 4-26-2012)

Sec. 7-090. - Penalties for unlawful tree removal.

Violation of this article shall be subject to the following fines and restrictions:

(A) Any person who violates any provision of this article or fails to comply with any notice issued pursuant to the provisions of this article, upon being found guilty of violation, shall be subject to a fine not to exceed $1,000.00 for each unlawfully removed tree.

(B) In addition to the penalties imposed in subsection (A) herein above, the party or parties found to be in violation of this article shall be required to plant or replace trees, pursuant to the requirements of section 7-080. The requirements of this subsection are mandatory, and shall apply regardless of any other penalties imposed for violations of this article.

(C) Where violation of this article is associated with construction, pursuant to a city building permit, a certificate of occupancy may not be issued until such violation has been remedied and trees are planted or replaced, pursuant to the requirements of section 7-080, as necessary to meet the requirements of this article. The requirements of this subsection are mandatory, and shall apply regardless of any other penalties imposed for violation of this article.

(Ord. No. 12-2012, 4-26-2012)

Sec. 7-100. - Appeals of actions.

Appeals of decisions of the city administrator, city marshal, or his designee, pursuant to this article shall be made to the mayor and council pursuant to city council meeting procedures.

Significant Species Common Name and Scientific Name	Mitigation Equivalent Per One Inch Live Oak For New Plantings	Minimum DBH Required for Remaining	Special Note

		Trees	
Red cedar *Juniperus virginiana*	1:1	4″	
Live oak *Quercus virginiana*	1:1	4″	
Laurel oak, water oak, etc. *Quercus sp.*	NA	4″	Water oaks left only in naturalized area
Magnolia grandiflora	1:1	4″	
Sugarberry *Celtis laeirgata*	1:1	4″	
Red bay *Persea borbonia*	1:1	4″	
Sycamore *Plantanu occidentalis*	1:1	4″	
Sweetgum *Liquidamber syraciflora*	NA	4″	
Native hollies *Ilex sp.*	1:1	3″	
Native maples *Acer sp.*	1:1	3″	
Toothache tree *Xanoxylum clava-hercules*	1:2 (1 inch toothache = 2 inch Live Oak)	3″	
Eastern redbud *Cercis Canadensis*	1:1	3″	
Devilwood (wild olive) *Osmanthus americanus*	NA	3″	
Carolina laurelcherry *Prunus caroliniana*	2:1	4″	
Carolina willow *Salix*	1:1	4″	

caroliniana			
Tough bumelia (buckthorn) *Bumelia tenex*	1:2	3"	
Sparkleberry *Vaccinium arboretum*	1:2	3"	
Palm numerous scientific names	1:1	3"	

(Ord. No. 12-2012, 4-26-2012)

PLANNING COMMISSION
NOTICE OF DETERMINATION

Meeting date: September 21, 2020

Project Name/Description: Text Amendment

Action Requested: ARTICLE 7. – Changes to Tree Removal regulations.

Special Review	Subdivision:
Site Plan Approval	Sketch Plan Approval ___ Conceptual ___
Variance	Preliminary Plan Approval ___
Map Amendment	Final Plat Approval ___
Text Amendment X	Minor Subdivision ___ Major Subdivision ___

Petitioner has met all documentation requirements, all external approval requirements, and all code requirements, except for the following:

The Planning Commission Motion on Petition: ☒ Approval ☐ Denial ☐ Continued

Action on Motion:

COMMISSIONER	FOR	AGAINST	COMMENTS
Bishop			Chair
Bossick	X		Vice Chair - Second
Matlock		X	
McGruder	X		Motion
McNaughton	X		
Reynolds	X		
Robertson			Absent

Planning Commission Chair: _____ Date: 9/23/2020

Planning & Zoning Manager: _____ Date: 9-23-2020

File Attachments for Item:

4. Georgia Municipal Employees Benefit System Defined Benefit Retirement Plan; Amendment to Establish an Early Retirement Incentive Program

ONE-TIME EARLY RETIREMENT INCENTIVE
ADDENDUM TO THE
GEORGIA MUNICIPAL EMPLOYEES BENEFIT SYSTEM
DEFINED BENEFIT RETIREMENT PLAN
ADOPTION AGREEMENT

This is an Addendum to the Adoption Agreement completed by the City of Tybee Island. It modifies the Adoption Agreement to provide for a one-time early retirement incentive for eligible Participants in the Retirement Plan for the Employees of the City of Tybee Island, in accordance with and subject to the following requirements:

(1) Eligibility for Enhanced Early Retirement Benefit. A Participant who is an Eligible Regular Employee is eligible to elect the enhanced early retirement benefit offered under this Addendum if, as of October 31, 2020, he or she satisfies (or will satisfy) the Rule of 75 (i.e., his or her age combined with his or her years of Total Credited Service as an Eligible Regular Employee of the City of Tybee Island equals or exceeds 75 as of October 31, 2020). GMEBS Portability Service may not be used to satisfy the Rule of 75. Elected or appointed members of the Governing Authority may not apply for the enhanced early retirement benefit offered under this Addendum. Prior Credited Service as an elected or appointed member of the Governing Authority, if any, does not count toward satisfying the eligibility requirements for the enhanced early retirement benefit offered under this Addendum. Any Employee who is rehired by the City after October 22, 2020, shall not be eligible to apply for the enhanced early retirement benefit.

(2) Description of Enhanced Early Retirement Benefit. Subject to the applicable limitations of Section 415 of the Internal Revenue Code and Article XI of Master Plan, the enhanced early retirement benefit payable to a Participant who is eligible to apply for the Enhanced Early Retirement Benefit pursuant to paragraph (1) above and who elects to retire in accordance with this Addendum shall be computed as provided under Section 6.01 of the Master Plan without actuarial reduction for the Participant's age. The portion of said monthly benefit attributable to Credited Service as an Eligible Regular Employee shall be based upon the Participant's Credited Service and his Final Average Earnings as an Eligible Regular Employee as of his date of termination as an Eligible Regular Employee. If a Participant who otherwise qualifies for

the enhanced early retirement benefit offered under this Addendum has Credited Service as an elected or appointed member of the Governing Authority, the portion of said monthly benefit attributable to Credited Service as an elected or appointed member of the Governing Authority shall be computed based upon the Participant's Credited Service as an elected or appointed member of the Governing Authority and the benefit formula in effect as of his/her latest vacation of office without actuarial reduction for the Participant's age.

(3) Window Period for Election. Any Participant who satisfies or will satisfy the eligibility requirements of paragraph (1) above may elect to terminate employment, retire and receive the enhanced early retirement benefit described in paragraph (2) above. In order to effect such election, the Participant must submit any and all form(s) (including any waiver and/or release forms) required by the City of Tybee Island for such purpose to the Pension Committee Secretary between 9:00 a.m., October 23, 2020, and 4:00 p.m., December 9, 2020. Participants cannot make an election to retire under this Addendum after they have terminated employment with the City of Tybee Island.

(4) 7-Day Revocation Period. Any Participant electing to retire early pursuant to this Addendum may revoke said election by providing written notice of said revocation to the Pension Committee Secretary within seven (7) days after he submits the election form(s) (the revocation period). The election to terminate employment, retire and receive an enhanced early retirement benefit pursuant to this Addendum shall become irrevocable upon the expiration of said revocation period.

(5) Termination of Employment; Effective Retirement Date. Participants who irrevocably elect to terminate employment, retire and receive enhanced early retirement benefits pursuant to this Addendum shall be required to terminate employment no later than the last day of the month coinciding with or next following the day after their 7-day revocation period ends, provided, however, that a Participant must have met the Rule of 75 prior to terminating employment to receive benefits pursuant to this Addendum. The effective Retirement date for Participants irrevocably electing to receive enhanced early retirement benefits in accordance with this Addendum shall be the first day of the month following the termination date, provided that GMEBS has received all the necessary documentation to permit commencement of

retirement benefits. Provided the requirements of this Addendum are met, benefits for eligible Participants electing to retire in accordance with this Addendum shall commence as of their effective Retirement date and shall be payable on the first day of each succeeding month thereafter for as long as the Participant is eligible to receive such benefits. If a Participant dies before his or her effective Retirement date, the Participant's election under this Addendum will be null and void, notwithstanding any provisions herein to the contrary.

(6) Voluntary Election. The election to terminate employment, retire and receive enhanced early retirement benefits pursuant to this Addendum shall be completely voluntary.

(7) The rights and obligations under the Plan with respect to persons whose employment or term of office with the City of Tybee Island is terminated for any reason whatsoever prior to the effective date of this Addendum are fixed and shall be governed by the Plan as was in effect at the time of such termination.

(8) The effective date of this Addendum is October 22, 2020.

(9) This Addendum shall be repealed as of April 30, 2021. However, such repeal shall in no way invalidate any payments made pursuant to this Addendum.

The terms of the foregoing One-Time Early Retirement Incentive Addendum to the Adoption Agreement are approved by the Mayor and Council of the City of Tybee Island, Georgia this _____ day of _____, 20____.

Attest: **CITY OF TYBEE ISLAND, GEORGIA**

_____ _____

City Clerk **Mayor**

(SEAL)

Approved:

_____

City Attorney

The terms of the foregoing One-Time Early Retirement Incentive Addendum are approved by the Board of Trustees of the Georgia Municipal Employees Benefit System.

IN WITNESS WHEREOF, the Board of Trustees of the Georgia Municipal Employees Benefit System has caused its Seal and the signatures of its duly authorized officers to be affixed this _____ day of _____, 20____.

Board of Trustees
Georgia Municipal Employees
Benefit System

(SEAL)

_____
Secretary

GEORGIA MUNICIPAL EMPLOYEES BENEFIT SYSTEM

DEFINED BENEFIT RETIREMENT PLAN

AN ORDINANCE
and
ADOPTION AGREEMENT
for

City of Tybee Island

Form Volume Submitter Adoption Agreement
Amended and Restated as of January 1, 2013
(With Amendments Taking Effect on or Before January 1, 2017)

TABLE OF CONTENTS

PAGE

I. AN ORDINANCE

An Ordinance to amend and restate the Retirement Plan for the Employees of the City of Tybee Island, Georgia in accordance with and subject to the terms and conditions set forth in the attached Adoption Agreement, any Addendum to the Adoption Agreement, the Georgia Municipal Employees Benefit System (GMEBS) Master Plan Document, and the GMEBS Trust Agreement. When accepted by the authorized officers of the City and GMEBS, the foregoing shall constitute a Contract between the City and GMEBS, all as authorized and provided by O.C.G.A. § 47-5-1 et seq.

BE IT ORDAINED by the Mayor and Council of the City of Tybee Island, Georgia, and it is hereby ordained by the authority thereof:

Section 1. The Retirement Plan for the Employees of the City of Tybee Island, Georgia is hereby amended and restated as set forth in and subject to the terms and conditions stated in the following Adoption Agreement, any Addendum to the Adoption Agreement, the Georgia Municipal Employees Benefit System (GMEBS) Master Plan Document, and the GMEBS Trust Agreement.

Ordinance continued on page 37

II. GMEBS DEFINED BENEFIT RETIREMENT PLAN ADOPTION AGREEMENT

1. ADMINISTRATOR

Georgia Municipal Employees Benefit System
201 Pryor Street, SW
Atlanta, Georgia 30303
Telephone: 404-688-0472
Facsimile: 404-577-6663

2. ADOPTING EMPLOYER

Name: **City of Tybee Island, Georgia**

3. GOVERNING AUTHORITY

Name: **Mayor and Council**
Address: **P.O. Box 2749, Tybee Island, GA 31328-2749**
Phone: **(912) 472-5080**
Facsimile: **(912) 786-5737**

4. PLAN REPRESENTATIVE

[To represent Governing Authority in all communications with GMEBS and Employees]
(See Section 2.49 of Master Plan)

Name: **City Manager**
Address: **P.O. Box 2749, Tybee Island, GA 31328-2749**
Phone: **(912) 472-5080**
Facsimile: **(912) 786-5737**

5. PENSION COMMITTEE

[Please designate members by position. If not, members of Pension Committee shall be determined in accordance with Article XIV of Master Plan]

Position: **Clerk of Council (City Clerk)**
Position: **City Manager**
Position: **Finance Officer of the City**
Position: **One (1) active City Employee appointed by the Mayor and Council**
Position: **One (1) active City Employee appointed by the Mayor and Council**
Position: **One (1) member of the Mayor and Council designated by the Mayor and Council**

In the event the title of a position on the Pension Committee should change, an amendment to the Adoption Agreement shall not be necessary; rather, such position shall be held and filled by the individual with the most similar job description.

Pension Committee Secretary: **Human Resources Administrator**
Address: **P.O. Box 2749, Tybee Island, GA 31328-2749**
Phone: **(912) 472-5080**
Facsimile: **(912) 786-5737**

6. TYPE OF ADOPTION

This Adoption Agreement is for the following purpose (**check one**):

☐ This is a new defined benefit plan adopted by the Adopting Employer for its Employees. This plan does not replace or restate an existing defined benefit plan.

☐ This is an amendment and restatement of the Adopting Employer's preexisting non-GMEBS defined benefit plan.

☒ This is an amendment and restatement of the Adoption Agreement previously adopted by the Employer, as follows **(check one or more as applicable):**

- ☒ To update the Plan to comply with PPA, HEART, WRERA, and other applicable federal laws and guidance.

- ☒ To make the following amendments to the Adoption Agreement **(must specify below revisions made in this Adoption Agreement; all provisions must be completed in a manner that satisfies the definite written program requirement of Treasury Regulation 1.401-1(a)(2) and the definitely determinable requirement of Treasury Regulation 1.401-1(b)(1)(i))**: **This is an amendment to implement a One-Time Early Retirement Incentive Program (ERIP) under the Plan (see attached One-Time Early Retirement Incentive Addendum).**

7. EFFECTIVE DATE

NOTE: This Adoption Agreement and any Addendum, with the accompanying Master Plan Document, is designed to comply with Internal Revenue Code Section 401(a), as applicable to a governmental qualified defined benefit plan, and is part of the GMEBS Defined Benefit Retirement Plan. Plan provisions designed to comply with certain provisions of the Pension Protection Act of 2006 ("PPA"); the Heroes Earnings Assistance and Relief Tax Act of 2008 ("HEART"); and the Worker, Retiree, and Employer Recovery Act of 2008 ("WRERA"); and Plan provisions designed to comply with certain provisions of additional changes in federal law and guidance from the Internal Revenue Service under Internal Revenue Service Notice 2012-76 (the 2012 Cumulative List) are effective as of the applicable effective dates set forth in the Adoption Agreement and Master Plan Document. By adopting this Adoption Agreement, with its accompanying Master Plan Document, the Adopting Employer is adopting a plan document intended to comply with Internal Revenue Code Section 401(a), as updated by PPA, HEART, WRERA, and the 2012 Cumulative List with the applicable effective dates.

(1) Complete this item (1) only if this is a new defined benefit plan which does not replace or restate an existing defined benefit plan.

The effective date of this Plan is _____.
(insert effective date of this Adoption Agreement not earlier than January 1, 2013).

(2) Complete this item (2) only if this Plan is being adopted to replace a non-GMEBS defined benefit plan.

Except as otherwise specifically provided in the Master Document or in this Adoption Agreement, the effective date of this restatement shall be the _____**(insert effective date of this Adoption Agreement not earlier than January 1, 2013)**. This Plan is intended to replace and serve as an amendment and restatement of the Employer's preexisting plan, which became effective on _____ **(insert original effective date of preexisting plan)**.

(3) Complete this item (3) only if this is an amendment and complete restatement of the Adopting Employer's existing GMEBS defined benefit plan.

Except as otherwise specifically provided in the Master Document or in this Adoption Agreement, the effective date of this restatement shall be **October 22, 2020 (insert effective date of this Adoption Agreement not earlier than January 1, 2013)**.

This Plan is adopted as an amendment and restatement of the Employer's preexisting GMEBS Adoption Agreement, which became effective on **February 27, 2020 (insert effective date of most recent Adoption Agreement preceding this Adoption Agreement)**.

The Employer's first Adoption Agreement became effective **July 1, 2003 (insert effective date of Employer's first GMEBS Adoption Agreement)**. The Employer's GMEBS Plan was originally effective **May 1, 1987 (insert effective date of Employer's original GMEBS Plan)**. (If the Employer's Plan was originally a non-GMEBS Plan, then the Employer's non-GMEBS Plan was originally effective _____ **(if applicable, insert effective date of Employer's original non-GMEBS Plan)**.)

8. PLAN YEAR

Plan Year means **(check one):**

☐ Calendar Year
☐ Employer Fiscal Year commencing _____.
☒ Other **(must specify month and day commencing)**: **May 1.**

9. CLASSES OF ELIGIBLE EMPLOYEES

Only Employees of the Adopting Employer who meet the Master Plan's definition of "Employee" may be covered under the Adoption Agreement. Eligible Employees shall not include non-governmental employees, independent contractors, leased employees, nonresident aliens, or any other ineligible individuals, and this Section 9 must not be completed in a manner that violates the "exclusive benefit rule" of Internal Revenue Code Section 401(a)(2).

A. Eligible Regular Employees

Regular Employees include Employees, other than elected or appointed members of the Governing Authority or Municipal Legal Officers, who are regularly employed in the services of the Adopting Employer. Subject to the other conditions of the Master Plan and the Adoption Agreement, the following Regular Employees are eligible to participate in the Plan **(check one)**:

☐ **ALL** - All Regular Employees, provided they satisfy the minimum hour and other requirements specified under "Eligibility Conditions" below.

☒ **ALL REGULAR EMPLOYEES EXCEPT** for the following employees **(must specify; specific positions are permissible; specific individuals may not be named)**:
Any City Manager who agrees in his or her employment contract with the City not to participate in this Plan shall be ineligible to participate in this Plan with respect to such employment. In the event that a City Manager agrees in his or her employment contract with the City not to participate in this Plan, the City shall provide GMEBS with written notice of such contract provision(s) within 180 days after the City Manager becomes employed with the City in such position; provided, however, that notwithstanding any provision in this Adoption Agreement or the Master Plan to the contrary, the failure of the City to provide such written notice to GMEBS shall not make such a City Manager eligible to participate in this Plan (see Adoption Agreement pp. 7-8 concerning participation in the Plan by City Managers).

B. Elected or Appointed Members of the Governing Authority

An Adopting Employer may elect to permit participation in the Plan by elected or appointed members of the Governing Authority and/or Municipal Legal Officers, provided they otherwise meet the Master Plan's definition of "Employee" and provided they satisfy any other requirements specified by the Adopting Employer. Municipal Legal Officers to be covered must be specifically identified by position. Subject to the above conditions, the Employer hereby elects the following treatment for elected and appointed officials:

(1) Elected or Appointed Members of the Governing Authority (check one):

☐ **ARE NOT** eligible to participate in the Plan.

☒ **ARE** eligible to participate in the Plan.

Please specify any limitations on eligibility to participate here (e.g., service on or after certain date, or special waiting period provision): **Each elected or appointed member of the Governing Authority who holds an office of the Employer on July 1, 2003, shall be qualified to participate in the Plan on such date. Each other elected or appointed member of the Governing Authority who holds an office subsequent to July 1, 2003 shall be qualified to participate in the Plan on the first day of the month immediately following or coinciding with the first date after July 1, 2003, that he occupies any elective office of the Governing Authority (see Adoption Agreement pp. 7-8 regarding participation in the Plan). In accordance with Section 4.03(b) of the Master Plan, an elected or appointed member of the Governing Authority who initially takes office or returns to office on or after January 1, 2015, shall be qualified to participate in the Plan on the date he or she initially takes such office or returns to office.**

(2) Municipal Legal Officers (check one):

☒ **ARE NOT** eligible to participate in the Plan.

☐ **ARE** eligible to participate in the Plan. The term "Municipal Legal Officer" shall include only the following positions **(must specify - specific positions are permissible; specific individuals may not be named)**: _____.

Please specify any limitations on eligibility to participate here (e.g., service on or after certain date) **(must specify in a manner that satisfies the definite written program requirement of Treasury Regulation 1.401-1(a)(2) and the definitely determinable requirement of Treasury Regulation 1.401-1(b)(1)(i))** : _____.

10. ELIGIBILITY CONDITIONS

A. Hours Per Week (Regular Employees)

The Adopting Employer may specify a minimum number of work hours per week which are required to be scheduled by Regular Employees in order for them to become and remain "Eligible Regular Employees" under the Plan. **It is the responsibility of the Adopting Employer to determine whether these requirements are and continue to be satisfied**. The Employer hereby elects the following minimum hour requirement for Regular Employees:

☐ No minimum
☐ 20 hours/week (regularly scheduled)
☐ 30 hours/week (regularly scheduled)
☒ Other: **35 hours/week** (must not exceed 40 hours/week regularly scheduled)

Exceptions: If a different minimum hour requirement applies to a particular class or classes of Regular Employees, please specify below the classes to whom the different requirement applies and indicate the minimum hour requirement applicable to them.

Class(es) of Regular Employees to whom exception applies **(must specify - specific positions are permissible; specific individuals may not be named): Eligible Regular Employees employed on or before October 10, 1996, provided they are not Terminated and reemployed after such date.**

Minimum hour requirement applicable to excepted Regular Employees:

- ☐ No minimum
- ☒ 20 hours/week (regularly scheduled)
- ☐ 30 hours/week (regularly scheduled)
- ☐ Other: _____ (must not exceed 40 hours/week regularly scheduled)

B. Months Per Year (Regular Employees)

The Adopting Employer may specify a minimum number of work months per year which are required to be scheduled by Regular Employees in order for them to become and remain "Eligible Employees" under the Plan. **It is the responsibility of the Adopting Employer to determine whether these requirements are and continue to be satisfied**. The Employer hereby elects the following minimum requirement for Regular Employees:

- ☐ No minimum
- ☒ At least **5** months per year (regularly scheduled)

Exceptions: If different months per year requirements apply to a particular class or classes of Regular Employees, the Employer must specify below the classes to whom the different requirements apply and indicate below the requirements applicable to them.

Regular Employees to whom exception applies **(must specify - specific positions are permissible; specific individuals may not be named)**: _____.

The months to year requirement for excepted class(es) are:

- ☐ No minimum
- ☐ At least _____ months per year (regularly scheduled)

11. WAITING PERIOD

Except as otherwise provided in Section 4.02(b) of the Master Plan, Eligible Regular Employees shall not have a waiting period before participating in the Plan. Likewise, elected or appointed members of the Governing Authority and Municipal Legal Officers, if eligible to participate in the Plan, shall not have a waiting period before participating in the Plan.

12. ESTABLISHING PARTICIPATION IN THE PLAN

Participation in the Plan is considered mandatory for all Eligible Employees who satisfy the eligibility conditions specified in the Adoption Agreement, except as provided in Section 4.03(e) of the Master Plan. However, the Employer may specify below that participation is optional for certain classes of Eligible Employees, including Regular Employees, elected or appointed members of the Governing Authority, Municipal Legal Officers, City Managers, and/or

Department Heads. If participation is optional for an Eligible Employee, then in order to become a Participant, he must make a written election to participate within 120 days after employment, election or appointment to office, or if later, the date he first becomes eligible to participate in the Plan. The election is irrevocable, and the failure to make the election within the 120 day time limit shall be deemed an irrevocable election not to participate in the Plan.

Classes for whom participation is optional **(check one)**:

- ☐ None (Participation is mandatory for all Eligible Employees except as provided in Section 4.03(e) of the Master Plan).
- ☒ Participation is optional for the following Eligible Employees **(must specify - specific positions are permissible; specific individuals may not be named; all positions or classes specified must be Eligible Employees)**: **If a former City Manager or other Employee has previously waived or declined participation in the Plan prior to July 1, 2003, said City Manager or Employee shall not receive credit for any service with the City prior to July 1, 2003. Notwithstanding any provision to the contrary, since July 1, 2003, the City's Plan has operated and will continue to operate as follows with respect to participation in the Plan by the City Manager and by elected or appointed members of the Governing Authority. The City Manager is required to participate in the Plan, provided he or she meets the eligibility requirements for participation that are applicable to other Regular Employees; however, a City Manager who affirmatively agrees in his or her employment contract with the City not to participate in this Plan is ineligible to participate in the Plan (see p. 5 relating to Eligible Regular Employees). Each elected or appointed member of the Governing Authority automatically participates in the Plan unless he or she irrevocable elects in writing not to participate in the Plan within 120 days following the date on which he or she first takes such office or returns to office, as applicable, and such election is submitted to the Pension Committee Secretary in the form and manner required by the City within said 120 day period.**

13. CREDITED SERVICE

In addition to Current Credited Service the Adopting Employer may include as Credited Service the following types of service:

A. Credited Past Service with Adopting Employer

Credited Past Service means the number of years and complete months of Service with the Adopting Employer prior to the date an Eligible Employee becomes a Participant which are treated as credited service under the Plan.

