



# PLANNING COMMISSION

## AGENDA

June 22, 2010

CITY OF OAK HARBOR  
PLANNING COMMISSION  
REGULAR MEETING  
CITY HALL – COUNCIL CHAMBERS

AGENDA  
June 22, 2010  
7:30 P.M.

ROLL CALL:      WIGGINS \_\_\_\_\_ JENSEN \_\_\_\_\_ NEIL \_\_\_\_\_  
                    FAKKEMA \_\_\_\_\_ FEY \_\_\_\_\_ WASINGER \_\_\_\_\_  
                    DALE \_\_\_\_\_

1.     **Approval of Minutes – May 25, 2010**
  
2.     **Public Comment** – Planning Commission will accept public comment for items not otherwise on the agenda for the first 15 minutes of the Planning Commission meeting.
  
3.     **ADULT ENTERTAINMENT INTERIM ORDINANCE – Public Meeting**  
Staff will update the Planning Commission on the Interim Ordinance adopted by the City Council. The process of adopting a final ordinance will include a public hearing conducted by the Planning Commission. The date for the hearing is yet to be determined. The item is intended to provide information only and the Planning Commission will not be asked to make any recommendations or take any action at this time.
  
4.     **2010 COMPREHENSIVE PLAN AMENDMENTS – LAND USE CHANGES – Public Meeting**  
Staff will provide information on the three land use change requests that are included in the 2010 Comprehensive Plan Amendment Docket. The item is being introduced for discussion and the Planning Commission will not be asked to make any recommendations or take any action at this time.

# MINUTES

May 25, 2010

**PLANNING COMMISSION  
REGULAR MEETING  
CITY HALL – COUNCIL CHAMBERS  
MAY 25, 2010**

**ROLL CALL:** Present: Mark Wiggins, Julie Dale, Keith Fakkema, Nancy Fey and Greg Wasinger.  
Absent: Bruce Neil and Kristi Jensen,  
Staff Present: Senior Planners Ethan Spoo and Cac Kamak and Associate Planner Melissa Sartorius.

Chairman Wiggins called the meeting to order at 7:35 p.m.

**MINUTES:** MS. FEY MOVED, MR. WASINGER SECONDED, MOTION CARRIED TO APPROVE THE APRIL 27, 2010 MINUTES AS PRESENTED.

**PUBLIC COMMENT**

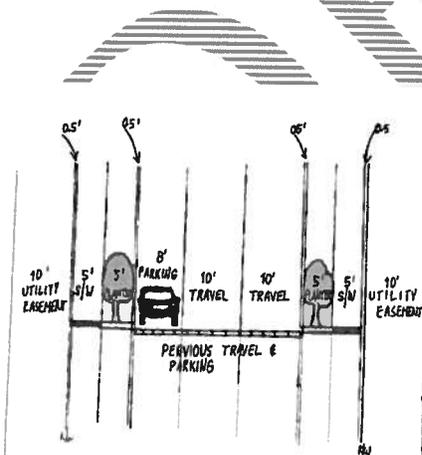
None.

**LOW IMPACT DEVELOPMENT (LID) CODE UPDATE PROJECT – Public Meeting**  
**(No action required)**

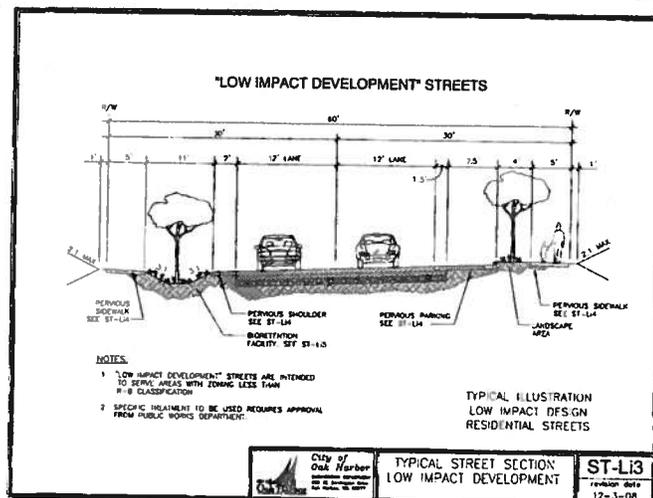
Mr. Spoo reported that the purpose of tonight's meeting is to discuss policy issues for LID streets, native vegetation areas, and open space in PRDs.

**LID Streets**

Mr. Spoo reminded the Commission of their discussion about the Puget Sound Partnership (PSP) street sections in February in which Planning Commission voiced concerns about the design, mainly dealing with maintenance of the raingarden. Because of that concern, staff came up with another option meant to reduce maintenance and the design is consistent with what has already been approved as part of the subdivision code.



This is the narrow street section that was approved as part of the subdivision code.



This is the PSP section with the raingarden on the left side of the street.

Mr. Spoo noted that there is one key difference between the street section approve as part of the subdivision code and the staff option. The difference is that the surface would be pervious concrete so that stormwater could percolate into the soil underneath the street. The important thing to remember is that the two street sections would be an alternative for applicants. It would be their choice whether or not to choose one.

Mr. Spoo posed the following policy questions for LID streets:

- Is PC comfortable with staff drafting code based on these two street sections.
- Are there other questions/ideas Planning Commission has about LID street design that staff needs to explore?

#### Commission Discussion

Planning Commission asked staff about previous versus impervious streets relating to maintenance. Mr. Spoo explained that pervious streets require maintenance as do impervious streets. The main reduction in maintenance comes from replacing the rain garden with pervious street.

#### Native Vegetation Areas

Mr. Spoo stated that the important things to know about native vegetation areas are that they function as a stormwater treatment method (first), open space (second) and they require maintenance for continued function.

The benefits are:

- Cleaner stormwater
- Cleaner air
- Habitat
- Property values
- Costs:
  - Land for other purposes (streets, buildings, parking, etc.)
  - Required maintenance by homeowners.
  - Overlap possible (open space/critical areas).

Mr. Spoo reviewed the decision tool which summarizes the costs and benefits. Mr. Spoo pointed out that as you move from voluntary to mandatory requirement of native vegetation areas, there are more positive impacts on the environment. There is no change in City costs since these would be maintained by homeowners. Private costs would go up, however, because home owners would be paying to maintain the native vegetation area. There is no economic impact until you get to the mandatory column. Assuming developers would not take the incentive unless it's economically feasible for them to do so. There is also moderate negative impact since you're taking some land that could be used for other purposes.

Mr. Spoo posed the following policy questions about Native Vegetation Areas:

- Should native vegetation areas be voluntary, encouraged through incentives, or mandatory?
  - Staff recommends incentive-based approach. Uniform and mandatory requirements may not legally feasible.
  - Type of incentive still needs to be discussed but could include reductions in stormwater fees, density bonuses, reductions in parking requirements.
- Replanting of native vegetation in existing developments?

- What is it? Replanting is recreation of native vegetation areas within existing developments. If someone comes in for a building permit, or any type of land use permit, PSP is suggesting that we require applicants replant (recreate a native vegetation area) at that time. If you get a building permit for your deck or to add a room on to your house, the replanting requirements would be triggered.
- Staff recommends focusing on protecting and maintaining existing native vegetation areas.
- Replanting is resource intensive for staff.

### Commission Discussion

Commissioners agreed incentive based is the best choice. There was some discussion about the tree retention requirements. Mr. Spoo noted the native vegetation area does not replace the existing tree retention ordinance. The tree retention requirement deals with the number of trees and the native vegetation area sets aside a certain area of the site for native vegetation retention. The trees retained could be inside of the native vegetation area so both requirements could be met at the same time.

Commissioners discussed the difficulties enforcing landscaping maintenance. There was some thought that adding on to a home wouldn't be enough to warrant having to replant native vegetation as well as the opposite thought that if you are covering ground that native vegetation areas become even more important.

There was a suggestion that maybe the focus should be on the percentage pervious surfaces or LID structures.

Mr. Spoo suggested that in the interest of keeping it simple, a standard that states that only new developments or short subdivision would be required to provide a native vegetation area. Mr. Spoo stated that staff would draft language along those lines.

Commissioners asked if there would be an incentive to include native vegetation areas. Mr. Spoo explained that there is already a kind of incentive built into the City stormwater fees because the fee is based on the amount of impervious service per lot. The problem is that there is a bit of a disconnect, because the person who is putting in the native vegetation area (developer) is not the same person who will receive the reduced stormwater fee (usually the homeowner). Staff will look into other incentives to create native vegetation areas.

### Open Space in PRDs.

Mr. Spoo pointed out that each application for a planned residential development is required to provide 10% common open space. In exchange, the City has the option of giving the applicant flexibility in zoning regulations such as setbacks and minimum lot sizes. That type of application is what is known as a PRD and is different from a straight subdivision plat where all zoning standards must be met.

As part of the subdivision code update Planning Commission and staff spent lots of time talking about the quality of open space, making sure that it is visible, usable, and accessible. PSP is recommending that we require 20% open space instead of 10%.

Benefits of that choice would be environmental, recreational in nature, as well as having positive impacts on property values for lots located within developments which have more open space. Costs are that developers and applicants may be giving up land which could be used for other purposes. Higher maintenance costs associated with more open space, but again there may be overlap with critical areas or native vegetation areas.

Mr. Spoo indicated that the decision tool shows more environmental benefits with more open space. No change in City costs. Private costs go up. Economy, is a mixed bag. Developer wouldn't choose the incentive unless it made economic sense for them. There is a slight negative impact in the short run, positive or neutral in the long run.

Mr. Spoo posed the following policy questions for Open Space in PRDs:

- Should the City increase the percent of open space in PRDs?
  - Staff recommends yes, and that it be mandatory for simplicity sake. Most jurisdictions require some where between 20 and 35% opens space in their PRDs, so Oak Harbor is on the low end.
- Voluntary, mandatory, incentive-based?
  - Staff recommends mandatory for simplicity.
- Appropriate percent?
  - Staff recommends 20%, comparable to other jurisdictions.

#### Commission Discussion

Commissioners voiced no opposition to the increase open space requirement.

#### **URBAN GROWTH AREA (UGA) CAPACITY ANALYSIS – Public Meeting (No action required)**

Mr. Kamak noted that at the last meeting density was the hot topic of discussion so he will provide data related to density as well as information about the various methodologies and data collected to date.

Mr. Kamak displayed slides relating to density trends for Oak Harbor (Attachment 1). Mr. Kamak explained that population data is provided by the Office of Financial Management (OFM). OFM provides low, medium, and high projections.

When updating codes such as the subdivision code and Planned Residential Development (PRD) code the general intent is to utilize the land as efficiently as possible and to include all the things that provide quality of life.

Mr. Kamak displayed the Residential Densities table and map (Attachment 2) while explaining that densities were calculated based on random sampling of 10 acre areas (areas shown on map) that typically represented development patterns during that decade. Selected sample areas do not include open spaces, tracts or parks. Rights-of-way are included. Mr. Kamak displayed the Development Densities table showing PRD and Plat developments over the last 10 years (Attachment 3). Mr. Kamak noted that the Development Density table shows that the PRD is an effective development tool for increasing density. The average density for PRD's and Plats including all zoning categories together is 5.2 units per acre. For individual categories R-1 is approximately 4.7 units per acre, R-2 is 6.55 units per acre, R-3 is 7 units per acre.

Mr. Kamak switched to the explaining methodologies for calculating capacity analysis. Mr. Kamak stated that the methodologies are relatively new and there are pros and cons to each methodology.

Before talking about the methodologies Mr. Kamak went through the data sources used, data management and corrections as follows:

#### Data Sources

- Island County Assessor's data

- Data used for valuation
- PIN – identifiers of properties that tracks property owners

#### Data Management

- Data provided in a spreadsheet or database for North Whidbey
- City matches County data with City maintained GIS map
  - Properties always don't match up – out of sync since they are maintained separately
  - Time gaps between lots created and PINs inputted in County data
  - A property may have multiple PINs or sometimes a single PIN can be assigned to multiple properties if still owned by the same person or entity.
- There is always some cleaning up of the data

#### Data Corrections

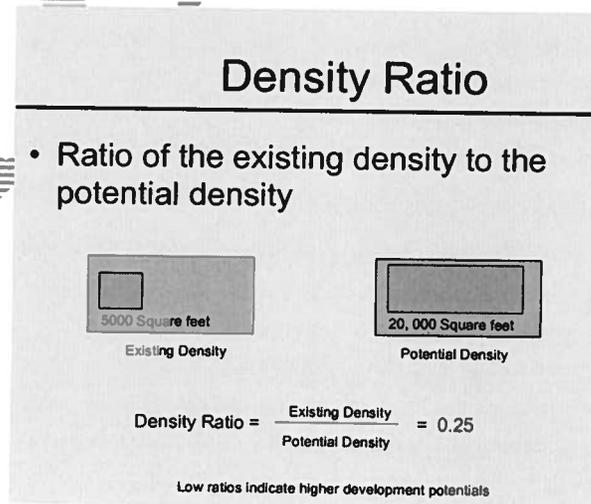
- Data gaps were filled only where County data did not link to City GIS maps
  - Condominiums
  - Tracts
    - Buffers
    - Landscape or common areas
    - Detention basins
  - Schools
  - Parks
  - Religious institutions

Mr. Kamak switched to explaining the three common methodologies used for capacity analysis calculations as follows:

#### Density Ratio

- Typically used for smaller study areas
- Appropriate in areas that have a wide range of densities
- Areas of inconsistent lot areas with the same zoning designations
- Impacted by change in zoning and development regulations (setbacks, buffers, parking etc.)

Density information is not readily available and would be resource intensive to collect and compile the data base.



Improvement to Land Ratio (at last meeting was called the Developability Ratio)

- Uses existing assessed values
- Calculations can include tax exempt properties (non-profits, faith based organizations etc.) that may be undevelopable
- May not include special features that add value to the property and are not included in the structure or land assessment

### Improvement to Land Ratio

- Ratio between the land and the improvements
  - Assessed Land value = 300,000
  - Assessed Improvement Value = 100,000

$$\text{ILR} = \frac{\text{Improvement value}}{\text{Land value}} = 33\% \quad (\text{The structure is 33\% of land value})$$

•Typically this method considers land with ILR <50% as redevelopable

Land to Total Value Ratio

- Uses existing assessed values
- Compares the value of land to the total assessed values
- Includes special features
- Does not include tax exempt properties in the calculations
- Focuses primarily on the land value

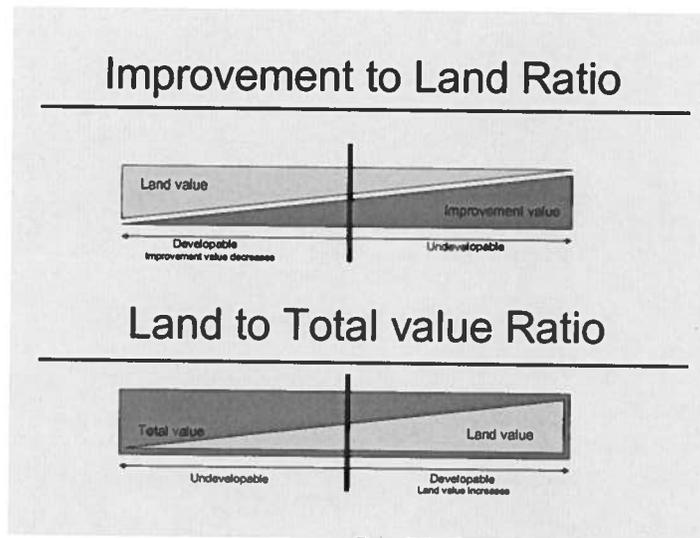
### Land to Total Value Ratio

- Ratio between total assessed value and land value
  - Total Assessed Value is \$400,000
  - Land Value is \$300,000
  - Structure and special features is \$100,000

$$\text{LTR} = \frac{\text{Land Value}}{\text{Total Assessed Value}} = 75\% \quad (\text{Land value is 75\% of the total value})$$

Higher percentages indicate higher redevelopment potential

Mr. Kamak displayed the following graphic to help explain methodologies.



Mr. Kamak explained that in the top graphic the line is drawn where the land value and the improvement values are equal. As you move left, the improvement value decreases and there is more potential for development. In the bottom graphic as you move right, the total value decreases and there is more potential for development. Mr. Kamak pointed out that he drew the line in the center just to explain how the methodologies work. At some point the City will have to decide where to draw that line according to what makes economic sense to consider property redevelopable. In the next few months we will need to look at what the numbers are telling us and what is on the ground to see if the numbers make sense.

Ms. Sartorius talked about the spreadsheets and the maps contained in the agenda packet that show percentage ratios for both the ILR and LTR methods. Ms. Sartorius went into detail about how the data was generated in GIS. The data was taken from the Assessor's Office and linked to the data in GIS. A new field was inserted with the formula to determine whether a property is ILR or LTR. The formulas are applied and the maps are generated from that data. The spreadsheet shows the details.

The following table summarizes ILR and LTR potentially developable acres:

		50%	40%	30%	20%	10%
ILR	City	728	704	688	632	549
	Unincorporated UGA	574	572	558	528	503
	Total	1302	1276	1225	1159	1052
		50%	60%	70%	80%	90%
LTR	City	859	895	625	518	419
	Unincorporated UGA	599	529	501	447	415
	Total	1459	1224	1127	966	835

Commission Discussion

Commissioners asked staff to pick 5 properties to use as examples of how they fit into the ratio formulas and present those at the next meeting.

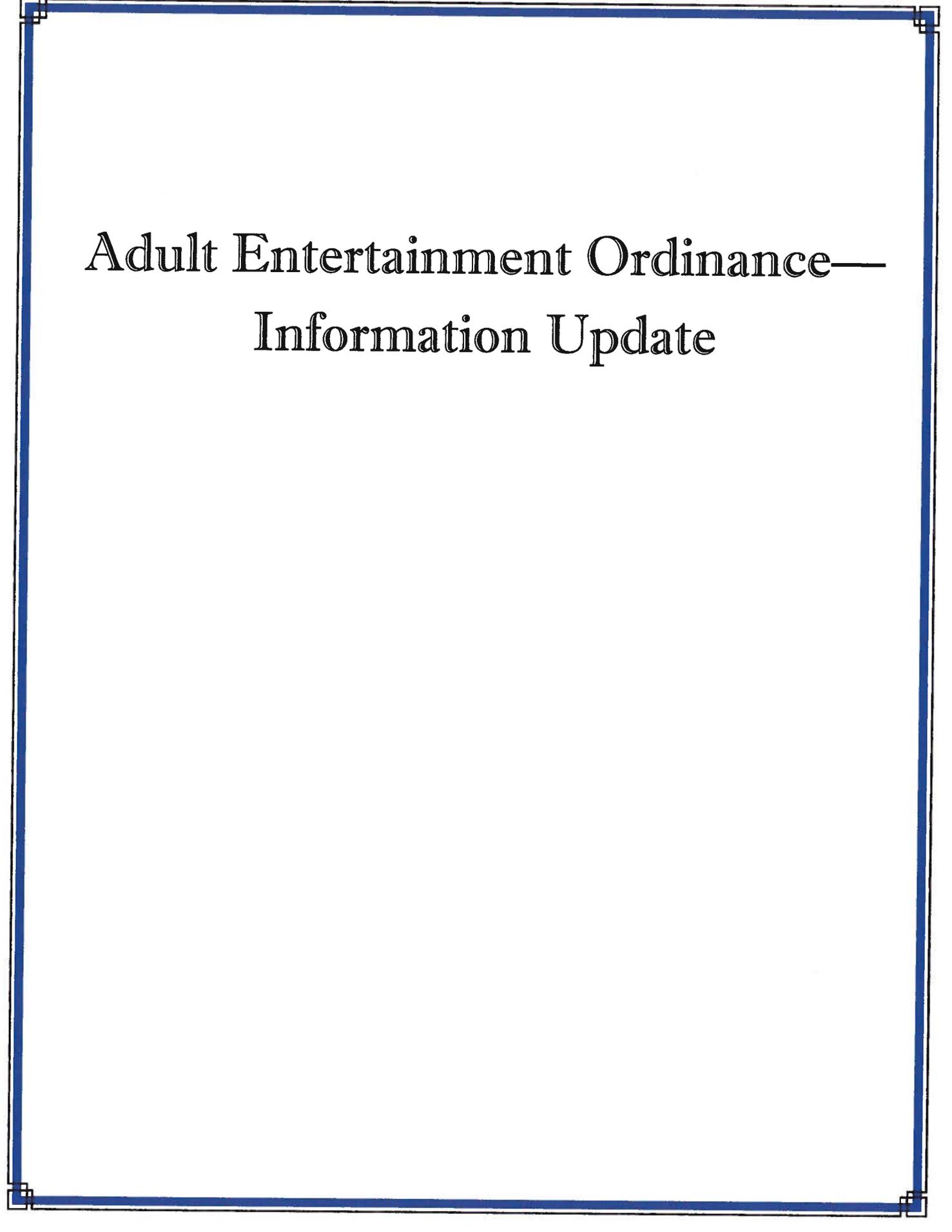
Chairman Wiggins opened the meeting to public comment.

**Vern Pederson** (2336 Happy Lane) complimented the LID presenter and encouraged everyone to save or add native vegetation. Mr. Pederson was concerned that as the City is looking for places to develop that the City is not look as much in the core as it might. He encouraged revitalizing the core. He also suggested providing ground level parking and building the commercial spaces as the second story. He also recommended that the City encourage more mixed uses.

**Thomas Garrett** (West Beach Road) was concerned about the City's appetite for growth. He feared that the last UGA expansion was driven more by special interest needs rather than community needs. He was also concerned about the process that was being used. He would feel more comfortable if he could see criteria for each of the density calculation methods to see if they made sense. He thought there should be a standard for different densities based on the vision for the community. For instance, what areas are going to have high density and what areas are going to have lower density. He didn't believe that it was practical to use an equal measure of density across the entire City. Mr. Garrett stated that he hasn't seen any evidence that staff is going out into the community to find out what the community vision is. He didn't have the sense that Oak Harbor has taken the trouble to consider what the vision should be for the whole community. He pointed out that the City had the lowest portion of tourists compared to the whole Island and that it was because the community has not taken the trouble to come up with a vision on how to get tourism. He stated that before the City thinks about expanding, the City needs to have a vision for the City. Mr. Garrett pointed to SR20 through town. He stated that West Beach Road gets all the people who are protesting the City's failure to manage traffic through town. People are driving 60 mph on West Beach Road because they are frustrated and don't want to go through Oak Harbor and how does that help the businesses? He stated that if people are avoiding Oak Harbor because the traffic hasn't been managed then the City isn't doing its job and is hurting all of us. Mr. Garrett also used Las Vegas and Tacoma as an example of over development and pointed out that their inner cities are dying due to overdevelopment. Mr. Garrett went on to say that he wasn't opposed to growth to West Beach under any condition. He would support Oak Harbor's growth out to West Beach Road if there was a vision to make Fakkema Farms a park and connecting Oak Harbor to the water with a pathway. He would be opposed to expanding Oak Harbor in a way that nobody wins except the person selling all the property. It should be done in a way that everybody benefits.

Chairman Wiggins thanked everyone for coming to the meeting and encourage everyone to voice their concerns to their elected officials and to keep bringing their thoughts and ideas forward.

**BEING NO FURTHER BUSINESS BEFORE THE PLANNING COMMISSION, THE MEETING WAS ADJOURNED AT 9:01 P.M.**



Adult Entertainment Ordinance—  
Information Update

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**PLANNING COMMISSION**

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**TO:** CITY OF OAK HARBOR PLANNING COMMISSIONERS

**FROM:** CAC KAMAK, AICP, SENIOR PLANNER

**SUBJECT:** ADULT ENTERTAINMENT ORDINANCE – INFORMATION UPDATE

**DATE:** 6/17/2010

**CC:** STEVE POWERS, AICP, DEVELOPMENT SERVICES DIRECTOR

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**Purpose:** The purpose of this memo is to share information on the City Council's recent adoption of ordinances related to adult entertainment establishments. The Planning Commission is not requested to take action or make any recommendation regarding these issues at this time.

**Introduction:** Adult entertainment can conjure up emotions, images and opinions of various kinds that are unique to each individual and can quickly become the center of debate in any discussion. The issue has been debated in several State Courts and the United States Supreme Court which have noted that such activity constitutes "expressive conduct" entitled to some protection under the state and federal constitution. However, the Supreme Court has also issued a number of decisions upholding adult business regulations aimed at reducing "secondary effects" such as increased criminal activity, sexual related crime, increased blight, increased vacancy rates etc.

The legal arena on the regulation of adult entertainment and sexually oriented business is enormous and will continue to grow as the industry changes and adapts to the times. This does not mean, however, that regulations cannot be adopted. The findings of applicable court cases and the numerous ordinances that have been adopted by cities and counties that have been upheld by the courts indicate that a defensible ordinance can be adopted by following a process of documenting the secondary impacts of sexually oriented businesses and tailoring the regulations to address the secondary impacts. The ordinances that have been recently adopted by the City focus on mitigating the secondary impacts and other content-neutral aspects of the adult entertainment business.

**Background:** The City, on March 23, 2010, adopted ordinances that address public nudity and licensing of adult entertainment based on a recently expressed interest to open an adult entertainment establishment in the area. As part of adopting these regulations, the City also adopted an interim zoning control to restrict such uses to an overlay district.

The agenda bills for these ordinances have been attached. A summary of the ordinances is provided below.

### **City Council Action – March 23, 2010**

The City Council agenda bills for March 23, 2010 (Attachment 1) related to the adoption of the ordinances are summarized below and are attached to this memo. The legal memorandums that are provided with each of the ordinances are an important and integral part of the documenting process and provide information on court decisions that support the ordinances.

- Ordinance Banning Public Nudity: The City Council adopted an ordinance creating a new chapter 6.70 entitled “Nudity in Public Places” to Title 6 Public Peace, Safety and Morals of the Oak Harbor Municipal Code. The purpose of this ordinance is to ban public nudity with appropriate exceptions for children under ten years of age, breastfeeding, nudity in locker rooms, hospitals and other similar facilities, and for a licensed entertainer performing in an adult entertainment establishments. Public nudity itself is a conduct subject to regulation and a ban on public nudity is a content-neutral restriction that regulates conduct and not expression. The attached agenda bill provides more detailed information and is supported by a legal memorandum. Since this is not a land use related ordinance it will not be necessary for Planning Commission to review this language as per the requirements of RCW 36.70A.390.
- Ordinance adopting Adult Entertainment Licensing and Regulations: The Ordinance created a new chapter 5.20 entitled “”Adult Entertainment”” in Title 5 Business Licenses and Regulations of the Oak Harbor Municipal Code. The regulations adopted with this ordinance address how the business should operate and the requirements that need to be met to comply with the provisions of the chapter. It deals directly with the details of the how the business is run to mitigate the secondary impacts that are caused by such uses. Since this deals with the business licensing and related requirements and is not a land use related ordinance it will not be necessary for Planning Commission to review this language as per the requirements of RCW 36.70A.390.
- Interim Ordinance adopting an Adult Entertainment Overlay Zone: This Ordinance created an interim zoning control by adopting an overlay zone that determines where such uses may locate. Such interim ordinances are authorized under RCW 36.70A.390. The interim ordinance created a new chapter 19.52 entitled “Adult Entertainment Facilities Overlay Zone”. The interim ordinance entered finding of fact concerning the negative secondary impacts of adult entertainment facilities and created an overlay districts that includes C-3, Community Commercial, I-Industrial and PIP, Planned Industrial Park zoned property. The extent of the overlay district was

determined by creating a buffer of 750 feet from schools, parks and religious institutions and 100 feet from residentially zoned areas. (map attached to March 23, 2010 agenda bill packet).

RCW 36.70A.390 allows the adoption of interim zoning control measure without public hearing as long as one is held within 60 days of the initial adoption.

The City Council adopted the ordinances as proposed. However, as a result of public comments and Council discussion, the City Council encouraged staff to pursue changing the buffer for residential uses to 750 feet (originally 100 feet).

**City Council Action – May 4, 2010**

The City Council held a public hearing as required by RCW 36.70A.390 within 60 days of the initial adoption on May 4, 2010. The proposed ordinance included the increased buffer for residential uses from 100 feet to 750 feet. The result of the increased buffer eliminated all the C-3, Community Commercial zoned property from the overlay zone. The interim ordinance was thus adopted with an overlay district that includes only I, Industrial and PIP, Planned Industrial Park properties along Goldie Street. The agenda bill adopting the ordinance has been attached for your reference.

**Process:** In accordance with RCW 36.70A.390 the adopted interim ordinance is effective for no longer than six months. Before the end of this period the City must adopt a final ordinance that has gone through the regular review process (SEPA review, Planning Commission review and recommendation, Department of Commerce notification) or develop a work plan for related studies that can extend the time by one or more six-month periods.

**Planning Commission Action:** The Planning Commission is not requested to take any action or make any recommendations at this time.

# ATTACHMENT - 1

City of Oak Harbor  
City Council Agenda Bill

Agenda Bill No. 7  
Date: March 23, 2010  
Subject: Proposed Ordinance Banning Public Nudity

FROM: William H. Hawkins, Assistant City Attorney

INITIALED AS APPROVED FOR  
SUBMITTAL TO THE COUNCIL BY:

 Jim Slowik, Mayor  
Paul Schmidt, City Administrator  
Doug Merriman, Finance Director  
Margery Hite, City Attorney, as to form

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## SUMMARY STATEMENT:

*Purpose:* The purpose of this ordinance is to ban public nudity.

*Description:* The proposed ordinance would ban public nudity, with appropriate exemptions for any child under age ten (10) years of age, breastfeeding, nudity within a locker room or other similar facility used for changing clothing in connection with athletic or exercise activities, nudity within a hospital or other medical facility for health-related purposes, and for a licensed entertainer performing in an adult entertainment establishment upon a stage at least eighteen (18) inches above the immediate floor level and removed at least ten (10) feet from the nearest patron.

*Policy considerations:* For many years, public lewdness, obscenity and nudity have been regulated by Washington state statutes regarding moral nuisance, public nuisance, and indecent exposure. Until recently, these laws supported enforcement measures satisfactorily. However, in recent months, several Washington jurisdictions have experienced shortcomings with existing laws as applied to "bikini baristas" and similar forms of activity. Some jurisdictions have found it necessary and advisable to adopt local ordinances banning public nudity.

Public nudity itself is conduct subject to regulation. *Erie v. PAP's AM*, 529 U.S. 277 (2000); *O'Day v. King County*, 109 Wn.2d 796 (1988); *Ino Ino, Inc., v. Bellevue*, 132 Wn.2d 103 (1997). A ban on public nudity is a content-neutral restriction that regulates conduct, not expression. *Id.*

Oak Harbor has historically banned public nudity under existing laws. An ordinance specifically and expressly banning public nudity is not intended to prohibit conduct not already prohibited under existing laws or to be a stricter standard, but merely to facilitate enforcement.

Proposed Ban on Public Nudity  
Agenda Bill - 1  
March 23, 2010

Appropriate exemptions are incorporated into the proposed ordinance concerning activity that would not annoy, injure or endanger the health safety and welfare of the community. These include breastfeeding, children under ten (10) years of age, nudity within a locker room or a health care facility. An exemption is also incorporated concerning nude dancing by a licensed entertainer on a raised stage in an adult entertainment establishment and removed at least ten (10) feet from the nearest patron, because of the constitutional protection that conduct may receive as nude expression. See Memo to Oak Harbor City Council regarding Proposed Ordinance to License and Regulate Adult Entertainment.

*Budget consideration:* Because public nudity has historically been banned in Oak Harbor under existing Washington state laws, and because no stricter or different standard would be established, no increase or decrease in law enforcement service is expected. If anything, it is anticipated that enforcement of a ban on public nudity would be facilitated under the proposed ordinance.

**STANDING COMMITTEE REVIEW:**

The ban on public nudity was discussed at the Government Services Committee meeting on March 9, 2010.

**RECOMMENDED ACTION:**

1. Hold public hearing
2. Adopt proposed ordinance banning public nudity

**ATTACHMENTS:**

1. Proposed Ordinance Banning Public Nudity
2. Legal Memorandum for the Record – Ban on Public Nudity

**MAYOR'S COMMENTS:**

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Proposed Ban on Public Nudity  
Agenda Bill - 2  
March 23, 2010

ORDINANCE NO. \_\_\_\_\_

AN ORDINANCE OF THE CITY OF OAK HARBOR ADDING A NEW CHAPTER 6.70 ENTITLED "NUDITY IN PUBLIC PLACES" TO TITLE 6 OF THE OAK HARBOR MUNICIPAL CODE

WHEREAS, the appearance in public of any person in a nude condition would annoy, injure or endanger the comfort, repose, health or safety of others, and offend decency and it detrimental to the public health, safety and welfare and leads to the debasement of both women and men; and

WHEREAS, public lewdness, obscenity and indecent exposure have been regulated by the state of Washington for many years; and

WHEREAS, incidents involving public nudity, lewdness, obscenity and indecent exposure have not been tolerated in the City of Oak Harbor but have been consistently enforced under Washington State law; and

WHEREAS, it is appropriate and desirable for the City of Oak Harbor to adopt an ordinance declaring in express terms what has impliedly been prohibited by state law for a number of years; and

WHEREAS, a ban on public nudity is a content neutral restriction that regulates conduct, not expression under the First Amendment to the U.S. Constitution or Article I, Section 5 of the Washington State Constitution;

WHEREAS, a prohibition against public nudity is not intended to apply to any child under ten (10) years of age, any individual exposing a breast in the process of breastfeeding an infant under two (2) years of age, nudity within a locker room or other similar facility used for changing clothing in connection with athletic or exercise activities, or nudity within a hospital clinic or other similar medical facility for health related purposes; or to a licensed entertainer performing in an adult entertainment establishment upon a stage at least eighteen (18) inches above the immediate floor level and removed at least ten (10) feet from the nearest patron; now, therefore,

THE CITY COUNCIL OF THE CITY OF OAK HARBOR do ordain as follows:

**Section One.** There is hereby added a new Chapter 6.70 entitled "Nudity in Public Places" to Title 6 of the Oak Harbor Municipal Code to read as follows:

**CHAPTER 6.70  
NUDITY IN PUBLIC PLACES**

**Sections:**

- 6.70.010 Definitions.
- 6.70.020 Nudity Prohibited.
- 6.70.030 Violation - Penalty.
- 6.70.040 Violation - Nuisance Declared.

