

Presented By:  
City Manager

Action Taken:  
Yes 4  
No 0  
Abstain 0

CITY OF NOME, ALASKA

ORDINANCE NO. O-16-01-02

AN ORDINANCE AMENDING CHAPTERS 3.40 AND 1.20 OF THE NOME CODE OF ORDINANCES TO PROVIDE FOR THE REGULATION OF THE COMMERCIAL MARIJUANA TRADE WITHIN CITY LIMITS

WHEREAS, the State of Alaska will issue licenses for the operation of marijuana establishments; and,

WHEREAS, marijuana, as an intoxicant, is rightfully regulated by the City of Nome in a manner similar to alcoholic beverages.

NOW, THEREFORE, BE IT ORDAINED BY THE NOME COMMON COUNCIL THAT CHAPTERS 3.40 AND 1.20 OF THE NOME CODE OF ORDINANCES BE AMMENDED AS FOLLOWS:

**Section 1. Classification.** This is a Code ordinance.

**Section 2. Amendment to NCO Section 3.40.010.** NCO 3.40.010 of the Code of Ordinances of Nome, Alaska, is hereby amended to read as follows [added language is underlined]:

**3.40.010. Definitions.**

“In public” means in or upon any city-owned property, as well as any place that members of the public are able to congregate regardless of whether the property is privately or publically owned. Examples include, but are not limited to, restaurants, bars, clubs, hallways, lobbies and common areas of hotels and multi-unit buildings, shorelines, waterways and tidelands.

“Marijuana” means all parts of the plant of the genus cannabis whether grown or not, the seeds thereof, the resin extracted from any part of the plant, and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or its resin, including marijuana concentrate.

“Marijuana accessories” means any equipment, products, or materials of any kind which are used, intended for use, or designed for use in planting, propagating, cultivating, growing, harvesting, composting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, vaporizing, or containing marijuana, or for ingesting, inhaling, or otherwise introducing marijuana into the human body.

“Marijuana establishment” means a marijuana cultivation facility, a marijuana testing facility, a marijuana product manufacturing facility, or a retail marijuana store that has been licensed by the State of Alaska.

“Marijuana products” means items containing concentrated marijuana and items that are comprised of marijuana and other ingredients and are intended for use or consumption, such as, but not limited to, edible products, ointments, and tinctures.

**Section 3. Amendment to NCO Section 3.40.030.** NCO 3.40.030 of the Code of Ordinances of Nome, Alaska is hereby amended by the addition of a new subsection 3.40.070(d) to read as follows:

(d) Upon conviction of a marijuana establishment licensee for a violation of any provision of this chapter or of the laws or regulations of the state of Alaska pertaining to marijuana and operation of marijuana establishments, the city police department shall send a notification of conviction together with a certified copy of the transcript of the trial proceeding and conviction to the Alaska Marijuana Control Board.

**Section 4. Amendment to NCO Chapter 3.40.** NCO 3.40 of the Code of Ordinances of Nome, Alaska, is hereby amended by the addition of new sections 3.40.070, 3.40.080, 3.40.090, and 3.40.100 to read as follows:

#### **3.40.070 Prohibitions.**

All laws and regulations of the state of Alaska regarding marijuana establishments, marijuana sales, cultivation, distribution, testing, manufacturing, and consumption apply within the city of Nome unless otherwise stated.

#### **3.40.080. Hours of Sale.**

(a) No person may consume, sell, offer for sale, give, furnish or deliver from a marijuana establishment, or on the premises of a marijuana establishment, any marijuana or marijuana product between the hours of ten p.m. and eleven a.m. on Mondays through Saturdays, and between the hours of ten p.m. and one p.m. on Sundays.

(b) The exception to subsection (a) of this section shall be from the day the first dog team arrives in the city from the Iditarod Dog Sled Race until the day of the Iditarod Banquet, from the first day of the Iditarod Basketball Tournament until the day of the Iditarod Basketball Banquet, from the first day of the Iditarod Dart Tournament and Iditarod Pool Tournament until the day of the Iditarod Dart and Iditarod Pool Tournament Championship Game, and on New Year’s Eve, when marijuana establishments are authorized to remain open until five a.m. on the following day; provided, however, that no exception period described above shall exceed five days in total. On the Sunday of the Bering Sea Open Golf Tournament and on the Sunday known as “Super Bowl Sunday,” marijuana establishments are authorized to open at ten a.m.

(c) The council may provide by resolution for other exceptions to subsection (b) of this section; provided, however, that no exception period under this section shall exceed five days in total. Exceptions authorized under this provision expire upon completion of any exception period. Permanent exceptions must be adopted by ordinance.

**3.40.090 Sale of non-Marijuana items.**

(a) No person shall solicit or engage in the sale, barter or exchange of any item on the premises of a marijuana establishment, except that the licensee, or his or her employees or agents, may sell marijuana, marijuana products, and marijuana accessories.

(b) It is unlawful for a marijuana establishment licensee, his or her employees or agents, to permit a person who violates subsection (a) of this section to remain upon the premises. If the licensee, or his or her employees or agents, has actual or constructive knowledge of a violation of subsection (a) of this section, he or she permits that person to remain if he or she fails to demand that that person leave the premises, or if such a demand is refused, fails to notify the Nome police department or Alaska State Troopers. As used in this subsection, “constructive knowledge” means the awareness a licensee, or his or her employees or agents, could have through the diligence in the operation of the licensed premises.

(c) The premises occupied by any marijuana establishment shall not be connected by a door, opening or other means of passage for the purpose of sales or for the purpose of passage by the general public to any other retail business establishment. :

**3.40.100 Off-duty police.**

No off-duty law enforcement officer shall enter any marijuana establishment with a firearm in his or her possession. Officers engaged in surreptitious or undercover duties may enter a marijuana establishment with a firearm, provided such a designation as surreptitious or undercover duties has been approved previously by a superior officer, and has been logged previously in an appropriate duty book as surreptitious or undercover law enforcement duties.