(1) Eligible Employees Employed on Original Effective Date of GMEBS Plan. With respect to Eligible Employees who are employed by the Adopting Employer on the original Effective Date of the Employer's GMEBS Plan, Service with the Adopting Employer prior to the date the Eligible Employee becomes a Participant (including any Service prior to the Effective Date of the Plan) shall be treated as follows **(check one)**:

☒ All Service prior to the date the Eligible Employee becomes a Participant shall be credited (as Credited Past Service).

☐ All Service prior to the date the Eligible Employee becomes a Participant shall be credited (as Credited Past Service), except for Service rendered prior to _____ **(insert date)**.

☐ All Service prior to the date the Eligible Employee becomes a Participant shall be credited (as Credited Past Service), except as follows **(must specify other limitation in a manner that satisfies the definite written program requirement of Treasury Regulation 1.401-1(a)(2) and the definitely determinable requirement of Treasury Regulation 1.401-1(b)(1)(i))**: _____.

☐ No Service prior to the date the Eligible Employee becomes a Participant shall be credited (as Credited Past Service).

(2) Previously Employed, Returning to Service after Original Effective Date. If an Eligible Employee is not employed on the original Effective Date of the Employer's GMEBS Plan, but he returns to Service with the Adopting Employer sometime after the Effective Date, his Service prior to the date he becomes a Participant (including any Service prior the Effective Date) shall be treated as follows **(check one)**:

☐ All Service prior to the date the Eligible Employee becomes a Participant shall be credited (as Credited Past Service), subject to any limitations imposed above with respect to Eligible Employees employed on the Effective Date.

☒ All Service prior to the date the Eligible Employee becomes a Participant shall be credited (as Credited Past Service), provided that after his return to employment, the Eligible Employee performs Service equal to the period of the break in Service or one (1) year, whichever is less. Any limitations imposed above with respect to Eligible Employees employed on the Effective Date shall also apply.

☐ No Service prior to the date the Eligible Employee becomes a Participant shall be credited (as Credited Past Service).

Other limitation(s) on Recognition of Credited Past Service **(must specify in a manner that satisfies the definite written program requirement of Treasury Regulation 1.401-1(a)(2) and the definitely determinable requirement of Treasury Regulation 1.401-1(b)(1)(i))**: **Notwithstanding any other provision, Credited Past Service shall not include any tenure of office as an elected or appointed member of the Governing Authority unless the Participant was serving as an elected or appointed member of the Governing Authority or Eligible Regular Employee on July 1, 2003.**

(3) Eligible Employees Initially Employed After Effective Date. If an Eligible Employee's initial employment date is after the original Effective Date of the Employer's GMEBS Plan, his Credited Past Service shall include only the number of years and complete months of Service from his initial employment date to the date he becomes a Participant in the Plan.

(4) Newly Eligible Classes of Employees. If a previously ineligible class of Employees becomes eligible to participate in the Plan, the Employer must specify in an addendum to this Adoption Agreement whether and to what extent said Employees' prior service with the Employer shall be treated as Credited Past Service under the Plan.

B. Prior Military Service

Note: This Section does not concern military service required to be credited under USERRA – See Section 3.02 of the Master Plan for rules on the crediting of USERRA Military Service.

(1) Credit for Prior Military Service.

The Adopting Employer may elect to treat military service rendered prior to a Participant's initial employment date or reemployment date as Credited Service under the Plan. Unless otherwise specified by the Employer under "Other Conditions" below, the term "Military Service" shall be as defined in the Master Plan. Except as otherwise required by federal or state law or under "Other Conditions" below, Military Service shall not include service which is credited under any other local, state, or federal retirement or pension plan.

Military Service credited under this Section shall not include any service which is otherwise required to be credited under the Plan by federal or state law. Prior Military Service shall be treated as follows **(check one)**:

☒ Prior Military Service is **not** creditable under the Plan **(if checked, skip to Section 13.C. – Prior Governmental Service)**.

☐ Prior Military Service shall be counted as Credited Service for the following purposes (check one or more as applicable):

- ☐ Computing amount of benefits payable.
- ☐ Meeting minimum service requirements for vesting.
- ☐ Meeting minimum service requirements for benefit eligibility.

(2) Maximum Credit for Prior Military Service.

Credit for Prior Military Service shall be limited to a maximum of _____ years **(insert number)**.

(3) Rate of Accrual for Prior Military Service.

Credit for Prior Military Service shall accrue at the following rate **(check one)**:

☐ One month of military service credit for every _____ month(s) **(insert number)** of Credited Service with the Adopting Employer.

☐ One year of military service credit for every _____ year(s**) (insert number)** of Credited Service with the Adopting Employer.

☐ All military service shall be creditable (subject to any caps imposed above) after the Participant has completed _____ years **(insert number)** of Credited Service with the Employer.

☐ Other requirement **(must specify in a manner that satisfies the definite written program requirement of Treasury Regulation 1.401-1(a)(2) and the definitely determinable requirement of Treasury Regulation 1.401-1(b)(1)(i))**: _____.

(4) Payment for Prior Military Service Credit(check one):

☐ Participants shall **not** be required to pay for military service credit.

☐ Participants shall be required to pay for military service credit as follows:

☐ The Participant must pay ____% of the actuarial cost of the service credit (as defined below).

☐ The Participant must pay an amount equal to **(must specify in a manner that satisfies the definite written program requirement of Treasury Regulation 1.401-1(a)(2) and the definitely determinable requirement of Treasury Regulation 1.401-1(b)(1)(i))**: _____.

Other Conditions for Award of Prior Military Service Credit **(must specify in a manner that satisfies the definite written program requirement of Treasury Regulation 1.401-1(a)(2) and the definitely determinable requirement of Treasury Regulation 1.401-1(b)(1)(i))**: _____.

(5) Limitations on Service Credit Purchases. Unless otherwise specified in an Addendum to the Adoption Agreement, for purposes of this Section and Section 13.C. concerning prior governmental service credit, the term "actuarial cost of service credit" is defined as set forth in the Service Credit Purchase Addendum. In the case of a service credit purchase, the Participant shall be required to comply with any rules and regulations established by the GMEBS Board of Trustees concerning said purchases.

C. Prior Governmental Service

Note: A Participant's prior service with other GMEBS employers shall be credited for purposes of satisfying the minimum service requirements for Vesting and eligibility for Retirement and pre-retirement death benefits as provided under Section 9.05 of the Master Plan, relating to portability service. This Section 13(C) does not need to be completed in order for Participants to receive this portability service credit pursuant to Section 9.05 of the Master Plan.

(1) Credit for Prior Governmental Service.

The Adopting Employer may elect to treat governmental service rendered prior to a Participant's initial employment date or reemployment date as creditable service under the Plan. Subject to any limitations imposed by law, the term "prior governmental service" shall be as defined by the Adopting Employer below. The Employer elects to treat prior governmental service as follows **(check one)**:

☒ Prior governmental service is **not** creditable under the Plan **(if checked, skip to Section 13.D. – Unused Sick/Vacation Leave)**.

☐ Prior governmental service shall be counted as Credited Service for the following purposes under the Plan **(check one or more as applicable)**:

☐ Computing amount of benefits payable.
☐ Meeting minimum service requirements for vesting.
☐ Meeting minimum service requirements for benefit eligibility.

(2) Definition of Prior Governmental Service.

Prior governmental service shall be defined as follows: **(must specify in a manner that satisfies the definite written program requirement of Treasury Regulation 1.401-1(a)(2) and the definitely determinable requirement of Treasury Regulation 1.401-1(b)(1)(i))**:
_____.

Unless otherwise specified above, prior governmental service shall include only full-time service (minimum hour requirement same as that applicable to Eligible Regular Employees).

(3) Maximum Credit for Prior Governmental Service.

Credit for prior governmental service shall be limited to a maximum of _____ years **(insert number)**.

(4) Rate of Accrual for Prior Governmental Service Credit.

Credit for prior governmental service shall accrue at the following rate **(check one)**:

☐ One month of prior governmental service credit for every _____ month(s) **(insert number)** of Credited Service with the Adopting Employer.

☐ One year of prior governmental service credit for every _____ year(s) **(insert number)** of Credited Service with the Adopting Employer.

☐ All prior governmental service shall be creditable (subject to any caps imposed above) after the Participant has completed _____ years **(insert number)** of Credited Service with the Adopting Employer.

☐ Other requirement **(must specify in a manner that satisfies the definite written program requirement of Treasury Regulation 1.401-1(a)(2) and the definitely determinable requirement of Treasury Regulation 1.401-1(b)(1)(i))**:
_____.

(5) Payment for Prior Governmental Service Credit.

☐ Participants shall **not** be required to pay for governmental service credit.

☐ Participants shall be required to pay for governmental service credit as follows:

☐ The Participant must pay ____% of the actuarial cost of the service credit.

☐ The Participant must pay an amount equal to **(must specify in a manner that satisfies the definite written program requirement of Treasury Regulation 1.401-1(a)(2) and the definitely determinable requirement of Treasury Regulation 1.401-1(b)(1)(i))**: _____.

Other Conditions for Award of Prior Governmental Service Credit **(must specify in a manner that satisfies the definite written program requirement of Treasury Regulation 1.401-1(a)(2) and the definitely determinable requirement of Treasury Regulation 1.401-1(b)(1)(i))**: ____.

D. Leave Conversion for Unused Paid Time Off (e.g., Sick, Vacation, or Personal Leave)

(1) Credit for Unused Paid Time Off.

Subject to the limitations in Section 3.01 of the Master Plan, an Adopting Employer may elect to treat accumulated days of unused paid time off for a terminated Participant, for which the Participant is not paid, as Credited Service. The only type of leave permitted to be credited under this provision is leave from a paid time off plan which qualifies as a bona fide sick and vacation leave plan (which may include sick, vacation or personal leave) and which the Participant may take as paid leave without regard to whether the leave is due to illness or incapacity. The Credited Service resulting from the conversion of unused paid time off must not be the only Credited Service applied toward the accrual of a normal retirement benefit under the Plan. The Pension Committee shall be responsible to certify to GMEBS the total amount of unused paid time off that is creditable hereunder.

Important Note: Leave cannot be converted to Credited Service in lieu of receiving a cash payment. If the Employer elects treating unused paid time off as Credited Service, the conversion to Credited Service will be automatic, and the Participant cannot request a cash payment for the unused paid time off.

The Employer elects the following treatment of unused paid time off:

☒ Unused paid time off shall **not** be treated as Credited Service **(if checked, skip to Section 14 – Retirement Eligibility)**.

☐ The following types of unused paid time off for which the Participant is not paid shall be treated as Credited Service under the Plan **(check one or more as applicable)**:

- ☐ Unused sick leave
- ☐ Unused vacation leave
- ☐ Unused personal leave
- ☐ Other paid time off **(must specify in a manner that satisfies the definite written program requirement of Treasury Regulation 1.401-1(a)(2) and the definitely determinable requirement of Treasury Regulation 1.401-1(b)(1)(i))**: _____.

(2) Minimum Service Requirement.

In order to receive credit for unused paid time off, a Participant must meet the following requirement at termination **(check one)**:

☐ The Participant must be 100% vested in a normal retirement benefit.
☐ The Participant must have at least _____ years **(insert number)** of Total Credited Service (not including leave otherwise creditable under this Section).
☐ Other **(must specify in a manner that satisfies the definite written program requirement of Treasury Regulation 1.401-1(a)(2) and the definitely determinable requirement of Treasury Regulation 1.401-1(b)(1)(i))**: _____.

(3) Use of Unused Paid Time Off Credit. Unused paid time off for which the Participant is not paid shall count as Credited Service for the following purposes under the Plan **(check one or more as applicable)**:

☐ Computing amount of benefits payable.
☐ Meeting minimum service requirements for vesting.
☐ Meeting minimum service requirements for benefit eligibility.

(4) Maximum Credit for Unused Paid Time Off.

Credit for unused paid time off for which the Participant is not paid shall be limited to a maximum of ____ months **(insert number)**.

(5) Computation of Unused Paid Time Off.

Unless otherwise specified by the Adopting Employer under "Other Conditions" below, each twenty (20) days of creditable unused paid time off shall constitute one (1) complete month of Credited Service under the Plan. Partial months shall not be credited.

(6) Other Conditions (please specify, subject to limitations in Section 3.01 of Master Plan; must specify in a manner that satisfies the definite written program requirement of Treasury Regulation 1.401-1(a)(2) and the definitely determinable requirement of Treasury Regulation 1.401-1(b)(1)(i)): _____.

14. RETIREMENT ELIGIBILITY

A. Early Retirement Qualifications

Early retirement qualifications are **(check one or more as applicable)**:

☒ Attainment of age **55 (insert number)**

☒ Completion of **10** years **(insert number)** of Total Credited Service

Exceptions: If different early retirement eligibility requirements apply to a particular class or classes of Eligible Employees, the Employer must specify below the classes to whom the different requirements apply and indicate below the requirements applicable to them.

Eligible Employees to whom exception applies **(must specify - specific positions are permissible; specific individuals may not be named)**: _____.

Early retirement qualifications for excepted class(es) are **(check one or more as applicable)**:

☐ Attainment of age _____ **(insert number)**

☐ Completion of _____ years **(insert number)** of Total Credited Service

B. Normal Retirement Qualifications

Note: Please complete this Section and also list "Alternative" Normal Retirement Qualifications, if any, in Section 14.C.

(1) Regular Employees

Normal retirement qualifications for Regular Employees are **(check one or more as applicable)**:

☒ Attainment of age **65 (insert number)**

☒ Completion of **5** years **(insert number)** of Total Credited Service

☐ In-Service Distribution to Eligible Employees permitted (i.e., a qualifying Participant may commence receiving retirement benefits while in service without first incurring a Bona Fide Separation from Service), if Participant meets minimum age and service requirements specified immediately above and is at least age 62 (unless a lower safe-harbor age is permitted under applicable federal law), subject to applicable Plan provisions concerning recalculation and offset applied at re-retirement to account for the value of benefits received prior to re-retirement. This rule shall apply to **(check one)**: ☐ all Participants ☐ only the following class(es) of Participants **(must specify - specific positions are permissible; specific individuals may not be named)**: _____.

Exceptions: If different normal retirement qualifications apply to a particular class or classes of Regular Employees, the Employer must specify below the classes to whom the different requirements apply and indicate below the requirements applicable to them.

Class(es) of Regular Employees to whom exception applies **(must specify - specific positions are permissible; specific individuals may not be named)**: _____.

Normal retirement qualifications for excepted class(es) are **(check one or more as applicable)**:

☐ Attainment of age _____ **(insert number)**

☐ Completion of _____ years **(insert number)** of Total Credited Service

☐ In-Service Distribution to Eligible Employees permitted (i.e., a qualifying Participant may commence receiving retirement benefits while in service without first incurring a Bona Fide Separation from Service), if Participant meets minimum age and service requirements specified immediately above and is at least age 62 (unless a lower safe-harbor age is permitted under applicable federal law), subject to applicable Plan provisions concerning recalculation and offset applied at re-retirement to account for the value of benefits received prior to re-retirement. This rule shall apply to **(check one)**: ☐ all Participants ☐ only the following class(es) of Participants **(must specify - specific positions are permissible; specific individuals may not be named)**: _____.

(2) Elected or Appointed Members of Governing Authority

Complete this Section only if elected or appointed members of the Governing Authority or Municipal Legal Officers are permitted to participate in the Plan. Normal retirement qualifications for this class are **(check one or more as applicable)**:

☒ Attainment of age **65 (insert number)**

☐ Completion of _____ years **(insert number)** of Total Credited Service

☐ In-Service Distribution to Eligible Employees permitted (i.e., a qualifying Participant may commence receiving retirement benefits while in service without first incurring a Bona Fide Separation from Service), if Participant meets minimum age and service requirements specified immediately above and is at least age 62 (unless a lower safe-harbor age is permitted under applicable federal law), subject to applicable Plan provisions concerning recalculation and offset applied at re-retirement to account for the value of benefits received prior to re-retirement. This rule shall apply to **(check one)**: ☐ all Participants ☐ only the following class(es) of Participants **(must specify - specific positions are permissible; specific individuals may not be named)**:_____.

Exceptions: If different normal retirement qualifications apply to particular elected or appointed members of the Governing Authority or Municipal Legal Officers, the Employer must specify below to whom the different requirements apply and indicate below the requirements applicable to them.

Particular elected or appointed members of the Governing Authority or Municipal Legal Officers to whom exception applies **(must specify - specific positions are permissible; specific individuals may not be named)**: _____.

Normal retirement qualifications for excepted elected or appointed members of the Governing Authority or Municipal Legal Officers are **(check one or more as applicable)**:

☐ Attainment of age _____ **(insert number)**

☐ Completion of _____ years **(insert number)** of Total Credited Service

☐ In-Service Distribution to Eligible Employees permitted (i.e., a qualifying Participant may commence receiving retirement benefits while in service without first incurring a Bona Fide Separation from Service), if Participant meets minimum age and service requirements specified immediately above and is at least age 62 (unless a lower safe-harbor age is permitted under applicable federal law), subject to applicable Plan provisions concerning recalculation and offset applied at re-retirement to account for the value of benefits received prior to re-retirement. This rule shall apply to **(check one)**: ☐ all Participants ☐ only the following class(es) of Participants **(must specify - specific positions are permissible; specific individuals may not be named)**:_____.

C. Alternative Normal Retirement Qualifications

The Employer may elect to permit Participants to retire with unreduced benefits after they satisfy service and/or age requirements other than the regular normal retirement qualifications specified above. The Employer hereby adopts the following alternative normal retirement qualifications:

Alternative Normal Retirement Qualifications (check one or more, as applicable):

(1) ☐ Not applicable (the Adopting Employer does not offer alternative normal retirement benefits under the Plan).

(2) ☐ **Alternative Minimum Age & Service Qualifications (if checked, please complete one or more items below, as applicable):**

☐ Attainment of age _____ **(insert number)**

☐ Completion of _____ years **(insert number)** of Total Credited Service

☐ In-Service Distribution to Eligible Employees permitted (i.e., a qualifying Participant may commence receiving retirement benefits while in service without first incurring a Bona Fide Separation from Service), if Participant meets minimum age and service requirements specified immediately above and is at least age 62 (unless a lower safe-harbor age is permitted under applicable federal law), subject to applicable Plan provisions concerning recalculation and offset applied at re-retirement to account for the value of benefits received prior to re-retirement. This rule shall apply to **(check one)**: ☐ all Participants ☐ only the following class(es) of Participants **(must specify - specific positions are permissible; specific individuals may not be named)**:_____.

This alternative normal retirement benefit is available to:

☐ All Participants who qualify.

☐ Only the following Participants **(must specify - specific positions are permissible; specific individuals may not be named)**: _____.

A Participant **(check one)**: ☐ is required ☐ is not required to be in the service of the Employer at the time he satisfies the above qualifications in order to qualify for this alternative normal retirement benefit.

Other eligibility requirement **(must specify in a manner that satisfies the definite written program requirement of Treasury Regulation 1.401-1(a)(2) and the definitely determinable requirement of Treasury Regulation 1.401-1(b)(1)(i))**: _____.

(3) ☐ **Rule of _____ (insert number)**. The Participant's combined Total Credited Service and age must equal or exceed this number. Please complete additional items below:

To qualify for this alternative normal retirement benefit, the Participant **(check one or more items below, as applicable)**:

☐ Must have attained at least age _____ **(insert number)**

☐ Must not satisfy any minimum age requirement

☐ In-Service Distribution to Eligible Employees permitted (i.e., a qualifying Participant may commence receiving retirement benefits while in service without first incurring a Bona Fide Separation from Service), if the Participant meets the minimum age and service requirements specified immediately above and is at least age 62 (unless a lower safe-harbor age is permitted under applicable federal law), subject to applicable Plan provisions concerning recalculation and offset applied at re-retirement to account for the value of benefits received prior to re-retirement. This rule shall apply to **(check one)**: ☐ all Participants ☐ only the following class(es) of Participants **(must specify - specific positions are permissible; specific individuals may not be named)**: _____.

This alternative normal retirement benefit is available to:

☐ All Participants who qualify.

☐ Only the following Participants **(must specify - specific positions are permissible; specific individuals may not be named)**: _____.

A Participant **(check one)**: ☐ is required ☐ is not required to be in the service of the Employer at the time he satisfies the Rule in order to qualify for this alternative normal retirement benefit.

Other eligibility requirement **(must specify in a manner that satisfies the definite written program requirement of Treasury Regulation 1.401-1(a)(2) and the definitely determinable requirement of Treasury Regulation 1.401-1(b)(1)(i))**: _____.

(4) ☐ **Alternative Minimum Service**. A Participant is eligible for an alternative normal retirement benefit if he has at least _____ years **(insert number)** of Total Credited Service, regardless of the Participant's age.

☐ In-Service Distribution to Eligible Employees permitted (i.e., a qualifying Participant may commence receiving retirement benefits while in service without first incurring a Bona Fide Separation from Service), if the Participant meets the minimum service requirement specified immediately above and is at least age 62 (unless a lower safe-harbor age is permitted under applicable federal law), subject to applicable Plan provisions concerning recalculation and offset applied at re-retirement to account for the value of benefits received prior to re-retirement. This rule shall apply to **(check one)**: ☐ all Participants ☐ only the following class(es) of Participants **(must specify - specific positions are permissible; specific individuals may not be named)**:_____.

This alternative normal retirement benefit is available to:

☐ All Participants who qualify.

☐ Only the following Participants **(must specify - specific positions are permissible; specific individuals may not be named)**: _____.

A Participant **(check one)**: ☐ is required ☐ is not required to be in the service of the Employer at the time he satisfies the qualifications for this alternative normal retirement benefit.

Other eligibility requirement **(must specify in a manner that satisfies the definite written program requirement of Treasury Regulation 1.401-1(a)(2) and the definitely determinable requirement of Treasury Regulation 1.401-1(b)(1)(i))**: _____.

(5) ☐ **Other Alternative Normal Retirement Benefit**.

Must specify qualifications (in a manner that satisfies the definite written program requirement of Treasury Regulation 1.401-1(a)(2) and the definitely determinable requirement of Treasury Regulation 1.401-1(b)(1)(i)): _____.

☐ In-Service Distribution to Eligible Employees permitted (i.e., a qualifying Participant may commence receiving retirement benefits while in service without first incurring a Bona Fide Separation from Service), if the Participant meets minimum age and service requirements specified immediately above and is at least age 62 (unless a lower safe-harbor age is permitted under applicable federal law), subject to applicable Plan provisions concerning recalculation and offset applied at re-retirement to account for the value of benefits received prior to re-retirement. This rule shall apply to **(check one)**: ☐ all Participants ☐ only the following class(es) of Participants **(must specify - specific positions are permissible; specific individuals may not be named)**:_____.

This alternative normal retirement benefit is available to:

☐ All Participants who qualify.

☐ Only the following Participants **(must specify - specific positions are permissible; specific individuals may not be named)**: _____.

A Participant **(check one)**: ☐ is required ☐ is not required to be in the service of the Employer at the time he satisfies the qualifications for this alternative normal retirement benefit.

Other eligibility requirement **(must specify in a manner that satisfies the definite written program requirement of Treasury Regulation 1.401-1(a)(2) and the definitely determinable requirement of Treasury Regulation 1.401-1(b)(1)(i))**: _____.

(6) ☒ **Other Alternative Normal Retirement Benefit <u>for Public Safety Employees Only</u>**.

