

CLERK'S OFFICE

AMENDED AND APPROVED

Date: 2-23-99

Submitted by: Chairman of the Assembly

Prepared by: Department of Law

For Reading: May 5, 1998

ANCHORAGE, ALASKA
AR NO. 98-164 (As Amended)

A RESOLUTION REVOKING THE CONDITIONAL USE PERMIT ALLOWING THE
RETAIL SALE AND DISPENSING OF ALCOHOLIC BEVERAGES AT 6119 OLD
SEWARD HIGHWAY, FORMERLY KNOWN AS THE SAWMILL CLUB AND
CURRENTLY KNOWN AS KLONDIKE KATE'S BARE TRAP SALOON.

FINDINGS OF FACT

- 1 The Assembly is authorized by AMC 21.50.160(E) to revoke a conditional use permit issued under this section for the retail sale of alcoholic beverages, providing a public hearing with notice to the owner affected is first held.
2. By AM 1184-84 and AM 38-85, in 1984 and 1985, Westfork, Inc., was granted a conditional use permit for the retail sales of alcoholic beverages at 6119 Old Seward Highway, subject to conditions of approval.
3. By AR 98-164 and AM 474-98, the Municipality initiated a revocation of the conditional use permit granted to Westfork, Inc.
4. Westfork, Inc., as well as Norman Hans Dahl and Elizabeth Yvonne Dahl, were notified of the pending revocation action.
5. The Assembly, in AR 98-251(S), adopted regulations codified in AMCR 21.05 for the hearing of actions to revoke conditional use permits issued for the retail sale of alcoholic beverages.
6. Under the provisions of AMCR 21.05, the Assembly referred the conditional use permit revocation action to the Municipality's Administrative Hearing Officer for purposes of conducting the public hearing, preparing findings of fact, conclusion of law, and making a recommended decision.
7. The Administrative Hearing Officer conducted the public hearing, under case number 98-1432 COD, on November 9, 1998, and prepared a decisional document dated January 8, 1999.
8. The Assembly agrees with and adopts the Administrative Hearing Officer's finding of fact numbers 1, 2, 3, 4, 6, 7, 10, 11, 12, 13, and 14.
9. The Assembly adopts the following findings of fact in lieu of those presented by the Administrative Hearing Officer:

- 1 5. AMC 21.50.160 requires a conditional use permit for any use involving the
2 retail sale of alcoholic beverages. This first request came before the
3 Municipal Assembly on September 25, 1984. There was substantial public
4 input from the local Community Council at that Assembly meeting. The
5 Community Council was concerned about the traffic volume and the fear that
6 the large bar would be a drunk driver generator. The Community Council also
7 stated its concern that the area was already saturated with liquor licenses,
8 pointing out that there were "establishments with a total of 2,469 seats
9 already in the area". The Community Council further submitted two petitions
10 to the assembly, both of which opposed the location of the proposed liquor
11 license at 6119 Old Seward. Ben Marsh, representing the petitioner, stated
12 on the record that "The owners are willing to assure the Assembly that the
13 Sawmill Club will be a supper club" in his presentation to the Assembly. After
14 considerable discussion by Assembly members regarding the requirement for
15 food service, the Assembly approved the conditional use permit to operate a
16 "facility" which could sell alcoholic beverages under a beverage dispensary
17 license at 6119 Old Seward Highway subject to a site plan review which
18 would address, among other things, "the relationship of the size of the
19 restaurant to the size of the bar" (per Assembly member Mystrom). The site
20 plan was required to be approved by the Assembly prior to the conditional use
21 becoming effective.
22
- 23 8. Notwithstanding the conditional use permit, which limited the floor space to be
24 used to 5,000 square feet, the Municipality, by action of the Assembly at its
25 January 14, 1986 meeting, approved the transfer of Dahl's other license to
26 the Sawmill club for use in the basement. There is no indication in the record
27 of this meeting that this action was intended as an amendment to the Sawmill
28 Club's previously approved conditional use permit granted September 24,
29 1984 which limited the size of the licensed "facility" to 5,000 square feet. The
30 action of the Assembly approved the transfer of the liquor license only. The
31 minutes of the January 14, 1986 meeting state that "In response to Ms. Flynn,
32 Mr. Faulkner stated the community council was told the owners were seeking
33 a way to keep the license from expiring." The owners were parking the
34 license at this location until another use could be found; without a location for
35 the license, it would cease to exist and thus, expire. The minutes of the
36 Assembly meeting where this second transfer was approved demonstrated
37 that there was little public concern. The minutes of this meeting also indicate
38 that "a member of the audience, apparently representing the Sawmill Club,
39 said the dinner theatre would be in at the club in the next six to eight weeks."
40
- 41 9. Unlike health and fire inspections, zoning and conditional use violations are
42 investigated on a complaint basis (as opposed to a regular basis). In the
43 years that followed there appears to have been no action to enforce
44 compliance with the conditional use permit. Various inspections were
45 conducted at the facility (6119 Old Seward) to assure compliance with health