**6.70.010 Definitions.** The following words and terms shall have the meanings which follow:

- (1) "Nude condition or nudity" means the display or exposure of the human male or female genital area, pubic hair or buttocks with less than a fully opaque covering; the showing of the female breast with less than a fully opaque covering of any part of the nipple or areola; the exposure of any device, costume or covering which gives the appearance of or simulates the genitals, pubic hair, natal cleft, perineum, anal region or pubic hair region; or the exposure of any device worn as a cover over the nipples and/or areola of the female breast, which device simulates and gives the realistic appearance of nipples and/or areola.
- (2) "Person" means a natural person of either gender or any corporation, partnership or association.
- (3) "Public place" means any public place including all outdoor places owned by or open to the general public, and all buildings and enclosed places owned by or open to the general public, including such places of entertainment, taverns, restaurants, clubs, theaters, dance halls, banquet halls, party rooms or halls limited to specific members, restricted to adults or to patrons invited to attend, whether or not an admission charge is levied.

**6.70.020 Nudity Prohibited.** No person shall intentionally appear, or intentionally cause the appearance or suffer the appearance of another in any public place in a nude condition or state of nudity; Provided, that the standards established in this Chapter shall not be construed to restrict or prohibit the following activities or products:

- (1) Any child under ten (10) years of age; or
- (2) Any individual exposing a breast in the process of breastfeeding an infant under two (2) years of age; or
- (3) Nudity within a locker room or other similar facility used for changing clothing in connection with athletic or exercise activities; or
- (4) Nudity within a hospital, clinic, or other similar medical facility for health-related purposes; or
- (5) A licensed entertainer performing in an adult entertainment establishment upon a stage at least eighteen (18) inches above the immediate floor level and removed at least ten (10) feet from the nearest patron.

**6.70.030 Violation - Penalty.** Any person convicted of violating this Chapter, or any part hereof, shall be guilty of a misdemeanor and shall, upon conviction thereof, be punished by a fine not exceeding One Thousand Dollars (\$1,000.00) or by imprisonment in jail for a period not exceeding ninety (90) days, or by both such fine and imprisonment.

**6.70.040 Violation - Nuisance Declared.** Any violation of this Chapter is declared to be a public nuisance and, upon any violation thereof, the city attorney may commence an action for the abatement, removal and enjoinder of such nuisance.

**Section Two. Severability.** If any provision of this Ordinance or its application to any person or circumstance is held invalid, the remainder of the Ordinance or the application of the provision to other persons or circumstances is not affected.

**Section Three. Effective Date.** This Ordinance shall be in full force and effect five days after publication.

PASSED by the City Council this \_\_\_\_ day of \_\_\_\_\_, 2010.

APPROVED by its Mayor this \_\_\_\_ day of \_\_\_\_\_, 2010.

THE CITY OF OAK HARBOR

\_\_\_\_\_  
Mayor

Attest:

\_\_\_\_\_  
City Clerk

Approved as to Form:

\_\_\_\_\_  
City Attorney

Published: \_\_\_\_\_

**ORDINANCE BANNING PUBLIC NUDITY**  
**LEGAL MEMORANDUM FOR THE RECORD**

**TO:** Oak Harbor City Council  
**FROM:** William H. Hawkins  
Assistant City Attorney  
**RE:** Proposed Ordinance Banning Public Nudity  
**DATE:** March 18, 2010

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**ISSUE PRESENTED:** Whether it is necessary or desirable for the City to adopt an ordinance banning public nudity.

**SHORT ANSWER:** Recent experience in other Washington municipalities and local jurisdictions has demonstrated that reliance on existing Washington state law regarding moral nuisance, public nuisance and indecent exposure to regulate various forms of public nudity is misplaced, and that more specific legislation is needed.

**DISCUSSION:** For many years, public lewdness, obscenity and nudity have been regulated by Washington state statutes regarding moral nuisance, public nuisance, and indecent exposure. Until recently, these laws supported enforcement measures satisfactorily. However, in recent months, several Washington jurisdictions have experienced shortcomings with existing laws as applied to "bikini baristas" and similar forms of activity. Some jurisdictions have found it necessary and advisable to adopt local ordinances banning public nudity.

Public nudity itself is conduct subject to regulation. *Erie v. PAP's AM*, 529 U.S. 277 (2000); *O'Day v. King County*, 109 Wn.2d 796 (1988); *Ino Ino, Inc., v. Bellevue*, 132 Wn.2d 103 (1997). A ban on public nudity is a content-neutral restriction that regulates conduct, not expression. *Id.*

Oak Harbor has historically banned public nudity under existing laws. An ordinance specifically and expressly banning public nudity is not intended to prohibit conduct not already prohibited under existing laws or to be a stricter standard, but merely to facilitate enforcement.

Appropriate exemptions are incorporated into the proposed ordinance concerning activity that would not annoy, injure or endanger the health safety and welfare of the community. These include breastfeeding, children under ten (10) years of age, nudity within a locker room or a health care facility. An exemption is also incorporated concerning nude dancing by a licensed entertainer on a raised stage in an adult entertainment establishment and removed at least ten (10) feet from the nearest patron, because of the constitutional protection that conduct may receive as nude expression. See Memo to Oak Harbor City Council regarding Proposed Ordinance to License and Regulate Adult Entertainment.

City of Oak Harbor  
City Council Agenda Bill

Agenda Bill No. 8  
Date: March 23, 2010  
Subject: Adult Entertainment Licensing and  
Regulation Ordinance

FROM: William H. Hawkins, Assistant City Attorney

INITIALED AS APPROVED FOR  
SUBMITTAL TO THE COUNCIL BY:

 Jim Slowik, Mayor  
 Paul Schmidt, City Administrator  
 Doug Merriman, Finance Director  
 Margery Hite, City Attorney, as to form

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**SUMMARY STATEMENT:**

*Description/Purpose:* The purpose of this ordinance is to address the appropriate licensing and regulation of the conduct and operation of a use not currently addressed in the Oak Harbor Municipal Code. Adult entertainment is a form of expression protected by the First Amendment to the U.S. Constitution and Article I, Section 5, of the Washington State Constitution. However, there are well documented negative secondary effects associated with adult entertainment in the form of impacts on crime, neighborhoods, property values and increased cost of municipal services. Local governments are authorized to impose licensing and conduct and operation regulations to address the associated negative secondary effects, as long as there remain sufficient "alternative avenues of communication" available for use after the imposition of the regulations. The proposed ordinance makes the following changes to the Oak Harbor Municipal Code:

- (1) It authorizes the City to investigate and in appropriate cases issue licenses to owners and operators of adult entertainment establishments, the managers of the establishments and the entertainers.
- (2) The ordinance imposes standards of conduct and operation and regulates adult entertainment concerning attire, minimum distance between entertainers and patrons, prohibits sexual contact between entertainers and patrons, prohibits direct tipping of entertainers and, imposes standards on the interior layout of adult entertainment establishments, imposes an age minimum for employees, entertainers and patrons, and prohibits the sale of alcoholic beverages in adult entertainment establishments.

The ten (10) foot separation is intended to mitigate the negative secondary effects of adult entertainment including prostitution and other illegal activity that has contributed to the profitability of adult entertainment and table dancing and lap dancing.

The standards of conduct and operation are intended to mitigate the negative secondary effects of adult entertainment facilities, by addressing significant criminal activity that has historically and regularly occurred in adult entertainment establishments while still permitting the expressive aspect of stage dancing. The criminal activity associated with adult entertainment includes prostitution, narcotics transactions, breaches of the peace, and organized crime.

*Policy considerations:* If the City Council determines to regulate this use, it must do so in light of well settled decisions of the U.S. Supreme Court, other federal courts and the Washington appellate courts on the subject. Because of First Amendment considerations, the use is protected within established limitations. The City Council may regulate the use for negative secondary impacts. Many other jurisdictions have studied adult entertainment and determined that there are negative impacts upon neighborhoods, property values and increased municipal services associated with adult entertainment establishments, in addition to associated criminal activity. The City Council may rely on the experiences of other jurisdictions and on findings in appellate court decisions in determining the existence of negative secondary impacts.

The proposed ordinance regulates and licenses adult entertainment establishments as a way of minimizing the negative secondary impacts of adult entertainment establishments.

*Budget consideration:* This ordinance is not anticipated to have any budget impacts.

**STANDING COMMITTEE REVIEW:**

Regulation of adult entertainment was discussed at the Public Safety Standing Committee on February 18, 2010 and at the Government Services Standing Committee on March 9, 2010.

**RECOMMENDED ACTION:**

1. Hold public hearing.
2. Adopt proposed ordinance regulating adult entertainment.

**ATTACHMENTS:**

1. Proposed ordinance regulating adult entertainment.
2. Legal Memorandum for the Record – Adult Entertainment Licensing Ordinance

**MAYOR'S COMMENTS:**

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Adult Entertainment Licensing and  
Regulation Agenda Bill - 2  
March 23, 2010 meeting

ORDINANCE NO. \_\_\_\_\_

AN ORDINANCE OF THE CITY OF OAK HARBOR ADDING A NEW CHAPTER 5.20 ENTITLED "ADULT ENTERTAINMENT" TO TITLE 5 OF THE OAK HARBOR MUNICIPAL CODE

WHEREAS, adult entertainment establishments require special supervision from the public safety agencies of the City in order to protect and preserve the health, safety, morals and welfare of the patrons of such businesses as well as the citizens of Oak Harbor; and

WHEREAS, the city council find that adult entertainment establishments are frequently used for unlawful sexual activities, including prostitution and sexual liaisons of a casual nature; and

WHEREAS, licensing is a legitimate and reasonable means of accountability to ensure that operators of sexually oriented businesses comply with reasonable regulations and to ensure that operators do not knowingly allow their establishments to be used as places of illegal sexual activity or solicitation; and

WHEREAS, there is convincing, documented evidence that adult entertainment establishments because of their very nature, have a deleterious effect on both the existing businesses around them and the surrounding residential areas adjacent to them, causing increased crime and the down grading of property values; and

WHEREAS, the city council desires to minimize and control these adverse effects and thereby protect the health, safety and welfare of the citizenry, protect the citizens from increased crime, preserve the quality of life, protect the property values and character of the surrounding neighborhoods; and

WHEREAS, the city council has determined that locational criteria alone do not adequately protect the health, safety and general welfare of the people of Oak Harbor; and

WHEREAS, it is not the intent of this ordinance to suppress any speech activities protected by the First Amendment of the U.S. Constitution or Article I, Section 5 of the Washington State Constitution, but to enact a content-neutral ordinance which addresses the secondary effects of adult entertainment businesses;

Pursuant to the authority granted by the Constitution and the legislature of the state of Washington; now, therefore,

THE CITY COUNCIL OF THE CITY OF OAK HARBOR do ordain as follows:

**Section One.** There is hereby added a new Chapter 5.20 entitled "Adult Entertainment" to Title 5 of the Oak Harbor Municipal Code to read as follows:

**CHAPTER 5.20  
ADULT ENTERTAINMENT**

**Sections:**

- 5.20.010 Findings of Fact.
- 5.20.020 Definitions.
- 5.20.030 Adult entertainment establishment license.
- 5.20.040 License for managers and entertainers.
- 5.20.050 License fees.
- 5.20.060 License prohibited to certain classes.
- 5.20.070 License applications.
- 5.20.080 License - Applicant investigation.
- 5.20.090 Issuance of licenses.
- 5.20.100 License - Posting and display.
- 5.20.110 License - Denial, revocation, or refusal to renew - Grounds.
- 5.20.120 Suspension or revocation of establishment license.
- 5.20.130 Filing of application.
- 5.20.140 License conditions.
- 5.20.150 Violation of license conditions.
- 5.20.160 Revision of license conditions.
- 5.20.170 Appeal to court.
- 5.20.180 Continuation of business while complaint hearing decision pending.
- 5.20.190 Standards of conduct and operation.
- 5.20.200 Physical layout of premises.
- 5.20.210 Permission to inspect.
- 5.20.220 Public nuisance.
- 5.20.230 Non-public areas.
- 5.20.240 Additional requirements for adult entertainment establishments.
- 5.20.250 List of entertainments - Fees.
- 5.20.260 Notice to customers.
- 5.20.270 Activities not prohibited.
- 5.20.280 Manager on premises.
- 5.20.290 Hours of operation.
- 5.20.300 Persons under eighteen (18) years of age prohibited.
- 5.20.310 Locking entrance unlawful.
- 5.20.320 Alarm system at entrance - Unlawful.
- 5.20.330 Warning of approach of police - Lookouts.
- 5.20.340 Warning that police are approaching - Unlawful.
- 5.20.350 Presence in place where warning given.
- 5.20.360 Locking rooms.
- 5.20.370 Presence in locked rooms.
- 5.20.380 Permitting alarm system unlawful.
- 5.20.390 Exemption from Chapter

**5.20.010 Findings of Fact.** Based on evidence concerning the adverse secondary effects of adult uses on the community presented in hearings and in reports made available to the council,

and on findings incorporated in the cases of *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986), *Young v. American Mini Theatres*, 426 U.S. 50 (1976), *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), *City of Erie v. Pap's A.M., TDA "Kandyland"*, 529 U.S. 277 (2000), *City of Los Angeles v. Alameda Books, Inc.*, 121 S.Ct. 1223 (2001), *Wise Enterprises, Inc., v. Athens-Clarke County Georgia*, No. 99-8265 (11th Circuit Court of Appeals 2000), *Sammy's v. City of Mobile*, No. 96-7073 (11th Circuit Court of Appeals 1998), *Ino Ino, Inc., v. Bellevue*, 132 Wn.2d 103 (1997), *World Wide Video v. Tukwila*, 117 Wn.2d 382 (1991), *Kitsap County v. Kev, Inc.*, 106 Wn.2d 135 (1986), *Colacurcio v. City of Kent*, 163 F. 3d 545 (1998), *DCR, Inc., v. Pierce County*, 92 Wn.App. 660 (1998), and on studies in other communities including, but not limited to, Bellevue, Burien, Everett, Shoreline, Lynnwood, Tukwila, SeaTac, Federal Way, Tacoma, and Seattle, the council hereby adopt the following Findings of Fact:

- (1) The city council has determined that locational criteria alone do not adequately protect the health, safety and general welfare of the people of Oak Harbor.
- (2) The secondary effects of the activities defined and regulated in this ordinance are detrimental to the public health, safety, morals, and general welfare of the citizens of the city and, therefore, such activities must be regulated.
- (3) Regulation of the adult entertainment industry is necessary because, in the absence of such regulation, significant criminal activity has historically and regularly occurred. This history of criminal activity in the adult entertainment industry has included prostitution, illegal employment of minors, narcotics, alcoholic beverage law violations, breaches of the peace, tax evasion, and the presence within the industry of individuals with hidden ownership interests and outstanding arrest warrants.
- (4) Proximity between entertainers and patrons during adult entertainment performances can facilitate sexual contact, prostitution, and related crimes. Concerns about crime and public sexual activity are legitimate and compelling concerns of the city which demand reasonable regulation of adult entertainment establishments in order to protect the public health, safety, and general welfare of its citizens, including a prohibition against direct contact between entertainers and patrons, a ten (10) foot minimum distance between entertainers and patrons, restricting nude dancing to stage raised 18 inches above the floor, and a ban on direct tipping of entertainers, as evidenced in Pierce County, the City of Kent, the City of Bellevue and the County of San Diego County in particular.
- (5) Licensing is a legitimate and reasonable means of accountability to ensure that operators of adult entertainment establishments comply with reasonable regulations and to ensure that operators don't knowingly allow their establishments to be used as places of illegal sexual activity or solicitation.
- (6) It is necessary to license entertainers in the adult entertainment industry to prevent the exploitation of minors, to ensure that each entertainer is an adult, and to ensure that such entertainers have not assumed a false name which would make regulation of the entertainer difficult or impossible.

- (7) It is necessary to have a licensed manager on the premises of establishments offering adult entertainment at such times as such establishments are offering adult entertainment, so there will at all necessary times be an individual responsible for the overall operation of the adult entertainment establishment, including the actions of patrons, entertainers, and other employees, and to ensure a design, layout and sufficient lighting to permit a manager to effectively monitor activity at all times, as evidenced in Spokane and Tukwila in particular.
- (8) The license fees required in this chapter are necessary as nominal fees imposed as necessary regulatory measures designed to help defray the substantial expenses incurred by the city in regulating the adult entertainment industry.
- (9) Hidden ownership interests for the purpose of skimming profits and avoiding the payment of taxes have historically occurred in the adult entertainment industry in the absence of regulation. These hidden ownership interests have historically been held by organized and white-collar crime elements. In order for the city to effectively protect the public health, safety, morals, and general welfare of its citizens and effectively allocate its law enforcement resources, it is important that the city be fully apprised of the actual ownership of adult entertainment establishments and the identities and backgrounds of persons responsible for management and control of the adult entertainment establishments, as evidenced in Tukwila in particular. P:\LGLA\WORK\RES-ORD2010\Adult Entertainment Licensing Ord #2.docP:\LGLA\WORK\RES-ORD2010\Adult Entertainment Licensing Ord #2.doc
- (10) Removal of doors on adult booths and requiring sufficient lighting on premises with adult booths advances a substantial governmental interest in the illegal and unsanitary sexual activity from occurring in adult entertainment establishments.
- (11) Requiring licensees of adult entertainment establishments to keep information regarding current employees and certain past employees will help reduce the incidents of certain types of criminal behavior by facilitating the identification of potential witnesses or suspects and by preventing minors from working in such establishments.
- (12) The general welfare, health, morals and safety of the citizens of Oak Harbor will be promoted by the enactment of this ordinance.
- (13) It is not the intent of this chapter to suppress or censor any expressive activities protected by the First Amendment of the United States Constitution or Article I, Section 5 of the Washington State Constitution, but rather to enact content neutral reasonable time, place, and manner regulations which address the compelling interests of the city in mitigating the secondary effects of adult entertainment establishments.

**5.20.020 Definitions.** For the purposes of Chapter 5.20 OHMC, the words and phrases used in this section shall have the following meanings, unless context indicates otherwise:

- (1) "Adult entertainment" shall mean any of the following:

- (a) Any exhibition, performance, or dance of any type conducted in a premises where such exhibition, performance, or dance involves a person who is unclothed or in such costume, attire, or clothing as to expose any portion of the female breast with less than a fully opaque covering of any part of the nipple or areola or any portion of the pubic region, anus, buttocks, vulva, or genitals, or wearing any device or covering exposed to view which simulates the appearance of any portion of the female breast with less than a fully opaque covering of any part of the nipple or areola or any portion of the pubic region, anus, buttocks, vulva, or genitals, or human male genitals in a discernibly turgid state, even if completely and opaquely covered.
- (b) Any exhibition, performance, or dance of any type conducted on a premises where such exhibition, performance, or dance is distinguished or characterized by a predominant emphasis on the depiction, description, simulation, or relation to the following specified sexual activities:
  - (i) Human genitals in a state of sexual stimulation or arousal;
  - (ii) Acts of human masturbation, sexual intercourse, or sodomy;
  - (iii) Fondling or other erotic touching of human genitals, pubic area, buttocks, or female breast.
- (2) "Adult entertainment establishment" shall mean any commercial premises or club to which any patron is invited or admitted and where adult entertainment is provided on a regular basis or is provided as a substantial part of the premises.
- (3) "Applicant" shall mean the individual or entity seeking an adult entertainment business.
- (4) "Applicant control persons" shall mean all partners, corporate officers, and directors, and any other individuals in the applicant's business organization who hold a significant interest in the adult entertainment establishment, based on responsibility for management of the adult entertainment business.
- (5) "Development Services Department" shall mean the city of Oak Harbor development services department.
- (6) "Employee" shall mean any and all persons, including managers, entertainers, and independent contractors who work in or at or render any services directly related to the operation of any adult entertainment establishment.
- (7) "Entertainer" shall mean any person who provides live adult entertainment, whether or not a fee is charged or accepted for such entertainment.

- (8) "Manager" shall mean any person who manages, directs, administers, or is in charge of the affairs and/or the conduct of any portion of any activity involving adult entertainment occurring at any adult entertainment establishment.
- (9) "Operator" shall mean any person operating, conducting, or maintaining an adult entertainment establishment.
- (10) "Picture machine" shall mean any machine, instrument, or device showing moving pictures, slides, plain, colored or three-dimensional pictures, or any picture device of a similar nature depicting sexual conduct or specified anatomical areas, the operation of which is made possible by the insertion or placing of any coin, plate, disc, or slug into the slot or other receptacle, or by the payment directly or indirectly of any consideration to another for such purpose.
- (11) "Sexual conduct" shall mean acts of:
  - (a) sexual intercourse within its ordinary meaning and occurs upon any penetration, however slight; and also means any penetration of the vagina or anus, however slight, by an object, when committed on one person by another, whether such persons are of the same or opposite sex, except when such penetration is accomplished for medically recognized treatment or diagnostic purposes;
  - (b) any contact between persons involving the sex organs of one person and the mouth or anus of another;
  - (c) masturbation, manual or instrumental, of oneself, or of one person by another.
- (12) "Specified anatomical areas" shall mean and include any of the following:
  - (a) Human genitals, pubic region, buttocks, anus, or female breasts with less than a fully opaque covering of any part of the nipple or areola; or
  - (b) Human male genitals in a discernibly turgid state, even if completely and opaquely covered.

**5.20.030 Adult entertainment establishment license.**

- (1) It is unlawful for any person to operate or maintain an adult entertainment establishment in the city of Oak Harbor unless the owner, operator or lessee thereof has obtained from the development services director a license to do so, to be designated an "adult entertainment establishment license".
- (2) It is unlawful for any person to knowingly allow the use of his or her property for the operation of an adult entertainment establishment that is not licensed under this Chapter.

- (3) It is unlawful for any entertainer, employee or manager to knowingly work in or about, or to knowingly perform any service or entertainment directly related to the operation of, an unlicensed adult entertainment establishment.

**5.20.040 License for managers and entertainers.**

- (1) It is unlawful for any person to work as a manager at an adult entertainment establishment without first having obtained from the development services director a license to do so, to be designated as an "adult entertainment manager's license".
- (2) It is unlawful for any person to work as an entertainer at an adult entertainment establishment without having first obtained from the development services director a license to do so, to be designated as an "adult entertainer's license".

**5.20.050 License fees.** The license year for adult entertainment establishment licenses, adult entertainer's licenses and adult entertainment manager's licenses required under this Chapter shall be from January 1st to December 31st. All license fees shall be payable on an annual basis, which fees shall be as follows:

- (1) Adult entertainment establishment license, Seven Hundred Twenty Dollars (\$720.00) per year;
- (2) Adult entertainer's license, One Hundred Forty-five Dollars (\$145.00) per year; and
- (3) Adult entertainment manager's license, One Hundred Forty-five Dollars (\$145.00) per year.

**5.20.060 License prohibited to certain classes.** No license authorized under this Chapter shall be issued to:

- (1) a natural person who has not attained the age of eighteen (18) years;
- (2) a partnership, unless all of the members thereof are individually qualified to obtain a license as provided by this Chapter. Such license shall be issued to the manager of the partnership; or
- (3) a corporation, unless all of the officers and directors thereof are individually qualified to obtain a license as provided by this chapter.

**5.20.070 License applications.**

- (1) Adult Entertainment Establishment License. All applications for an adult entertainment establishment license shall be submitted in the name of the person proposing to conduct such adult entertainment on the establishment and shall be signed by such person and notarized or certified as true under penalty or perjury. All applications shall be submitted

on a form supplied by the development services director and shall require the following information:

- (a) The name, residence address, home telephone number, date and place of birth, and social security number of the applicant;
- (b) The business name, address and telephone number of the establishment;
- (c) The names, residence addresses, residence telephone numbers, social security numbers and dates of births of any partners, corporate officers and directors;
- (d) Such information as the development services director, by rule, may require concerning the identity of corporate shareholders;
- (e) Addresses of the applicant for the five (5) years immediately prior to the date of application;
- (f) Whether the applicant has had a license under this Chapter or an adult entertainment-related license issued by another jurisdiction, denied, suspended or revoked within the five (5) years immediately preceding the date of the application; and, if so, the name and location of the adult entertainment business to which the denied, suspended or revoked license pertained, the date of the action, the jurisdiction that took such action, the reason for the action, and the status of any appeal of the action;
- (g) A description of the business, occupation, or employment of the applicant for the five (5) years immediately preceding the date of application;
- (h) The name of at least one (1) natural person whose name and mailing address, which shall be an address located within the state of Washington, shall appear on the adult entertainment establishment license and who shall receive notices from the development services department;
- (i) Whether the applicant has been the subject of a bail forfeiture, adverse finding or conviction with local, state or federal criminal law, other than a parking offense or traffic infraction, within the five (5) years preceding the date of the application; and, if so, the nature of the crime and the date, location and nature of the judicial action taken.

A failure to provide information required by this subsection will constitute an incomplete application and will not be processed.

- (2) Adult Entertainment Manager's or Adult Entertainer's License. All applications for an adult entertainment manager's license or adult entertainer's license shall be signed by the applicant and notarized or certified as true under penalty of perjury. All applications shall

be submitted on a form supplied by the development services director, and shall require the following information:

- (a) The applicant's name, home address, home telephone number, date and place of birth, social security number, proof of U.S. citizenship or of legal residency and the right to work in Washington State, and any stage names or nicknames used in entertaining;
- (b) The name and address of each business at which the applicant intends to work as a manager or entertainer;
- (c) The applicant shall present documentation that he or she has attained the age of eighteen (18) years. Any of the following shall be accepted as documentation of age:
  - (i) A motor vehicle operator's license issued by any state bearing the applicant's photograph and date of birth;
  - (ii) A state-issued identification card bearing the applicant's photograph and date of birth;
  - (iii) An official passport issued by the United States of America;
  - (iv) An immigration card issued by the United States of America;
  - (v) Any other picture identification bearing the applicant's photograph and date of birth issued by a governmental agency; or
  - (vi) Such other form of identification as the development services director deems, by rule, to be acceptable;
- (d) Whether the applicant has had a license under this Chapter or an adult entertainment-related license issued by another jurisdiction denied, suspended or revoked within the five (5) years immediately preceding the application; and, if so, the name and location of the adult entertainment business to which the denied, suspended or revoked license pertained, the jurisdiction that took such action, the reason for the action, the date of the action and the status of any appeal of the action;
- (e) Whether the applicant has been the subject of a bail forfeiture, adverse finding or conviction in connection with local, state or federal criminal law, other than a parking offense or traffic infraction, within the five (5) years immediately preceding the date of the application; and if so, the nature of the crime and the date, location, and nature of the judicial action take; and

Failure to provide information required by this subsection will constitute an incomplete application and will not be processed.

- (3) **Duty to Supplement.** Each license applicant for, or holder of, a license issued under this Chapter shall modify or supplement application information on file with the development services director, within ten (10) days of a change, if the information changes materially from what is stated on the applicant or holder's license application.

**5.20.080 License - Applicant investigation.** The development services director shall investigate an application for an adult entertainment establishment license required by requesting criminal records and a confirmation of zoning compliance from appropriate city agencies. The development services director shall investigate an application for an adult entertainment manager's or adult entertainer's license by requesting criminal records from appropriate city agencies.

**5.20.090 Issuance of licenses.**

- (1) **Adult Entertainment Establishment License.** Within thirty (30) days of receipt by the development services director of a complete application for an adult entertainment establishment license, including all submittals and information required by this Chapter, the development services director shall issue or deny the adult entertainment establishment license. If the development services director fails to issue or deny the license within the thirty (30) day period, the license is deemed issued on the last day of the thirty (30) day period and the applicant may operate the adult entertainment establishment for which the license was sought, subject to all other provisions of this Chapter.
- (a) The development services director shall deny the adult entertainment establishment license for any of the following reasons, and shall notify the applicant in writing of the reasons for the denial and the opportunity to appeal if the development services director finds:
- (i) the application does not meet the requirements of this Chapter;
  - (ii) the applicant, his or her employee, agent, partner, director, officer, or manager has knowingly made any false, misleading or fraudulent omission or statement of material fact in the application for a license, or in any report or record required to be filed with the development services director;
  - (iii) the applicant, and all employees, agents, partners, directors, officers, or managers of the applicant have not attained the age of eighteen (18) years, as provided by OHMC 5.20.060;
  - (iv) the applicant or his or her partner, director, or officer is currently the subject of a final adult entertainment establishment license revocation

order issued pursuant to this Chapter which became final less than one (1) year prior to the pending application.

- (b) If the development services director denies an adult entertainment establishment license authorized by this Chapter, and if the applicant files a timely notice of appeal pursuant to this Chapter, the development services director shall, upon receipt of a copy of such notice of appeal, immediately issue the applicant a temporary license which shall authorize the applicant to operate the establishment to the same requirements as if the license had been granted, pending the final outcome of the appeal. A license applicant must pay the fee for an adult entertainment establishment license as set forth in OHMC 5.20.030 at the time the temporary license is issued. The holder of a temporary license is subject to all requirements, standards and penalty provisions of this Chapter. Nothing in this section is intended to authorize activities that do not comply with other requirements of the Oak Harbor Municipal Code or other applicable law.

(2) Adult Entertainment Manager's and Adult Entertainer's Licenses. The development services director shall issue or deny an adult entertainment manager's license or an adult entertainer's license on the same business day in which a complete application, including all submittals and information required by this Chapter, is received.

- (a) The development services director shall deny an application for an adult entertainment manager's license or an adult entertainer's license for any of the following reasons, and shall notify the applicant in writing of the grounds for the denial and the opportunity to appeal, if the development services director finds:
  - (i) the applicant is less than eighteen (18) years old;
  - (ii) the applicant has failed to provide any of the submittals or information required to be supplied according to this Chapter;
  - (iii) the applicant has knowingly made any false, misleading or fraudulent statement or omission of material fact in the application for a license; or
  - (iv) the applicant is currently the subject of a final license suspension order issued pursuant to this Chapter or is the subject of a license revocation order issued pursuant to this Chapter which became final less than one (1) year before the pending application.
- (b) If the development services director denies an adult entertainment manager's license or an adult entertainer's license authorized by this Chapter, and if the applicant files a timely notice of appeal pursuant to this Chapter, the development services director shall, upon receipt of a copy of such notice of appeal, immediately issue the applicant a temporary license which shall authorize the applicant to perform as a manager or entertainer in the same manner and subject to the same requirements as if the license had been granted, pending the final

outcome of the appeal. A license applicant must pay the fee for an adult entertainment manager's license or an adult entertainer's license as set forth in OHMC 5.20.050 at the time the temporary license is issued. The holder of a temporary license is subject to all requirements, standards and penalty provisions of this Chapter. Nothing in this section is intended to authorize activities that do not comply with other requirements of the Oak Harbor Municipal Code or other applicable law.

**5.20.100 License - Posting and display.**

- (1) Every adult entertainer shall post his or her license in his or her work area so it is readily available for inspection by city authorities responsible for enforcement of this Chapter.
- (2) Every person, corporation, partnership, or association licensed under this Chapter as an adult entertainment establishment or adult entertainment manager shall post such license in a conspicuous place and manner on the licensed premises.
- (3) Each manager and/or operator shall be responsible for maintaining a daily log, on a form provided by the development services director, of all employees, entertainers, and managers working at the adult entertainment establishment each day. The log shall list the employee's, entertainer's and manager's name as it is listed on his/her license, license number, stage name, if any, the time he/she arrived at the adult entertainment establishment, and the time he/she left the adult entertainment establishment. Each employee, entertainer and manager shall sign his/her name in the daily log each time he/she arrives and leaves the adult entertainment establishment.
- (4) It is unlawful for any person to violate any of the provisions of this section.

**5.20.110 License - Denial, revocation, or refusal to renew - Grounds.** A license may be denied, suspended, revoked, or not renewed for violation of any ordinance or law that regulates licensed activity in order to further the public interest in public health, safety, and welfare. A license may also be denied, suspended, revoked, or not renewed upon a finding that any applicant or licensee, or any owner, officer or agent thereof:

- (1) has omitted to disclose any material fact necessary to make a statement not misleading, in any application for the license; or
- (2) has charges pending against her/him or has been convicted of a crime or offense that directly relates to the activity for which the license is required, and the time elapsed since the date of conviction or release from jail or prison, whichever is more recent, is less than ten (10) years; or has been convicted of several crimes including at least one (1) within the last ten (10) years; provided, however, that any licensee whose license is revoked because of charges pending against her/him may engage in the activity for which the license is required, pending a final decision on the charges; or

- (3) has been subject to an adverse finding in any judgment or order that directly relates to the activity for which the license is required, in any judicial or administrative proceeding in which fraud, deceit, coercion, breach of trust, unfair method of competition, unfair or deceptive trade act or practice, or assertion of unconscionable contractual provisions, or other similar act, practice, or conduct, on the part of the licensee-applicant is proven, and the time elapsed since the judgment or order is less than ten (10) years; or
- (4) has violated or failed to comply with any applicable provisions of the OHMC or rule or regulation prescribed under this subtitle; provided, that failure to obtain a license shall not be grounds for license denial; or
- (5) is in default in any payment of any fee or tax required under the Oak Harbor Municipal Code; or
- (6) has been subject to an adverse finding in any judgment or order, in any judicial or administrative proceeding for violation of any provision of a city ordinance or rule or regulation prescribed thereunder pertaining to fire, building, health, sanitation, zoning, weights and measures, consumer protection, environmental protection, or any other ordinance or law and that is applicable to the licensed activity or licensed establishment; or
- (7) has been determined to have discriminated against any person because of race, color, age, sex, marital status, sexual orientation, gender identity, political ideology, creed, religion, ancestry, national origin, or the presence of any sensory, mental, or physical handicap, in the course of licensed activity, in violation of a city ordinance, law, rule or regulation prescribed thereunder; or
- (8) has violated or failed to comply with any final order of the development services director or hearing examiner; or
- (9) has failed to complete the application for a license as required by the OHMC; or
- (10) has failed to obtain a license or permit required by state or other law necessary to engage in the licensed activity; or
- (11) has failed to comply with Chapters 49.12 and 26.28 RCW, and rules and regulations promulgated pursuant thereto, regarding employment of minors; or
- (12) has permitted or authorized his/her agent to violate or fail to comply with any provision of the OHMC; or
- (13) has allowed the property at which the business is located to be determined by a court to be a chronic nuisance property as provided by law.