Must specify qualifications (in a manner that satisfies the definite written program requirement of Treasury Regulation 1.401-1(a)(2) and the definitely determinable requirement of Treasury Regulation 1.401-1(b)(1)(i)): **<u>Attainment of age 55 and completion of 20 years of Total Credited Service.</u>**

☐ In-Service Distribution to Eligible Employees who are Public Safety Employees permitted (<u>i.e.</u>, a qualifying Participant may commence receiving retirement benefits while in service without first incurring a Bona Fide Separation from Service), if the Participant meets minimum age and service requirements specified immediately above and is at least age 50 (unless a lower safe-harbor age is permitted under applicable federal law), subject to applicable Plan provisions concerning recalculation and offset applied at re-retirement to account for the value of benefits received prior to re-retirement. This rule shall apply to **(check one)**: ☐ all Participants ☐ only the following class(es) of Participants **(must specify - specific positions are permissible; specific individuals may not be named)**:_____.

This alternative normal retirement benefit is available to:

☐ All public safety employee Participants who qualify.

☒ Only the following public safety employee Participants **(must specify - specific positions are permissible; specific individuals may not be named)**: **<u>Firefighters and Police Officers, as defined in Section 2.34 and 2.51 of the Master Plan, respectively.</u>**

A public safety employee Participant **(check one)**: ☐ is required ☒ is not required to be in the service of the Employer at the time he satisfies the qualifications for this alternative normal retirement benefit.

Other eligibility requirement **(must specify in a manner that satisfies the definite written program requirement of Treasury Regulation 1.401-1(a)(2) and the definitely determinable requirement of Treasury Regulation 1.401-1(b)(1)(i))**: _____.

Note: "Public safety employees" are defined under the Internal Revenue Code for this purpose as employees of a State or political subdivision of a State who provide police protection, firefighting services, or emergency medical services for any area within the jurisdiction of such State or political subdivision.

D. Disability Benefit Qualifications

Subject to the other terms and conditions of the Master Plan and except as otherwise provided in an Addendum to this Adoption Agreement, disability retirement qualifications are based upon Social Security Administration award criteria or as otherwise provided under Section 2.23 of the Master Plan. The Disability Retirement benefit shall commence as of the Participant's Disability Retirement Date under Section 2.24 of the Master Plan.

To qualify for a disability benefit, a Participant must have the following minimum number of years of Total Credited Service **(check one)**:

☐ Not applicable (the Adopting Employer does not offer disability retirement benefits under the Plan).
☒ No minimum.
☐ _____ years **(insert number)** of Total Credited Service.

Other eligibility requirement **(must specify in a manner that satisfies the definite written program requirement of Treasury Regulation 1.401-1(a)(2) and the definitely determinable requirement of Treasury Regulation 1.401-1(b)(1)(i))**: _____.

15. RETIREMENT BENEFIT COMPUTATION

A. Maximum Total Credited Service

The number of years of Total Credited Service which may be used to calculate a benefit is **(check one or all that apply)**:

☒ not limited.

☐ limited to _____ years for all Participants.

☐ limited to _____ years for the following classes of Eligible Regular Employees:

- ☐ All Eligible Regular Employees.
- ☐ Only the following Eligible Regular Employees: _____.

☐ limited to _____ years as an elected or appointed member of the Governing Authority.

☐ limited to _____ years as a Municipal Legal Officer.

☐ Other **(must specify in a manner that satisfies the definite written program requirement of Treasury Regulation 1.401-1(a)(2) and the definitely determinable requirement of Treasury Regulation 1.401-1(b)(1)(i))**: _____.

B. Monthly Normal Retirement Benefit Amount

(1) Regular Employee Formula

The monthly normal retirement benefit for Eligible Regular Employees shall be 1/12 of **(check and complete one or more as applicable)**:

☐ (a) **Flat Percentage Formula**. _____**% (insert percentage)** of Final Average Earnings multiplied by years of Total Credited Service as an Eligible Regular Employee.

This formula applies to:

☐ All Participants who are Regular Employees.
☐ Only the following Participants **(must specify - specific positions are permissible; specific individuals may not be named)**: _____.

☐ (b) **Alternative Flat Percentage Formula**. _____**% (insert percentage)** of Final Average Earnings multiplied by years of Total Credited Service as an Eligible Regular Employee. This formula applies to the following Participants **(must specify - specific positions are permissible; specific individuals may not be named)**: _____.

☒ (c) **Split Final Average Earnings Formula**. **1.5**% **(insert percentage)** of Final Average Earnings up to the amount of **Covered Compensation (see subsection (2) below for definition of Covered Compensation)**, plus **2.0**% **(insert percentage)** of Final Average Earnings in excess of said Covered Compensation, multiplied by years of Total Credited Service as an Eligible Regular Employee.

This formula applies to:

☒ All Participants who are Regular Employees.
☐ Only the following Participants **(must specify - specific positions are permissible; specific individuals may not be named)**:_____.

☐ (d) **Alternative Split Final Average Earnings Formula**. _____ % **(insert percentage)** of Final Average Earnings up to the amount of **Covered Compensation (see subsection (2) below for definition of Covered Compensation)**, plus _____% **(insert percentage)** of Final Average Earnings in excess of said Covered Compensation, multiplied by years of Total Credited Service as an Eligible Regular Employee.

This formula applies to:

☐ All Participants.
☐ Only the following Participants **(must specify - specific positions are permissible; specific individuals may not be named)**: _____.

[Repeat above subsections as necessary for each applicable benefit formula and Participant class covered under the Plan.]

(2) Covered Compensation (complete only if Split Formula(s) is checked above):

Covered Compensation is defined as (check one or more as applicable):

☐ (a) **A.I.M.E. Covered Compensation** as defined in Section 2.18 of the Master Plan. This definition of Covered Compensation shall apply to **(check one)**:

☐ All Participants who are Regular Employees.
☐ Only the following Participants **(must specify - specific positions are permissible; specific individuals may not be named)**:_____.

☒ (b) **Dynamic Break Point** Covered Compensation as defined in Section 2.19 of the Master Plan. This definition of Covered Compensation shall apply to **(check one)**:

☒ All Participants who are Regular Employees.
☐ Only the following Participants **(must specify - specific positions are permissible; specific individuals may not be named)**:_____.

☐ (c) **Table Break Point** Covered Compensation as defined in Section 2.20 of the Master Plan. This definition of Covered Compensation shall apply to **(check one)**:

☐ All Participants who are Regular Employees.
☐ Only the following class(es) of Participants **(must specify - specific positions are permissible; specific individuals may not be named)**: _____.

☐ (d) **Covered Compensation** shall mean a Participant's annual Earnings that do not exceed $_____ **(specify amount)**. This definition shall apply to **(check one)**:

☐ All Participants who are Regular Employees.
☐ Only the following Participants **(must specify - specific positions are permissible; specific individuals may not be named)**:_____.

(3) Final Average Earnings

Unless otherwise specified in an Addendum to the Adoption Agreement, Final Average Earnings is defined as the monthly average of Earnings paid to a Participant by the Adopting Employer for

the **60 (insert number not to exceed 60)** consecutive months of Credited Service preceding the Participant's most recent Termination in which the Participant's Earnings were the highest, multiplied by 12. Note: GMEBS has prescribed forms for calculation of Final Average Earnings that must be used for this purpose.

This definition of Final Average Earnings applies to:

☒ All Participants who are Regular Employees.
☐ Only the following Participants **(must specify - specific positions are permissible; specific individuals may not be named)**: _____.

[Repeat above subsection as necessary for each applicable definition and Participant class covered under the Plan.]

(4) Formula for Elected or Appointed Members of the Governing Authority

The monthly normal retirement benefit for members of this class shall be as follows **(check one)**:

☐ Not applicable (elected or appointed members of the Governing Authority or Municipal Legal Officers are not permitted to participate in the Plan).

☒ $**20.00 (insert dollar amount)** per month for each year of Total Credited Service as an elected or appointed member of the Governing Authority or Municipal Legal Officer or major fraction thereof (6 months and 1 day).

This formula applies to:

☒ All elected or appointed members of the Governing Authority or Municipal Legal Officers eligible to participate.
☐ Only the following elected or appointed members of the Governing Authority or Municipal Legal Officers eligible to participate **(must specify - specific positions are permissible; specific individuals may not be named)**: _____.

[Repeat above subsection as necessary for each applicable formula for classes of elected or appointed members covered under the Plan.]

C. Monthly Early Retirement Benefit Amount

Check and complete one or more as applicable:

☒ (1) **Standard Early Retirement Reduction Table**. The monthly Early Retirement benefit shall be computed in the same manner as the monthly Normal Retirement benefit, but the benefit shall be reduced on an Actuarially Equivalent basis in accordance with Section 12.01 of the Master Plan to account for early commencement of benefits. This provision shall apply to:

☒ All Participants.

☐ Only the following Participants **(must specify - specific positions are permissible; specific individuals may not be named)**:_____.

☐ (2) **Alternative Early Retirement Reduction Table**. The monthly Early Retirement benefit shall be computed in the same manner as the monthly Normal Retirement benefit, but the benefit shall be reduced to account for early commencement of benefits based on the following table. This table shall apply to:

☐ All Participants.
☐ Only the following Participants **(must specify - specific positions are permissible; specific individuals may not be named)**:_____.

Alternative Early Retirement Reduction Table

Number of Years Before [Age (Insert Normal Retirement Age)] (check as applicable)	**Percentage of Normal Retirement Benefit* (complete as applicable)**
☐ 0	1.000
☐ 1	0.___
☐ 2	0.___
☐ 3	0.___
☐ 4	0.___
☐ 5	0.___
☐ 6	0.___
☐ 7	0.___
☐ 8	0.___
☐ 9	0.___
☐ 10	0.___
☐ 11	0.___
☐ 12	0.___
☐ 13	0.___
☐ 14	0.___
☐ 15	0.___

*Interpolate for whole months

D. Monthly Late Retirement Benefit Amount (check one):

☒ (1) The monthly Late Retirement benefit shall be computed in the same manner as the Normal Retirement Benefit, based upon the Participant's Accrued Benefit as of his Late Retirement Date.

☐ (2) The monthly Late Retirement benefit shall be the greater of: (1) the monthly retirement benefit accrued as of the Participant's Normal Retirement Date, actuarially increased in accordance with the actuarial table

contained in Section 12.05 of the Master Plan; or (2) the monthly retirement benefit accrued as of the Participant's Late Retirement Date, without further actuarial adjustment under Section 12.06 of the Master Plan.

E. Monthly Disability Benefit Amount

The amount of the monthly Disability Benefit shall be computed in the same manner as the Normal Retirement benefit, based upon the Participant's Accrued Benefit as of his Disability Retirement Date.

Minimum Disability Benefit. The Adopting Employer may set a minimum Disability Benefit. The Employer elects the following minimum Disability benefit **(check one)**:

☐ Not applicable (the Adopting Employer does not offer disability retirement benefits under the Plan).

☐ No minimum is established.

☒ No less than **(check one):** ☒ 20% ☐ 10% ☐ ____% **(if other than 20% or 10% insert percentage amount)** of the Participant's average monthly Earnings for the 12 calendar month period (excluding any period of unpaid leave of absence) immediately preceding his Termination of Employment as a result of a Disability. (Unless otherwise specified in an Addendum to the Adoption Agreement, no minimum will apply to elected or appointed members of the Governing Authority or Municipal Legal Officers.)

☐ No less than **(check one):** ☐ 66 2/3 % ☐ _____% **(if other than 66 2/3%, insert percentage amount)** of the Participant's average monthly Earnings for the 12 calendar month period (excluding any period of unpaid leave of absence) immediately preceding his Termination of Employment as a result of a Disability, less any monthly benefits paid from federal Social Security benefits as a result of disability as reported by the Employer. (Unless otherwise specified in an Addendum to the Adoption Agreement, no minimum will apply to elected or appointed members of the Governing Authority or Municipal Legal Officers.)

Note: The Adopting Employer is responsible for reporting to GMEBS any amounts to be used in an offset.

F. Minimum/Maximum Benefit For Elected Officials

In addition to any other limitations imposed by federal or state law, the Employer may impose a cap on the monthly benefit amount that may be received by elected or appointed members of the Governing Authority. The Employer elects **(check one)**:

☐ Not applicable (elected or appointed members of the Governing Authority do not participate in the Plan).

☐ No minimum or maximum applies.

☒ Monthly benefit for Service as an elected or appointed member of the Governing Authority may not exceed 100% of the Participant's final salary as an elected or appointed member of the Governing Authority.

☐ Other minimum or maximum **(must specify in a manner that satisfies the definite written program requirement of Treasury Regulation 1.401-1(a)(2) and the definitely determinable requirement of Treasury Regulation 1.401-1(b)(1)(i))**: _____.

16. SUSPENSION OF BENEFITS FOLLOWING BONA FIDE SEPARATION OF SERVICE; COLA

A. <u>Re-Employment as Eligible Employee After Normal, Alternative Normal, or Early Retirement and Following Bona Fide Separation of Service (see Master Plan Section 6.06(c) Regarding Re-Employment as an Ineligible Employee and Master Plan Section 6.06(e) and (f) Regarding Re-Employment After Disability Retirement)</u>

(1) Reemployment After Normal or Alternative Normal Retirement. In the event that a Retired Participant 1) is reemployed with the Employer as an Eligible Employee (as defined in the Plan) after his Normal or Alternative Normal Retirement Date and after a Bona Fide Separation from Service, or 2) is reemployed with the Employer in an Ineligible Employee class, and subsequently again becomes an Eligible Employee (as defined in the Plan) due to the addition of such class to the Plan after his Normal or Alternative Normal Retirement Date, the following rule shall apply **(check one)**:

☒ (a) The Participant's benefit shall be suspended in accordance with Section 6.06(a)(1) of the Master Plan for as long as the Participant remains employed.

☐ (b) The Participant may continue to receive his retirement benefit in accordance with Section 6.06(b) of the Master Plan. This rule shall apply to **(check one)**: ☐ all Retired Participants ☐ only the following classes of Retired Participants **(must specify (specific positions are permissible; specific individuals may not be named) - benefits of those Retired Participants not listed shall be suspended in accordance with Section 6.06(a) of the Master Plan if they return to work with the Employer)**:

_____.

(2) Reemployment After Early Retirement. In the event a Participant Retires with an Early Retirement benefit after a Bona Fide Separation from Service 1) is reemployed with the Employer as an Eligible Employee before his Normal Retirement Date; or 2) is reemployed with the Employer in an Ineligible Employee class, and subsequently again becomes an Eligible

Employee (as defined in the Plan) before his Normal Retirement Date due to the addition of such class to the Plan, the following rule shall apply **(check one or more as applicable)**:

(a) ☒ The Participant's Early Retirement benefit shall be suspended in accordance with Section 6.06(a)(1) of the Master Plan for as long as the Participant remains employed.

This rule shall apply to **(check one)**: ☒ all Retired Participants; ☐ only the following classes of Retired Participants **(must specify - specific positions are permissible; specific individuals may not be named)**: _____.

(b) ☐ The Participant's Early Retirement benefit shall be suspended in accordance with Section 6.06(a)(1) of the Master Plan. However, the Participant may begin receiving benefits after he satisfies the qualifications for Normal Retirement or Alternative Normal Retirement, as applicable, and after satisfying the minimum age parameters of Section 6.06(a)(3) of the Master Plan, in accordance with Section 6.06(b)(2)(B)(i) of the Master Plan.

This rule shall apply to **(check one)**: ☐ all Retired Participants; ☐ only the following classes of Retired Participants **(must specify - specific positions are permissible; specific individuals may not be named)**: _____.

(c) ☐ The Participant's Early Retirement benefit shall continue in accordance with Section 6.06(b)(2)(B)(ii) of the Master Plan.

This rule shall apply to **(check one)**: ☐ all Retired Participants; ☐ only the following classes of Retired Participants **(must specify - specific positions are permissible; specific individuals may not be named)**: _____.

B. Cost Of Living Adjustment

The Employer may elect to provide for an annual cost-of-living adjustment (COLA) in the amount of benefits being received by Retired Participants and Beneficiaries, which shall be calculated and paid in accordance with the terms of the Master Plan. The Employer hereby elects the following **(check one)**:

☐ (1) No cost-of-living adjustment.

☒ (2) Variable Annual cost-of-living adjustment not to exceed **3.0**% **(insert percentage)**.

☐ (3) Fixed annual cost-of-living adjustment equal to _____% **(insert percentage)**.

The above cost-of-living adjustment shall apply with respect to the following Participants (and their Beneficiaries) **(check one)**:

☐ All Participants (and their Beneficiaries).
☒ Participants (and their Beneficiaries) who terminate employment on or after **June 1, 1999 (insert date)**.
☐ Other **(must specify in a manner that satisfies the definite written program requirement of Treasury Regulation 1.401-1(a)(2) and the definitely determinable requirement of Treasury Regulation 1.401-1(b)(1)(i)); specific positions are permissible; specific individuals may not be named)**: _____.

The Adjustment Date for the above cost-of-living adjustment shall be (if not specified, the Adjustment Date shall be January 1): _____.

17. TERMINATION OF EMPLOYMENT BEFORE RETIREMENT; VESTING

A. Eligible Regular Employees

Subject to the terms and conditions of the Master Plan, a Participant who is an Eligible Regular Employee and whose employment is terminated for any reason other than death or retirement shall earn a vested right in his accrued retirement benefit in accordance with the following schedule **(check one):**

☐ **No vesting schedule (immediate vesting)**.

☐ **Cliff Vesting Schedule**. Benefits shall be 100% vested after the Participant has a minimum of _____ years **(insert number not to exceed 10)** of Total Credited Service. Benefits remain 0% vested until the Participant satisfies this minimum.

☒ **Graduated Vesting Schedule**. Benefits shall become vested in accordance with the following schedule **(insert percentages)**:

COMPLETED YEARS OF TOTAL CREDITED SERVICE	VESTED PERCENTAGE
1	**0**%
2	**0**%
3	**0**%
4	**0**%
5	**50**%
6	**60**%
7	**70**%
8	**80**%
9	**90**%
10	**100**%

Exceptions: If a vesting schedule other than that specified above applies to a special class(es) of Regular Employees, the Employer must specify the different vesting schedule below and the class(es) to whom the different vesting schedule applies.

Regular Employees to whom exception applies **(must specify - specific positions are permissible; specific individuals may not be named)**: _____.

Vesting Schedule for excepted class **(must specify in a manner that satisfies the definite written program requirement of Treasury Regulation 1.401-1(a)(2) and the definitely determinable requirement of Treasury Regulation 1.401-1(b)(1)(i))**: _____.

B. Elected or Appointed Members of the Governing Authority

Subject to the terms and conditions of the Master Plan, a Participant who is an elected or appointed member of the Governing Authority or a Municipal Legal Officer shall earn a vested right in his accrued retirement benefit for Credited Service in such capacity in accordance with the following schedule **(check one)**:

☐ Not applicable (elected or appointed members of the Governing Authority are not permitted to participate in the Plan).

☐ No vesting schedule (immediate vesting).

☒ Other vesting schedule **(must specify in a manner that satisfies the definite written program requirement of Treasury Regulation 1.401-1(a)(2) and the definitely determinable requirement of Treasury Regulation 1.401-1(b)(1)(i))**: **Benefits shall be 100% vested after the Participant has a minimum of 4 years of Total Credited Service. Benefits remain 0% vested until the Participant satisfies this minimum. If the Participant holds office as an elected or appointed member of the Governing Authority or is employed as an Eligible Regular Employee on July 1, 2003, then Service with the City prior to July 1, 2003 will be taken into account in determining whether the Participant has satisfied the 4 year retirement. Otherwise, service prior to July 1, 2003 will not be taken into account.**

18. PRE-RETIREMENT DEATH BENEFITS

A. In-Service Death Benefit

Subject to the terms and conditions of the Master Plan, the Employer hereby elects the following in-service death benefit, to be payable in the event that an eligible Participant's employment with the Employer is terminated by reason of the Participant's death prior to Retirement **(check and complete one)**:

(1) ☐ **Auto A Death Benefit**. A monthly benefit payable to the Participant's Pre-Retirement Beneficiary, equal to the decreased monthly retirement benefit that would have otherwise been payable to the Participant, had he elected a 100% joint and survivor benefit under Section 7.03 of the Master Plan. In order to be eligible for this benefit, a Participant must meet the following requirements **(check one)**:

☐ The Participant must be vested in a normal retirement benefit.

☐ The Participant must have _____ years **(insert number)** of Total Credited Service.

☐ The Participant must be eligible for Early or Normal Retirement.

☐ Other eligibility requirement **(must specify in a manner that satisfies the definite written program requirement of Treasury Regulation 1.401-1(a)(2) and the definitely determinable requirement of Treasury Regulation 1.401-1(b)(1)(i))**: _____.

(2) ☒ **Actuarial Reserve Death Benefit**. A monthly benefit payable to the Participant's Pre-Retirement Beneficiary, actuarially equivalent to the reserve required for the Participant's anticipated Normal Retirement benefit, provided the Participant meets the following eligibility conditions **(check one)**:

☒ The Participant shall be eligible upon satisfying the eligibility requirements of Section 8.02(c) of the Master Plan.

☐ The Participant must have _____ years **(insert number)** of Total Credited Service.

☐ Other eligibility requirement **(must specify in a manner that satisfies the definite written program requirement of Treasury Regulation 1.401-1(a)(2) and the definitely determinable requirement of Treasury Regulation 1.401-1(b)(1)(i))**: _____.

Imputed Service. For purposes of computing the actuarial reserve death benefit, the Participant's Total Credited Service shall include **(check one)**:

☒ Total Credited Service accrued prior to the date of the Participant's death.

☐ Total Credited Service accrued prior to the date of the Participant's death, plus **(check one)**: ☐ one-half (½) ☐ _____ **(insert other fraction)** of the Service between such date of death and what would otherwise have been the Participant's Normal Retirement Date. **(See Master Plan Section 8.02(b) regarding 10-year cap on additional Credited Service.)**

Minimum In-Service Death Benefit for Vested Employees Equal to Terminated Vested Death Benefit. Unless otherwise specified under "Exceptions" below, if a Participant's employment is terminated by reason of the Participant's death prior to Retirement, and if as of the date of death the Participant is vested but he does not qualify for the in-service death benefit, then the Auto A Death Benefit will be payable, provided the Auto A Death Benefit is made available to terminated vested employees under the Adoption Agreement (see "Terminated Vested Death Benefit" below).

(3) **Exceptions:** If an in-service death benefit other than that specified above applies to one or more classes of Participants, the Employer must specify below the death benefit payable,

the class(es) to whom the different death benefit applies, and the eligibility conditions for said death benefit.

Alternative Death Benefit **(must specify formula that satisfies the definite written program and definitely determinable requirements of Treasury Regulations Sections 1.401-1(a)(2) and 1.401-1(b)(1)(i) and does not violate limits applicable to governmental plans under Code Sections 401(a)(17) and 415):** _____.

Participants to whom alternative death benefit applies **(must specify - specific positions are permissible; specific individuals may not be named)**: _____.

Eligibility conditions for alternative death benefit **(must specify in a manner that satisfies the definite written program requirement of Treasury Regulation 1.401-1(a)(2) and the definitely determinable requirement of Treasury Regulation 1.401-1(b)(1)(i))**: _____.

B. Terminated Vested Death Benefit

(1) Complete this Section only if the Employer offers a terminated vested death benefit. The Employer may elect to provide a terminated vested death benefit, to be payable in the event that a Participant who is vested dies after termination of employment but before Retirement benefits commence. Subject to the terms and conditions of the Master Plan, the Employer hereby elects the following terminated vested death benefit **(check one)**:

☒ **Auto A Death Benefit**. A monthly benefit payable to the Participant's Pre-Retirement Beneficiary, equal to the decreased monthly retirement benefit that would have otherwise been payable to the Participant had he elected a 100% joint and survivor benefit under Section 7.03 of the Master Plan.

☐ **Accrued Retirement Benefit**. A monthly benefit payable to the Participant's Pre-Retirement Beneficiary which shall be actuarially equivalent to the Participant's Accrued Normal Retirement Benefit determined as of the date of death.