1 and fire codes. There was intermittent operation of the Sawmill Club on the
2 ground floor. Various establishments were located at different times in the
3 basement including the Sawmill Basement, Rock-U (both alcoholic and non-
4 alcoholic), and Confetti's. There was a teen club in the whole building serving
5 non-alcoholic beverages for about 9 months. The ABC Board routinely
6 renewed the two licenses on the property without protest from the Municipality
7 of Anchorage. In 1990 and 1991, there appears to be about a one and one
8 half year period when the kitchen was closed and at least three occasions
9 when there was a fire inspection when the bar was open although there was a
10 condition of approval requiring substantial food service during hours of
11 operation.
12

13 CONCLUSIONS OF LAW

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15 Based on the foregoing finding of fact, the Assembly makes the following conclusions of
16 law:
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- 18 1 The condition of approval requiring food service to be available at all times liquor
19 was being sold was clearly violated.
20
- 21 2. The condition of approval limiting bar floor area to a maximum of 5,000 square feet
22 was clearly violated.
23
- 24 3. The defense of "right to cure" asserted by the permittee is rejected by the Assembly
25 due to the fact that there is no statutory right to cure conditional use permit violations
26 in the Municipal Code.
27
- 28 4. The defense of "equitable estoppel" asserted by the permittee is rejected by the
29 Assembly for the following reasons:
30
 - 31 • there was five new members on the Assembly when the transfer of the
32 second liquor license to 6119 Old Seward Highway was approved;
 - 33 • there was no mention of the conditional use permit or the conditions of
34 approval during the Assembly's license transfer hearing;
 - 35 • there was no request from the owners of the premises located at 6119
36 Old Highway to amend the conditional use permit to allow for operation of any
37 liquor license in excess of the approved 5,000 square feet;
 - 38 • at the Assembly's January 14, 1986 license transfer hearing Assembly
39 members were told that the license was being transferred to 6119 Old Seward
40 Highway because "the owners were seeking a way to keep the license from
41 expiring";
 - 42 • it is the permittee's responsibility, not the Assembly's, to ensure that
43 conditions of approval on a conditional use permit are complied with.

1
2 **DECISION**
3

4 Based on the foregoing findings of fact and conclusions of law, the Assembly makes the
5 following decision:

6 .50.

7 In accordance with AMC 21.15.160(E), after holding a public hearing
8 with notice to the affected owner on February 23, 1999, the Assembly hereby revokes
9 the conditional use permit allowing for the retail sales of alcoholic beverages at 6119
10 Old Seward Highway for blatant and willful failure to comply with conditions of the
11 permit.
12

13 **Section 1.** That the Municipal Clerk is hereby directed to notify the State of
14 Alaska, Alcoholic Beverage Control Board that conditional use approval for the retail
15 sale and dispensing of alcoholic beverages at 6119 Old Seward Highway under license
16 numbers 2024 (Klondike Kate's Bare Trap Saloon) and 2456 (Rock U) has been
17 revoked by the Municipality.
18

19 **Section 2.** This resolution shall become effective immediately upon passage and
20 approval by the Assembly and shall be promptly delivered by the Municipal Clerk by
21 certified mail, return receipt requested, to the permittee Westfork, Inc.
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23 PASSED AND APPROVED by the Anchorage Assembly this twenty-third day of
24 February, 1999.
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29 Chair of the Assembly
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32 **ATTEST:**
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36 Municipal Clerk
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38 Clerk's Note: Hearing Officer Tim Middleton's Findings are Attachment A.
Revisor of Ordinances Mary Hughes' memo is Attachment B.

Findings of Fact

1. The undersigned has jurisdiction to hear this matter pursuant to AMC 21.50.160(E) and AMCR 21.05.

2. Norman Dahl, who is now 72 years of age, grew up in Montana where his father was in the hotel and bar business. He came to Alaska in 1951 after college. Shortly after arrival he purchased a bar known as the Fisherman's Club located on 4th Avenue in partnership with a man named Rod Cherrier. They changed the name of the bar to the Montana Club. The next year Dahl bought out his partner and then formed a corporation, which he named Montana Club, Inc., to own and operate the bar. He was the sole stockholder and remained the sole stockholder until recently when a Steve Tyson was made a minority shareholder (less than 10%). In 1952 the corporation opened a second bar on 4th Avenue called the Malamute. Dahl also owned the "Hub" from 1955 to 1975 when he sold it; in 1980 he had to repossess it and it was then transferred to his brother, Lloyd Dahl. During the entire period until their respective deaths, both Lloyd Dahl and Norman's wife Elizabeth were officers of the corporation and active in the business.