**Section 5. Amendment to NCO 1.20.040.** Section 1.20.040 of the Nome Municipal Code – Minor Offense Fine Schedule is hereby amended by the addition of new language to read as follows:

Code Reference	Offense	Penalty/Fine
3.40.070	Incorporated state law violation	100 – 1 <sup>st</sup> offense 200 – 2 <sup>nd</sup> offense 500 – 3 <sup>rd</sup> and subsequent offenses
3.40.080	Hours of operation violation	100 – 1 <sup>st</sup> offense 200 – 2 <sup>nd</sup> offense 500 – 3 <sup>rd</sup> and subsequent offenses
3.40.090	Sale of non-marijuana item	100 – 1 <sup>st</sup> offense 200 – 2 <sup>nd</sup> offense 500 – 3 <sup>rd</sup> and subsequent offenses

3.40.100	Off-duty police officer violation	100 - 1 <sup>st</sup> offense 200 - 2 <sup>nd</sup> offense 500 - 3 <sup>rd</sup> and subsequent offenses
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**Section 6.** **Effective Date.** This ordinance shall become effective immediately upon its enactment.

APPROVED and SIGNED the 25<sup>th</sup> day of January, 2016.

  
RICHARD BENEVILLE, Mayor

ATTEST:

  
BRYANT HAMMOND, Clerk

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**MEMORANDUM**

To: Nome Common Council

From: Charles A. Cacciola

Date: December 24, 2015

Re: Regulating Marijuana like Alcohol in the City of Nome

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At the December 14 work session, the council asked for an ordinance that would regulate marijuana establishments similar to the way Nome regulates alcohol establishments. The council also asked us to identify other areas that can be regulated. This memo explains the draft ordinance and outlines other potential areas of regulation. First, however, it briefly addresses the issue of marijuana clubs under the final draft of the state regulations.

**A. Marijuana Clubs**

The final version of the state regulations offers a *partial* solution to the problem of regulating marijuana clubs/bars by changing course on the privileges of marijuana retail stores. Previously, consumption of marijuana on the store premises was prohibited (much like consuming alcohol at a liquor store). The marijuana board added the following provision to the privileges of marijuana retail stores:

[A store may,] with prior approval of the board, permit consumption of marijuana or a marijuana product purchased on the licensed premises, in a designated area on the licensed premises.<sup>1</sup>

This provision allows a store to conduct take-away sales and sales for consumption on site. The board has not developed criteria for granting “prior approval,” probably because the board hit upon this idea late into the drafting process.

I suspect that the board will review a request to allow on-site consumption based upon criteria similar to those for serving alcoholic beverages. The “designated area” will probably be regulated similar to the way bars are regulated.

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<sup>1</sup> 3 AAC 306.305(a)(4).

Among other requirements for allowing on-site consumption, I am confident that the board will not approve an application for on-site consumption if the municipality has prohibited on-site consumption. Thus, if a municipality wishes to allow for retail sales but prohibit on-site consumption, it can do so by ordinance.<sup>2</sup> Similarly, a municipality could zone to allow marijuana sales in some areas while limiting on-site consumption to a more limited area. Again, the package store versus bar relationship is a good analogy to a “package” marijuana retail store and a marijuana retail store that can sell for on-site consumption.

By authorizing on-site consumption as a privilege of retail store licenses, the board may have created a stronger basis for regulating marijuana clubs generally. By making such consumption a regulated activity, the board will be better positioned to argue that it has authority to prohibit unlicensed marijuana clubs. As previously noted, at least one existing marijuana club has stated that it intends to challenge in court the board’s authority to prohibit the club. The outcome of such a challenge remains unclear.

### **B. Regulating Marijuana Establishments like Alcohol Sales**

The draft ordinance is closely based on Nome’s regulation of alcohol sales. Nome’s alcohol ordinances distinguish between package store and on-premises consumption vendors (i.e., restaurant/bars). Because of the novelty of on-site marijuana consumption, we have drafted the marijuana regulations to primarily track Nome’s package store operating hours, which are somewhat narrower than bar and restaurant hours. The council can certainly amend these hours as it sees fit and can also chose to precisely track Nome’s package store/on-site consumption distinction for retail sales and on-site consumption. At this time, however, we believe a simpler set of ordinances is appropriate. If and when lawful on-site marijuana consumption occurs in Nome, the council can then expand those operating hours to match bar hours if the council so chooses.

### **C. Further Regulation**

The regulations Nome has in place when the first licenses are issued in spring 2016 can be entirely different from the regulations Nome has a year later. This is an ongoing process, not the final word. The council can amend the regulations and enact a local option at any time, even after marijuana establishments are operating. If a municipality choses to prohibit marijuana establishments (any or all type), those establishments must cease operating 90 days after the ordinance goes into effect – that’s a risk of entering into the business.

Other regulatory areas the council may wish to consider include:

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<sup>2</sup> Nome has already prohibited on-site consumption via its definition of “in public,” which would include prohibiting marijuana consumption in a store. The board amended the *state’s* definition of “in public” so that it does NOT include “an area on the premises of a licensed marijuana retail store designated for on-site consumption under 3 AAC 306.305.”

- **Taxation**
  - All sales currently subject to Nome’s 5% sales tax. The tax rate for marijuana could be increased if the voters approve.
  - Excise tax (charged by weight or volume, not price). Excise tax does not require voter approval.
- **On-site consumption**
  - Nome’s prohibition of public marijuana consumption currently prohibits a store from allowing on-site consumption. If the council wishes to allow on-site consumption, it will need to amend the definition of “in public”.
- **Zoning**
  - Under Nome’s existing zoning ordinances marijuana establishments are not permitted in the city’s residential district.
- **Advertising restrictions**
  - State regulations limit signs for marijuana establishments to three signs, each is limited 4,800 square inches.
- **Marijuana product restrictions**
  - Allow market to decide based on state regulations?
  - Prohibit all non-bud marijuana products?
  - Prohibit edibles?
  - Prohibit non-edible marijuana products? (e.g., smokable concentrates)
  - Given the level of detail required for marijuana product packaging and labeling required by the state regulations, further regulating these is probably not necessary.
- **Cultivation & testing facility restrictions**
  - We’ve primarily discussed retail stores, but the city can separately regulate cultivation and testing facilities. These facilities are already subject to rigorous regulations, but further regulation is possible if the council has particularly concerns relating to these facilities.
- **Other regulations: ?**

Municipal authority to regulate marijuana business is broad. Regulation, state and local, will develop as the industry develops. Local regulation will also adapt to changes in state and federal regulation. At present, we do not know if legal marijuana commerce in Nome is viable. The council can most effectively regulate by determining broad policy goals – what, where, when – for marijuana commerce. Other details are best left for later consideration based upon how legal marijuana commerce develops in Nome.