**5.20.120 Suspension or revocation of establishment license.** As now or hereafter amended, an adult entertainment establishment license may be suspended or revoked upon a finding that:

- (1) the licensee permitted or authorized his or her employees, agents, entertainers or managers to violate any of the provisions of this Chapter; or
- (2) the adult entertainment manager permitted or authorized any violation of any of the provisions of this Chapter by any person;
- (3) the licensee is convicted of any crime or offense involving prostitution, promoting prostitution, or transactions involving controlled substances (as that term is defined in Chapter 69.50 RCW) committed on the premises, or the conviction of any of the licensee's servants, agents, or employees of any crime or offense involving prostitution, promoting prostitution or transactions involving controlled substances (as that term is defined in Chapter 69.50 RCW) committed on the licensed premises when the licensee knew or should have known of the violations committed by the licensee's servants, agents, or employees;
- (4) the Oak Harbor Fire Department, Oak Harbor Police Department, Oak Harbor Public Works Department or the Island County Health Department find that any condition exists upon the premises of an adult entertainment establishment which constitutes a threat of immediate serious injury or damage to persons or property, said official may immediately suspend any license issued under this Chapter, pending a hearing in accordance with this Chapter. The official shall issue a notice setting forth the basis for the action and the facts that constitute a threat of immediate serious injury or damage to persons or property, and informing the licensee and the development services department of the right to appeal the suspension to the city council under the same appeal provision set forth in this Chapter; provided, however, that a suspension based on threat of immediate serious injury or damage shall not be stayed during the pendency of the appeal.

**5.20.130 Filing of application.**

- (1) Application for an adult entertainment establishment license, adult entertainment manager's license or adult entertainer's license shall be made to the development services director, together with a receipt from the development services director or designee for the amount of the license in full. The license application shall include personal identification information requested by the city including date of birth and Social Security number. The application shall also specify the business location upon which the adult entertainment establishment license, adult entertainment manager's license or adult entertainer's license will be conducted. The application fee includes the fee to cover the cost of a WATCH criminal background check, as provided in OHMC 3.64.100. Upon filing of the application and fees, the applicant(s) shall be issued a temporary license which shall expire upon the city council determination set forth in Chapter 5.20 OHMC, unless stayed by filing of a judicial appeal within thirty (30) days of the city council decision appealed.

- (2) If the development services director denies an adult entertainment establishment license, adult entertainment manager's license or adult entertainer's license authorized by this Chapter, and if the applicant files a timely notice of appeal pursuant to this chapter, the development services director shall, upon receipt of a copy of such notice of appeal, immediately issue the applicant a temporary license which shall authorize the applicant to continue as an adult entertainment establishment or to continue to perform as a manager or entertainer in the same manner and subject to the same requirements as if the license had been granted, pending the final outcome of the appeal. A license applicant must pay the fee for an adult entertainment establishment license, adult entertainment manager's license or adult entertainer's license as set forth in this Chapter at the time the temporary license is issued. The holder of a temporary license is subject to all requirements, standards and penalty provisions of this Chapter. Nothing in this section is intended to authorize activities that do not comply with other requirements of the Oak Harbor Municipal Code or other applicable law.

**5.20.140 License conditions.**

- (1) Upon receipt of an application for an adult entertainment establishment license, the city clerk shall transmit the application to the chief of police, who shall immediately conduct a WATCH criminal background check of the applicant(s).
- (2) The chief of police shall also investigate the business location to determine whether there are any features of the establishment which pose noise, traffic or other similar public health or safety concerns for the operation of an adult entertainment establishment. The chief of police may request the assistance of other city departments, including the fire department and/or the building official, in assessing the impacts of the proposed business location if used as an adult entertainment establishment.
- (3) The chief of police shall report to the city council the result of his/her investigation and make recommendations concerning any conditions that should be placed upon the adult entertainment establishment license to reduce noise, traffic or other similar public health and safety impacts. Allowable conditions may include, but are not limited to, restrictions upon the hours of operation, structural improvements to the establishment to reduce noise impacts on neighboring uses, limitations on the numbers of patrons at any one time, landscaping or other screening, and requirements for traffic control. Periodic review of the efficacy of the imposed conditions may also be a condition of the adult entertainment establishment license.
- (4) The city council shall hold a public hearing with respect to the issuance of the adult entertainment establishment license. The applicant(s) shall be entitled to respond to any findings of the police chief or other city officials and any proposed conditions on the adult entertainment establishment license. Unless the applicant is restricted from holding an adult entertainment establishment license pursuant to this Chapter, the city council shall then determine whether the noise, traffic and other similar public health and safety impacts of the adult entertainment establishment require mitigation through specified

conditions and, if so, shall impose such conditions on the license. In no event shall the expressive content of any music, signing or dancing be the basis for denial of an adult entertainment establishment license or any conditions placed thereon.

- (5) The decision of the city council shall be the final decision of the city.

**5.20.150 Violation of license conditions.**

- (1) A license holder who violates any license condition of his/her adult entertainment establishment license, adult entertainment manager's license or adult entertainer's license shall be subject to civil penalties and to a license suspension or revocation as follows:
- (a) First violation of a license condition: Five Hundred Dollars (\$500.00) fine and/or a license suspension for thirty (30) days per violation;
  - (b) Second violation of same license condition: Seven Hundred Fifty Dollars (\$750.00) fine and a license suspension for ninety (90) days per violation;
  - (c) Third violation of same license condition: One Thousand Dollars (\$1,000.00) fine and revocation for a third violation within any twenty-four (24) month period.
- (2) Time spent serving a suspension shall not be counted in determining the twenty-four (24) month period referred to in this section.
- (3) For an adult entertainment premises licensee, a violation for which an adult entertainment premises license may be suspended or revoked includes a violation of this Chapter a manager, employee, agent, entertainer or any other person, occurring on the premises when the adult entertainment premises licensee knew of or should have known of the violation.
- (4) For an adult entertainment manager's license, a violation for which an adult entertainment manager's license may be suspended or revoked includes a violation of this Chapter by an adult entertainer or other person when the adult entertainment manager knew of or should have known of the violation.
- (5) If a licensee is convicted of committing a crime or offenses involving one of the following occurring on the premises of an adult entertainment establishment, the license shall be revoked:
- (a) A violation of RCW 9A.88.030, 9A.88.070, 9A.88.080 or 9A.88.090;
  - (b) A violation of OHMC 6.05.270;
  - (c) A transaction involving a controlled substance as defined in Chapter 69.50 RCW or OHMC 6.05.470; or

- (d) A violation of Chapter 9A.44 RCW, Sex Offenses or Chapter 9.68A RCW, Sexual Exploitation of Children, or OHMC 6.05.430.
- (6) For an adult entertainment establishment licensee, a conviction for which the adult entertainment establishment license may be revoked includes the conviction of a manager, employee, agent or entertainer for a crime or offense listed in this section occurring on the premises of the adult entertainment establishment when the adult entertainment establishment licensee knew of or should have known of the crime or offense.
- (7) For an adult entertainment manager's license, a conviction for which the adult entertainment manager's license may be revoked includes the conviction of an employee or entertainer for a crime or offense listed in this section occurring on the premises of the adult entertainment establishment when the adult entertainment manager licensee knew of or should have known of the crime or offense.
- (8) A licensee whose license has been revoked is not eligible to reapply for any license authorized by this Chapter for one (1) year following the date the decision to revoke is final.
- (9) On receipt of a notice of suspension or revocation, the license holder shall promptly deliver the license to the development services director unless an appeal is pending under this Chapter. Upon expiration of a license suspension, the development services director shall return the license to the license holder.
- (10) For purposes of this section, a person "should have known" of a crime or offense or violation of this Chapter, when the person has information which would lead a reasonable person to believe that a crime or offense or violation of this Chapter was occurring or would occur.
- (11) If the development services director determines that a condition exists on an adult entertainment premises which constitutes a threat of immediately serious injury or damage to a person or property, the development services director may immediately suspend an adult entertainment premises license. The development services director shall issue a notice setting forth the basis for the action and the facts that constitute a threat of immediate serious injury or damage to a person or property.
- (12) First, second and third violations of license conditions shall constitute civil offenses and shall be governed by the procedures of Chapter 1.28 OHMC.
- (13) The fourth or greater violation of the same license provision shall constitute a misdemeanor punishable by a fine not exceeding One Thousand Dollars (\$1,000.00), up to ninety (90) days in jail, or both such fine and jail time.

**5.20.160 Revision of license conditions.**

- (1) The city council also reserves to itself the power to revise the conditions of the adult entertainment establishment license upon information received indicating that the existing conditions are not sufficient to mitigate the noise, traffic and public health and safety impacts associated with the adult entertainment establishment location. A revision proceeding shall be initiated by an investigative report by the chief of police, fire chief, building official or other city official.
- (2) In the event that such investigative report is filed, the license holder shall be sent a copy of the complaint and/or report and provided at least ten (10) days' notice of a hearing to determine whether the conditions of the license shall be modified. At a public hearing before the city council, the license holder shall have the opportunity to respond to the investigative report, and to present any evidence in opposition to a modification of conditions. The city council shall base any change in conditions on the license upon noise, traffic or other similar public health and safety impacts. In no event shall the expressive content of any music, singing or dancing be the basis for denial of an adult entertainment establishment license or any conditions placed thereon. The decision of the city council, after a public hearing on the proposed change in conditions, shall be final.

**5.20.170 Appeal to court.** Appeal of any final decision of the city under this Chapter shall be to Superior Court. The city's decision shall be stayed upon appeal filed within thirty (30) days of the city council decision appealed, pending judicial review.

**5.20.180 Continuation of business while complaint hearing decision pending.**

- (1) Except in the case of summary suspension or revocation, whenever a timely request for hearing on a complaint is filed, a licensee or an applicant for license renewal may engage in the activity for which the license is required, pending decision by the city council. An applicant not licensed in the preceding license year may not engage in the activity for which the license is required pending decision by the city council. Nothing in this section is intended to authorize activities that do not comply with other requirements of the Oak Harbor Municipal Code or other applicable law.
- (2) If the development services department denies an adult entertainment establishment license governed by this Chapter, and if the license applicant files a notice of appeal with the city council, the development services director shall immediately issue the license applicant a temporary license. The temporary license shall authorize the license applicant to operate an adult entertainment establishment or perform as a manager or entertainer, in the same manner as if the license had been granted, pending the city council's decision.
  - (a) If the city council affirms the development services director's license denial, the temporary license shall remain in effect pending a motion for reconsideration before the city council and, in addition

- (i) if the license applicant does not timely file for judicial review, then only until the expiration of the time allowed to file an application for a writ of review under Chapter 7.16 RCW; or
  - (ii) if the license applicant does timely file an application for a writ of review, then only until the court either issues a writ or denies the writ application.
- (b) If the city council dismisses the adult entertainment establishment license denial with prejudice, the development services department shall immediately issue an adult entertainment license.
  - (c) If the city council dismisses the adult entertainment denial without prejudice, the temporary license shall remain in effect for five (5) additional business days, at the end of which time the development services department must either reissue a denial or issue an adult entertainment establishment license. If the development services director reissues the denial, then the temporary license will continue in effect according to the procedures set forth in subsection (2) of this section.
  - (d) If a license applicant is issued a temporary license, the license applicant shall pay the fee charged for an adult entertainment establishment license under this Chapter.

**5.20.190 Standards of conduct and operation.** The following standards of conduct must be adhered to by employees of any adult entertainment establishment:

- (1) No employee or entertainer shall unclothed or in such less than opaque and complete attire, costume, or clothing so as to expose to view any portion of the female breast below the top of the areola, or any portion of the pubic regions, anus, buttocks, vulva, or genitals, except upon a stage at least eighteen (18) inches above the immediate floor level and removed at least ten (10) feet from the nearest patron.
- (2) No employee or entertainer mingling with patrons shall be unclothed or in less than opaque and complete attire, costume, or clothing as described in subsection (1) of this section, nor shall any male employee or entertainer at any time appear with his genitals in a discernibly turgid state, even if completely and opaquely covered, or wear or use any device or covering which simulates the same.
- (3) No employee or entertainer mingling with patrons shall wear or use any device or covering exposed to view which simulates the breast with less than a fully opaque covering of any part of the nipple or areola, vulva, genitals, anus, or buttocks.
- (4) No employee or entertainer shall caress, fondle, or erotically touch any patron. No employer or entertainer shall encourage or permit any patron to caress, fondle, or erotically touch any employee or entertainer.

- (5) No employee or entertainer shall perform actual or simulated acts of sexual conduct as defined in this Chapter, or any act which constitutes a violation of Chapter 7.48A RCW, the Washington Moral Nuisances Statute.
- (6) No employee or entertainer mingling with patrons shall conduct any dance, performance, or exhibition in or about the non-stage area of the adult entertainment establishment.
- (7) No tip or gratuity offered to or accepted by an adult entertainer may be offered or accepted prior to any performance, dance, or exhibition provided by the entertainer. No entertainer performing upon any stage area shall be permitted to solicit, demand, accept or receive any form of gratuity offered directly to the entertainer by any patron. Any gratuity offered to any entertainer must be placed into a receptacle provided for receipt of gratuities by the adult entertainment establishment, or provided through a manager on duty on the premises. Any gratuity or tip offered to any adult entertainment establishment shall be placed into a receptacle provided by the manager, and not upon the person or into the clothing of the adult entertainer.
- (8) Separate restrooms shall be maintained for performers, entertainers, managers and employees than for customers and members of the public. Performers, entertainers, managers and employees shall not be permitted to use restrooms available for customers or members of the public, nor shall customers or members of the public be permitted to use restrooms available for performers, entertainers, managers and employees.
- (9) No viewing equipment shall be installed, maintained or used in any of the restrooms located on the premises.

**5.20.200 Physical layout of premises.**

- (1) Performance area at adult entertainment establishments. Every place offering adult entertainment shall be physically arranged in such a manner that the performance area where adult entertainment is provided shall be a stage or platform at least eighteen (18) inches in elevation above the level of the patron seating areas, and shall be separated by a distance of at least ten (10) feet from all areas of the premises to which patrons have access. The stage and the entire interior portion of cubicles, rooms, or stalls wherein adult entertainment is provided must be visible from the common areas of the premises and at least one (1) manager's station. Visibility shall not be blocked or obstructed by doors, curtains, drapes, or any other obstruction whatsoever.
- (2) Picture machines must be visible and publicly accessible. Every booth, cubicle, or partition utilized or maintained at a picture machine location as the area from which the screen of any picture machine is to be viewed shall be arranged so that any person viewing such picture machine screen shall be visible from the waist down to the floor from without obstruction by the viewing booth, cubicle, or partition. The licensee shall not permit any doors to any publicly accessible area on the premises to be locked during business hours. Every room or area on such premises which is open to the public shall be readily accessible at all times for inspection by any public officer charged with the

enforcement of the provisions of applicable city ordinances or regulations. The licensee shall maintain sufficient illumination generally distributed in all parts of the premises at all times when the picture machine area is open or when the public is permitted to enter or remain on the picture machine premises.

- (3) No activity or entertainment occurring on the premises shall be visible at any time from outside the facility or from any other public place.
- (4) No alteration in the configuration or location of a manager's station may be made without the prior approval of the city.
- (5) It is the duty of the licensee of the premises to ensure that at least one licensed manager is on duty and situated in each manager's station at all time that any patron is present inside the premises.

**5.20.210 Permission to inspect.** An adult entertainment establishment licensee and its manager shall permit the development services director and the personnel from the Oak Harbor Police Department to conduct announced inspections, during hours that the adult entertainment establishment is open to the public, of all exterior and interior areas of the premises open to and used by members of the public and of all books and records required to be kept under this Chapter. The purpose of such inspections is to determine whether the premises are being operated in compliance with the provisions of this Chapter.

**5.20.220 Public nuisance.** An adult entertainment premises operated, conducted or maintained in violation of laws of the state of Washington shall be, and the same is, declared to be unlawful and a public nuisance. The city attorney may, in addition to, or in lieu of, any other remedies set forth in this Chapter, commence an action to enjoin, remove or abate such nuisance and may take such other steps and apply to such court or courts as may have jurisdiction to grant such relief as will abate or remove such public nuisance, and restrain and enjoin any person from operating, conducting or maintaining an adult entertainment premises contrary to the provisions of this chapter.

**5.20.230 Non-public areas.** No member of the public shall be permitted to enter into any of the non-public portions of the adult entertainment establishment, which shall include but are not limited to: the dressing rooms of entertainers or other rooms provided for the benefit of employees, and the kitchen and storage areas; except that persons delivering goods and materials, food and beverages or performing maintenance or repairs to the premises or equipment on the premises may be permitted into non-public areas to the extent required to perform their job duties.

**5.20.240 Additional requirements for adult entertainment establishments.** At any adult entertainment establishment, the following are required:

- (1) Admission must be restricted to persons of the age of eighteen (18) years or older.

- (2) No adult entertainment shall be visible outside the adult entertainment establishment, nor any photograph, drawing, sketch, or other pictorial or graphic representation, which includes lewd matter as defined in Chapter 7.48A RCW, or display of sexually explicit material in violation of RCW 9.68.130.
- (3) Sufficient lighting shall be provided in and equally distributed in and about the parts of the premises which are open to patrons so that all objects are plainly visible at all times. A minimum lighting level of thirty (30) lux horizontal measured at thirty (30) inches from the floor on ten (10) foot centers is hereby established for all areas of the adult entertainment establishment where members of the public are admitted. It shall be the duty of the licensee and the manager to ensure that the illumination described above is maintained at all times that any patron is present in the premises.
- (4) No viewing room may be occupied by more than one (1) person at a time.
- (5) No licensee shall allow openings of any kind to exist between viewing rooms or booths.
- (6) No person shall make or attempt to make an opening of any kind between a viewing booths or rooms. The manager shall, during each business day, regularly inspect the walls between the viewing booths to determine if any openings or holes exist.
- (7) The licensee shall cause all wall coverings, floor coverings, and ceiling coverings in viewing booths to be non-porous, easily cleanable surfaces with no rugs or carpeting.

**5.20.250 List of entertainments - Fees.** There shall be posted and conspicuously displayed in the common areas of each place offering adult entertainment a list of any and all entertainment provided on the premises. Such list shall further indicate the specific fee or charge in dollar amounts for each entertainment listed.

**5.20.260 Notice to customers.** A sign shall be conspicuously displayed in a common area of the premises which shall read as follows:

"This adult entertainment establishment is regulated by the City. Entertainers are:

- (1) not permitted to engage in any type of sexual conduct;
- (2) not permitted to appear semi-nude or nude, except on stage;
- (3) not permitted to accept tips of gratuities in advance of their performance;  
and
- (4) not permitted to accept tips or gratuities directly from patrons while performing upon any stage area."

**5.20.270 Activities not prohibited.**

- (1) This Chapter shall not be construed to prohibit:
  - (a) plays, operas, musicals, or other dramatic works which are not obscene; or
  - (b) classes, seminars, and lectures held for serious scientific or educational purposes that are not obscene; or
  - (c) exhibitions, performances or dances which are not obscene.
- (2) Whether or not activity is obscene shall be judged by consideration of the following factors:
  - (a) Whether the average person, applying contemporary community standards, would find that the activity taken as a whole appeals to a prurient interest in sex;
  - (b) Whether the activity depicts or describes in a patently offensive way, as measured against community standards, sexual conduct as described in RCW 7.48A.010(2)(b);
  - (c) Whether the activity taken as a whole lacks serious literary, artistic, political, or scientific value.

**5.20.280 Manager on premises.**

- (1) A licensed manager shall be on duty at an adult entertainment establishment during the adult entertainment establishment's hours of operation. The name of the manager on duty shall be prominently posted during business hours.
- (2) Any adult entertainment establishment found to be operating without a manager on duty shall be immediately closed until a licensed manager arrives for duty at the adult entertainment establishment pursuant to subsection (1) above.
- (3) The manager shall verify that each entertainer performing while the manager is on duty possesses a current and valid entertainer's license, as required by this Chapter. The manager shall verify that such adult entertainment license is posted in the manner required by this Chapter.
- (4) A manager shall not perform as an entertainer on days during which he or she acts as a manager on duty at an adult entertainment establishment.

**5.20.290 Hours of operation.** It is unlawful for any adult entertainment establishment to be conducted, operated, or otherwise open to the public between the hours of two o'clock a.m. (2:00 a.m.) and ten o'clock a.m. (10:00 a.m.).

**5.20.300 Persons under eighteen (18) years of age prohibited.**

- (1) It is unlawful for any person under the age of eighteen (18) years to be in or upon any premises for which an adult entertainment establishment license is required. Only the following types of identification will be accepted as proof of age:
  - (a) A motor vehicle operator's license issued by any state, bearing the applicant's photograph and date of birth;
  - (b) A state-issued identification card bearing the applicant's photograph and date of birth;
  - (c) An official passport issued by the United States of America;
  - (d) An immigration card issued by the United States of America;
  - (e) Any other picture identification bearing the applicant's photograph and date of birth by a governmental agency.
- (2) It is unlawful for any owner, operator, manager, or other person in charge of an establishment for which an adult entertainment establishment license is required, to knowingly permit or allow any person under the age of eighteen (18) years to be in or upon such premises.

**5.20.310 Locking entrance unlawful.** It is unlawful for any person or persons in charge of or having the management of, or being in the employment of, or a member of or guest in, any adult entertainment establishment, either incorporated or unincorporated, to lock, bar, or in any manner obstruct, or to suffer or permit to be locked, barred or in any manner obstructed, the entrance or entrances leading to any room or place in such social club wherein non-intoxicating beverage and/or tobaccos are kept for sale or facilities for social games are maintained, at any time when any person is present therein with one (1) or more persons.

**5.20.320 Alarm system at entrance - Unlawful.** It is unlawful for any person to construct or cause to be constructed, or to suffer or permit to continue or be maintained, any alarm or system of alarms in connection with the entrance or entrances leading to any room or place in any adult entertainment establishment.

**5.20.330 Warning of approach of police - Lookouts.** It is unlawful for the owner or any person having the management or control or charge of, or in the employment of the owner of, any place in the city of Oak Harbor, or where an adult entertainment establishment is maintained, to employ, station, post, keep, maintain, suffer or permit any person or persons at or near the entrance or entrances thereto, or in any place so as to command a view of the approach thereto, for the purpose or with the object of giving any advice, information or warning in any manner whatsoever that police officers are approaching, are about to enter, are entering, or have entered such place.

**5.20.340 Warning that police are approaching - Unlawful.** It is unlawful for any person to give any advice, information or warning, in any manner whatsoever, that police officers are approaching, are about to enter, are entering or have entered, any place in the adult entertainment establishment.

**5.20.350 Presence in place where warning given.** It shall be unlawful for any person to be with one (1) or more other persons in any adult entertainment establishment, when , with the knowledge of such person at such time any person is employed, stationed, kept, maintained, suffered or permitted at or near the entrance or entrances thereto or in any place so as to command a view of the approach thereto, for the purpose or with the object of giving any advice, information or warning in any manner whatsoever that police officers are approaching, or are about to enter, are entering, or have entered, such place.

**5.20.360 Locking rooms.** It shall be unlawful for the owner of, or any agent or other person or persons having the charge or rental of, any premises occupied by any adult entertainment establishment, to knowingly suffer or permit to be locked, barred, or in any manner obstructed, the entrance or entrances leading to any room or place in such adult entertainment establishment.

**5.20.370 Presence in locked rooms.** It shall be unlawful for any person to be with one (1) or more other persons in any room or place in any adult entertainment establishment, at any time when the entrance or entrances leading thereto are locked, barred or obstructed in any manner equipped with any alarm or system of alarms.

**5.20.380 Permitting alarm system unlawful.** It shall be unlawful for the owner of, or any agent or other person or persons having the charge or rental of, any premises occupied by any adult entertainment establishment, to knowingly suffer or permit to be constructed, or to be continued or maintained, any alarm or system of alarms in connection with the entrance or entrances leading to any room or place in such adult entertainment establishment.

**5.20.390 Exemption from Chapter.** No person holding an adult entertainment establishment license, and no manager or employee of any such person, and no entertainer, shall allow alcohol on the premises except for those adult entertainment establishments properly licensed under the Washington State Liquor Control Board.

Any license issued pursuant to this Chapter shall be subject to any applicable rules or regulations of the Washington State Liquor Control Board relating to the sale of intoxicating liquor. In the event of a conflict between the provisions of this Chapter and the applicable rules and regulations of the Washington State Liquor Control Board, the rules and regulations of the Washington State Liquor Control Board shall control.

**Section Two. Severability.** If any provision of this Ordinance or its application to any person or circumstance is held invalid, the remainder of the Ordinance or the application of the provision to other persons or circumstances is not affected.

**Section Three. Finding of Emergency.** The city council finds as follows:

1. The Oak Harbor Municipal Code does not presently address the appropriate zone for an adult entertainment business. The closest existing zone is the C-3 Community Commercial zone in which "amusement enterprises" and "places of entertainment" are permitted uses. Principal uses permitted in the C-3 district are also allowed in the Industrial district.
2. Recent inquiries about locating adult entertainment uses in the city create a reasonable expectation that such uses may attempt to locate in the city and would, therefore, locate in the C-3 Community Commercial zone.
3. However, without further refinement, there are parcel locations in the C-3 Community Commercial zone which would abut or fall within a seven hundred and fifty (750) feet radius of religious institutions, schools, and parks or within one hundred (100) feet of residentially zoned neighborhoods. The city council find that locating an adult entertainment facility in such parcel locations would be detrimental to existing churches, schools, parks and residential zones, and that the public safety, welfare and peace dictates that adult entertainment facilities not be located in such proximity with those uses.
4. The city council find the definitions in this ordinance (OHMC 5.20.020) are a necessary element of the interim adult entertainment facilities zoning overlay ordinance and therefore must take effect immediately to protect the public welfare, safety and peace.

**Section Four. Effective Date.** This city council having found that an emergency exists, OHMC 5.20.020 of this ordinance shall be in full force and effect immediately. The remaining sections of this ordinance shall be in full force and effect five days after publication.

PASSED by a majority plus one of the entire membership of the City Council this \_\_\_\_ day of \_\_\_\_\_, 2010.

APPROVED by its Mayor this \_\_\_\_ day of \_\_\_\_\_, 2010.

THE CITY OF OAK HARBOR

\_\_\_\_\_  
Mayor

Attest:

\_\_\_\_\_  
City Clerk

Approved as to Form:

\_\_\_\_\_  
City Attorney

Published: \_\_\_\_\_

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**ADULT ENTERTAINMENT LICENSING ORDINANCE**

**LEGAL MEMORANDUM FOR THE RECORD**

**TO:** Oak Harbor City Council

**FROM:** William H. Hawkins  
Assistant City Attorney

**RE:** Proposed Ordinance to License and Regulate Adult Entertainment

**DATE:** March 23, 2010

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**ISSUE PRESENTED:** The purpose of this Memo is to identify and discuss the parameters of a lawful response to a request to establish an adult entertainment establishment.

**SHORT ANSWER:** Because adult entertainment is conduct that has been determined by the United States Supreme Court to be protected by the First Amendment, a municipality may not prohibit adult entertainment establishments. Under the leading U.S. Supreme Court case of *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) and the numerous court cases decided in the intervening 24 years, local governments may limit the location of adult entertainment establishments, and may license and regulate the conduct and operation of the establishments in order to prevent crime, protect the city's retail trade, maintain property values, and generally protect the quality of the city's neighborhoods, commercial districts, and the quality of life, but may not suppress the expression of unpopular views by banning them altogether. This proposed ordinance would regulate the conduct and operation of adult entertainment establishments through licensing and the establishment of performance and design criteria that have been shown to minimize the harmful secondary effects of adult entertainment.

Simultaneous to the presentation of this proposed ordinance to license and regulate the conduct and operation of adult entertainment establishments, a second proposed ordinance will be presented regarding zoning, as well as a third proposed ordinance prohibiting public nudity.

**DISCUSSION:**

The U.S. Supreme Court has held that the First Amendment applies not only to pure speech but also to certain forms of conduct. The Court has consistently held in a long line of cases that nude dancing is a form of conduct protected by the First Amendment to the Constitution, although it "falls only within the outer ambit of the First Amendment's protection." *Erie v. PAP's A.M. "tdba Kandyland"*, 529 U.S. 277 (2000). Even though it "clings to the edge of protected expression", *JJR Inc. v. City of Seattle*, 126 Wn.2d 1 (1995), nude dancing receives

constitutional protection. However, public nudity itself is conduct subject to the police power that can be prohibited. *Ino Ino, Inc., v. Bellevue*, 132 Wn.2d 103 (1997).

At the same time, adult entertainment establishments, including those that offer nude or semi-nude dancing, have been found in many jurisdictions in which they exist, to create adverse secondary effects that are often not controlled by the owners, operators, managers or personnel associated with the establishments. The secondary effects include a wide variety of criminal and unlawful activities which are detrimental to the public health, safety and welfare of a community.

The criminal activity complained of has included the following: breaches of the peace; assaults; criminal contact between entertainers and patrons, between patrons, and between establishment personnel and entertainers; sexually explicit conduct, acts of lewdness and indecent exposure; prostitution, patronizing a prostitute, promotion of prostitution; soliciting, procuring, aiding and abetting, employing, authorizing or causing a sexual performance by a minor; sexual solicitation, molestation or exploitation of minors; contributing to the delinquency of minors; having a minor on the premises where there are materials or performances depicting specified anatomical areas or activities; maintaining a moral nuisance; tax evasion; money laundering.

Adult entertainment establishments have engaged in practices which involve secreting ownership interest for the purpose of skimming profits and avoiding the payment of taxes in the absence of regulations such as those in the proposed ordinance. These hidden ownership interests have, on occasion, been held by individuals and entities reputed to be involved in organized crime. In order for the City to protect the public safety and general welfare of its citizens and effectively allocate its law enforcement resources, it is important that the City be fully apprised of the actual operation of adult entertainment establishments and identities and backgrounds of persons responsible for management and control of the adult entertainment establishments.

In deciding whether an ordinance regulating nude or semi-nude dancing (or any other form of protected conduct) is constitutional, the courts first determine what level of scrutiny to apply to the ordinance, which depends on whether the regulation is "related to the suppression of expression" or whether it is "content neutral". If the governmental purpose in enacting the regulation is unrelated to the suppression of expression, then the regulation need only satisfy the less stringent standard of *U.S. v. O'Brien*, 391 U.S. 377 (1968) for evaluating restrictions on symbolic speech. If the ordinance were deemed to be related to the content of the expression, it would constitute a prior restraint and would have to meet a more demanding standard. *Texas v. Johnson*, 491 U.S. 397 (1989).

The Washington State Supreme Court has held that, for purposes of obscenity, Article I, Section 5 of the Washington State Constitution is coextensive with the interpretation given by the federal courts of the First Amendment, not broader. *Ino Ino, Inc., v. Bellevue, supra*.

The following have been found enforceable as reasonable time, place and manner restrictions on nude or semi-nude dancing, and not to constitute prior restraints and are being proposed for adoption:

1. A 10 foot distance restriction between nude or semi-nude dancing and the nearest patron, and restricting the dancing to a stage raised 18 inches above the floor. *Kev Inc., v. Kitsap County*, 793 F.2d 1053 (1986); *Colacurcio v. City of Kent*, 163 F.3d 545 (1998); *DCR Inc., v. Pierce County*, 92 Wn.App. 660 (1998);
2. A prohibition against direct tipping of entertainers by patrons. *Kev Inc., v. Kitsap County, supra*;
3. A prohibition against direct contact between entertainers and patrons. *DCR Inc., v. Pierce County, supra*; *Colacurcio v. City of Kent, supra*; *Kev Inc., v. Kitsap County, supra*;
4. An open booth design with doors cut at least 42 inches from the floor and the required presence of a manager to monitor activity. *Spokane Arcade v. Spokane*, 75 F.3d 663 (1996); *World Wide Video v. Tukwila*, 117 Wn.2d 382 (1991);
5. A requirement of sufficient lighting to permit effective monitoring. *Ino Ino, Inc., v. Bellevue, supra*; see also *Tollis v. County of San Diego*, No. 05-56300 (9<sup>th</sup> Cir.);
6. A 2:00 a.m. to 10:00 a.m. business closure. *Ino Ino, Inc., v. Bellevue, supra*;
7. A five-day delay in issuing an operator's license. *Kev Inc., v. Kitsap, supra*;
8. A 30-day delay in issuing a license for operators of peep show booths. *World Wide Video v. Tukwila, supra*;
9. Requiring licensing of every interested party, i.e., every party with a significant interest in the business. *World Wide Video v. Tukwila*.

Although a ban on nude dancing and a requirement that dancers wear pasties and a G-string has been upheld by the U.S. Supreme Court in two separate cases, *Barnes v. Glenn Theatre*, 501 U.S. 560 (1991) and *Erie v. PAP's AM, supra*, the Washington State Supreme Court case law on this issue is not entirely clear. In *O'Day v. King County*, 109 Wn.2d 796 (1988), the court held that Article I, Section 5 protects nude expression, including nude dancing. At that time, the U.S. Supreme Court had not yet ruled on the issue. Thereafter, in *Barnes v. Glenn Theatre* and *Erie v. PAP's, supra*, the U.S. Supreme Court held that the First Amendment did not protect nude dancing. Although the Washington State Supreme Court has held that, for purposes of obscenity, Article I, Section 5 provides no greater protection than its federal counterpart, the most recent decision of Washington's highest court directly on point does hold that nude dancing is a protected form of expression. Legal counsel for Washington Cities Insurance Authority (WCIA) and other attorneys with direct experience defending regulations on adult entertainment have expressed reservations about the ability of a ban on nude dancing to withstand attack against constitutional scrutiny as a prior restraint. Consequently, the proposed ordinance does not purport to ban nude dancing entirely.

City of Oak Harbor  
City Council Agenda Bill

Agenda Bill No. 9  
Date: March 23, 2010  
Subject: Interim Adult Entertainment  
Facilities Overlay Zone Ordinance --  
Emergency Ordinance

FROM: Steve Powers, Development Services Director *SP*

**INITIALED AS APPROVED FOR  
SUBMITTAL TO THE COUNCIL BY:**

*JS* Jim Slowik, Mayor  
*PS* Paul Schmidt, City Administrator  
*DM* Doug Merriman, Finance Director  
*MH* Margery Hite, City Attorney, as to form

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**SUMMARY STATEMENT:** This ordinance is an interim measure to be adopted on an emergency basis to address the appropriate location for a use not currently addressed in the Oak Harbor Municipal Code. Adult entertainment is a form of expression protected by the First Amendment to the U.S. Constitution. However, there are well-studied negative secondary effects associated with this use in the form of impacts on crime, neighborhoods and property values. Local governments are authorized to impose zoning regulations to address the associated negative secondary effects, as long as there remain sufficient "alternative avenues of communication" available for the use after the imposition of the regulations.

