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ORDINANCE NO. 19596

AN ORDINANCE introduced by City Manager Norton N. Bonaparte, Jr., concerning driving under the influence, amending City of Topeka Code § 10.15.020 and specifically repealing said original section as well as creating Article IV of Chapter 10.20 consisting of § 10.20.230, § 10.20.240, § 10.20.250 and § 10.20.260.

WHEREAS, the City of Topeka currently follow DUI laws provided for in the 2010 Standard Traffic Ordinance; and

WHEREAS, as of July 1, new state laws pertaining to driving under the influence will become effective and the provisions of the STO will not be in compliance with the new state law; and

WHEREAS, the City needs to amend the City Code in order to be in compliance with the new state law.

THEREFORE, BE IT ORDAINED BY THE GOVERNING BODY THE CITY OF TOPEKA, KANSAS:

Section 1. That section 10.15.020, Amendments, of The Code of the City of Topeka, Kansas, is hereby amended to read as follows:

Amendments.

The current edition of the Standard Traffic Ordinance for Kansas Cities, as adopted by reference, shall be amended as follows:

(a) Section 33 of the Standard Traffic Ordinance, relating to maximum speed limits, is hereby declared to be and is omitted and deleted and the provisions set forth at TMC 10.20.060 shall be substituted therefor.
(b) Section 50 of the Standard Traffic Ordinance relating to right, left and U-turns at intersection – obedience to, is hereby declared to be and is omitted and deleted and the provisions set forth at TMC 10.20.200 shall be substituted therefor.

(c) Section 67 of the Standard Traffic Ordinance, relating to pedestrians to use right half of crosswalks, is hereby declared to be and is omitted and deleted.

(d) Section 104 of the Standard Traffic Ordinance, relating to inattentive driving, is hereby declared to be and is omitted and deleted and the provisions set forth at TMC 10.20.100 shall be substituted therefor.

(e) Section 107 of the Standard Traffic Ordinance, relating to unattended motor vehicles, is hereby declared to be and is omitted and deleted and the provisions set forth at TMC 10.20.125 shall be substituted therefor.

(f) Section 119 of the Standard Traffic Ordinance, relating to parades and processions, is hereby declared to be and is omitted and deleted and the provisions set forth in Chapter 10.50 TMC shall be substituted therefor.

(g) Section 194 of the Standard Traffic Ordinance, relating to driving while license canceled, suspended or revoked, is hereby declared to be and is omitted and deleted.

(h) Section 195.1 of the Standard Traffic Ordinance, relating to operation of a motor vehicle when a habitual violator, is hereby declared to be and is omitted and deleted.

(i) Section 198 of the Standard Traffic Ordinance, relating to vehicle license – illegal tag, is hereby declared to be and is omitted and deleted and the provisions set forth at TMC 10.05.060 shall be substituted therefor.
(j) Section 1 of the Standard Traffic Ordinance, specifically the definition for "Other Competent Evidence" is hereby declared to be and is omitted and deleted and the following provisions shall be substituted therefore: Other Competent Evidence (1) includes alcohol concentration tests obtained from samples taken three hours or more after the operation or attempted operation of a vehicle; and (2) readings obtained from a partial alcohol concentration test on a breath testing machine.

(k) Section 30 of the Standard Traffic Ordinance, relating to driving under the influence of intoxicating liquor or drugs, is hereby declared to be and is omitted and deleted and the provisions set forth in TMC 10.20.230 shall be substituted therefor.

(l) Section 30.1 of the Standard Traffic Ordinance, relating to driving commercial motor vehicle under the influence of intoxicating liquor or drugs, is hereby declared to be and is omitted and deleted and the provisions set forth in TMC 10.20.240 shall be substituted therefor.

(m) Section 30.2 of the Standard Traffic Ordinance, relating to preliminary breath test, is hereby declared to be and is omitted and deleted and the provisions set forth in TMC 10.20.250 shall be substituted therefor.

(n) Section 30.3 of the Standard Traffic Ordinance, relating to ignition interlock devices; tampering, is hereby declared to be and is omitted and deleted and the provisions set forth in TMC 10.20.260 shall be substituted therefor.