1<sup>st</sup> Reading: August 10, 2015  
2<sup>nd</sup> Reading: August 24, 2015

Presented By:  
City Attorney  
Action Taken:  
Yes 5  
No 0  
Abstain 0

**CITY OF NOME, ALASKA**

**ORDINANCE NO. O-15-08-03 (Amended)**

**AN ORDINANCE AMENDING TITLE 3 OF THE NOME CODE OF ORDINANCES TO ESTABLISH CHAPTER 3.40 MARIJUANA REGULATION AND AMENDING SECTION 1.20.040 TO ESTABLISH A PENALTY FOR VIOLATION**

**WHEREAS**, the State of Alaska has legalized personal use of marijuana; and

**WHEREAS**, marijuana, as an intoxicant, is rightfully regulated by the City of Nome for the health and safety of its residents.

**NOW, THEREFORE, BE IT ORDAINED BY THE NOME COMMON COUNCIL THAT:**

**Section 1.** Amendment to Title 3. Nome Municipal Code Title 3 (Business Licenses and Regulations) is hereby amended by the addition of a new Chapter 3.40 (Marijuana Regulation) to read as follows:

**Chapter 3.40  
MARIJUANA REGULATION**

- 3.40.010 Definitions.**
- 3.40.020 Local regulatory authority.**
- 3.40.030 Violations and penalties.**
- 3.40.040 Marijuana establishment registrations.**
- 3.40.050 Marijuana use in public prohibited.**
- 3.40.060 Marijuana use in motorized vehicles prohibited.**
- 3.40.070 Marijuana use without consent of property owner prohibited.**

**3.40.010. Definitions.**

“In public” means in or upon any city-owned property, as well as any place that members of the public are able to congregate regardless of whether the property is privately or publically owned. Examples include, but are not limited to: restaurants, bars, clubs, hallways, lobbies and common areas of hotels and multi-unit buildings, shorelines, waterways and tidelands.

“Marijuana” means all parts of the plant of the genus cannabis whether grown or not, the seeds thereof, the resin extracted from any part of the plant, and every compound, manufacture, salt, derivative, mixture or preparation of the plant, its seeds, or its resin, including marijuana concentrate.

“Marijuana establishment” means a marijuana cultivation facility, a marijuana testing facility, a marijuana product manufacturing facility, or a retail marijuana store that has been licensed by the State of Alaska.

“Marijuana products” means items containing concentrated marijuana and items that are comprised of marijuana and other ingredients, and are intended for use or consumption, such as, but not limited to: edible products, ointments, and tinctures.

**3.40.020. Local Regulatory Authority.**

The City Council is designated as the “local regulatory authority” as that term is used in Alaska Statutes Chapter 17.38 and any implementing legislation or rule-making.

**3.40.030. Violations and Penalties.**

A. It is unlawful for any person who operates any restaurant, eatery, bar, hotel, or other lodging to permit marijuana use in violation of the chapter.

B. It is unlawful for any person to send, transport, bring, consume or use marijuana or marijuana products in violation of this chapter.

C. Any person aggrieved by a violation or threatened violation of this chapter, or the city, may bring a civil action against a person who violates this chapter and may recover a civil penalty in an amount equal to the fine amount for the violation as set forth in the bail forfeiture and fine schedule. An action to enjoin a violation may be brought notwithstanding the availability of any other remedy.

~~**3.40.040. Importation of Marijuana for Sale or Commercial Manufacture Prohibited.**~~

~~A. No person shall send, transport or bring marijuana or marijuana products into the City of Nome for commercial manufacture of marijuana products or for sale within the City of Nome.~~

~~B. This provision does not prohibit transport of marijuana or marijuana products:~~

~~1. Through the City of Nome by a marijuana establishment located outside city limits when such transport is documented as required by law;~~

~~2. For lawful personal use.~~

**3.40.050.040. Marijuana use in public prohibited.**

Use or consumption of marijuana in public is prohibited. This section is not intended to restrict the owner of any property from further restricting use of marijuana.

~~**3.40.060.050. Marijuana use in or on motor vehicles is prohibited.**~~

~~Marijuana use in or on motor vehicles, watercraft, or aircraft is prohibited.~~

~~**3.40.070.060. Marijuana use without consent of property owner.**~~

~~A. Use or consumption of marijuana on private property without the affirmative consent of the property owner is prohibited.~~

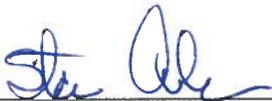
B. If a person has a possessory interest in private property but is not the owner and the owner prohibits the use or consumption of marijuana, use or consumption of marijuana on or in that property is prohibited.

**Section 2.** Amendment to Title 1. Nome Municipal Code Title 1 (1.20.040 Minor Offense Fine Schedule) is hereby amended by the additions of new language to read as follows:

NCO Section	Offense	Penalty/Fine
3.40.030 (A)	<b>Permitting prohibited marijuana use</b>	
	First violation within a twelve-month period	\$100
	Second violation within a twelve-month period	\$500
	Third violation within a twelve-month period	Mandatory Court
3.40.030 (B)	<b>Prohibited marijuana use or transport</b>	
	First violation within a twelve-month period	\$100
	Second violation within a twelve-month period	\$500
	Third violation within a twelve-month period	Mandatory Court

**Section 3.** Effective Date. This ordinance shall be effective upon passage.

APPROVED and SIGNED the 24<sup>th</sup> day of August, 2015.

