

CITY OF UNALASKA
UNALASKA, ALASKA

ORDINANCE 2019-14

AN ORDINANCE OF THE UNALASKA CITY COUNCIL AMENDING UNALASKA CODE OF ORDINANCES SECTION 8.12.170 (O)(4,5,6,7,8,9,10 & 11) & SECTION 9.36.090 REGARDING AMORTIZATION OF EXISTING ADULT USES AND OPERATING HOURS OF ADULT BUSINESSES

BE IT ENACTED by the City Council of the City of Unalaska:

Section 1: Form. This is a Code ordinance

Section 2: Amendment of Chapter 8.12.170

Section 8.12.170 (O)(4,5,6,7,8,9,10 & 11) of the Unalaska Code of Ordinances is hereby amended to read as follows [additions are underlined and deletions are overstruck]

- (O) Adult-oriented business.
- (1) Location. Must be separated from any residential district (Single-Family/Duplex, Moderate-Density, High-Density), school, church, public or private park and from a youth- oriented facility or business by a buffer distance of at least 300 feet.
 - (2) Compliance with Title 9 Business Regulations. Must comply with all requirements of Chapter 9.32 of this Code.
 - (3) Premises out of compliance. Except as provided in subsection (P)(4), an adult-oriented business not in compliance with this section must immediately cease all activities.
 - ~~(4) Amortization of existing non-conforming uses. Notwithstanding the provisions of Chapter 8.12.180, adult-oriented businesses lawfully established before the effective date of this subsection (P) [that is, Ordinance No. 2002-04, effective March 12, 2002] may continue to exist as nonconforming uses only if they obtain an amortization permit from the Commission on or before January 1, 2003.~~
 - ~~(5) An application for an amortization permit must be submitted to the Planning Department on or before July 1, 2002, and shall contain the following:
 - ~~(a) Financial information demonstrating the actual capital investment made in the business;~~
 - ~~(b) Evidence of compliance with all provisions of Title 9 of this Code, including but not limited to a diagram of the premises showing a plan thereof specifying the location of one or more manager's stations, the location of all stages, viewing booths, tables, dressing rooms, overhead lighting fixtures and designating any portion of the premises in which patrons will not be permitted. A professionally prepared diagram in the nature of an engineer's or architect's blueprint shall not be required; however, each diagram should be oriented to the north or to some designated street or object and should be drawn to a designated scale or with marked dimensions sufficient to show the various internal dimensions of all areas of the interior of the premises to an accuracy of plus or minus six inches. The City may waive the foregoing diagram for renewal applications if the applicant adopts a diagram that was previously submitted and certifies that the configuration of the premises has not been altered since it was prepared.~~
 - ~~(c) Information regarding the number of police calls made to the property between the time it began operation as an adult business and the date of the application;~~
 - ~~(d) Copies of all sales tax returns filed with the City prior to the date of the application or, if no sales tax returns have been filed, evidence of the gross receipts of the adult-oriented business between the date it commenced operations and the date of the application;~~
 - ~~(e) The legal names of all persons who have performed as adult entertainers between the date the adult-oriented business commenced operations and the date of the application;~~
 - ~~(f) Copies of all business licenses issued for the adult-oriented business and to all persons who have performed as adult entertainers between the date the adult-oriented business commenced operations and the date of the application~~
 - ~~(g) Any other information reasonably requested by the Planning Department.~~~~