Section 2. That the Code of the City of Topeka, Kansas, is hereby amended by adding a section to be numbered 10.20.230, of Article IV, Chapter 10.20, which said section reads as follows:

Driving Under the Influence of Intoxicating Liquor or Drugs; Penalties.
(a) Driving under the influence is operating or attempting to operate any vehicle within this city while:

(1) The alcohol concentration in the person’s blood or breath as shown by any competent evidence, including other competent evidence, is .08 or more;

(2) The alcohol concentration in the person’s blood or breath, as measured within three hours of the time of operating or attempting to operate a vehicle, is .08 or more;

(3) Under the influence of alcohol to a degree that renders the person incapable of safely driving a vehicle;

(4) Under the influence of any drug or combination of drugs to a degree that renders the person incapable of safely driving a vehicle; or

(5) Under the influence of a combination of alcohol and any drug or drugs to a degree that renders the person incapable of safely driving a vehicle; or

(6) The person is a habitual user of any narcotic, hypnotic, somnifacient or stimulating drug.

(b) Penalties.

(1) Driving under the influence is:

(A) on a first conviction a class B, nonperson misdemeanor. The person convicted shall be sentenced to not less than 48 consecutive hours nor more than six months’ imprisonment, or in the court’s discretion 100 hours of public service, and fined not less than $750 nor more than $1,000. The person convicted shall serve at least 48 consecutive hours’ imprisonment or 100 hours of public service either before or as a condition of any grant of probation or suspension, reduction of sentence or parole.
The court may place the person convicted under a house arrest program pursuant to section 249 of chapter 136 of the 2010 Session Laws of Kansas, and amendments thereto, to serve the remainder of the minimum sentence only after such person has served 48 consecutive hours' imprisonment.

(B) on a second conviction a class A, nonperson misdemeanor. The person convicted shall be sentenced to not less than 90 days nor more than one year's imprisonment and fined not less than $1,250 nor more than $1,750. The person convicted shall serve at least five consecutive days' imprisonment before the person is granted probation, suspension or reduction of sentence or parole or is otherwise released. The five days' imprisonment mandated by this subsection may be served in a work release program only after such person has served 48 consecutive hours' imprisonment, provided such work release program requires such person to return to confinement at the end of each day in the work release program. The person convicted, if placed into a work release program, shall serve a minimum of 120 hours of confinement. Such 120 hours of confinement shall be a period of at least 48 consecutive hours of imprisonment followed by confinement hours at the end of and continuing to the beginning of the offender's work day. The court may place the person convicted under a house arrest program pursuant to section 249 of chapter 136 of the 2010 Session Laws of Kansas, and amendments thereto, to serve the remainder of the minimum sentence only after such person has served 48 consecutive hours' imprisonment.
imprisonment. The person convicted, if placed under house arrest, shall be monitored by an electronic monitoring device, which verifies the offender's location. The offender shall serve a minimum of 120 hours of confinement within the boundaries of the offender's residence. Any exceptions to remaining within the boundaries of the offender's residence provided for in the house arrest agreement shall not be counted as part of the 120 hours;

(2) In addition, prior to sentencing for any conviction, the court shall order the person to participate in an alcohol and drug evaluation conducted by a provider in accordance with K.S.A. 8-1008, and amendments thereto. The person shall be required to follow any recommendation made by the provider after such evaluation, unless otherwise ordered by the court.

(c) Any person convicted of violating this section who had one or more children under the age of 14 years in the vehicle at the time of the offense shall have such person's punishment enhanced by one month of imprisonment. This imprisonment must be served consecutively to any other minimum mandatory penalty imposed for a violation of this section. Any enhanced penalty imposed shall not exceed the maximum sentence allowable by law. During the service of the enhanced penalty, the judge may order the person on house arrest, work release or other conditional release.

(d) If a person is charged with a violation of this section involving drugs, the fact that the person is or has been entitled to use the drug under the laws of this state shall not constitute a defense against the charge.

(e) The court may establish the terms and time for payment of any fines, fees, assessments and costs imposed pursuant to this section. Any assessment and costs
shall be required to be paid not later than 90 days after imposed, and any remainder of
the fine shall be paid prior to the final release of the defendant by the court.