  
STAN ANDERSEN,  
Presiding Councilman

ATTEST:

  
TOM MORAN,  
City Clerk



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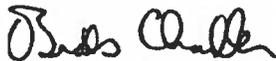
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**MEMORANDUM**

**TO:** Ms. Josie Bahnke  
City Manager

**FROM:** Brooks W. Chandler  
City Attorney



**DATE:** July 20, 2015

**SUBJECT:** Marijuana Ordinance

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We have prepared a draft ordinance which:

1. Sets the boundaries of unlawful use of marijuana "in public".
2. Establishes the city council as the "local regulatory body" for commercial marijuana.
3. Prohibits the importation of marijuana for sale in the City of Nome.
4. Sets fine levels.

The importation provision would limit commercial marijuana in Nome to "Nome grown" marijuana and marijuana products. Establishing the city council as a local regulatory authority is required if Nome wishes to qualify to receive one-half of the state fees associated with future state permits for commercial marijuana facilities in Nome.

The council did not specifically request provisions establishing the boundaries of lawful "public use" of marijuana in Nome. These were included only because we had already prepared similar provisions for other communities we represent and due to the failure of the state legislature to adopt SB 30 which contained a state law definition of "public" specific to marijuana.

This memorandum discusses the ordinance section by section.

**3.40.010 - Definitions**

The definition of "in public" is included because there currently is no state statute defining this phrase specific to use of marijuana. There is a state regulation originally adopted on an "emergency" basis. We question the enforceability of that definition in Nome in part because we do not believe the original situation leading to the adoption of the regulation qualified as an "emergency". In addition, there are common sense reasons to allow local police officers to issue citations based on our own ordinance rather than as a violation of state law. These include reducing the criminal consequences of these violations to a "minor offense" and allowing the city to keep the fine money. The substance of the definition would ban smoking marijuana in bars and clubs and common areas in apartment buildings and hotels. If the city council does not wish to consider this issue at this time this definition should be deleted.

The definitions of marijuana and marijuana products are taken from state law. AS 17.38.900.

**3.40.020 - Local Regulatory Authority**

This designates the city council as the local regulatory authority. As previously advised, this is required by state law if the city is to receive half the state permit fees. It also means that if for some reason the State fails to meet the deadlines for regulation of commercial marijuana facilities persons wishing to enter that business may apply to the city for a commercial marijuana permit.

**3.40.030 - Violations and Penalties**

This establishes what conduct violates the law. Subsection A makes a business owner who permits marijuana to be used in public subject to a fine. Subsection B makes the person using marijuana in public or importing marijuana for sale subject to a fine. Subsection C allows a private citizen to file a civil lawsuit to stop violations. This was added as a possible alternative to involving the city in disputes between neighbors over marijuana use.

**3.40.040 - Importation for Sale Ban**

This is the "Nome grown" provision. If the City allows commercial marijuana facilities, marijuana or marijuana products sold in a licensed marijuana store must be grown

Memo to Josie Bahnke  
July 20, 2015  
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or made in Nome. The exceptions are based on existing state law (personal use) and proposed state regulations (transit exception).

**3.40.050- No Marijuana Use in Public**

If enacted this provision would allow the police department to issue citations under city law rather than state law.

**3.40.060 - No Use in Cars, Planes or Boats**

This would prohibit passengers from using marijuana. This is not clearly prohibited by existing state law. It is the equivalent of the "open container" alcohol law.

**3.40.070 - Property Owner Consent**

This would allow the police to issue citations to persons smoking marijuana on vacant lots or in situations where their landlord has prohibited marijuana use. Since this conduct takes place on private property it is not clearly prohibited by existing state law.

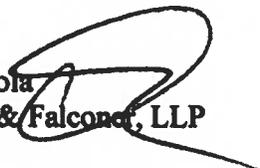
**Section 3.** This establishes the fines. The \$100 fine amount is set by state law. The \$500 fine applies to conduct not expressly prohibited by state law is not subject to the \$100 fine amount set by AS 17.38.

We recommend the draft be considered in a work session so that desired changes can be made before the ordinance is introduced.

## MEMORANDUM

To: City Council

Tom Moran  
City Clerk

From: Charles A. Cacciola   
Boyd, Chandler, & Falconer, LLP  
City Attorney

Date: August 17, 2015

Re: Authority for Proposed Marijuana Ordinances

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We have been asked to address concerns that certain marijuana-regulating provisions of Ordinance 2015-08-03 violate the right to privacy enshrined in the Alaska Constitution and that the City of Nome lacks authority to pass and enforce the ordinance.

The City has authority to pass and enforce the ordinance and no provision unlawfully infringes on Alaskans' right to privacy or due process. Our basis for this conclusion, set out below, begins by discussing Nome's legislative powers, then the right to privacy and how courts apply it, and finally turns to the ordinance provisions.

### I. LEGISLATIVE AUTHORITY

As a first class city outside of a borough, the City of Nome has all powers not prohibited by law.<sup>1</sup> Unless a constitution, statute, or superior regulation prohibits the City from enacting and enforcing legislation, it has the power and authority to do so.

Nome resident Tim Smith argues the right to privacy, enshrined in the Alaska Constitution<sup>2</sup> and implied (though less robustly) by the US Constitution,<sup>3</sup> precludes the City from enacting certain marijuana-regulating provisions of Ordinance 2015-08-03. If Mr. Smith is correct, the City is precluded from exercising this authority.

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<sup>1</sup> AS 29.45.260.

<sup>2</sup> See Alaska Constitution, Art. I, Sec. §22.

<sup>3</sup> See e.g., *Mapp v. Ohio*, 367 US 643 (1961).

