

TOWN OF OPHIR, COLORADO

ORDINANCE No. 2017 - 1

AN ORDINANCE AUTHORIZING USE OF PAPER BALLOTS FOR ELECTIONS OF OFFICERS, APPOINTMENT OF TOWN MANAGER AND MUNICIPAL JUDGE AND CLERK, AND CERTAIN CODE AND ORDINANCE ENFORCEMENT MATTERS, AND PROVIDING FOR THE PRIVACY OF VOTES CAST BY MEMBERS OF THE OPHIR GENERAL ASSEMBLY AND ELECTORS.

WHEREAS, the Town of Ophir is a home-rule municipality and is one of only two municipalities that is governed in the form of a General Assembly in which Members and not elected representatives such as Trustees or Councilpersons routinely decide most legislative, quasi-judicial and administrative matters by direct vote in open meeting, with the exception of certain elections for the offices of Mayor, Town Clerk, and Treasurer, which have often been conducted by paper ballot when contested; and

WHEREAS, under Section 2.A of Article II of the Town of Ophir Home-Rule Charter (“Charter”), Qualifications to Vote in Town Election:

A qualified elector is any person eighteen (18) years of age or older who has resided within the Town of Ophir for twenty-two (22) days immediately preceding the election at which the person offers to vote and has registered to vote with the Town Clerk on or before the date of the election at which the person offers to vote.

; and

WHEREAS, under Section 2.B of Article II of the Charter, Qualifications to Serve as Member of the General Assembly:

A qualified member of the General Assembly is any person eighteen (18) years of age or older who has resided within the Town of Ophir for twenty-two (22) days immediately preceding any meeting of the General Assembly in which the person offers to vote and has registered to vote with the Town Clerk on or before the date of the meeting or election at which the person offers to vote.

; and

WHEREAS, under Section 4D of Article II of the Charter, Colorado Municipal Election Code Adopted with Reservation:

Procedures, standards and requirements for arranging, conducting and determining the results of municipal elections and shall conform with Article 31, Title 10 C.R.S. known as the Colorado Municipal Election Code, provided that in any case of conflict between the Colorado Municipal Election Code and

provisions of this Charter or any Town ordinance, the local provision shall be deemed valid and control.

; and

WHEREAS, under Section 6 of Article II of the Charter, Elections and Elections Dates,

The General Assembly may prescribe by ordinance provisions for paper ballot voting in municipal elections.

; and

WHEREAS, under Section 6 of Article II of the Charter,

The General Assembly may prescribe by ordinance provisions for paper ballot voting in General Assembly meetings and hearings.

; and

WHEREAS, the Town of Ophir is a small, close-knit residential community whose residents as General Assembly Members are sometimes be reluctant to vote or take action in a General Assembly meeting or election that may be adverse or contrary to the positions of other residents or property owners if that Member's personal position or vote is disclosed or disclosable to others. The Members of the General Assembly desire to provide for the maximum extent of privacy in casting votes on matters such as election of officers, appointment of the Town Manager and Municipal Court Judge and Clerk, and, enforcement of the Ophir Land Use Code ("LUC"), Building Codes, Model Traffic Code, and municipal ordinances in order to encourage greater participation in General Assembly and electoral matters; and

WHEREAS, unlike elected officials, Members of the General Assembly are not and should not be held accountable to other Members or electors in casting their personal votes or ballots, subject to compliance with qualification and registration and conflict-of-interest requirements. The Ophir General Assembly hereby declares that the public interest will be served by adopting a paper ballot system for certain types of votes in which the individual voter's identity is kept private and not disclosed, but which may allow identification of the voter(s) if necessary pursuant to lawful process, including the Colorado Open Records Act ("CORA") and the Colorado Open Meetings Law ("COML"); and

WHEREAS, following the case of *Henderson v. City of Fort Morgan*, 277 P.3d 853, (Colo. App. 2011), the Colorado General Assembly adopted changes to the COML, highlighted below, in C.R.S. 24-6-402(2)(d)(IV) providing that:

Neither a state nor a local public body may adopt any proposed policy, position, resolution, rule, or regulation or take formal action by secret ballot unless otherwise authorized in accordance with the provisions of this subparagraph (IV). Notwithstanding any other provision of this section, a vote to elect leadership of a state or local public body by that same public body may be taken by secret ballot,

and a secret ballot may be used in connection with the election by a state or local public body of members of a search committee, which committee is otherwise subject to the requirements of this section, but the outcome of the vote shall be recorded contemporaneously in the minutes of the body in accordance with the requirements of this section. ... For purposes of this subparagraph (IV), "secret ballot" means a vote cast in such a way that the identity of the person voting or the position taken in such vote is withheld from the public.