(f) In lieu of payment of a fine imposed pursuant to this section, the court may
order that the person perform community service specified by the court. The person
shall receive a credit on the fine imposed in an amount equal to $5 for each full hour
spent by the person in the specified community service. The community service ordered
by the court shall be required to be performed not later than one year after the fine is
imposed or by an earlier date specified by the court. If by the required date the person
performs an insufficient amount of community service to reduce to zero the portion of
the fine required to be paid by the person, the remaining balance of the fine shall
become due on that date.

(g) Exceptions.

(1) Except as provided in paragraph (5) of this subsection (g), in
addition to any other penalty which may be imposed upon a first conviction of a
violation of this section, the court may order that the convicted person’s motor
vehicle or vehicles be impounded or immobilized for a period not to exceed one
year and that the convicted person pay all towing, impoundment, and storage
fees or other immobilization costs.

(2) The court shall not order the impoundment or immobilization of a
motor vehicle driven by a person convicted of a violation of this section if the
motor vehicle had been stolen or converted at the time it was driven in violation
of this section.
(3) Prior to ordering the impoundment or immobilization of a motor vehicle or vehicles owned by a person convicted of a violation of this section, the court shall consider, but not be limited, the following:

(A) Whether the impoundment or immobilization if the motor vehicle would result in the loss of employment by the convicted person or a member of such person’s family; and

(B) Whether the ability of the convicted person or a member of such person’s family to attend school or obtain medical care would be impaired.

(4) Any personal property in a vehicle impounded or immobilized pursuant to this subsection may be retrieved prior to or during the period of such impoundment or immobilization.

(5) As used in this subsection, the convicted person’s motor vehicle or vehicles shall include any vehicle leased by such person. If the lease on the convicted person’s motor vehicle subject to impoundment or immobilization expires in less than one year from the date of the impoundment or immobilization, the time of impoundment or immobilization of such vehicle shall be the amount of the time remaining on the lease.

(h) Responsibility of City Attorney.

(1) Upon filing a complaint, citation or notice to appear alleging a violation of this section, and prior to a conviction thereof, the city attorney shall request and shall receive from the:
(A) Division a record of all prior convictions obtained against such person for any violations of any of the motor vehicle laws of this state; and

(B) Kansas Bureau of Investigation central repository of all criminal history record information concerning such person.

(2) If the elements of a violation of this section are the same as the elements of a violation of K.S.A. 8-1567 that would constitute, and be punished as, a felony, the city attorney shall refer the violation to the district attorney for prosecution.

(i) The court shall electronically report every conviction of a violation of this section and every diversion agreement entered into in lieu of further criminal proceedings on a complaint alleging a violation of this section to the division. Prior to sentencing under the provisions of this section, the court shall request and shall receive from the division a record of all prior convictions obtained against such person for any violations of any of the motor vehicle laws of this state.

(j) For the purpose of determining whether a conviction is a first or second conviction in sentencing under this section:

(1) **Conviction** includes being convicted of a violation of this section or entering into a diversion agreement in lieu of further criminal proceedings on a complaint alleging a violation of this section;

(2) **Conviction** includes being convicted of a violation of a law of any state or an ordinance of any city, or resolution of any county, which prohibits the acts that this section prohibits or entering into a diversion agreement in lieu of
further criminal proceedings in a case alleging a violation of such law, ordinance or resolution:

(3) Only convictions occurring on or after July 1, 2001, shall be taken into account when determining the sentence to be imposed for a first or second offender:

(4) It is irrelevant whether an offense occurred before or after conviction for a previous offense; and

(5) A person may enter into a diversion agreement in lieu of further criminal proceedings for a violation of this section, and amendments thereto, only once during the person’s lifetime.

(k) Upon conviction of a person of a violation of this section, the division, upon receiving a report of conviction, shall suspend, restrict or suspend and restrict the person’s driving privileges as provided by K.S.A. 8-1014, and amendments thereto.

(l) Upon conviction of a person of a violation of this section, the court may order the convicted person to pay restitution to any victim who suffered loss due to the violation for which the person was convicted.

(m) No plea bargaining agreement shall be entered into nor shall any judge approve a plea bargaining agreement entered into for the purpose of permitting a person charged with a violation of this section to avoid the mandatory penalties established by this section. For the purpose of this subsection, entering into a diversion agreement pursuant to K.S.A. 12-4413 et seq., and amendments thereto, shall not constitute plea bargaining.
The alternatives set out in subsections (a)(1), (a)(2) and (a)(3) may be pleaded in the alternative, and the city may, but shall not be required to, elect one or two of the three prior to submission of the case to the fact finder.