## II. RIGHT TO PRIVACY

The right to privacy has been described many ways, including the “right to be left alone”.<sup>4</sup> But this right, in a free society such as ours, has never been recognized as absolute and without limitation.<sup>5</sup> The courts’ function is to create a workable equilibrium between the two polar idea of privacy and public interest. As a result, Alaska courts apply a balancing test to alleged violations of the right to privacy.<sup>6</sup>

The nature of the balancing varies with the importance of the privacy interest infringed.<sup>7</sup> When encroaching on *fundamental* aspects of the rights to privacy or liberty, there must be a compelling governmental interest and the absence of a less restrictive means to advance that interest. “When, on the other hand, governmental action interferes with an individual’s freedom in an area that is *not characterized as fundamental*, a less stringent test is ordinarily applied.”<sup>8</sup> To justify interference with non-fundamental aspects of privacy and liberty, the government must show (1) a legitimate interest and (2) a close and substantial relationship between that interest and the chosen means of advancing it.<sup>9</sup>

As a result, the first step is to determine the nature of the interest affected as not every claim of privacy is a fundamental aspect of the right to privacy. Fundamental aspects include seclusion in the home,<sup>10</sup> personal identity and appearance,<sup>11</sup> family planning,<sup>12</sup> intimate relations,<sup>13</sup> and choosing or rejecting medical treatment.<sup>14</sup> Non-fundamental concerns and intrusions include wearing a seatbelt,<sup>15</sup> physician-assisted suicide, massage parlors,<sup>16</sup> and smoking tobacco in a private club.<sup>17</sup>

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<sup>4</sup> See e.g., *Ravin v. State*, 537 P.2d 494, 509 (Alaska 1975); *FCC v. Pacifica Foundation*, 438 US 726, 748 (1978).

<sup>5</sup> *Messerli v. State*, 626 P. 2d 81, 83 (Alaska 1980).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Ravin*, 537 P.2d at 497 (emphasis added).

<sup>9</sup> *Sampson v. State*, 31 P. 3d 88, 91 (Alaska 2001).

<sup>10</sup> *Ravin*, 537 P.2d 494.

<sup>11</sup> *Breese v. Smith*, 501 P. 2d 159 (Alaska 1972).

<sup>12</sup> *Valley Hosp. Ass’n v. Mat-Su Coalition*, 948 P. 2d 963 (Alaska 1997).

<sup>13</sup> *Lawrence v. Texas*, 539 US 558 (2003).

<sup>14</sup> *Myers v. Alaska Psychiatric Institute*, 138 P. 3d 238 (Alaska 2006).

<sup>15</sup> *Chase v. State*, 243 P. 3d 1014 (Alaska 2010).

<sup>16</sup> *Hilbers v. Municipality of Anchorage*, 611 P. 2d 31 (Alaska 1980).

### III. *RAVIN V. STATE OF ALASKA*

The Alaska Supreme Court looked at marijuana and the right to privacy in *Ravin v. State*. Irwin Ravin challenged the constitutionality of marijuana prohibition following his arrest for possessing a small amount of marijuana in his car.<sup>18</sup> He argued the state's interest in prohibiting marijuana was insufficient to overcome his right to privacy. The Court concluded the right to privacy prevents the state from enforcing the marijuana prohibition against a resident possessing a modest amount (later determined to be four ounces<sup>19</sup>) *in his home* because prohibiting marijuana on a statewide basis is not narrowly tailored to the state's legitimate interest in protecting health and safety. *Ravin does not* hold that Alaskans have a right to use marijuana. Rather, marijuana use *in the home* is not sufficiently harmful to justify the state's intrusion into the home, where the right to privacy is at its zenith. Alaskans have the constitutional right to be left alone at home, not use or possess marijuana.

### IV. CHALLENGED ORDINANCE SECTIONS

Mr. Smith challenges four separate sections of Ordinance 2015-08-03. Each section is a proposed addition to the Nome Code of Ordinances. Violation of each section, if passed, will constitute a minor offense, punishable by a modest monetary fine.

#### A. 3.40.040 Importation of Marijuana for Sale or Commercial Manufacture Prohibited.

Nome Ordinance 3.40.040 would prohibit importing marijuana into the City for the purposes of commercial manufacture of marijuana products and for sale within the City. The ordinance allows marijuana to be imported for lawful personal use as well as marijuana in the stream of commerce merely passing through Nome. Mr. Smith argues that this section violates Alaskans' right to privacy.

In *Hilbers v. Municipality of Anchorage*, the Alaska Supreme Court determined that "the 'commercial and public' aspects of [ ] massage parlor activities remove the shield of privacy from these activities."<sup>20</sup> That is, while intimate relations are normally accorded the highest degree of protection, the commercial nature of the massage parlor removed the privacy interest.

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<sup>17</sup> *Frat. Order of Eagles v. Borough of Juneau*, 254 P.3d 348 (Alaska 2011).

<sup>18</sup> *Ravin*, 537 P.2d 494.

<sup>19</sup> *Noy v. State*, 83 P.3d 538 (Alaska App. 2003).

<sup>20</sup> *Hilbers*, 611 P.2d at 42.

Presented with Mr. Smith's challenge, a court would apply the same principle. Importation for *personal* use may be protected by the right to privacy (conduct that is not prohibited by the ordinance); importation for *commercial purposes* is not protected. This conclusion is buttressed by *Ravin*, which noted the right to privacy protected marijuana in a "purely personal, *non-commercial* context in the home".<sup>21</sup>

The City has a substantial interest in controlling intoxicants imported for commercial sale, which does not impugn residents' right to privacy as that right does not extend to commercial activity. Further, pending administrative regulations specifically recognize municipalities' authority to prohibit importation for commercial sale.<sup>22</sup>

**B. 3.40.050 Marijuana use in public prohibited.**

Section 3.40.050 would prohibit using marijuana in public, defined as follows:

"In public" means in or upon any city-owned property, as well as any place that members of the public are able to congregate regardless of whether the property is privately or publically owned. Examples include, but are not limited to, restaurants, bars, clubs, hallways, lobbies and common areas of hotels and multi-unit buildings, shorelines, waterways and tidelands.<sup>23</sup>

Mr. Smith argues that 3.40.050 violates Alaskan's right to privacy, presumably based upon the definition of "in public."

The right to privacy does not extend to public conduct as a person does not have a reasonable expectation of privacy in public. Thus, we understand Mr. Smith's objection to be the scope of the City's definition of "in public" rather than to the City's authority to regulate marijuana use in public.<sup>24</sup> Mr. Smith has not stated what aspect of the "in public" he finds so overly broad that it would regulate private spaces.