- ~~(6) Upon receipt of an application for an amortization permit under this section which conforms to subsection (P)(5), the Planning Director shall forward that application, together with the director's analysis and recommendations, to the Commission. On receipt of an application and the Planning Director's recommendation, the Commission shall conduct a public hearing with advance notice to the applicant and to the public as provided in § 8.12.200(B) of this Code.~~
- ~~(7) After a public hearing, the Commission shall determine an appropriate period of time, expressed in months or years, during which a nonconforming adult-oriented business may continue business operations under this section. In making that determination, the Commission shall consider:~~
- ~~(a) The actual investment made by the owner in the nonconforming adult-oriented business, the estimated or actual return received to date on that investment, and a reasonable rate of return on that investment;~~
 - ~~(b) Any adverse impact continuation of the business may have on surrounding uses of land;~~
 - ~~(c) The compatibility of the adult business with the future development of land uses in the surrounding area;~~
 - ~~(d) The value of the land and improvements which constitute the nonconforming use relative to the value of surrounding land, improvements, and uses;~~
 - ~~(e) The length of the period of nonconforming use;~~
 - ~~(f) The nature of the neighborhood surrounding the nonconforming use;~~
 - ~~(g) The value and condition of the improvements on neighboring premises;~~
 - ~~(h) The nearest area where an adult-oriented business may operate as a conditional use;~~
 - ~~(i) The cost of moving an adult-oriented business from an area in which such adult-oriented business is a nonconforming use to an area in which such adult-oriented business is a conforming use;~~
 - ~~(j) Any other reasonable costs which bear upon the kind and amount of damages sustained by terminating a non-conforming use; and~~
 - ~~(k) Any other factors relevant to this determination.~~
- ~~(8) In connection with approval of an amortization permit under this section, the Commission may impose reasonable requirements governing:~~
- ~~(a) The hours the adult business may be operated;~~
 - ~~(b) The size, number, location, and illumination of exterior signage;~~
 - ~~(c) Traffic circulation, on-site parking and parking lot illumination;~~
 - ~~(d) Proof that each person who will operate or manage the business is at least 21 years of age;~~
 - ~~(e) The employment of persons convicted of felonies as operators or managers of the business; and~~
 - ~~(f) Buffering, screening, or other measures intended to lessen the impact of the adult business on surrounding residential neighborhoods.~~
- ~~(9) Decisions of the Planning Commission on amortization permits may be appealed as provided in § 8.12.200(E) of this Code.~~
- ~~(10) An amortization permit may be issued only for one adult-oriented business at a fixed and certain location and cannot be transferred to another location.~~
- ~~(11) Amortization permits shall not be required for the continuance of any adult-oriented business lawfully established after the effective date of this subsection (P) [that is, Ordinance No. 2002-04, effective March 12, 2002] which becomes a nonconforming use by reason of the establishment of a lawful residential, school, church, public or private park or youth-oriented facility or business use after the effective date of this subsection (P) within the buffer zone for adult-oriented businesses.~~
- (4) (12) Authorized representatives of the City of Unalaska Public Safety Department shall have the authority to enter any adult-oriented business at all reasonable times to inspect the premises for the purpose of determining compliance with the terms and conditions of applicable permits, codes, regulations and laws. At a minimum, reasonable times shall include the operating hours of the business.

Section 3: Amendment of Chapter 9.36.090

Section 9.36.090 of the Unalaska Code of Ordinances is hereby amended to read as follows:
[additions are underlined and deletions are overstruck]

9.36.090 Repealed HOURS OF OPERATION.

- ~~—An adult-oriented business, except for an adult motel, may remain open only between the following hours:~~
- ~~—(A) Monday 8:00 a.m. through Tuesday 3:00 a.m.~~
- ~~—(B) Tuesday 8:00 a.m. through Wednesday 3:00 a.m.~~
- ~~—(C) Wednesday 8:00 a.m. through Thursday 3:00 a.m.~~
- ~~—(D) Thursday 8:00 a.m. through Friday 3:00 a.m.~~
- ~~—(E) Friday 8:00 a.m. through Saturday 3:00 a.m.~~
- ~~—(F) Saturday 8:00 a.m. through Sunday 5:00 a.m.~~

Section 4: Effective Date. This ordinance shall be effective upon adoption

PASSED AND ADOPTED BY A DULY CONSTITUTED QUORUM OF THE UNALASKA CITY COUNCIL THIS
26 DAY OF November, 2019.