As used in this section:

1. **Alcohol Concentration** means the number of grams of alcohol per 100 milliliters of blood or per 210 liters of breath.

2. **Drug** includes toxic vapors as such term is defined in Section 1.

3. **Imprisonment** shall include any restrained environment in which the court and law enforcement agency intend to retain custody and control of a defendant and such environment has been approved by the board of county commissioners or the governing body of a city.

That the Code of the City of Topeka, Kansas, is hereby amended by adding a section to be numbered 10.20.240 of Article IV, Chapter 10.20, which said section reads as follows:

**Driving Commercial Motor Vehicle Under the Influence of Intoxicating Liquor or Drugs; Penalties.**

(a) Driving a commercial motor vehicle under the influence is operating or attempting to operate any commercial motor vehicle within this city while:

1. The alcohol concentration in the person’s blood or breath, as shown by any competent evidence, including other competent evidence, is .04 or more;

2. The alcohol concentration in the person’s blood or breath, as measured within three hours of the time of driving a commercial motor vehicle, is .04 or more; or
(3) Committing a violation of subsection (a) of TMC 10.20.230.

(b) Penalties.

(1) Driving a commercial motor vehicle under the influence is:

(A) on a first conviction a class B, nonperson misdemeanor. The person convicted shall be sentenced to not less than 48 consecutive hours nor more than six months’ imprisonment, or in the court’s discretion, 100 hours of public service, and fined not less than $750 nor more than $1,000. The person convicted shall serve at least 48 consecutive hours’ imprisonment or 100 hours of public service either before or as a condition of any grant of probation, suspension or reduction of sentence or parole or other release;

(B) on a second conviction a class A, nonperson misdemeanor. The person convicted shall be sentenced to not less than 90 days nor more than one year’s imprisonment and fined not less than $1,250 nor more than $1,750. The person convicted shall serve at least five consecutive days’ imprisonment before the person is granted probation, suspension or reduction of sentence or parole or is otherwise released. The five days’ imprisonment mandated by this subsection may be served in a work release program only after such person has served 48 consecutive hours’ imprisonment, provided such work release program requires such person to return to confinement at the end of each day in the work release program. The person convicted, if placed into a work release program, shall serve a minimum of 120 hours of confinement. Such 120 hours of confinement shall be a period of at least 48
consecutive hours of imprisonment followed by confinement hours at the
end of and continuing to the beginning of the offender’s work day. The
court may place the person convicted under a house arrest program
pursuant to section 249 of chapter 136 of the 2010 Session Laws of
Kansas, and amendments thereto, to serve the remainder of the minimum
sentence only after such person has served 48 consecutive hours’
imprisonment. The person convicted, if placed under house arrest, shall
be monitored by an electronic monitoring device, which verifies the
offender’s location. The offender shall serve a minimum of 120 hours of
confinement within the boundaries of the offender’s residence. Any
exceptions to remaining within the boundaries of the offender’s residence
provided for in the house arrest agreement shall not be counted as part of
the 120 hours.

(2) In addition, prior to sentencing for any conviction, the court shall
order the person to participate in an alcohol and drug evaluation conducted by a
provider in accordance with K.S.A. 8-1008, and amendments thereto. The
person shall be required to follow any recommendation made by the provider
after such evaluation, unless otherwise ordered by the court.

(c) Any person convicted of a violation of this section who had one or more
children under the age of 14 years in the vehicle at the time of the offense shall have
such person’s punishment enhanced by one month of imprisonment. This imprisonment
shall be served consecutively to any other minimum mandatory penalty imposed for a
violation of this section, or a violation of a city ordinance or county resolution prohibiting
the acts prohibited by this section. Any enhanced penalty imposed shall not exceed the
maximum sentence allowable by law. During the service of the enhanced penalty, the judge may order the person on house arrest, work release or other conditional release.

(d) If a person is charged with a violation of this section involving drugs, the fact that the person is or has been entitled to use the drug under the laws of this state shall not constitute a defense against the charge.

(e) The court may establish the terms and time for payment of any fines, fees, assessments and costs imposed pursuant to this section. Any assessment and costs shall be required to be paid not later than 90 days after imposed, and any remainder of the fine shall be paid prior to the final release of the defendant by the court.