3. The Montana Club and the Malamute, which were fixtures on 4th Avenue, were operated by the Dahls from the early 50's until 1984, pretty much without incident. During the early 1980's, the Municipality was attempting to develop downtown; part of that development was the construction of a parking garage in East Anchorage, which required the acquisition of additional real property. The Municipality purchased the real property owned by Dahl where the two bars were located. According to the oral testimony of Dahl, the purchase was completed in 1984 for a price of \$2.4 million; there was no evidence supplied to document this. Nor was this testimony refuted. As a result of the purchase, Dahl ended up with two beverage dispensary licenses (for Montana Club and Malamute Club) and no location for their operation.

4. The Dahls then began looking for another location and settled on a 10 acre tract that was located on the corner of Old Seward Highway and Dowling Road, which Dahl purchased for \$750,000. Dahl's early plans were for a large entertainment and hotel complex including a bowling alley, hotel and large nightclub. This was then referred to as "world class honky-tonk." These plans were scaled down to a supper club/bar/nightclub to be constructed on a 3-acre parcel in the middle of the original 10-acre site that now has the address of 6119 Old Seward Highway. The current building contains a total of about 21,000 square feet of space on two floors; it has not been increased since its construction.

5. The real property at the new site was zoned I-1, so it was necessary for Dahl to obtain a conditional use permit pursuant to AMC 21.40.200 and AMC 21. 50.160. This request first came before the Municipal Assembly on September 25, 1984. There was substantial public input from the local Community Council at that Assembly meeting. The Community Council was concerned about the traffic volume and the fear that the large bar would be a drunk driver generator. The Assembly approved the conditional use permit to operate a "facility" which could sell alcoholic beverages under a beverage dispensary license at 6119 Old Seward Highway subject to a site plan review (which would come before the Assembly again) AM 1184-84.

6. The site plan was submitted to the Assembly pursuant to AM 38-85, for approval at its January 8, 1985 meeting. After testimony by the president of the Campbell Park Community Council on the need to have "food consumption" at the facility to mitigate the "effects of alcohol consumption" the Assembly voted 6-3 to require that "some type of food service be made available during operating hours of the establishment." One of the Assembly members expressed the intent of the amendment to mean that "food service" meant "some type of substantial food service be offered during operating hours, not just chips and peanuts." Because of the concern for the traffic volume, the floor area to be utilized was to be limited to 5,000 square feet.

7. The facility was constructed in accordance with the conditional use permit and the site plan, which was approved by the Assembly. The building's total size is about 21,000 square feet with just short of 5,000 square feet available for use as bar on the ground floor and a similar amount of space available in the basement. Since 1985, there has been no additional construction to expand the building.

8. Notwithstanding the conditional use permit, which limited the floor space to be used to 5,000 square feet, the Municipality, by action of the Assembly at its January 14, 1986 meeting, approved the transfer of Dahl's other license to the Sawmill Club for use in the basement. The minutes of the Assembly meeting where this second transfer was approved demonstrate that there was little public concern. The local community council chose not to take a position on the transfer of the second license into the same building at 6119 Old Seward Highway. During the debate, Assemblyman Baker pointed out that the license was to be operated in the basement of the Sawmill Club facility. Further, there was no discussion of the conditional use permit or the possible need for another one.

9. In the years that followed there appears to have been no action to enforce compliance with the conditional use permit. Various inspections were conducted at the facility (6119 Old Seward) to assure compliance with health and fire codes. There was intermittent operation of the Sawmill Club on the ground floor. Various establishments were located at different times in the basement including the Sawmill Basement, Rock-U (both alcoholic and non-alcoholic), and Confetti's. There was a teen club in the whole building serving non-alcoholic beverages for about 9 months. The ABC Board routinely renewed the two liquor licenses on the property without protest from the Municipality of Anchorage. In 1990 and 1991, there appears to be about a one and one half year period when the kitchen was closed and at least on three occasions when there was a fire inspection when the bar was open.