; and

WHEREAS, in *Henderson*, two Council appointments and a municipal judge appointment were made by anonymous written ballots that did not identify the name of the Councilperson casting the vote. The District Court ruled that a challenge to the appointments should be dismissed, among other reasons, if the local voting procedure conflicted with the COML, it was authorized by the home rule charter and the voting was a matter of local concern, and this ruling was not decided on appeal when the District Court ruling was upheld; and

WHEREAS, it is unlikely that the Colorado General Assembly considered the existence of or effect upon municipalities that operate by the General Assembly as the local governing body when it amended the COML by adopting C.R.S. 24-6-402(2)(d)(IV); and

WHEREAS, unlike the voting procedure in *Henderson*, the paper ballots to be employed by the Town of Ophir General Assembly or electorate pursuant to this Ordinance will include information identifying the individual voter and will not be anonymous and such identifying information may or may not be disclosable or produced pursuant to lawful process; and

WHEREAS, pursuant to C.R.S. 1-1-104, a designated election official shall not allow persons other than the person of interest to inspect election records that contain an original signature or other identification of the elector; and

WHEREAS, votes of General Assembly Members are more akin to elections than votes by elected representatives in that each Member is also a qualified elector and a larger number of Members typically vote than the numbers of votes cast by the governing body of a non-General Assembly municipality; and

WHEREAS, Section 1 of Article II of the Charter, Elections and Electorate, provides:

The General Assembly shall be the sole judge of Town elections and qualifications of its own members....

; and

WHEREAS, the conduct of Ophir municipal elections and General Assembly meetings utilizing paper ballots is hereby declared to be a matter of strictly local concern, and disclosure of cast paper ballots that would allow identification of individual voter's or

elector's votes would cause substantial injury to the public interest and have a chilling effect on Member(s) participation in Ophir General Assembly meetings and elections.

BE IT ORDAINED BY THE GENERAL ASSEMBLY OF THE TOWN OF OPHIR, COLORADO:

Section 1. Recitals. The Recitals set forth above are incorporated herein as findings and declarations of the General Assembly.

Section 2. Paper Ballots Voting – Authorization and Procedure.

- A. Paper ballots shall be used for all contested elections of the offices of Mayor, Mayor Pro-Tem, Clerk and Treasurer, and for appointment or discharge of the Town Manager, Municipal Court Judge, and Municipal Court Clerk.
- B. Upon motion and affirmative vote of the General Assembly, a decision of the General Assembly at such meeting shall be made by using paper ballots for the following classes of decisions: enforcement or authorization for enforcement of the LUC, Model Traffic Code, International Residential Code; International Existing Building Code; International Mechanical Code; the International Fuel Gas Code; International Energy Conservation Code; San Miguel County Prescriptive Energy Code & Green Building Standards; any similar uniform code that may be adopted by the Town of Ophir; and general ordinances of the Town of Ophir. "Enforcement" of the LUC shall include by way of example, and not of limitation, the following actions: (a) action to require compliance with applicable LUC standards and requirements, special use permit conditions, variance conditions, subdivision or rezoning conditions; (b) revocation or suspension of special use permit, variance, subdivision or rezoning approvals; (c) direction to enforcement officials to initiate prosecution of LUC violations or to enjoin a use or activity in violation of LUC, special use permit, variance, rezoning or subdivision approvals.

Section 3. Form of Ballot for Election or Voting at Meeting.

Each paper ballot shall be cast following the voter printing the voter's name, date of birth, date of vote, summary identification of the vote as described by the Town Clerk, and filling-in blanks to vote in favor, against, or abstain. The ballots shall be placed into a sealed box. The Clerk shall canvass the ballots and tally the vote totals and announce the total votes cast yay or nay or abstain. The Clerk's canvass and tally shall be subject to verification by the Mayor or Mayor Pro-Tem and then immediately announced to the General Assembly. If the Clerk has a conflict of interest in conducting the vote, the Mayor or Mayor Pro Tem shall perform the Clerk's function and the Town Manager or another person designated by the Mayor or Mayor Pro-Tem shall verify the ballot vote. Following the announcement of the vote, the Members General Assembly shall vote whether or not to ratify results of the paper ballot vote and the action taken by the paper ballot vote. The vote of the General Assembly as to whether or not to ratify the paper

ballot vote shall constitute the final action of General Assembly. The Clerk and Mayor or Mayor Pro-Tem as the case may be shall not divulge the identity any individual General Assembly Member or elector who casts a vote nor the vote cast by that Member or elector, except pursuant to lawful process.