HONORABLE VINCENT M. TUTIAKOFF, SR.
MAYOR

ATTEST:


MARJIE VEEDER, CMC
CITY CLERK



MEMORANDUM TO COUNCIL

To: Mayor and City Council Members
From: William Homka, Director, Planning Department
Through: Erin Reinders, City Manager
Date: November 12, 2019
Re: Ordinance 2019-14 AN ORDINANCE OF UNALASKA CITY COUNCIL
AMMENDING UNALASKA CODE OF ORDINANCES SECTION 8.12.170
(O)(4,5,6,7,8,9,10 & 11) & SECTION 9.36.090 REGARDING
AMORTIZATION OF EXISTING ADULT USES AND OPERATING
HOURS OF ADULT BUSINESSES

SUMMARY: In August 2019 Alaska's Supreme Court ruled against rules that restrict the hours of operation for adult businesses. The Court decided that restricting hours of operation for adult businesses interfered with the First Amendment guaranteeing freedom of expression and were therefore unconstitutional. This decision also affects the Unalaska Code of Ordinances. In response to the ruling the Planning Department drafted changes to Title 8 that eliminate the restriction of operating hours. The Department also amended Title 9 with regard to amortizing existing adult businesses into compliance with zoning regulations. This is no longer a concern. The Planning Commission reviewed the proposed amendments on October 24, 2019 and recommended approval to City Council. The amendments are now before City Council for adoption. Staff recommends approval.

PREVIOUS COUNCIL ACTION: Ordinance 2002-03 was on adopted on March 12, 2002 and established hours of operation for adult oriented businesses. Ordinance No. 2002-04 was adopted concurrently on the same day and established regulations for the location of adult oriented businesses.

BACKGROUND: In 2002 the City of Unalaska faced a possible adult oriented business coming to the city. The City lacked any ordinances to regulate the development of adult entertainment businesses. The City developed regulations controlling the placement, operation hours, definitions, and other tools required to effectively regulate the use. The City also adopted an ordinance dealing with bringing existing adult businesses into compliance with zoning regulations. These are typically referred to as amortization of existing uses. This was developed because it was feared the proposed business would be developed prior to the adoption of adult business regulations.

The City Planning Commission reviewed this issue at its public meeting on October 17, 2019. After reviewing the matters pertaining to the constitutionality of imposing hours of operation on adult businesses, as well as the lack of a need to regulate any existing adult businesses since there currently are none, the Planning Commission passed Resolution 2019-11 Recommending City Council Adopts Changes to Unalaska City Code Titles 8 & 9 Regarding Operating Hours of Adult Businesses and Amortization of Existing Adult Uses.

DISCUSSION: The city passed ordinances in Titles 9 using business licenses to control hours of operation. Title 8 developed zoning rules to control the location as well as to address any existing adult businesses in the community. The City Attorney's recent email concerning the Alaska Supreme Court decision regarding hours of operation has an effect on Unalaska's ordinances. The Supreme Court cited a lack of credible evidence linking nude dancing with negative secondary effects and as a result reasoned that First Amendment rights prevail over rules that govern 'expressive content.' The City should amend its Unalaska City Ordinances (UCO) related to adult businesses accordingly, specifically (UCO) 9.36.090 requiring adult businesses to close between 3 am and 8 am. Since we do not currently have an existing adult business, we can also eliminate the section in the zoning ordinance of Title 8 dealing with existing adult businesses.

ALTERNATIVES: Without amending UCO 9.36.090 requiring adult businesses to close between 3 am and 8 am the City of Unalaska's Codified Ordinance could be deemed unconstitutional if challenged in a court of law.

FINANCIAL IMPLICATIONS: There is no cost to amend the ordinance, however there could be financial fines imposed upon the city if its ordinances are ever deemed to be unconstitutional or overly restrictive of the freedom of expression.

LEGAL: This ordinance has been developed at the recommendation of our City Attorney.