The proposed interim ordinance makes the following changes to the OHMC:

1. It adopts a zoning ordinance which permits adult entertainment establishments to be located in an "Adult entertainment facilities overlay zone" within the C-3, Industrial and Planned Industrial Park zones. This overlay zone was drawn to create a buffer around incompatible uses.
2. The overlay draws a 750 ft. buffer around religious institutions, parks and schools.
3. It also draws a 100 ft. buffer between the overlay and residentially zoned neighborhoods.
4. It amends OHMC 18.20.250 to include extensions of time for non-conforming adult entertainment facilities.

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The buffers are intended to mitigate the negative secondary effects of adult entertainment facilities upon sensitive uses such as schools, churches and parks and on residential neighborhoods and property values, while still retaining sufficient parcels for adult entertainment uses to be located within the City.

***Emergency ordinance:*** The proposal is that the City Council adopt this interim ordinance on an emergency basis to address adult entertainment uses that may seek to locate within the city limits in the near future. The City staff has received several inquiries about City regulations on the subject in recent months and notes that the absence of regulations creates an imminent risk that an inappropriate location could be chosen for an adult entertainment facility. Since there are no regulations specifically addressing this use in the Oak Harbor Municipal Code (OHMC), it is necessary to ensure that potential applicants are directed to the overlay zone rather than locating next to a church, school, park or residential zone.

Adopting the interim ordinance on an emergency basis allows the City to take additional time to study and hone its zoning regulations, to create a public participation process and to permit the establishment of adult entertainment facilities, at the same time as restricting patently inappropriate locations in the immediate future.

There are several requirements of the emergency ordinance:

1. It must be passed by a majority plus one of the whole membership of the council.
2. The council must make a finding that the ordinance is necessary for the protection of public health, public safety, public property or the public peace.
3. There must be a public hearing on the ordinance within 60 days of adoption. Staff recommends the hearing be set for May 4, 2010.

The interim ordinance may remain in effect for six months, subject to an extension of up to a year, so that the Planning Commission may make its recommendation, public participation may be encouraged and so that any further studies deemed necessary be undertaken. During the period of the interim ordinance, the City will also undertake its obligations to perform a SEPA review and to provide 60 days' prior notification of the new zoning provision to the Department of Commerce.

***Policy considerations:*** If the City Council determines to regulate this use, it must do so in light of well-settled U.S. Supreme Court decisions on the subject. Because of First Amendment considerations, the use is protected within established limitations. The City Council may regulate the use for negative secondary impacts. Many other jurisdictions have studied the use and determined that there are negative impacts upon schools, churches, parks, neighborhoods and

property values, in addition to associated criminal activity, as a result of the activities and location of adult entertainment uses.

The proposed ordinance lays out a zoning framework for addressing the negative secondary impacts of adult entertainment uses. It is intended to address those uses seeking to locate in the City until a final ordinance can be adopted. It is recommended that the City Council adopt this as an interim measure and direct that further study, public participation and Planning Commission recommendation go forward to be included in the ultimate decision on a final ordinance.

***Budget considerations:*** This interim ordinance is not anticipated to have any budget impacts.

**STANDING COMMITTEE REVIEW:** Regulation of adult entertainment was discussed at the Public Safety Standing Committee on February 18<sup>th</sup> and at the Government Services Standing Committee on March 9<sup>th</sup>.

**RECOMMENDED ACTION:**

1. Consider the record.
2. Allow public comment.
3. Adopt the Interim Adult Entertainment Facilities Overlay Zone Ordinance.

**ATTACHMENTS:**

•Proposed interim ordinance establishing zoning locations for adult entertainment facilities which include the following:

1. Findings that an emergency exists requiring the immediate effectiveness of the interim ordinance for the protection of public health, safety and peace;
2. Findings of Fact substantiating the need to establish the zones in which adult entertainment facilities may locate;
3. A new chapter of the zoning code entitled "Adult Entertainment Facilities Overlay Zone";
4. Amendment of OHMC 18.20.250 to include extensions of time for non-conforming adult entertainment facilities;
5. A public hearing date on the interim ordinance for May 4, 2010.

•Legal Memorandum for the Record – Zoning

**MAYOR'S COMMENTS:**

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ORDINANCE NO. \_\_\_\_\_

AN INTERIM ORDINANCE OF THE CITY OF OAK HARBOR ADOPTING A NEW CHAPTER 19.52 TO THE OAK HARBOR MUNICIPAL CODE ENTITLED "ADULT ENTERTAINMENT FACILITIES OVERLAY ZONE", ENTERING FINDINGS OF FACT CONCERNING THE NEGATIVE SECONDARY EFFECTS OF ADULT ENTERTAINMENT FACILITIES, FINDING AN EMERGENCY WITH RESPECT TO PUBLIC HEALTH, SAFETY AND WELFARE REQUIRING IMMEDIATE ADOPTION OF AN INTERIM ORDINANCE TO ADDRESS PERMISSIBLE LOCATIONS FOR ADULT ENTERTAINMENT FACILITIES, AND AMENDING OHMC 18.20.250 ENTITLED "REVIEW PROCESS III" TO INCLUDE APPLICATIONS FOR EXTENSIONS OF TIME FOR NON-CONFORMING ADULT ENTERTAINMENT FACILITIES

THE CITY COUNCIL OF THE CITY OF OAK HARBOR do ordain as follows:

**Section One. Findings of Fact and Finding of Emergency.** Based on the record submitted in this case, the public comments, and the experience of the city officials of the city of Oak Harbor, the city council hereby enters the following findings of fact:

1. The city of Oak Harbor takes notice and specifically relies upon the experiences and studies utilized by other cities and counties in combating the specific adverse impacts of adult entertainment and sexually oriented businesses, including nude and semi-nude dancing. This includes, but is not limited to, the studies relied upon and findings of fact entered by the city councils of the cities of Bellevue, Tukwila, SeaTac, Federal Way, Burien, Everett and Shoreline.
2. The above-referenced studies and findings of fact establish that there are significant and documented negative secondary effects associated with adult entertainment establishments, including increased crime, negative impacts on neighborhoods and decreases in property values. The crimes associated with adult entertainment establishments include prostitution, drug use and sales, and assaults.
3. These negative associated effects of adult entertainment establishments are particularly harmful to schools, religious institutions, parks and residential neighborhoods.
4. It is not the intent of this chapter to suppress or censor any expressive activities protected by the First Amendment of the United States Constitution or Article I, Section 5 of the Washington State Constitution, but rather to establish locations within the city where adult entertainment facilities may locate in such a way as to buffer sensitive uses from the secondary effects of adult entertainment establishments.
5. The Oak Harbor Municipal Code does not presently address the appropriate zone for an adult entertainment business. The closest existing zone is the C-3 Community Commercial zone in which "amusement enterprises" and "places of entertainment" are

permitted uses. Principal uses permitted in the C-3 district are also allowed in the Industrial district.

6. Recent inquiries about locating adult entertainment uses in the city create a reasonable expectation that such uses may attempt to locate in the city and would, therefore, locate in the C-3 Community Commercial zone.
7. However, without further refinement, there are parcel locations in the C-3 Community Commercial zone which would abut or fall within a seven hundred and fifty (750) feet radius of religious institutions, schools, and parks or within one hundred (100) feet of residentially zoned neighborhoods. The city council finds that locating an adult entertainment facility in such parcel locations would be detrimental to existing churches, schools, parks and residential zones, and that the public safety, welfare and peace dictates that adult entertainment facilities not be located in such proximity with those uses.
8. Therefore, the city council finds that an emergency exists requiring immediate council action to establish an adult entertainment facilities overlay zone which both establishes permissible locations for adult entertainment facilities and also buffers sensitive uses from the secondary impacts of adult entertainment facilities. This emergency adoption is necessary for the protection of public welfare, safety and peace.
9. The adult entertainment facilities overlay zone established in the interim ordinance will permit adult entertainment facilities uses to locate in a portion of a general commercial zone (C-3 Community Commercial), the Industrial zone and the Planned Industrial Park zone.
10. The interim adult entertainment facilities overlay zone contains eleven (11) parcels of property – eight (8) in the C-3 Community Commercial zone, one (1) in the Industrial zone, and two (2) in the Planned Industrial Park zone. All of the parcels have City water and sewer available to them. The total acreage available in all eleven parcels is 27.92–9.06 acres in C-3 Community Commercial, 9.08 in Industrial, and 9.78 acres in Planned Industrial Park.
11. At the time of the adoption of the interim ordinance, the city council is aware of no adult entertainment facilities meeting the definition of adult entertainment facility which are located in the City of Oak Harbor and there are no applications for permits for such facilities pending. In light of all these circumstances, the city council finds that there are sufficient parcels in the adult entertainment facilities overlay zone to accommodate demand for properly zoned real estate for those uses in the next year.
12. The city council further finds that an interim ordinance is necessary to establish immediate zoning regulations for adult entertainment facilities uses while the city council studies and evaluates the issues involved in locating adult entertainment facilities in greater detail.

13. The city council further intends that the study and evaluation period will include opportunities for public participation and comment, planning commission recommendation, SEPA review and review by the Washington State Department of Commerce.

**Section Two:** There is hereby added a new Chapter 19.52 entitled "Adult Entertainment Facilities Overlay Zone" to Title 19 of the Oak Harbor Municipal Code to read as follows:

**Chapter 19.52**  
**ADULT ENTERTAINMENT FACILITIES OVERLAY ZONE**

**Sections:**

- 19.52.010 Purpose.  
19.52.020 Application of chapter provisions.  
19.52.030 Definitions.  
19.52.040 Adult entertainment facilities overlay zone established.  
19.52.045 Overlay zone map adopted.  
19.52.050 Adult entertainment overlay zone use restrictions.  
19.52.060 Non-conforming uses.

**19.52.010 Purpose.** The purpose of this chapter is to establish an overlay district within which adult entertainment facilities may be located in such a way as to mitigate the adverse secondary effects associated with such facilities. Because of the adverse secondary effects of adult entertainment facilities, restrictions on location are necessary: to protect residents, especially sensitive uses such as schools, religious institutions, parks and residential neighborhoods, from crimes, nuisances and disturbances of the public welfare, peace and safety; to preserve property values; and to respect the place of neighborhoods, schools, religious institutions and parks in the city of Oak Harbor. It is not the intention of this ordinance to suppress any constitutionally protected speech or expression, but to provide sufficient alternative avenues of communication for adult entertainment uses at the same time as providing appropriate zoning and separation between adult entertainment facilities and potentially conflicting uses.

**19.52.020 Application of chapter provisions.** Adult entertainment facilities, as defined in OHMC 19.52.030(2), shall only be permitted within the Adult Entertainment Facilities Overlay Zone established herein. This chapter applies to all adult entertainment facilities located within the city of Oak Harbor.

**19.52.030 Definitions.** The following definitions shall apply to this chapter.

- (1) "Adult entertainment" shall have the meaning set out in OHMC 5.20.020.
- (2) "Adult entertainment facility" shall mean any commercial premises or club to which any patron is invited or admitted and where adult entertainment is provided on a regular basis or is provided as a substantial part of the premises activity.

- (3) "Overlay zone" shall mean that portion of the C-3 Community Commercial zone, the Industrial zone and the Planned Industrial Park zone in which adult entertainment establishments may be located.
- (4) "Potentially conflicting uses" shall mean schools, religious institutions, residential zones and parks established within the city of Oak Harbor as of the date of this ordinance. The term "potentially conflicting uses" shall also mean any such other uses which the city council shall determine require separation from adult entertainment facilities, provided that the addition of any such uses shall require a review of available lands to ensure sufficient alternative avenues of communication for adult entertainment uses are available.

**19.52.040 Adult entertainment facilities overlay zone established.** There is established an adult entertainment facilities overlay zone in the city of Oak Harbor. The adult entertainment facilities overlay zone shall overlay the C-3 Community Commercial zone, the Industrial zone and the Planned Industrial Park zone. It does not include certain portions of the C-3 zone, the Industrial zone and the Planned Industrial Park zone in which potentially conflicting uses were located at the time of adoption of this ordinance. The following exclusions from the C-3 zone, the Industrial zone and the Planned Industrial Park zones apply:

- (1) The adult entertainment facilities overlay zone removes a buffer of seven hundred fifty (750) feet around the existing potentially conflicting uses of schools, religious institutions, and parks.
- (2) A further buffer removes one hundred (100) feet around existing areas zoned exclusively for residential uses – R-1, Single-Family Residential; R-2, Limited Multiple-Family Residential; R-3, Multiple-Family Residential; and R-4, Multiple-Family Residential.

**19.52.045 Overlay zone map adopted.** The adult entertainment facilities overlay zone map as attached hereto in Exhibit A is adopted as a pictorial description of the sole geographic areas within the city of Oak Harbor in which adult entertainment facilities are permitted. A copy of the adult entertainment facilities overlay zone map is on file with the city clerk and shall be available for public inspection and copying.

**19.52.050 Adult entertainment overlay zone use restrictions.** To mitigate the adverse secondary effects associated with adult entertainment facilities, the following parking and lighting restrictions shall apply within the adult entertainment facilities overlay zone:

- (1) Parking requirements. For adult entertainment facilities constructed after the effective date of this ordinance all parking must be visible from the public right-of-way. For adult entertainment facilities located in buildings constructed prior to the effective date of this ordinance, all parking should be visible from the public right-of-way. In cases of adult entertainment facilities located in buildings constructed prior to the effective date of this ordinance where this is not feasible, access to the parking shall be in as direct a route as possible from the public right-of-way and the parking area shall remain free and clear of visual obstructions at all times. Access to the exterior rear of the building shall be denied

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to any persons other than employees and public officials during the performance of their respective duties and tasks by means of a fence, wall or other device approved by the city building official. On-site parking shall be required and regulated in accordance with Chapter 19.44 OHMC. Parking shall be provided at a ratio of one (1) space for every three (3) seats, plus one (1) space for every two (2) employees on the largest shift.

- (2) Lighting requirements. All on-site parking areas and premises entries of adult entertainment facilities shall be illuminated from dusk until one (1) hour past closing hours of operation with a lighting system which provides an average maintained horizontal illumination of one (1) foot candle of light on the parking surface and/or walkways. In addition, all on-site lighting, including signs, shall comply with the shading and directional requirements of OHMC 19.28.010(4). An on-premises exterior lighting plan shall be presented to the city building official for approval prior to the operation of any adult entertainment.

**19.52.060 Non-conforming uses.** For purposes of this title, a “non-conforming adult entertainment facility” constitutes an adult entertainment facility which lawfully exists as an adult entertainment facility which receives non-conforming status by virtue of an order from a court of competent jurisdiction, or which lawfully existed as an adult entertainment facility prior to a change in the zoning which change does not permit an adult entertainment facility in its existing location and is maintained as an adult entertainment facility although it does not comply with the adult entertainment facility zoning requirements set forth in this chapter, or is an adult entertainment facility which lawfully existed prior to annexation by the city and is maintained after the effective date of annexation and does not comply with the adult entertainment facility zoning requirements set forth in this chapter.

- (1) The location of a newly-established public park, permanent religious institution, or school within seven hundred fifty (750) feet or the establishment of a residential district within one hundred (100) feet of an existing adult entertainment facility shall not cause the existing adult entertainment business to be deemed a non-conforming use unless the city council makes a determination that the newly-established park, religious institution or school requires separation from adult entertainment facilities, and further provided that the exclusion of any such areas from adult entertainment facility zoning overlay shall require a review of available lands to ensure sufficient alternative avenues of communication for adult entertainment uses are available.
- (2) Adult entertainment facilities which are non-conforming uses in the zone in which they are located and which are located within the city limits shall be discontinued within one year of the date of becoming a non-conforming adult use business or upon the expiration of the leasehold period in existence as of the date of becoming a non-conforming adult entertainment facility, or upon the sale of the non-conforming adult entertainment facility, whichever occurs first. Adult entertainment facilities which are non-conforming as a result of annexation to the city shall be discontinued within one year of the date of annexation. Such non-conforming adult entertainment facility shall not be extended, expanded, enlarged or increased in intensity. Such prohibited activities (extend, expand, enlarge, increase in intensity) shall include:

- (a) Extension of a non-conforming adult entertainment facility to any building or other structure or land area other than one occupied by such use as of the date of becoming a non-conforming adult entertainment facility.
  - (b) Extension of any specific type of non-conforming adult entertainment facility, as separately defined in OHMC 19.52.030(2), within a building or other structure to any portion of the floor area that was not occupied by that same type of adult entertainment facility as of the date of becoming a non-conforming adult entertainment facility.
  - (c) Operation of a non-conforming use in such manner as to conflict with, or to further conflict with if already conflicting as of the date of becoming a non-conforming adult entertainment facility.
- (3) Any change in a non-conforming adult entertainment facility shall be to a use which is legally permitted within the zone in which it is located. In the event a non-conforming adult entertainment facility, or portion thereof, is changed to a use which is legally permitted within the zone in which it is located, then the structure or portion thereof which contained the adult entertainment facility cannot thereafter be used or reused for any type of adult entertainment facility. In the event a non-conforming adult entertainment facility building or structure is vacated, closed or abandoned for a period in excess of six (6) months, the structure shall not thereafter be used except in conformance with a use which is legally permitted within the zone in which it is located. A vacated, closed or abandoned non-conforming adult entertainment facility building or structure shall also be subject to the discontinuation provisions of OHMC 19.52.060(2).
- (4) Repairs and alterations to a non-conforming adult entertainment facility building or structure shall be limited to nonstructural repairs and incidental alterations for normal maintenance and shall only be permitted to the extent necessitated by normal wear and tear. No structural alterations shall be allowed.
- (5) A building or structure containing a non-conforming adult entertainment facility which is damaged or destroyed by fire, wind, earthquake or other natural disaster can be restored and the same use or occupancy continued or resumed provided the total cost of such restoration does not exceed fifty percent (50%) of the real valuation of the building or structure exclusive of foundations at the time of such damage provided that such restoration shall not extend the one (1) year discontinuation period established in OHMC 19.52.060(2). Restoration of a structure or building housing a non-conforming adult entertainment facility or moneys used therefore shall not be used as factors by the examiner when considering any request of a time extension made pursuant to subsection (6) of this section.
- (6) In the event the owner of a non-conforming adult entertainment facility determines that the period set forth in subsection (2) of this section does not provide the adult entertainment facility with a reasonable period of amortization, then no later than one

hundred eighty (180) days prior to the expiration of the period, the owner of a non-conforming adult entertainment facility shall make application to the city land use hearing examiner for an extension of time. Accompanying the application shall be a fee in the amount of Seven Hundred Twelve Dollars (\$712.00) and detailed information addressing the below-listed factors to be considered by the hearing examiner. In determining whether or not to grant the extension, the hearing examiner shall determine whether or not the harm or hardship to the non-conforming adult entertainment facility outweighs the benefit to be gained from the public from termination of the use. Factors to be considered by the hearing examiner include the location of the business in relation to sensitive land uses such as schools, parks, churches, residential zone(s), etc., initial capital investment, investment realization to date, life expectancy of the investment, the existence or nonexistence of a lease obligation, as well as a contingency clause permitting termination of the lease, or whether a reasonable alternate use of the property exists. The action of the hearing examiner shall be in accordance with the review process as described in Chapter 18.40 OHMC for a Review Process III.

- (7) Within thirty (30) calendar days of becoming a non-conforming adult entertainment facility, the non-conforming adult entertainment facility shall provide the city's development services director with copies of its current leasehold document(s) which sets forth their existing leasehold time period or, in the case of a non-leasehold interest, the city's development services director shall be provided other documents which show record of ownership.

**Section Three.** OHMC 18.20.250 entitled "Review Process III", last amended by Ordinance 1376 §13 in 2004 is hereby amended to read as follows:

**18.20.250 Review process III.**

- (1) Review process III applies to all permit applications that require an open public hearing before the hearing examiner.
- (2) Review process III actions include the following decisions:
  - (a) Variances;
  - (b) Conditional uses;
  - (c) Wetland permits and variances designated to be decided at a predecision public hearing; and
  - (d) Applications for extensions of time for non-conforming adult entertainment facilities pursuant to OHMC 19.52.060(6).

**Section Four: Public Hearing.** In accordance with RCW 36.70A.390, a public hearing shall be held on this interim zoning ordinance on May 4, 2010 or such other date within sixty (60) days of the date of adoption of this interim ordinance as shall be publicly noticed.

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**Section Five. Severability.** If any provision of this Ordinance or its application to any person or circumstance is held invalid, the remainder of the Ordinance or the application of the provision to other persons or circumstances is not affected.

**Section Six. Effective Date.** The City Council having found that adoption of this Ordinance as an emergency is necessary for the protection of the public welfare, public safety and the public peace, this Interim Ordinance shall be in full force and effect immediately.

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PASSED by a majority plus one of the entire membership of the City Council this 23rd day of March, 2010.

APPROVED by its Mayor this \_\_\_\_ day of \_\_\_\_\_, 2010.

THE CITY OF OAK HARBOR

\_\_\_\_\_  
Mayor

Attest:

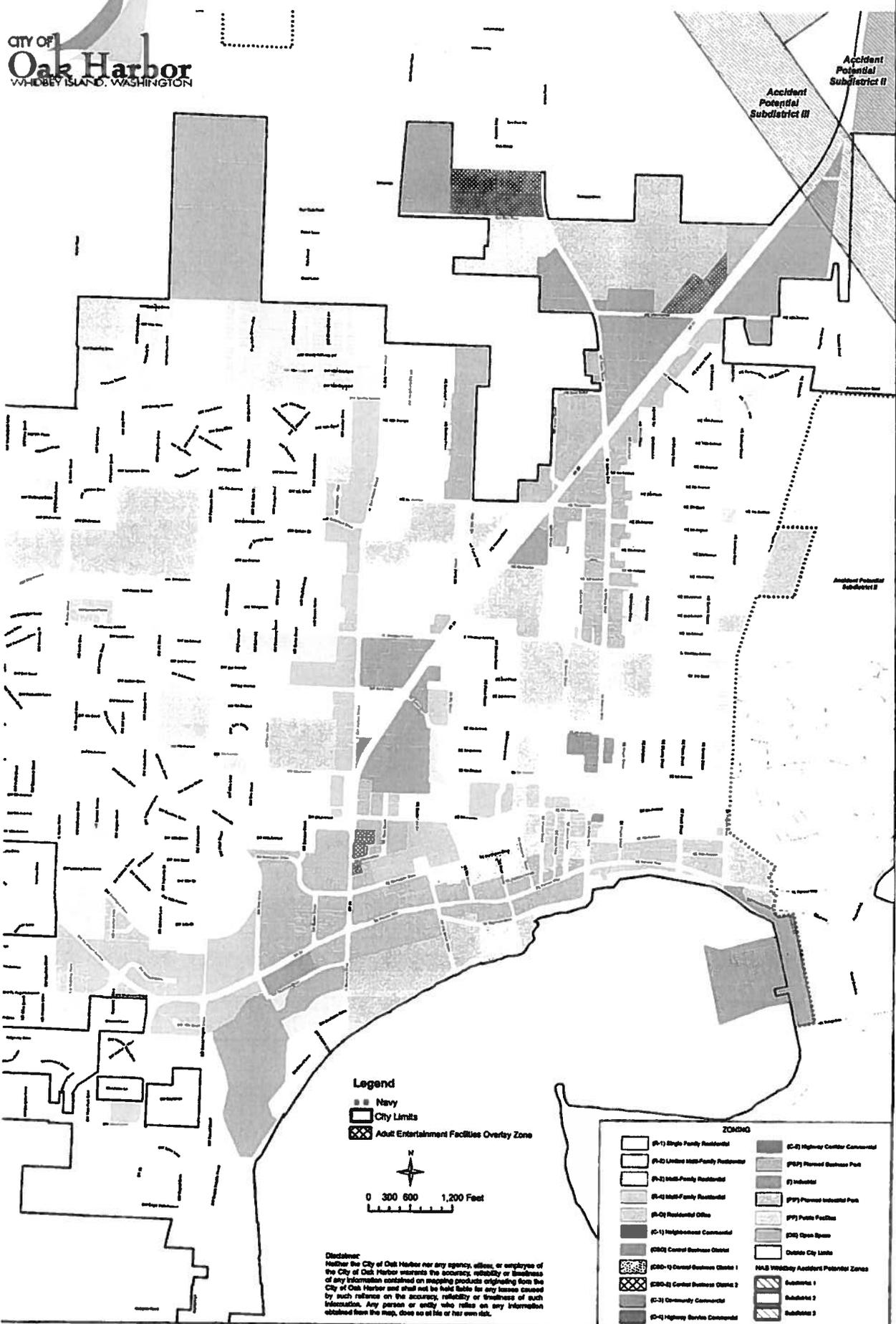
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City Clerk

Approved as to Form:

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City Attorney

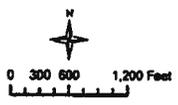
Published: \_\_\_\_\_

# EXHIBIT A Adult Entertainment Facilities Overlay Zone



**Legend**

- Navy
- City Limits
- ▨ Adult Entertainment Facilities Overlay Zone



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**ZONING**

(R-1) Single Family Residential	(C-2) Highway Corridor Commercial
(R-2) Limited Multi-Family Residential	(P-B) Planned Business Park
(R-3) Multi-Family Residential	(I) Industrial
(R-4) Multi-Family Residential	(P-P) Planned Industrial Park
(R-5) Residential Office	(P-F) Public Facilities
(C-1) Neighborhood Commercial	(O) Open Space
(C-2) Central Business District	Outside City Limits
(C-3) Central Business District 1	NAB Whidbey Accident Potential Zones
(C-4) Central Business District 2	Subdistrict 1
(C-5) Community Commercial	Subdistrict 2
(C-6) Highway Service Commercial	Subdistrict 3

Accident Potential Subdistrict III

Accident Potential Subdistrict II

Accident Potential Subdistrict I

**INTERIM ORDINANCE  
ADULT ENTERTAINMENT FACILITIES OVERLAY ZONE**

**LEGAL MEMORANDUM FOR THE RECORD**

To: Mayor Jim Slowik, Members of the Oak Harbor City Council

Re: Zoning Considerations for Adult Entertainment Businesses

Fm: Margery Hite, City Attorney

Date: March 18, 2010

**ISSUE PRESENTED**

The purpose of this memorandum is to outline the legal parameters that have been established with respect to land use regulation and zoning of adult entertainment businesses, and to discuss the proposed interim adult entertainment facilities overlay zone in light of these legal requirements.

**I. Fundamental Principles**

Nude dance is a form of "speech" protected under the First Amendment to the U.S. Constitution although it falls only within the "outer ambit of the First Amendment's protection."<sup>1</sup> As protected "speech", the content of the nude expression is protected but the time, place and manner of the speech are proper matters for government regulation.<sup>2</sup> The 1986 case *City of Renton v. Playtime Theatres, Inc.*<sup>3</sup>, challenged a city's zoning ordinance prohibiting the location of adult motion picture theaters within 1,000 feet of uses such as churches, schools and parks as a violation of the First and Fourteenth Amendments to the U.S. Constitution. In upholding the right of a city to establish such zoning regulations, the U.S. Supreme Court found that the zoning regulations were a time, place and manner regulation focused on the secondary effects of the adult theaters rather than upon the content of the "speech" or expression taking place in the adult theaters. As long as the city's zoning regulations were designed to serve a "substantial governmental interest" and allowed for "reasonable alternative avenues of communication", they were found not to violate the First or Fourteenth Amendments.

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<sup>1</sup> *City of Erie v. Pap's A.M. tdba "Kandyland"*, 529 U.S. 277, 289, 120 S.Ct. 1382, 1391, 146 L.Ed.2d 265 (2000).

<sup>2</sup> *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566, 111 S.Ct. 2456, 2460, 115 L.Ed.2d 504 (1991).

<sup>3</sup> 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986).

The Court found that the city council could rely upon studies conducted by other jurisdictions to determine that there is a substantial governmental interest in regulating the zoning of adult theaters.<sup>4</sup> In Renton's case, these studies showed deleterious effects upon crime, property values and the quality of neighborhoods and urban life generally. The Court found that Renton's regulations were "narrowly tailored" to affect only those businesses with the unwanted secondary effects, which was necessary to sustain the regulations.<sup>5</sup>

In determining that the city's zoning ordinance was constitutional, the Court also found that it allowed for "reasonable alternative avenues of communication". The zoning ordinance left approximately 520 acres or more than five percent of the entire land area of Renton open to use as adult theater sites.<sup>6</sup>

## II. Mitigating Secondary Effects of Adult Entertainment

As part of adopting zoning regulations specific to adult entertainment businesses, then, the city council will need to find a substantial governmental interest in mitigating the secondary effects of adult entertainment businesses and that the zoning regulations are narrowly tailored to address those secondary effects.<sup>7</sup>

The secondary effects of the entertainment activity have been established by other cities and counties who have examined the issue.<sup>8</sup> In a city such as Oak Harbor that has not had experience of adult entertainment uses, the experience of other cities and counties may be used by the city council to determine that there is a substantial governmental interest at stake.<sup>9</sup> Other cities in western Washington, including Everett, Shoreline, Kent, Des Moines, Federal Way, Bellevue, Burien, Lynnwood and Tukwila, have had experience with adult entertainment businesses. These are referenced in the record submitted, and the court decisions involving regulation by these cities that are also part of the record. Spokane's experience with adult businesses generally is also included in the record.

Everett's experience with adult entertainment businesses is described in the record submitted with the proposed ordinance – employees and customers of live adult entertainment businesses are frequently involved in acts of prostitution which are initiated on premises and performed at nearby locations; such prostitution and solicitation affect nearby residences, businesses, traffic

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<sup>4</sup> "We hold that Renton was entitled to rely on the experiences of Seattle and other cities, and in particular on the "detailed findings" summarized in the Washington Supreme Court's *Northend Cinema* opinion, in enacting its adult theater zoning ordinance." *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 at 51, 106 S.Ct. 925 at 931, 89 L.Ed.2d 29 (1986).

<sup>5</sup> *City of Renton v. Playtime Theatres, Inc.*, 106 S.Ct. at 931.

<sup>6</sup> At the time, the city of Renton had a population of approximately 32,000. 106 S.Ct. at 928.

<sup>7</sup> This finding is intended to meet the four-part *O'Brien* test.

<sup>8</sup> *World Wide Video of Washington v. City of Spokane*, 368 F.3d 1186 (9<sup>th</sup> Cir. 2004) – This case dealt with adult book and video stores rather than adult entertainment in the form of dance, etc. In either case, however, the object of the regulations should not be the suppression of expression but mitigation of secondary effects.

<sup>9</sup> However, those studies must address the uses being regulated in Oak Harbor's ordinance – adult entertainment establishments. *World Wide Video, Inc. v. City of Tukwila*, 117 Wn.2d 382, 816 P.2d 18 (1991) Tukwila zoning ordinance regulating "take-home" merchandise stores exceeded evidence of secondary effects in adult entertainment studies and was not, therefore "narrowly tailored" and constitutional.

and the quality of life in adjacent neighborhoods.<sup>10</sup> Other criminal activity associated with adult entertainment businesses are public lewd conduct, use and sale of controlled substances and assault.

Spokane's experience with adult businesses generally is described in the affidavits submitted in support of the City's motion for summary judgment in *World Wide Video of Washington v. City of Spokane*, Eastern District of Washington, No. CS-02-0074-AAM. They show that adult businesses have been associated with the secondary effects of public masturbation, sex acts and condoms in public places, solicitation, prostitution and public urination.

The record submitted also shows that sexually oriented businesses or adult businesses generally are associated with property value decline<sup>11</sup> and increases in crime rates.<sup>12</sup>

The city council may use this information, in conjunction with the rest of the record, public comment, and council member experience, to establish that there is a "substantial governmental interest" in regulating the location of adult entertainment businesses to mitigate the associated secondary effects. It must tie the regulations to the secondary effects such that the regulations are directed towards mitigating those effects.

In the proposed zoning overlay ordinance, the secondary effects of sex-crimes, public lewdness, drug use and assaults are addressed by creating buffer zones around the uses that are most likely to be negatively affected by contact with the secondary effects. Children are protected from viewing sex and sex-related conduct, as well as drug crimes, solicitation and violent behavior, by placing 750 foot buffers around schools, and parks. Religious institutions are buffered from those effects as well, since congregations (which include children) are highly sensitive to the incompatibility of the associated secondary effects of adult entertainment. Neighborhoods similarly have a buffer of 100 feet to preserve the quality of life.

### III. Establishing Reasonable Alternative Zoning Locations for Adult Entertainment

While larger buffers may be preferred by residents, it is important to still leave "alternative avenues of communication" in the form of sufficient locations zoned for adult entertainment uses. Larger buffers reduce the number of available parcels. The size of buffers proposed here intends to achieve a balance between protecting incompatible uses from the secondary effects of adult entertainment and providing locations that are zoned for adult entertainment uses.

There is no requirement that a city provide a commercially viable location for a specific adult entertainment applicant. "That respondents must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation."<sup>13</sup> Further, it is not relevant whether a site will result in "lost profits, higher overhead costs, or even prove to be commercially infeasible for an adult business."<sup>14</sup>

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<sup>10</sup> Everett record at pp. 26-28.

<sup>11</sup> Indianapolis record, 1984.

<sup>12</sup> Minneapolis record, 1989, Garden Grove California record, 1991, Phoenix record – increase in sex crime rate

<sup>13</sup> *City of Renton v. Playtime Theaters*, 106 S.Ct. at 932.

<sup>14</sup> *Topanga Press v. City of Los Angeles*, 989 F.2d 1524, 1530 (9<sup>th</sup> Cir. 1993).

However, an adult business must have a reasonable opportunity to locate or relocate in the jurisdiction.<sup>15</sup> Under cases decided by the 9<sup>th</sup> Circuit Court of Appeals<sup>16</sup>, this means that there must be an adequate number of potential relocation sites in the real estate market. To determine whether a site is part of the real estate market, five considerations are set out. First, there must be a genuine possibility that the site could become available. Second, the site must be reasonably accessible to the general public. Third, areas in manufacturing zones may be included with proper infrastructure, such as sidewalks, roads and lighting. Fourth, if the site is not commercially zoned, then it must be a reasonable site for some commercial enterprise, rather than a swamp, a sewage treatment plant, or the like. Fifth, sites zoned for commercial uses are presumed to be part of the real estate market for such uses.<sup>17</sup>

The majority of sites in the proposed adult entertainment facilities overlay zone are in the C-3 Community Commercial zone. One site is in the Industrial zone, which permits uses designated for the C-3 zone as well as industrial uses. In total, there are eight (8) parcels in the C-3 Community Commercial zone, one (1) in the Industrial zone, and two (2) in the Planned Industrial Park zone. All of the parcels have City water and sewer available to them. The total acreage available in all eleven parcels is 27.92 acres - 9.06 acres in C-3 Community Commercial, 9.08 acres in Industrial, and 9.78 acres in Planned Industrial Park.