(2) Exceptions: If a terminated vested death benefit other than that specified above applies to one or more classes of Participants, the Employer must specify below the death benefit payable, the class(es) to whom the different death benefit applies, and the eligibility conditions for said death benefit.

Alternative Death Benefit **(must specify formula that satisfies the definite written program and definitely determinable requirements of Treasury Regulations Sections 1.401-1(a)(2) and 1.401-1(b)(1)(i) and does not violate limits applicable to governmental plans under Code Sections 401(a)(17) and 415):** _____.

Participants to whom alternative death benefit applies **(must specify - specific positions are permissible; specific individuals may not be named):** _____.

Eligibility conditions for alternative death benefit **(must specify in a manner that satisfies the definite written program requirement of Treasury Regulation 1.401-1(a)(2) and the definitely determinable requirement of Treasury Regulation 1.401-1(b)(1)(i))**: _____.

19. EMPLOYEE CONTRIBUTIONS

(1) Employee contributions (check one):

☒ Are not required.

☐ Are required in the amount of _____ % **(insert percentage)** of Earnings for all Participants.

☐ Are required in the amount of _____ % **(insert percentage)** of Earnings for Participants in the following classes **(must specify - specific positions are permissible; specific individuals may not be named)**: _____.

[Repeat above subsection as necessary if more than one contribution rate applies.]

(2) Pre-Tax Treatment of Employee Contributions. If Employee Contributions are required in Subsection (1) above, an Adopting Employer may elect to "pick up" Employee Contributions to the Plan in accordance with IRC Section 414(h). In such case, Employee Contributions shall be made on a pre-tax rather than a post-tax basis, provided the requirements of IRC Section 414(h) are met. If the Employer elects to pick up Employee Contributions, it is the Employer's responsibility to ensure that Employee Contributions are paid and reported in accordance with IRC Section 414(h). The Adopting Employer must not report picked up contributions as wages subject to federal income tax withholding.

The Employer hereby elects **(check one)**:

☐ To pick up Employee Contributions. By electing to pick up Employee Contributions, the Adopting Employer specifies that the contributions, although designated as Employee Contributions, are being paid by the Employer in lieu of Employee Contributions. The Adopting Employer confirms that the executor of this Adoption Agreement is duly authorized to take this action as required to pick up contributions. This pick-up of contributions applies prospectively, and it is evidenced by this contemporaneous written document. On and after the date of the pick-up of contributions, a Participant does not have a cash or deferred election right (within the meaning of Treasury Regulation Section 1.401(k)-1(a)(3)) with respect to the designated Employee Contributions, which includes not having the option of receiving the amounts directly instead of having them paid to the Plan.

☐ Not to pick up Employee Contributions.

(3) Interest on Employee Contributions. The Adopting Employer may elect to pay interest on any refund of Employee Contributions.

☐ Interest shall not be paid.

☐ Interest shall be paid on a refund of Employee Contributions at a rate established by GMEBS from time to time.

☐ Other rate of interest **(must specify rate in a manner that satisfies the definite written program requirement of Treasury Regulation 1.401-1(a)(2) and the definitely determinable requirement of Treasury Regulation 1.401-1(b)(1)(i))**: _____.

20. MODIFICATION OF THE TERMS OF THE ADOPTION AGREEMENT

If an Adopting Employer desires to amend any of its elections contained in this Adoption Agreement (or any Addendum), the Governing Authority by official action must adopt an amendment of the Adoption Agreement (or any Addendum) or a new Adoption Agreement (or Addendum) must be adopted and forwarded to the Board for approval. The amendment of the new Adoption Agreement (or Addendum) is not effective until approved by the Board and other procedures required by the Plan have been implemented.

The Administrator will timely inform the Adopting Employer of any amendments made by the Board to the Plan.

21. TERMINATION OF THE ADOPTION AGREEMENT

This Adoption Agreement (and any Addendum) may be terminated only in accordance with the Plan. The Administrator will inform the Adopting Employer in the event the Board should decide to discontinue this volume submitter program.

22. EMPLOYER ADOPTION AND AUTHORIZATION FOR AMENDMENTS

Adoption. The Adopting Employer hereby adopts the terms of the Adoption Agreement and any Addendum, which is attached hereto and made a part of this ordinance. The Adoption Agreement (and, if applicable, the Addendum) sets forth the Employees to be covered by the Plan, the benefits to be provided by the Adopting Employer under the Plan, and any conditions imposed by the Adopting Employer with respect to, but not inconsistent with, the Plan. The Adopting Employer reserves the right to amend its elections under the Adoption Agreement and any Addendum, so long as the amendment is not inconsistent with the Plan or the Internal Revenue Code or other applicable law and is approved by the Board of Trustees of GMEBS. The Adopting Employer acknowledges that it may not be able to rely on the volume submitter advisory letter if it makes certain elections under the Adoption Agreement or the Addendum.

The Adopting Employer hereby agrees to abide by the Master Plan, Trust Agreement, and rules and regulations adopted by the Board of Trustees of GMEBS, as each may be amended from time to time, in all matters pertaining to the operation and administration of the Plan. It is intended that the Act creating the Board of Trustees of GMEBS, this Plan, and the rules and regulations of the

Board are to be construed in harmony with each other. In the event of a conflict between the provisions of any of the foregoing, they shall govern in the following order:

(1) The Act creating the Board of Trustees of The Georgia Municipal Employees' Benefit System, O.C.G.A. Section 47-5-1 *et seq*. (a copy of which is included in the Appendix to the Master Defined Benefit Plan Document) and any other applicable provisions of O.C.G.A. Title 47;

(2) The Master Defined Benefit Plan Document and Trust Agreement;

(3) This Ordinance and Adoption Agreement (and any Addendum); and

(4) The rules and regulations of the Board.

In the event that any section, subsection, sentence, clause or phrase of this Plan shall be declared or adjudged invalid or unconstitutional, such adjudication shall in no manner affect the previously existing provisions or the other section or sections, subsections, sentences, clauses or phrases of this Plan, which shall remain in full force and effect, as if the section, subsection, sentence, clause or phrase so declared or adjudicated invalid or unconstitutional were not originally a part hereof. The Governing Authority hereby declares that it would have passed the remaining parts of this Plan or retained the previously existing provisions if it had known that such part or parts hereof would be declared or adjudicated invalid or unconstitutional.

This Adoption Agreement (and any Addendum) may only be used in conjunction with Georgia Municipal Employees Benefit System Master Defined Benefit Retirement Plan Document approved by the Internal Revenue Service under advisory letter J501718a dated March 30, 2018. The Adopting Employer understands that failure to properly complete this Adoption Agreement (or any Addendum), or to operate and maintain the Plan and Trust in accordance with the terms of the completed Adoption Agreement (and any Addendum), Master Plan Document and Trust, may result in disqualification of the Adopting Employer's Plan under the Internal Revenue Code. Inquiries regarding the adoption of the Plan, the meaning of Plan provisions, or the effect of the IRS advisory letter should be directed to the Administrator. The Administrator is Georgia Municipal Employees Benefit System, with its primary business offices located at: 201 Pryor Street, SW, Atlanta, Georgia, 30303. The business telephone number is: (404) 688-0472. The primary person to contact is: GMEBS Legal Counsel.

Authorization for Amendments. Effective on and after February 17, 2005, the Adopting Employer hereby authorizes the volume submitter practitioner who sponsors the Plan on behalf of GMEBS to prepare amendments to the Plan, for approval by the Board, on its behalf as provided under Revenue Procedure 2005-16, as superseded by Revenue Procedure 2015-36, Revenue Procedure 2011-49, and Announcement 2005-37. Effective January 1, 2013, Georgia Municipal Association, Inc., serves as the volume submitter practitioner for the Plan. Employer notice and signature requirements were met for the Adopting Employer before the effective date of February 17, 2005. The Adopting Employer understands that the implementing amendment reads as follows:

> On and after February 17, 2005, the Board delegates to the Practitioner the authority to advise and prepare amendments to the Plan, for approval by the Board, on behalf of all Adopting Employers, including those Adopting Employers who

have adopted the Plan prior to the January 1, 2013, restatement of the Plan, for changes in the Code, the regulations thereunder, revenue rulings, other statements published by Internal Revenue Service, including model, sample, or other required good faith amendments (but only if their adoption will not cause such Plan to be individually designed), and for corrections of prior approved plans. These amendments shall be applied to all Adopting Employers. Employer notice and signature requirements have been met for all Adopting Employers before the effective date of February 17, 2005. In any event, any amendment prepared by the Practitioner and approved by the Board will be provided by the Administrator to Adopting Employers.

Notwithstanding the foregoing paragraph, no amendment to the Plan shall be prepared on behalf of any Adopting Employer as of either:

- the date the Internal Revenue Service requires the Adopting Employer to file Form 5300 as an individually designed plan as a result of an amendment by the Adopting Employer to incorporate a type of Plan not allowable in a volume submitter plan as described in Revenue Procedure 2015-36; or

- as of the date the Plan is otherwise considered an individually designed plan due to the nature and extent of the amendments.

If the Adopting Employer is required to obtain a determination letter for any reason in order to maintain reliance on the advisory letter, the Practitioner's authority to amend the Plan on behalf of the Adopting Employer is conditioned on the Plan receiving a favorable determination letter.

The Adopting Employer further understands that, if it does not give its authorization hereunder or, in the alternative, adopt another pre-approved plan, its Plan will become an individually designed plan and will not be able to rely on the volume submitter advisory letter.

AN ORDINANCE (continued from page 1)

Section 2. Except as otherwise specifically required by law or by the terms of the Master Plan or Adoption Agreement (or any Addendum), the rights and obligations under the Plan with respect to persons whose employment with the City was terminated or who vacated his office with the City for any reason whatsoever prior to the effective date of this Ordinance are fixed and shall be governed by such Plan, if any, as it existed and was in effect at the time of such termination.

Section 3. The effective date of this Ordinance shall be October 22, 2020.

Section 4. All Ordinances and parts of ordinances in conflict herewith are expressly repealed.

Approved by the Mayor and Council of the City of Tybee Island, Georgia this _____ day of _____, 20_____.

Attest: CITY OF TYBEE ISLAND, GEORGIA

_____ _____

City Clerk Mayor

(SEAL)

Approved:

_____

City Attorney

The terms of the foregoing Adoption Agreement are approved by the Board of Trustees of Georgia Municipal Employees Benefit System.

IN WITNESS WHEREOF, the Board of Trustees of Georgia Municipal Employees Benefit System has caused its Seal and the signatures of its duly authorized officers to be affixed this _____ day of _____, 20____.

Board of Trustees
Georgia Municipal Employees
Benefit System

(SEAL)

_____

Secretary

GEORGIA MUNICIPAL ASSOCIATION

September 28, 2020

TRANSMITTED VIA E-MAIL
(jelliott@cityoftybee.org)

Ms. Janice Elliott
Human Resources Administrator
City of Tybee Island
P.O. Box 2749
Tybee Island, Georgia 31328-2749

RE: City of Tybee Island Georgia Municipal Employees Benefit System (GMEBS) Defined Benefit Retirement Plan; Amendment to Establish an Early Retirement Incentive Program

Dear Ms. Elliott:

Per the City's request, enclosed please find a draft amended Adoption Agreement, a draft amended General Addendum and a draft Early Retirement Incentive Program ("ERIP") Addendum for the City of Tybee Island's Georgia Municipal Employees Benefit System ("GMEBS") Defined Benefit Retirement Plan ("Plan"). The amendment to the Plan establishes an Early Retirement Incentive Program ("ERIP") through the One-Time Early Retirement Incentive Addendum, as follows:

Eligibility Retirements – Paragraph 1 of the ERIP Addendum provides that an eligible regular employee may apply for an enhanced early retirement benefit if his/her years of age combined with his/her years of credited service as an eligible regular employee under the retirement plan equals or exceeds 75 years as of October 31, 2020 ("Rule of 75"). No minimum age or years of credited service is required. Elected officials cannot participate in the ERIP. GMEBS portability service (i.e., service with other GMEBS employers) cannot be used to meet the Rule of 75. Participants who become reemployed on or after October 22, 2020, will not be eligible to apply for this enhanced early retirement benefit.

Enhanced (Unreduced) Early Retirement Benefit – Paragraph 2 of the ERIP Addendum states that eligible participants who elect the enhanced early retirement benefit will receive an unreduced retirement benefit without actuarial reduction for the participant's younger age at retirement. The retirement benefit will be calculated in the usual manner, based upon the participant's service and final average earnings upon termination.

IRC Section 415 Limits – Internal Revenue Code Section 415 may restrict the annual retirement benefit amount that eligible participants can receive if they retire at significantly younger ages. Benefits paid under the retirement plan cannot exceed certain annual dollar limits established under the IRC Section 415. This limit is currently $230,000 per year but is reduced for those who retire at ages younger than 62.

The Burgess Building • 201 Pryor Street, SW • Atlanta, GA 30303-3606 • Tel 404.688.0472 • Toll Free 1.888.488.4462 • Website www.gacities.com
Mailing Address: PO Box 105377 • Atlanta, GA 30348

Window Period for Acceptance of Early Retirement Offer: October 23, 2020 – December 9, 2020 – Paragraph 3 of the ERIP Addendum establishes a window period between 9:00 a.m., Friday October 23, 2020, and 4:00 p.m., Wednesday December 9, 2020, during which eligible participants may apply for the enhanced early retirement benefit on a form(s) provided by the city for this purpose. Please note that we have not included a draft election form with the enclosed materials.

7-Day Revocation Period – Paragraph 4 of the ERIP Addendum gives participants who elect to retire under the ERIP an opportunity to revoke their election. This revocation period will end seven (7) days after the employee submits the election. If a participant doesn't revoke his or her election by the end of the revocation period, his or her election to retire under the program will become irrevocable.

Termination Date; Effective Retirement Date – Paragraph 5 of the ERIP Addendum provides that a participant who irrevocably elects to terminate, retire and receive enhanced early retirement benefits pursuant to the ERIP must terminate no later than the last day of the month coinciding with or next following the day after the 7-day revocation period ends. A participant must meet the Rule of 75 before he or she terminates to be eligible for the ERIP. The participant's effective retirement date will be the first day of the month following his or her termination date. Monthly retirement benefits for the participant will begin as of his or her effective retirement date, provided that GMEBS has received all the necessary documentation, and will be payable on the first day of each month thereafter for as long as the participant is eligible to receive GMEBS retirement benefits. Please note, if the participant dies before his or her effective retirement date, the enhanced early retirement benefits provided under the ERIP will not be payable.

Please note that the draft ERIP Addendum amends the City's GMEBS retirement plan only. The ERIP Addendum does not address any non-retirement benefits that may be offered in connection with the ERIP. If the City is going to include non-retirement benefits as part of the ERIP, these should be addressed outside of the ERIP Addendum, since they would not be part of the retirement plan.

Age Discrimination in Employment Act and Older Workers Benefit Protection Act – The Age Discrimination in Employment Act (ADEA) and the Older Workers Benefit Protection Act (OWBPS) impose certain rules with respect to early retirement incentives and employee waivers or releases that may be sought in connection with such programs. We suggest you consult the City Attorney regarding these requirements. These requirements are designed in part to ensure an employee's decision to retire under an early retirement incentive program is knowing and voluntary.

The ADEA and OWBPA appear to require that if the City is going to mandate that employees sign a release of waiver of claims against the City in connection with the ERIP, the City must provide notice to eligible employees, explaining the eligibility requirements, benefits offered, and other details of the early retirement incentive program. If the City intends to provide benefits (other than enhanced retirement benefits) in connection with the program, these should be explained in the notice as well. The notice should also advise employees to consult an attorney before electing to participate under the ERIP.

We have enclosed a sample draft notice that you may want to use a starting point to prepare a notice to employees regarding the ERIP. This sample notice will need to be modified to reflect the specific terms of your program. Also, it contains notes to the city that will have to be deleted before it can be given to employees.

If the City is going to require participants to sign a release of waiver of ADEA or other possible legal claims in connection with the early retirement incentive program, there are a number of additional requirements that must be met to ensure the enforceability of the waiver **(we have not included a sample release/waiver**

form with the enclosed materials). One of these requirements is that the employees be given a minimum 45-day window period in which to consider their election. The ADEA regulation also provides that, if a release or waiver of claims is going to be required, the employee notice regarding the program must specify job titles and ages of all persons eligible to retire under the window, and the ages of all persons who are not eligible.

If you are going to require a waiver/release this information should be included as part of the employee notice. The enclosed sample notice does not include this information; it will have to be supplied by the City if the City is going to require that employees sign a waiver or release in connection with the ERIP.

We are enclosing for your review and information an article and copy of the ADEA regulations that summarize the requirements applicable to early retirement incentive programs and waivers sought in connection with such programs. These materials, this letter and the sample documents provided are for informational purposes only and should not be considered legal advice. Please consult the City Attorney on any legal requirements associated with implementation of the ERIP.

The Adoption Agreement provides that the amendment will become effective on October 22, 2020. **Please note that per O.C.G.A. § 47-5-40, the Adoption Agreement has been drafted in the form of an ordinance.**

If the draft Adoption Agreement, General Addendum and ERIP Addendum are acceptable as drafted, please have the designated representatives sign and date each document where indicated (p. 37, p. 2, p. 3, respectively). Once the documents are executed, please scan and email each document to Regina Gresham at rgresham@gacities.com. We will then countersign the documents and return an electronic copy to you. Please note that GMEBS will not execute plan documents that have been edited by the City. If changes are needed to the documents please let us know before adopting them.

If you have any questions about the information provided in this letter or require further information, please feel free to contact me at (678) 686-6236 or cdorsey@gacities.com.

Sincerely,

Caroline Dorsey

Caroline Dorsey
Associate General Counsel

Encl.

C: Mr. Edward Hughes, City Attorney, City of Tybee Island (w/ encl.)
Ms. Marinetty Bienvenu, Director, Employee Benefit Services (w/o encl.)
Ms. Michelle Warner, Director, Retirement Field Services and DC Program (w/o encl.)
Ms. Gwin Hall, Senior Associate General Counsel (w/o encl.)

GENERAL ADDENDUM TO THE GEORGIA MUNICIPAL EMPLOYEES BENEFIT SYSTEM DEFINED BENEFIT RETIREMENT PLAN ADOPTION AGREEMENT

This is an Addendum to the Adoption Agreement completed by the City of Tybee Island, Georgia as follows (complete one or more sections, as applicable):

***** Items (1) through (11) of General Addendum – Not Applicable *****

(12) <u>Minimum and Maximum Limits on Normal Retirement Benefit Amount for Regular Employees</u>.

Check one or more as applicable:

□ **(a) The <u>minimum</u> monthly normal retirement benefit amount shall be: □ $_____, □ _____% of the Participant's Final Average Earnings (specify minimum monthly amount or percentage).**

The minimum benefit amount elected above shall apply to (check one):

□ **All Participants who are Regular Employees.**
□ **Only the following Participants (must specify)**
_____.

☒ **(b) The <u>maximum</u> monthly normal retirement benefit amount shall be: □ $_____, ☒ <u>100</u>% (specify maximum monthly amount or percentage) of: ☒ the highest monthly earnings used to calculate the Participant's Final Average Earnings, □ the Participant's Final Average Earnings. This maximum benefit limit shall apply in addition to and not in lieu of any applicable limits under Internal Revenue Code Section 415.**

The maximum benefit amount elected above shall apply to (check one):

☒ **All Participants who are Regular Employees.**
□ **Only the following Participants (must specify)**
_____.

Note: The minimum or maximum limit elected above shall apply to the standard form of payment. If the Participant elects a different form of benefit payment, the limit shall be actuarially adjusted based on the form of benefit payment elected.

***** Items (13) through (15) of General Addendum – Not Applicable *****

The terms of the foregoing Addendum to the Adoption Agreement are approved by the Mayor and Council of the City of Tybee Island, Georgia this _____ day of _____, 20____.

Attest: **CITY OF TYBEE ISLAND, GEORGIA**

_____ **_____**
City Clerk **Mayor**

(SEAL)

Approved:

_____
City Attorney

The terms of the foregoing Addendum are approved by the Board of Trustees of the Georgia Municipal Employees Benefit System.

IN WITNESS WHEREOF, the Board of Trustees of the Georgia Municipal Employees Benefit System has caused its Seal and the signatures of its duly authorized officers to be affixed this _____ day of _____, 20____.

Board of Trustees
Georgia Municipal Employees
Benefit System

(SEAL)

_____
Secretary

[Note to Employer: this sample notice is intended for general information purposes only. It does not and is not intended to constitute legal advice. Please consult your legal counsel to determine how the law applies to your specific circumstances.]

SAMPLE

(On Employer Stationery)

TO: _____, EMPLOYEE

FROM: _____

DATE: _____

RE: **EARLY RETIREMENT INCENTIVE PROGRAM**

The Mayor and Council of the City of Tybee Island have voted to adopt an Early Retirement Incentive Program (ERIP), which is designed to provide special benefits to certain eligible regular employees who elect to terminate employment and retire under the program during a limited window period. Participation in the program is completely voluntary. Assuming you meet the program's eligibility requirements, the decision whether to elect early retirement is entirely up to you. Below is a more detailed explanation of the eligibility requirements and benefits available under the program.

Eligible Employees

You are eligible to participate under the Early Retirement Incentive Program if, as of October 31, 2020, your years of age combined with your years of Credited Service as an eligible regular employee under the City of Tybee Island's GMEBS defined benefit retirement plan will equal or exceed 75 years ("Rule of 75"). No minimum age or years of Credited Service is required. Credited Service with other GMEBS member employers (GMEBS portability service) *may not* be used to meet this eligibility requirement; additionally, service as an elected official of the City of Tybee Island *may not* be used to meet this eligibility requirement. In order to participate, you must make an election in accordance with the rules explained below.

[Note to Employer: If employees are going to be required to sign a waiver of their legal rights or a covenant not to sue in connection with their election, then ADEA regulations require that in order for the waiver to be enforceable, eligible employees must receive prior notice of the job titles and ages of all individuals who are eligible to participate under the program and the ages of all individuals who are not eligible. See generally 29 CFR §

1625.22(f)(ii) and other regulations on notice requirements.]

Benefits Available under the Program

Normal Rules in the Absence of the Early Retirement Incentive Program

The City's defined benefit retirement plan normally requires that you be at least age 65 and have at least 5 years of Total Credited Service in order to receive an **unreduced normal** retirement benefit. Alternatively, if you are a police officer or a firefighter, you are eligible for an unreduced normal retirement benefit if you are at least age 55 and have at least 20 years of Total Credited Service. **Note**: If you already qualify for the 65 & 5 normal retirement benefit (or the 55 & 20 alternative normal retirement benefit available to police officers and firefighters) you would not receive an enhanced benefit if you chose to participate in the ERIP, because you already qualify for a normal retirement benefit that is not reduced on account of your age (see "Enhanced Early Retirement Benefit Under ERIP" below).

Normally under the retirement plan, an employee may elect **early** retirement if he or she has attained age 55 and has a minimum of 10 years of Total Credited Service. However, the amount of the early retirement benefit is **reduced** to take into account the fact that monthly benefits will likely be paid to the participant over a longer period of time (due to the participant's younger age at early retirement).

Enhanced Early Retirement Benefit under Early Retirement Incentive Program

Eligible Employees are being given a one-time opportunity to elect to retire under the Early Retirement Incentive Program. If you are eligible (i.e., if you meet the Rule of 75 as of October 31, 2020) and if you properly elect to participate in the program, you will receive an early retirement benefit that is not reduced on account of your age. That is, the reduction which is normally applied to an early retirement benefit to account for a participant's younger age at early retirement (see above) will not be applied to early retirement benefits paid under the program. **As a reminder, if you are eligible for the ERIP but you are also *already* eligible for an unreduced normal retirement or alternative normal retirement benefit (see above), the ERIP does not provide an incentive for you to retire; the incentive provided by the ERIP is the ability to receive an early retirement benefit that is not reduced on account of your age.**

IRC Section 415 Limitations

Notwithstanding any of the provisions of the Early Retirement Incentive Program, retirement benefits paid under the retirement plan cannot exceed certain dollar limits established under Internal Revenue Code (IRC) Section 415. This limit is currently $230,000 per year, but the limit is significantly reduced for individuals who retire at ages much younger than age 62. Certain exceptions may apply for employees who have at least 15 years of credited service as police officers or firefighters.