The proposed definition of "in public" is substantially similar to the definition provided by the Alaska Administrative Code, which states:

In AS 17.38.040, "in public" means in a place to which the public or a substantial group of persons has access and includes highways, transportation facilities, schools, place or amusement or business, parks, playgrounds, prisons, and hallways, lobbies, and other portions of

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<sup>21</sup> *Ravin*, 537 P.2d at 504.

<sup>22</sup> Proposed Regulation Set #1, Round 2, 3 AAC 306.240.

<sup>23</sup> Ordinance 2015-08-03, § 3.40.010.

<sup>24</sup> Which is specifically provided for by statute. *See* AS 17.38.040.

apartment houses and hotels not constituting rooms or apartments designed for actual residential use.<sup>25</sup>

Alaska appellate courts have repeatedly declined to find the right to privacy protects public marijuana use.<sup>26</sup> The above definitions are based on well-established definitions used by other areas of Alaska law.<sup>27</sup> The definitions also mirror the City's prohibition on public consumption of alcohol,<sup>28</sup> and similar prohibitions contained in municipal codes throughout Alaska that have been in place for many years without a successful legal challenge.<sup>29</sup>

Additionally, the Alaska Supreme Court has found that the right to privacy does not supersede municipal authority to prohibit smoking in *private* clubs, which afford a greater degree of privacy than places in the "in public" definition.<sup>30</sup>

The proposed definition of "in public" mirrors accepted definitions and the City is authorized to prohibit public marijuana use. As a result, a court would find the right to privacy does not preclude the City from prohibiting marijuana use in public as so defined.

#### **C. 3.40.060 Marijuana use in or on motor vehicles prohibited.**

Section 3.40.060 would prohibit use of marijuana in or on vehicles, watercraft, or aircraft. Mr. Smith argues that such a prohibition violates Alaskans' right to privacy.

Alaska appellate courts have repeatedly stated that the right to privacy does not extend to the *possession* of marijuana in an automobile, much less use.<sup>31</sup> The proposed ordinance prohibits marijuana use in vehicles. Such a prohibition unquestionably serves a legitimate government interest and is closely and the City's means of advancing that interest are substantially related to the interest.

In *Ravin*, the Court determined marijuana's effects on health are relatively benign, but specifically noted the risks of operating a vehicle under the influence of marijuana are

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<sup>25</sup> 3 AAC 304.990(b).

<sup>26</sup> *E.g., Belgrad v. State*, 543 P.2d 206 (Alaska 1975).

<sup>27</sup> *See e.g., Ell v. State*, 572 P.2d 786 (Alaska 1997); *Tuttle v. State*, 175 P.3d 60 (Alaska App. 2008).

<sup>28</sup> NCO § 3.05.030.

<sup>29</sup> *E.g., Anchorage Municipal Code* § 8.35.400; *Juneau Code of Ordinances* § 42.20.090(b)(2).

<sup>30</sup> *Frat. Order of Eagles*, 254 P.3d 348.

<sup>31</sup> *Ravin*, 537 P. 2d at 510; *Noy*, 83 P.3d 538.

not. Operating under the influence of marijuana is a criminal offense in Alaska<sup>32</sup> and presents similar risks to operating under the influence of alcohol. Preventing intoxicated driving is not merely a legitimate public interest, but a compelling one.

The proposed ordinance, of course, prohibits *all* marijuana use in vehicles, not just by the operator or operating under the influence. Nevertheless, the regulation is a lawful expression of municipal authority. Prohibiting marijuana use in vehicles is substantially related to preventing people from operating vehicles under the influence as well as deterring unnecessary distractions.

The Supreme Court has held that laws requiring motorcyclists to wear helmets<sup>33</sup> and vehicle occupants to wear seatbelts<sup>34</sup> do not violate the right to privacy or due process. Such regulations are supported by “compelling state interests in providing for [the] safety of the traveling public”.<sup>35</sup>

Prohibiting marijuana use in vehicles is likely to reduce incidences of driving under the influence of marijuana as well as decrease incidences of passengers distracting the operator from operating the vehicle. Reducing marijuana use in vehicles is an effective measure for reducing deaths and serious injuries from vehicle accidents.

Moreover, this ordinance has a very close analog under a decades-old state statute. AS 28.35.029 prohibits open containers of alcohol in a vehicle. The public interest in such a prohibition is the same as prohibiting marijuana use: The conduct is not inherently dangerous, but the conduct is substantially proximate to conduct that is exceptionally dangerous – intoxicated and distracted operation of a vehicle.

The right to privacy does not protect using marijuana in a vehicle. In any case, Alaskans’ privacy and liberty rights must give way to the compelling public interest of reducing intoxicated and distracted driving. Prohibiting use of intoxicants in vehicles is closely and substantially related to this compelling interest.

**D. 3.40.070 Marijuana use without consent of property owner.**

This section would prohibit marijuana use on private property without the consent of a person with authority to give such consent.<sup>36</sup> If a person *does not have* a possessory

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<sup>32</sup> AS 28.35.050.

<sup>33</sup> *Kingery v. Chapple*, 504 P.2d 831, 835-37 (Alaska 1972).

<sup>34</sup> *Chase v. State*, 243 P. 3d 1014, 1017-1018 (Alaska App. 2010).

<sup>35</sup> *Kingery*, 504 P.2d at n. 6.

<sup>36</sup> To clarify the intent and purpose of the ordinance, subsection A should be amended to read “without the affirmative consent of a person with authority to grant it” rather than the current language requiring permission from the property owner. For

interest in the property (e.g., a lease), the person needs the affirmative consent of the property owner before using marijuana on the property. If the person *has* a possessory interest, the person is able to use marijuana unless the property owner has affirmatively prohibited marijuana use.

The first part of the ordinance presumes that most people do not want others coming onto their property to use marijuana. But it does not prohibit a person from allowing such conduct (which would violate the right to privacy). The privacy interest primarily belongs to the property owner and that person is able to allow others to use marijuana on the property as he chooses.