After determining that the parcels to be considered are part of the appropriate real estate market, the next question is whether the remaining acreage or sites provide the adult entertainment businesses with a reasonable opportunity to locate in the city. The adequacy of zoned parcels should be assessed in terms of the evidence of total demand for such sites and other factors such as the percentage of available acreage theoretically available to adult businesses, the number of sites potentially available in relation to the population, "community needs, the incidence of [adult businesses] in other comparable communities, [and] the goals of the city plan."<sup>18</sup>

Because there are no actual adult entertainment businesses located in Oak Harbor, the demand is unknown. However, it is reasonable to assume that the adult entertainment facilities overlay district established in the interim ordinance need only address the demand over the interim period of the ordinance.<sup>19</sup>

It is important to remember that there is no absolute number of parcels that must be provided to meet the "reasonable alternative avenues of communication." In Simi Valley, a city 35 miles northwest of Los Angeles, with a population of approximately 100,000, the city could identify 4 potential sites for its first adult business application. Like Oak Harbor, Simi Valley had never had an adult entertainment business before and therefore the demand for sites for such businesses was unknown (beyond the first applicant). The 9<sup>th</sup> Circuit refused to rule as a matter of law that 4 sites were insufficient, holding instead that it was a fact-specific inquiry whether an adult

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<sup>15</sup> *Ibid.*

<sup>16</sup> Washington state and thus Oak Harbor lies within the jurisdiction of the Federal 9<sup>th</sup> Circuit Court of Appeals.

<sup>17</sup> *Topanga Press v. City of Los Angeles*, 989 F.2d 1524, 1531 (9<sup>th</sup> Cir. 1993).

<sup>18</sup> *Isbell v. City of San Diego*, 258 F.3d 1108, 1114 (9<sup>th</sup> Cir. 2001) citing *Young v. City of Simi Valley*, 216 F.3d 807 (9<sup>th</sup> Cir. - 1999).

<sup>19</sup> See *Diamond v. Taft*, 215 F.3d 1052 (9<sup>th</sup> Cir. 2000), finding that adequate opportunities existed for the one current applicant.

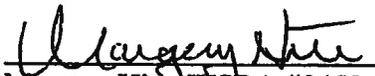
business has a "reasonable opportunity to open and operate".<sup>20</sup> Considerations the court listed were: percentage of available acreage theoretically available to adult businesses, the number of sites potentially available in relation to the population, community needs, the incident of adult businesses in other comparable communities, and the goals of the city plan.

The proposed interim ordinance allows the city to create an interim location for adult entertainment businesses so that they do not abut or locate in proximity to schools, religious institutions, parks or residentially-zoned neighborhoods. The study period that this interim ordinance will afford the city should be used, among other things, to undertake the analysis required to meet constitutional requirements.

#### IV. Conclusion

The proposed buffers around schools, religious institutions, parks and residentially-zoned neighborhoods are intended to provide mitigation of the secondary effects of adult entertainment establishments. Further study is needed to create a final zoning regulation and the adoption of an interim ordinance allows the city time to undertake this complex process while still protecting the most sensitive uses from adult entertainment business impacts in the interim.

Dated this 18<sup>th</sup> day of March, 2010.

  
Margery Hite, WSBA #8450  
City Attorney

<sup>20</sup> *Young v. City of Simi Valley*, 216 F.3d 807 (9<sup>th</sup> Cir. – 1999).

City of Oak Harbor  
City Council Agenda Bill

Agenda Bill No. 10  
Date: May 4 2010  
Subject: Interim Adult Entertainment  
Facilities Overlay Zone Ordinance --  
Public Hearing

FROM: Steve Powers, Development Services Director *SP*

INITIALED AS APPROVED FOR  
SUBMITTAL TO THE COUNCIL BY:

*[Signature]* Jim Slowik, Mayor  
*[Signature]* Paul Schmidt, City Administrator  
*[Signature]* Doug Merriman, Finance Director  
*[Signature]* Margery Hite, City Attorney, as to form

**PURPOSE**

Two separate actions are proposed in this agenda bill. The first is the adoption of a resolution which states the City's public hearing requirement on the interim ordinance has been satisfied. The second is the adoption of a revised interim ordinance. This agenda bill requests that the City Council conduct a public hearing on Ordinance 1572, the Interim Adult Entertainment Facilities Overlay Zone Ordinance adopted in March 23, 2010, approved on an emergency basis on March 23, 2010 and requires that a public hearing be held within sixty (60) days of adoption. This agenda bill also presents amendments to the interim ordinance for the Council's consideration.

**AUTHORITY**

RCW 36.70A.390 allows cities to adopt interim zoning ordinances without first conducting a public hearing so long as a hearing is conducted on the interim ordinance within sixty (60) days of adoption.

**BACKGROUND:**

**City Council Action**

On March 23, 2010 the City Council adopted an interim ordinance on an emergency basis regulating the location of adult entertainment facilities. Prior to that action, the Oak Harbor Municipal Code (OHMC) did not address land uses of this nature.

The adopted interim ordinance made the following changes to the OHMC:

1. It adopts a temporary zoning ordinance which permits adult entertainment establishments to be located in an "Adult entertainment facilities overlay zone" within the C-3, Industrial and Planned Industrial Park zones. This overlay zone was drawn to create a buffer around incompatible uses.
2. The overlay draws a 750 ft. buffer around religious institutions, parks and schools.

3. It also draws a 100 ft. buffer between the overlay and residentially zoned neighborhoods.
4. It amended OHMC 18.20.250 to include a process for requesting an extension of time for non-conforming adult entertainment facilities.

The agenda bill and minutes from the March 23<sup>rd</sup> meeting are attached to this agenda bill as Attachment 1.

### **Interim Ordinance**

As was noted above, the interim ordinance was adopted pursuant to RCW 36.70A.390, which states in part:

A county or city governing body that adopts a moratorium, interim zoning map, interim zoning ordinance, or interim official control without holding a public hearing on the proposed moratorium, interim zoning map, interim zoning ordinance, or interim official control, shall hold a public hearing on the adopted moratorium, interim zoning map, interim zoning ordinance, or interim official control within at least sixty days of its adoption, whether or not the governing body received a recommendation on the matter from the planning commission or department. If the governing body does not adopt findings of fact justifying its action before this hearing, then the governing body shall do so immediately after this public hearing. A moratorium, interim zoning map, interim zoning ordinance, or interim official control adopted under this section may be effective for not longer than six months, but may be effective for up to one year if a work plan is developed for related studies providing for such a longer period. A moratorium, interim zoning map, interim zoning ordinance, or interim official control may be renewed for one or more six-month periods if a subsequent public hearing is held and findings of fact are made prior to each renewal.

This procedure allows the City to utilize a temporary zoning ordinance to take additional time to study and hone its zoning regulations, to create a public participation process and to permit the establishment of adult entertainment facilities, at the same time as restricting patently inappropriate locations in the immediate future.

RCW 36.70A.390 sets out very specific steps the City must follow in adopting an interim ordinance. After adopting an interim ordinance, the City is required to meet the following procedural requirements:

1. A city governing body that adopts an interim zoning ordinance without holding a public hearing on the proposed ordinance shall hold a public hearing on the interim zoning ordinance within at least sixty days of its adoption.  
The public hearing is scheduled for May 4, 2010 which is within sixty (60) days of the adoption date of March 23, 2010.
2. The city's governing body shall conduct the public hearing whether or not they have received a recommendation on the matter from the planning commission.  
The hearing is scheduled for May 4<sup>th</sup> prior to receipt of the Planning Commission's recommendation. The proposed resolution includes direction to staff to forward the ordinance to the Planning Commission for their review and recommendation.

3. If the governing body does not adopt findings of fact justifying its action before this hearing, then the governing body shall do so immediately after this public hearing. Findings of fact were adopted with the interim ordinance. Revised findings of fact are proposed to support the proposed amendments to the revised interim ordinance.
4. An interim zoning ordinance adopted under this section may be effective for not longer than six months, but may be effective for up to one year if a work plan is developed for related studies providing for such a longer period. Staff is developing a work plan outlining the work to be completed during the balance of the initial six month period. It is not known at this time if the interim ordinance will need to be extended beyond the six month timeframe.

#### **Proposed Amendments to Interim Ordinance**

During the March 23<sup>rd</sup> meeting, there was both citizen and City Council concern with two aspects of the interim ordinance: the adequacy of the 100-foot buffer from residentially zoned properties and the inclusion of C-3 zoned properties located on SR-20 as part of the available sites inventory. Generally speaking the concern with the 100-foot buffer was that it did not match the 750-foot buffer around other sensitive uses (churches, schools and parks) and that it was insufficient to protect neighborhoods. The concern with the C-3 zoned properties along SR-20 was that they were somewhat near informal community gathering places (such as a grocery store) and that the highway locations were inconsistent with the scenic byway designation of SR-20.

In response to these comments and concerns, staff proposes the interim ordinance be amended by increasing the buffer from residentially zoned properties to 750-feet. The increased distance provides the same level of protection to all of the identified sensitive (or incompatible) uses: churches, schools, parks and residentially zoned properties.

A byproduct of increasing the buffer is that the C-3 zoned properties previously included in the available sites inventory are now eliminated. This step would leave only the Industrial and Planned Industrial Park sites located along NE Goldie Street in the overlay zone. It is important to note that while it is intended that this number of sites is sufficient for the purposes of an interim ordinance, it may not be sufficient for the final ordinance.

#### **STANDING COMMITTEE REVIEW:**

The regulation of adult entertainment was discussed at the Public Safety Standing Committee on February 18<sup>th</sup> and at the Governmental Services Standing Committee on March 9<sup>th</sup>. The proposed amendments to the interim ordinance were discussed with the Governmental Services Standing Committee on April 13<sup>th</sup>.

**RECOMMENDED ACTION:**

- Conduct public hearing on interim ordinance and on amendments to the interim ordinance.
- Adopt resolution affirming the City of Oak Harbor's compliance with the public hearing requirements of RCW 36.70A.390 and referring the interim ordinance to the Planning Commission for review and recommendation.
- Adopt amended Interim Adult Entertainment Facilities Overlay Zone ordinance.

**ATTACHMENTS:**

1. Agenda bill and (w/o attachments) from March 23, 2010 meeting and minutes
2. Interim Adult Entertainment Facilities Overlay Zone (Ordinance 1572)
3. Resolution
4. Revised Interim Adult Entertainment Facilities Overlay Zone ordinance
5. Revised Adult Entertainment Facilities Overlay Zone map

**MAYOR'S COMMENTS:**

City of Oak Harbor  
City Council Agenda Bill

Agenda Bill No. 19  
Date: March 23, 2010  
Subject: Interim Adult Entertainment  
Facilities Overlay Zone Ordinance --  
Emergency Ordinance

FROM: Steve Powers, Development Services Director *rsp*

INITIALED AS APPROVED FOR  
SUBMITTAL TO THE COUNCIL BY:

*JS* Jim Slowik, Mayor  
*PS* Paul Schmidt, City Administrator  
*DM* Doug Merriman, Finance Director  
*MH* Margery Hite, City Attorney, as to form

**SUMMARY STATEMENT:** This ordinance is an interim measure to be adopted on an emergency basis to address the appropriate location for a use not currently addressed in the Oak Harbor Municipal Code. Adult entertainment is a form of expression protected by the First Amendment to the U.S. Constitution. However, there are well-studied negative secondary effects associated with this use in the form of impacts on crime, neighborhoods and property values. Local governments are authorized to impose zoning regulations to address the associated negative secondary effects, as long as there remain sufficient "alternative avenues of communication" available for the use after the imposition of the regulations.

The proposed interim ordinance makes the following changes to the OHMC:

1. It adopts a zoning ordinance which permits adult entertainment establishments to be located in an "Adult entertainment facilities overlay zone" within the C-3, Industrial and Planned Industrial Park zones. This overlay zone was drawn to create a buffer around incompatible uses.
2. The overlay draws a 750 ft. buffer around religious institutions, parks and schools.
3. It also draws a 100 ft. buffer between the overlay and residentially zoned neighborhoods.
4. It amends OHMC 18.20.250 to include extensions of time for non-conforming adult entertainment facilities.

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The buffers are intended to mitigate the negative secondary effects of adult entertainment facilities upon sensitive uses such as schools, churches and parks and on residential neighborhoods and property values, while still retaining sufficient parcels for adult entertainment uses to be located within the City.

**Emergency ordinance:** The proposal is that the City Council adopt this interim ordinance on an emergency basis to address adult entertainment uses that may seek to locate within the city limits in the near future. The City staff has received several inquiries about City regulations on the subject in recent months and notes that the absence of regulations creates an imminent risk that an inappropriate location could be chosen for an adult entertainment facility. Since there are no regulations specifically addressing this use in the Oak Harbor Municipal Code (OHMC), it is necessary to ensure that potential applicants are directed to the overlay zone rather than locating next to a church, school, park or residential zone.

Adopting the interim ordinance on an emergency basis allows the City to take additional time to study and hone its zoning regulations, to create a public participation process and to permit the establishment of adult entertainment facilities, at the same time as restricting patently inappropriate locations in the immediate future.

There are several requirements of the emergency ordinance:

1. It must be passed by a majority plus one of the whole membership of the council.
2. The council must make a finding that the ordinance is necessary for the protection of public health, public safety, public property or the public peace.
3. There must be a public hearing on the ordinance within 60 days of adoption. Staff recommends the hearing be set for May 4, 2010.

The interim ordinance may remain in effect for six months, subject to an extension of up to a year, so that the Planning Commission may make its recommendation, public participation may be encouraged and so that any further studies deemed necessary be undertaken. During the period of the interim ordinance, the City will also undertake its obligations to perform a SEPA review and to provide 60 days' prior notification of the new zoning provision to the Department of Commerce.

**Policy considerations:** If the City Council determines to regulate this use, it must do so in light of well-settled U.S. Supreme Court decisions on the subject. Because of First Amendment considerations, the use is protected within established limitations. The City Council may regulate the use for negative secondary impacts. Many other jurisdictions have studied the use and determined that there are negative impacts upon schools, churches, parks, neighborhoods and

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property values, in addition to associated criminal activity, as a result of the activities and location of adult entertainment uses.

The proposed ordinance lays out a zoning framework for addressing the negative secondary impacts of adult entertainment uses. It is intended to address those uses seeking to locate in the City until a final ordinance can be adopted. It is recommended that the City Council adopt this as an interim measure and direct that further study, public participation and Planning Commission recommendation go forward to be included in the ultimate decision on a final ordinance.

***Budget considerations:*** This interim ordinance is not anticipated to have any budget impacts.

**STANDING COMMITTEE REVIEW:** Regulation of adult entertainment was discussed at the Public Safety Standing Committee on February 18<sup>th</sup> and at the Government Services Standing Committee on March 9<sup>th</sup>.

**RECOMMENDED ACTION:**

1. Consider the record.
2. Allow public comment.
3. Adopt the Interim Adult Entertainment Facilities Overlay Zone Ordinance.

**ATTACHMENTS:**

•Proposed interim ordinance establishing zoning locations for adult entertainment facilities which include the following:

1. Findings that an emergency exists requiring the immediate effectiveness of the interim ordinance for the protection of public health, safety and peace;
2. Findings of Fact substantiating the need to establish the zones in which adult entertainment facilities may locate;
3. A new chapter of the zoning code entitled "Adult Entertainment Facilities Overlay Zone";
4. Amendment of OHMC 18.20.250 to include extensions of time for non-conforming adult entertainment facilities;
5. A public hearing date on the interim ordinance for May 4, 2010.

•Legal Memorandum for the Record – Zoning

**MAYOR'S COMMENTS:**

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**MOTION:** Councilmember Paggao moved to rescind the vote on Consent Agenda Items E and G. The motion was seconded by Councilmember Dudley.

Discussion followed about the lengthy process to bring these proposed vessel sales before Council, that there has been no communication on behalf of these boats except a partial payment with a check that had insufficient funds and has since gone to collection, and that ownership is unknown for the other boat.

**VOTE ON THE**

**MOTION:** Councilmembers Paggao and Dudley voted in favor of the motion. Councilmembers AlMBERG, Palmer, Munns, and Severns opposed. The motion did not carry.

**Consent Agenda Item B, Noise Permit – Whidbey Island Tea Party**

**MOTION:** Councilmember Palmer moved to approve the noise permit for the Whidbey Island Tea Party. The motion was seconded by Councilmember Munns and carried unanimously.

**Public Hearing – Proposed Ordinance banning Public Nudity**

**Public Hearing – Proposed Ordinance for Adult Entertainment Licensing and Regulation**

City Attorney Hite explained that the two proposed ordinances for public hearing both have to do with nude expression and were combined for comments so the public does not have to comment twice. Comments will be included on both. Ms. Hite talked about the effective dates for each of these ordinances as well as the third ordinance which is not set for public hearing but will be open to public comment.

1. Ordinance banning Public Nudity: This Ordinance shall be in full force and effect five days after publication.
2. Ordinance for Adult Entertainment Licensing and Regulation: Having found that an emergency exists, OHMC 5.20.020 of this ordinance shall be in full force and effect immediately. The remaining sections of this ordinance shall be in full force and effect five days after publication.
3. Interim Ordinance – Adult Entertainment Facilities Overlay Zone: Having found that adoption of this Ordinance as an emergency is necessary for the protection of the public welfare, public safety and the public peace, this interim ordinance shall be in full force and effect immediately.

Ms. Hite also explained that this last ordinance must be adopted by a majority plus one of the whole membership of the Council and there must be a public hearing on the interim ordinance within 60 days of adoption. The hearing would be set for May 4, 2010. The interim ordinance must also come before the Planning Commission, undergo SEPA review and review by the Department of Commerce. It may remain in effect for six months subject to an extension of up to a year to allow for this review process.

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Prosecuting Attorney / Law and Justice Coordinator Bill Hawkins gave the presentation for the proposed ordinance banning public nudity and the proposed ordinance for adult entertainment licensing and regulation. Mr. Hawkins began his presentation by noting that Oak Harbor will be celebrating its centennial in five years and has done without this type of adult entertainment establishment through all of these years. This has changed within the last couple of months and we have been asked to address legal principles. This is a heavily regulated area. Why can't we ban it? The answer is that you cannot ban it legally but you can regulate it extensively. Total bans on nude dancing have been invalidated. Municipalities may regulate protected expression. We do not start from scratch; we are allowed by law to consider the collective weight of studies and communities from Washington and around the country. Council must find that regulations are specific to address the impact of an establishment and curb the harmful secondary effects without limiting expressive conduct. Negative secondary effects: Those that are found inside the establishment (prostitution, involvement of minors, alcohol and drugs, licensing violations) and then outside of the establishment through impact on neighborhoods, the business community, lifestyles, property values, churches, schools, parks, increased criminal activity, increased traffic problems, and increased need for police protection and response. Mr. Hawkins gave examples of other communities and the problems experienced with adult entertainment establishments and cited Palm Beach, FL as a helpful example for Oak Harbor's proposed ordinance language.

#### **Proposed Ordinance Banning Public Nudity**

The proposed ordinance would ban public nudity, with appropriate exemptions for any child under age ten (10) years of age, breastfeeding, nudity within a locker room or other similar facility used for changing clothing in connection with athletic or exercise activities, nudity within a hospital or other medical facility for health-related purposes, and for a licensed entertainer performing in an adult entertainment establishment upon a stage at least eighteen (18) inches above the immediate floor level and removed at least ten (10) feet from the nearest patron. For many years, public lewdness, obscenity and nudity have been regulated by Washington state statutes regarding moral nuisance, public nuisance, and indecent exposure. Until recently, these laws supported enforcement measures satisfactorily. However, in recent months, several Washington jurisdictions have experienced shortcomings with existing laws as applied to "bikini baristas" and similar forms of activity. Some jurisdictions have found it necessary and advisable to adopt local ordinances banning public nudity. Public nudity itself is conduct subject to regulation. *Erie v. PAP's AM*, 529 U.S. 277 (2000); *O'Day v. King County*, 109 Wn.2d 796 (1988); *Ino Ino, Inc., v. Bellevue*, 132 Wn.2d 103 (1997). A ban on public nudity is a content-neutral restriction that regulates conduct, not expression. *Id.* Oak Harbor has historically banned public nudity under existing laws. An ordinance specifically and expressly banning public nudity is not intended to prohibit conduct not already prohibited under existing laws or to be a stricter standard, but merely to facilitate enforcement.

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### **Proposed Ordinance – Adult Entertainment Licensing and Regulation**

The purpose of this ordinance is to address the appropriate licensing and regulation of the conduct and operation of a use not currently addressed in the Oak Harbor Municipal Code. Adult entertainment is a form of expression protected by the First Amendment to the U.S. Constitution and Article I, Section 5, of the Washington State Constitution. However, there are well documented negative secondary effects associated with adult entertainment in the form of impacts on crime, neighborhoods, property values and increased cost of municipal services. Local governments are authorized to impose licensing and conduct and operation regulations to address the associated negative secondary effects, as long as there remain sufficient "alternative avenues of communication" available for use after the imposition of the regulations. The proposed ordinance makes the following changes to the Oak Harbor Municipal Code:

- (1) It authorizes the City to investigate and in appropriate cases issue licenses to owners and operators of adult entertainment establishments, the managers of the establishments and the entertainers.
- (2) The ordinance imposes standards of conduct and operation and regulates adult entertainment concerning attire, minimum distance between entertainers and patrons, prohibits sexual contact between entertainers and patrons, prohibits direct tipping of entertainers and, imposes standards on the interior layout of adult entertainment establishments, imposes an age minimum for employees, entertainers and patrons, and prohibits the sale of alcoholic beverages in adult entertainment establishments.

The ten (10) foot separation is intended to mitigate the negative secondary effects of adult entertainment including prostitution and other illegal activity that has contributed to the profitability of adult entertainment and table dancing and lap dancing. The standards of conduct and operation are intended to mitigate the negative secondary effects of adult entertainment facilities, by addressing significant criminal activity that has historically and regularly occurred in adult entertainment establishments while still permitting the expressive aspect of stage dancing. The criminal activity associated with adult entertainment includes prostitution, narcotics transactions, breaches of the peace, and organized crime. If the City Council determines to regulate this use, it must do so in light of well settled decisions of the U.S. Supreme Court, other federal courts and the Washington appellate courts on the subject. Because of First Amendment considerations, the use is protected within established limitations. The City Council may regulate the use for negative secondary impacts. Many other jurisdictions have studied adult entertainment and determined that there are negative impacts upon neighborhoods, property values and increased municipal services associated with adult entertainment establishments, in addition to associated criminal activity. The City Council may rely on the experiences of other jurisdictions and on findings in appellate court decisions in determining the existence of negative secondary impacts. The proposed ordinance regulates and licenses adult entertainment establishments as a way of minimizing the negative secondary impacts of adult entertainment establishments.

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Mayor Slowik opened the public hearing at 7:30 p.m.

**Michelle O'Kelley, 1753 SE 4<sup>th</sup>.** I am the person in the paper. I think that what City staff and City Council are doing is great. I believe in First Amendment rights. I believe that efforts can succeed. My opposition is to the zoning ordinance and I would like to talk about a modification to the public nudity and licensing ordinances: the 10 foot rule between patrons and the stage. I am asking for a physical barrier of no less than 4 feet to allow less distance between stage and patrons. I am hoping for the best, leniency, and sympathy for small business owners. I want to be at the top of the ladder of success.

**Rev. Tim Geist, 1076 Landing Circle.** Rev. Geist spoke in opposition to adult entertainment and his complete statement is attached to these minutes as Exhibit A.  
**Carolyn Pivarnik, 745 SE 8<sup>th</sup> Avenue.** I am concerned with secondary effects. Dancers make their living dancing close. It puts them in a position of not making a living or breaking the law. Lap dances are the most lucrative source of tips. Ms. Pivarnik talked about an attorney's statement which was meant to elicit sympathy for the dancers which defined dancers as independent contractors. Ms. Pivarnik talked about the arrest of two dancers for prostitution which included a 16 year old. Rules can be posted, but those rules will not last long in order for dancers to make a living. Crime elements will take a foothold. The common denominator for sex trafficking of women in the U.S. is adult entertainment establishments including strip clubs.

**Mel Vance, P.O. Box 2882.** Mr. Vance felt that the public nudity ordinance should be sent back to committee and not passed this evening. The ordinance for adult entertainment licensing and regulation should also sent back to committee and a moratorium should be put in place while the City works on these proposals. There are exemptions that are very specific and do not include everything that we should be exempting. The ordinances do not include massage businesses, tattoo and piercing parlors, both of which can involve nudity. I found at least 30 separate language revisions that need to be made in the adult entertainment ordinance which include a broader range than strip clubs such as adult videos. This has been rushed through. It is legal to impose a temporary moratorium. These ordinances are not ready and need more work. Impose a moratorium.

**Jim Kiesel, 1372 Orchard Loop.** Mr. Kiesel thanked Council for their service to our City. We are approving adult entertainment in our community. Mr. Kiesel then talked about this evening's invocation. You have a hard decision to make and I encourage you to do what is right. We have a supreme God above the Supreme Court. I am sure there is an appetite for this type of entertainment and that there is money to be made. Pornography is a drug.

**Kali Waldron, 1678 Zylstra Road.** I want to see the next generation make a difference and these establishments will bring about the destruction of youth. This can ruin their lives.

**Michele Sladko, 1199 SE 9<sup>th</sup>.** I am against this. Do the ban on nudity. As far as adult entertainment, I am concerned with the effect on the community. I am awakened by the bars on Pioneer Way right now. If these businesses come in, it will adversely affect the area. I will not feel safe.

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**Brian Jones, 959 SW 3<sup>rd</sup> Avenue.** As a father of two young ladies, I cringe at the thought of having this in our community. I have lived in larger areas, and chose to come back to Oak Harbor because these establishments don't exist here. If you can't ban it, I ask that you make it hard for a business like this to operate in our City.

**Juan Palm, 2090 Crosswoods.** As a former Minnesota resident, I know that these types of businesses look for areas that are ill-equipped to monitor them. Do not think that our long history without adult entertainment establishments will prevent this. I commend Mr. Hawkins and Council and ask that regulations be quickly put in place.

**Nicole Brown, 1313 NW Falls Creek.** I was a dancer for 4 years. This is difficult lifestyle and I moved back to Whidbey Island to get away from this lifestyle. Oak Harbor already has enough problems with drugs and violence.

**Michael Harris, 590 Birch Street.** I was in the Navy and was stationed in Oak Harbor after 20 years in the Navy. I love this town for its lifestyle. I was stationed in San Diego for the first 17 years and adult entertainment could be viewed there. As a Christian man, I find it distasteful. Think about what it can do to the sailors. I have seen, firsthand, the statistics that Mr. Hawkins mentioned; grief, brawls, murder, prostitution – it all happens. No alcohol – it doesn't matter, they will get drunk beforehand. The police department, hospitals, and mortuaries will all be involved.

**Dan Renner, 950 SW Silverberry Street.** I am the pastor of Calvary Chapel here in Oak Harbor. We don't want this to come to our community. I also grew up in San Diego and don't want to see this come here.

**Dawn King, 549 SE Quaker Street.** I have been an Oak Harbor resident for 29 years. I am a Christian, married, and have 4 young boys. I am against adult entertainment. The sex industry is a \$97.6 billion dollar industry; \$5 billion for strip clubs alone. How many more will be allowed in our community? The Seattle Times reported that police departments working the strip club beat find illegal sexual activity. Who will pay for the growing law enforcement need? Dancers are assaulted, threatened with weapons, sexually abused as children, use drugs, have sexually transmitted diseases, and many dancers feel desperately isolated and alone. Would you want this for your daughter? Would you encourage your son to frequent such an establishment?

**Carley Knapp, 505 Grandview.** I am very concerned about this. Why does Michelle want to do this to our town; degrade our town. Other cities would do anything to keep this from happening. We should not allow it. I am concerned about Michelle's children.

**Wayne Knapp, 505 Grandview.** Other speakers have done a good job. This is a cancer on our society. It denigrates our society. You have got to make the right decision. This industry breeds crime, death, and destruction of personal lives. We say the Supreme Court says it's alright, I don't think so. It is foolish to let this industry come into our town. I think it is wrong.

**Jerry Pitsch, 2527 West Beach Road.** Most of what I wanted to say has been covered. Whether the Supreme Court decision is right or wrong, we need to make a moral decision. I encourage you to challenge the First Amendment and do the right thing morally.

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**Mike Thelan, 1401 SE Dock Street.** People's rights are usurped by governing bodies above us; the Supreme Court. The church building down the street is being challenged because it wants a steeple, yet we can allow this and have to protect a business of this nature. Sex sells. I find it interesting that this is a way to put children through school. I can't imagine the impact on existing businesses. You need to put this in the most remote place that you can to protect other businesses. What Mr. Hawkins said bothers me; that everything predicts more crime, problems, policing, yet we are at the edge of City budgets. We are volunteering to step up to something that we have no ability to provide for.

**Kathleen Bourbeau, 976 NW Prow.** My family has been here for over 50 years and my husband has been in the Navy for 15 years. I wanted to come back here to start a family. I love this town, I love this country. This is all about the Constitution. I am a card-carrying member of the NRA. I love our town and we need to save our small town. This terrifies me. Look at Lynden. Lynden is very creative about keeping things out.

**Helen Chatfield-Weeks, 1415 se 9<sup>th</sup>.** I never thought I would be present for such a suggestion for Oak Harbor, but I am not a bit worried about what the result will be. I depend on Mr. Hawkins' advice.

**Ivan Lathrop, 2606 Airline Way.** I am an ordained minister (retired) in the Church of Nazarene. My first pastorate was in Oak Harbor. Our son wanted to come back here and I told him what a great town this is. We can see that you are working hard on this situation. We are behind you and know that you will do everything you can. We will support and work with you. Yes, I am opposed to this and wish we could ban it, and I hope you can come close to that.

**Dolly Griffith, 76 N. Oak Harbor Street.** I have been a resident for 2 years. Protect the women if this is allowed. My best friend was sexually abused, was told she could end up as a dancer. It takes advantage of them. To get to top of ladder from people who are weak or who have lost their self worth, and then think that money is happiness is wrong. Life is full of problems; money won't make you happy without spiritual fulfillment. We will all be judged some day.

**Gerry Oliver, 947 NW Prow.** When I spoke of entrepreneurship to succeed earlier this evening, I don't believe that adult entertainment is right. I am a lifetime resident of Oak Harbor and it is obvious that this type of entertainment attracts the wrong kind of people. People come here for the beauty of this area and the community. Regulate this heavily and make it tough for this type of business to exist in Oak Harbor. How do I explain this to my daughters? I don't think this needs to only be a church issue; it needs to be a community issue.

**Richard Felds, 547 SE 6<sup>th</sup> Avenue.** I first came here in 1995 to visit. We moved here in 2003 from a city of over 200,000. This is heavy on everyone's mind and heart. It is just not right for this type of community. We went to a lot of work to promote Oak Harbor through the Windjammer Project.

**Joel Geist, 1076 Landing Circle.** My views have been expressed by most of the other speakers. This is a beautiful town and I would hate to see our reputation ruined.

**Jeff Waldron, 1678 Zylstra Road.** I am strongly opposed to this. Take a rotten piece of fruit and it will ruin the whole bowl.

**Rev. David Jenkins, 2111 Pinewood Way.** My church is in the same building that they want to move into. All that is required for evil to prevail is for good men to do nothing.

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Don't change the flavor of this community. Where are the benefits to our community? We open the door if we don't regulate this out of our community. I have been here for over 20 years. Don't allow undesirable elements to come into our City.

**Beatrice LaMay, P.O. Box 3014, Oak Harbor.** Think about the children. Look at our playgrounds, parks, and your children. They can be easily reeled in. It is easy to say "adult," but think of children and what happens when patrons leave the clubs. People have to live in these environments. They are not operating on their own; an 18 year old does not say they want to be a stripper. The environment is already here.

**Tina Bowman, 2461 Highpoint Lane.** We moved here 9 years ago. I was born and raised in Escondido which used to be a cow town and is now a metropolis. We fell in love with Oak Harbor. I heard it was a wonderful place to raise your kids. Raise them according to good morals. I would hate to leave this town for the same reasons we left another. Make the choice for humanity and not the Supreme Court. Make the right decision.

With no other comments coming forth, Mayor Slowik closed the public hearing at 8:30 p.m.

#### **Break**

Mayor Slowik called for a five-minute break at 8:30 and the meeting reconvened at 8:35 p.m.

#### **Response from Mr. Hawkins and Chief of Police Wallace**

Mr. Hawkins noted that he had heard some moving and wise comments this evening even though they might not be legally correct. In answer: What are the City's chances if we fight this? If you choose to ban, your chance of winning that would be zero. The City would be hauled into court, sued for damages, and would lose. It is reckless to take on the Supreme Court. This is an emergency measure than can be tightened up. The interim zoning ordinance comes back for additional review. In response to the inclusion of tattoo parlors, tattooing does not exist in public so this would not be a factor. With regard to a theater being turned into adult entertainment, there is language in the adult entertainment ordinance addressing plays, operas, musicals, or other dramatic works which are not obscene. Changing the 10 foot barrier to 4 feet, as suggested by Ms. O'Kelley – the record documents clearly that 3 feet, 4 feet, was difficult to enforce; 6 feet and 8 feet are still within arms reach, and 10 feet is now the most aggressive ban in place. It is clear that shorter barriers do not work. A 10 foot distance does not stop prostitution, but it forces the club to be set up in a certain way, and I disagree strongly with going to a 4 foot distance. With regard to Rev. Geist's comments on public nudity and that the ordinance does not ban nude dancing. The U.S. Supreme Court does say that a locality can ban nude dancing. We have not gone to that type of a ban because the Washington State Supreme Court holds a conflicting opinion and we don't believe a ban on nude dancing would be tolerated. No other jurisdiction in Washington has attempted that and we would spend a great deal of money in expensive litigation. The City of Renton spent \$1 million in 1986. We are presenting the best ordinances that we believe can be sustained in court.

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Mayor Slowik swore in Chief of Police, Rick Wallace for his testimony.