(f) In lieu of payment of a fine imposed pursuant to this section, the court may order that the person perform community service specified by the court. The person shall receive a credit on the fine imposed in an amount equal to not less than $5 for each full hour spent by the person in the specified community service. The community service ordered by the court shall be required to be performed not later than one year after the fine is imposed or by an earlier date specified by the court. If by the required date the person performs an insufficient amount of community service to reduce to zero the portion of the fine required to be paid by the person, the remaining balance of the fine shall become due on that date.

(g) City Attorney responsibilities. Upon filing a complaint, citation or notice to appear alleging a violation of this section, and prior to a conviction thereof, the city attorney shall request and shall receive the following:

(1) From the Division, a record of all prior convictions obtained against such person for any violations of any of the motor vehicle laws of this state; and
(2) From the Kansas Bureau of Investigation central repository all criminal history record information concerning such person.

(h) Courts responsibilities. The court shall electronically report every conviction of a violation of this section and every diversion agreement entered into in lieu of further criminal proceedings on a complaint alleging a violation of this section to the division. Prior to sentencing under the provisions of this section, the court shall request and shall receive the following:

(1) From the Division, a record of all prior convictions obtained against such person for any violation of any of the motor vehicle laws of this state; and

(2) From the Kansas bureau of investigation central repository, all criminal history record information concerning such person.

(i) Upon conviction of a person of a violation of this section, the division, upon receiving a report of conviction, shall:

(1) Disqualify the person from driving a commercial motor vehicle under K.S.A. 8-2,142, and amendments thereto; and

(2) Suspend, restrict or suspend and restrict the person’s driving privileges as provided by K.S.A. 8-1014, and amendments thereto.

(j) Upon conviction of a person of a violation of this section, the court may order the convicted person to pay restitution to any victim who suffered loss due to the violation for which the person was convicted.

(k) No plea bargaining agreement shall be entered into nor shall any judge approve a plea bargaining agreement entered into for the purpose of permitting a person charged with a violation of this section to avoid the mandatory penalties established by this section.
The alternatives set out in subsections (a)(1), (a)(2) and (a)(3) may be pleaded in the alternative, and the city may, but shall not be required to, elect one or two of the three prior to submission of the case to the fact finder.

For the purpose of determining whether a conviction is a first or second conviction in sentencing under this section:

1. "Conviction" includes being convicted of a violation of a law of another state or an ordinance of any city, or resolution of any county, which prohibits the acts that this section prohibits;

2. Any convictions occurring during a person's lifetime shall be taken into account when determining the sentence to be imposed for a first or second offender; and

3. It is irrelevant whether an offense occurred before or after conviction for a previous offense.

For the purpose of this section:

1. "Alcohol concentration" means the number of grams of alcohol per 100 milliliters of blood or per 210 liters of breath;

2. "Imprisonment" shall include any restrained environment in which the court and law enforcement agency intend to retain custody and control of a defendant and such environment has been approved by the board of county commissioners or the governing body of a city; and

3. "Drug" includes toxic vapors as such term is defined in K.S.A. 2010 Supp. 21-36a12, and amendments thereto; and
(4) “Drive” means to drive, operate or be in physical control of a motor vehicle in any place open to the general public for purposes of vehicular traffic and includes operation or physical control of a motor vehicle anywhere in the city.

(o) For the purpose of this section, commercial motor vehicle shall not include:

(1) Farm vehicles, defined as follows:

(A) Registered as a farm truck or truck tractor under K.S.A. 8-143, and amendments thereto;

(B) Used to transport either agricultural products, farm machinery, farm supplies, or both, to or from a farm;

(C) Not used in the operations of a common or contract motor carrier; and

(D) Used within 150 air miles of any farm or farms owned or leased by the registered owner of such farm vehicle;

(2) Vehicles operated by firefighters and other persons which are necessary to the preservation of life or property or the execution of emergency governmental functions, are equipped with audible and visual signals and are not subject to normal traffic regulation. These vehicles include fire trucks, hook and ladder trucks, foam or water transport trucks, police SWAT team vehicles, ambulances or other vehicles that are used in response to emergencies;

(3) Military vehicles which are operated by military personnel in pursuit of military purposes and all noncivilian operators of equipment owned or operated by the United States department of defense. This applies to any active duty military personnel and members of the reserves and national guard on
active duty, including personnel on full-time national guard duty, personnel on
part-time training and national guard military technicians, civilians who are
required to wear military uniforms and are subject to the code of military justices;
and
(4) Motor vehicles, which would otherwise be considered commercial
motor vehicles, if such vehicles are used solely and exclusively for private
noncommercial use and any operator of such vehicles.