10. In 1991, Lloyd Dahl, the brother who attended to the details of Dahl's operations passed away

11. In the spring of 1997, Dahl put the Sawmill Club up for sale. A real estate agent contacted a man named Steve Tyson who was interested in operating a club. Tyson had grown up in Anchorage and had been in the liquor industry for about 30 years, mostly arranging talent for bar entertainment. He wanted to operate what he described as a gentleman's club, in other words, a bar that offered adult entertainment. Tyson and Dahl agreed to operate the existing facility together and

to provide adult entertainment. The details of the arrangement between Dahl and Tyson are not a part of the record, but it is apparent that Tyson assumed a day-to-day managerial role.

12. On November 27, 1997, the upstairs and downstairs of the Sawmill Club were opened as bars, to operate long enough to keep both licenses active for 1997 and 1998. (See AS 04.11.330 for the minimum operating requirements to keep a license active.) This meant the two were operated until January 31, 1998. The bars were subject to inspection for compliance with health and fire codes, but no municipal official raised the issue of compliance with the conditional use permit. During this period neither the upstairs nor the downstairs bar was open more than the minimum required by State law to keep the license active (8 hours a day). The kitchen upstairs was not in use. Employees who wanted food could order out. No food service of the type contemplated by AM 1184-84 was available at the Sawmill Club – upstairs or down.

13. The Sawmill Club closed down in February of 1998 to accomplish the remodeling necessary to convert the upstairs to a nightclub providing nude dancing. Also, Mr. Tyson worked to put a kitchen into operation, including recruitment of a chef, which proved more difficult than he expected. Nonetheless, Klondike Kate's Bare Trap Saloon opened on March 27, 1998 without the kitchen being in full operation. The kitchen opened on June 11, 1998. In the interim sandwiches heated in a microwave oven were available from about May of 1998.

14. On March 26, 1998 Westfork Inc., through counsel, filed an action in Superior Court seeking a declaratory judgment to the effect that AMC 21.45.240 restricting the location of adult entertainment, was unconstitutional. This lawsuit also sought an injunction to allow operation of the facility. The Municipality filed a three count counterclaim alleging that: (1) AMC 21.45.240 applied and that Westfork had violated that code section; (2) Westfork had violated its conditional use permit by exceeding the maximum square footage for use in the bar; and (3) Westfork had violated the conditional use permit by not providing food service. The injunction was not formally granted but the judge did allow continued operation pending a decision on the constitutional issues. On July 14, 1998 the counsel for the parties herein entered into a settlement agreement which would resolve counts II & III of the counterclaim and leave the constitutionality of AMC 21.45.240 to be litigated. This settlement agreement required the approval of the Assembly; the Assembly has not yet agreed to that settlement. Barring settlement, the case is expected to go to trial in June of 1999. Meanwhile, the facility is in full operation.

15. In connection with the above-mentioned lawsuit, Land Use Enforcement began an investigation of the facility which resulted in the two visits on April 2 and 3, 1998 by Land Use Enforcement Officers Brian Hall and Richard Fern to video tape activity of the Klondike Kate's Bare Trap Saloon. No food service was offered to either officer during their one-hour stay on either occasion. On April 10, 1998, Brian Hall visited the facility and talked to Tyson. During that conversation, Hall informed Tyson of the need to post the conditional use permit on the wall alongside the beverage dispensary license. Tyson testified this was the first he had heard of the existence of the conditional use permit.



MUNICIPALITY OF ANCHORAGE
OFFICE OF THE MUNICIPAL ATTORNEY

MEMORANDUM

DATE: February 25, 1999
TO: Lejane Ferguson, Municipal Clerk
FROM: Mary K. Hughes, Municipal Attorney *mkh*
SUBJECT: Correction of Typographical Error in AR 98-164 (As Amended)

It has been brought to my attention that there is a typographical in Assembly Resolution (AR) 98-164 (As Amended), which was approved by the Assembly at special session on February 23, 1999. Specifically, there is a citation on page 4, line 7 of this Resolution to AMC 21.15.160(E) which is a non-existent ordinance. From the context of this Resolution, particularly Finding of Fact number 1, it is clear that the intended citation should have been to AMC 21.50.160(E). This has been confirmed by the author of this portion of AR 98-164 (As Amended), Assembly Member Clementson, who also confirmed the inadvertent typographical nature of this error.

Therefore, pursuant to the authority granted me under AMC 1.05.070.B, I hereby authorize revision of the citation at page 4, line 7 of AR 98-164 (As Amended) from AMC 21.15.160(E) to AMC 21.50.160(E).

cc: Cheryl Clementson, Municipal Assembly

ATTACHMENT B

701.110.01