Other Benefits

[Note to Employer: please describe here any additional benefits outside of the Retirement Plan (e.g., health or dental benefits) that are going to be provided to participating employees].

Election Window Period

If you meet the eligibility requirements and you want to elect to retire early under the program, you must make your election during a limited election window period. The election window period is between **9:00 a.m., Friday, October 23, 2020 and 4:00 p.m. Wednesday, December 9, 2020**. Please note you cannot make an election to retire under the program after you have terminated employment with the City of Tybee Island. You may submit your election to retire under the ERIP before reaching the Rule of 75; however, **to be eligible for the unreduced early retirement benefit you must remain employed until your age combined with your years of service equals or exceeds 75**.

Forms Required for Election

If you are eligible and choose to participate in the Early Retirement Incentive Program, you will be required to complete, sign, and submit to the Human Resources Administrator an election form and any other forms as required by the City. If you do not complete and submit all required forms before the end of the election window period, you will not be able to participate in the program, even if you otherwise meet the eligibility requirements under the program. Please see the Human Resources Administrator to obtain information about the election form.

[Note to Employer – the following provision should be included only if the Employer will require waiver of the right to sue the Employer as a condition of participating in the early retirement incentive program. Please note, GMEBS cannot supply the election and waiver forms but these forms should be distributed with the employee notice on or before the date the election period opens if waiver/release will be required]:

As a condition of participation in the Early Retirement Incentive Program, you will also be required to sign a Release/Waiver/Covenant Not to Sue. A copy of this form is attached to this notice. This form must be submitted to the Human Resources Administrator with your election form.]

Seven (7) Days to Revoke Election

You will have seven (7) days after you submit your election form to revoke your election. To revoke your election, you must deliver a written letter revoking your election, signed by you, to the Human Resources Administrator. If you do not revoke your election within seven (7) days after you submit it, then your election to terminate employment and receive enhanced early retirement benefits will become irrevocable. However, if you die before your effective retirement date, your election will be considered null and void.

Required Termination Date; Effective Retirement Date

If you elect to retire under the program (and assuming you do not revoke your election before the revocation period expires), you will be required to terminate employment no later than the last day of the month coinciding with or next following the day after your 7-day revocation period ends. Your effective retirement date will be the first day of the month following your termination date, provided that you have submitted all the necessary documentation to permit commencement of retirement benefits.

Additional Information

This notice provides only a general description of the Early Retirement Incentive Program. The terms of the program are explained in greater detail in the One-Time Early Retirement Incentive Addendum to the City's Retirement Plan Adoption Agreement. A copy of the Addendum is available from the Human Resources Administrator.

Consultation with Attorney

You should take the opportunity to analyze the Early Retirement Incentive Program for yourself, and you should consult with an attorney before you decide to make an election under the program. Your election to participate in the Early Retirement Incentive Program is completely voluntary, and eligible employees may take advantage of the program's special benefits or decline the offer.

A Final Word

Please remember, your election to participate in the Early Retirement Incentive Program is completely voluntary. The program is available only during this limited window period. The City has no current intention to offer another Early Retirement Incentive Program in the future. All other definitions, provisions and benefits of the City's retirement plan remain unchanged.

OWBPA, EEOC Rules Set Strict Requirements For Waivers Under Early Retirement Programs

Index To The Report

Amendments to the Age Discrimination in Employment Act (ADEA) made by the Older Workers Benefit Protection Act of 1990 (OWBPA) established strict requirements applying to early retirement incentive programs. Employees' decisions to accept an early retirement incentive offer must be "voluntary," and any waiver of ADEA claims in connection with an exit incentive must meet certain minimum requirements.

In 1998, the Equal Employment Opportunity Commission issued final regulations governing waivers of claims under the ADEA. The final regulations, which are codified at 29 CFR Part 1625, were effective July 6, 1998.

This report analyzes the OWBPA requirements, the provisions of the EEOC's final regulations, and pertinent court decisions.

ISSUED 11-2-07

Amendments to the Age Discrimination in Employment Act (ADEA) made by the Older Workers Benefit Protection Act of 1990 (OWBPA) set out a two-pronged requirement that early retirement incentive plans must meet. Such plans cannot be inconsistent with the relevant purposes of the ADEA, and employees' decisions to accept early retirement incentives must be "voluntary."

The ADEA also states that no employee benefit plan may require or permit the involuntary retirement of any individual on account of age. (This language has been part of the ADEA since the 1978 amendments.) Regulations issued under the ADEA specifically provide that nothing in that Act makes it unlawful for a plan to permit individuals to elect early retirement at a specified age *at their own choice* (29 CFR 1625.9(d)).

Waivers

Employers generally ask those employees accepting an offer under an early retirement incentive program to sign a waiver, through which the employee releases the employer from future legal claims against it in connection with the program. The waiver then could be used as a defense to any charge of age discrimination subsequently brought against the employer.

The OWBPA added a new section to the ADEA that sets out the minimum standards that a waiver must meet in order to be considered "knowing and voluntary." If the employer attempts to use the waiver to defend a claim of age discrimination, it will bear the burden of proving that each of the requirements is met.

In 1998, the Equal Employment Opportunity Commission issued final regulations governing waivers of claims under the ADEA. The final regulations, which are codified at 29 CFR Part 1625, were effective July 6, 1998.

Minimum Requirements

The minimum requirements for waivers under the OWBPA are:

1. The agreement of which the waiver is a part must be "written in a manner calculated to be understood"

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by the individual employee or by the average employee who is eligible to participate.

2. The waiver must specifically refer to the ADEA.

3. The waiver can only apply to claims that may have arisen to date (that is, it cannot purport to waive any claims that the employee may feel he or she has against the employer based on anything that occurs after the date of the waiver).

4. The waiver by the employee must be given in exchange for something in addition to what the employee is already entitled. In an early retirement incentive program, the additional something could include pension sweeteners, lump sum separation payments, additional retiree medical coverage, etc.

5. Prior to signing the waiver, the employee must be advised in writing to consult with an attorney.

6. The employee must be given at least 45 days to consider the exit incentive of which the waiver is a part (21 days if the waiver is in connection with an agreement other than an exit incentive or other employment termination program offered to a group of employees).

7. The employee must be given at least seven days after accepting the incentive to revoke the decision to accept.

8. The employer must give the employees offered the exit incentive or group termination program the following information in writing (again, written in a manner "calculated to be understood by the average individual"):

(a) the eligibility factors and time limitations of the incentive, and the class, unit, or group of employees covered; and

(b) the job titles of employees eligible for the incentive, and their ages, and the ages of employees in the same job classification or organizational unit who are not eligible.

If the waiver is made to settle a lawsuit or a charge filed with the EEOC (as compared, for example, with a waiver made at the time an exit incentive is accepted), the first five requirements above apply. Additionally, the individual must be given sufficient time to consider the settlement.

The law specifies that waivers do not affect the separate right of the EEOC to enforce the ADEA.

Regulations Clarify Requirements

The EEOC's final regulations clarify the requirements that a waiver of ADEA rights must meet in order to be considered "knowing and voluntary." In addition to the minimum requirements set forth in the preceding section, the regulations state that other facts and circumstances may bear on the question of whether a waiver is knowing and voluntary. Such facts and circumstances include whether there is a material mistake, omission, or misstatement in the information furnished to an employee in connection with the waiver.

The regulations clarify that the entire waiver agreement must be in writing. Waiver agreements must be drafted in plain language geared to the level of understanding of the individual party to the agreement. According to the regulations, employers should take into account factors such as the level of comprehension and education of typical participants. Consideration of these factors usually will require the elimination of technical jargon and of long, complex sentences.

Furthermore, the waiver agreement must not have the effect of misleading, misinforming, or failing to inform participants. Any advantages or disadvantages described in the agreement must be presented without either exaggerating the benefits or minimizing the limitations.

As specified by the regulations, the 45-day or 21-day period (as applicable) for considering an offer runs from the date of the employer's final offer. Material changes to the final offer restart the running of the 45-day or 21-day period, while changes that are not material do not restart the running of the applicable period. However, the parties may agree that changes, whether material or immaterial, do not restart the running of the applicable period. The regulations stress that the seven-day revocation period may *not* be shortened by the parties, by agreement or otherwise.

The regulations go on to state that an employee may sign a release prior to the end of the 45-day or 21-day period (as applicable), thereby commencing the mandatory seven-day revocation period. However, this is permissible only if the employee's decision to accept such shortening of time is knowing and voluntary and is not induced by the employer through fraud, misrepresentation, a threat to withdraw or alter the offer prior to the expiration of the 45-day or 21-day period, or by providing different terms to employees who sign the release prior to the expiration of the applicable time period. If an employee signs a release before the expiration of the 45-day or 21-day period, the employer may expedite the processing of the consideration provided in exchange for the waiver.

continued on next p

Identifying The "Decisional Unit"

According to the regulations, for purposes of satisfying the notification requirements for waivers, when identifying the scope of the "class, unit, or group" and "job classification or organizational unit," an employer should consider its organizational structure and decision-making process. The regulations state that a "decisional unit" is that portion of the employer's organizational structure from which the employer chose the persons who would be offered consideration for the signing of a waiver and those who would not be offered such consideration. When identifying the population of the decisional unit, the employer acts on a case-by-case basis, and thus the determination of the appropriate class, unit, or group and job classification or organizational unit also must be made on a case-by-case basis.

If the employer's goal is to reduce the work force at a particular facility and the employer undertakes a decision-making process by which certain employees of the facility are selected for a reduction program and others are not selected for the program, then that facility generally will be the decisional unit. However, if an employer seeks to terminate employees by exclusively considering a particular portion or subgroup of its operations at a specific facility, then that portion or subgroup of the work force at that facility will be considered the decisional unit. Likewise, if the employer analyzes its operations at several facilities, specifically considers and compares ages, seniority, or similar factors at differing facilities, and determines to focus its work-force reduction at a particular facility, then by the nature of the employer's decision-making process, the decisional unit would include all considered facilities and not just the facility selected for the reductions.

The regulations provide examples of identifying the appropriate decisional unit. According to the regulations, the examples "are not all-inclusive and are meant only to assist employers and employees in determining the appropriate decisional unit." The examples of decisional units are as follows:

(1) facility-wide: 10% of the employees in the Springfield facility will be terminated within the next ten days;

(2) division-wide: 15% of the employees in the Computer Division will be terminated in December;

(3) department-wide: one-half of the employees in the Keyboard Department of the Computer Division will be terminated in December;

(4) reporting: 10% of the employees who report to the vice president for sales, wherever the employees are located, will be terminated immediately; and

(5) job category: 10% of all accountants, wherever the employees are located, will be terminated next week.

The decisional units in the above examples are (1) the Springfield facility, (2) the Computer Division, (3) the Keyboard Department, (4) all employees reporting to the vice president of sales, and (5) all accountants.

The regulations go on to provide additional examples that may assist employers in determining when the decisional unit is other than the entire facility. These examples are as follows:

(a) a number of small facilities with interrelated functions and employees in a specific geographic area may comprise a single decisional unit;

(b) if a company utilizes personnel for a common function at more than one facility, the decisional unit for that function (e.g., accounting) may be broader than one facility;

(c) a large facility with several distinct functions may comprise a number of decisional units; for example, if a single facility has distinct internal functions with no employee overlap (e.g., manufacturing, accounting, human resources), and the program is confined to a distinct function, a smaller decisional unit may be appropriate.

Presentation Of Information

As specified by the regulations, information furnished to participants regarding ages should be broken down according to the age of each person eligible or selected for the program and each person not eligible or selected for the program. The use of age bands broader than one year (such as "age 20-30") does *not* satisfy this requirement. In a termination of employees in several established grade levels and/or other established subcategories within a job category or job title, the information must be broken down by grade level or other subcategory.

If in its disclosure the employer combines information concerning both voluntary and involuntary ter-

minations, the employer must present the information in a manner that distinguishes between voluntary and involuntary terminations. If the employees being terminated are selected from a subset of a decisional unit, the employer still must disclose information for the entire population of the decisional unit. For example, if the employer decides that a 10% work-force reduction in the Accounting Department will come from the accountants whose performance is in the bottom one-third of the division, the employer still must disclose information for all employees in the Accounting Department, even those who are the highest rated.

The regulations go on to note that an involuntary termination program in a decisional unit may take place in successive increments over a period of time, and special rules apply to such a situation. Under these special rules, information furnished with respect to the involuntary termination program should be cumulative, so that later terminees are provided ages and job titles or job categories, as appropriate, for all individuals in the decisional unit at the beginning of the program and all employees terminated to date. However, there is no requirement to supplement the information furnished to earlier terminees.

The regulations contain an example of one way in which the required information could be presented to employees. However, the regulations stress that the example is not a prototype notification agreement that will automatically comply with the ADEA.

In the example, Y Corporation lost a major construction contract, and determined that it must terminate 10% of the employees in the Construction Division. Y decided to offer all terminees $20,000 in severance pay in exchange for a waiver of all rights. The waiver presents the required ADEA information as follows:

(1) The decisional unit is the Construction Division.

(2) All employees in the Construction Division are eligible for the program. All employees who are being terminated in the November work-force reduction are selected for the program.

(3) All employees who are being offered consideration under a waiver agreement must sign the agreement and return it to the personnel office within 45 days after receiving the waiver. Once the signed waiver is returned to the personnel office, the employee has seven days to revoke the waiver agreement.

(4) The **Table Of Job Listings** (cited in this report) identifies the ages and job titles of employees in the Construction Division who were and were not selected for termination and the offer of consideration for signing a waiver.

Table Of Job Listings

Job Title	Age	Number Selected	Number Not Selected
Mechanical Engineers, I	25	21	48
	26	11	73
	63	4	18
	64	3	11
Mechanical Engineers, II	28	3	10
	29	11	17
	Etc., for all ages		
Structural Engineers, I	21	5	8
	Etc., for all ages		
Structural Engineers, II	23	2	4
	Etc., for all ages		
Purchasing Agents	26	10	11
	Etc., for all ages		

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Court Upholds Validity Of Waiver

An employee who signed a valid waiver releasing any claims arising out of his termination was precluded from bringing a lawsuit against his former employer under ADEA. This was the ruling of the Third Circuit U.S. Court of Appeals in *Wastak v. Lehigh Valley Health Network* (No. 02-2111).

In January 1990, Lehigh Valley Health Network hired John Wastak as the administrator for its department of psychiatry, and Mr. Wastak held that position for eight years. In 1997, Mr. Wastak began negotiations to lease office space for the psychiatry department. However, the department chair subsequently directed Mr. Wastak to cease the discussions, and the department then engaged in the lease negotiations with a different employee as its representative.

On March 12, 1998, Lehigh Valley terminated Mr. Wastak, who was age 57 at the time. The department chair informed Mr. Wastak that his termination was a result of his conducting inappropriate lease negotiations. At the time of his termination, Lehigh Valley gave Mr. Wastak a separation agreement and release; the release specified that Mr. Wastak agreed to waive any claims arising out of his employment or termination, including claims under the ADEA. In exchange for signing the release, Lehigh Valley offered Mr. Wastak 36 weeks' pay. Mr. Wastak was given 21 days to sign the release, and seven days thereafter to revoke the waiver. Although he was unable to hire an attorney, Mr. Wastak signed the release.

Nine months after his termination, in December 1998, Mr. Wastak learned that Lehigh Valley had replaced him with a 40-year-old employee. Mr. Wastak then filed suit against Lehigh Valley in Pennsylvania state court, alleging that his termination violated the ADEA. Lehigh Valley removed the case to the U.S. District Court for the Eastern District of Pennsylvania, which dismissed Mr. Wastak's suit on the grounds that he had signed a valid waiver. Mr. Wastak appealed, but the Third Circuit affirmed the district court's ruling.

Release Was Valid

On appeal, Mr. Wastak argued that his ADEA claim was not barred because it was not covered by the terms of the release. According to Mr. Wastak, his claim arose long after he executed the release, when he learned that Lehigh Valley had replaced him with a younger employee. In rejecting that argument, the Third Circuit explained, "By the plain terms of the release, Wastak agreed not to bring any actions against Lehigh Valley arising from his employment or termination under the ADEA. It is clear from the record that Wastak's injury was complete and discovered when Lehigh Valley terminated him. At that point, Wastak knew both of his injury—the discharge—and the cause of his injury—Lehigh Valley's decision to terminate his employment. Wastak argues strenuously that he had little reason to believe that he was the victim of age discrimination until he learned that he had been replaced by a younger employee. That may well be true, but it has little to do with whether his claim was prospective in March of 1998, a question that depends solely on when his claim accrued."

Alternatively, Mr. Wastak argued that the release violated the requirement of the OWBPA mandating that a waiver of ADEA claims be knowing and voluntary. According to Mr. Wastak, the release was invalid because he was unable to secure counsel to review the relevant documents, and he did not understand the nature and content of the release. However, the Third Circuit likewise rejected that argument, concluding, "The record here belies any claim that Wastak signed this release unknowingly or involuntarily. Although Wastak testified that he was, understandably, not familiar with the particular statutory citations in the release, when asked directly whether he understood that 'in return for the 36 weeks of salary continuation, [he was] agreeing not to sue or file a lawsuit against Lehigh Valley,' Wastak answered that he did. As for Wastak's claim that he signed the waiver involuntarily given his financial circumstances and fragile mental state, we agree with the district court that Wastak has not come forth with sufficient evidence to create a genuine issue of material fact with regard to any lack of understanding or voluntariness on his part in signing the release."

Waiver Upheld In *Parsons*

In a 2006 decision, the Eighth Circuit U.S. Court of Appeals ruled that a former employee validly waived

his right to pursue a claim under the ADEA and, hence, the employee could not pursue an ADEA claim against his former employer. The Eighth Circuit's ruling came in *Parsons v. Pioneer Seed Hi-Bred International, Inc.* (No. 05-3496).

Roger D. Parsons began working for Pioneer Seed Hi-Bred International in 1972. Beginning in 2000, Mr. Parsons held the position of project manager of Pioneer's Warehouse Management System (WMS). In September 2002, two Pioneer executives determined that the initial phase of the WMS project was complete, that a WMS coordinator was needed instead of a WMS project manager, and that the coordinator position would not require the level of skills possessed by Mr. Parsons. Pioneer then eliminated the WMS project manager position and gave the part-time WMS coordinator duties to a younger employee, who was age 41.

On Sept. 25, 2002, Pioneer informed Mr. Parsons—who was age 55 at the time—that his position was being eliminated, and the company gave him two severance options. Mr. Parsons consulted an attorney and chose one of the severance options, which provided him a lump sum payment of $9,896 in exchange for his agreement to waive any and all claims against Pioneer, including ADEA claims.

After signing the agreement, Mr. Parsons filed suit against Pioneer in the U.S. District Court for the Southern District of Iowa, asserting a claim under the ADEA. However, the district court granted summary judgment in favor of Pioneer, and on appeal, the Eighth Circuit affirmed that ruling.

Waiver Was Valid

In rendering its decision, the Eighth Circuit initially explained, "Congress enacted the Older Workers Benefits Protection Act in 1990 to clarify the protections afforded older workers under the ADEA. Congress addressed employers' attempts to pressure departing workers into waiving their right to bring an ADEA claim in exchange for a severance or settlement agreement. While such waivers are valid, Congress requires that the waivers be knowing and voluntary, and it enacted specific statutory requirements that must be met before the waiver can bind the worker. The requirements are strict and unqualified; if the waiver does not satisfy the statute, it is ineffective as a matter of law."

Turning to the waiver at issue, the Eighth Circuit stated, "Parsons argues that his waiver did not satisfy the statute because it did not meet the first enumerated requirement, that 'the waiver be part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual.' The severance agreement specifically released Pioneer from any cause of action under the ADEA in paragraph 11 of the agreement. Parsons claims that language in paragraphs 10 and 17 is contradictory to that release, rendering the waiver ineffective. The language here is not confusing or contradictory. Paragraph 11 is the general release and states the consideration given for the release. Paragraph 10 is a confidentiality clause and provides that an employee's failure to abide by any of the terms of the agreement could result in loss of the consideration to be received pursuant to paragraph 11.

"Nor does paragraph 17 contradict the explicit release of ADEA rights. The paragraph merely excepts enforcement claims that pertain to the ADEA from the attorney's fee provision. This again is consistent with the regulations that prohibit a waiver from penalizing an employee for challenging the validity of the agreement. It does not purport to negate the general release contained in paragraph 11. Legal documents by their nature are often very detailed and complex due to the need to cover a host of variables often unseen at the time of their drafting, as well as the need in this case to comply with specific regulatory requirements. Pioneer's attempts to comply with the OWPBA and its accompanying regulations may make the agreement nuanced, but the language employed is written in a manner that is understandable by the average participant."

No Fraudulent Inducement

An employer did not fraudulently induce an employee to sign a separation agreement that included a waiver of claims under the ADEA. This was the decision of the Eleventh Circuit U.S. Court of Appeals in *Raybon v. Continental Tire North America, Inc.* (No. 05-13521).

Kenneth W. Raybon was an employee of Continental Tire North America. Mr. Raybon served as Continental's key account manager for the company's Wal-Mart and Sam's Club accounts.

Mr. Raybon's job was eliminated when the duties that he previously performed were combined with other

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duties in a new position; Mr. Raybon's successor was a younger employee. In conjunction with the elimination of Mr. Raybon's job, Continental offered Mr. Raybon an early retirement package in exchange for his release of any discrimination claims he might have against the company, including claims under the ADEA. Mr. Raybon accepted the early retirement package and signed a separation agreement that included the waiver.

Subsequently, Mr. Raybon filed suit against Continental in the U.S. District Court for the Southern District of Alabama, challenging the validity of the separation agreement. In the suit, Mr. Raybon alleged that Continental had fraudulently induced him to sign the agreement, and thus that he was entitled to sue the company for age discrimination under the ADEA. However, the district court granted summary judgment in favor of Continental, and on appeal, the Eleventh Circuit affirmed that ruling.

In rendering its decision, the Eleventh Circuit initially explained, "Section 201 of the Older Workers Benefit Protection Act prohibits a waiver of ADEA rights unless the waiver is 'knowing and voluntary.' An ADEA waiver is 'knowing and voluntary' when several statutory requirements have been met. Nonstatutory circumstances, such as fraud, duress, or coercion in connection with the execution of the waiver, may render an ADEA waiver not 'knowing and voluntary.' Under Alabama law, the elements of fraud are: (1) a misrepresentation of a material fact, (2) made willfully to deceive, recklessly, without knowledge, or mistakenly, (3) that was reasonably relied on by the plaintiff under the circumstances, and (4) that caused damage as a proximate consequence."

Turning to the facts of the case, the Eleventh Circuit concluded, "Raybon's job was eliminated when the duties that he previously performed were combined with other duties in a new position. There is no doubt about this. Raybon's successor performed not only Raybon's former duties, but significant other duties as well. Thus, Continental did not misrepresent a material fact when it told Raybon that it was combining his job with others. Furthermore, even if we were to assume that a misrepresentation occurred, Raybon's reliance on it was not reasonable because, at the time he signed the separation agreement, Raybon had the job description for the new position, had read it, and had noticed the similarities between its duties and his former duties—all of which was sufficient to put him on notice that all of his duties, i.e., his entire job, had not been eliminated. In short, the district court properly granted Continental summary judgment on Raybon's ADEA claim."

Waiver Requirements Not Met

In a 2005 decision, the Eighth Circuit ruled that a former employee may pursue his claim that his termination violated the ADEA because the waiver of claims that he signed as part of an involuntary termination program did not satisfy the statutory requirements for waivers. This ruling came in *Thomforde v. International Business Machines Corporation* (No. 04-1538).

Dale J. Thomforde worked for IBM as an engineer from 1973 to 2001. In 2001, as part of a work-force reduction, IBM implemented the "server group resource action" (SGRA), an involuntary termination program. In July 2001, IBM notified Mr. Thomforde that he had been selected for termination under the program, and the company provided him with a general release. IBM terminated Mr. Thomforde on Aug. 24, 2001, and he signed the release on September 6 of that year in exchange for severance benefits.