Chief Wallace:

This testimony is directed towards the ban on public nudity and not necessarily to the adult entertainment ordinance. We have used indecent exposure and lewd conduct, but there is no ordinance/language in place in our Municipal Code that regulates public nudity. Prior to 2008, it was determined that an existing ordinance was too vague and subsequently repealed. It was used toward amateur nights, wet T-shirt contests, but we were on weak ground. What could we do without an ordinance in place; especially addressing public nudity. This ordinance will fulfill that need.

### Council Discussion

In response to a question about a majority plus one vote, City Attorney Hite explained that the vote is needed for the adult entertainment facilities overlay zone interim ordinance to be adopted on an emergency basis. The adult entertainment and licensing ordinance has a section explaining what is being talked about in the zoning ordinance. Discussion continued about citizen's rights and minimal/moderate government involvement and that what has been presented is the best direction, how to define morality (found in OHMC's nuisance language), and that larger cities, by size, have more areas to help with a buffer zone but Oak Harbor is a small and tightly developed community which limits the buffering area and zoning choices. Suggested changes to the public nudity ordinance:

On page one: The first Whereas, second sentence add the word "is" in front of the word "detrimental."

On page two: In Definitions, number 2 "person": say "any legal entity authorized to do business in the State of Washington" instead of corporation, partnership or association.

Discussion continued about wet T-shirt contests (covering must be fully opaque per the public nudity ordinance), how to keep 18 year olds from entering a club, the 5-year suspension/revocation term and if that is set by the state (a matter of case law), and the license application process. Discussion followed about conversation between dancers and patrons, cubical room size and doors, how bathrooms can be watched (cannot be electronically monitored), the use of uniformed PD officer inspections and undercover officers, and signage. Photography in a club (most likely monitored by club management), the 10 foot barrier, and use of moratoriums was also discussed. In the past, it was typical for cities to impose moratoriums, but the 30-day time limit is not enough of a study period and the City needs to move forward right now. The sale of alcohol brings a club under the strict enforcement and large staff of the Liquor Control Board and clubs usually avoid the potential for Liquor Control Board violations by not serving alcohol. This then allows 18 year olds to enter a club. Legislation was recently changed to allow local jurisdictions more local control. Discussion continued about "applicant control persons" in the definitions section of the adult entertainment ordinance which speaks to significant interest in the club and keeps silent partnership at bay. The application process was discussed again, the under the age of 10 years exemption in the public nudity ordinance was also discussed (uniformly used in other

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jurisdiction's ordinances) and the finality of the first two ordinances – public nudity and adult entertainment. Ordinances can be amended; the zoning overlay ordinance is interim as discussed earlier. Ms. Hite had worked on these issues for Snohomish County and noted that this is an elaborate industry. The public is our strongest voice and it is the community that stands up and keeps the community true. Discussion continued about how quickly the license must be turned around along with discussion about the license fees. The City is allowed to charge enough to cover costs and, looking at other ordinances, these fees are the best estimate of actual costs. Discussion returned to the allowable age of patrons, 18 or 21 depending on alcohol or no alcohol, and that clubs would prefer to sell liquor even though they would lose a younger patron, but considering the nature of the club's activity, would not risk a Liquor Control Board violation and closure.

**MOTION:** Councilmember Munns moved to adopt the ordinance banning public nudity. The motion was seconded by Councilmember Palmer and carried unanimously.

**MOTION:** Councilmember Munns moved to adopt the ordinance regulating adult entertainment. The motion was seconded by Councilmember Severns.

Council asked if a club can be forced to sell liquor (no) and Ms. Hite also clarified that OHMC 5.20.020 of the adult entertainment ordinance shall be in full force and effect immediately.

**VOTE ON THE MOTION TO ADOPT  
THE ADULT ENTERTAINMENT ORDINANCE:**  
The motion carried unanimously.

**Interim Ordinance – Adult Entertainment Facilities Overlay Zone**

Development Services Director Steve Powers presented this agenda bill. This ordinance is an interim measure to be adopted on an emergency basis to address the appropriate location for a use not currently addressed in the Oak Harbor Municipal Code. Adult entertainment is a form of expression protected by the First Amendment to the U.S. Constitution. However, there are well-studied negative secondary effects associated with this use in the form of impacts on crime, neighborhoods, and property values. Local governments are authorized to impose zoning regulations to address the associated negative secondary effects, as long as there remain sufficient "alternative avenues of communication" available for the use after the imposition of the regulations. The proposed interim ordinance makes the following changes to the OHMC:

1. It adopts a zoning ordinance which permits adult entertainment establishments to be located in an "Adult entertainment facilities overlay zone" within the C-3, Industrial and Planned Industrial Park zones. This overlay zone was drawn to create a buffer around incompatible uses.
2. The overlay draws a 750 ft. buffer around religious institutions, parks and schools.

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3. It also draws a 100 ft. buffer between the overlay and residentially zoned neighborhoods.
4. It amends OHMC 18.20.250 to include extensions of time for non-conforming adult entertainment facilities.

The buffers are intended to mitigate the negative secondary effects of adult entertainment facilities upon sensitive uses such as schools, churches and parks and on residential neighborhoods and property values, while still retaining sufficient parcels for adult entertainment uses to be located within the City. The proposal is that the City Council adopt this interim ordinance on an emergency basis to address adult entertainment uses that may seek to locate within the City limits in the near future. City staff has received several inquiries about City regulations on the subject in recent months and notes that the absence of regulations creates an imminent risk that an inappropriate location could be chosen for an adult entertainment facility. Since there are no regulations specifically addressing this use in the Oak Harbor Municipal Code (OHMC), it is necessary to ensure that potential applicants are directed to the overlay zone rather than locating next to a church, school, park or residential zone. Adopting the interim ordinance on an emergency basis allows the City to take additional time to study and hone its zoning regulations, to create a public participation process and to permit the establishment of adult entertainment facilities, at the same time as restricting patently inappropriate locations in the immediate future. There are several requirements of the emergency ordinance:

1. It must be passed by a majority plus one of the whole membership of the Council.
2. The Council must make a finding that the ordinance is necessary for the protection of public health, public safety, public property or the public peace.
3. There must be a public hearing on the ordinance within 60 days of adoption. Staff recommends the hearing be set for May 4, 2010.

The interim ordinance may remain in effect for six months, subject to an extension of up to a year, so that the Planning Commission may make its recommendation, public participation may be encouraged, and so that any further studies deemed necessary be undertaken. During the period of the interim ordinance, the City will also undertake its obligations to perform a SEPA review and to provide 60 days' prior notification of the new zoning provision to the Department of Commerce. If the City Council determines to regulate this use, it must do so in light of well-settled U.S. Supreme Court decisions on the subject. Because of First Amendment considerations, the use is protected within established limitations. The City Council may regulate the use for negative secondary impacts. Many other jurisdictions have studied the use and determined that there are negative impacts upon schools, churches, parks, neighborhoods and property values, in addition to associated criminal activity, as a result of the activities and location of adult entertainment uses. The proposed ordinance lays out a zoning framework for addressing the negative secondary impacts of adult entertainment uses. It is intended to address those uses seeking to locate in the City until a final ordinance can be adopted. It is recommended that the City Council adopt this as an interim measure and direct that further study, public participation and Planning Commission recommendation go forward to be included in the ultimate decision on a final ordinance.

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Mr. Powers also gave a summarizing PowerPoint presentation which is attached to these minutes as Exhibit B.

Mayor Slowik called for public comments at 10:20 p.m.

**Michele Sladkow, 1199 SE 9<sup>th</sup> Avenue.** Ms. Sladkow objected to the location by the Safeway parking lot since there are a lot of teenagers in this area.

**Juan Palm, 2090 Crosswoods.** How many proposed areas are occupied by existing businesses? At the intersection of SR-20 and 16<sup>th</sup>, there are multi-family homes directly across the street.

**Jill Johnson, 1499 SE 9<sup>th</sup>.** Highway 20 is designated a scenic byway and the Chamber of Commerce receives grant funds through that status. How would an adult entertainment business on the highway affect or impact the scenic byway status? I would hate to see Oak Harbor become the Amsterdam of Whidbey Island.

**Tashia LaMay** I work two jobs. I don't want to see this by Safeway. A lot of traffic goes by there, including teens.

**Tim Gelst, 1076 Landing Circle.** I would like to see the sites out of sight; Goldie Road or Gun Club Road.

**Mel Vance, P.O. Box 2882.** I recall Mayor Cohen's administration addressing zoning for adult entertainment in industrial areas. I would like to see C-3 zoning taken off the table since there are established businesses there. Another area that should be included is the Hackney property at the end of Gun Club Road. That would be an out of sight area away from churches and businesses. The south edge of this property is clipped by proximity to a church and residential area, but the bulk of this property is out of the way.

With no other comments coming forth, Mayor Slowik closed comments on this subject at 10:30 p.m.

Mr. Powers noted that this is an interim ordinance which will be worked on over the next six months but the City does need to meet its obligation to provide a sufficient number of sites. Businesses are not an automatically excluding criteria. The Hackney property is designated as a planned business park. It was not excluded from consideration because of the buffer; it was excluded because it cannot be served by sewer at this time. We are challenged by where we have commercial property locations and the relationship to churches, schools, and the highway. As said earlier, we are a compact community and we are trying to handle a convergence of factors. The multi-family units near 16<sup>th</sup> and SR-20 were excluded because of the 100 foot buffer and properties on the west side of the highway are actually in commercial zoning. This matter has been before the Council two separate times in the last ten years, but was not adopted by Council. Mr. Powers also called attention to the thirteen separate findings of fact within the ordinance and that Oak Harbor is relying on the experience and findings done by other communities, as well. These studies are extensive and significant and document secondary impacts.

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Ms. Hite referred to her legal memorandum noting that this is an interim ordinance that, if not adopted tonight, would not be available for consideration until the second meeting in April.

### Council Discussion

Discussion followed about the urgency of this interim ordinance, the buffer zone size and whether it could match the 1,000 foot drug and gun free zones around schools or become uniformly a 750 foot radius for all buffers. Mr. Powers noted that staff worked toward balancing how the buffers work and that larger buffers covered more land area but then excluded any site provisions. It was also noted that the City would not redraw the buffer zone as uses move into the City. Definitions of churches and schools were discussed, Safeway Center was eliminated because of its proximity to Beeksma/Gateway Park, and the discrepancy between buffer zone radiuses continued to be discussed along with what a sufficient number of sites would be for a city the size of Oak Harbor. Adult entertainment cannot be zoned out of existence and the courts do not have a flat answer. Discussion continued about bringing utilities to a proposed property and why an undeveloped property could not be included. Oak Harbor will have greater flexibility at an interim stage but a property has to be part of the general commercial real estate market. Council felt there should be greater separation between residential areas and adult entertainment and returned to discussing planned business parks. If a 750 foot buffer was used around residential properties, the community would be covered with the exception of industrial and planned industrial on Goldie Road. Mr. Powers again commented on the issue of infrastructure: We cannot look at adult entertainment sites the way we look at regular development. With adult activity, by its very nature, we have a limited number of locations. Without infrastructure, other cities have run into trouble. Potential sites have to be reasonably served by infrastructure. Ms. Hite, responding to a question about annexations, noted that this is not a moving target; we are adopting a map and just this map and not addressing future annexations. This is written as its own overlay zone.

Mayor Slowik noted that this discussion had also been held on a staff level and he, too, had been uncomfortable with certain site selections. If we are creating an emergency ordinance on a temporary basis to allow a reasonable amount of site inventory, what if we flip that around, tightened this up tonight, and then allow the next six months to consider available areas. City Attorney Hite felt this would put the City in the realm of risk. If you reduce the number of available parcels, you are less likely to sustain. On the other hand, it is an interim ordinance; is there available opportunity in the other parcels. Mr. Powers added that the Goldie Road parcels, the PIP (Planned Industrial Park) include one developed and one undeveloped parcel. Ms. Hite noted that the industrially zoned parcels have general uses like C-3 parcels and this is not true for PIP.

Discussion continued about the Goldie Road parcels and if they are sub-dividable (yes for industrial, no for PIP which are 5-acres in size; the parcels have to be considered as they are today). Discussion continued about the impact of adult entertainment establishments on SR-20, how schools are defined (daycare centers and kindergarten

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schools do not fall under the definition but could be covered by the residential buffer if they are in a residential area), and repeated discussion about the use of a 1,000 foot buffer instead of a 750 foot buffer for churches, schools, and parks. A 1,000 foot buffer would then include the Goldie Road properties, SR-20 locations, and some of the industrial area, but maybe not the PIP. It would decrease the number of available parcels and potentially create a ban. Cities that use 1,000 feet as a buffer zone have remaining space available for potential sites.

**MOTION:** Councilmember Munns moved to adopt the Interim Adult Entertainment Facilities Overlay Zone Ordinance. The motion was seconded by Councilmember Almberg.

Discussion continued about adopting this ordinance now and how it would affect a club six months from now that establishes on SR-20. Mr. Powers noted that, if it becomes a nonconforming condition, it then requires a nonconforming use to close in one year.

**AMENDMENT TO THE**

**MOTION:** Councilmember Dudley moved to amend the motion and add the same 750 foot buffer zone to residential zones as we allow for churches, parks and schools. The motion was seconded by Councilmember Paggao.

Discussion followed about the Goldie Road parcels and if they would be eliminated (possibly the industrial, but not PIP), if it is likely that properties on SR-20 are going to be used at this point, and the risk involved in eliminating potential properties for adult entertainment use. City Attorney Hite noted that this interim ordinance requires a public hearing in sixty days, and has to return to Council in six months following Planning Commission review, SEPA review, and notification to and review by the Department of Commerce. In the absence of this ordinance, an adult entertainment establishment can locate anywhere in C-3.

Councilmember Dudley spoke to the amendment: I do think there is a risk with that first parcel on the right coming down SR-20. Discussion included removing that one parcel (which would need a rationale) and how the Goldie Road parcels and SR-20 parcels would be measured (buffered).

**VOTE ON THE AMENDMENT TO THE ORIGINAL**

**MOTION:** Councilmembers Dudley and Paggao voted in favor of the amendment. Councilmembers Almberg, Munns, Palmer, and Severns opposed. The amendment to the original motion did not carry.

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**VOTE ON THE ORIGINAL**

**MOTION:** Councilmembers AlMBERG, Munns, Paggao, Palmer, and Severns voted in favor of the original motion. Councilmember Dudley opposed. The original motion received a five to one vote in favor and carried.

Mayor Slowik thanked Ms. Hite, Mr. Hawkins, Mr. Powers, Mr. Schmidt and Mr. Wallace for their extensive work on these ordinances – it took a monumental effort.

**Authorization to Negotiate Scope of Work with Carollo Engineers – Wastewater Treatment Facility**

City Engineer Eric Johnston presented this agenda bill which summarized the engineering consultant selection process for the wastewater treatment facility project. During development of the Sewer Comprehensive Plan in 2006 and 2007, the need for additional wastewater treatment facilities began to emerge. The sewer plan identifies the need for additional capacity as early as 2017 depending on the level of growth that may occur within the City service area. The need for additional facilities is also driven by the condition of the existing plants and anticipated regulatory changes likely to occur in the next 5 years. Specifically, the RBC treatment plant near Windjammer Park has reached the end of its useful and practical life. Constructed in the early 1970's, the RBC plant utilizes an outdated process technology and equipment that is no longer supported by the industry. The condition of the existing treatment facilities and the capacity of the system are only part of the issues facing the City. The Puget Sound Partnership Action Agenda identifies a number of areas targeted for Puget Sound cleanup efforts. A key target of the cleanup effort is ensuring that dissolved oxygen levels are sufficient to sustain marine life. Dissolved oxygen levels drop as the nutrient loading increases. Municipal wastewater treatment plants are identified as significant contributors to nutrient loading in Puget Sound. The addition of nutrient removal from treated wastewater as a condition of discharge permits issued by the Department of Ecology is likely to occur in the near future as implementation of the Puget Sound Action plan gains momentum. Neither the RBC nor the SPB lagoon plants are capable of nutrient removal without significant investment. Finally, the recent conversion of the Crescent Harbor marsh area from freshwater to salt water habitat has resulted in a significant flooding risk to the SPB lagoon plant that threatens the long term viability of a treatment plant at that location. In following this prescribed process for selecting the most qualified firm, City staff issued a request for qualifications for the project in September of 2009. From the list of eight firms who submitted, four firms were short listed for further consideration. The short list was based on a staff review and ranking of the submitted statements of qualifications. Each of the four firms short listed were invited to a formal interview in February 2010. Councilmembers Paggao, AlMBERG and Munns together with Mayor Slowik and City staff formed the interview panel and based on the written proposal and the interviews, Carollo Engineers was selected as the most qualified engineering firm to assist the City with the development of the wastewater facility plan. It is worth noting at this point that the RFP document included goals for wastewater effluent quality that are significantly higher than the current permit

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ORDINANCE NO. 1572

AN INTERIM ORDINANCE OF THE CITY OF OAK HARBOR ADOPTING A NEW CHAPTER 19.52 TO THE OAK HARBOR MUNICIPAL CODE ENTITLED "ADULT ENTERTAINMENT FACILITIES OVERLAY ZONE", ENTERING FINDINGS OF FACT CONCERNING THE NEGATIVE SECONDARY EFFECTS OF ADULT ENTERTAINMENT FACILITIES, FINDING AN EMERGENCY WITH RESPECT TO PUBLIC HEALTH, SAFETY AND WELFARE REQUIRING IMMEDIATE ADOPTION OF AN INTERIM ORDINANCE TO ADDRESS PERMISSIBLE LOCATIONS FOR ADULT ENTERTAINMENT FACILITIES, AND AMENDING OHMC 18.20.250 ENTITLED "REVIEW PROCESS III" TO INCLUDE APPLICATIONS FOR EXTENSIONS OF TIME FOR NON-CONFORMING ADULT ENTERTAINMENT FACILITIES

THE CITY COUNCIL OF THE CITY OF OAK HARBOR do ordain as follows:

**Section One. Findings of Fact.** Based on the record submitted in this case, the public comments, and the experience of the city officials of the city of Oak Harbor, the city council hereby enters the following findings of fact:

1. The city of Oak Harbor takes notice and specifically relies upon the experiences and studies utilized by other cities and counties in combating the specific adverse impacts of adult entertainment and sexually oriented businesses, including nude and semi-nude dancing. This includes, but is not limited to, the studies relied upon and findings of fact entered by the city councils of the cities of Bellevue, Tukwila, SeaTac, Federal Way, Burien, Everett and Shoreline.
2. The above-referenced studies and findings of fact establish that there are significant and documented negative secondary effects associated with adult entertainment establishments, including increased crime, negative impacts on neighborhoods and decreases in property values. The crimes associated with adult entertainment establishments include prostitution, drug use and sales, and assaults.
3. These negative associated effects of adult entertainment establishments are particularly harmful to schools, religious institutions, parks and residential neighborhoods.
4. It is not the intent of this chapter to suppress or censor any expressive activities protected by the First Amendment of the United States Constitution or Article I, Section 5 of the Washington State Constitution, but rather to establish locations within the city where adult entertainment facilities may locate in such a way as to buffer sensitive uses from the secondary effects of adult entertainment establishments.
5. The Oak Harbor Municipal Code does not presently address the appropriate zone for an adult entertainment business. The closest existing zone is the C-3 Community Commercial zone in which "amusement enterprises" and "places of entertainment" are

permitted uses. Principal uses permitted in the C-3 district are also allowed in the Industrial district.

6. Recent inquiries about locating adult entertainment uses in the city create a reasonable expectation that such uses may attempt to locate in the city and would, therefore, locate in the C-3 Community Commercial zone.
7. However, without further refinement, there are parcel locations in the C-3 Community Commercial zone which would abut or fall within a seven hundred and fifty (750) feet radius of religious institutions, schools, and parks or within one hundred (100) feet of residentially zoned neighborhoods. The city council finds that locating an adult entertainment facility in such parcel locations would be detrimental to existing churches, schools, parks and residential zones, and that the public safety, welfare and peace dictates that adult entertainment facilities not be located in such proximity with those uses.
8. Therefore, the city council finds that an emergency exists requiring immediate council action to establish an adult entertainment facilities overlay zone which both establishes permissible locations for adult entertainment facilities and also buffers sensitive uses from the secondary impacts of adult entertainment facilities. This emergency adoption is necessary for the protection of public welfare, safety and peace.
9. The adult entertainment facilities overlay zone established in the interim ordinance will permit adult entertainment facilities uses to locate in a portion of a general commercial zone (C-3 Community Commercial), the Industrial zone and the Planned Industrial Park zone.
10. The interim adult entertainment facilities overlay zone contains eleven (11) parcels of property – eight (8) in the C-3 Community Commercial zone, one (1) in the Industrial zone, and two (2) in the Planned Industrial Park zone. All of the parcels have City water and sewer available to them. The total acreage available in all thirteen parcels is 27.92–9.06 acres in C-3 Community Commercial, 9.08 in Industrial, and 9.78 acres in Planned Industrial Park.
11. At the time of the adoption of the interim ordinance, the city council is aware of no adult entertainment facilities meeting the definition of adult entertainment facility which are located in the City of Oak Harbor and there are no applications for permits for such facilities pending. In light of all these circumstances, the city council finds that there are sufficient parcels in the adult entertainment facilities overlay zone to accommodate demand for properly zoned real estate for those uses in the next year.
12. The city council further finds that an interim ordinance is necessary to establish immediate zoning regulations for adult entertainment facilities uses while the city council studies and evaluates the issues involved in locating adult entertainment facilities in greater detail.

13. The city council further intends that the study and evaluation period will include opportunities for public participation and comment, planning commission recommendation, SEPA review and review by the Washington State Department of Commerce.

**Section Two:** There is hereby added a new Chapter 19.52 entitled "Adult Entertainment Facilities Overlay Zone" to Title 19 of the Oak Harbor Municipal Code to read as follows:

**Chapter 19.52  
ADULT ENTERTAINMENT FACILITIES OVERLAY ZONE**

**Sections:**

- 19.52.010 Purpose.
- 19.52.020 Application of chapter provisions.
- 19.52.030 Definitions.
- 19.52.040 Adult entertainment facilities overlay zone established.
- 19.52.045 Overlay zone map adopted.
- 19.52.050 Adult entertainment overlay zone use restrictions.
- 19.52.060 Non-conforming uses.

**19.52.010 Purpose.** The purpose of this chapter is to establish an overlay district within which adult entertainment facilities may be located in such a way as to mitigate the adverse secondary effects associated with such facilities. Because of the adverse secondary effects of adult entertainment facilities, restrictions on location are necessary: to protect residents, especially sensitive uses such as schools, religious institutions, parks and residential neighborhoods, from crimes, nuisances and disturbances of the public welfare, peace and safety; to preserve property values; and to respect the place of neighborhoods, schools, religious institutions and parks in the city of Oak Harbor. It is not the intention of this ordinance to suppress any constitutionally protected speech or expression, but to provide sufficient alternative avenues of communication for adult entertainment uses at the same time as providing appropriate zoning and separation between adult entertainment facilities and potentially conflicting uses.

**19.52.020 Application of chapter provisions.** Adult entertainment facilities, as defined in OHMC 19.52.030(2), shall only be permitted within the Adult Entertainment Facilities Overlay Zone established herein. This chapter applies to all adult entertainment facilities located within the city of Oak Harbor.

**19.52.030 Definitions.** The following definitions shall apply to this chapter.

- (1) "Adult entertainment" shall have the meaning set out in OHMC 5.20.020.
- (2) "Adult entertainment facility" shall mean any commercial premises or club to which any patron is invited or admitted and where adult entertainment is provided on a regular basis or is provided as a substantial part of the premises activity.

- (3) "Overlay zone" shall mean that portion of the C-3 Community Commercial zone, the Industrial zone and the Planned Industrial Park zone in which adult entertainment establishments may be located.
- (4) "Potentially conflicting uses" shall mean schools, religious institutions, residential zones and parks established within the city of Oak Harbor as of the date of this ordinance. The term "potentially conflicting uses" shall also mean any such other uses which the city council shall determine require separation from adult entertainment facilities, provided that the addition of any such uses shall require a review of available lands to ensure sufficient alternative avenues of communication for adult entertainment uses are available.

**19.52.040 Adult entertainment facilities overlay zone established.** There is established an adult entertainment facilities overlay zone in the city of Oak Harbor. The adult entertainment facilities overlay zone shall overlay the C-3 Community Commercial zone, the Industrial zone and the Planned Industrial Park zone. It does not include certain portions of the C-3 zone, the Industrial zone and the Planned Industrial Park zone in which potentially conflicting uses were located at the time of adoption of this ordinance. The following exclusions from the C-3 zone, the Industrial zone and the Planned Industrial Park zones apply:

- (1) The adult entertainment facilities overlay zone removes a buffer of seven hundred fifty (750) feet around the existing potentially conflicting uses of schools, religious institutions, and parks.
- (2) A further buffer removes one hundred (100) feet around existing areas zoned exclusively for residential uses – R-1, Single-Family Residential; R-2, Limited Multiple-Family Residential; R-3, Multiple-Family Residential; and R-4, Multiple-Family Residential.

**19.52.045 Overlay zone map adopted.** The adult entertainment facilities overlay zone map as attached hereto in Exhibit A is adopted as a pictorial description of the sole geographic areas within the city of Oak Harbor in which adult entertainment facilities are permitted. A copy of the adult entertainment facilities overlay zone map is on file with the city clerk and shall be available for public inspection and copying.

**19.52.050 Adult entertainment overlay zone use restrictions.** To mitigate the adverse secondary effects associated with adult entertainment facilities, the following parking and lighting restrictions shall apply within the adult entertainment facilities overlay zone:

- (1) Parking requirements. For adult entertainment facilities constructed after the effective date of this ordinance all parking must be visible from the public right-of-way. For adult entertainment facilities located in buildings constructed prior to the effective date of this ordinance, all parking should be visible from the public right-of-way. In cases of adult entertainment facilities located in buildings constructed prior to the effective date of this ordinance where this is not feasible, access to the parking shall be in as direct a route as possible from the public right-of-way and the parking area shall remain free and clear of

visual obstructions at all times. Access to the exterior rear of the building shall be denied to any persons other than employees and public officials during the performance of their respective duties and tasks by means of a fence, wall or other device approved by the city building official. On-site parking shall be required and regulated in accordance with Chapter 19.44 OHMC. Parking shall be provided at a ratio of one (1) space for every three (3) seats, plus one (1) space for every two (2) employees on the largest shift.

- (2) Lighting requirements. All on-site parking areas and premises entries of adult entertainment facilities shall be illuminated from dusk until one (1) hour past closing hours of operation with a lighting system which provides an average maintained horizontal illumination of one (1) foot candle of light on the parking surface and/or walkways. In addition, all on-site lighting, including signs, shall comply with the shading and directional requirements of OHMC 19.28.010(4). An on-premises exterior lighting plan shall be presented to the city building official for approval prior to the operation of any adult entertainment.

**19.52.060 Non-conforming uses.** For purposes of this title, a “non-conforming adult entertainment facility” constitutes an adult entertainment facility which lawfully exists as an adult entertainment facility which receives non-conforming status by virtue of an order from a court of competent jurisdiction, or which lawfully existed as an adult entertainment facility prior to a change in the zoning which change does not permit an adult entertainment facility in its existing location and is maintained as an adult entertainment facility although it does not comply with the adult entertainment facility zoning requirements set forth in this chapter, or is an adult entertainment facility which lawfully existed prior to annexation by the city and is maintained after the effective date of annexation and does not comply with the adult entertainment facility zoning requirements set forth in this chapter.

- (1) The location of a newly-established public park, permanent religious institution, or school within seven hundred fifty (750) feet or the establishment of a residential district within one hundred (100) feet of an existing adult entertainment facility shall not cause the existing adult entertainment business to be deemed a non-conforming use unless the city council makes a determination that the newly-established park, religious institution or school requires separation from adult entertainment facilities, and further provided that the exclusion of any such areas from adult entertainment facility zoning overlay shall require a review of available lands to ensure sufficient alternative avenues of communication for adult entertainment uses are available.
- (2) Adult entertainment facilities which are non-conforming uses in the zone in which they are located and which are located within the city limits shall be discontinued within one year of the date of becoming a non-conforming adult use business or upon the expiration of the leasehold period in existence as of the date of becoming a non-conforming adult entertainment facility, or upon the sale of the non-conforming adult entertainment facility, whichever occurs first. Adult entertainment facilities which are non-conforming as a result of annexation to the city shall be discontinued within one year of the date of annexation. Such non-conforming adult entertainment facility shall not be extended,

expanded, enlarged or increased in intensity. Such prohibited activities (extend, expand, enlarge, increase in intensity) shall include:

- (a) Extension of a non-conforming adult entertainment facility to any building or other structure or land area other than one occupied by such use as of the date of becoming a non-conforming adult entertainment facility.
  - (b) Extension of any specific type of non-conforming adult entertainment facility, as separately defined in OHMC 19.52.030(2), within a building or other structure to any portion of the floor area that was not occupied by that same type of adult entertainment facility as of the date of becoming a non-conforming adult entertainment facility.
  - (c) Operation of a non-conforming use in such manner as to conflict with, or to further conflict with if already conflicting as of the date of becoming a non-conforming adult entertainment facility.
- (3) Any change in a non-conforming adult entertainment facility shall be to a use which is legally permitted within the zone in which it is located. In the event a non-conforming adult entertainment facility, or portion thereof, is changed to a use which is legally permitted within the zone in which it is located, then the structure or portion thereof which contained the adult entertainment facility cannot thereafter be used or reused for any type of adult entertainment facility. In the event a non-conforming adult entertainment facility building or structure is vacated, closed or abandoned for a period in excess of six (6) months, the structure shall not thereafter be used except in conformance with a use which is legally permitted within the zone in which it is located. A vacated, closed or abandoned non-conforming adult entertainment facility building or structure shall also be subject to the discontinuation provisions of OHMC 19.52.060(2).
- (4) Repairs and alterations to a non-conforming adult entertainment facility building or structure shall be limited to nonstructural repairs and incidental alterations for normal maintenance and shall only be permitted to the extent necessitated by normal wear and tear. No structural alterations shall be allowed.
- (5) A building or structure containing a non-conforming adult entertainment facility which is damaged or destroyed by fire, wind, earthquake or other natural disaster can be restored and the same use or occupancy continued or resumed provided the total cost of such restoration does not exceed fifty percent (50%) of the real valuation of the building or structure exclusive of foundations at the time of such damage provided that such restoration shall not extend the one (1) year discontinuation period established in OHMC 19.52.060(2). Restoration of a structure or building housing a non-conforming adult entertainment facility or moneys used therefore shall not be used as factors by the examiner when considering any request of a time extension made pursuant to subsection (6) of this section.

- (6) In the event the owner of a non-conforming adult entertainment facility determines that the period set forth in subsection (2) of this section does not provide the adult entertainment facility with a reasonable period of amortization, then no later than one hundred eighty (180) days prior to the expiration of the period, the owner of a non-conforming adult entertainment facility shall make application to the city land use hearing examiner for an extension of time. Accompanying the application shall be a fee in the amount of Seven Hundred Twelve Dollars (\$712.00) and detailed information addressing the below-listed factors to be considered by the hearing examiner. In determining whether or not to grant the extension, the hearing examiner shall determine whether or not the harm or hardship to the non-conforming adult entertainment facility outweighs the benefit to be gained from the public from termination of the use. Factors to be considered by the hearing examiner include the location of the business in relation to sensitive land uses such as schools, parks, churches, residential zone(s), etc., initial capital investment, investment realization to date, life expectancy of the investment, the existence or nonexistence of a lease obligation, as well as a contingency clause permitting termination of the lease, or whether a reasonable alternate use of the property exists. The action of the hearing examiner shall be in accordance with the review process as described in Chapter 18.40 OHMC for a Review Process III.
- (7) Within thirty (30) calendar days of becoming a non-conforming adult entertainment facility, the non-conforming adult entertainment facility shall provide the city's development services director with copies of its current leasehold document(s) which sets forth their existing leasehold time period or, in the case of a non-leasehold interest, the city's development services director shall be provided other documents which show record of ownership.

**Section Three.** OHMC 18.20.250 entitled "Review Process III", last amended by Ordinance 1376 §13 in 2004 is hereby amended to read as follows:

**18.20.250 Review process III.**

- (1) Review process III applies to all permit applications that require an open public hearing before the hearing examiner.
- (2) Review process III actions include the following decisions:
  - (a) Variances;
  - (b) Conditional uses;
  - (c) Wetland permits and variances designated to be decided at a predecision public hearing; and
  - (d) Applications for extensions of time for non-conforming adult entertainment facilities pursuant to OHMC 19.52.060(6).

**Section Four: Public Hearing.** In accordance with RCW 36.70A.390, a public hearing shall be held on this interim zoning ordinance on May 4, 2010 or such other date within sixty (60) days of the date of adoption of this interim ordinance as shall be publicly noticed.

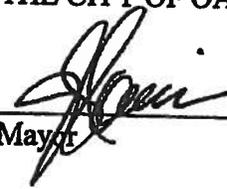
**Section Five. Severability.** If any provision of this Ordinance or its application to any person or circumstance is held invalid, the remainder of the Ordinance or the application of the provision to other persons or circumstances is not affected.

**Section Six. Effective Date.** The City Council having found that adoption of this Ordinance as an emergency is necessary for the protection of the public welfare, public safety and the public peace, this Interim Ordinance shall be in full force and effect immediately.

PASSED by a majority plus one of the entire membership of the City Council this 23rd day of March, 2010.

APPROVED by its Mayor this 24<sup>th</sup> day of MARCH, 2010.

