

**CITY OF WASILLA
ORDINANCE SERIAL NO. 12-18**

AN ORDINANCE OF THE WASILLA CITY COUNCIL AMENDING WMC 9.04.010, DEFINITIONS, AND WMC 9.04.030, ACTION TO ABATE LEWD CONDUCT.

Section 1. Classification. This ordinance is of a general and permanent nature and shall become part of the city code.

Section 2. Amendment of section. WMC 9.04.010, Definitions, is hereby amended to read as follows:

9.04.010 Definitions.

When used in this chapter, the following words and phrases shall have the meanings set forth in this section:

"Nudity" is a person's intentional failure to cover with a fully opaque covering that person's own genitals, pubic areas, rectal area, or female breast below a point immediately above the top of the areola.

"Public nudity" means nudity in or in view of a public place.

~~"Public Place". For purposes of this chapter, a public place is any place which is not:~~

1. A private residence;
2. A hotel room rented for use as a bedroom;
3. A shower locker room or dressing room associated with a gymnasium, swimming pool or similar facility, if the said shower room, etc. is restricted to members of the same sex;
4. A medical facility in which nudity or partial nudity is required during the course of any medical examination or treatment.

"Fully Opaque" means a ~~A~~ covering is fully opaque if it is sufficiently opaque to render invisible the skin surface on the parts of the body required to be covered.

~~"Lewd Conduct". Lewd conduct is synonymous with obscene conduct, and means any matter:~~

1. Which the average person, applying contemporary community standards, would find, when considered as a whole, appeals to the prurient interest;
2. Which involves patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated; or

Underline, added. ~~Strikethrough, deleted~~

masturbation, excretory functions, or lewd exhibition of public nudity, ~~and~~

3. ~~Includes, but is not limited to, striptease, and nude dancing defined as:~~

a. ~~Dancing performed to recorded or live music without other significant performance context within which to communicate an artistic message.~~

No definition within this section Nothing herein contained is intended to include or proscribe any matter which, when considered as a whole, and in the context in which it is used, possesses serious literary, artistic, political or scientific value.

Section 3. Amendment of section. WMC 9.04.030, Action to abate lewd conduct, is hereby amended to read as follows:

9.04.030 Action to abate lewd conduct.

A. The city attorney, ~~city prosecutor or any person residing within the city~~ may maintain an action to enjoin lewd conduct sponsored or permitted for commercial purposes as prohibited in Section 9.04.020.~~(B)~~.

B. The action provided for in subsection A of this section shall be brought in the Superior Court, Third Judicial District, Palmer, Alaska. Such action shall be commenced by filing of a verified complaint alleging the facts constituting a violation of Section 9.04.020.~~(B)~~. After the filing of the complaint, ~~application for a temporary injunction may be made to the court, or to the judge thereof, who shall grant a hearing within ten (10) days as soon as possible after the filing. If such action is instituted by a resident of the city, the complainant shall post security or execute bond in accordance with Alaska Civil Rule 65(c) in an amount to be determined by the court.~~

C. ~~Where such an application for a temporary injunction is made, the court or judge thereof may, on application of the complainant showing good cause, issue an ex parte restraining order, restraining the defendant and all other persons from violations of this chapter. The order may be served with any person in charge of the place where the violation occurred or residing therein, or by posting a copy thereof in a conspicuous place at or upon one or more of the principal doors or entrances to such place, or by both such delivery and posting. Any violation of such restraining order is a contempt of court, and where such order is posted, mutilation or removal thereof while the same remains in force is a contempt of court if such posted order contains therein a notice to that effect.~~

D. ~~A copy of the complaint, together with a notice of the time and place of the hearing of the application for a temporary injunction, shall be served upon the defendant as soon as possible. at least three days before such hearing. The place may also be served by posting such papers in the same manner as is provided for above in the case of a restraining order. If~~

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~~the hearing is then continued at the instance of any defendant, the temporary writ as prayed shall be granted as a matter of course. Before or after the commencement of the hearing of an application for a temporary injunction, tThe court, on application of either of the parties or on its own motion, may order the trial of the action on the merits to be expedited advanced and consolidated with the hearing on the application for the temporary injunction. Any evidence received upon an application for a temporary injunction which would be admissible in the trial on the merits becomes a part of the record of the trial and need not be repeated as to such parties at the trial on the merits.~~

~~E. If, upon hearing, the allegations of the complaint are sustained to the satisfaction of the court or judge, the court or judge shall issue a temporary injunction without posting of additional bond, restraining the defendant and any person acting for or on the behalf of the defendant from continuing to sponsor or permit lewd conduct for commercial purposes.~~

~~D.F. If the action is brought by a person who is a resident of the city and the court finds that there was no reasonable grounds or probable cause for bringing the action, and the case is dismissed before trial for that reason or for want of a prosecution, the costs, including actual attorney's fees, may be taxed to such person. If the existence of a violation of Section 9.04.020 is established upon the trial, a judgment shall be entered which shall perpetually enjoin the defendant and any other person from any further performance or exhibition of the material determined to be obscene violations at the place complained of, and the defendant from sponsoring or permitting lewd conduct for commercial purposes elsewhere in the city. The entire expenses of such abatement, including attorney's fees, shall be recoverable by the plaintiff as a part of his or her costs of the lawsuit.~~

~~If the complaint is filed by a person who is a resident of the city, it shall not be dismissed at the instance of the complainant except upon a sworn statement by the complainant and his or her attorney, setting forth the reason why the action should be dismissed, and the dismissal approved by the city attorney in writing or in open court. If the judge is of the opinion that the action should not be dismissed, he or she may direct the city attorney to prosecute the action to judgment at the expense of the city. Attorney fees in situations other than those specified above shall be determined according to Rule 82, Alaska Civil Rules.~~

~~EG. Any person found to be in willful violation of any restraining order, temporary or permanent injunction issued under this chapter is in contempt of court, and upon determination of such violation the judge or court shall, in addition to any other remedy or punishment permissible by law, order that the commercial establishment in which the violation~~

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occurred be closed and enjoined from engaging in business for a period of not less than ten (10) business days.