The release provided to Mr. Thomforde included language specifying, "You agree that this release covers, but is not limited to, claims arising from the ADEA. You agree that you will never institute a claim of any kind against IBM. You agree that you will pay all costs and expenses of defending against the suit incurred by IBM, including reasonable attorneys' fees. This covenant not to sue does not apply to actions based solely under the ADEA. That means that if you were to sue IBM only under the ADEA, you would not be liable under the terms of this release for their attorneys' fees and other costs and expenses of defending against the suit."

Mr. Thomforde was not satisfied with the reduced retirement benefits that he received following his termination, and as a result, he filed an ADEA claim against IBM in the U.S. District Court for the District of Minnesota. At trial, IBM argued that the covenant not to sue in the waiver did not "undo" Mr. Thomforde's release of his ADEA claims, but merely exempted him from li-

ability for attorneys' fees associated with defending an ADEA suit. Mr. Thomforde countered that the waiver did not satisfy the requirement of the OWBPA that a waiver be knowing and voluntary. However, the district court granted summary judgment in favor of IBM, concluding that Mr. Thomforde had clearly waived any potential claims against IBM by signing the waiver. Mr. Thomforde appealed, and the Eighth Circuit reversed the district court's ruling.

Statutory Requirements Not Satisfied

In rendering its decision, the Eighth Circuit initially explained that under the OWBPA, "The statutory requirements for waiver of ADEA claims are strict and unqualified; if an employer fails to meet any of the statutory requirements, the waiver is ineffective as a matter of law. Thus, if the agreement at issue here was not 'written in a manner calculated to be understood by the average individual eligible to participate,' then Thomforde did not release his rights under the ADEA."

Citing the language of the waiver, the Eighth Circuit stated, "The waiver language in the agreement clearly states that Thomforde, in exchange for the amount determined under the SCRA, released IBM from all claims of any kind, including claims under the ADEA. Three paragraphs later, the agreement then states that 'you agree that you will never institute a claim of any kind against IBM including, but not limited to, claims related to your employment with IBM.' The paragraph continues by stating that 'this covenant not to sue does not apply to actions based solely under the ADEA.' Thus, one plausible reading of the document reveals that the employee releases IBM from all ADEA claims and agrees not to institute a claim of any kind against IBM, except the employee may bring an action based solely under the ADEA. Without a clear understanding of the legal differences between a release and a covenant not to sue, these provisions would seem to be contradictory; how can an employee bring a suit solely under the ADEA if the employee has waived all claims under the ADEA?"

According to the Eighth Circuit, "Despite their distinct purposes, the differences between a release and a covenant not to sue are fairly amorphous and may not be readily apparent to a lay reader. The intended effect of the agreement was to release the employee's substantive claims under the ADEA, while preserving the employee's right to challenge the validity of the release through a lawsuit, as provided by the regulations. Yet, the agreement does not explain how the provisions relate to each other or the limited nature of the exception to the covenant not to sue in light of the release of claims. Once IBM chose to use the legal terms of art in the agreement, IBM had a duty to carefully explain the provisions. We can easily see how a participant under this agreement could construe the statement that 'this covenant not to sue does not apply to actions based solely under the ADEA' as an exception to the general release, not just an exception to the covenant not to sue." Accordingly, the Eighth Circuit returned the case to the district court for trial.

Another IBM Waiver Invalid

In another 2006 decision, the Ninth Circuit U.S. Court of Appeals ruled that former employees may pursue their claims under the ADEA because the waivers that the employees had signed in connection with a severance benefit package were not "calculated to be understood by the average" employee. This ruling came in *Syverson v. International Business Machines Corporation* (No. 04-16449).

In January 2001, IBM implemented a work-force reduction. As part of its work-force reduction plan, IBM offered each employee selected for termination severance pay and certain benefits in exchange for the employee signing a document entitled "Microelectronics Resource Action (MERA) General Release and Covenant Not To Sue" (MERA agreement). Along with the MERA agreement, IBM issued each selected employee a lengthy document entitled "Microelectronics Division Resource Action Employee Information Package," which detailed the job titles, ages, and numbers of those employees selected and those not selected for termination from various IBM divisions. William Syverson was one of the IBM employees selected for termination.

In a class action lawsuit filed in the U.S. District Court for the Northern District of California, Mr. Syverson alleged that the MERA agreement violated the ADEA, as amended by the OWBPA. The OWBPA specifies that employees may not waive rights or claims arising under the ADEA unless the waiver is "knowing and voluntary," and that to qualify as "knowing and voluntary," a waiver must be "written in a manner calculated to be understood" by the average employee. However, the district court dismissed the suit, holding that the MERA agreement was "written in a manner calculated

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to be understood by an average individual" and thus was "knowing and voluntary" under the OWBPA. Mr. Syverson appealed, and the Ninth Circuit reversed the district court's ruling.

In rendering its decision, the Ninth Circuit initially cited the EEOC's regulations under the ADEA, and explained, "To satisfy the 'manner calculated' requirement, 'waiver agreements must be drafted in plain language geared to the level of understanding of the individual party to the agreement or individuals eligible to participate' in a group termination plan. Employers are thus instructed to 'take into account such factors as the level of comprehension and education of typical participants.' These considerations 'usually will require the limitation or elimination of technical jargon and of long, complex sentences.'"

Provisions Of Agreement Cited

On appeal, Mr. Syverson cited two provisions of the MERA agreement: (1) the last sentence of the covenant not to sue, which read, "This release does not preclude filing a charge with the EEOC"; and (2) a footnote that read, "The [ADEA] prohibits employment discrimination based on age and is enforced by the EEOC." According to Mr. Syverson, the MERA agreement was unclear and confusing because, when read in conjunction, those two provisions convey "the impression that, notwithstanding the waiver, IBM employees could still obtain individual relief for their ADEA claims filed with the EEOC."

According to the Ninth Circuit, "The employees' core complaint is that the MERA agreement misleads participating employees to believe that, above and beyond their unaffected right to file an ADEA claim with the EEOC, they retain the right to pursue independently an ADEA claim in court. They contend that the phrasing of the release and covenant not to sue engenders confusion over whether ADEA claims are in fact covered by the release or are excepted from it. We agree, and hold that the MERA agreement does not satisfy the 'manner calculated' requirement of the OWBPA. The employees' waiver of ADEA claims, along with the accompanying covenant not to sue, was therefore not 'knowing or voluntary,' and both are unenforceable."

The Ninth Circuit went on to conclude, "The MERA agreement contains, on the one hand, a release of '*all* claims,' including 'claims arising from the ADEA,' and, on the other hand, a 'covenant not to sue' which includes an 'agreement to never institute a claim of *any* kind against IBM related to employment with IBM.' It also provides, however, that 'this covenant not to sue *does not apply* to actions based solely under the [ADEA].' The existence of a technical distinction between legal terms does nothing to demonstrate that the average employee confronted with the MERA agreement would grasp the import of the distinction in a meaningful way. Instead, to a lay reader—and to many lawyers as well—these provisions first seem to release all ADEA claims an employee might have, and then to preserve a right to sue under the ADEA, implying retention, not release, of ADEA claims." (Emphasis in original.)

Same Outcome In *Kruchowski*

In another 2005 decision, the Tenth Circuit U.S. Court of Appeals ruled that a group of 16 plaintiffs could pursue claims against their former employer under the ADEA because the waivers that the employees had signed did not comply with the requirements of the ADEA, as amended by the OWBPA. The Tenth Circuit's ruling came in *Kruchowski v. The Weyerhaeuser Company* (No. 04-7118).

The plaintiffs were among 31 employees of the Weyerhaeuser Company selected for a work-force reduction at the firm's Valliant Containerboard Mill in Valliant, Okla. At the time each employee was informed of his or her termination, each received a "group termination notification." Attached to the notification was a list of those employees selected for termination and eligible for severance pay and those employees not selected for termination and therefore not eligible for severance pay. The employees on both lists were identified only by job titles and ages. After the employees were terminated, Weyerhaeuser mailed each of them a release of claims and a calculation of their severance benefits.

Subsequently, the 16 plaintiffs filed suit against Weyerhaeuser in the U.S. District Court for the Eastern District of Oklahoma, asserting claims of discrimination under the ADEA. However, the district court granted

summary judgment in favor of Weyerhaeuser, holding that the releases signed by the plaintiffs complied with the OWBPA and thus that the plaintiffs could not pursue their ADEA claims. The plaintiffs appealed, and the Tenth Circuit reversed the district court's ruling.

In rendering its decision, the Tenth Circuit initially observed, "The OWBPA imposes specific requirements for releases covering ADEA claims. This court has summarized these statutory requirements as follows: (1) the release must be written in a manner calculated to be understood by the employee signing the release; (2) the release must specifically refer to claims arising under the ADEA; (3) the release must not purport to encompass claims that may arise after the date of execution; (4) the employer must provide consideration for the waiver or release of ADEA claims above and beyond that to which the employee would otherwise already be entitled; (5) the employee must be advised in writing to consult with an attorney prior to executing the agreement; (6) the employee must be given at least 45 days to consider signing if the incentive is offered to a group; (7) the release must allow the employee to revoke the agreement up to seven days after signing; and (8) if the release is offered in connection with an exit incentive or group termination program, the employer must provide information relating to the job titles and ages of those eligible for the program, and the corresponding information relating to employees in the same job titles who were not eligible or not selected for the program."

Waivers Were Invalid

Turning to the waivers at issue, the Tenth Circuit cited Sec. 626(f)(1)(H) of the ADEA, which specifies that a waiver offered in connection with an employment termination program must inform employees as to "any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program." The court then stated, "Plaintiffs argue that the release fails as a matter of law because it did not contain the required group informational disclosures. Although the group termination notice established the decisional unit as all salaried employees of defendant employed at the Valliant Containerboard Mill, defendant later indicated the decisional unit was only those salaried employees who reported to the mill manager. Plaintiffs correctly argue that these are two separate groups. With the change in the decisional unit, 15 employees of the mill, over 10%, were omitted from the job titles and ages provided in the termination notice."

According to the Tenth Circuit, "The statute requires that terminated employees be informed of the decisional unit at the time they consider whether to waive any ADEA claims. Defendant failed to provide the correct, mandated information when it informed plaintiffs that the decisional unit included all salaried employees of the mill. Because the information defendant provided did not meet the strict and unqualified requirement of the OWBPA, the release is ineffective as a matter of law. Plaintiffs therefore did not waive their right to pursue claims under the ADEA."

The Tenth Circuit went on to conclude, "The OWBPA requires the employer to inform affected employees about the 'class, unit, or group of individuals covered by the program, any eligibility factors for such program, and any time limits applicable to such program.' Defendant stated that the eligibility factors it used in analyzing each salaried employee reporting to the mill manager were the leadership, abilities, technical skills, and behavior of each employee and whether each employee's skills matched defendant's business needs. Defendant admitted that it did not provide this eligibility information to plaintiffs. Defendant's failure to provide information about eligibility factors resulted in a failure to comply with the OWBPA's information requirement." Accordingly, the Tenth Circuit returned the case to the district court for trial. ■

Chemicals, Inc. (11 F.3d 534). In its opinion in the case, the Fifth Circuit specifically criticized the Seventh Circuit's decision in *Oberg*.

In September 1990, Champlin Refining and Chemicals informed the employees in its Irving, Texas, office that the company was merging with Citgo Petroleum Corporation and that the office would be shut down. Champlin offered the employees of the office a termination pay plan under which they would receive severance payments in exchange for waiving any ADEA and other legal claims against the company.

In January 1992, five employees who had signed the waivers and received severance payments ranging from $25,000 to $90,000 filed suit against Champlin, alleging that they had been laid off because of their age in violation of the ADEA. In the suit, the laid-off employees contended that the waivers were invalid because the company did not provide the required 45-day consideration period.

At trial, Champlin pointed out that the severance pay agreement specifically gave employees a 45-day consideration period. However, the employees countered that they were verbally pressured to sign the waivers before their termination date, which was fewer than 45 days after they were informed of the office shutdown.

The U.S. District Court for the Northern District of Texas dismissed the suit, holding that the employees had knowingly and voluntarily waived their right to pursue age discrimination claims in accordance with the OWBPA. Furthermore, the district court found that even if the waivers were invalid when executed, the employees subsequently ratified the waivers by refusing to return the severance payments. The employees appealed, and the Fifth Circuit affirmed the dismissal of their suit.

Waivers Were Ratified

Initially, the Fifth Circuit observed that, without a trial, it would be impossible to determine whether Champlin actually pressured the employees to sign the waivers before the 45-day consideration period expired. Thus, the court noted that it could not determine whether the waivers were in fact knowing and voluntary under the OWBPA. However, the court went on to hold that even though the waivers may not have met the requirements of the OWBPA at the time they were executed, this issue was "immaterial" in light of the fact that the employees ratified the waivers by retaining the severance payments.

In handing down its ruling, the Fifth Circuit discussed the concept of void contracts versus voidable contracts. According to the court, if a contract is void, it is not legally binding. However, voidable contracts are different, the court noted. Under voidable contracts, a party may be able to avoid a promise it has made, but that party may again become bound by the contract by making a new promise. The court referred to this process as "contractual ratification."

Turning to the facts of the case, the Fifth Circuit observed that the issue to be resolved was whether waivers that fail to meet the requirements of the OWBPA are void or voidable. If such waivers are void, then they have no effect. However, the court held that defective waiver agreements "are voidable and not void." According to the court, this means that through a later act of ratification—in this case, the retention of the severance payments—the employees became bound by the waivers. Consequently, the court ruled that the employees could not pursue claims under the ADEA.

Oberg Ruling Criticized

In rendering its decision, the Fifth Circuit criticized the ruling of the Seventh Circuit in *Oberg*. Asserting that the *Oberg* decision "is at odds with the legislative history and congressional intent behind the OWBPA," the Fifth Circuit stated that it would be inconsistent with one of the expressed purposes of the ADEA to rule that defective waiver agreements are void. That purpose is to help employers and employees find ways of addressing problems that arise from the impact of age on employment, the court explained.

According to the Fifth Circuit, "The simplest and easiest way to further this purpose is to give effect to private agreements which resolve age-related employment problems without the inevitable delays and costs associated with litigation." The court went on to state that, "were employers forced to assume the risk that noncompliance with all of the statutory requirements" of the OWBPA would render waiver agreements void, "they would be disinclined to propose such solutions."

Accordingly, the Fifth Circuit concluded, "Neither

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the language nor the purpose of the OWBPA indicates a congressional desire to deprive an employee of the ability to ratify a waiver that fails to meet the requirements of the OWBPA. When the plaintiffs chose to retain and not tender back to Champlin the benefits paid them in consideration for their promise not to sue Champlin, they manifested their intention to be bound by the waivers and, thus, made a new promise to abide by their terms."

The Sixth Circuit's Position

In a 1997 decision, the Sixth Circuit U.S. Court of Appeals joined the Seventh Circuit, holding that plaintiffs challenging the validity of waivers under the OWBPA are not required to return the benefits they received in exchange for executing the waivers. The Sixth Circuit's ruling came in *Raczak v. Ameritech Services, Inc.* (103 F.2d 1257).

In September 1992, Michigan Bell Telephone Company and Ameritech Services, a subsidiary of Ameritech Corporation, announced that they were implementing a downsizing program for management employees. The downsizing program consisted of both voluntary and involuntary components. Under the voluntary component, any management employee who elected to take early retirement by Nov. 2, 1992, received two additional years of service credit, a supplemental payment, and a favorable interest rate in calculating lump sum pension distributions.

The involuntary component of the downsizing program involved two phases. In the first phase, the companies designated an "at-risk pool" consisting of the lowest performing 30% of managers, based on 1990 and 1991 incentive payments and bonuses. Workers in the at-risk pools then were grouped according to salary grade. In the second phase, the at-risk managers were classified based on assessments of their job performance, specific job skills or expertise, and other factors. These workers then were ranked based on their average rating.

Managers at the two companies received an information packet describing the supplemental severance benefits that were available if they signed a waiver releasing all of their legal claims, including claims under the ADEA. The managers also received a chart that listed the numbers of employees selected and not selected for involuntary termination, with information broken down by an employee's age and salary grade.

Subsequently, Gary Raczak and a number of other former employees of the two companies filed suit against Ameritech in the U.S. District Court for the Eastern District of Michigan. In the suit, the former employees alleged that they had been selected for the downsizing program on the basis of age in violation of the ADEA and that the waivers they signed were invalid because the waivers failed to provide all of the information required by the OWBPA. Ameritech filed a counterclaim for breach of contract, asserting that the employees' refusal to return the enhanced severance benefits that they had received barred them from contesting the validity of the waivers.

OWBPA Requirements Are "Unclear"

Among other provisions, the OWBPA requires that a waiver of ADEA rights be "written in a manner calculated to be understood" by the average employee and that the waiver provide information on "the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program." The district court concluded that the waivers signed by the former employees were unenforceable because they failed to provide the job titles of individuals eligible or selected for the downsizing program; instead, the waivers provided only the salary grade for each individual. The district court further held that the employees' acceptance and retention of the enhanced severance benefits did not ratify the defective waivers.

Ameritech appealed, arguing that organizing the information in the waivers by salary grade was the best method of providing the information because job titles did not adequately describe or identify an employee's position. Furthermore, the company contended that using salary grade was appropriate because it compared employees by salary grade in selecting the persons to be terminated. The former employees countered that the failure to provide the information on job titles prevented them from accurately assessing whether they had valid claims under the ADEA.

Initially, the Sixth Circuit noted that the terms "job title," "job classification," and "organizational unit" are not defined in the OWBPA and therefore that the provisions of the law containing those terms are "unclear." The appellate court went on to state that those terms "should be interpreted on a case-by-case basis, with an eye to the purposes of the Act, rather than as a dogmatic exercise in definition." According to the court, in inter

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preting the requirements of the OWBPA, "the touchstone should be the 'understandable to the average worker' standard. If the employer provides information that purports to comply with the statute, then the inquiry should move to the question of understandability."

The Sixth Circuit thus returned the case to the district court for further proceedings consistent with its opinion. In so doing, it instructed the district court to consider evidence regarding the following factors: whether Ameritech used the job titles and classifications in its work processes before the downsizing, whether they were used in assessing or choosing workers for downsizing, and whether they were meaningful to the average worker's understanding of the workplace and the downsizing process.

No Tender-Back Requirement

With respect to the issue of the employees' retention of the enhanced severance benefits, the Sixth Circuit ruled that plaintiffs challenging the validity of waivers are not required to tender back the consideration they received as a precondition to bringing suit under the ADEA. In so ruling, the appeals court stated, "It would be inequitable and contrary to the protective nature of the OWBPA to require plaintiffs to tender back the consideration received in exchange for executing waivers where the waivers were obtained without compliance with the OWBPA. Furthermore, it would deter meritorious challenges to releases. Potential plaintiffs would be faced with the Hobsonian choice of releasing their claims and receiving payments immediately or filing an age discrimination claim that would likely take years to resolve. Requiring that release amounts be subtracted from judgment amounts would be a more equitable remedy than forcing potential claimants to tender back benefits prior to bringing suit."

Finally, the Sixth Circuit concluded that "a tender-back requirement would contradict the concerns that Congress evidenced in enacting the OWBPA. Congress established the OWBPA because of its concern that employees may waive their rights prior to becoming aware that they are entitled to legal and equitable relief. It was the intent of Congress that waivers would not preclude parties from bringing suit under the OWBPA. A tender-back requirement is an effective bar to suit and, as such, is incongruous with the intent of the OWBPA."

Third Circuit Agrees In *Long*

Shortly after the *Raczak* case was decided, the Third Circuit U.S. Court of Appeals sided with the Sixth and Seventh Circuits when it ruled that a laid-off employee who accepted a severance payment in exchange for signing a waiver of ADEA rights was not required to return the severance payment in order to file an age discrimination claim against his former employer. The Third Circuit's ruling came in *Long v. Sears Roebuck & Co.* (105 F.3d 1529).

Thomas Long worked as a salesman in Sears' home improvement product and services division. In January 1993, Sears announced a nationwide closing of that division, and the company informed the division's employees that they would be laid off unless they were transferred to other positions within the company.

Then, in February 1993, Sears offered Mr. Long and certain other employees an enhanced severance package. In exchange for the package, eligible employees were asked to sign a waiver discharging Sears from all lawsuits, including ADEA actions. Mr. Long signed the waiver and received more than $39,000 in severance benefits.

However, in January 1995, Mr. Long filed suit against Sears in the U.S. District Court for the Eastern District of Pennsylvania. In the suit, Mr. Long asserted a claim of age discrimination under the ADEA, and he further alleged that the waiver of ADEA rights was invalid because it failed to comply with the requirements of the OWBPA. Sears countered that the waiver did in fact comply with the OWBPA, and also argued that Mr. Long's failure to return his severance payment served to ratify the waiver, thereby precluding any claims that the waiver was invalid.

The district court granted summary judgment in favor of Sears, concluding that even if the waiver failed to comply with the OWBPA, Mr. Long's retention of his severance payment ratified the release and operated to bar his ADEA claim. Mr. Long appealed, and the Third Circuit reversed the district court's ruling.

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Employee Need Not Return Severance Pay To Challenge ADEA Waiver, According To Supreme Court And EEOC

Court Looks To Congress' Intent

After reviewing the opinions in both *Oberg* and *Wamsley,* the Third Circuit concluded that the Seventh Circuit's reasoning in *Oberg* was "more consistent with the purposes underlying the OWBPA." Echoing the opinion in *Oberg,* the Third Circuit explained that "the enactment of the OWBPA changed the legal landscape with respect to the release of ADEA claims," and stated, "In light of the law as it now stands, the ratification doctrine does not apply to ADEA releases which fail to comply with the OWBPA."

Initially, the Third Circuit rejected the Fifth Circuit's focus on the issue of "void" versus "voidable" contracts. According to the court, "No matter how we characterize a release which fails to comply with the OWBPA—void or voidable—we must, under either theory, decide whether Long's retention of severance benefits should prevent him from pursuing his ADEA claim. Because we conclude that neither ratification nor tender back was meant to apply in the ADEA context, we need not address the void/voidable distinction."

Citing the numerous requirements that a waiver must meet in order to be valid under the OWBPA, including the right to seek counsel, the 45-day consideration period, the seven-day right of revocation, and the provision of detailed information about those affected by group terminations, the Third Circuit noted that those requirements "clearly exceed the protections available under common law." Accordingly, the court stated, "We are convinced that in enacting the OWBPA, Congress intended to occupy the area of ADEA releases and, in doing so, to supplant the common law."

The Third Circuit thus concluded, "Given the clear and specific goals of the OWBPA, we cannot accept that Congress intended that the common law doctrine of ratification be applied to releases invalid under the OWBPA. The common law fiction of a 'new promise' forged from retention of benefits has no place in this statutory scheme. To conclude otherwise would be to say that Congress only intended that the OWBPA requirements apply to the 'first' waiver. Such a result is inconsistent with the aims of the Act and works a hardship on employees who could not have known that by retaining severance pay they were, in effect, declining the protection of the OWBPA. This conclusion applies as well to the common law concept of tender back of benefits as a prerequisite to suit under the ADEA."

Supreme Court Resolves The Issue

In its 1998 ruling in *Oubre v. Entergy Operations* (522 U.S. 422), the Supreme Court resolved the split among the appellate courts over the issue of ratification of defective ADEA waivers. In *Oubre,* the Court held that an employee who accepted a severance payment in exchange for signing a release that did not meet the requirements of the OWBPA was not required to return the severance payment in order to file a lawsuit under the ADEA.

In the case, Dolores Oubre worked as an assistant scheduler for Entergy Operations, a New Orleans-based power company. In 1994, Ms. Oubre received a poor performance rating. Ms. Oubre then met with her supervisor on Jan. 17, 1995, and was given the option of either improving her performance during the coming year or accepting a voluntary severance package.

On Jan. 31, 1995, Ms. Oubre, who was age 41, decided to accept the severance offer. Accordingly, Ms. Oubre signed a release in which she agreed "to waive, settle, release, and discharge any and all claims, demands, damages, actions, or causes of action" against Entergy. In exchange for signing the release, Ms. Oubre received six installment payments over the next four months totaling $6,258.