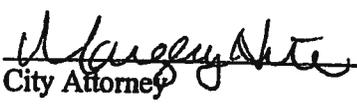
THE CITY OF OAK HARBOR

  
\_\_\_\_\_  
Mayor

Attest:

  
\_\_\_\_\_  
City Clerk

Approved as to Form:

  
\_\_\_\_\_  
City Attorney

Published: MARCH 27, 2010

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Adult Entertainment Facilities  
Overlay Zone Ordinance - 8  
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ATTACHMENT 2

# EXHIBIT A Adult Entertainment Facilities Overlay Zone

CITY OF  
**Oak Harbor**  
WHIDBEY ISLAND WASHINGTON

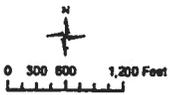
ATTACHMENT 2  
P. Sub

Accident Potential Subdistrict III

Accident Potential Subdistrict I

82

**Legend**  
 ■ Navy  
 □ City Limits  
 ⊞ Adult Entertainment Facilities Overlay Zone



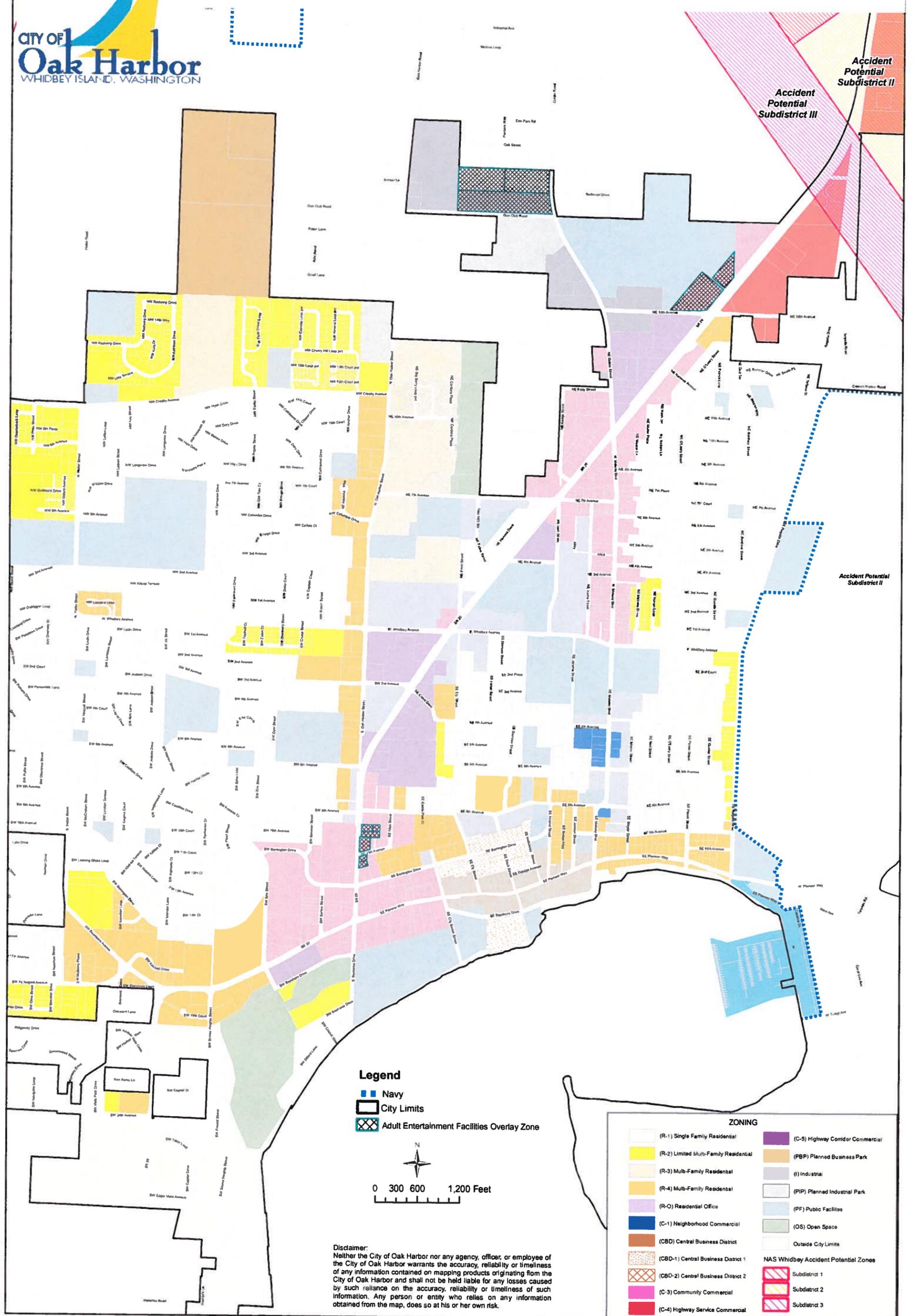
**Disclaimer:**  
 Neither the City of Oak Harbor nor any agency, officer, or employee of the City of Oak Harbor warrants the accuracy, reliability or timeliness of any information contained on mapping products originating from the City of Oak Harbor and shall not be held liable for any losses caused by such reliance on the accuracy, reliability or timeliness of such information. Any person or entity who relies on any information obtained from the map, does so at his or her own risk.

**ZONING**

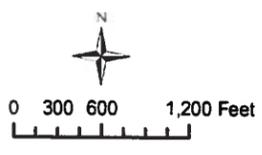
(R-1) Single Family Residential	(C-4) Highway Center Commercial
(R-2) Limited Multi-Family Residential	(P-2) Planned Business Park
(R-3) Multi-Family Residential	(I) Industrial
(R-4) Multi-Family Residential	(P-1) Planned Professional Park
(R-5) Residential Office	(PF) Public Facility
(C-1) Neighborhood Commercial	(C-2) Office (Retail)
(C-20) Central Business District	Office C-1 (Retail)
(C-30-1) Central Business District 1	<b>NAS Whidbey Accident Potential Zones</b>
(C-30-2) Central Business District 2	Subdistrict 1
(C-1) Community Commercial	Subdistrict 2
(C-1) Highway Service Commercial	Subdistrict 3



# EXHIBIT A Adult Entertainment Facilities Overlay Zone



- Legend**
- Navy
  - City Limits
  - Adult Entertainment Facilities Overlay Zone



**Disclaimer:**  
Neither the City of Oak Harbor nor any agency, officer, or employee of the City of Oak Harbor warrants the accuracy, reliability or timeliness of any information contained on mapping products originating from the City of Oak Harbor and shall not be held liable for any losses caused by such reliance on the accuracy, reliability or timeliness of such information. Any person or entity who relies on any information obtained from the map, does so at his or her own risk.

**ZONING**

<span style="display: inline-block; width: 15px; height: 15px; background-color: white; border: 1px solid black; margin-right: 5px;"></span> (R-1) Single Family Residential	<span style="display: inline-block; width: 15px; height: 15px; background-color: purple; border: 1px solid black; margin-right: 5px;"></span> (C-5) Highway Corridor Commercial
<span style="display: inline-block; width: 15px; height: 15px; background-color: yellow; border: 1px solid black; margin-right: 5px;"></span> (R-2) Limited Multi-Family Residential	<span style="display: inline-block; width: 15px; height: 15px; background-color: orange; border: 1px solid black; margin-right: 5px;"></span> (PBP) Planned Business Park
<span style="display: inline-block; width: 15px; height: 15px; background-color: lightyellow; border: 1px solid black; margin-right: 5px;"></span> (R-3) Multi-Family Residential	<span style="display: inline-block; width: 15px; height: 15px; background-color: grey; border: 1px solid black; margin-right: 5px;"></span> (I) Industrial
<span style="display: inline-block; width: 15px; height: 15px; background-color: gold; border: 1px solid black; margin-right: 5px;"></span> (R-4) Multi-Family Residential	<span style="display: inline-block; width: 15px; height: 15px; background-color: lightgrey; border: 1px solid black; margin-right: 5px;"></span> (PIP) Planned Industrial Park
<span style="display: inline-block; width: 15px; height: 15px; background-color: lightpurple; border: 1px solid black; margin-right: 5px;"></span> (R-O) Residential Office	<span style="display: inline-block; width: 15px; height: 15px; background-color: lightblue; border: 1px solid black; margin-right: 5px;"></span> (PF) Public Facilities
<span style="display: inline-block; width: 15px; height: 15px; background-color: blue; border: 1px solid black; margin-right: 5px;"></span> (C-1) Neighborhood Commercial	<span style="display: inline-block; width: 15px; height: 15px; background-color: lightgreen; border: 1px solid black; margin-right: 5px;"></span> (OS) Open Space
<span style="display: inline-block; width: 15px; height: 15px; background-color: brown; border: 1px solid black; margin-right: 5px;"></span> (CBD) Central Business District	<span style="display: inline-block; width: 15px; height: 15px; background-color: white; border: 1px solid black; margin-right: 5px;"></span> Outside City Limits
<span style="display: inline-block; width: 15px; height: 15px; background: repeating-linear-gradient(45deg, transparent, transparent 2px, black 2px, black 4px); border: 1px solid black; margin-right: 5px;"></span> (CBD-1) Central Business District 1	<span style="display: inline-block; width: 15px; height: 15px; background-color: white; border: 1px solid black; margin-right: 5px;"></span> NAS Whidbey Accident Potential Zones
<span style="display: inline-block; width: 15px; height: 15px; background: repeating-linear-gradient(-45deg, transparent, transparent 2px, black 2px, black 4px); border: 1px solid black; margin-right: 5px;"></span> (CBD-2) Central Business District 2	<span style="display: inline-block; width: 15px; height: 15px; background: repeating-linear-gradient(45deg, transparent, transparent 2px, red 2px, red 4px); border: 1px solid black; margin-right: 5px;"></span> Subdistrict 1
<span style="display: inline-block; width: 15px; height: 15px; background-color: pink; border: 1px solid black; margin-right: 5px;"></span> (C-3) Community Commercial	<span style="display: inline-block; width: 15px; height: 15px; background: repeating-linear-gradient(45deg, transparent, transparent 2px, yellow 2px, yellow 4px); border: 1px solid black; margin-right: 5px;"></span> Subdistrict 2
<span style="display: inline-block; width: 15px; height: 15px; background-color: red; border: 1px solid black; margin-right: 5px;"></span> (C-4) Highway Service Commercial	<span style="display: inline-block; width: 15px; height: 15px; background: repeating-linear-gradient(45deg, transparent, transparent 2px, orange 2px, orange 4px); border: 1px solid black; margin-right: 5px;"></span> Subdistrict 3

RESOLUTION NO. \_\_\_\_\_

**A RESOLUTION AFFIRMING THE CITY OF OAK HARBOR'S COMPLIANCE WITH THE PROVISIONS OF RCW 36.70A.390 AS IT RELATES TO THE ADOPTION OF AN INTERIM ADULT ENTERTAINMENT FACILITIES OVERLAY ZONE**

WHEREAS, the City of Oak Harbor adopted Ordinance 1572, an Interim Adult Entertainment Facilities Overlay Zone, on March 23, 2010 on an emergency basis such that a public hearing was not held prior to such adoption as allowed under RCW 36.70A.390; and

WHEREAS, on May 4, 2010 the City of Oak Harbor City Council as required by RCW 36.70A.300 conducted a public hearing within sixty (60) days of adoption of the interim ordinance, said hearing being duly advertised in the Whidbey News Times on April 17, 2010 and

WHEREAS, Findings of Fact were included with the adoption of Ordinance 1572; and

WHEREAS, the City of Oak Harbor City Council intends that the Interim Adult Entertainment Facilities Overlay Zone ordinance should be reviewed by the Oak Harbor Planning Commission, that the Commission should conduct their own public hearing and that the Commission should forward a recommendation to the City Council; and

WHEREAS, the City of Oak Harbor intends to develop a work plan for completing the review of the interim ordinance and hold another public hearing before the expiration of the six-month interim period allowed by RCW 36.70A.390.

NOW, THEREFORE, BE IT RESOLVED by the City Council of the City of Oak Harbor that:

1. The City of Oak Harbor has met the public hearing and findings of fact requirements of RCW 36.70A.390 for the Interim Adult Entertainment Facilities Overlay Zone ordinance.
2. The Interim Adult Entertainment Facilities Overlay Zone ordinance shall be forwarded to the Planning Commission for its review and recommendation.
3. The Development Services Director shall develop a schedule, which includes the necessary environmental and state department reviews, for completing work on the final ordinance within six (6) months of adoption of the interim ordinance or as expeditiously as is reasonable under the circumstances.
4. A public hearing shall be held on \_\_\_\_\_ or such other date as may be scheduled prior to the expiration of the six (6) month period of the interim ordinance.

PASSED and approved by the City Council this 4<sup>th</sup> day of May, 2010.

THE CITY OF OAK HARBOR

---

Jim Slowik  
Mayor

Attest:

---

City Clerk

Approved as to form:

---

Margery Hite  
City Attorney

ORDINANCE NO. \_\_\_\_\_

AN ORDINANCE AMENDING OAK HARBOR MUNICIPAL CODE CHAPTER 19.52, ADULT ENTERTAINMENT FACILITIES OVERLAY ZONE, BY INCREASING BUFFERS FROM RESIDENTIALLY ZONED PROPERTY AND DELETING C-3 ZONED PROPERTIES FROM THE OVERLAY ZONE

THE CITY COUNCIL OF THE CITY OF OAK HARBOR do ordain as follows:

**Section One. Findings of Fact.** Based on the record created during the adoption of Ordinance 1572 and upon the further investigation and report of the Director of Development Services concerning an Interim Adult Entertainment Facilities Overlay Zone, the city council hereby enters the following additional findings of fact:

1. The city council finds that during the adoption of the interim ordinance on March 23, 2010 citizen testimony and city council discussion raised concern with two aspects of the interim ordinance: the 100-foot buffer from residentially zoned properties and the inclusion of C-3 zoned properties located on SR-20 as part of the available sites inventory.
2. That in response to these concerns and to sufficiently address the negative associated effects of adult entertainment establishments on residential neighborhoods it is necessary to increase the buffer from residential properties from 100 feet to 750 feet.
3. That by increasing the buffer from residentially zoned properties to 750 feet, the eleven (11) parcels included in the original adult entertainment facilities overlay zone are reduced to three (3) parcels: one (1) in the Industrial zone (9.08 acres) and two (2) in the Planned Industrial Park zone (9.78 acres).
4. The city council finds that the parcels listed above are sufficient to meet the short term demand for adult entertainment establishments for the duration of the interim ordinance because:
  - a. While presently there are three total properties, there is the potential that these properties can be further developed to create additional building sites.
  - b. All of the sites are capable of being served by city water and sewer.
  - c. One of the PIP sites is partially developed, has two building pads available for construction, common storm drainage facilities have already constructed to serve the site and it is in the closest proximity to city water and sewer services located in NE Goldie Street.
  - d. The minimum lot size for PIP development is 20,000 square feet and the remaining PIP site is approximately 4.99 acres in size which makes the subdivision and/or development of up to ten additional lots possible.

- e. The site with Industrial zoning is approximately 9.08 acres in size, has frontage on NE Goldie Street, may be subdivided to create individual building sites and has direct access to city water and sewer in NE Goldie Street

5. The city council further finds that providing three parcels (and their development potential) will not suppress or censor any expressive activities protected by the First Amendment of the United States Constitution or Article I, Section 5 of the Washington State Constitution, because sufficient locations are provided within the city where adult entertainment facilities may locate on an interim basis given the very limited demand for such locations anticipated for the duration of this interim ordinance.

THE CITY COUNCIL OF THE CITY OF OAK HARBOR do ordain as follows:

**Section Two:** Oak Harbor Municipal Code Chapter 19.52 adopted by Ordinance 1572 §2 is hereby amended to read as follows:

**Chapter 19.52  
ADULT ENTERTAINMENT FACILITIES OVERLAY ZONE**

**Sections:**

- 19.52.010 Purpose.
- 19.52.020 Application of chapter provisions.
- 19.52.030 Definitions.
- 19.52.040 Adult entertainment facilities overlay zone established.
- 19.52.045 Overlay zone map adopted.
- 19.52.050 Adult entertainment overlay zone use restrictions.
- 19.52.060 Non-conforming uses.

**19.52.010 Purpose.** The purpose of this chapter is to establish an overlay district within which adult entertainment facilities may be located in such a way as to mitigate the adverse secondary effects associated with such facilities. Because of the adverse secondary effects of adult entertainment facilities, restrictions on location are necessary: to protect residents, especially sensitive uses such as schools, religious institutions, parks and residential neighborhoods, from crimes, nuisances and disturbances of the public welfare, peace and safety; to preserve property values; and to respect the place of neighborhoods, schools, religious institutions and parks in the city of Oak Harbor. It is not the intention of this ordinance to suppress any constitutionally protected speech or expression, but to provide sufficient alternative avenues of communication for adult entertainment uses at the same time as providing appropriate zoning and separation between adult entertainment facilities and potentially conflicting uses.

**19.52.020 Application of chapter provisions.** Adult entertainment facilities, as defined in OHMC 19.52.030(2), shall only be permitted within the Adult Entertainment Facilities Overlay Zone established herein. This chapter applies to all adult entertainment facilities located within the city of Oak Harbor.

**19.52.030 Definitions.** The following definitions shall apply to this chapter.

- (1) "Adult entertainment" shall have the meaning set out in OHMC 5.20.020.
- (2) "Adult entertainment facility" shall mean any commercial premises or club to which any patron is invited or admitted and where adult entertainment is provided on a regular basis or is provided as a substantial part of the premises activity.
- (3) "Overlay zone" shall mean that portion of the C-3 Community Commercial zone, the Industrial zone and the Planned Industrial Park zone in which adult entertainment establishments may be located.
- (4) "Potentially conflicting uses" shall mean schools, religious institutions, residential zones and parks established within the city of Oak Harbor as of the date of this ordinance. The term "potentially conflicting uses" shall also mean any such other uses which the city council shall determine require separation from adult entertainment facilities, provided that the addition of any such uses shall require a review of available lands to ensure sufficient alternative avenues of communication for adult entertainment uses are available.

**19.52.040 Adult entertainment facilities overlay zone established.** There is established an adult entertainment facilities overlay zone in the city of Oak Harbor. The adult entertainment facilities overlay zone shall overlay the ~~C-3 Community Commercial zone, the Industrial zone and the Planned Industrial Park zone.~~ It does not include certain portions of the ~~C-3 zone, the Industrial zone and the Planned Industrial Park zone~~ in which potentially conflicting uses were located at the time of adoption of this ordinance. The following exclusions from the ~~C-3 zone, the Industrial zone and the Planned Industrial Park zones~~ apply:

- (1) The adult entertainment facilities overlay zone removes a buffer of seven hundred fifty (750) feet around the existing potentially conflicting uses of schools, religious institutions, and parks.
- (2) A further buffer removes ~~one hundred (100) feet~~ seven hundred fifty (760) feet around existing areas zoned exclusively for residential uses – R-1, Single-Family Residential; R-2, Limited Multiple-Family Residential; R-3, Multiple-Family Residential; and R-4, Multiple-Family Residential.

**19.52.045 Overlay zone map adopted.** The adult entertainment facilities overlay zone map as attached hereto in Exhibit A is adopted as a pictorial description of the sole geographic areas within the city of Oak Harbor in which adult entertainment facilities are permitted. A copy of the adult entertainment facilities overlay zone map is on file with the city clerk and shall be available for public inspection and copying.

**19.52.050 Adult entertainment overlay zone use restrictions.** To mitigate the adverse secondary effects associated with adult entertainment facilities, the following parking and lighting restrictions shall apply within the adult entertainment facilities overlay zone:

Adult Entertainment Facilities  
Overlay Zone Ordinance - 3  
\\City\planning\CC\10\May 4\Amended Adult Ent Ord ver2.doc

- (1) **Parking requirements.** For adult entertainment facilities constructed after the effective date of this ordinance all parking must be visible from the public right-of-way. For adult entertainment facilities located in buildings constructed prior to the effective date of this ordinance, all parking should be visible from the public right-of-way. In cases of adult entertainment facilities located in buildings constructed prior to the effective date of this ordinance where this is not feasible, access to the parking shall be in as direct a route as possible from the public right-of-way and the parking area shall remain free and clear of visual obstructions at all times. Access to the exterior rear of the building shall be denied to any persons other than employees and public officials during the performance of their respective duties and tasks by means of a fence, wall or other device approved by the city building official. On-site parking shall be required and regulated in accordance with Chapter 19.44 OHMC. Parking shall be provided at a ratio of one (1) space for every three (3) seats, plus one (1) space for every two (2) employees on the largest shift.
- (2) **Lighting requirements.** All on-site parking areas and premises entries of adult entertainment facilities shall be illuminated from dusk until one (1) hour past closing hours of operation with a lighting system which provides an average maintained horizontal illumination of one (1) foot candle of light on the parking surface and/or walkways. In addition, all on-site lighting, including signs, shall comply with the shading and directional requirements of OHMC 19.28.010(4). An on-premises exterior lighting plan shall be presented to the city building official for approval prior to the operation of any adult entertainment.

**19.52.060 Non-conforming uses.** For purposes of this title, a “non-conforming adult entertainment facility” constitutes an adult entertainment facility which lawfully exists as an adult entertainment facility which receives non-conforming status by virtue of an order from a court of competent jurisdiction, or which lawfully existed as an adult entertainment facility prior to a change in the zoning which change does not permit an adult entertainment facility in its existing location and is maintained as an adult entertainment facility although it does not comply with the adult entertainment facility zoning requirements set forth in this chapter, or is an adult entertainment facility which lawfully existed prior to annexation by the city and is maintained after the effective date of annexation and does not comply with the adult entertainment facility zoning requirements set forth in this chapter.

- (1) The location of a newly-established public park, permanent religious institution, or school within seven hundred fifty (750) feet or the establishment of a residential district within ~~one hundred (100) feet~~ seven hundred fifty (750) feet of an existing adult entertainment facility shall not cause the existing adult entertainment business to be deemed a non-conforming use unless the city council makes a determination that the newly-established park, religious institution or school requires separation from adult entertainment facilities, and further provided that the exclusion of any such areas from adult entertainment facility zoning overlay shall require a review of available lands to ensure sufficient alternative avenues of communication for adult entertainment uses are available.

- (2) Adult entertainment facilities which are non-conforming uses in the zone in which they are located and which are located within the city limits shall be discontinued within one year of the date of becoming a non-conforming adult use business or upon the expiration of the leasehold period in existence as of the date of becoming a non-conforming adult entertainment facility, or upon the sale of the non-conforming adult entertainment facility, whichever occurs first. Adult entertainment facilities which are non-conforming as a result of annexation to the city shall be discontinued within one year of the date of annexation. Such non-conforming adult entertainment facility shall not be extended, expanded, enlarged or increased in intensity. Such prohibited activities (extend, expand, enlarge, increase in intensity) shall include:
- (a) Extension of a non-conforming adult entertainment facility to any building or other structure or land area other than one occupied by such use as of the date of becoming a non-conforming adult entertainment facility.
  - (b) Extension of any specific type of non-conforming adult entertainment facility, as separately defined in OHMC 19.52.030(2), within a building or other structure to any portion of the floor area that was not occupied by that same type of adult entertainment facility as of the date of becoming a non-conforming adult entertainment facility.
  - (c) Operation of a non-conforming use in such manner as to conflict with, or to further conflict with if already conflicting as of the date of becoming a non-conforming adult entertainment facility.
- (3) Any change in a non-conforming adult entertainment facility shall be to a use which is legally permitted within the zone in which it is located. In the event a non-conforming adult entertainment facility, or portion thereof, is changed to a use which is legally permitted within the zone in which it is located, then the structure or portion thereof which contained the adult entertainment facility cannot thereafter be used or reused for any type of adult entertainment facility. In the event a non-conforming adult entertainment facility building or structure is vacated, closed or abandoned for a period in excess of six (6) months, the structure shall not thereafter be used except in conformance with a use which is legally permitted within the zone in which it is located. A vacated, closed or abandoned non-conforming adult entertainment facility building or structure shall also be subject to the discontinuation provisions of OHMC 19.52.060(2).
- (4) Repairs and alterations to a non-conforming adult entertainment facility building or structure shall be limited to nonstructural repairs and incidental alterations for normal maintenance and shall only be permitted to the extent necessitated by normal wear and tear. No structural alterations shall be allowed.
- (5) A building or structure containing a non-conforming adult entertainment facility which is damaged or destroyed by fire, wind, earthquake or other natural disaster can be restored and the same use or occupancy continued or resumed provided the total cost of such restoration does not exceed fifty percent (50%) of the real valuation of the building or

structure exclusive of foundations at the time of such damage provided that such restoration shall not extend the one (1) year discontinuation period established in OHMC 19.52.060(2). Restoration of a structure or building housing a non-conforming adult entertainment facility or moneys used therefore shall not be used as factors by the examiner when considering any request of a time extension made pursuant to subsection (6) of this section.

- (6) In the event the owner of a non-conforming adult entertainment facility determines that the period set forth in subsection (2) of this section does not provide the adult entertainment facility with a reasonable period of amortization, then no later than one hundred eighty (180) days prior to the expiration of the period, the owner of a non-conforming adult entertainment facility shall make application to the city land use hearing examiner for an extension of time. Accompanying the application shall be a fee in the amount of Seven Hundred Twelve Dollars (\$712.00) and detailed information addressing the below-listed factors to be considered by the hearing examiner. In determining whether or not to grant the extension, the hearing examiner shall determine whether or not the harm or hardship to the non-conforming adult entertainment facility outweighs the benefit to be gained from the public from termination of the use. Factors to be considered by the hearing examiner include the location of the business in relation to sensitive land uses such as schools, parks, churches, residential zone(s), etc., initial capital investment, investment realization to date, life expectancy of the investment, the existence or nonexistence of a lease obligation, as well as a contingency clause permitting termination of the lease, or whether a reasonable alternate use of the property exists. The action of the hearing examiner shall be in accordance with the review process as described in Chapter 18.40 OHMC for a Review Process III.
- (7) Within thirty (30) calendar days of becoming a non-conforming adult entertainment facility, the non-conforming adult entertainment facility shall provide the city's development services director with copies of its current leasehold document(s) which sets forth their existing leasehold time period or, in the case of a non-leasehold interest, the city's development services director shall be provided other documents which show record of ownership.

**Section Four: Severability.** If any provision of this Ordinance or its application to any person or circumstance is held invalid, the remainder of the Ordinance or the application of the provision to other persons or circumstances is not affected.

**Section Five. Effective Date.** This Ordinance shall be in full force and effect five days following publication.

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PASSED by the City Council this 4<sup>th</sup> day of May, 2010.

- ( ) APPROVED by its Mayor this \_\_\_\_\_ day of \_\_\_\_\_, 2010.
- ( ) Vetoed

THE CITY OF OAK HARBOR

\_\_\_\_\_  
Mayor

Attest:

\_\_\_\_\_  
City Clerk

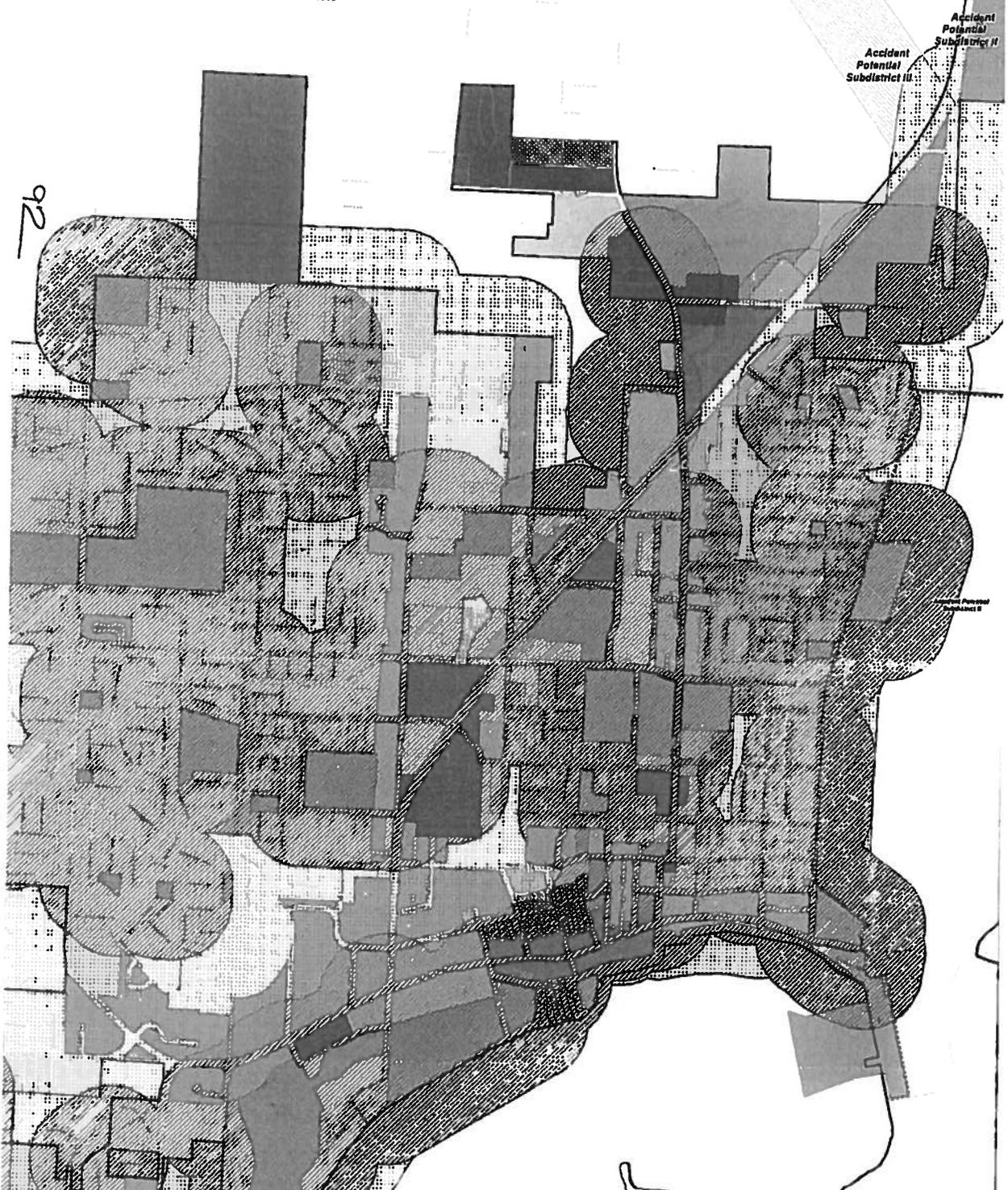
Approved as to Form:

\_\_\_\_\_  
City Attorney

Published: \_\_\_\_\_



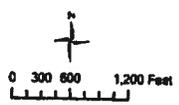
# DRAFT Adult Entertainment Facilities Working Map C-3, I, and PIP Zoning Outside of 750 Foot Buffers and 750 Foot Residential Buffer



Accident Potential Subdistrict II  
Accident Potential Subdistrict III

**Legend**

- Navy
- City Limits
- 750' Buffer around all Schools, Parks & Churches
- 750' Buffer around Residential
- Adult Entertainment Facilities Overlay Zone
- Parcels in & PIP Outside of Buffers