Section 4. Privacy of Ballots. The Clerk and Mayor or Mayor Pro-Tem as the case may be shall not divulge the ballot or vote cast by any individual General Assembly Member or elector who casts a vote, except pursuant to lawful process. "Lawful process" means a valid subpoena or court order, or a request for a paper ballot or ballots as public records under CORA. If a CORA request for a ballot or ballots is received, the custodian shall either deny the request on the basis of substantial injury to the public interest, or apply to the District Court pursuant to C.R.S. 24-72-204 for a determination of whether release of the ballots is prohibited by CORA. The ballots shall be kept by the Clerk in a sealed envelope for six months after the vote occurs, and the Clerk shall thereafter destroy the ballots unless a lawful process for release or production of the ballots is pending, in which case the ballots shall be maintained until the process in which the request for production or release is concluded.

Section 5. Severability.

The provisions of this ordinance are severable and the invalidity of any section, phrase, clause or portion of the ordinance as determined by a court of competent jurisdiction shall not affect the validity or effectiveness of the remainder of the ordinance.

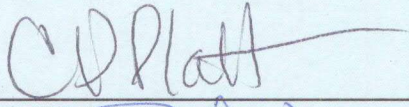
Section 6. Repealer. All ordinances, resolutions or parts of ordinances or resolutions inconsistent herewith are hereby repealed to the extent only of such inconsistency. This repealer shall not be construed to revive any ordinance or resolution or part of any ordinance or resolution heretofore repealed.

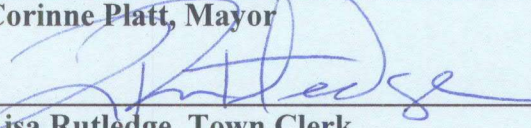
Section 7. Effective Date; Publication. The adoption of this ordinance is necessary to preserve the public health and safety and welfare of the Town of Ophir, including but not limited to establishing and protecting the legitimacy of elections of public officials and appointment of Town Manager at the General Assembly meeting of January 17, 2017 in which the voting and procedures set forth herein shall be utilized. The effective date of this Ordinance shall be immediately upon adoption. The Town Clerk shall cause publication of notice of passage including the full title of this ordinance in a newspaper of general circulation within the Town of Ophir.

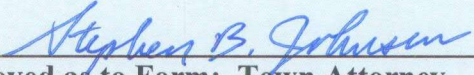
INTRODUCED, READ AND TABLED before the General Assembly of the Town of Ophir, Colorado on the 25th day of October, 2016.

RE-INTRODUCED, READ, AND REFERRED TO PUBLIC HEARING by the General Assembly of the Town of Ophir, Colorado the 3rd day of January, 2016.

HEARD AND FINALLY ADOPTED by the General Assembly of the Town of Ophir, Colorado the 17th day of January, 2016.

By: 
Corinne Platt, Mayor

Attest: 
Lisa Rutledge, Town Clerk

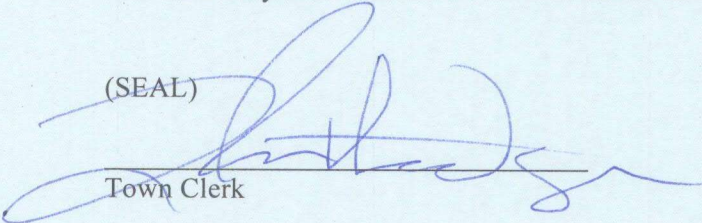

Approved as to Form: Town Attorney

STATE OF COLORADO)
COUNTY OF SAN MIGUEL) SS.
TOWN OF OPHIR)

I, Lisa Rutledge, the Town Clerk of the Town of Ophir, Colorado (the "Town"), do hereby certify:

1. The foregoing pages are a true and correct copy of an Ordinance (the "Ordinance") finally passed and adopted by the Ophir General Assembly (the "General Assembly") of the Town at a meeting of the General Assembly held on January 17, 2017.
2. The Ordinance was duly moved and seconded and the Ordinance was adopted at the meeting of January 17, 2017, by an affirmative vote of a majority of the qualified members present of the General Assembly, of whom 16 members were present and of whom 12 members voted affirmatively to adopt such Ordinance.
3. The Ordinance was approved and authenticated by the signature of the Mayor, sealed with the Town seal, attested by the Clerk and recorded in the minutes of the General Assembly.
4. There are no bylaws, rules or regulations of the General Assembly which might prohibit the adoption of said Ordinance.
5. Notice of the meetings of October 25, 2016 and January 3, 2017 and January 17, 2017 in the form attached hereto as Exhibit A was posted at the Ophir Town Hall not less than 48 hours prior to the meetings in accordance with law.

WITNESS my hand and the seal of said Town affixed this 7th day of February 2017.

(SEAL) 
Town Clerk

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