However, after receiving the last severance payment, Ms. Oubre filed a lawsuit in the U.S. District Court for the Eastern District of Louisiana alleging that she was terminated because of her age in violation of the ADEA. Ms. Oubre also charged that the waiver she signed was invalid because she was not given sufficient time to decide whether to accept the severance offer. Entergy countered that even if the waiver was defective, Ms. Oubre ratified the waiver by failing to return the severance payments she had received. The district court agreed with Entergy's argument and granted summary judgment in favor of the company, and the Fifth Circuit affirmed that decision. Ms. Oubre then turned to the Supreme Court, which reversed the Fifth Circuit's ruling.

"Statutory Command Is Clear"

In its opinion, the Court initially observed that the waiver that Ms. Oubre had signed did not meet the specific requirements of the OWBPA. According to the Court, the waiver failed to comply with the requirements of the OWBPA in at least three respects: (1) it did not

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give Ms. Oubre enough time to consider her options; (2) it did not give her seven days to change her mind regarding the offer; and (3) it did not make specific reference to ADEA claims.

The Court then went on to cite the language of the OWBPA, which specifies, "An individual may not waive any right or claim under [the ADEA] unless the waiver is knowing and voluntary. A waiver may not be considered knowing and voluntary unless at a minimum" the waiver satisfies certain enumerated requirements, including the three listed in the preceding paragraph. Based on that language, the Court stated, "The statutory command is clear: an employee 'may not waive' an ADEA claim unless the waiver or release satisfies the OWBPA's requirements."

Adding that the policy of the OWBPA clearly is to protect the rights and benefits of older workers, the Court explained, "The OWBPA implements Congress' policy via a strict, unqualified statutory stricture on waivers, and we are bound to take Congress at its word. Congress imposed specific duties on employers who seek releases of certain claims created by statute. Congress delineated these duties with precision and without qualification: an employee 'may not waive' an ADEA claim unless the employer complies with the statute. Courts cannot with ease presume ratification of that which Congress forbids."

In rejecting Entergy's argument that Ms. Oubre ratified the waiver by failing to return the severance payments, the Court stated, "The OWBPA sets up its own regime for assessing the effect of ADEA waivers, separate and apart from contract law. The statute creates a series of prerequisites for knowing and voluntary waivers and imposes affirmative duties of disclosure and waiting periods. The OWBPA governs the effect under federal law of waivers or releases of ADEA claims and incorporates no exceptions or qualifications. The text of the OWBPA forecloses the employer's defense, notwithstanding how general contract principles would apply to non-ADEA claims."

According to the Court, a ratification rule "would frustrate the statute's practical operation as well as its formal command. In many instances, a discharged employee likely will have spent the monies received and will lack the means to tender their return. These realities might tempt employers to risk noncompliance with the OWBPA's waiver provisions, knowing it will be difficult to repay the monies and relying on ratification. We ought not to open the door to an evasion of the statute by this device."

In concluding its opinion, the Court stated, "Oubre's cause of action arises under the ADEA, and the release can have no effect on her ADEA claim unless it complies with the OWBPA. In this case, both sides concede the release the employee signed did not comply with the requirements of the OWBPA. Since Oubre's release did not comply with the OWBPA's stringent safeguards, it is unenforceable against her insofar as it purports to waive or release her ADEA claims. As a statutory matter, the release cannot bar her ADEA suit, irrespective of the validity of the contract as to other claims."

EEOC Codifies Ruling

As stated at the beginning of this report, in December 2000, the EEOC issued final regulations that codified the Court's ruling in *Oubre*. As specified by the final regulations, an individual alleging that a waiver agreement, covenant not to sue, or other equivalent arrangement was not knowing and voluntary under the ADEA is not required to tender back the consideration given for that agreement before filing either a lawsuit or a charge of discrimination with the EEOC. The regulations stress that retention of consideration does not foreclose a challenge to any waiver agreement, covenant not to sue, or other equivalent arrangement; nor does such retention constitute the ratification of any waiver agreement, covenant not to sue, or other equivalent arrangement.

Furthermore, the regulations specify that no ADEA waiver agreement, covenant not to sue, or other equivalent arrangement may impose any condition precedent, any penalty, or any other limitation adversely affecting any individual's right to challenge the agreement. This prohibition includes, but is not limited to, provisions requiring employees to tender back consideration received, as well as provisions allowing employers to recover attorneys' fees and/or damages because of the filing of an ADEA suit. However, the regulations add that this prohibition is not intended to preclude employers from recovering attorneys' fees or costs specifically

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authorized under federal law.

As provided by the regulations, where an employee successfully challenges a waiver agreement, covenant not to sue, or other equivalent arrangement, and the employee prevails on the merits of an ADEA claim, courts have the discretion to determine whether an employer is entitled to restitution, recoupment, or setoff against the employee's monetary award. However, such a reduction cannot exceed the amount recovered by the employee; or the consideration the employee received for signing the waiver agreement, covenant not to sue, or other equivalent arrangement, whichever is less. The regulations add that in a case involving more than one plaintiff, any reduction must be applied on a plaintiff-by-plaintiff basis; no individual's award can be reduced based on the consideration received by any other person. Finally, the regulations specify that no employer may abrogate its duties to any signatory under a waiver agreement, covenant not to sue, or other equivalent arrangement, even if one or more of the signatories or the EEOC successfully challenges the validity of that agreement under the ADEA. ⊞

Subpart B—Substantive Regulations

§ 1625.21 Apprenticeship programs.

All apprenticeship programs, including those apprenticeship programs created or maintained by joint labor-management organizations, are subject to the prohibitions of sec. 4 of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. 623. Age limitations in apprenticeship programs are valid only if excepted under sec. 4(f)(1) of the Act, 29 U.S.C. 623(f)(1), or exempted by the Commission under sec. 9 of the Act, 29 U.S.C. 628, in accordance with the procedures set forth in 29 CFR 1627.15.

[61 FR 15378, Apr. 8, 1996]

§ 1625.22 Waivers of rights and claims under the ADEA.

(a) *Introduction.* (1) Congress amended the ADEA in 1990 to clarify the prohibitions against discrimination on the basis of age. In Title II of OWBPA, Congress addressed waivers of rights and claims under the ADEA, amending section 7 of the ADEA by adding a new subsection (f).

(2) Section 7(f)(1) of the ADEA expressly provides that waivers may be valid and enforceable under the ADEA only if the waiver is ''knowing and voluntary''. Sections 7(f)(1) and 7(f)(2) of the ADEA set out the minimum requirements for determining whether a waiver is knowing and voluntary.

(3) Other facts and circumstances may bear on the question of whether the waiver is knowing and voluntary, as, for example, if there is a material mistake, omission, or misstatement in the information furnished by the employer to an employee in connection with the waiver.

(4) The rules in this section apply to all waivers of ADEA rights and claims, regardless of whether the employee is employed in the private or public sector, including employment by the United States Government.

(b) *Wording of Waiver Agreements.* (1) Section 7(f)(1)(A) of the ADEA provides, as part of the minimum requirements for a knowing and voluntary waiver, that:

> The waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate.

(2) The entire waiver agreement must be in writing.

(3) Waiver agreements must be drafted in plain language geared to the level of understanding of the individual party to the agreement or individuals eligible to participate. Employers should take into account such factors as the level of comprehension and education of typical participants. Consideration of these factors usually will require the limitation or elimination of technical jargon and of long, complex sentences.

(4) The waiver agreement must not have the effect of misleading, misinforming, or failing to inform participants and affected individuals. Any advantages or disadvantages described shall be presented without either exaggerating the benefits or minimizing the limitations.

(5) Section 7(f)(1)(H) of the ADEA, relating to exit incentive or other employment termination programs offered to a group or class of employees, also contains a requirement that information be conveyed ''in writing in a manner calculated to be understood by the average participant.'' The same standards applicable to the similar language in section 7(f)(1)(A) of the ADEA apply here as well.

(6) Section 7(f)(1)(B) of the ADEA provides, as part of the minimum requirements for a knowing and voluntary waiver, that ''the waiver specifically refers to rights or claims under this Act.'' Pursuant to this subsection, the waiver agreement must refer to the Age Discrimination in Employment Act (ADEA) by name in connection with the waiver.

(7) Section 7(f)(1)(E) of the ADEA requires that an individual must be ''advised in writing to consult with an attorney prior to executing the agreement.''

(c) *Waiver of future rights.* (1) Section 7(f)(1)(C) of the ADEA provides that:

> A waiver may not be considered knowing and voluntary unless at a minimum . . . the individual does not waive rights or claims

that may arise after the date the waiver is executed.

(2) The waiver of rights or claims that arise following the execution of a waiver is prohibited. However, section 7(f)(1)(C) of the ADEA does not bar, in a waiver that otherwise is consistent with statutory requirements, the enforcement of agreements to perform future employment-related actions such as the employee's agreement to retire or otherwise terminate employment at a future date.

(d) *Consideration.* (1) Section 7(f)(1)(D) of the ADEA states that:

> A waiver may not be considered knowing and voluntary unless at a minimum * * * the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled.

(2) ''Consideration in addition'' means anything of value in addition to that to which the individual is already entitled in the absence of a waiver.

(3) If a benefit or other thing of value was eliminated in contravention of law or contract, express or implied, the subsequent offer of such benefit or thing of value in connection with a waiver will not constitute ''consideration'' for purposes of section 7(f)(1) of the ADEA. Whether such elimination as to one employee or group of employees is in contravention of law or contract as to other employees, or to that individual employee at some later time, may vary depending on the facts and circumstances of each case.

(4) An employer is not required to give a person age 40 or older a greater amount of consideration than is given to a person under the age of 40, solely because of that person's membership in the protected class under the ADEA.

(e) *Time periods.* (1) Section 7(f)(1)(F) of the ADEA states that:

> A waiver may not be considered knowing and voluntary unless at a minimum * * *
>
> (i) The individual is given a period of at least 21 days within which to consider the agreement; or
>
> (ii) If a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement.

(2) Section 7(f)(1)(G) of the ADEA states:

> A waiver may not be considered knowing and voluntary unless at a minimum . . . the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired.

(3) The term ''exit incentive or other employment termination program'' includes both voluntary and involuntary programs.

(4) The 21 or 45 day period runs from the date of the employer's final offer. Material changes to the final offer restart the running of the 21 or 45 day period; changes made to the final offer that are not material do not restart the running of the 21 or 45 day period. The parties may agree that changes, whether material or immaterial, do not restart the running of the 21 or 45 day period.

(5) The 7 day revocation period cannot be shortened by the parties, by agreement or otherwise.

(6) An employee may sign a release prior to the end of the 21 or 45 day time period, thereby commencing the mandatory 7 day revocation period. This is permissible as long as the employee's decision to accept such shortening of time is knowing and voluntary and is not induced by the employer through fraud, misrepresentation, a threat to withdraw or alter the offer prior to the expiration of the 21 or 45 day time period, or by providing different terms to employees who sign the release prior to the expiration of such time period. However, if an employee signs a release before the expiration of the 21 or 45 day time period, the employer may expedite the processing of the consideration provided in exchange for the waiver.

(f) *Informational requirements.* (1) Introduction. (i) Section 7(f)(1)(H) of the ADEA provides that:

> A waiver may not be considered knowing and voluntary unless at a minimum . . . if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer (at the commencement of the period specified in subparagraph (F)) [which provides time periods for employees to consider the waiver] informs the individual in writing in a manner calculated to

be understood by the average individual eligible to participate, as to—

(i) Any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and

(ii) The job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

(ii) Section 7(f)(1)(H) of the ADEA addresses two principal issues: to whom information must be provided, and what information must be disclosed to such individuals.

(iii)(A) Section 7(f)(1)(H) of the ADEA references two types of ''programs'' under which employers seeking waivers must make written disclosures: ''exit incentive programs'' and ''other employment termination programs.'' Usually an ''exit incentive program'' is a voluntary program offered to a group or class of employees where such employees are offered consideration in addition to anything of value to which the individuals are already entitled (hereinafter in this section, ''additional consideration'') in exchange for their decision to resign voluntarily and sign a waiver. Usually ''other employment termination program'' refers to a group or class of employees who were involuntarily terminated and who are offered additional consideration in return for their decision to sign a waiver.

(B) The question of the existence of a ''program'' will be decided based upon the facts and circumstances of each case. A ''program'' exists when an employer offers additional consideration for the signing of a waiver pursuant to an exit incentive or other employment termination (e.g., a reduction in force) to two or more employees. Typically, an involuntary termination program is a standardized formula or package of benefits that is available to two or more employees, while an exit incentive program typically is a standardized formula or package of benefits designed to induce employees to sever their employment voluntarily. In both cases, the terms of the programs generally are not subject to negotiation between the parties.

(C) Regardless of the type of program, the scope of the terms ''class,'' ''unit,'' ''group,'' ''job classification,'' and ''organizational unit'' is determined by examining the ''decisional unit'' at issue. (*See* paragraph (f)(3) of this section, ''The Decisional Unit.'')

(D) A ''program'' for purposes of the ADEA need not constitute an ''employee benefit plan'' for purposes of the Employee Retirement Income Security Act of 1974 (ERISA). An employer may or may not have an ERISA severance plan in connection with its OWBPA program.

(iv) The purpose of the informational requirements is to provide an employee with enough information regarding the program to allow the employee to make an informed choice whether or not to sign a waiver agreement.

(2) To whom must the information be given. The required information must be given to each person in the decisional unit who is asked to sign a waiver agreement.

(3) The decisional unit. (i)(A) The terms ''class,'' ''unit,'' or ''group'' in section 7(f)(1)(H)(i) of the ADEA and ''job classification or organizational unit'' in section 7(f)(1)(H)(ii) of the ADEA refer to examples of categories or groupings of employees affected by a program within an employer's particular organizational structure. The terms are not meant to be an exclusive list of characterizations of an employer's organization.

(B) When identifying the scope of the ''class, unit, or group,'' and ''job classification or organizational unit,'' an employer should consider its organizational structure and decision-making process. A ''decisional unit'' is that portion of the employer's organizational structure from which the employer chose the persons who would be offered consideration for the signing of a waiver and those who would not be offered consideration for the signing of a waiver. The term ''decisional unit'' has been developed to reflect the process by which an employer chose certain employees for a program and ruled out others from that program.

(ii)(A) The variety of terms used in section 7(f)(1)(H) of the ADEA demonstrates that employers often use differing terminology to describe their organizational structures. When identifying the population of the decisional unit, the employer acts on a case-by-

case basis, and thus the determination of the appropriate class, unit, or group, and job classification or organizational unit for purposes of section 7(f)(1)(H) of the ADEA also must be made on a case-by-case basis.

(B) The examples in paragraph (f)(3)(iii), of this section demonstrate that in appropriate cases some subgroup of a facility's work force may be the decisional unit. In other situations, it may be appropriate for the decisional unit to comprise several facilities. However, as the decisional unit is typically no broader than the facility, in general the disclosure need be no broader than the facility. ''Facility'' as it is used throughout this section generally refers to place or location. However, in some circumstances terms such as ''school,'' ''plant,'' or ''complex'' may be more appropriate.

(C) Often, when utilizing a program an employer is attempting to reduce its workforce at a particular facility in an effort to eliminate what it deems to be excessive overhead, expenses, or costs from its organization at that facility. If the employer's goal is the reduction of its workforce at a particular facility and that employer undertakes a decision-making process by which certain employees of the facility are selected for a program, and others are not selected for a program, then that facility generally will be the decisional unit for purposes of section 7(f)(1)(H) of the ADEA.

(D) However, if an employer seeks to terminate employees by exclusively considering a particular portion or subgroup of its operations at a specific facility, then that subgroup or portion of the workforce at that facility will be considered the decisional unit.

(E) Likewise, if the employer analyzes its operations at several facilities, specifically considers and compares ages, seniority rosters, or similar factors at differing facilities, and determines to focus its workforce reduction at a particular facility, then by the nature of that employer's decision-making process the decisional unit would include all considered facilities and not just the facility selected for the reductions.

(iii) The following examples are not all-inclusive and are meant only to assist employers and employees in determining the appropriate decisional unit. Involuntary reductions in force typically are structured along one or more of the following lines:

(A) *Facility-wide:* Ten percent of the employees in the Springfield facility will be terminated within the next ten days;

(B) *Division-wide:* Fifteen of the employees in the Computer Division will be terminated in December;

(C) *Department-wide:* One-half of the workers in the Keyboard Department of the Computer Division will be terminated in December;

(D) *Reporting:* Ten percent of the employees who report to the Vice President for Sales, wherever the employees are located, will be terminated immediately;

(E) *Job Category:* Ten percent of all accountants, wherever the employees are located, will be terminated next week.

(iv) In the examples in paragraph (f)(3)(iii) of this section, the decisional units are, respectively:

(A) The Springfield facility;

(B) The Computer Division;

(C) The Keyboard Department;

(D) All employees reporting to the Vice President for Sales; and

(E) All accountants.

(v) While the particular circumstances of each termination program will determine the decisional unit, the following examples also may assist in determining when the decisional unit is other than the entire facility:

(A) A number of small facilities with interrelated functions and employees in a specific geographic area may comprise a single decisional unit;

(B) If a company utilizes personnel for a common function at more than one facility, the decisional unit for that function (i.e., accounting) may be broader than the one facility;

(C) A large facility with several distinct functions may comprise a number of decisional units; for example, if a single facility has distinct internal functions with no employee overlap (i.e., manufacturing, accounting, human resources), and the program is confined to a distinct function, a

smaller decisional unit may be appropriate.

(vi)(A) For purposes of this section, higher level review of termination decisions generally will not change the size of the decisional unit unless the reviewing process alters its scope. For example, review by the Human Resources Department to monitor compliance with discrimination laws does not affect the decisional unit. Similarly, when a regional manager in charge of more than one facility reviews the termination decisions regarding one of those facilities, the review does not alter the decisional unit, which remains the one facility under consideration.

(B) However, if the regional manager in the course of review determines that persons in other facilities should also be considered for termination, the decisional unit becomes the population of all facilities considered. Further, if, for example, the regional manager and his three immediate subordinates jointly review the termination decisions, taking into account more than one facility, the decisional unit becomes the populations of all facilities considered.

(vii) This regulatory section is limited to the requirements of section 7(f)(1)(H) and is not intended to affect the scope of discovery or of substantive proceedings in the processing of charges of violation of the ADEA or in litigation involving such charges.

(4) Presentation of information. (i) The information provided must be in writing and must be written in a manner calculated to be understood by the average individual eligible to participate.

(ii) Information regarding ages should be broken down according to the age of each person eligible or selected for the program and each person not eligible or selected for the program. The use of age bands broader than one year (such as ''age 20–30'') does not satisfy this requirement.

(iii) In a termination of persons in several established grade levels and/or other established subcategories within a job category or job title, the information shall be broken down by grade level or other subcategory.

(iv) If an employer in its disclosure combines information concerning both voluntary and involuntary terminations, the employer shall present the information in a manner that distinguishes between voluntary and involuntary terminations.

(v) If the terminees are selected from a subset of a decisional unit, the employer must still disclose information for the entire population of the decisional unit. For example, if the employer decides that a 10% RIF in the Accounting Department will come from the accountants whose performance is in the bottom one-third of the Division, the employer still must disclose information for all employees in the Accounting Department, even those who are the highest rated.

(vi) An involuntary termination program in a decisional unit may take place in successive increments over a period of time. Special rules apply to this situation. Specifically, information supplied with regard to the involuntary termination program should be cumulative, so that later terminees are provided ages and job titles or job categories, as appropriate, for all persons in the decisional unit at the beginning of the program and all persons terminated to date. There is no duty to supplement the information given to earlier terminees so long as the disclosure, at the time it is given, conforms to the requirements of this section.

(vii) The following example demonstrates one way in which the required information could be presented to the employees. (This example is not presented as a prototype notification agreement that automatically will comply with the ADEA. Each information disclosure must be structured based upon the individual case, taking into account the corporate structure, the population of the decisional unit, and the requirements of section 7(f)(1)(H) of the ADEA): Example: Y Corporation lost a major construction contract and determined that it must terminate 10% of the employees in the Construction Division. Y decided to offer all terminees $20,000 in severance pay in exchange for a waiver of all rights. The waiver provides the section 7(f)(1)(H) of the ADEA information as follows:

(A) The decisional unit is the Construction Division.

(B) All persons in the Construction Division are eligible for the program. All persons who are being terminated in our November RIF are selected for the program.

(C) All persons who are being offered consideration under a waiver agreement must sign the agreement and return it to the Personnel Office within 45 days after receiving the waiver. Once the signed waiver is returned to the Personnel Office, the employee has 7 days to revoke the waiver agreement.

(D) The following is a listing of the ages and job titles of persons in the Construction Division who were and were not selected for termination and the offer of consideration for signing a waiver:

Job Title	Age	No. Selected	No. not selected
(1) Mechanical Engineers, I	25	21	48
	26	11	73
	63	4	18
	64	3	11
(2) Mechanical Engineers, II	28	3	10
	29	11	17
	Etc., for all ages		
(3) Structural Engineers, I	21	5	8
	Etc., for all ages		
(4) Structural Engineers, II	23	2	4
	Etc., for all ages		
(5) Purchasing Agents	26	10	11
	Etc., for all ages		

(g) *Waivers settling charges and lawsuits.* (1) Section 7(f)(2) of the ADEA provides that:

> A waiver in settlement of a charge filed with the Equal Employment Opportunity Commission, or an action filed in court by the individual or the individual's representative, alleging age discrimination of a kind prohibited under section 4 or 15 may not be considered knowing and voluntary unless at a minimum—
>
> (A) Subparagraphs (A) through (E) of paragraph (1) have been met; and
>
> (B) The individual is given a reasonable period of time within which to consider the settlement agreement.

(2) The language in section 7(f)(2) of the ADEA, ''discrimination of a kind prohibited under section 4 or 15'' refers to allegations of age discrimination of the type prohibited by the ADEA.

(3) The standards set out in paragraph (f) of this section for complying with the provisions of section 7(f)(1)(A)–(E) of the ADEA also will apply for purposes of complying with the provisions of section 7(f)(2)(A) of the ADEA.

(4) The term ''reasonable time within which to consider the settlement agreement'' means reasonable under all the circumstances, including whether the individual is represented by counsel or has the assistance of counsel.

(5) However, while the time periods under section 7(f)(1) of the ADEA do not apply to subsection 7(f)(2) of the ADEA, a waiver agreement under this subsection that provides an employee the time periods specified in section 7(f)(1) of the ADEA will be considered ''reasonable'' for purposes of section 7(f)(2)(B) of the ADEA.

(6) A waiver agreement in compliance with this section that is in settlement of an EEOC charge does not require the participation or supervision of EEOC.

(h) *Burden of proof.* In any dispute that may arise over whether any of the requirements, conditions, and circumstances set forth in section 7(f) of the ADEA, subparagraph (A), (B), (C), (D), (E), (F), (G), or (H) of paragraph (1), or subparagraph (A) or (B) of paragraph (2), have been met, the party asserting the validity of a waiver shall have the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary pursuant to paragraph (1) or (2) of section 7(f) of the ADEA.

(i) *EEOC's enforcement powers.* (1) Section 7(f)(4) of the ADEA states:

> No waiver agreement may affect the Commission's rights and responsibilities to enforce [the ADEA]. No waiver may be used to

justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the Commission.

(2) No waiver agreement may include any provision prohibiting any individual from:

(i) Filing a charge or complaint, including a challenge to the validity of the waiver agreement, with EEOC, or

(ii) Participating in any investigation or proceeding conducted by EEOC.

(3) No waiver agreement may include any provision imposing any condition precedent, any penalty, or any other limitation adversely affecting any individual's right to:

(i) File a charge or complaint, including a challenge to the validity of the waiver agreement, with EEOC, or

(ii) Participate in any investigation or proceeding conducted by EEOC.

(j) *Effective date of this section.* (1) This section is effective July 6, 1998.

(2) This section applies to waivers offered by employers on or after the effective date specified in paragraph (j)(1) of this section.