Section 4. That the Code of the City of Topeka, Kansas, is hereby amended
by adding a section, to be numbered 10.20.250 of Article IV, Chapter 10.20, which said
section reads as follows:

**Preliminary Breath Test.**

(a) Any person who operates or attempts to operate a vehicle within this state
is deemed to have given consent to submit to a preliminary screening test of the
person’s breath or saliva, or both, subject to the provisions set out in subsection (b).

(b) A law enforcement officer may request a person who is operating or
attempting to operate a motor vehicle within this state to submit to a preliminary
screening test of the person’s breath or saliva, or both if the officer has reasonable
suspicion to believe that the person has been operating or attempting to operate a
vehicle while under the influence of alcohol or drugs or both alcohol and drugs.

(c) At the time the test is requested, the person shall be given oral notice that:

(1) There is no right to consult with an attorney regarding whether to
submit to testing;

(2) Refusal to submit to testing is a traffic infraction; and
(3) Further testing may be required after the preliminary screening test. Failure to provide the notice shall not be an issue or defense in any action. The law enforcement officer then shall request the person to submit to the test.

(d) Refusal to take and complete the test as requested is a traffic infraction. If the person submits to the test, the results shall be used for the purpose of assisting law enforcement officers in determining whether an arrest should be made and whether to request the tests authorized by K.S.A. 8-1001 and amendments thereto. A law enforcement officer may arrest a person based in whole or in part upon the results of a preliminary screening test. Such results shall not be admissible in any civil or criminal action concerning the operation of or attempted operation of a vehicle except to aid the court or hearing officer in determining a challenge to the validity of the arrest or the validity of the request to submit to a test pursuant to K.S.A. 8-1001 and amendments thereto. Following the preliminary screening test, additional tests may be requested pursuant to K.S.A. 8-1001 and amendments thereto.

(e) Any preliminary screening of a person’s breath shall be conducted with a device approved pursuant to K.S.A. 65-1,107, and amendments thereto. Any preliminary screening of a person’s saliva shall be conducted with a device approved pursuant to section 2, and amendments thereto.

Section 5. That the Code of the City of Topeka, Kansas, is hereby amended by adding a section, to be numbered 10.20.260 of Article IV, Chapter 10.20, which said section reads as follows:

Ignition Interlock Devices; Tampering.

(a) No person shall:
(1) Tamper with an ignition interlock device, circumvent it or render it inaccurate or inoperative;

(2) Request or solicit another to blow into an ignition interlock device, or start a motor vehicle equipped with such device, providing an operable motor vehicle to a person whose driving privileges have been restricted to driving a motor vehicle equipped with such device;

(3) Blow into an ignition interlock device, or start a motor vehicle equipped with such device, providing an operable motor vehicle to a person whose driving privileges have been restricted to driving a motor vehicle equipped with such device; or

(4) Operate a vehicle not equipped with an ignition interlock device while such person’s driving privileges have been restricted to driving a motor vehicle equipped with such device.

(b) Violation of this section is a class A, nonperson misdemeanor pursuant to K.S.A. 8-1017.

Section 6. That original § 10.15.020 of The Code of the City of Topeka, Kansas, is hereby specifically repealed.

Section 7. This ordinance shall take effect and be in force from and after its passage, approval and publication in the official City newspaper.

Section 8. This ordinance shall supersede all ordinances, resolutions or rules, or portions thereof, which are in conflict with the provisions of this ordinance.

Section 9. Should any section, clause or phrase of this ordinance be declared invalid by a court of competent jurisdiction, the same shall not affect the validity of this ordinance as a whole, or any part thereof, other than the part so declared to be invalid.
PASSED AND APPROVED by the City Council on June 28, 2011.

CITY OF TOPEKA, KANSAS

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William W. Bunten, Mayor

ATTEST:

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Brenda Younger, City Clerk