The second part presumes a lessee or tenant has the right to use the leased property to the full extent permitted by the owner. A property owner unquestionably has the right to prohibit marijuana use a lease condition.<sup>37</sup> This subsection makes violation of such a lease condition into a minor offense. Public enforcement of a private interest has substantial precedent, but it is important to look to the primary intent of this ordinance – ensuring that residents and tenants of multi-unit buildings that the owner has determined shall be marijuana-free are able to enjoy use of the property free of marijuana.

If anything, this section furthers the right to privacy as it furthers the control a property owner may assert over his or her property. The section is effectively a trespass ordinance and Mr. Smith has not identified any constitutional right to trespass. This provision does not impugn on the right to privacy as there is no right to use marijuana (or anything else) on the property of another without that person's permission or against the express demands of the property owner.

## V. CONCLUSION

Each section of Ordinance 2015-08-03 is a lawful expression of the City's legislative authority. *Marijuana is not protected by the constitutional right to privacy.* The proposed regulations may affect certain non-fundamental rights, but those rights must give way to legitimate public interests. A right to be left alone and use marijuana in a car, for example, must give way to the public interest in deterring intoxicated and distracted driving. The proposed ordinances do not invade any fundamental right and each ordinance furthers a legitimate public interest and the method chosen is closely and substantially related to the interest furthered.

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example, the lessee of property should be able to give consent so long as marijuana consumption is not prohibited by the landlord.

<sup>37</sup> AS 17.38.010.

Presented By:  
City Manager

Action Taken:  
Yes 4  
No 2  
Abstain 0

**CITY OF NOME, ALASKA**

**ORDINANCE NO. O-15-02-08**

**AN ORDINANCE AMENDING CHAPTER 10.50 OF THE NOME CODE OF ORDINANCES**

**WHEREAS**, the City of Nome has the power to regulate the conduct of persons within City limits pursuant to a number of provisions of the Nome Code of Ordinances; and,

**WHEREAS**, the passage of Ballot Measure #2 in the 2014 State of Alaska Election has provided for the legalization of various marijuana-related activities on a specific timeline; and,

**WHEREAS**, the City wishes to be proactive in regulating the marijuana-related behaviors that can be regulated by individual municipalities; and,

**WHEREAS**, in order for the City to regulate such behaviors, an applicable ordinance must be in place; and,

**WHEREAS**, on January 26, 2015, the City Council requested that such an ordinance be drafted by the City Attorney and the Police Chief.; and,

**WHEREAS**, in order for Chapter 3.07 of the Nome Code of Ordinances to be effective, Chapter 10.50 must be amended to include marijuana smoking.

**NOW, THEREFORE, BE IT ORDAINED BY THE NOME COMMON COUNCIL THAT CHAPTER 10.50 OF THE NOME CODE OF ORDINANCES BE AMENDED AS FOLLOWS:**

**Section 1.**     Classification. This is a Code ordinance.

**Section 2.**

**Chapter 10.50  
SMOKING IN PLACES OF EMPLOYMENT AND PUBLIC PLACES**

Sections:

<u>10.50.010</u>	Definitions.
<u>10.50.020</u>	Smoking prohibited.
<u>10.50.030</u>	Reasonable distance.
<u>10.50.040</u>	Where smoking not prohibited.
<u>10.50.050</u>	Sign posting and other requirements.
<u>10.50.070</u>	Violations and penalties.

**10.50.010 Definitions.**

“Business” means any legal entity, whether for profit or not-for-profit, that provides goods or services, including, but not limited to, a sole proprietorship, partnership, limited liability company, corporation, trust, membership organization or similar entity.

“Employee” means any person who is employed by any employer for compensation or works for an employer as a volunteer.

“Employer” means any person or business, including a municipal corporation or nonprofit entity, who employs the services of one or more individual persons.

“Enclosed area” means all space between a floor, a ceiling and surrounding walls, windows and doors, whether open or closed, temporary or permanent. An area is not enclosed if at least fifty percent of the combined surface of the area’s vertical planes is permanently and directly open to the outdoors.

“Health care facility” means a business, office or institution that provides care or treatment of diseases or disability, whether physical, mental or emotional.

“Marijuana” means all the parts of the plant of the genus cannabis whether growing or not, the seeds thereof, the resin extracted from any part of the plant, and every compound, manufacture, derivative, mixture, or preparation of the plant, its seeds, or its resin, including marijuana concentrate; “marijuana” does not include fiber produced from the stalks, oil, cake made from the seed of the plant, sterilized seeds of the plant which is incapable of germination, or the weight of any other ingredient combined with marijuana to prepare topical or oral administrations, food, drink, or other products.

“Place of employment” means an area under the control of a public or private employer including, but not limited to, work areas, private offices, employee lounges, restrooms, conference rooms, classrooms, cafeterias, hallways, and vehicles. A private residence is not a place of employment except during the time when used as a child care, adult care or health care facility on a fee-for-service basis.

“Public place” means any place to which the public or a substantial group of persons has access, including but not limited to streets, highways, alleys, sidewalks, transportation facilities, schools, places of amusement or business, food and beverage service facilities, offices, retail stores, parks, playgrounds, hallways, lobbies, vehicles available for commercial hire, and other portions of apartment houses and hotels not constituting rooms or apartments designed for actual residence and waterways.

“Smoking” means inhaling, exhaling, burning or carrying any lighted or heated tobacco, nicotine, marijuana, plant material intended for inhalation or any oils intended for vaporization and inhalation; or material designed to mimic tobacco or marijuana products. Smoking includes the use of all electronic devices designed for the purpose of consuming the above substances by producing heat, smoke or vapor. (Ord. 11-04-02 § 2 (part), 2011)

**10.50.020 Smoking prohibited.**

(a) Smoking is prohibited at the following places:

- (1) All enclosed public places within the city of Nome.

(2) All enclosed areas that are places of employment, including office buildings, hotels, restaurants, bars, medical facilities, stores, and all other types of businesses.