(3) No inference is to be drawn from this section regarding the validity of waivers offered prior to the effective date.

(k) *Statutory authority.* The regulations in this section are legislative regulations issued pursuant to section 9 of the ADEA and Title II of OWBPA.

[63 FR 30628, June 5, 1998]

§ 1625.23 Waivers of rights and claims: Tender back of consideration.

(a) An individual alleging that a waiver agreement, covenant not to sue, or other equivalent arrangement was not knowing and voluntary under the ADEA is not required to tender back the consideration given for that agreement before filing either a lawsuit or a charge of discrimination with EEOC or any state or local fair employment practices agency acting as an EEOC referral agency for purposes of filing the charge with EEOC. Retention of consideration does not foreclose a challenge to any waiver agreement, covenant not to sue, or other equivalent arrangement; nor does the retention constitute the ratification of any waiver agreement, covenant not to sue, or other equivalent arrangement.

(b) No ADEA waiver agreement, covenant not to sue, or other equivalent arrangement may impose any condition precedent, any penalty, or any other limitation adversely affecting any individual's right to challenge the agreement. This prohibition includes, but is not limited to, provisions requiring employees to tender back consideration received, and provisions allowing employers to recover attorneys' fees and/or damages because of the filing of an ADEA suit. This rule is not intended to preclude employers from recovering attorneys' fees or costs specifically authorized under federal law.

(c) *Restitution, recoupment, or setoff.* (1) Where an employee successfully challenges a waiver agreement, covenant not to sue, or other equivalent arrangement, and prevails on the merits of an ADEA claim, courts have the discretion to determine whether an employer is entitled to restitution, recoupment or setoff (hereinafter, ''reduction'') against the employee's monetary award. A reduction never can exceed the amount recovered by the employee, or the consideration the employee received for signing the waiver agreement, covenant not to sue, or other equivalent arrangement, whichever is less.

(2) In a case involving more than one plaintiff, any reduction must be applied on a plaintiff-by-plaintiff basis. No individual's award can be reduced based on the consideration received by any other person.

(d) No employer may abrogate its duties to any signatory under a waiver agreement, covenant not to sue, or other equivalent arrangement, even if one or more of the signatories or the EEOC successfully challenges the validity of that agreement under the ADEA.

[65 FR 77446, Dec. 11, 2000]

PART 1626—PROCEDURES—AGE DISCRIMINATION IN EMPLOYMENT ACT

Sec.

File Attachments for Item:

5. George Shaw: Septic to Sewer Fee Policy

Septic to Sewer fee policy 9-28-2020

It is in the interest of the City of Tybee Island to reduce pollution from failing septic systems on the island. With rising sea levels, the risk of system failures increases. Septic pollution leaching into the marsh endangers plant and animal health in this fragile ecosystem.

Therefore:

It shall be the policy of the City of Tybee Island to waive all permit fees related to switching from a septic system to connection to the City's sanitary sewer system.

It will still be the responsibility of the homeowner to pay for all connection construction costs.

File Attachments for Item:

6. Discussion, 2020-20 (Draft), Article 4, Chapter 22, Section 22-110 through 22-112, Noises

ORDINANCE NO. 2020 _____

AN ORDINANCE TO AMEND THE CODE OF ORDINANCES OF THE CITY OF TYBEE ISLAND SO AS TO REVISE PROVISIONS ADDRESSING PROHIBITED NOISE THAT IS UNREASONABLY LOUD, RAUCOUS, JARRING, DISTURBING OR A NUISANCE WITHIN THE AREA OF AUDIBILITY AND TO REPEAL INCONSISTENT OR CONFLICTING ORDINANCES AND TO ELIMINATE PROVISIONS REGARDING DECIBEL LEVELS FOR THE CONTROL OR MEASUREMENT OF NOISE AND SUBSTITUTING IN LIEU THEREOF A STANDARD OF PLAINLY AUDIBLE FROM A SPECIFIED DISTANCE FOR DETERMINATIONS OF OFFENSIVE OR PROHIBITED NOISE AND TO RECOGNIZE THE ADOPTION OF CIVIL PENALTIES FOR OFFENSES INCLUDING PROHIBITED NOISE, FOR THE REPEAL OR CONFLICTING ORDINANCES, TO ESTABLISH AN EFFECTIVE DATE AND TO AUTHORIZE THE ENFORCEMENT THEREOF

WHEREAS, the duly elected governing authority for the City of Tybee Island, Georgia, is authorized under Article 9, Section 2, Paragraph 3 of the Constitution of the State of Georgia to adopt reasonable ordinances to protect and improve the public health, safety, and welfare of the citizens of Tybee Island, Georgia, and

WHEREAS, the duly elected governing authority for the City of Tybee Island, Georgia, is the Mayor and Council thereof; and

WHEREAS, the governing authority desires to adopt ordinances under its police and home rule powers; and

WHEREAS, the control of sound and sound making devices which produce noise at levels that are unreasonably loud, raucous, jarring, disturbing or a nuisance to persons within the area of audibility is necessary for the peace and wellbeing of residents and visitors to the City; and

WHEREAS, Tybee Island is unique in the location of business establishments, a county pier where events are conducted and residential dwellings that coexist in close proximity to commercial establishments that provide gatherings, music and other sources of sound; and

WHEREAS, wind directions and speeds can have significant impacts on the distribution of sounds; and

WHEREAS, the City of Tybee Island has for in excess of 15 years explored alternative methods of addressing noise, noise complaints, disorderly behavior in various residential and other areas; and

WHEREAS, the City has attempted to improve the peace, tranquility and health and safety of residents and occupants of residential dwellings by controlling or limiting unreasonably loud noises through sound level controls based on decibel levels and in the opinion of many, the efforts have not been as successful as desired; and

WHEREAS, court decisions upholding the constitutionality of the restrictions on noise and noise producing activity where doing so creates "plainly audible" disturbances to nearby properties have been recognized and resulted in successful prohibitions and prosecutions; and

WHEREAS, the City of Tybee Island has previously adopted administrative procedures for civil penalties for certain Code violations which can include unreasonably loud noise violations;

NOW THEREFORE, it is hereby ordained by the governing authority of the City of Tybee Island duly assembled as follows:

SECTION I

Existing Tybee Code Sections identified as Article 4 of Chapter 22 "Noises" Sections 22-110 through 22-112 are hereby repealed in their entirety and are replaced with the Code Sections hereinafter set forth and designated numerically as hereinafter set forth.

ARTICLE IV. NOISES

Sec. 22-110. Definitions.

The following words, terms and phrases, when used in this article, shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

Construction means any site preparation, assembly, erection, substantial repair, alteration, or similar action, for or of public or private rights-of-way, structures, utilities, or similar property.

Demolition means any dismantling, intentional destruction or removal of structures, utilities, public or private right-of-way surfaces, or similar property.

Emergency means any occurrence or set of circumstances involving actual or imminent physical or psychological trauma or property damage which demands immediate action.

Emergency work means any work performed for the purpose of alleviating or resolving an emergency.

Enclosed Building means all space between a floor and ceiling that is enclosed on all sides by solid walls or windows, exclusive of doorways, which extend from the floor to the ceiling.

Holidays means those holidays recognized by the U.S. Office of Personnel Management.

Mechanical Sound Making Devices means any radio receiving device, television, stereo, musical instrument, phonograph sound amplifier or other machines or devices for the producing, reproducing or amplifying of sound and/or noise.

Motor vehicle means any motor-operated vehicle licensed for use on the public highways, but not including a motorcycle.

Motorboat means any vessel which operates on water and which is propelled by a motor, including, but not limited to, boats, barges, amphibious craft, water ski towing devices and hover craft.

Motorcycle means any motor vehicle having a saddle or seat for the use of the rider and designed to travel on not more than three wheels in contact with the ground. The term shall include, but not be limited to, motorized bicycles and motor scooters.

Noise means any sound which disturbs humans or which causes or tends to cause an adverse psychological or physiological effect on humans.

Noisy Assembly means any gathering of more than one (1) person which creates noise.

Noise disturbance means any sound which endangers or injures the welfare, safety or health of human beings, or disturbs a reasonable person of normal sensitivities, or devalues or injures personal or real property, or is hereinafter defined.

Noise sensitive activities means activities which should be conducted under conditions of exceptional quiet including, but not limited to, operation of schools, libraries open to the public, churches, hospitals, and nursing homes.

Noise sensitive area means any area designated for the purpose of ensuring exceptional quiet and clearly posted with "noise sensitive area" signs, because of the noise sensitive activities conducted therein.

Official Public event means any event put on by, adopted, approved or endorsed by the City.

Person means any individual, partnership, firm, association, joint venture, public or private corporation, trust, estate, commission, board, public or private institution, utility, operative, state agency, municipality or other political subdivisions of this state, any interstate body, or any other legal entity.

Plainly audible shall mean any sound emanating from the specific sound-producing sources set forth below which can be heard from the distances set forth below, using the following sound measurement standards: Measurement shall be by the auditory senses of a person standing at a distance no less than the required minimum distance from the source of the sound. For music and other noise, words and phrases need not be discernable. For music and other noise, bass reverberations are included.

Powered model vehicle means any self-propelled airborne, waterborne, or land borne model plane, vessel, or vehicle, which is not designed to carry persons, including, but not limited to any model airplane, boat, car or rocket.

Public right-of-way means any street, avenue, boulevard, highway, sidewalk, lane or similar place which is owned or controlled by a governmental entity.

Public space means any real property, including any structure thereon, which is owned or controlled by a governmental entity.

Public works project means any project financed by public funds such as roads, highways, bridges or other construction on public or government owned property. It does not include projects merely approved by mayor and council.

Real property boundary means an imaginary line along the ground surface, and its vertical extension, which separates the real property owned by one person from that owned by another person, but not including intra-building real property divisions.

Residential means any property on which is located a building or structure used wholly or partially for living or sleeping purposes.

School means any place of learning or caring for children, both public and private.

Sound means an oscillation in pressure, particle displacement, particle velocity or other physical parameter, in a medium with internal forces that cause compression and rarefaction of that medium. The description of sound may include any characteristic of such sound, including duration, intensity and frequency.

Used means and includes the words "intended,", "designed," or "arranged to be used. "
(Code 1983, § 11-3-2)

Sec. 22-111. Exceptions.
The provisions of this article shall not apply to:

(1) The emission of sound for the purpose of alerting persons to the existence of an emergency;
(2) The emission of sound in the performance of emergency work;
(3) Agricultural activities, exclusive of those involving the ownership or possession of animals or birds;
(4) Public mass transportation vehicles;
(5) Church or clock carillons, bells, or chimes;
(6) The emission of sound in the discharge of weapons or in fireworks displays for which a permit has been issued;
(7) Public works projects;
(8) South End Business Overlay District;
(9) Maritime District;
(10) Noises and/or sounds that are permitted by a special event permit pursuant to section 54-70, et seq; provided, however, that the producer or coordinator of the special event must comply with the terms, restrictions and conditions of the special event permit;
(12) Sound volumes produced by radio, tape player, or other mechanical sound making device or instrument from within a motor vehicle on a street or highway, which sound is controlled by O.C.G.A. § 40-6-14;
(13) Noises or sounds made by law enforcement and other public safety officials performing their public functions;
(14) The emission of sound from a public space during an official public event; or
(15) The emission of sound from a school or church during the regular scheduled hours of operation or during special events.
(Code 1983, § 11-3-3)

Sec. 22-112. Noise disturbance prohibited.

(a) *Prohibited conduct.*

(1) *Restrictions of 300 feet for _____ a.m. through _____ p.m. Sunday through Thursday and _____ a.m. through _____ midnight on Friday and Saturday and holidays.*

a. *Mechanical sound-making devices.* It is unlawful for any person or persons to play, use, operate, or permit to be played, used, or operated any Mechanical Sound Making Devices at such a volume and in such a manner so as to create, or cause to be created, any noises or sounds which are plainly audible at a distance of 300 feet or more from the building, structure or vehicle, or in the case of real property, beyond the property limits, in which it is located, whichever is farthest, between the hours of _____ a.m. and _____ p.m. Sunday through Thursday and between the hours of _____ a.m. and _____ on Friday and Saturday and holidays.

b. *Human-produced sounds.* It is unlawful for any person or persons to yell, shout, whistle, or sing on the public streets or sidewalks or on private property so as to create, or cause to be created, any noises or sounds which are plainly audible at a distance of 300 feet or more from the place, building, structure, or in the case of real property, beyond the real property boundary, in which the person is located, whichever is farthest, between the hours of _____ a.m. and _____ p.m.

Sunday through Thursday and between the hours of _____ a.m. and _____ on Friday and Saturday and holidays.

c. *Commercial advertising.* It is unlawful for any person or persons to use, operate, or permit to be used or operated any radio receiving device, musical instrument, phonograph, loud speaker, sound amplifier or other machine or device for the production or reproduction of sound which is cast upon the public streets or other public property for the purpose of commercial advertising or which serves to attract the attention of the public to any building, structure or vehicle in such a manner so as to create, or cause to be created, any noises or sounds which are plainly audible at a distance of 300 feet or more from the source of the sound cast upon the public streets or other public property or from the building, structure, or in the case of real property, beyond the real property boundary, in which it is located, whichever is farthest, between the hours of _____ a.m. and _____ p.m. Sunday through Thursday and between the hours of 7:00 a.m. and 12 midnight on Friday and Saturday and holidays.

d. *Party noise.* It is unlawful for any person or persons in charge of a party or other social event that occurs on any private property to allow that party or social event to produce noise in such a manner that such noise is plainly audible at a distance of 300 feet or more from the building or structure from which the noise is emanating or in the case of real property, beyond the real property boundary, on which the party or social event is located, whichever is farthest, between the hours of _____ a.m. and _____p.m. Sunday through Thursday and between the hours of _____ a.m. and _____ on Friday and Saturday and holidays. For the purposes of this subsection, a "person in charge of a party or other social event" shall mean any adult person who resides in or on the premises involved in such party or social event and is present at such party or social event. For the purposes of this subsection, "noise" shall mean the same sounds, or any combination thereof, as described in paragraphs a. or b. above.

(2) *Restrictions of 100 feet for _____ p.m. through _____ a.m. Sunday through Thursday and _____ through a.m. on Saturday and Sunday and holidays.*

a. *Mechanical sound-making devices.* It is unlawful for any person or persons to play, use, operate, or permit to be played, used, or operated any Mechanical Sound Making Devices at such a volume and in such a manner so as to create, or cause to be created, any noises or sounds which are plainly audible at a distance of 300 feet or more from the building, structure or vehicle, or in the case of real property, beyond the property limits, in which it is located, whichever is farthest, between the hours of _____ a.m. and _____ p.m. Sunday through Thursday and between the hours of _____ a.m. and _____ on Friday and Saturday and holidays.

b. *Human-produced sound.* It is unlawful for any person or persons to yell, shout, hoot, whistle, or sing on the public streets or sidewalks or on private property so as to create, or cause to be created, any noises or sounds which are plainly audible at a distance of 100 feet or more from the place on public streets and sidewalks, or in the case of private real property, beyond the real property boundary, on which the person is located, whichever is farthest, between the hours of _____ p.m. and _____ a.m. Sunday through Thursday and between the hours of _____ and _____ a.m. on Saturday and Sunday and holidays.

c. *Commercial advertising.* It is unlawful for any person or persons to use, operate, or permit to be used or operated any radio receiving device, musical instrument, phonograph, loud speaker, sound amplifier or other machine or device for the production or reproduction of sound which is cast upon the public streets or other public property for the purpose of commercial advertising or which serves to attract the attention of the public to any building, structure or vehicle in such a manner so as to create, or cause to be created, any noises or sounds which are plainly audible at a distance of 100 feet or more from the source of the sound cast upon the public streets or other public property or from the building, structure, or in the case of real property, beyond the real property boundary, in which it is located, whichever is farthest, between the hours of _____p.m. and _____ a.m. Sunday through Thursday and between the hours of _____ and _____ a.m. on Saturday and Sunday and holidays.

d. *Party noise.* It is unlawful for any person or persons in charge of a party or other social event that occurs on any private property to allow that party or event to produce noise in such a manner so as to such noise is plainly audible at a distance of 100 feet or more from the building or structure from which the party noise is emanating or in the case of real property, beyond the real property boundary, on which the party or social event is located, whichever is farthest, between the hours of _____ p.m. and _____ a.m. Sunday through Thursday and between the hours of _____ and _____ a.m. on Saturday and Sunday and holidays. For the purposes of this subsection, a "person in charge of a party or other social event" shall mean any adult person who resides in or on the premises involved in such party or social event and is present at such party or social event. For the purposes of this subsection, "noise" shall mean the same sounds, or any combination thereof, as described in paragraphs a. or b. above.

(3) *Restrictions for areas within apartments, condominiums, townhouses, duplexes, or other such residential dwelling units.*

Except for persons within commercial enterprises that have an adjoining property line or boundary with a residential dwelling unit, it is unlawful for any person to make, continue, or cause to be made or continued any noise in such a manner as to be plainly audible to any other person a distance of five feet beyond the adjoining property line wall or boundary of any apartment, condominium, townhouse, duplex, or other such residential dwelling units with adjoining points of contact.

For the purposes of this subsection, "noise" shall mean human-produced sounds of yelling, shouting, hooting, whistling, singing, or mechanically-produced sounds made by radio-receiving device, television, stereo, musical instrument, phonograph sound amplifier or other machines or devices for the producing, reproducing, or amplifying of sound, or any combination thereof.

For the purposes of this subsection, "property line or boundary" shall mean an imaginary line drawn through the points of contact of (1) adjoining apartments, condominiums, townhouses, duplexes or other such residential dwelling units with adjoining points owned, rented, or leased by different persons; or (2) adjoining common areas or adjoining exterior walls. Said property line or boundary includes all points of a plane formed by projecting the property line or boundary including the ceiling, the floor, and the walls.

(b) *Property bordering Residential*. In addition to all other provisions of this Article, if the property boundary of a property borders residential, the following shall apply:

(1) It shall be unlawful for any person or persons to play, use, operate, or permit to be played, used, or operated any Mechanical Sound Making Devices between the hours of _____ p.m. and _____ a.m. Sunday through Thursday and _____ p.m. through _____ a.m. Friday and Saturday and holidays, unless the music is played exclusively within an enclosed building. In addition to the foregoing, any use or operation of any Mechanical Sound Making Devices between the restricted hours which produces noises that are plainly audible from the property boundary of the property is a violation of this section.

(2) It shall be unlawful for any person or persons to constitute a Noisy Assembly, or permit property under his or her control to be used for a Noisy Assembly, between the hours of _____ p.m. and _____ a.m. Sunday through Thursday _____ p.m. through _____ a.m. Friday and Saturday and holidays, unless the Noisy Assembly is exclusively within an enclosed building. In addition to the foregoing, any Noisy Assembly between the restricted hours which produces noises than are plainly audible from the property boundary of the property is a violation of this section.

(c) *Equipment use restrictions.* Regardless of the other provisions of this Article, the following equipment may not be operated between the hours of 8:00 p.m. and 7:00 a.m.: Monday-Friday and on Saturday and Sunday 8:00 p.m. to 10:00 a.m.:
(1) Electrical power tools.
(2) Motor powered, muffler equipped lawn, garden, and tree trimming equipment except residential lawn mowers.
(3) Construction equipment, which includes landscaper's lawn mowers and other landscaping motorized equipment.

(Code 1983, § 11-3-4; Ord. of 4-29-2005; Ord. of 7-26-2007)

SECTION II

All ordinances and parts of ordinances in conflict herewith are expressly repealed.

SECTION III

It is the intention of the governing body, and it is hereby ordained, that the provisions of this ordinance shall become effective and be made a part of the Code of Ordinances, City of Tybee Island, Georgia, and the sections of this ordinance may be renumbered to accomplish such intention.

SECTION IV

This ordinance shall be effective upon its adoption by the Mayor and Council pursuant to The Code of the City of Tybee Island, Georgia.

This Ordinance shall become effective on _____ day of _____, 2020.

ADOPTED THIS ____ DAY OF _____, 2020.

_____
MAYOR

ATTEST:

_____
CLERK OF COUNCIL

FIRST READING: _____

SECOND READING: _____

ENACTED: _____

File Attachments for Item:

10. Minutes, Planning Commission, September 21, 2020, Information Only

Planning Commission Meeting
MINUTES
September 21, 2020

Chair Bishop called the September 21, 2020 Tybee Island Planning Commission meeting to order. Commissioners present were **Charles Matlock, Elaine T. McGruder, J. Whitley Reynolds, Vice Chair Ron Bossick** and **David McNaughton**. **Alan Robertson** was absent.

Consideration of Minutes:
Chair Demery Bishop asked for consideration of the August 17, 2020 minutes. **Commissioner J. Whitley Reynolds** made a motion to approve. **Commissioner Elaine T. McGruder** seconded. The vote to approve was unanimous.

Disclosures/Recusals:
Chair Demery Bishop asked if there were any Disclosures or Recusals. There were none.

Old Business:
Sit Plan: requesting office and warehouse expansion – 201 McKenzie Ave. – 4002602011 - Zone C-2 – 201 McKenzie St. LLC.
George Shaw stated this is a new site plan showing the buffer for this item. Nothing else was changed on the site plan. **Commissioner McNaughton** asked if the vegetation plants are required to run the full length of the property. **George Shaw** stated according to the City Attorney a buffer is not required at all because it is a public right of way. But it is a good jester considering there is a residential use next door. **Commissioner Bossick** asked if that was the entire right of way. **George Shaw** stated at one time this right of way Laurel Avenue was a sixty foot wide. The neighbor on the opposite side acquired thirty foot of it in the past. **Toby Thomas** approached the Planning Commission and stated he is representing his Mother Marie Heymans, who lives at 109 McKenzie Avenue the property on the other side of the Laurel Avenue right of way. He stated she is concerned this will have an effect on the value of her property in the future. He stated there are several lots attached to this large piece of property that is also attached to this right of way. He also asked if he could read a letter from the owner at 202 McKenzie Avenue across from 201 McKenzie Avenue whose name is Travis Williams. The letter states that Mr.Williams is concerned that there will be more tractor trailer traffic and he would like the City to add speed bumps. **Toby Thomas** also gave a copy of a map that shows nine separate lots to George Shaw. **George Shaw** stated this map does show nine lots and he would have to look into it to see if this was recorded as one big lot or nine lots. **Ashley Mosely** the representative and engineer for the applicant approached the Planning Commission and stated the applicant has not used the right of way but would like to use the right a way for their addition and parking and leave it open for the adjacent owners to use as well. **Commissioner Whitley Reynolds** made a motion to approve. **Commissioner Charles Matlock** seconded. The vote to approve was four yes and one no. Motion to approve carried.

New Business:

Text Amendment: Sec. 3-190 Swimming pool requirements.

George Shaw stated this text amendment was a recommendation from a City Council member. It is to require the initial fill and significant refills of the pool to be done with water from off the island and not the City's water system. This is to reduce water withdrawal from the Citys water supply. He also stated the average pool size estimate in the packet was an estimate he came up with in general. **Commissioner Whitley** asked if portable water is readily available in this area. **George Shaw** stated he did look around the area and could not find one. **Commissioner McNaughton** asked how the City would enforce this amendment. **George Shaw** stated he is not sure right now. Maybe by requireing them to show a sales receipt. **Commissioner McGruder** made a motion to approve. There was no second, motion failed. **Commissioner Bossick** made a motion to continue and have these questions answered "Is there a source for getting water off island" "How to prove where they got the water" "What other jurisdictions have this procedure" answered and brought back to Planning Commission meeting October 19, 2020. **Commissioner McGruder** seconded. The vote to continue was unanimous.

Text Amendment: ARTICLE 7. – Changes to Tree Removal regulations.

George Shaw stated this is an amendment that came from a council member to stiffen the penalty for removal of a tree without a permit. **Commissioner McGruder** asked what the difference in cost for a two inch verses a four inch would be. **George Shaw** stated there is a significant difference and some may be difficult to find in this area. **Commissioner McGruder** made a motion to approve. **Commissioner Bossick** seconded. Vote to approve was four yes and one no. Motion to approve carried.

Discussions:

Adjournment: 9:00pm

Lisa L. Schaaf