Section 4. Effective date. This ordinance shall take effect upon adoption by the Wasilla City Council.

ADOPTED by the Wasilla City Council on June 25, 2012.


VERNE E. RUPRIGHT, Mayor

ATTEST:


KRISTIE SMITHERS, MMC, City Clerk

[SEAL]

Underline, added. ~~Strikethrough, deleted~~

The ACLU presented the City with a summary of the lewd conduct restraints or ordinances of cities of comparable size. It is presented herewith for your review.

It is my belief that the code revisions are legally sound.

STAFF RECOMMENDATION: Introduce and set for public hearing Ordinance Serial No. 12-18.



May 29, 2012

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STUDENT ADVISOR

I had promised to follow up with you regarding the practices of other municipalities comparable in size to Wasilla, documenting what their practices are. I have included below some information regarding what I have found in other, comparable jurisdictions. Please note that we are not designating any of the below municipal ordinances as desirable or even constitutional. We are instead trying to create a record by which Wasilla can review what other municipalities do.

Many municipal codes are simply silent on the issue of adult entertainment, obscenity, and obscene performance. The City of Homer, for instance, has no local ordinance addressing these issues. Neither does the Kenai Peninsula Borough, the Kodiak Island Borough, nor the City of North Pole.

Some municipal codes address the issue of adult entertainment through a zoning ordinance. The Fairbanks North Star Borough, for instance, permits adult entertainment facilities in certain portions of the borough designated as general use. *See* FNSB Muni. Code 18.44.020, 18.45.020, & 18.06.010. The Matanuska-Susitna Borough also zones portions of the Borough for adult businesses outside Wasilla, Houston, and Palmer. Mat-Su Borough Code 17.90.010 *et seq.* The City of Soldotna and the City of Kenai regulate adult businesses and designate them as a conditional use for zoning purposes. Soldotna City Code 9.10.010; Kenai City Code 14.20.175.

Other municipalities prohibit obscene performances, using the *Miller* language (or something similar to it) but do not go further to prohibit all nude performances. *See, e.g.,* Fairbanks City Code 46-259. The City of Kenai designates places where obscene books are sold as nuisances, but permits adult bookstores. Kenai City Code 12.10.010; Kenai City Code 14.20.175.

I did identify three jurisdictions that unconstitutionally restrict nude dancing or nude appearance in a public place: the City of Palmer, the City of Kodiak, and the City of Valdez. *See* Kodiak City Code 8.56.020;

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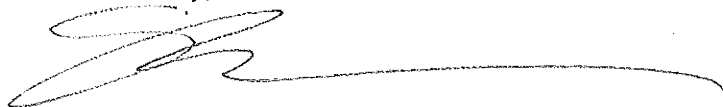
Palmer City Code 9.24.010; Valdez City Code 9.12.100(f). The City of Seward also has an impermissibly vague prohibition on "indecent, immoral, or obscene conduct" in its code. Seward City Code 10.20.010; Valdez City Code 9.12.100 (same). We will take appropriate steps to address these issues with the municipalities in question.

However, no municipality that I discovered allows the kind of prior restraint permitted under Wasilla law. As I stated in the letter I sent you last week, the origin of the language in the Wasilla code permitting abatement of lewd conduct appears to be in a Washington statute rather than any similar municipal ordinance in Alaska. *Compare* Wasilla City Code 9.04.030 *with* RCWA 7.48.058 *et seq.* The Washington statutes in question were struck down as unconstitutional by the Ninth Circuit; the U.S. Supreme Court upheld the judgment of the Ninth Circuit. *Spokane Arcades, Inc. v. Brockett*, 631 F.2d 135, 136 (9th Cir. 1980) *aff'd*, 454 U.S. 1022 (1981).

We appreciate all your efforts to revise the Wasilla ordinances on obscenity. We appreciate the already substantial efforts made to improve the ordinances. We would suggest that the City of Wasilla abandon its efforts to impose any prior restraints on alleged obscenity. Prior restraints present little advantage to the city, but permit great mischief to the rights of speakers. In the clearest examples of obscene performances, where the performance undoubtedly meets the *Miller* criteria, a person presenting a clearly obscene performance is no more likely to be deterred by the possibility of being held in contempt than by the already existing criminal penalties. Instead, the people most likely to be deterred by the Wasilla ordinance are those whose performance operates at the borderlines of the U.S. Supreme Court's definition of obscenity, where the risk of chilling non-obscene speech is highest.

We think that the City of Wasilla can find constitutional alternatives to the current policy without any prior restraint of speech. We hope we can continue to work with you to improve the Wasilla code.

Sincerely,



Thomas Stenson
Legal Director
ACLU of Alaska Foundation