(3) All enclosed areas on properties, including buildings or vehicles, owned or controlled by the city of Nome, and including every room, chamber, place of meeting or public assembly under the control of the city of Nome.

(4) All areas within twenty feet of each entrance to enclosed areas on properties owned or controlled by the city of Nome, including every room, chamber, place of meeting or public assembly under the control of the city of Nome.

(5) All areas within fifty feet of each entrance to a health care facility.

(6) All outdoor playing fields, playgrounds, and parks controlled by the city of Nome except in designated smoking areas, which may be established only in perimeter areas at least twenty feet from bleachers, grandstands, seating areas within the venue/park/playground, and concession stands.

(7) All public and school bus stops, including buildings and other structures intended for shelter while waiting for transportation.

(8) All areas within twenty feet of each entrance to enclosed areas at an establishment licensed under state law to sell alcoholic beverages for consumption on the premises. When an establishment licensed under state law to sell alcoholic beverages for consumption on the premises includes an entrance to an outdoor area such as a patio or deck, the minimum reasonable distance under NCO Section 10.50.030 shall be ten feet.

(9) Reasonable distance areas as defined by NCO Section 10.50.030.

(b) Smoking is prohibited on any property not listed in subsection (a) of this section, whether or not enclosed, if the owner, operator, manager, or other person having control of the property chooses to prohibit smoking.

#### **10.50.030 Reasonable distance.**

To ensure that smoke does not enter any enclosed area where smoking is prohibited by this chapter through entrances, windows, ventilation systems or any other means, smoking shall occur only at a reasonable distance outside any enclosed public place or place of employment where smoking is prohibited. Unless otherwise stated under this chapter, the minimum reasonable distance is twenty feet. (Ord. 11-04-02 § 2 (part), 2011)

#### **10.50.040 Where smoking not prohibited.**

(a) Smoking is not prohibited in the following places:

(1) Outdoor areas of places of employment except the outdoor areas identified under NCO Section 10.50.020.

(2) Private residences, except during the time when used as a child care, adult care, or health care facility on a fee-for-service basis. Individuals providing child care in a private residence on a fee-for-service basis shall disclose to parents or guardians of children cared for on the premises if the proprietor permits smoking outside of the hours when child care is provided. Disclosure shall include posting on the premises a conspicuous written notice and orally informing parents or guardians.

(b) Nothing in this chapter shall be construed or interpreted to provide any person a right to smoke on premises or property owned, leased or under the legal control of another. (Ord. 11-04-02 § 2 (part), 2011)

#### **10.50.050 Sign posting and other requirements.**

(a) The owner, operator, manager or other person in control of a public place or place of employment where smoking is prohibited by this chapter shall clearly and conspicuously place at every entrance "No Smoking" signs or the international "No Smoking" symbol (consisting of a pictorial representation of a burning cigarette enclosed in a red circle with a red bar across it).

(b) The owner, operator, manager or other person in control of every health care facility to which this chapter applies shall post at every entrance a conspicuous sign clearly stating that smoking is prohibited within fifty feet of the entrance to the building and within the building.

(c) Employers shall provide a smoke-free workplace, and neither an employer nor a person having legal control of the premises may permit an employee, customer or other person to smoke inside enclosed areas subject to the requirements of this chapter.

(d) The owner, operator, manager or other person in control of any area where smoking is prohibited by this chapter shall remove all ashtrays from the area, except those ashtrays for sale and not intended for use on the premises.

(e) If an owner, operator, manager or other person in control of any area where smoking is prohibited observes a person smoking in violation of this chapter, he or she shall direct the person to stop smoking. If the person does not stop smoking, the owner, operator, manager or other person in control of the area shall ask the person to leave the premises. If the person in violation refuses to leave, the owner, operator, manager or other person in control shall report the violation as provided by NCO Section 10.50.080(a). (Ord. 11-04-02 § 2 (part), 2011)

#### **10.50.070 Violations and penalties.**

(a) It is unlawful for any owner, operator, manager or other person in control of any area where smoking is prohibited by this chapter to fail to comply with any provision of this chapter.

(b) It is unlawful for any person to smoke in any area where smoking is prohibited by this chapter.

(c) Any person who violates any provision of this chapter shall be guilty of an infraction, punishable by a fine as set forth in NCO Section 1.20.040, plus any surcharge required to be imposed by AS 12.55.039.

(d) Each and every day that such violation continues shall be deemed a separate and distinct violation.

(e) The city or any person aggrieved by a violation or threatened violation of this chapter may bring a civil action against a person who violates this chapter and may recover a civil penalty not to exceed five hundred dollars per violation. (Ord. 0-14-01-02 § 24, 2014; Ord. 11-04-02 § 2 (part), 2011)

#### **10.50.080 Enforcement.**

(a) Enforcement of this chapter shall be by the city manager or his or her designee(s) or by city police officers. Any person who desires to register a complaint hereunder may initiate enforcement consideration with the city manager or his or her designee(s) or with the Nome police department.

(b) Prior to citing an owner, operator, manager or other person in control of any area where smoking is prohibited by this chapter for an initial violation, the city shall provide the owner, operator, manager or other person in control with a written warning. Thereafter, the owner, operator, manager or other person in control shall be subject to the penalties set forth in NCO Section 1.20.040. The written warning required by this subsection does not apply in the case of an individual person who unlawfully smokes in violation of NCO Section 10.50.070(b).

(c) Notwithstanding the availability of any other remedy provided by the provisions of this chapter, the city manager or any person aggrieved by the failure of the owner, operator,

manager or other person in control of any area where smoking is prohibited to comply with the provisions of this chapter may apply for injunctive relief to enforce these provisions in any court of competent jurisdiction. (Ord. O-14-01-02 § 25, 2014; Ord. 11-04-02 § 2 (part), 2011)

**Section 3.** **Effective date.** This ordinance is effective upon passage.

**APPROVED** and **SIGNED** the 2<sup>nd</sup> day of March, 2015.



**DENISE MICHELS**  
Mayor

**ATTEST:**



**TOM MORAN**  
City Clerk