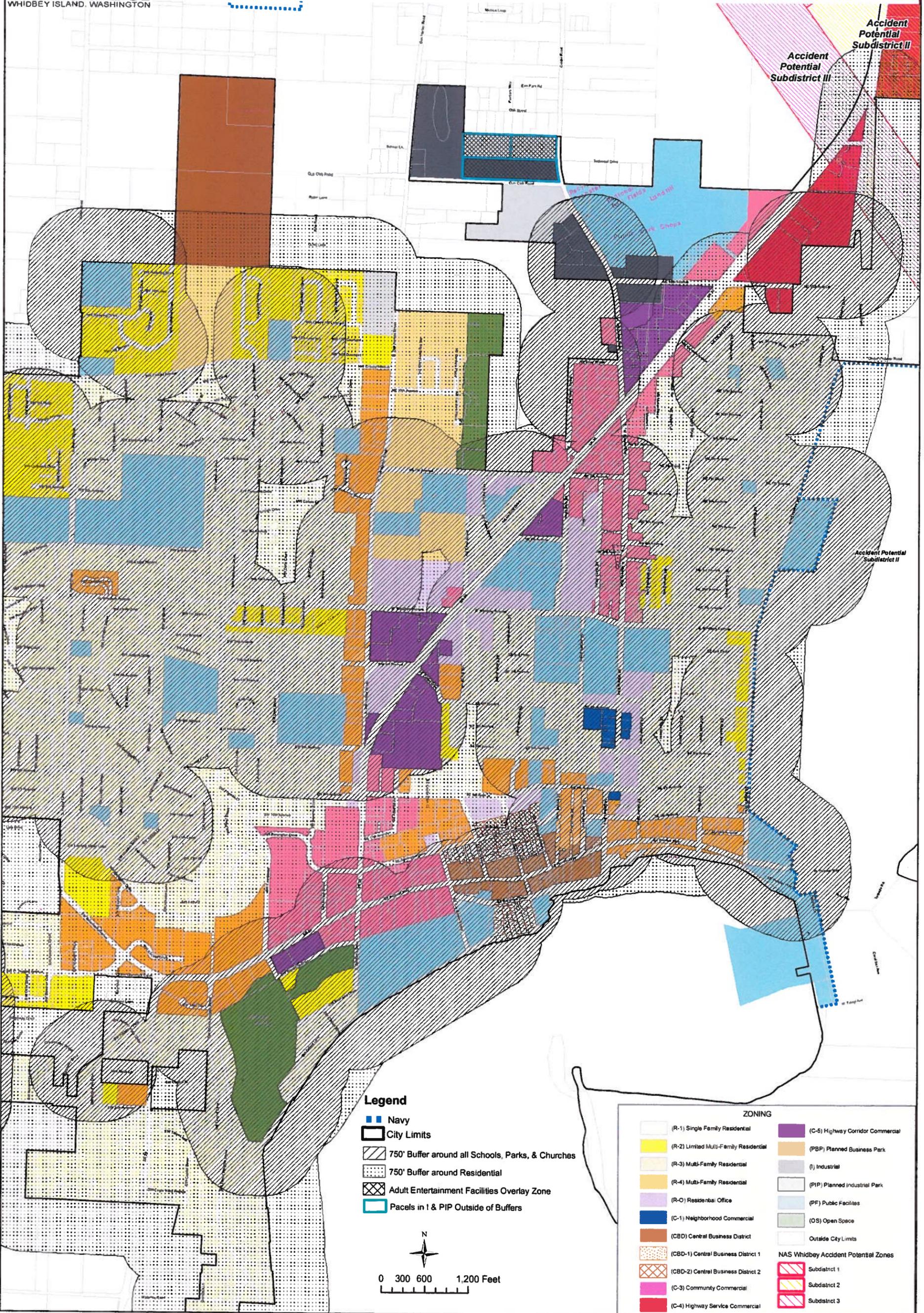
**ZONING**

R-1 Single Family Residential	R-C Highway Corridor Commercial
R-2 Single Family Residential	R-20 Planned Business Park
R-3 Single Family Residential	R-25 Planned Suburban Park
R-4 Single Family Residential	R-30 Planned Suburban Park
R-5 Single Family Residential	R-35 Planned Suburban Park
R-6 Single Family Residential	R-40 Planned Suburban Park
R-7 Single Family Residential	R-45 Planned Suburban Park
R-8 Single Family Residential	R-50 Planned Suburban Park
R-9 Single Family Residential	R-55 Planned Suburban Park
R-10 Single Family Residential	R-60 Planned Suburban Park
R-11 Single Family Residential	R-65 Planned Suburban Park
R-12 Single Family Residential	R-70 Planned Suburban Park
R-13 Single Family Residential	R-75 Planned Suburban Park
R-14 Single Family Residential	R-80 Planned Suburban Park
R-15 Single Family Residential	R-85 Planned Suburban Park
R-16 Single Family Residential	R-90 Planned Suburban Park
R-17 Single Family Residential	R-95 Planned Suburban Park
R-18 Single Family Residential	R-100 Planned Suburban Park
R-19 Single Family Residential	R-105 Planned Suburban Park
R-20 Single Family Residential	R-110 Planned Suburban Park
R-21 Single Family Residential	R-115 Planned Suburban Park
R-22 Single Family Residential	R-120 Planned Suburban Park
R-23 Single Family Residential	R-125 Planned Suburban Park
R-24 Single Family Residential	R-130 Planned Suburban Park
R-25 Single Family Residential	R-135 Planned Suburban Park
R-26 Single Family Residential	R-140 Planned Suburban Park
R-27 Single Family Residential	R-145 Planned Suburban Park
R-28 Single Family Residential	R-150 Planned Suburban Park
R-29 Single Family Residential	R-155 Planned Suburban Park
R-30 Single Family Residential	R-160 Planned Suburban Park
R-31 Single Family Residential	R-165 Planned Suburban Park
R-32 Single Family Residential	R-170 Planned Suburban Park
R-33 Single Family Residential	R-175 Planned Suburban Park
R-34 Single Family Residential	R-180 Planned Suburban Park
R-35 Single Family Residential	R-185 Planned Suburban Park
R-36 Single Family Residential	R-190 Planned Suburban Park
R-37 Single Family Residential	R-195 Planned Suburban Park
R-38 Single Family Residential	R-200 Planned Suburban Park
R-39 Single Family Residential	R-205 Planned Suburban Park
R-40 Single Family Residential	R-210 Planned Suburban Park
R-41 Single Family Residential	R-215 Planned Suburban Park
R-42 Single Family Residential	R-220 Planned Suburban Park
R-43 Single Family Residential	R-225 Planned Suburban Park
R-44 Single Family Residential	R-230 Planned Suburban Park
R-45 Single Family Residential	R-235 Planned Suburban Park
R-46 Single Family Residential	R-240 Planned Suburban Park
R-47 Single Family Residential	R-245 Planned Suburban Park
R-48 Single Family Residential	R-250 Planned Suburban Park
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R-50 Single Family Residential	R-260 Planned Suburban Park
R-51 Single Family Residential	R-265 Planned Suburban Park
R-52 Single Family Residential	R-270 Planned Suburban Park
R-53 Single Family Residential	R-275 Planned Suburban Park
R-54 Single Family Residential	R-280 Planned Suburban Park
R-55 Single Family Residential	R-285 Planned Suburban Park
R-56 Single Family Residential	R-290 Planned Suburban Park
R-57 Single Family Residential	R-295 Planned Suburban Park
R-58 Single Family Residential	R-300 Planned Suburban Park
R-59 Single Family Residential	R-305 Planned Suburban Park
R-60 Single Family Residential	R-310 Planned Suburban Park
R-61 Single Family Residential	R-315 Planned Suburban Park
R-62 Single Family Residential	R-320 Planned Suburban Park
R-63 Single Family Residential	R-325 Planned Suburban Park
R-64 Single Family Residential	R-330 Planned Suburban Park
R-65 Single Family Residential	R-335 Planned Suburban Park
R-66 Single Family Residential	R-340 Planned Suburban Park
R-67 Single Family Residential	R-345 Planned Suburban Park
R-68 Single Family Residential	R-350 Planned Suburban Park
R-69 Single Family Residential	R-355 Planned Suburban Park
R-70 Single Family Residential	R-360 Planned Suburban Park
R-71 Single Family Residential	R-365 Planned Suburban Park
R-72 Single Family Residential	R-370 Planned Suburban Park
R-73 Single Family Residential	R-375 Planned Suburban Park
R-74 Single Family Residential	R-380 Planned Suburban Park
R-75 Single Family Residential	R-385 Planned Suburban Park
R-76 Single Family Residential	R-390 Planned Suburban Park
R-77 Single Family Residential	R-395 Planned Suburban Park
R-78 Single Family Residential	R-400 Planned Suburban Park
R-79 Single Family Residential	R-405 Planned Suburban Park
R-80 Single Family Residential	R-410 Planned Suburban Park
R-81 Single Family Residential	R-415 Planned Suburban Park
R-82 Single Family Residential	R-420 Planned Suburban Park
R-83 Single Family Residential	R-425 Planned Suburban Park
R-84 Single Family Residential	R-430 Planned Suburban Park
R-85 Single Family Residential	R-435 Planned Suburban Park
R-86 Single Family Residential	R-440 Planned Suburban Park
R-87 Single Family Residential	R-445 Planned Suburban Park
R-88 Single Family Residential	R-450 Planned Suburban Park
R-89 Single Family Residential	R-455 Planned Suburban Park
R-90 Single Family Residential	R-460 Planned Suburban Park
R-91 Single Family Residential	R-465 Planned Suburban Park
R-92 Single Family Residential	R-470 Planned Suburban Park
R-93 Single Family Residential	R-475 Planned Suburban Park
R-94 Single Family Residential	R-480 Planned Suburban Park
R-95 Single Family Residential	R-485 Planned Suburban Park
R-96 Single Family Residential	R-490 Planned Suburban Park
R-97 Single Family Residential	R-495 Planned Suburban Park
R-98 Single Family Residential	R-500 Planned Suburban Park
R-99 Single Family Residential	R-505 Planned Suburban Park
R-100 Single Family Residential	R-510 Planned Suburban Park

ATTACHMENT 5



# Adult Entertainment Facilities Overlay Zone I and PIP Zoning Outside of 750 Foot Buffers and 750 Foot Residential Buffer



**Legend**

- Navy
- City Limits
- 750' Buffer around all Schools, Parks, & Churches
- 750' Buffer around Residential
- Adult Entertainment Facilities Overlay Zone
- Parcels in I & PIP Outside of Buffers



**ZONING**

- |  |   |
|--|---|
| <ul style="list-style-type: none"> <li><span style="display: inline-block; width: 15px; height: 15px; background-color: white; border: 1px solid black; margin-right: 5px;"></span> (R-1) Single Family Residential</li> <li><span style="display: inline-block; width: 15px; height: 15px; background-color: yellow; border: 1px solid black; margin-right: 5px;"></span> (R-2) Limited Multi-Family Residential</li> <li><span style="display: inline-block; width: 15px; height: 15px; background-color: lightyellow; border: 1px solid black; margin-right: 5px;"></span> (R-3) Multi-Family Residential</li> <li><span style="display: inline-block; width: 15px; height: 15px; background-color: orange; border: 1px solid black; margin-right: 5px;"></span> (R-4) Multi-Family Residential</li> <li><span style="display: inline-block; width: 15px; height: 15px; background-color: lightpurple; border: 1px solid black; margin-right: 5px;"></span> (R-O) Residential Office</li> <li><span style="display: inline-block; width: 15px; height: 15px; background-color: blue; border: 1px solid black; margin-right: 5px;"></span> (C-1) Neighborhood Commercial</li> <li><span style="display: inline-block; width: 15px; height: 15px; background-color: brown; border: 1px solid black; margin-right: 5px;"></span> (CBD) Central Business District</li> <li><span style="display: inline-block; width: 15px; height: 15px; border: 1px solid black; background-image: linear-gradient(to right, transparent 49%, black 49%, black 51%, transparent 51%); background-size: 4px 4px; margin-right: 5px;"></span> (CBD-1) Central Business District 1</li> <li><span style="display: inline-block; width: 15px; height: 15px; border: 1px solid black; background-image: linear-gradient(to right, transparent 49%, black 49%, black 51%, transparent 51%); background-size: 4px 4px; margin-right: 5px;"></span> (CBD-2) Central Business District 2</li> <li><span style="display: inline-block; width: 15px; height: 15px; background-color: pink; border: 1px solid black; margin-right: 5px;"></span> (C-3) Community Commercial</li> <li><span style="display: inline-block; width: 15px; height: 15px; background-color: red; border: 1px solid black; margin-right: 5px;"></span> (C-4) Highway Service Commercial</li> </ul> | <ul style="list-style-type: none"> <li><span style="display: inline-block; width: 15px; height: 15px; background-color: purple; border: 1px solid black; margin-right: 5px;"></span> (C-5) Highway Corridor Commercial</li> <li><span style="display: inline-block; width: 15px; height: 15px; background-color: orange; border: 1px solid black; margin-right: 5px;"></span> (PBP) Planned Business Park</li> <li><span style="display: inline-block; width: 15px; height: 15px; background-color: gray; border: 1px solid black; margin-right: 5px;"></span> (I) Industrial</li> <li><span style="display: inline-block; width: 15px; height: 15px; background-color: lightgray; border: 1px solid black; margin-right: 5px;"></span> (PIP) Planned Industrial Park</li> <li><span style="display: inline-block; width: 15px; height: 15px; background-color: lightblue; border: 1px solid black; margin-right: 5px;"></span> (PF) Public Facilities</li> <li><span style="display: inline-block; width: 15px; height: 15px; background-color: lightgreen; border: 1px solid black; margin-right: 5px;"></span> (OS) Open Space</li> <li><span style="display: inline-block; width: 15px; height: 15px; background-color: white; border: 1px solid black; margin-right: 5px;"></span> Outside City Limits</li> </ul> <p><b>NAS Whidbey Accident Potential Zones</b></p> <ul style="list-style-type: none"> <li><span style="display: inline-block; width: 15px; height: 15px; border: 1px solid red; margin-right: 5px;"></span> Subdistrict 1</li> <li><span style="display: inline-block; width: 15px; height: 15px; border: 1px solid yellow; margin-right: 5px;"></span> Subdistrict 2</li> <li><span style="display: inline-block; width: 15px; height: 15px; border: 1px solid pink; margin-right: 5px;"></span> Subdistrict 3</li> </ul> |
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2010 Comprehensive Plan  
Amendments—Requested  
Land Use Changes

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## PLANNING COMMISSION

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**TO:** CITY OF OAK HARBOR PLANNING COMMISSIONERS  
**FROM:** CAC KAMAK, AICP, SENIOR PLANNER  
**SUBJECT:** 2010 COMPREHENSIVE PLAN AMENDMENTS – REQUESTED LAND USE CHANGES  
**DATE:** 6/17/2010  
**CC:** STEVE POWERS, AICP, DEVELOPMENT SERVICES DIRECTOR

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**Purpose:** The purpose of this memo is to share preliminary information on the three requests for land use changes that were included for consideration with the 2010 Comprehensive Plan Docket. No action or recommendation by the Planning Commission is requested at this time.

**Introduction:** The 2010 Comprehensive Plan Docket includes three properties for which land use changes were requested. All three properties are owned by the City and the requested changes are intended to reflect the proposed use of the properties.

The three properties included in the 2010 Comprehensive Plan Docket are listed below:

- Scenic Heights Trailhead site - Land use change from Low Density Residential to Public Facilities
- North Reservoir Site west of Oak Harbor Road near Gun Club Road – Land use change from Planned Business Park to Public Facilities
- SE corner of SR 20 and Fakemma Road – Land use change from Auto/Industrial Commercial to Open Space

**Scenic Heights Trailhead site:** This property is located on SW Scenic Heights Street adjacent to SW 20<sup>th</sup> Court. The property was purchased by the City using Conservation Futures Funds with the intent to develop it into a trailhead site for the Waterfront Trail. The existing zoning for the property is R-1, Single Family Residential and the existing land use designation is Low Density Residential.

The property is proposed to be developed as a trailhead site for the Waterfront Trail, which extends from SW Scenic Heights Street to Maylor Point. The site is currently in its planning stages and proposed design includes an area with informational displays, a viewing area and some parking. Construction of this project is expected to commence

this summer. Upon completion the trailhead site would become part of Oak Harbor's park system.

The Public Facilities classification is intended to accommodate public facilities such as parks, utilities, government offices, etc. and therefore would be the most appropriate land use category for the property. All parks in Oak Harbor are designated as Public Facilities and since the trailhead site would be part of the park system it would be logical to amend the land uses designation. If the requested change is approved the property would be zoned for Public Facilities which would permit the intended use by right.

Since construction of the trailhead is scheduled to commence prior to a decision on the land use change, the project will need a conditional use permit under the current zoning classification. The hearing for the permit is scheduled for the June 18, 2010. Decision by the Hearing Examiner will take approximately 2-3 weeks. Staff will keep the Planning Commission updated regarding the project.

North Reservoir Site: This property is located near Gun Club Road in northwest Oak Harbor. The City currently owns a 10 acre tract but will retain only 5 acres to develop it for two water reservoirs. The five acre tract is approximately 1000 feet north of unimproved Gun Club Road (see attached map) between Oak Harbor Road and Heller Road. The existing zoning for the property is Planned Business Park and the existing land use designation is Planned Business Park. The Planned Business Park classification is intended to promote the development of larger-scaled master planned developments related to office complexes and other similar facilities. The use of this property for a water reservoir does not fit within the purpose of the Planned Business Park classification.

The City has identified this site as an appropriate location for possibly two water reservoirs to serve Oak Harbor. The location for this project was determined following a technical analysis on the water system. The Public Facilities classification is intended to accommodate public facilities such as parks, utilities, government offices etc and therefore would be the best suited land use category for the use.

Construction for this project is not expected to commence this year. If the requested change in land use is approved the project will be permitted by right and will be required to go through a Type II site plan review process.

SE corner of SR 20 and Fakemma Road: The property was formerly referred to as the Boyer Property. The property was purchased through a collaboration of the City, Island County, State of Washington and the Navy with the City retaining ownership in fee simple. The property was purchased by the City, County and Navy with the intention to restrict development activity due to its location within the flight path. The property is located in Accident Potential Sub-district One and Two and is currently zoned C-4, Highway Service Commercial with a land use designation of Auto/Industrial Commercial.

The Parks and Recreation Plan adopted in 2009 identified this property as a potential location for an Oak Grove. Pursuing this idea will require a land use designation of Open Space.

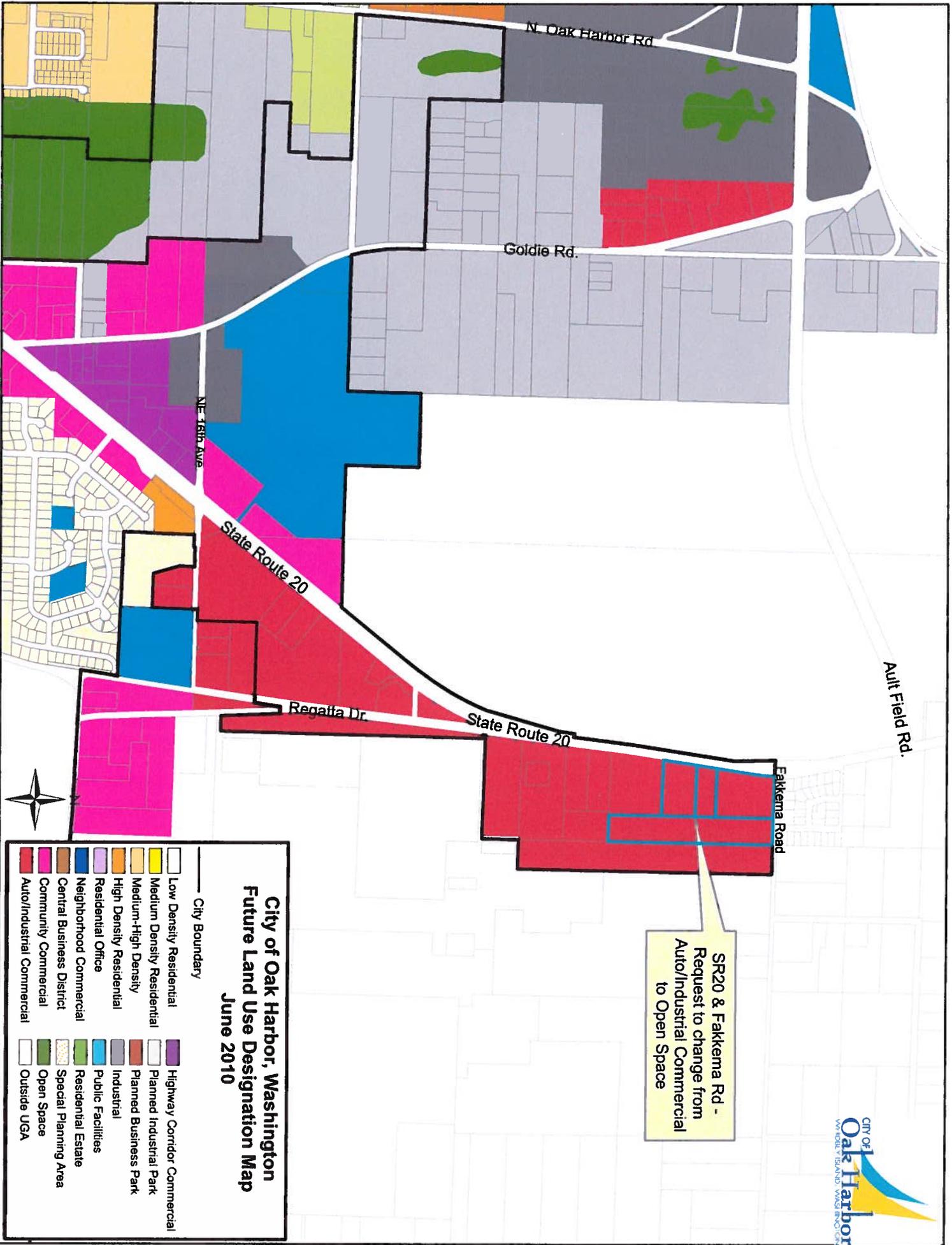
Staff is currently working with soil experts to determine the characteristics of the soil and its suitability for vegetation. The soil on the property is classified as Everett-Alderwood (70-30) complex – 0 to 5 percent slopes. This kind of soil is conducive for forests similar to the growth that currently surrounds the property. The Everett soil profile is 0-2 inches of slightly decomposed plant material, 2-9 inches sandy loam, 9-13 inches gravelly sandy loam, 13-30 inches very gravelly coarse sand and 30-60 of extremely gravelly coarse sand. The Alderwood soil profile is 0-1 inches slightly decomposed plant material, 1-10 inches of extremely gravelly sandy loam, 10 – 18 inches of extremely coarse sandy loam, 18-36 inches of extremely gravelly coarse sandy loam and 36-60 inches of gravelly silt clay loam. These soils seem to indicate that it is not the best suited for general farming.

Attached is some information on Garry Oaks and its habitat. The information indicates that Garry Oaks has a broad tolerance of substrates, which vary from rocky, thin soils to deep loams and clays of valley bottom.

Given the tolerance of Oaks to wide variety of substrates and the soil profile on the property seems to indicate that Garry Oaks can be grown on this property. They may require some attention when initially planted but will be maintenance free once they establish themselves. Staff is continuing to explore this option and will provide more updates as the process moves along.

**Summary:** This memo provides and update on the requested land use changes and no action or recommendations is required at this time.

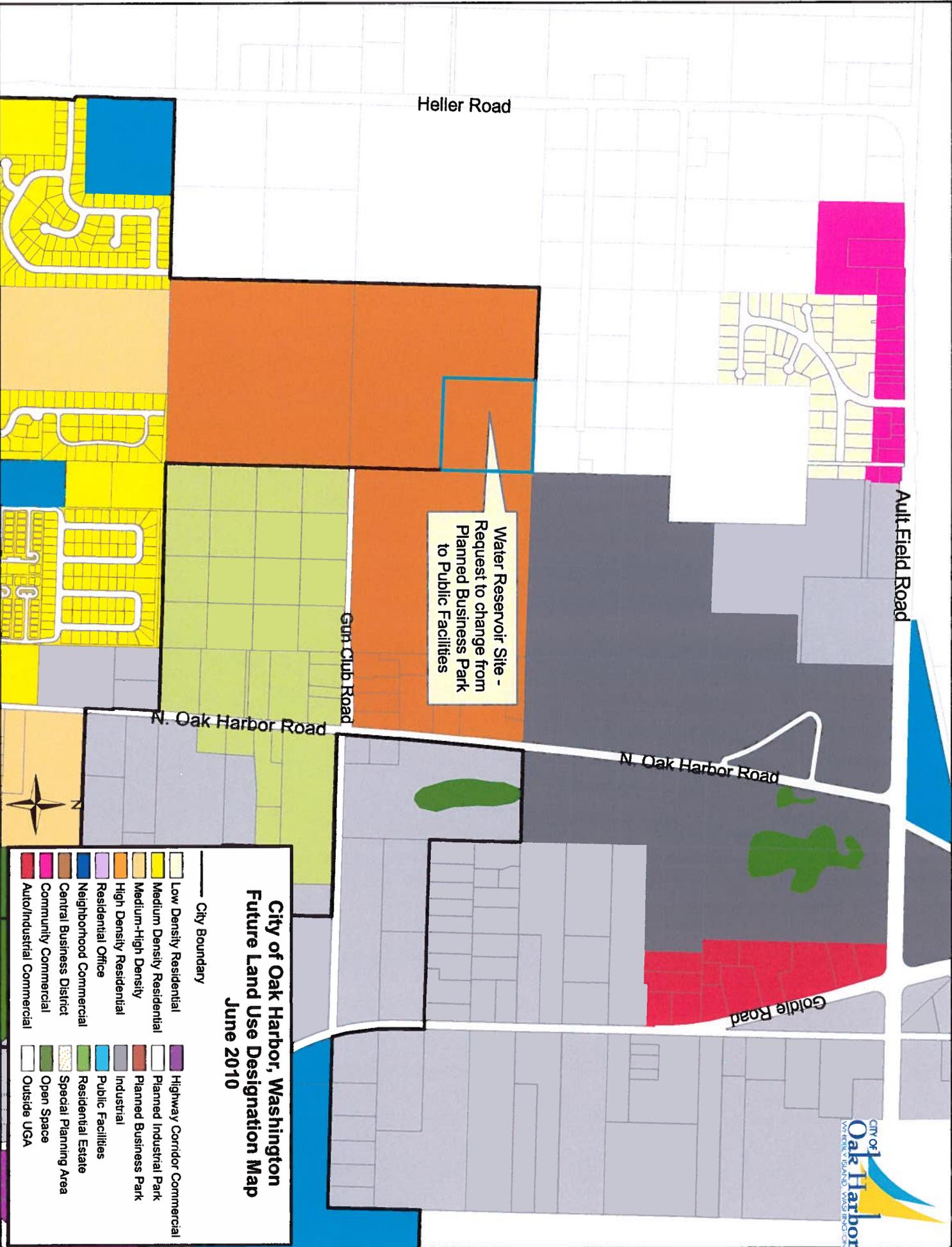
Attachments:      Location maps of the properties with land use designations.  
                            Quercus Garryana – Oregon Oak Plant Guide



**City of Oak Harbor, Washington  
Future Land Use Designation Map  
June 2010**

	City Boundary		Highway Corridor Commercial
	Low Density Residential		Planned Industrial Park
	Medium Density Residential		Planned Business Park
	Medium-High Density Residential		Industrial
	High Density Residential		Public Facilities
	Residential Office		Residential Estate
	Neighborhood Commercial		Special Planning Area
	Central Business District		Open Space
	Community Commercial		Outside UGA
	Auto/Industrial Commercial		

SR20 & Fakkema Rd -  
Request to change from  
Auto/Industrial Commercial  
to Open Space



Heller Road

Ault Field Road

Gun Club Road

N. Oak Harbor Road

N. Oak Harbor Road

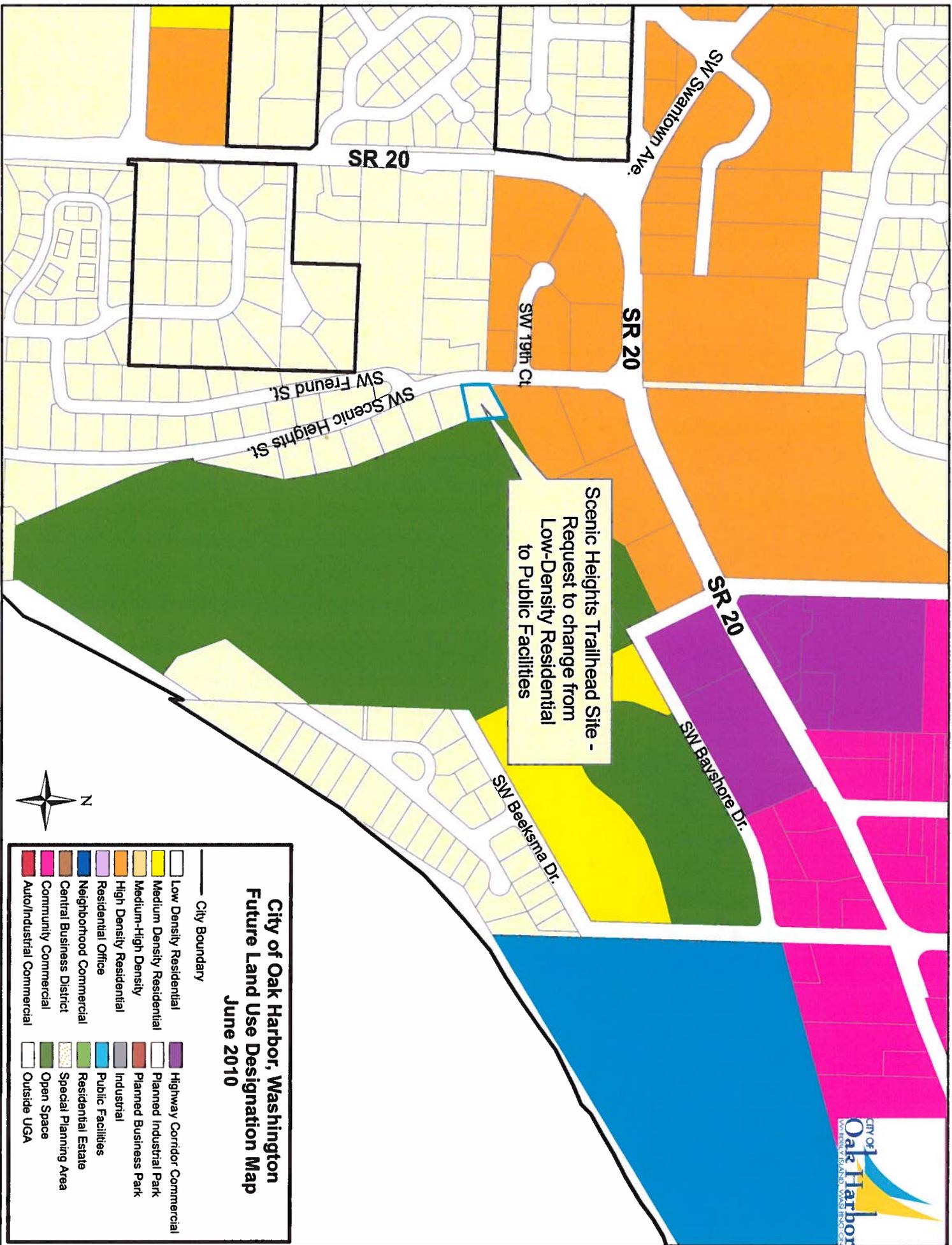
Goldie Road

Water Reservoir Site -  
Request to change from  
Planned Business Park  
to Public Facilities

**City of Oak Harbor, Washington**  
**Future Land Use Designation Map**  
**June 2010**

	City Boundary		Highway Corridor Commercial
	Low Density Residential		Planned Industrial Park
	Medium Density Residential		Planned Business Park
	Medium-High Density Residential		Industrial
	High Density Residential		Public Facilities
	Residential Office		Residential Estate
	Neighborhood Commercial		Special Planning Area
	Central Business District		Open Space
	Community Commercial		Outside UGA
	Auto/Industrial Commercial		





**Scenic Heights Trailhead Site -  
Request to change from  
Low-Density Residential  
to Public Facilities**

**City of Oak Harbor, Washington  
Future Land Use Designation Map  
June 2010**

	City Boundary		Highway Corridor Commercial
	Low Density Residential		Planned Industrial Park
	Medium Density Residential		Planned Business Park
	Medium-High Density Residential		Industrial
	High Density Residential		Residential Estate
	Residential Office		Special Planning Area
	Neighborhood Commercial		Open Space
	Central Business District		Outside UGA
	Community Commercial		
	Auto/Industrial Commercial		

## OREGON OAK

### *Quercus garryana* Dougl. ex Hook.

Plant Symbol = QUGA4

Contributed by: Santa Barbara Botanic Garden and  
USDA NRCS National Plant Data Center



Brother Alfred Brousseau  
© Brother Eric Vogel, St. Mary's College  
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#### Alternate Names

Oregon white oak, Garry oak, Brewer's oak, chêne de Garry; three varieties are recognized for this species: *Quercus garryana* var. *garryana*, *Quercus garryana* var. *breweri*, and *Quercus garryana* var. *semota*

#### Uses

**Wildlife:** Oregon oak is a valuable source of food and cover for wildlife. Gray squirrels, deer, and livestock eat acorns and the leaves of young shoots and sprouts.

**Ethnobotanic:** Native Americans used Acorns as a food staple.

**Construction:** In the Pacific Northwest, large trees were preferred for shipbuilding, railroad ties, and construction. Resistance to decay also contributed to

its use as fence posts. The wood continues to be important to cottage furniture and cabinet industries.

#### Status

Please consult the PLANTS Web site and your State Department of Natural Resources for this plant's current status, such as, state noxious status and wetland indicator values.

#### Description

**General:** Oak Family (Fagaceae). *Quercus garryana*, a native deciduous tree up to 30 m tall throughout much of its range in the Pacific Northwest, has an open, rounded crown. However, in the southern part of its range, including interior California, it also is a shrub up to 5 m tall, which is treated as var. *breweri* (Engelm.) Jepson. The mature bark is brownish gray and shallowly fissured in a checker-like pattern. Leaves are oblong to obovate, 8-15 cm long, and deeply lobed (5-7 rounded lobes). The upper surfaces are shiny and dark green, but the lower surfaces are pale green. Like all oaks, Oregon oak is monoecious and wind-pollinated. The acorn cups are composed of thick, tubercled scales. The one-seeded nuts are 2-3 cm long, ovoid, and mature in one year. Flowering takes place from March to May. Fruits mature between August and November. Color images, line drawings, and a description can be found in Farrar (1995).

#### Distribution

This species is known from California, Washington, Oregon, and British Columbia. For current distribution, please consult the Plant Profile page for this species on the PLANTS Web site.

#### Establishment

**Adaptation:** Oregon oak is best developed as a tree on slopes and valleys below 1500 m where annual rainfall exceeds 30 inches. The range in climate is considerable, extending from the relatively cool, moist Fraser Valley of British Columbia to the summer-dry Coast Ranges north of San Francisco and the foothills of the Sierra Nevada in California. Oregon oak takes the form of a shrub on nutrient-poor soils (e.g., serpentine) and drier sites, often forming clonal thickets. It is tolerant of freezing conditions and also has a broad tolerance of substrates, which vary from rocky, thin soils of ridges to the deep loams and clays of valley bottoms. Common associates in mixed forests include madrone, Douglas fir, tanbark oak, and yellow pines.

In the coastal mountains and in the absence of fire, Douglas fir gradually replaces Oregon oak. Throughout much of its range, Oregon oak reproduces extensively by basal sprouts, which often develop after fires. Thus, Oregon Oak is often associated with local grasslands maintained by fire. In some areas seedlings develop into multi-stemmed plants, which may live up to 10 years, until a single shoot becomes dominant. Like most oaks, Oregon oak has an obligate relationship with mycorrhizal fungi, which provide additional moisture and nutrients.

**Seed Preparation:** Oak seeds do not store well and consequently seeds should be planted soon after maturity. Nuts are considered ripe when they separate freely from the acorn cap and fall from the tree. Care should be taken to collect local fruits, because they may be adapted to local environmental conditions. Viable nuts may be green to brown, and have unblemished walls. Nuts with discoloration or sticky exudates, and small holes caused by insect larvae, should be discarded.



Charles Webber  
© California Academy of Sciences  
@ CalPhotos

**Direct Seeding:** Seeds may be planted at the beginning of the winter. Once the site is chosen, prepare holes that are 10 inches in diameter and 4-5 inches deep. One gram of a slow-release fertilizer should be placed in the bottom and covered by a small amount of soil. Place 6-10 acorns in each hole at a depth of 1-2 inches. Rodents or birds should use temporary enclosures to minimize herbivory. A simple enclosure can be constructed from a one-quart plastic dairy container with the bottom removed and a metal screen attached. Towards the end of the first season, seedlings should be thinned to 2 or 3 per hole and to one seedling by the second season. Supplemental watering may be necessary if a drought of 6 weeks or more occurs during the spring.

**Container Planting:** Seeds may be planted in one-gallon containers, using well-drained potting soil that includes slow-release fertilizer. Tapered plastic planting tubes, with a volume of 10 cubic inches, may also be used. Seeds should be planted 1-2 inches deep and the soil kept moist and aerated. Seedlings should be transplanted as soon as the first leaves open and become firm, which generally occurs in spring. Planting holes should be at least twice as wide and deep as the container. Seedlings may require watering every 2-3 weeks during the first season. Care should be taken to weed and mulch around young plants until they are 6-10 inches tall.

#### **Management**

Natural regeneration, through sprouting and seed germination, is promoted by fire, which contributes to expansion and persistence of Oregon oak stands. Continued disturbance by fire may result in pure stands that are often associated with an understory of grasses or scattered shrubs. Oregon oak is not as susceptible to oak crown (e.g., *Inonotus*, *Ganoderma*, and *Laetiporus*) as other oaks, unless disturbed by changes that include irrigation. Activities that disturb or compact soil around large trees, especially in urban settings, should be avoided.

#### **Cultivars, Improved and Selected Materials (and area of origin)**

This species can be acquired from nurseries throughout its range that deal in native plants. Contact your local Natural Resources Conservation Service (formerly Soil Conservation Service) office for more information. Look in the phone book under "United States Government." The Natural Resources Conservation Service will be listed under the subheading "Department of Agriculture."

#### **References**

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For more information about this and other plants, please contact your local NRCS field office or Conservation District, and visit the PLANTS Web site <<http://plants.usda.gov>> or the Plant Materials Program Web site <<http://Plant-Materials.nrcs.usda.gov>>

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