STAFF RECOMMENDATION: Staff recommends the City Council approval of Ordinance 2019-14, amending UCO 9.36.090 and eliminating hours of operation associated with adult businesses, and eliminating UCO 8.12.170 (0)(4), (5), (6), (7), (8), (9), (10) and (11) dealing with amortization of existing nonconforming adult businesses.

PROPOSED MOTION: "I move to approve Ordinance 2019-14 and to schedule the second reading and public hearing for November 26, 2019."

CITY MANAGER COMMENTS: I support approval of this ordinance.

ATTACHMENTS: One (1)

Resolution 2019-11 Recommending City Council Adopts Changes to Unalaska City Code Titles 8 & 9 Regarding Operating Hours of Adult Businesses and Amortization of Existing Adult Uses.

**City of Unalaska, Alaska
Planning Commission/Platting Board
Resolution 2019-11**

**RESOLUTION 2019-11: A RESOLUTION RECOMMENDING CITY COUNCIL ADOPTS
CHANGES TO UNALASKA CITY CODE TITLES 8 & 9 REGARDING OPERATING HOURS
OF ADULT BUSINESSES AND AMORTIZATION OF EXISTING ADULT USES**

WHEREAS, UCO §8.12.170(O)(4, 5, 6, 7, 8, 9, 10 & 11) set forth the amortization procedures for a “grandfathered” Adult Business; and

WHEREAS, UCO §8.12.170(O)(4, 5, 6, 7, 8, 9, 10 & 11) was established in the Unalaska Code of Ordinances as a reaction to the establishment of an Adult Business; and

WHEREAS, UCO §8.12.170(O)(4, 5, 6, 7, 8, 9, 10 & 11) are no longer needed as there are no existing adult uses currently in town; and

WHEREAS, UCO §9.36.090 sets forth the procedures for the hours of operation for Adult Businesses; and

WHEREAS, the Alaska State Supreme Court has found in the case Club SinRock, LLC v Municipality of Anchorage that First Amendment rights governing the ‘expressive content’ of nude dancing required Anchorage to demonstrate a link between so called ‘adverse secondary effects’ associated with such businesses and the specific hours of closure; and

WHEREAS, the Court ruled that the history of Anchorage’s adoption of the closing hours ordinance did not have proof that problems such as crime and prostitution associated with these establishments were ‘worse’ between 2am and 6am than at other times; and

WHEREAS, the decision creates a situation where the existing code is illegal and subject to expose the city to legal challenge; and

WHEREAS, the City of Unalaska’s Legal Counsel, Brooks Chandler of Boyd, Chandler, Falconer LLP, have reviewed the decision and counseled the Planning Department to remove the offending language; and

WHEREAS, the City of Unalaska’s Legal Counsel advises taking the opportunity to also strike UCO §8.12.170(O)(4, 5, 6, 7, 8, 9, 10 & 11) from the Unalaska Code of Ordinances; and

WHEREAS, notices of the public hearing were posted and mailed; and

WHEREAS, the City of Unalaska Planning Commission held a public hearing on October 17, 2019 to consider this request and to hear testimony of the public, and

WHEREAS, the Planning Commission reviewed the advice of legal counsel;


THEREFORE BE IT RESOLVED, the Planning Commission recommends to the City Council adopts changes to Unalaska Code of Ordinances titles 8 & 9 regarding operating hours of adult businesses and amortization of existing uses.

BE IT FURTHER RESOLVED, the secretary of the Planning Commission is to certify a copy of this Resolution and to file it with the Unalaska City Clerk no later than fifteen (15) working days from the date shown below.

APPROVED AND ADOPTED THIS 24th DAY OF October, 2019, BY THE PLANNING COMMISSION OF THE CITY OF UNALASKA, ALASKA.



Billie Jo Gehring
Commission Chair



Bil Homka, AICP, Planning Director
Secretary of the Commission